6 The Preliminary Ruling Procedure in a Nearly Six Decades Perspective

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At the time when the European Economic Community was established, the preliminary ruling procedure was assumed to be such a specific form of procedure by which national courts, in the context of cooperation with the European Court of Justice established in 1951, would receive answers with regard to the proper interpretation of EU law, insofar as it is necessary for resolving the cases before them. For the courts against whose decisions there is still judicial remedy, the initiation of the procedure is merely an entitlement, however, making a reference for a preliminary ruling is an obligation for those courts against whose decisions there is no judicial remedy. Although the majority of questions referred to the Court of Justice in fact relate to the interpretation of primary and secondary EU law, the preliminary ruling procedure may also cover the validity of secondary legislation. In this case, all lower and upper courts are under obligation to make a reference.

In the past decades, preliminary ruling procedure has inevitably played an exceptional role in the shaping of EU law. Suffice it to say that the legal principles determining the characteristics of Community law, such as the autonomy and the primacy thereof, the doctrine of direct effect, the responsibility of the state for damage caused by its acts contrary to EU law, have emerged in such procedures.

Although the procedure was not unprecedented in the national legal systems, and, indeed, it was fundamentally inspired by them,[1] in the case of international treaties such a system of interpretation has not existed until recently outside the sphere of EU law.[2] At the same time, however, the preliminary ruling procedure is likely to have extended beyond the framework initially intended for it by the fathers of the Treaties, both in terms of the nature and the quantity of the questions. The first question referred for a preliminary ruling was received at the Court of Justice in 1961, then, as the Community legal instruments have expanded, the number of Member States has increased and the questions referred for a preliminary ruling have become more and more concrete and specific, the number of such questions has increased steadily, when, in 1978, it rose to

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1 Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*. Oxford, Oxford University Press, 2014. p. 4.

2 A very much similar construction has been recently introduced by the Protocol No 16 to the European Convention of Human Rights with regard to the interpretation of the Convention.

more than a hundred and it reached its highest number so far in 2017 with 533 initiated procedures. Almost half (10 149) of the 21 538 cases received at the European Court of Justice since its establishment have been brought before the Court of Justice under the preliminary ruling procedure,[3] which demonstrates the dominance and a kind of success of the procedure. Of these cases, 2 976 were received from supreme courts.[4] The significance of this number is that it shows the ratio of the lower courts referring their questions to the Court of Justice without the obligation to do so and being entitled to interpret EU law themselves and the number of preliminary ruling procedures initiated by courts which were under the obligation to make a reference under Article 267(3) TFEU. The figures therefore reflect how many times it was necessary to bring the case to the highest level to allow the question of interpretation of EU law to be brought before the European Court of Justice. Since the proportion of the cases initiated by the supreme courts is smaller than 1/3 of the overall number of references, the activity of those courts not obliged to make a reference appears to be relatively balanced on a European level. This proportion may, obviously, vary at the level of individual Member States and it is also indicative in all cases.[5]

The record number of references for preliminary ruling in 2017 clearly shows that, despite the possible difficulties, rigidities and uncertainties of the preliminary ruling procedures, the inclination of the national courts to make a reference does not wane, the national courts regard the European Court of Justice as a clear point of orientation, in many cases to solve their real uncertainties, in other cases to share their decision-making responsibility.

Over the past decades, the Court of Justice itself has taken several initiatives and measures the purpose of which was primarily to enable the Court of Justice to respond to emerging questions of interpretation in an efficient, timely and helpful manner, and in so doing it sought, in particular, to ensure that the length of proceedings do not have a discouraging effect at the level of national courts. In this spirit, by implementing internal structural changes and by the rationalization of case management and procedure, in the last decade the Court of Justice has reduced the duration of preliminary ruling procedures

3 Annual Report of the Court of Justice of the European Union, 2017, Judicial activities, Luxembourg, 2018, p. 108. Until 2017 the record number of references was produced in the previous year, in 2016 with 470 cases referred.

4 Id., pp. 123-124.

5 For instance, in the case of the 53 references initiated by the Czech courts since accession, 34 were referred by the Supreme Court or the Supreme Administrative Court and from among the 45 Lithuanian referrals only 11 were sent by courts not being under the obligation to refer. The proportion of the cases initiated by supreme courts is also considerably high in Austria (236 from the overall number of 521), in Poland (63 from the overall number of 127), in Finland (79 from the overall number of 115), in Slovenia (15 from the overall number of 20) Id., pp. 124-125.

by almost ten months, and now the procedure is likely to be completed in a manageable time, within a year and a half.[6] The other initiative in this respect was the introduction of the possibility of an urgent preliminary ruling procedure from 2008 in cases concerning EU acts adopted in respect of the area of freedom, security and justice.[7] To that effect, in matters which, by their very nature, require a particularly rapid determination (especially if the rights of persons deprived of their personal liberty are affected and in order to protect the rights of children) and therefore it would not be possible to address them in traditional preliminary ruling procedures, there will be a possibility to carry out an urgent procedure which is extraordinary rapid, thus the procedure is abridged and expedited and takes only 2 to 3 months. Reducing the length of the procedure in general and prioritizing matters typically requiring particularly rapid determination were such measures which made it possible to ensure that the long duration of the preliminary ruling procedure do not have a discouraging effect on national courts when considering whether to seek the interpretation of the Court of Justice and they presumably significantly contributed to the preservation of the authority and effect of the preliminary ruling procedure and to the maintenance of the willingness to make a reference.[8] However, over a period of nearly six decades, the question arises as to whether any obstacles to the effectiveness and advancement of the preliminary ruling procedure as a special form of cooperation facilitating the proper and uniform application of EU law can be identified which would require a new approach and resolution, where appropriate, or which previously acted as obstacles, but have now been removed. Hereunder, I will consider these factors arranged in three groups: Obstacles to access, functional obstacles and endeavours to preserve the prestige of preliminary ruling procedure as obstacles affecting other areas of EU law. In my analysis, I focus essentially on the preliminary ruling procedure in which interpretation of EU law is sought.

