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# The role of constitutional courts in multi- level governance

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European Union:  
The Court of Justice  
of the European Union

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STUDY

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**THE ROLE OF CONSTITUTIONAL COURTS  
IN MULTI-LEVEL GOVERNANCE:  
A COMPARATIVE LAW PERSPECTIVE**

**European Union:  
the Court of Justice of the European Union**

STUDY

November 2016

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## List of abbreviations

<b>Court / CJEU</b>	Court of Justice of the European Union
<b>CST</b>	Civil Service Tribunal
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECSC</b>	European Coal and Steel Community
<b>ed.</b>	edition
<b>Ed.</b>	Editor
<b>eds</b>	editors
<b>EEC</b>	European Economic Community
<b>EP</b>	European Parliament
<b>Euratom</b>	European Atomic Energy Community
<b>No</b>	number
<b>OJEU / OJ</b>	Official Journal of the European Union
<b>p.</b>	page
<b>pp.</b>	pages
<b>Rules of Procedure</b>	Rules of Procedure of the Court of Justice
<b>Statute</b>	Protocol on the Statute for the Court of Justice of the European Union
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UPRP</b>	Urgent Preliminary Ruling Procedure

## Abstract

This study will analyse the role and competences assigned to the Court of Justice of the European Union by the founding Treaties, the Statute and the Rules of Procedure.

Particular attention will be paid to the functions carried out by the Court in resolving disputes between institutions, between the Member States and between the Members States and the institutions in a multi-level governance system. The objective is to facilitate comparison with the competences granted to the Constitutional Courts of the Member States.

An introduction, dedicated to the growing role entrusted to the Court by the treaties in its evolution from the beginning of the Community to today, will be followed by a description of the role and functions assigned to the Magistrates and the Advocates-General, the criteria that they must fulfil, the duration of their mandate, and appointment, renewal, suspension, replacement and removal procedures.

The study will continue with a description of the main provisions contained in the Court's Statute and Rules of Procedure and will focus on the internal organisation of the Court and the regulations which govern its functioning, analysing the respective roles fulfilled by the President and Vice-President of the Court, the Registrar and the First Advocate General, the composition of the chambers, procedures for assigning judges to the different chambers, and the meeting and voting quorum applicable to the decisions adopted.

Another section will examine the Court's contentious and non-contentious powers, with a particular focus on the proceedings launched by the institutions or the Member States, as well as those initiated by national judges through referrals for preliminary rulings.

In particular, this section will include a thorough analysis of annulment proceedings, whose purpose is to examine the legality and validity of the acts adopted by the institutions. Particular attention will be paid to absolute and functional non-competence (annulment appeal), challenges to the inertia of the institutions in the event of a failure to adopt obligatory acts set out in the treaties (action for failure to act), and appeals against violations of treaty provisions or the obligations of the Members States as members of the European Union (infringement appeal).

We will also see how the Court has been assigned competences over time to enable it to process cases in a more prompt and effective way, such as through expedited or urgent proceedings.

However, the study will also highlight shortcomings in the European Union's legal system, such as the absence of any mechanism enabling recourse to the Court for preliminary assessments of the compatibility of the provisions contained within a proposal for an act with the principles set out in the treaties. An exception to this rule are the proceedings provided for in Article 218(11) TFEU, which grant the Member States and the institutions the ability to request an opinion from the Court on the compatibility of the text of an international agreement with the principles of the Treaty. Even if such cases involve an advisory procedure which concludes with the formulation of an opinion, the opinion, optional in its acquisition, takes the form of an assent, in the sense that the institutions (and, potentially, the Member States in mixed agreements) must respect the recommendations received from the Court, if they are to proceed in accordance with the provisions contained in the Treaty.

Similarly, there are no Court prior consultation mechanisms which enable the national

governments to prevent conflicts of jurisdiction arising between the Member States or between the Member States and the institutions, nor do mechanisms exist which enable the institutions to settle conflicts of jurisdiction within the Union before launching Court proceedings.

The study will also focus on the active legal standing of natural and legal persons to lodge appeals which, as we will see, is still limited by the need to demonstrate that the person acting in law deserves judicial protection and that the grounds for their appeal are legitimate and concrete i.e., that the claimant has suffered immediate and direct harm as a consequence of the application (or lack of application) of the contested act.

As we will see, however, unlike when bringing legal proceedings before other international courts, natural or legal persons are not required to have exhausted all internal actions before lodging an appeal before the Court, enabling individuals to bring direct actions before the Court (specifically the General Court) where the contested act contains provisions allegedly detrimental to a fundamental right, for example.

Finally, the conclusion of the study will be devoted to the effectiveness and enforceability of the judgments of the Court within the legal systems of the Member States and the resulting obligations on the national governments to ensure compliance with those rulings.

## I. Introduction and historical evolution

The Court of Justice of the European Union (CJEU) is unique among international and supranational judicial bodies in its origins, nature and functions (Ritleng, 2016).

Established as a judicial body by the founding treaties of an international organisation, the European Union, the Court is clearly distinguishable from both Supreme Courts responsible for ensuring compliance with the fundamental principles inherent in national legal systems, whether federal or quasi-federal in nature, and those considered international courts, since the unique characteristics and specific features of the EU legal system make it difficult to classify the Court according to the categories of traditional international law.

Pursuant to Article 19 TEU, the Court is made up of the Court of Justice, the General Court and the specialised courts.

In other words, the Court is a judicial body hierarchically superior to the judicial bodies of the Member States of the European Union, interacting with Constitutional Courts and other judicial bodies in the Member States to guarantee compliance not only with the laws of the European Union as traditionally understood and their primacy over the law of the Member States, but also with the fundamental rights enshrined in the treaties (Caldera, 1995).

The fact that the founding treaties have been transposed into the legal systems of the Member States by means of execution orders contained in acts with the force of ordinary law, while justified by the primacy of EU law on the basis of a principle of speciality regarding the obligation to uphold international treaties (*pacta sunt servanda*), raises sensitive questions about potential conflicts of jurisdiction, where disputed EU acts or provisions appear incompatible with constitutional rules applicable in the legal systems of the Member States. This problem is, in part, mitigated within the legal systems of the Member States, which establish the obligation to comply with EU law through constitutional rules of law.

The primacy of the rulings of the Court of Justice still generally recognised in the decisions handed down by the Constitutional Courts of the Member States does not mean, however, that rulings issued by the national constitutional courts, if considered contrary to EU law, may constitute legitimate grounds for an infringement procedure against the Member State concerned for violation of its obligations as a member of the European Union.

This is a result of the already quasi-federal nature of the European Union, at least in relation to the judicial system and relations between the Court of Justice of the European Union and the Constitutional Courts of the Member States, in which the Court of Justice of the European Union encounters insurmountable restrictions in the exercise of its jurisdiction and of the competences assigned to it by the Treaties in the form of the constitutional principles of the legal systems of Member States. The Constitutional Courts of the Member States remain the supreme and exclusive guarantors of the national legal systems (Hinarejos, 2009; Prencic, Stöbner, Kokott, 2006).