However, it should be emphasized that the objective of the identification of any obstacles is not to call into question or doubt the usefulness of the preliminary ruling procedure, its outstanding role in the shaping of EU law, its uniqueness and indispensability. On the contrary, the here and there critical remarks merely want to highlight the points of the procedure which are still weak.

6 In 2003 the average length of a preliminary ruling procedure was of 25.5 months, while in 2016 the conclusion of a procedure took only 15 months. Between the two dates the duration has been progressively reducing. Id., p. 114; *The Annual Report of the European Court of Justice*, 2006, Judicial Activities, 2007, p. 91.

7 See the authorisation of Art. 23a of the Statute of the Court of Justice and Chapter VII of the Rules of Procedure currently in force.

8 *See*: Réka Somssich, *Egységes jog – egységes értelmezés?* Budapest, Eötvös Kiadó, 2016, pp. 149-150.

6.1 Obstacles to Access

I classify those factors as obstacles to access which hinder or has hindered the development of the preliminary ruling procedure by preventing certain thematic or time-bound sets of cases to be brought before the Court of Justice or which due to the current specific feature of the preliminary ruling procedure, exclude the possibility to request the interpretation of the Court of Justice, although practical reasons would justify it. Some of these obstacles have now been eliminated, while others are currently forming.

6.1.1 The Restricted Possibility of Initiating Preliminary Ruling Procedure in Respect of the Area of Freedom, Security and Justice

Surprisingly, the national courts entitled to initiate a preliminary ruling procedure were, for a long time, subject to limitation in such a field in the sub-area of which the introduction of urgent preliminary ruling procedure subsequently brought considerable relief. Prior to the Treaty of Amsterdam, acts concerning judicial cooperation in civil matters, currently included in EU regulations, were incorporated in international conventions concluded by the Member States, outside the Community pillar. The Brussels Convention[9] was concluded very early, in 1968, while the Rome Convention[10] was concluded in 1980. As both intruments were adopted outside the Community law, the rules for participating in the preliminary ruling procedure had to be settled separately. This was carried out by subsequent Protocols attached to these Conventions. Article 2 of the Protocol annexed to the Brussels Convention in 1971[11] sets out three categories of national courts which are entitled to request the interpretation of the Convention from the Court of Justice: these are the supreme courts exhaustively listed in Article 2(1), the appellate courts and, as regards Article 37 of the Convention, the courts listed therein. The supreme courts listed in paragraph (1) are also subject to the obligation to make a reference, in accordance with the relevant provisions of the Treaty. Thus, the Protocol established a system which is more limited than the general rules of preliminary ruling procedure, since the courts of first instance were completely barred from the possibility to initiate the procedure. The Protocol on the same subject, annexed to the Rome Convention in 1988,[12] contained provisions completely similar to the above. These restrictions could be,

9 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32-42.

10 Rome Convention on the law applicable to contractual obligations, OJ L 266, 9.10.1980, p-1-19.

11 Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 204, 2.8.1975, pp. 28-31.

12 First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, OJ L 48, 20.2.1989, 1-7.

in principle, justified by the kind of "outsider" nature of the instruments concerned, that is they fall outside the scope of Community law, and, in particular, by the caution which could be associated with the possible large number of interpretation questions arising in these areas.

With the Amsterdam Treaty and the possibility of transforming the conventions into regulations of Community law, the assumption reasonably emerged that in the field of judicial cooperation in civil matters the general rules of preliminary ruling procedure would naturally apply. This step did not happen, but what is more, the then effective Article 68 of the EC Treaty introduced further restrictions in comparison to the system of Protocols and allowed only such courts to initiate a preliminary ruling procedure against whose decisions there is no judicial remedy. That is to say, after 1999, in the area of judicial cooperation in civil matters only those courts had the possibility to make a reference which was obliged to do it under the general rules. Thus, the progress in respect of the regulatory instrument was accompanied by a clear backward step in respect of ensuring uniform interpretation. The probable ground of this restriction, which is difficult to understand and reflects excessive caution, was the avoidance of a large number of references that might have occurred suddenly in this area.[13]

The Treaty of Amsterdam, with Article 35 TFEU, introduced a similar restriction in the area of cooperation in criminal matters left in the third pillar and not communitarised, when it made the initiation of a preliminary ruling procedure in criminal matters conditional upon whether the government of the national court concerned has made a statement in that regard and, if so, whether it has allowed all courts to refer its questions to the Court of Justice or only those courts against whose decisions there is no judicial remedy.

These restrictions seem to have been incorporated into the Treaties irrespective of the will of the Court of Justice, and thus have been identified as obstacles to access to a preliminary ruling which are independent of the Court of Justice itself. This can be inferred from several sources. In his study published in 2005, Koen Lenaerts, the current President of the Court of Justice and its Judge since 1989, wrote that among the many problems associated with the restrictions of Article 68 TFEU and Article 35 TEU, paramount are their detrimental effects for the rule of law.[14] In 2006, the Commission ex-

13 Ulrich Magnus submits that in the light of the data on yearly number of earlier references concerning the conventions such fears had been overestimated Ulrich Magnus & Peter Mankowski, *Brussels I Regulation*, München, Sellier, 2007, p. 41.