Nevertheless, as we will see, the Court of Justice of the European Union remains the sole arbiter of the respect and proper exercise of the competences allocated by the founding Treaties to the institutions, bodies, offices and agencies of the EU, of disputes between EU institutions or between EU institutions and the Member States, and of disputes between the Member States over the substance of the Treaties which are referred to the Court by virtue of an arbitration agreement, as well as being the sole arbiter of the validity and interpretation of the Treaties and the resulting acts of law (Bobek, 2014; Arnull, 2006).

The origins of the Court of Justice of the European Union, established in Luxembourg on 10

December 1952, date back to the Treaty of Paris of 18 April 1951 establishing the European Coal and Steel Community (ECSC). Article 7 of the ECSC Treaty includes the Court of Justice among the institutions of the Community, assigning to it the task of ensuring respect for the rule of law in the interpretation and application of the Treaty and of its implementing regulations (Article 31 of the ECSC Treaty). With the Treaty of Rome of 25 March 1957, establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), the Court of Justice was entrusted with similar competences over the interpretation and application of the founding Treaties – the EEC and Euratom respectively – as well as of the acts of law resulting from those treaties (Tamm, 2013).

The Court has therefore held jurisdiction over the three Communities from the outset, justified by the need to prevent conflicting judgments between the three then very different international organisations (ECSC, EEC, Euratom).

The successive accessions of new Member States to the three Communities, and the progressive broadening of the competences entrusted to the Communities themselves, led the Member States to establish a Court of First Instance within the Court, by means of a 1988 Council decision, at the request of the Court itself.

The double instance justice system was thus introduced into Community laws, with effect from 31 October 1989, for all appeals lodged by natural and legal persons, during which the Court fulfils the role of appeals court. However, bringing actions before the Court precludes the re-examination of the grounds for the dispute and the Court acts as the exclusive arbiter of legal standing, even though the case could be referred to the Court in the event of a violation of the procedural provisions.

The organisation evolved further in 2004, with the creation of the Civil Service Tribunal (CST). The CST may rule at the first instance on appeals regarding issues of public employment governed by the Staff Regulations of Officials of the European Union.

The objective of the CST is to alleviate the workload of the Court, while reserving for the Court the power to make decisions, upon appeal, on first instance rulings handed down by the CST.

Following the amendments introduced by the Treaty of Lisbon (Adinolfi, 2010; Chiti, 2008), it is now possible to convene specialised courts under the Court of Justice. Their composition and related competences are governed under the founding Rules of Procedure, which may be adopted by the Council and the European Parliament in accordance with the ordinary legislative procedure (Article 257 TFEU).

In recent years, the Court has called for an increase in the number of Court judges, owing to the steady and gradual increase in the number of disputes and the resulting increase in judgment waiting time, with a view to mitigating the risk that the EU is charged with violating the right to a hearing within a reasonable time (set out in Article 47 of the Charter of Fundamental Rights of the European Union of 7 December 2000, adopted on 12 December 2007 in Strasbourg and appended to the Treaty of Lisbon, recognised in Article 6 TEU as having the same legal value as the Treaties) (Timmermans, 2015).

Under Regulation (EU, Euratom) 2015/2422 of 16 December 2015<sup>1</sup>, the European Parliament and the Council amended Protocol No 3 of the Statute of the Court, providing for a gradual increase in the number of Court judges. Judges will be replaced only partially until the total reaches two judges per Member State, with effect from 1 September 2019.

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<sup>1</sup> In OJ L 341 of 24 December 2015, p. 14.

Under the judicial reform, the jurisdiction of the CST shall be transferred to the Court with effect from 1 September 2016.

## II. The composition of the Court

### II.1. Judges and Advocates General

Article 19 TEU provides that the Court of Justice shall consist of one judge from each Member State aided by Advocates General, while the General Court shall include 'at least' one judge per Member State, enabling the number of Court judges to be increased without needing to amend the treaty.

The Court of Justice currently comprises 28 judges, one for each Member State, and nine Advocates-General. The General Court currently comprises 38 judges<sup>2</sup>, but this number will increase progressively following implementation of recent reforms (see above I).

Historically, the figure of Advocate-General is borrowed from the French legal system. Their role is to guide the decision of the Court by providing non-binding opinions at the conclusion of the judicial proceedings. By reason of their specific function, Advocates-General are also commonly known as *amicus curiae*.

The role of the Advocate-General is to present public conclusions, with absolute impartiality and full independence, based on the cases submitted to the Court and on some specific cases submitted to the General Court, to assist the latter in carrying out its functions.

The Advocates-General assist the Judges by providing them with the most objective and impartial assessments possible before any decision is adopted. The assessments are based on an in-depth study of the factual circumstances and the law applicable to the dispute in question, with a view to guiding the decision. The Court appoints the First Advocate-General for a period of one year. The typical activities of an Advocate-General involve issuing 'Conclusions' in the form of non-binding opinions which serve as recommendations to the Court about the ruling to be handed down.

In accordance with the principle of procedural economy, if the Court considers that the case does not raise new points of law, it can decide to issue a ruling without a submission from the Advocates-General (Article 20 of the Statute).

The position of Advocate-General does not exist at the General Court, even though, in the most complex cases, the functions of Advocate-General may be assigned to one of the Judges of the General Court.

### II.2. Requirements and procedures for appointing members of the Court

Pursuant to the Treaties (Article 19 TEU, Article 253 TFEU), the Judges and Advocates-General must be chosen from among persons whose independence is beyond doubt and who satisfy the appointment criteria, in their respective countries, for the highest judicial offices, or who are jurisconsults of recognised competence (Bell, 2010).

In order to ensure independence and impartiality, Judges and Advocates-General are precluded from exercising any political or administrative function, except for exceptional derogations granted by the Council, which verifies the compatibility of the functions with the exercise of any professional activities, whether remunerated or not (Carpano, 2014).

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<sup>2</sup> The figure refers to the month of August 2016.

The Judges and Advocates-General are appointed by common accord of the governments of the Member States, once the issue has been discussed by a panel whose role it is to produce an opinion on the suitability of candidates for the performance of the relevant duties<sup>3</sup>.

Before assuming their duties, the Judges and Advocates-General take an oath before a public sitting of the Court that they will exercise their duties in full impartiality and according to conscience and that they will not divulge information regarding the secrecy of deliberations, and sign a declaration as a solemn guarantee that they will respect, for the duration of their duties and thereafter, the obligations inherent in their position, in particular the duty to behave with integrity and discretion when accepting certain posts and advantages after completing their duties.

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or advisor or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity (Article 18 of the Statute).

Judges and Advocates-General serve a renewable, six-year mandate.

Judges and Advocates-General are appointed every three years through a partial replacement procedure, involving 14 Judges and 4 Advocates-General. The objective here is to ensure continuity and avoid sudden changes in judicial direction.

### **II.3. Matters pertaining to the composition of the Court**

Aside from regular replacements, the composition of the Court can change in the event of death or a resignation from office, or if an individual is no longer able to perform the functions of Judge or Advocate-General. In such cases, the Member States replace the Judge or Advocate-General, in accordance with the aforementioned appointment procedure. The replacement assumes the functions of the previous Judge or Advocate-General for the remainder of the term of office.

Judges and Advocates-General can also be removed from their functions if the other Judges and Advocates-General of the Court unanimously decide that they no longer meet the requirements or fulfil the obligations of the position.

### **II.4. Immunity of Judges and Advocates-General**

Judges and Advocates-General enjoy jurisdictional immunity for the entirety of their mandate, which continues after expiry of their term of office for acts carried out in the performance of their functions. They have a duty to preserve the confidentiality of information acquired while carrying out their role.

Immunity, free movement, taxation and social welfare provisions applicable to Union officials and other staff also apply to Judges and Advocates-General, pursuant to the Protocol on the Privileges and Immunities of the European Union appended to the Treaties.

Immunity may be revoked by means of a decision taken by the full Court, on the advice of the judicial body or specialised tribunal (General Court or CST) to which the Judge in question belongs.

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<sup>3</sup> The panel comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognised competence, one of whom is proposed by the European Parliament. Members are appointed by decision of the Council, which also establishes the rules of operation.

Where immunity is revoked during criminal proceedings brought against a Judge or Advocate-General, a ruling shall be issued by the judicial body of each Member State responsible for trying judges belonging to the highest national judicial bodies.

### **III. The organisation and functioning of the Court**

#### **III.1. The Statute and the Rules of Procedure of the Court**

The organisation and functioning of the Court are governed by the provisions contained in the Statute and those set out in the Rules of Procedure, in addition to the regulations contained in the Treaties.

In particular, the Statute of the Court contains the general principles for the organisation of the Court, as well as those relating to procedures followed at the Court, the General Court, the CST and the specialised courts.

The Statute defines the status and functions of the Judges, Advocates-General and Registrar, establishes the meeting and voting *quorum* for the valid adoption of decisions – stipulating that the Court may only validly deliberate when those present make up an odd number – and enshrines the principle of the confidentiality of Court deliberations, which is binding on judges who participate in confidential deliberations, including following the expiry of their mandate.

Each judicial body of the Court of Justice (the Court, General Court and CST) exercises its powers of self-organisation in the adoption of its own Rules of Procedure. These contain specific, detailed provisions which both implement and supplement the provisions of the Statute, regarding respective competences and functions.

#### **III.2. Internal organisation of the Court of Justice**

##### **III.2.1. The appointment and functions of the President and Vice-President**

The Judges of each judicial body of the Court elect from among their number a President and Vice-President for a term of three years. They may be re-elected (Article 9a, Article 47).

The Vice-President shall assist the President and take the President's place when the latter is prevented from attending or when the office of President is vacant.

The President of the Court of Justice is responsible for adopting the measures necessary when Judge-Rapporteurs and Advocates-General are prevented from attending.

Immediately after the election of the President and Vice-President of the Court, the Judges shall elect the Presidents of the Chambers of five Judges for a term of three years. The Judges shall then elect the Presidents of the Chambers of three Judges for a term of one year.

When cases are assigned to a Chamber of five or three Judges, the powers of the President of the Court shall be exercised by the President of the Chamber.

##### **III.2.2. The structure and composition of the Chambers**

The Court of Justice sits in Chambers, composed of three or five judges who, upon request by a Member State or an institution party to a dispute, may meet in a Grand Chamber of 15 judges, or as a full Court in certain cases set out in the Treaty (Article 228(2); Article 245(2); Article 247; Article 286(6) TFEU), and in addition, after hearing the Advocate-General, whenever it is judged that a case pending before a court is of exceptional importance (Article 16).

After the election of the Presidents of the respective Chambers, judges are appointed to the Chambers of five and three Judges on the basis of prepared lists and taking into account seniority criteria.

The seniority of Judges and Advocates-General shall be calculated without distinction according to the date on which they took up their duties and, where seniority is equal in this regard, according to age. Judges and Advocates-General whose terms of office are renewed shall retain their seniority.

The Grand Chamber shall, for each case, be composed of the President and the Vice-President of the Court, three Presidents of Chambers of five Judges, the Judge-Rapporteur and the number of Judges required to make the total up to 15. The latter shall be appointed based on lists drawn up to that end to guarantee rotation among the different Judges of the Court, in accordance with the requirements established in Article 27(3 and 4) of the Rules of Procedure and published in the OJEU.

The Chambers of five Judges and of three Judges shall, for each case, be composed of the President of the Chamber, the Judge-Rapporteur and the number of Judges required to bring the total to five and three Judges respectively.

Decisions of the Chambers of either three or five Judges shall be valid only if they are taken by three Judges; decisions of the Grand Chamber shall be valid only if eleven Judges are sitting; while decisions of the full Court shall be valid only if 17 Judges are sitting.

If the quorum cannot be reached in a case assigned to the Grand Chamber or a Chamber of five or three Judges (as set out in Article 17(2 and 3) of the Statute), the President of the Court shall designate one or more additional judges according to the next in line in terms of seniority.

### **III.2.3. Assigning cases to the Chambers**

For proceedings brought before the Court, the Rules of Procedure, in implementing the Statute, stipulate that the President of the Court shall designate a Judge to act as Rapporteur in the case as soon as possible after the initiating document has been lodged.

Likewise, it is the responsibility of the First Advocate-General to assign each case to an Advocate-General

For cases assigned to the Chamber of five Judges, the Judge-Rapporteur shall be selected from among the Judges of the Chamber in question, on a proposal from the President of that Chamber.

When the President of a Chamber or a member of the relevant formation of the Court is prevented from acting, the President of a Chamber of five Judges shall be replaced by the President of a Chamber of three Judges, while, if the President of a Chamber of three Judges or a member of the relevant formation of the Court is prevented from acting, his duties shall be assumed by the Judge of that Chamber who is next in line in terms of seniority.

If the Court considers that a number of cases must be heard together, the composition of the formation of the Court shall be the same as that for the case whose preliminary report was examined first.

If, however, the formation of the Chamber believes that a ruling on a case should fall to a broader formation, the new formation shall include the Judges of the Chamber to which the case was initially assigned.

## **IV. Court jurisdiction (in relation to:)**

### **IV.1. Compliance with the Treaties**

The Court operates as the legal adjudicator and has the power to resolve disputes arising between the Member States, between the institutions of the EU or between the institutions and the Member States, and to rule on disputes between various natural and legal persons from the Member States and institutions of the EU (Condinanzi, Mastorianni, 2009; Türk, 2009).

For the purposes of the legal certainty of the relevant law, the submission of EU acts for judicial review and the lodging of appeals against the failure to adopt acts binding on the institutions, offices and agencies of the EU under the Treaty are subject to a tight deadline (see below, VI.1.4.).

However, pursuant to Article 277 TFEU: *'Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act'*.

#### **IV.1.1. Acts which may be submitted for review by the Court**

The Court may only exercise its powers of review over the interpretation of the provisions contained in the Treaty or the validity and interpretation of the binding acts adopted by the institutions and bodies of the European Union (Schermers HG, Waelbroek D, 2001).

This prevents the Court from interpreting or examining the legality of (binding) acts adopted by the Member States or by other entities and institutions within the national legal system, and acts adopted by the institutions of the European Union which are not regulations, directives or decisions. In particular, recommendations and opinions adopted by the institutions, bodies, offices and agencies of the European Union are not subject to review by the Court of Justice as they have no binding force (Article 288 TFEU).

#### **IV.1.2. Lack of a prior examination of legality mechanism**

The treaty does not provide for any instruments which would enable the institutions or the Member States to file a petition to the Court requesting it to examine, under the ordinary legislative procedure, the legality of a binding act in the light of the provisions of the Treaty, before the act is adopted.