14 Koen Lenaerts, 'The Unity of European Law and the Overload of the ECJ: The System of Preliminary Rulings Revisited', in: Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden, Nomos, 2005, p. 219.

pressed a critical voice and made a proposal for amendment in a Communication[15] in order to adapt Article 68 of the EC Treaty, having observed that, after a period of five years referred to in the Treaty of Amsterdam, the Council has failed to take a decision on the proper adaptation of the Court's jurisdiction. The purpose of this Communication was to eliminate the paradoxically lower level of judicial protection of individuals in the field of judicial cooperation in civil matters as well as to ensure and allow that the principle of uniform interpretation is properly applied. Ultimately, the amendment was not introduced, since the Treaty of Lisbon addressed the problem and did away with the discrimination. However, the different rules were a significant obstacle to access for many years: From 1977 and from 1988, courts of first instance could not refer questions to the European Court of Justice, while, after 1999, from the date of entry into force of these Regulations, until December 2009, appellate courts could not refer questions either, if further remedies were available against their decisions. We have no information on how many cases the lower courts interpreted EU law themselves so that the case was not subsequently appealed to a court subject to the obligation to make a reference. However, there is information about the fact that some courts, despite the lack of their entitlement, initiated a preliminary ruling procedure, which the Court, of course, rejected.[16] It is important to see that the refused references of lower courts often formulated such questions which had practical relevance and would have needed therefore an answer by the Court of Justice and which had to be submitted subsequently to it by other courts entitled to make a reference in order to address these questions properly and to be given a guidance thereon.[17] In other words, the limitations which were present in the area of freedom, security and justice for many years in respect of the preliminary ruling procedure certainly caused significant disadvantages, but, at least, a loss of time in respect of the uniform interpretation of EU law.

15 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities – Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346 final.

16 Judgment of 13 of January 2016 in Case C-397/15, *Raiffeisen Privatbank Liechtenstein AG* [ECLI:EU:C:2016:16]; judgment of 22 of March 2002 in Case C-24/02, *Marseille Fret SA* [ECLI:EU:C:2002:220].

17 In Case C-24/02, Fret the commercial tribunal of Marseille asked the Court about the compatibility with the Brussels Convention of the so-called anti-suit injunctions of English law prohibiting foreign courts to proceed in a given case. As the French court was not entitled to initiate preliminary ruling procedure before the Court, the question could only be answered later in Case C-159/02, *Turner*, in which it was the House of Lords (as supreme court) which formulated essentially the same question.

6.1.2 The Restrictive Interpretation by the Court of Its Jurisdiction in Relation to the Interpretation of EU Law

While the long-standing limitations in the field of judicial cooperation in civil and criminal matters can clearly be identified as external obstacles to access and independent of the Court of Justice, there are obstacles which essentially result from the case law of the Court of Justice and which primarily arose to be some kind of boundaries in respect of the interpretative competences of the Court for the purpose of optimising the number of cases. These restrictions basically occur in two areas. On the one hand, where the national legislature, on its own initiative, extends the scope of an EU legal instrument to matters which fall outside its scope, and, on the other hand, in respect of newly acceded Member States, in such matters that have arisen before accession but in an areas where otherwise already implemented legal measures of the Union are to be applied.

In 1990, in order to ensure the uniform interpretation, the Court of Justice established the approach in the *Dzodzi* case[18] that it would answer the questions referred to it even if the facts of the cases being considered by the national courts were outside the scope of EU law but where the provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions. The underlying logic of the doctrine known as the Dzodzi principle was clearly not to interpret differently the same provision of EU law depending on the fact that it falls within the competence of EU law or the application thereof is extended by the national legislature within the framework of national legislation[19] The conditions for the application of the Dzodzi principle were later tightened somewhat in the *Kleinwort Benson* case,[20] where the Court of Justice, for its interpretation of EU law also in situations governed by national law, required that the national law should make EU law directly and unconditionally applicable. If it is not established that the national law intended to extend, expressly and fully, the application of the provision of EU law concerned to the area governed by national legislation, the Court would not answer the national court's question. In addition, in the *Kleinwort Benson* case, the Court also held that the national court addressing the question must be bound by the judgment of the Court of Justice. The latter criterion later seemed to be omitted in the judgments in the cases of *Leur Bloem* and *Giloy*[21] and at the end of the 1990s it seemed that the requirements for a literal transposition of a provision of EU law were also relaxed[22] However, in the 2000s, there were several cases in which the Court only answered the questions referred to it where it was verified, beyond doubt, that the provision of EU law covered by the interpretation is fully applicable under national com-

18 Judgment of 17 of October 1990 in Joined Cases C-297/88 and C-197/89, *Dzodzi* [ECLI:EU:C:1990:360].
19 Judgment of 14 of March 2013 in Case C-32/11, *Allianz Hungaria* [ECLI:EU:C:2013:160].
20 Judgment of 28 of March 1995 in Case C-346/93, *Kleinwort Benson* [ECLI:EU:C:1995:85].
21 Silvère Lefèvre, 'The Interpretation of Community Law by the Court of Justice in Areas of National Competence', *European Law Review*, Vol. 29, No. 4, 2004, p. 506.
22 Judgment of 7 of January 2003 in Case C-306/99, *BIAO* [ECLI:EU:C:2003:3].

petence, irrespective of the fact that the national court reasoned in its submission that it was necessary for it to have the question answered in order to resolve a dispute brought before it.[23] A recent example of this approach is provided by the questions raised by the Higher Regional Court, Munich (*Oberlandesgericht München*) in the case of *Sahyouni* in 2015 for which the Court did not consider the description of the provisions of the relevant national law convincing enough to reveal that they intended to extend the scope of Rome III Regulation at national level.[24] The case before the German Higher Regional Court is particularly interesting, because, following an order refusing to answer the questions, it submitted a fresh reference in 2016,[25] that is to say, it brought the case before the Court for a second time, and, with a one-year delay, finally it received an answer to its questions.