The Court exercises its powers of review exclusively over acts which have already been adopted (or in the case of a failure to adopt an act which should have been adopted by the institutions) and, in preliminary hearings, over the interpretation of the Treaties or the interpretation and validity of acts 'adopted' by the institutions, bodies, offices and agencies of the Union.

#### **IV.1.3. The reference for preliminary ruling**

A unique characteristic which distinguishes the Court of Justice of the European Union from other international or supranational judicial bodies is recourse to a preliminary referral procedure. This can be initiated through a referral mechanism established by a national court before which a case is pending whose resolution depends on the interpretation of one or more EU provisions (D'Alessandro, 2012).

The procedure, set out in Article 267 TFEU, establishes a mechanism for cooperation among

the judges of the Member States and the Court of Justice of the European Union, tasking the Court of Justice, exclusively, with the interpretation of the law of the European Union in order to guarantee the uniform application of the law under all legal systems of the Member States of the European Union.

In order to submit to the Court a question about the interpretation of a provision contained in EU law (whether in the treaties or in any other binding act), a pre-existing dispute must be pending before a national court, the resolution of which depends on the correct application of an EU law whose interpretation is disputed.

In such a scenario a procedural issue arises, similar to that which arises if, in a judicial proceeding pending before a national judge, the constitutional legality of the applicable rule is challenged, causing the national court to suspend the trial and refer the acts to the Court, drafting one or more questions of interpretation upon which the Court is called to answer.

Here it is important to note how the correct formulation of questions assumes great relevance for the purpose of exercising the powers assigned to the Court.

It is for the Court to interpret the rules of law of the European Union, while the verification of the facts at the origin of the case remain under the exclusive jurisdiction of the referring judge.

If deemed necessary, the Court can decide to reformulate the questions referred to it. The role of the Court is to interpret all the provisions of the law of the Union which may be useful to national judges for the purpose of resolving disputes brought before them, including if such provisions are not expressly indicated in the questions referred to them by those judges<sup>4</sup>.

In other words, on the basis of the information provided by the referring national judge and, in particular, the grounds for the referral, the Court has the power to identify the rules and principles of EU law which require interpretation in relation to the subject of the principal dispute<sup>5</sup>.

However, the Court does not replace, nor could it replace, the referring national judge. It must limit itself to providing the judge with a useful solution which enables him to resolve the dispute referred to the Court.

With regard to the preliminary referral procedure, it is also worth recalling that the concept of national judge as laid down by the Treaty is also to be interpreted in the light of EU law.

According to the Court, the judicial nature of bodies authorised to raise a question for preliminary interpretation before the Court of Justice must be determined on the basis of compliance with certain requirements, including legal basis, independence, permanence, the obligatory nature of the jurisdiction, compliance with the adversarial principle and the application of legal provisions.

In order to facilitate and make more efficient collaboration between the Court of Justice and national judges, the Court has adopted a series of recommendations concerning the submission of preliminary ruling referral requests by the national courts, including information on the criteria for interpreting applicable law and useful indications to this end, assessing the appropriate moment for making a preliminary referral, and the format and

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<sup>4</sup> *Eco cosmetics and Raffaisbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, point 32, and *Subdelegación del Gobierno en Guipuzkoa - Extranjería*, C-38/14, EU:C:2015:260, point 25.

<sup>5</sup> *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, point 34.

content of the request<sup>6</sup>.

## **IV.2. Conflicts of competence between institutions**

Article 263 TFEU applies to conflicts of competence between institutions and, at least partly, to those arising between States and the institutions (Alicino, 2006).

According to the action for annulment procedure, all EU institutions may review the legality of acts adopted by any other institution where they infringe upon the competences entrusted to the institution filing the appeal (Curti Gialdino, 2008). The above occurs in all positive conflicts of competence, where the claimant institution claims competence for the adoption a binding act adopted by another institution without competence to do so.

Such disputes, which arise whenever a lack of functional competence of the institution which adopted the contested measure is reported, are based on the assumption that the claimant institution is claiming exclusive competence, based on a provision contained in the Treaty, to adopt the act adopted by the summonsed institution. The problem may arise, for example, in scenarios involving the adoption of a Regulation by the Commission, which does not limit itself to introducing implementing provisions, instead introducing further obligations for the parties concerned regarding provisions contained in the act it intends to implement. A conflict of competence may also occur when an act should be adopted jointly by two institutions (for example, the Parliament and the Council under ordinary legislative procedure) but is adopted only by one of them (for example, the Council).

In the event of a negative conflict of jurisdiction between the institutions, the Court of Justice cannot be called upon to establish which is the competent institution, because the complaint cannot be brought before the Court in advance.

On the other hand, any institution which believes that another institution has failed to adopt a binding act whose adoption is obligatory under the Treaty, can bring an action before the Court to ensure that the institution in question remedies this failure (Article 265 TFEU).

In both the procedures outlined above (actions for annulment and actions for failure to act), the judgment of the Court is merely declaratory and from the judgment stems the obligation for the interested institutions to comply with the content of the judgment of the Court, with the result that if an act is annulled on grounds of lack of jurisdiction, a new act may be adopted only by the competent institution. Meanwhile, if a decision confirms the failure to adopt an act which, pursuant to the Treaty, is binding on the institution in question, the defaulting institution is required to adopt it.

## **IV.3. Conflicts of competence between institutions and the Member States**

Article 263 TFEU, governing actions for annulment, provides for the mechanism through which the Member States may claim competence exercised illegally by the institutions of the European Union. Each Member State, if it considers that an institution of the European Union has adopted a binding act without holding the relevant competence (absolute lack of powers), irrespective of whether the contested act is addressed to the Member States, can bring an action to the Court of Justice for a declaration of invalidity.

The invalidity of an act can also be invoked by the States, as interested parties, under a

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<sup>6</sup> In OJ C 2012, 6 November 2012.

referral for preliminary ruling triggered by a national judge.

However, conflicts of competence between States and institutions mainly relate to the division of powers between the European Union and the Member States in areas of concurrent competence.

For the purposes of providing settlement criteria and mitigating disputes relating to potential conflicts of competence, the Treaty of Maastricht of 1992 introduced the principle of subsidiarity, now set out in Article 5(3) TEU. This stipulates that in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States.

#### **IV.4.Conflicts of competence between the Member States**

Scope for intervention by the Court in conflicts of competence between the Member States is extremely limited.

In addition to the appeal proceedings examined above, the TFEU, through a kind of termination clause, permits the Member States to extend the competence of the Court to any subsequent case in which they are involved, when the case relates to, or is connected to, the interpretation or application of the Treaties. Pursuant to Article 273 TFEU, the Court of Justice shall have jurisdiction in any dispute between the Member States which relates to the subject matter of the Treaties, where the dispute is submitted under a special agreement between the parties.

In the absence of explicit provisions on the subject, and even though the Court's jurisprudence is minimal, the arbitration clause which enables the referral of potential disputes between States to the Court may be contained in any act and concluded even after the dispute between the States in question has arisen.

Beyond the scenarios envisaged in Article 273 TFEU, in (negative or positive) conflicts of competence between the Member States, if the prosecuting State considers that another Member State has exercised, or failed to exercise, a competence in violation of the provisions of the Treaty, the Member States may have recourse, direct or through the Commission, to infringement proceedings set out in Articles 258 and 259 TFEU.

However, even in this scenario, the Court does not provide for any prior consultation mechanisms enabling the Member States to determine which Member State holds the potentially disputed competence, before potential conflicts of competence arise.

#### **IV.5.Concluding international agreements**

The Court of Justice holds the unique power to issue an opinion, upon request, on the compatibility of any planned international agreement with the Treaties (Article 218 TFEU).

A case may be brought before the Court by the Parliament, the Council, the Commission or by a Member State.

This involves a single opinion whose acquisition is voluntary but whose effects are binding. In other words, the procedure for verifying compliance of the provisions contained in an agreement with the provisions of the Treaty is voluntary and should be considered optional. However, if requested, the institutions and the Member States must undertake to comply with it. If the opinion is negative, the agreement cannot be concluded unless the text of the agreement is changed to ensure compliance with the provisions of the treaty, in respect of the indications provided by the Court. Otherwise, the treaty must be amended, as was

required to enable the EU to accede to the ECHR (see Article 6 TEU)<sup>7</sup>.

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<sup>7</sup> However, when the Commission referred the matter to the Court, the Court decided (Opinion 2/13 of 18 December 2014) that the agreement on accession to the ECHR was not compatible with the Treaties. Specifically, it ruled that the agreement would not be in line with Protocol No 8, which sets out the conditions that the agreement on accession to the ECHR must respect in order to be considered compatible with the Treaties. The aim of such conditions is to ensure that the specific characteristics of the Union and EU law are preserved and that the accession of the Union affects neither its competences nor the powers of the institutions. In the opinion mentioned above, the Court decided that the draft accession agreement to the ECHR would have subjected the European Union and its institutions to external control, thereby undermining the specific characteristics of the Union and EU law as well as affecting the competences and powers of the institutions (Jacqué, 2015).

## V. Right of action

### V.1. Parties to the case and their *locus standi*

Two categories of applicants have the right of action before the Court, commonly divided into 'privileged' applicants and 'non-privileged' applicants.

Privileged applicants are the Member States<sup>8</sup>, the Parliament, the Council and the Commission, while non-privileged applicants are all natural and legal persons, whether governed by private or public law.

The difference between the two categories lies in the fact that, while privileged applicants may be assumed to have legitimate grounds for bringing proceedings *juris et de jure* before the Court, non-privileged applicants must be able to demonstrate that they have concrete and legitimate grounds for lodging an appeal, that is to say, that they are directly harmed by a provision contained in the contested act (or by the failure to adopt an obligatory act), whose effects are immediately detrimental to the rights or prerogatives of the claimant (Amalfitano, 2003).

A further sub-category of applicants, known as 'semi-privileged', was recently included under the Treaty of Lisbon, thereby recognising settled case-law which seeks to uphold the right of all institutions to challenge acts detrimental to their respective competences. Article 263(3) TFEU stipulates that the Court of Justice shall have jurisdiction in actions brought by the Court of Auditors, the European Central Bank and the Committee of the Regions 'for the purposes of protecting their prerogatives'.

The Statute stipulates that, in proceedings brought before the Court, the Member States and the institutions shall be represented by an agent who may be assisted by an adviser or a lawyer, while other parties must be represented by a lawyer authorised to practice within a national court. An exception to this rule is the fact that the rights accorded to lawyers are extended to university professors resident in the Member States, whose national law grants them the right to an audience.

In addition to applicants and defendants, the Member States and the EU institutions may intervene in cases brought before the Court of Justice.

However, the intervention may only be *ad adjuvandum* or *ad opponendum* in support one of the parties and the intervener cannot broaden or change the subject matter of the case.

EU bodies and offices (for example the Agencies) and any natural or legal person may also intervene, if the intervening party can demonstrate that it has a legitimate interest in the resolution of the dispute brought before the Court. However, the Statute specifies that natural or legal persons shall not intervene in disputes between the Member States, between EU institutions, or between the Member States and the EU institutions. This limits the possibility for intervention by a natural or legal person to disputes to which natural or legal persons are party.

Lastly, it is important to note that the Court can rule in absentia if the defendant does not appear.

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<sup>8</sup> The concept of 'State' should be understood in the traditional sense, excluding from the privileged applicants category the entities through which the State structures its internal affairs (for example Regions, Länder, Autonomous Communities), which must be considered non-privileged applicants (Adinolfi, 2002; Cartabia, 2001; Salvatore, 1999).

Exclusive jurisdiction for disputes between the Union and its own agents (Condinzani, Mastroianni, 2009, p. 409) then returns to the Court (specifically to the CST) within the limits and conditions established by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Union (Article 270 TFEU).

## **V.2. *Locus standi* of individuals**

Applications lodged by individuals fall under the jurisdiction of the General Court; an appeals procedure gives individuals who are party to the case at the first instance the possibility of challenging the judgment issued by the General Court by appealing to the Court of Justice, even if only on points of law (Jacobs FG, 2002).

In addition, actions reserved for the exclusive jurisdiction the Court, specifically the CST, by the Treaties, do not fall within the proceedings heard in relation to disputes arising between the Union, its bodies, offices and agencies and respective agents, within the limits and conditions established by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Union. In such cases, the Court, through the CST, exercises jurisdiction similar to that assigned to *ad hoc* judicial bodies, established under international organisations, entrusted with resolving disputes between organisations and their own officials.

### **V.2.1. *Locus standi* in relation to acts of general application**

The proceedings in which individuals have a right to lodge an application are those governed under Article 263 TFEU (actions for annulment) and Article 265 TFEU (actions for failure to act).

Pursuant to Article 263 TFEU, actions for annulment may be brought by a natural or legal person provided that the contested act addresses that person, concerns them directly and individually, or is a regulatory act of direct concern to him or her and which does not involve implementing measures (Arnull, 2001).

Therefore, the wording of Article 263 TFEU unequivocally prevents individuals from bringing direct actions against a Directive.

Similarly, Article 265 TFEU, governing actions for failure to act, stipulates that a natural or legal person may bring an action before the Court in order to challenge an EU institution, body, office or agency for failure to adopt a binding act.

Therefore, the right of individuals to challenge general acts through direct actions is extremely limited and has been interpreted restrictively by the Court (General Court, Order of 19 September 2006, Case T-122/05, ECLI:EU:T:2006:262).

Article 263(1) TFEU, and the first part of Article 263(4), refer to 'legislative acts', while the second part of Article 263(4) refers to 'regulatory acts'.

Such terminology is not casually chosen but is rather an expression of the fact that, pursuant to Article 263 TFEU, different categories of claimants have legal standing to bring a direct action in different fields: privileged claimants, pursuant to Article 263(2) TFEU, and semi-privileged claimants, pursuant to Article 263(3) TFEU, have legal standing to bring actions against all types of EU acts provided for in Article 263(1), including legislative acts, while the direct legal standing of natural and legal persons, pursuant to Article 263(4) TFEU, is limited to certain types of EU acts (Sgueo, 2007).