We can assume that the repeated and consistent enforcement of the Court's stringent requirements that the national judge is to undoubtedly verify the actual and full transposition of the provision of EU law into the national law may be somewhat associated with the fact that, after the millennium, there is, in essence, a kind of restrictive attitude in respect of the boundaries of the Court's interpretative jurisdiction, which occurred most certainly for the purpose of optimising the cases, taking into account also the caseload potentially arriving from the ten countries that acceded in 2004. It may be the result of this that the Court replied in the negative to the fundamental question of the first reference for a preliminary ruling submitted directly after the accession in 2004 asking whether the Court of Justice has competence to interpret EU law in cases where the facts of the case before the national court dates back to the time before the accession, but the applicable national law was intended to transpose an EU directive and it has not been amended with a view to the accession either.[26] That is to say, while in the case of a provision of national law extending the scope of the application of EU law, although under strict conditions, it is possible to request the interpretation of the Court of Justice, there is no such possibility in case of measures, implementing EU law, of countries which by the time of the occurrence of the facts of the case were not yet subject to EU law but became Member States later.

This approach, although comprehensible at the level of legal consequences associated with the status of a Member State, certainly constituted and will – in the future, upon each new accession – constitute an obstacle to the uniform interpretation of standards of

23 Judgment of 18 of December 2014 in Case C-470/13, *Generali-Providencia* [EU:C:2014:2469] and the judgments given in the cases concerning references initiated by the Corte dei conti, sezione giurisdizionale per la Regione Puglia (judgment of 15 of October 2014 in Case C-246/14, *De Bellis* [ECLI:EU:C:2014:2291], judgment of 7 of November 2013 in Case C-313/12, *Romeo* [ECLI:EU:C:2013:718], judgment of 21 of December 2011 in Case C-482/10, *Cicala* [ECLI:EU:C:2011:868]) and the judgment of 18 of October 2012 in Case C-358/10, *Nolan* [ECLI:EU:C:2012:160].

24 Order of 12 of May 2016 in Case C-281/15, *Soha Sahyouni* [ECLI:EU:C:2016:343].

25 Case C-372/16, *Soha Sahyouni.*

26 Judgment of 10 of January 2006 in Case C-302/04, *Ynos* [ECLI:EU:C:2006:9].

EU origin. Indeed, after 2004, the judges of the new Member States were forced to interpret the underlying provision of EU law themselves in cases the facts of which dated back before the date of accession, where their national law allowed to take EU law into account as an aid to interpretation in such cases.[27] On the other hand, it may have easily occurred that in these cases the national court ruled without taking EU law into account, which may have resulted in a different decision in respect of facts occurring before or after the accession, provided that the Court has already given an interpretation in relation to the latter.

With its doctrine laid down in the judgment in the *Ynos* case, the Court of Justice apparently ruled out a large number of interpretative claims from receiving an interpretation in accordance with EU law. The cases where the facts date back to the time before the accession, relating to the Hungarian local tax on economic operations[28] and the Polish additional tax sanctioning the irregularities of VAT return,[29] indicate that the interpretative questions incurred in these cases appeared as real needs before the national courts, as a few years later, in relation to disputes the facts of which occurred after the accession, more questions were brought before the Court, identical to the previous ones.[30] However, it is not at all certain that all claims of interpretation have later found a way to the Court.

6.1.3 Lack of Advisory Opinions

A specific feature of the preliminary ruling procedure is that interpretation questions can only be sent to the Court of Justice in relation to a given pending case before the national court.[31] The Court does not answer hypothetical questions which are unrelated to and independent of the case.[32] Thus, obviously, the Court is not in the position to publish, ex officio or upon request to this effect, a kind of interpretation with an effect of unifying

27 In its judgment of 29 of September 2005 the Czech Supreme Administrative Court expressly provided that it is possible to take EU law in Ynos type cases as an interpretation guidance into account if the national measures had been adopted with the aim of harmonisation and there is no proof that the Czech legislator intended to deviate from the EU norm (Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice', *Common Market Law Review*, Vol. 45, No. 6, 2008, pp. 1633-1635).

28 Judgment of 9 of February 2006 in Case C-261/05, *Lakép* [ECLI:EU:C:2006:98].

29 Judgment of 7 of March 2007 in Case C-168/06, *Ceramika Paradyż* [ECLI:EU:C:2007:139].

30 With regard to the local tax on economic operations see the judgment of 11 of October 2007 in Joined Cases C-283/06, *Kögáz* and C-312/06, *OTP Garancia Biztosító* [ECLI:EU:C:2007:598] and with regard to the Polish tax supplement see the judgment of 15 of January 2009 in Case C-502/07, *K-1 sp. z o.o.* [ECLI:EU:C:2009:11].

31 *See in particular* the judgment of 12 of March 1998 in Case C-314/96, *Ourdia Djabali* [ECLI:EU:C:1998:4] and the judgment of 21 January 2003 in Case C-318/00, *Bacardi-Martini SAS* [ECLI:EU:C:2003:41].

32 *See in particular* the judgment of 20 of January 2005 in Case C-225/02, *Rosa García Blanco* [ECLI:EU:C:2005:34] and the judgment 24 of March 2009 in Case C-525/06, *De Nationale Loterij* NV [ECLI:EU:C:2009:179].

case law in relation to a question of EU law in respect of which it perceives that the case law of the Member States is diverging. Thus, the Court cannot give a decision similar to the uniformity decisions issued by some of the supreme courts of the Member States. While this kind of restriction is logical assuming that the essential characteristic of the preliminary ruling procedure is to assist national courts in the actual interpretation of EU law, but, in terms of uniform interpretation, it may not always be appropriate. In particular, an understandable need for such advisory opinions may arise in cases where the national courts, in large-scale cases of the same type, are unable to bring their questions before the Court of Justice or are forced to withdraw them because the disputes before them are terminated. This situation might well be illustrated by those German and Dutch national court cases relating to family reunification in which the procedure before the national court was terminated because the previously rejected residence permit was finally granted by the authorities to the applicant during the procedure and therefore the questions whether the requirement imposed by national law on family members to have at least a basic knowledge of the language of the country in which residence is sought is a correct interpretation of EU law, had to be withdrawn. Facts show however that it would have been relevant to answer this question because a similar practice was pursued in hundreds of administrative proceedings involving comparable issues of fact.[33] In the Case C-155/11 PPU *Imran*, a Dutch District Court (*Rechtbank Zwolle-Lelystad*), while informing the Court of Justice that the person concerned by the proceedings received the right of residence in the Netherlands, requested the Court to answer the questions nevertheless, because their correct interpretation would be relevant for subsequent actions for damages involving the same issues of fact and law. Referring to its previous, consistent case law, the Court refused this request and removed the case. Although the need for a uniform interpretation on the issue in question clearly appeared in two Member States, it was only after more than five years and after two national judgements of higher courts delivered without initiating a preliminary ruling procedure, two withdrawn references and a question unanswered due to lack of competence, that the Court of Justice was finally able to rule on the compatibility of the pre-entry language requirements in a specific case in which the question was not withdrawn,. A few years earlier, the Court adopted a similar approach in Case C-225/02 *García Blanco*, where the Spanish court, irrespective of the proceedings terminated, requested the Court of Justice to give an actual answer to its previously raised questions on the ground that it would be important also in other ongoing proceedings.[34]

Arguments on the usefulness of the Court's advisory opinion should obviously not result in questioning the requirements relating to the necessity of actual dispute. However, there may be a solution which does not require this. In this regard, it should be

33 For detailed analysis, *see*: Somssich 2016, pp. 225-229; Réka Somssich, 'Le regroupement familial et les exigences linguistiques', *Revue des études françaises*, No. 21, 2016.

34 Case C-225/02, *Garcia Blanco*, para. 23.

noted that the above cited Protocols on the jurisdiction of the Court of Justice attached to the Rome and Brussels Conventions provided for a procedure which would have allowed the designated authorities of the Member States to initiate a preliminary ruling procedure even in cases where the judgements of their courts, which have res judicata effect, were contrary to the case law of the Court of Justice or of a court of another Member State.[35] The second option, obviously in respect of the Conventions only, has explicitly authorized the Court of Justice to take decisions ensuring uniformity. Although these provisions have never been applied, several authors referred to this solution in relation to an eventual reform of the preliminary ruling procedure as one which may efficiently address situations where the actual dispute is terminated, but the need for a uniform interpretation would be strong.[36]

6.2 Functional Obstacles

While the obstacles to access include those external obstacles (resulting from regulations independent of the Court of Justice) and internal obstacles (resulting from the case law of the Court of Justice) which preclude certain interpretation questions to be brought before the Court, functional obstacles comprise such factors which are related to the operation of and, in a broader sense, to certain characteristics of the case law of the Court of Justice and constitute a kind of risk factor during a preliminary ruling procedure.

6.2.1 The Growing Responsibility of the National Judge When Making a Reference for a Preliminary Ruling

It has already been mentioned in the context of obstacles to access that, in the last decade, the Court of Justice has taken a strict position in matters relating to the provisions of EU law extended in national competences, and expects the national judge to fully and accurately substantiate that the issue in the given case is really the transposition of the provisions of EU law into national law. In the same period of time, this type of approach seems to be reflected in the traditional preliminary ruling procedures, where the Court of Justice increasingly expects from the national courts to give a precise and detailed picture of the national legislation relevant to the case before them and of their content. This expectation is somewhat ambivalent in the light of the fact that the subject-matter of the preliminary ruling procedure, though in the context of national legislation applicable in the main proceedings and of the facts, must be the interpretation of EU law and never that of

35 Point 4 of the above mentioned Protocol.

36 Jonathan Fitchen, 'Harmonising Procedural Rules in the EU', in: Paul Beaumont et al. (eds.), *Cross-Border Litigation in Europe*, Oxford, Hart, 2017, p. 73.

national law. A similar expectation is expressed as regards the description of the factual background and circumstances of the case concerned.