In particular, natural and legal persons, defined as non-privileged claimants, can bring a first instance action before the General Court and a second instance action, on points of law,

before the European Court of Justice, provided that the contested act is of 'direct and individual concern to them' (Article 263(4) TFEU).

Lastly, Article 263(4) TFEU also provides for legal standing to institute simplified proceedings, albeit limited to regulatory acts and not against any type of legislative act (Decision 3 of October 2013, C-583/11P, ECLI:EU:C:2013:625).

Under the system enshrined in the Treaty of Lisbon, the annulment of legislative acts represents a heavier burden. This may be explained by the fact that these acts are expressions of greater democratic legitimacy (emanating from Parliament's participation in the adoption procedure) compared to delegated and implementing acts, and by the fact that actions may not be brought against these acts in the majority of procedural systems in the Member States.

Restricting cases in which individuals may bring a direct action before the Court was considered necessary in order, on the one hand, to avoid an *actio popularis* and, on the other, to prevent an excessive workload for the Court (Amalfitano, 2003).

If an action is brought against a regulation or a decision addressing a State and the claimant is not among those addressed expressly, a claimant must be able to show that he or she is the substantial addressee of the act in order to institute a direct action, which is to say that he or she must demonstrate that the challenged act produces direct legal effects on them, the direct beneficiaries, without leaving any discretion to States (Sgueo, 2007).

Direct actions brought before the Court by individuals or legal persons in cases other than those mentioned above are not admissible.

### **V.2.2. The protection of individual rights**

However, it is worth noting that where the Treaty recognises the active legal standing of individuals, these individuals can bring an action before the Court, without first lodging an appeal before the national judicial bodies. This is a prerequisite for bringing actions before other international judicial bodies (e.g. the European Court of Human Rights), excluding exceptions made in cases concerning respect for procedural rights and provisions which restrict personal freedoms.

In any event, individuals may bring an action before the EU courts indirectly, through national judges who, in accordance with the principle of sincere cooperation, are tasked with addressing lacunae that may be present in national legal systems, with regard to the protection of individual rights protected by EU law.

In the case of doubt over the interpretation or validity of the applicable EU law, the judge may refer the issue to the Court by means of a preliminary referral procedure.

Similarly, the Treaty provides for the possibility, including in the case of individuals, for the disapplication of an act of general application via incidental proceedings, as part of a case lodged before a national judge (Article 277 TFEU). Under such a procedure, individuals can challenge the illegitimacy of a EU act of general application which could otherwise not be challenged for failure to meet the necessary criteria for lodging an annulment appeal (Decision of 2 July 2009, C-343/07, Bavaria, ECLI:EU:C:2009:415).

## VI. Procedural provisions

### VI.1. Key features

Except for some particular cases, proceedings brought before the Court are divided into a written phase and an oral phase, and conclude with the issuing of a judgment (Lenaerts, Maselis, Gutman, 2015; Biavati, 2015).

The purpose of the written phase is to put before the Court the claims, pleas and arguments of the parties to the proceedings and, in preliminary rulings, the observations which the interested parties intend to submit concerning the questions raised by the judges of the Member States of the European Union.

The oral phase, which is not guaranteed but usually follows the written phase, is designed to enable the judges of the Court to deepen their knowledge of the acts and facts of the case, through a hearing with the parties and the Advocate-General.

However, if the Court determines that the action is inadmissible or declares a lack of jurisdiction, it may put an end to the proceedings at any stage by way of a reasoned order.

All procedural acts and accompanying documentation received by the Court are recorded chronologically in a register held under the responsibility of the Registrar.

At the beginning of all legal proceedings a notice shall be published in the Official Journal of the European Union indicating the date of registration of an application initiating proceedings, the names of the parties, the form of order sought by the applicant and a summary of the pleas in law and of the main supporting arguments or, as the case may be, the date of a request for a preliminary ruling, the identity of the referring court or tribunal and the parties to the main proceedings, and the questions referred to the Court.

Proceedings brought before the Court are free so long as they do not relate to the submission of actions subject to payment of any fees or taxes.

A party to the preliminary or main proceedings who is wholly or partially unable to meet the costs of the proceedings before the Court may at any time apply for legal aid.

If reasons for confidentiality are submitted, a party (although not the Member States, nor the institutions, bodies, offices and agencies of the European Union) can invoke anonymity, calling on the Court not to divulge its identity or certain information pertaining to it.

Another feature which characterises proceedings instituted before the Court are the procedures for the lodging and service of documents through a computer application known as e-curia.

The application is based on a mechanism for electronic authentication which provides for the allocation of a user name and password in order to guarantee the authenticity, integrity and confidentiality of the documents sent.

The procedural documents are considered submitted on delivery of an undersigned document and related attachments to the Registrar.

In the interests of an efficient administration of justice, to supplement the Statute and the Rules of Procedure and for the purposes of facilitating understanding, the Court has adopted practical instructions for the Parties regarding cases brought before the Courts, as well as recommendations for national courts and tribunals on submitting preliminary ruling requests. Both documents are valuable tools for accurate interpretation and provide the

parties and the national courts and tribunals with extremely useful guidance enabling a better understanding of the functioning of the proceedings brought before the Court.

### **VI.1.1. The written phase**

The Statute stipulates that proceedings brought before the Court of Justice shall consist of a written phase and an oral phase. The written phase consists of notifications, the lodging of acts (application, defence, reply and rejoinder) and documents, whose exchange between the parties takes place through the Registrar of the Court.

The written phase is designed to enable the Court to gain an understanding the subject of the case to be reviewed and its implications.

However, while in direct actions the written phase involves the exchange of documents by the parties through the Registrar, this does not form part of the preliminary referral proceedings governed under Article 267 TFEU. These are non-contentious proceedings in which the interested parties are invited to formulate observations on the questions instituted by national courts and tribunals without learning the position of the other interested parties on the aforementioned issues.

The acts upon which the written phase is structured, in proceedings instituted directly, are the application, the defence, the reply and the rejoinder.

The action must include pleas in law with specific reference to the subject matter of the dispute, supporting arguments and the form of order sought, supported by concrete evidence or an offer of evidence.

The application and the defence should not exceed 30 pages unless in special circumstances.

### **VI.1.2. The oral phase**

During the oral phase, the interested parties, representatives of the agents and/or advisers and lawyers, any experts and witnesses and, finally, the Advocate-General, are heard in a public sitting.

In addition, the Court may decide at any time to entrust any individual, body, authority, committee or other organisation (Article 25), or any witness it chooses (Article 26), with the task of proving an expert opinion.

The hearing in Court shall be public, unless the Court of Justice (Article 29), on its own initiative or on application by the parties, decides otherwise on serious grounds (Article 31). The case list shall be established by the President and minutes shall be taken at each hearing.

### **VI.1.3. Language regime**

Direct actions brought before the Court shall take place in one of the 24 official languages of the EU<sup>9</sup>, to be chosen by the applicant. However, where the defendant is a Member State, the language of the case shall be the official language of that State (where the State has more than one official language, the applicant may choose between them).

At the joint request of the parties, the use of another of the official languages for all or part of the proceedings may be authorised.

At the request of one of the parties, the use of another language for all or part of the proceedings may be authorised once the opposing party and the Advocate-General have

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<sup>9</sup> Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, Irish, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish.

been heard.

The President of the Court has competence to adopt decisions on requests relating to the language regime applicable to the proceedings.