Paragraph 15 of the document entitled *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings*[37] calls upon the national judges to set out the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case law, and to give the precise references thereof. With regard to the facts, the previous paragraph merely states that their presentation must be such as to enable the interested persons entitled to make observations in the procedure to understand the factual context of the main proceedings. The Recommendations do not indicate the required extent of these presentations; it is obviously left to the national judge who will decide, in the light of the circumstances of the case and of the provision of EU law affected by the interpretation, how much scope he or she provides for this presentation. Under Paragraph 13, the Court must receive all information which will enable it to give a useful answer to the court or tribunal referring the question or questions. However, considering also the expectation expressed by the Recommendations itself that the request should preferably not be longer than ten pages, the national judge is confined to rather narrow limits as regards the length of the request.

Interestingly, in the abovementioned preliminary ruling procedure, which was the first one initiated by those countries acceding in 2004, in the *Ynos* case, there is a kind of condemnation, in the opinion of Advocat General Tizzano, towards the national judge in respect of the compliance with the above conditions, in so far as the judge did not state its position on the necessity but presented merely the applicant's arguments.[38] The expectation of sophistication to such a degree in relation to the first submission of a newly acceded Member State's court is surprising, whereas, in relation to former submissions, this was not explicitly indicated. Recently, the increasing stringency has been given greater emphasis also in the judgements of the Court of Justice.

In the recent case law of the Court of Justice, these arguments seem to be raised primarily in cases, where complex legal background and national case law have been established and the interpreted provision of EU law is firmly anchored therein, and, in relation to the field, a kind of 'dumping of references' has developed which the Court tries to prevent after a while. This can be observed in the second and third waves of preliminary ruling procedures relating to foreign currency loans initiated by the Hungarian courts. The Court of Justice rejected the questions in Case C-232-17 *WD*[39] due to the inadequate presentation of the factual background, while in Case C-259/17 *Rózsavölgyi*[40] also for the lack of substantiation of necessity. In a third case relating to foreign currency

37 2018/C 257/01 (OJ C 257 20.07.2018).

38 Paras. 57-60 of the Opinion of Advocate General Tizzano in Case C-302/04, *Ynos Kft.*

39 Order of 21 of November in Case C-232/17, *WD* [ECLI:EU:C:2017:907].

40 Order of 21 of November in Case C-259/17, *Rózsavölgyi* [ECLI:EU:C:2017:908].

loans, Advocat General Wahl put forward similar proposals as to the legal and factual background being not sufficiently clear.[41]

In the system of cooperation provided by the preliminary ruling procedure, the growing expectation to describe the legal and factual background in more details clearly increases the burden on national judges, and the non-observance thereof constitutes also a kind of filter. However, at the same time, this expectation appears as a reasonable self-limiting check on the Court's side so as to stay away from giving answers to questions on the application of EU law rather than on its interpretation in cases where it does not have a complete knowledge of the national legal and factual environment.

6.2.2 The Relativization of the Doctrine of Useful Answer

The mission to which the Court of Justice is committed to in the preliminary ruling procedure is to provide a useful answer to the referring national court. The Court of Justice considers the fulfilment of the preceding point as a prerequisite of the above, namely that it has precise information on the factual and legal background of the case concerned. Thus, according to the Court's approach, its answer given to the national court can be useful in view of such information. However, very little information is available as to whether the answer given by the Court to the national court is truly useful, whether it actually meant assistance in deciding the case before the national court, and whether it was clear so as to enable the national judge to draw the appropriate and correct conclusions therefrom in the case before him or her.

Some of the cases which are doubtful in this respect belong to a group of cases where the Court of Justice, by giving certain guidance, leaves it to the national judge to actually answer the question referred. Should the question referred concern a large number of cases, such a response may lead to diverging jurisprudence at Member State level. A consequence of this may either be that the courts of the Member State concerned will refer the question once again to the Court for a more specific answer[42] or the matter will be uniformly settled by Member State legislation in the light of the Court's judgment.[43] The Court of Justice shifts a particularly heavy burden on the national judge in so far as it leaves to the national judge to make a specific decision in cases where, obliquely, the compatibility of national law with EU law should be decided. In most national legal

41 Paras. 25-34 of the opinion in Case C-483/16, *Sziber* [ECLI:EU:C:2018:9].

42 *See*: Case C-169/91, *Stoke-on-Trent* [ECLI:EU:C:1992:519] in which the House of Lords asked for the clarification of the earlier ruling of the Court on Sunday trading prohibition.

43 See the Polish Act adopted one and half year after the delivery of the judgment of 17 of January 2017 in Case C-313/05. *Brzezinski* [ECLI:EU:C:2007:33] in order to put an end to the diverging case law of Polish courts on the reimbursement of registration tax or the uniformity decision of the Hungarian Supreme Court (Kúria) and the legislation adopted following the judgment of 30 of April 2014 in Case C-26/13, *Kásler* [ECLI:EU:C:2014:282].

systems such decisions falls outside the duties of ordinary judges. The risk that a national judge is left alone with a given issue after the conclusion of the preliminary ruling procedure and, at the same time, he or she may be put under the spotlight for that reason may have a significant dissuasive effect on the willingness and inclination to make a reference for a preliminary ruling.

Another group of cases which are less useful for the national courts is where the answer given by the Court of Justice is not very precise and is of a general nature, which is not necessarily helpful for the judge to decide in the case before him or her. In such cases, it again may happen that, in the given case or in other cases (eventually also from other Member States), more questions will be brought before the Court of Justice, or alternatively, the national courts will shape the national case law themselves on the basis of the generally formulated answer. An interesting example of this is the English case, where the *High Court of Justice* reached a completely different conclusion and delivered a contrary judgment on the basis of the preliminary ruling in which the Court of Justice gave a very general answer to its question[44] as compared to the *Supreme Court* which made another reference in the case and, this time, received a clear response.[45] We may also mention here the reference of the Cluj-Napoca Tribunal in which the court asked, in relation to a specific provision of a loan agreement, whether such a provision may be considered to be the main subject-matter of the contract, while, in the *Kásler* case, the Court had recently refused to give a specific answer, beyond a general definition, to a question of similar nature. Interestingly, it gave a specific answer in the *Matei* case.[46]

One of the greatest weaknesses of the Court's current case law is the fact that it is not predictable to which types of questions it gives a clear answer and to which it does not because it essentially qualifies them as questions on the application (and not interpretation) of EU law falling within the competence of the national judge. The Court's approach is not predictable because it basically shows a kind of "swing" behaviour so that it may behave differently even in relation to the same or similar matters and issues. This unpredictability of the approach creates uncertainty on the national courts' side, which may not take the risk to make a reference, especially if the matter concerned drew extraordinary attention, is economically significant or politically sensitive.

6.2.3 The Lack of Specialization

It is well-known that the legal experience of the judges of the Court of Justice is basically different, since the Treaty only requires the alternative condition that they should possess the qualifications required for the appointment to the highest judicial offices in their

44 Judgment of 9 of February 2006 in Case C-127/04, *Declan O'Byrne* [ECLI:EU:C:2006:93].
45 Judgment of 2 of December 2009 in Case C-358/08, *Aventis Pasteur* [ECLIEU:C:2009:744].
46 Judgment of 26 of February in Case C-143/13, *Bogdan Matei* [ECLI:EU:C:2015:127].

respective countries or they should be jurisconsults of recognised competence. Although it is detectable that the cases are distributed among the permanent chambers of the Court of Justice on the grounds of subject-matter, there is no real possibility for specialization in the Court. The composition of the Grand Chamber – which proceeds in view of the complexity and importance of the case – constantly varies.

In many cases, however, the requests for a preliminary ruling received by the Court of Justice are not classical questions of law independent of the specific characteristics of the respective fields, but questions of substantial professional relevance requiring special expertise. Primarily, the fields of intellectual property, taxation, and certain subareas of environmental law can be concerned. In these areas, any possible non-professional decision might tend to prevent the national courts from making a reference for a preliminary ruling and they will rule on the matters themselves. It is no coincidence, for example, that the horizontal cooperation among the national courts and the monitoring of each other's case law are relatively strong in the field of industrial property rights.[47] The Court of Justice may have recourse to an expert during the procedure, but this rarely happens and, furthermore, it makes the procedure lengthy.

6.3 The Preservation of the Prestige of the Preliminary Ruling Procedure

The preliminary ruling procedure has undoubtedly played a decisive role in the evolution and development of EU law since the establishment of the Communities and it continues to play this role even today. Therefore, it is understandable that the Court of Justice itself guards the full application and development of the procedure in which it appears as an interpreter of EU law whose interpretations are binding, while the national courts are bodies interpreting and applying EU law on an everyday basis. However, in recent years, two opinions have been issued by the Court of Justice, in which it delayed or blocked in some respect other important EU-level initiatives, by endeavouring to preserve the boundaries of the preliminary ruling procedure. In its Opinion 1/09,[48] the Court of Justice held that the draft agreement on the European and Community Patents Court was not compatible with the provisions of the Treaty, while, in its Opinion 2/13,[49] it held the same for the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. In the first case, this cost further years of delay in setting up the system of unitary patent, which has a troubled history anyway, while, in the second case, it practically postponed the accession

47 Emmanuel Lageza, 'Mapping Judicial Dialogue across National Borders: An Explanatory Network Study of Learning from Lobbying among European Intellectual Property Judges', *Utrecht Law Review*, Vol. 8, No. 1, 2012, p. 122.

48 Opinion of the Court of 8 of March 2011 [ECLI:EU:C:2011:123].

49 Opinion of the Court of 18 of December of 2014 [ECLI:EU:C:2014:2454].

of the Union to the European Convention for Human Rights, to which the Treaty of Lisbon finally established the legal basis, for an unknown length of time.

6.3.1 *The Relationship Between the Draft Agreement on the European and Community Patents Court and the Preliminary Ruling Procedure*

The agreement in question aimed to establish an autonomous court system to settle disputes relating to the unitary patent. As regards these disputes, the Patents Court was intended to fully take over the role of national courts, in so far as it was to exercise exclusive jurisdiction in matters falling within the scope of the Unitary Patent Regulation[50] and to apply EU law (and not just patent regulations, but also related acts, including EU competition rules as well as general principles). Although the Patents Court would have been entitled to initiate a preliminary ruling procedure, but, at the same time, national courts could not have made use of such an option in respect of the related matters. The Court of Justice held that, in a field covered by EU law, the jurisdiction to resolve such disputes and the right or obligation of preliminary ruling could not be conferred on a court created by an international agreement.[51] Accordingly, the main objection of the Court of Justice was that the patent court system was not to be established within the EU court system as a national court or as a court common to the Member States. In that regard, the Court also criticised the fact that if a decision of the Patents Court were to be in breach of European Union law, that decision could not be the subject of infringement proceedings and, in case of damage caused to individuals, it could not give rise to any financial liability on the part of one or more Member States.[52] In the light of the above, the Court of Justice has concluded that the envisaged agreement would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of EU law. In this Opinion of the Court of Justice, the national courts, as parties to the preliminary ruling procedure, are labelled as the "guardians" of the interests of individuals and are protected in that function.[53]

The Opinion resulted in the renegotiation of the agreement and, consequently, the rethinking of the new court system so that the Unified Patents Court acts as a court common to the Member States and the Member States are jointly and severally liable for possible infringements.[54]

50 Regulation No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361 31.12.2012, p. 1).

51 Para. 81 of the Opinion.

52 Id., para. 88.

53 Roberto Baratta, 'National Courts as "Guarduans" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ', *Legal Issues of Economic Integration*, Vol. 38, No. 4, 2011.