In preliminary ruling proceedings, the language of the case shall be the language of the referring national court or tribunal.

The language of the case shall in particular be used in the written and oral pleadings of the parties, including the items and documents produced or annexed to them, and also in the minutes and decisions of the Court.

Any item or document produced or annexed that is expressed in another language must be accompanied by a translation into the language of the case. In the case of substantial items or lengthy documents, translations may be confined to extracts. At any time the Court may, of its own motion or at the request of one of the parties, call for a complete or fuller translation.

The language arrangements for ordinary and extraordinary appeals are the same as for the proceedings giving rise to the contested decision.

By way of derogation from these principles, the Rules of Procedure provide that a Member State shall be entitled to use its official language when taking part in preliminary ruling proceedings, when intervening in a case before the Court or when bringing a matter before the Court pursuant to Article 259 (infringement proceedings).

The language provisions shall apply not only to all parties but also to all those who take part in the proceedings, including experts and witnesses. However, where a witness or expert states that he is unable adequately to express himself in one of the official languages of the EU, the Court may authorise him to give his evidence in another language. The Registrar shall arrange for translation into the language of the case.

#### **VI.1.4. Time limits**

Time limits for the submission of documentation are set out under the Rules of Procedure. However, the Statute establishes that proceedings brought against the institutions, bodies, offices and agencies of the Union in matters arising from non-contractual liability shall be barred after a period of five years.

To ensure legal certainty, actions brought before the Court of Justice are subject to rigorous time limits.

Lodging annulment appeals against binding acts adopted by EU institutions, bodies, offices and agencies which produce legal effects on third parties is subject to a time limit of two months from the date of publication of the act, the date on which the claimant was notified of its existence or, failing that, the date on which it came to the claimant's attention.

However, actions for failure to act may only be brought before the Court once the defaulting institution has been issued with prior warning and a formal notification of the complaint. The institution in question is then given a reasonable amount of time within which to rectify the situation (not less than two months); an action for failure to act may then be brought before the Court should the notified institution fail to respond within the allotted time.

All procedural time limits are peremptory and non-exemptible, but shall be extended on account of distance by a one-off period of 10 days.

The time limits established for direct action proceedings do not apply to the referral procedures for preliminary rulings. These are subject to discretionary assessments by the

national courts or tribunals before which the principal dispute is pending.

## **VI.2.Suspension of the operation of the challenged act**

Actions brought before the Court of Justice shall not have a suspensory effect. If the Court of Justice deems it necessary, however, it may decide to suspend the application of the contested act (Article 278 TFEU).

In addition, in accordance with the Treaty, the Court is able to grant atypical interim relief, having the power to prescribe any interim measures required (Article 279 TFEU).

The conditions for granting interim measures are the same as for when temporary measures are granted by a national judicial body: *fumus boni juris* and *periculum in mora*. The objective is to ensure that the time needed to determine the grounds for the dispute do not jeopardise the effectiveness of the final decision and have an irreversible impact on the situation, causing serious and irreparable damage to the party invoking the interim measure. A further condition for granting the interim measure is that the action is *prima facie* well-founded.

The rejection of a request for protective measures does not preclude the possibility of submitting a new request based on new circumstances of fact.

Requests for suspension shall be presented as an autonomous, distinct and separate act from the appeal itself, and the opposing party shall be notified. The President of the Court shall establish a short time limit within which the opposing party may present observations. The protective measure is therefore ancillary and incidental to the principal proceedings and must have been initiated previously or simultaneously, since a request for the suspension of the effects of the challenged provision or for the granting of protective measures is not admissible if a principal action is not currently pending.

However, the President can make a decision on the suspension request *inaudita altera parte* and without needing to hold a preparatory inquiry. Protective proceedings are therefore similar to the proceedings for interim measures.

A decision on the suspension request is adopted by reasoned Presidential order and may not be challenged, unless the President considers it necessary to refer the case to the formation of the Court which, in such cases, must examine the request promptly after hearing the Advocate-General.

The decision to grant or reject protective measures can subsequently be modified or revoked by the Court, of its own motion, if circumstances have changed.

## **VI.3.Stay of proceedings**

Article 55 of the Rules of Procedure provides for a stay of proceedings where the Court of Justice and the General Court are seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called into question.

While a stay of proceedings before the General Court is more common, the Court of Justice may also decide to stay the proceedings brought before it until such time as it has delivered its judgment when the cases concern the same issue, to enable proceedings before the General Court to continue.

In addition to the above scenario, the Court of Justice may stay proceedings in all other cases it deems necessary, after hearing the Judge-Rapporteur, the Advocate-General and, save in the case of references for a preliminary ruling, the parties.

The decision to stay the proceedings is taken by the President, who, in special circumstances, may, either of his own motion or at the request of one of the parties, defer a case to be dealt with at a later date (Article 56 of the Rules of Procedure).

## **VI.4. Expedited and urgent proceedings**

The President may in special circumstances decide to prioritise one particular case over others. The rules of procedure govern the procedures to be followed for expedited proceedings or, with reference to preliminary rulings relating to freedom, security and justice, urgent proceedings.

The Statute leaves to the discretion of the Rules of Procedure the circumstances in which an expedited procedure and, for preliminary referral procedures, an urgent procedure, may be launched, establishing that, in cases of extreme urgency, the written stage of the procedure may be omitted (Article 23a).

Lastly, it must be pointed out that with regard to preliminary referral procedures, in the interests of procedural economy, the Rules of Procedure (Article 99) stipulate that where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, and where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling leaves no room for reasonable doubt, the Court may avail itself of a simplified procedure (D'Alessandro, 2012, p. 198), deciding at any time to rule by reasoned order, on a proposal from the Judge-Rapporteur and after hearing the Advocate-General (Article 99 of the Rules of Procedure).

### **VI.4.1. Expedited proceedings**

Where the nature of a case requires it to be dealt with in a short time, the President of the Court of Justice, after hearing the other party, the Judge-Rapporteur and the Advocate-General, may decide that the case is to be determined pursuant to an expedited procedure at the request of the parties or, exceptionally, of his own motion (Article 133, Rules of Procedure).

The expedited procedure enables the Court of Justice to rule swiftly on urgent cases, reducing the time taken to complete the written phase – which, unless otherwise ordered by the President, is limited to an exchange of initiating acts (application and defence), thereby avoiding the second round of pleadings (reply and rejoinder) – instead focusing the hearing on absolute priority issues.

To save time and as an exception to the general rule, interested parties in expedited procedures may supplement their arguments and produce or offer evidence during the oral phase of the procedure. However, they are not permitted to introduce new grounds, in doing so broadening the substance of the case as defined in the initiating acts.

A similar procedure is followed even if a case has been brought before the Court of Justice through a preliminary referral. Here, too, a decision regarding the expedited procedure is taken by the President, upon a reasoned request by the referring judge or, exceptionally, of his own motion. He immediately sets the date of the hearing and assigns a short time limit within which interested parties must lodge any pleadings or submit written observations.

### **VI.4.2. Urgent Preliminary Ruling Procedure**

Under the preliminary referral procedure which gives rise before the Court to one or more questions concerning freedom, security and justice (police and judicial cooperation in civil and criminal matters, as well as visas, asylum, immigration and other policies relating to the

free movement of people), the Court, upon reasoned request by the referring judge, or, exceptionally, of his own motion, may avail itself of an urgent procedure (Tizzano, Gencarelli, 2010).