54 The new agreement was published in the Official Journal in 2013 (OJ C 175, 20.06.2013, p. 1).

6.3.2 The Relationship between the Accession to the European Convention on Human Rights and the Preliminary Ruling Procedure

One of the most controversial and most criticized decisions of the Court of Justice was the Opinion 2/13 in which the Court held that the draft agreement on the accession to the European Convention on Human Rights (Convention or ECHR) was not compatible with the Treaty. Among the many reasons, there are two which are directly or indirectly linked to the preservation of the prestige of the preliminary ruling procedure. It is to be noted at this point that the Court of Justice revealed, even in the course of the negotiations on the draft agreement, in a discussion document, the need of its involvement into such a procedure brought before the European Court of Human Rights (ECtHR) where a legal act of the Union is to be interpreted or where the issue of compatibility of the legal act with the Convention arise and the Court of Justice had not been able to adopt a position previously.[55] This was supposed to be reflected by the procedure for the involvement of the Court of Justice set out in Article 3(6) of the draft agreement. However, in its opinion, the Court of Justice concluded that this provision of the Convention violates the Treaty since it appears (or at least it cannot be precluded) therefrom that the ECtHR itself would have the power to decide whether the Court of Justice has already interpreted the provision of the EU law concerned. According to the Court of Justice, this question can only be answered by the competent EU institution (i.e. the Court of Justice) and its decision must bind the ECtHR.[56] The Court further claimed that the involvement procedure does not include the interpretation of secondary law and the Court of Justice could only be involved in respect of the questions of validity. The Court took the view that "if the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law."[57]

In addition, the Court also commented on Protocol No 16 to the Convention, even though the relationship to it did not form part of the agreement. It is the specificity of Protocol No 16 that it establishes, in the context of the national supreme courts and the ECtHR, an advisory procedure similar to the preliminary ruling procedure for the interpretation of the rights set out in the Convention and in its Protocols. The Court of Justice explains that the new mechanism could – notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR – affect the autono-

55 Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (5 of May 2010).

56 Paras. 237-238 of the Opinion.

57 Id., para. 246.

my and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU, since it entails the possibility of circumventing the preliminary ruling procedure where the supreme courts are otherwise under an obligation to make a reference under Article 267(3) and it opens the door to a form of "forum shopping."[58]

This Opinion of the Court of Justice resulted in far more serious consequences than in the case of the Patents Court. The renegotiation of the accession agreement is a continuing priority on the Commission's agenda, however, progress has not been made since the adoption of the Opinion in December 2014. Following the publication of the Opinion, experts immediately voiced their doubts about the ability to renegotiate the agreement, primarily because of its political sensitivity, the large number of actors and their different interests. The ratification of the revolutionary Protocol No 16 slowed down and although the ten ratifications required for its entry into force have been gathered, only five of the EU Member States (Finland, France, Estonia, Lithuania and Slovenia) appear among the ratifying countries..

The literature, with a few exceptions, expressed condemnation against the Court of Justice which practically prevented the accession of the Union, it was labelled "jealous",[59] "a court which follows its own interests only" and "accepts only the blue sky over its head",[60] describing it as such which gives preference to the protection of the fundamentals of EU law against the protection of values on which it is founded.[61] Others, however, also note that – in spite of the specific consequences of the Opinion – this overly cautious attitude of the Court actually made the Court what it has become in the past decades: the central actor of the constitutional process of the Union.[62] According to Cristoph Krenn, the preliminary ruling procedure is a very fragile and vulnerable procedure, the success of which is shown by the extent to which the national courts recourse to it. The Court, in turn, wants to avoid the possible marginalization and depreciation of the procedure through the above Opinions.[63] In any case, after the Opinion, the accession of the Union to the Convention seems to be, for a long time, unrealistic.

58 Id., paras. 197-198.

59 Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR', in: W. Benedek et al. (eds.), *European Yearbook on Human Rights 2015,* Wien, Neuer Wissenschaftlicher Verlag, 2015.

60 Walther Michl, 'Thou Shalt Have No Other Courts Before Me', *Verfblog*, http://verfassungsblog.de/thoushalt-no-courts/.

61 Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', *German Law Journal*, Vol. 16, No. 1, 2015.

62 Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13', *German Law Journal*, Vol. 16, No. 1, 2015, p. 148.

63 Id., p. 105.

6.4 Final Considerations

In their ambitious monograph on preliminary ruling procedure, Marten Broberg and Niels Fenger suggest that the preliminary ruling procedure is strongly threatened by the risk of becoming a victim of its own success.[64] This is primarily reflected in the large and growing number of references which seems to be unmanageable. The obstacles identified above also attempted to point out how the Court of Justice tries to address the challenges arising from the frequent use of the procedure and what kind of effects in respect of the future of the procedure these responses may cause on the national courts, and whether the Court of Justice can control the further development of cooperation with national courts. We also tried to highlight that, although the importance of the preliminary ruling procedure must not be underestimated, the protection mechanisms established to safeguard the status of the procedure and hence of the Court of Justice can have undesired consequences to the Union law as a whole, and, in the broader sense, to the Union.

64 Broberg–Fenger 2014, p. 5.