For an urgent preliminary ruling procedure, the designated Chamber may decide to omit the written phase which is generally limited to points of law identified by the Court in the decision which provides for the urgent procedure.

Under the urgent procedure, interested persons present statements of case or written observations, generally during the oral phase of the procedure at an obligatory hearing.

Urgent cases are normally ruled upon by Chambers of five Judges, but they may meet in a formation of three judges or call for the case to be determined by a larger formation of the Court.

## VII. The effectiveness and enforceability of judgments

Decisions of the Court take immediate and direct effect on the Member States; no act of recognition is required. The Member States are obliged to adopt all necessary provisions for compliance, and natural or legal persons to whom the decision is addressed must undertake to comply with the provisions contained in the ruling<sup>10</sup>.

The judgment of the Court must be reasoned and include reference to the Judges who took part in the deliberations, and the ruling must be delivered in open court (Beck, 2013).

Judgments by the CJEU are definitive and not subject to ordinary challenges, except by the party declared in default whose challenge must be raised within a month of notification of the judgment. Judgments of the Court may, however, be challenged through extraordinary third-party proceedings and revision, in cases in which the judgment has been issued without having summonsed the interested party on whom the ruling produces harmful effects, or where facts are discovered after the ruling which are of such a nature as to be a decisive factor and were unknown to the Court and the party claiming revision before the judgment.

It should be noted that, with the exception of the few cases in which the TFEU enables the Court to hand down sentences, the judgments of the Court are declaratory judgments.

The Court, in exercising its duties, cannot take the place of the Member States or the institutions. The adoption of provisions necessary to rectify violations of the principles enshrined in the Treaty is the exclusive competence of the Member States and the institutions.

When a judgment is handed down at the conclusion of infringement proceedings (Articles 258 and 259 TFEU), the Member States are obliged to implement without delay any measures necessary to ensure compliance with the provision contained in the Court's judgment.

However, if the judgment is handed down pursuant to Article 263 TFEU (actions for annulment) or Article 265 TFEU (actions for failure to act), the competent institution shall assess the potential adoption of further acts as a consequence of the annulment of the challenged act or, if failure to act has been ascertained, to adopt the proper act.

However, for judgments delivered after a preliminary ruling procedure, the referring national court or tribunal may resolve the dispute by applying the interpretive guidelines issued by the Court.

States are obliged to comply fully with EU law in accordance with the principle of sincere cooperation.

Should an addressee fail to fulfil an obligation – fully, partially or tardily – infringement proceedings will be brought against them, prior to recourse to the litigation stage, by the Commission (Article 258 TFEU) or by the Member States (Article 259 TFEU).

In the event of a failure to fulfil an obligation to comply with a ruling of the Court, as in the case of any other obligation deriving from membership of the European Union, the Court may issue a declarative judgment in which it finds that a Member State has failed to fulfil its obligations. Failure to comply with a judgment which finds that a Member State has failed to

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<sup>10</sup> Pursuant to Article 91 of the Rules of Procedure of the Court, a judgment shall be binding from the date of its delivery, unlike orders which take effect once the addressee is notified.

fulfil an EU obligation constitutes grounds for a new infringement procedure for failure to adopt the acts and measures necessary for compliance with the ruling. A second infringement procedure may conclude with a further judgment of failure to fulfil an obligation, under which the Court may impose a financial penalty on the non-compliant State (Amalfitano, 2012).

Unlike in some federal or quasi-federal legal systems, the judgments handed down by the Court do not constitute a precedent and there is no obligation on national authorities to apply the principles enshrined in the judgment or extend the effect of the ruling to third parties.

However, in order to reduce the workload of the Court, courts or tribunals of last instance in national legal systems may evade the obligation to suspend the pending procedure and refer the acts to the Court whenever the interpretation of EU law appears relevant to resolving the dispute. Unambiguous and consolidated case law may then be established in order to dispel any element of doubt in interpretation which may justify a further preliminary ruling.

In this way, the CILFIT<sup>11</sup> judgment introduced a principle of temperate *stare decisis* founded, at least in part, on the theory of clear action. Almost 60 years of *acquis communautaire* since the entry into force of the Treaty of Rome mean that the interpretative guidance of the Court relating to the principles upon which the legal system of the European Union is based is almost incontrovertible and beyond doubt. These principles have been subject to repeated preliminary referrals, such as those relating to the ban on discrimination based on nationality, the ban on the introduction of duties, equivalent measures and quantitative restrictions, and mutual recognition based on laws in different countries of origin.

Only the sentences delivered by the Court are considered European enforcement orders and can be enforced in the Member States in the same way as sentences delivered by national judiciary bodies.

However, Court judgments which find that a Member State has failed to fulfil an obligation cannot be invoked by natural or legal persons who are not party to the dispute - there is no horizontal effectiveness - as it is vital that the non-compliant Member States adopt the acts and measures necessary to comply with the Court's judgment. In other words, the Court does not have the power, through its judgments, to act as a replacement for the non-compliant State nor to annul the provisions of national law considered to be against EU law.

The Court's decisions have the effect of *res judicata* and can be amended only after an extraordinary challenge procedure.

The Rules of Procedure set out the extraordinary procedures for actions against Court judgments, opposition to judgments by default, third-party proceedings and revision.

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<sup>11</sup> Judgment of 6 October 1982, Case C-283/81, ECLI:EU:C:1982:335.

## VIII. Conclusions

Over more than 60 years of legal activity, the Court of Justice has played a fundamental role in promoting the integration of the Member States into the European Union.

In exercising its competences, intended to ensure respect for the Treaties, it has made a vital contribution to the development of the *acquis communautaire*, often acting as a driving force in developing forward-thinking case law and progressive solutions, received positively when amending the treaties.

Today, the organisation and functioning of the Court seem rigorously governed in great detail by a plurality of texts, including self-regulatory sources, which seek to ensure the efficiency of a complex and multi-faceted judicial system.

However, a focus should be placed on encouraging discussion of certain aspects which are critical to the issues addressed in this study.

Of particular importance is the absence within the EU's legal system of a prior legality mechanism, which, in case of doubt, enables consultation of the Court before the adoption of a binding act or before the exercise of a competence by an institution, in order to verify its compatibility with the principles enshrined in the Treaties.

In addition, there is no specific procedure enabling the resolution *in limine litis* of conflicts (positive or negative) of jurisdiction which may arise between national judiciary bodies and the Court in the many different types of case brought before it (for example, if assessing whether an act by an EU official should be considered a personal act or one carried out in the exercise of his duties).

Despite many attempts in recent years, there is still no solution to the problem of relations between the Court of Justice of the European Union and the European Court of Human Rights, in terms of both concurrent competence to interpret fundamental rights and the effectiveness of their respective judgments.

Remaining on the subject of protecting individual rights, the Court's involvement in incidental procedures, via the indirect intervention of referring national courts or tribunals, would appear inefficient, since it increases the time taken for the protection granted to come into effect.

These general outlines cover just some of the issues which, in the context of the reform to the EU's judicial structure, could warrant further consideration.

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