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UNDERGRADUATE THESIS

TOWARDS AN OPTIMAL SYSTEM OF PRELIMINARY RULINGS OF THE EUROPEAN COURT OF JUSTICE: A CASE OF FREE MOVEMENT OF GOODS

Grosuplje, September 2020 ŽAN GULIČ NOSAN

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LIST OF ABBREVIATIONS

sl. - Slovene

AG – Advocate General

BIT – Bilateral Investment Treaty

Brexit – British Exit (Departure of the United Kingdom from the European Union); (sl. Izhod Združenega Kraljestva iz Evropske Unije)

CJEU – Court of Justice of the European Union

COVID-19 – Corona Virus Disease 2019

ECJ – European Court of Justice

EFTA – European Free Trade Association

EU – European Union; (sl. Evropska Unija)

EWCA – the Court of Appeal of England and Wales

MEQR – Measures Equivalent to Quantitative Restrictions

TEU – Treaty on European Union

TFEU; (sl. PDEU) – Treaty on Functioning of European Union; (sl. Pogodba o Delovanju Evropske Unije)

(sl. t.i.) – (sl. tako imenovan)

USA – United States of America

INTRODUCTION

The Court of Justice of the European Union is one of the most important organs of the European Union as it represents the judicial branch of the Union. It is divided into two major courts, the European General Court and the European Court of Justice. Although there has been a rise of the productivity in the ECJ in the year 2019 (865 cases have been solved compared to 760 cases back in 2018), the duration of procedures is still long, approximately 14,4 months, for preliminary rulings (Court of Justice of the European Union, 2020a). Approximately 70% of the rulings brought to the ECJ are preliminary rulings. This is not surprising considering that this is the vital mechanism of enforcing the law of the European Union and enabling both natural and legal persons to enjoy the rights provided by the Union law and respect the obligations given. In absolute terms 601 preliminary rulings were completed in 2019, whereas there were only 192 completed rulings in 1999 (Court of Justice of the European Union, 2020a). With the workload increasing, the overburden of the ECJ needs to be recognised, which is why this thesis will focus on the optimization of preliminary rulings procedures.

Many issues have caused the current state of affairs. The desire for total uniformity of the EU law, distrust in the relation between ECJ and national courts, the decline of cooperation in favour of coordination, structural issues of the national courts to name few issues. The cooperation on the level of the European Union is of great importance in these dire times. In 2020, the European Union is facing a pandemic and almost inevitable economic crisis. In 2020, the first Member State has left the European Union, which indicates that there is a rise of Euroscepticism. If we add the worrying rise of the right-wing movement, a threat of another asylum crisis and the cold war between the United States of America and the People's Republic of China, it is clear that European Union should be stronger than ever. The current problem of the preliminary ruling procedure is adding fuel to the Eurosceptic community.

The purpose of this thesis is to provide a better understanding of the circumstances that turned the preliminary ruling procedure into the most common procedure of the ECJ. It suggests some methods that may lead to the optimal system. The main purpose of the thesis is to draw the importance of the issue itself rather than enforce solutions.

The conclusions of the thesis will be the result of the examination of the primary law of the European Union (Treaty on European Union and Treaty on the Functioning of European Union), preliminary ruling procedures, scientific papers and literature related to the legal order of the EU. Statistics of judicial activity will be used to further illustrate the issue. Press releases and the so-called Eurobarometer will be used to give to introduce the perspective of the citizens of the European Union.

At first, the judicial bodies of the European Union will be introduced. The concept of the preliminary ruling procedure will be introduced afterwards. The principles that enable the European Court of Justice to give preliminary rulings will be mentioned. In addition, the free movement of goods will be briefly introduced. Thereby the influence of preliminary rulings on the development of this fundamental freedom will be brought up. The theoretical part of the thesis will be introduced to the current state of preliminary ruling procedures and numerous problematic aspects will be addressed. Once the thesis presents the dissatisfactory state of the procedure, the possible solutions will be discussed. Moreover, some obstacles will be presented. It is important to realise that this thesis introduces numerous areas that are beyond the original scope of the thesis. Facts that are important to the topic of the thesis will be introduced, while the further explanation of the area will be omitted.

1 INTRODUCTION TO JUDICIAL BODIES OF THE EUROPEAN UNION

Charles de Secondat, a French philosopher also known as Montesquieu argued that every democratic state should have three branches of political authority: judicial, executive and legislative. These branches are independent of one another (Shackleton, n.d.). European Union, the Union following democratic principles, thus established seven interconnected institutions: the European Council, the Council of the European Union, the European Court of Auditors, the European Commission, the European Parliament, the European Central Bank and the Court of Justice of the European Union (Learneurope, n.d.).

Court of Justice of the European Coal and Steel Communities was created in 1952 (Court of Justice of the European Union, n.d.). The name of the judicial branch was changed with the Treaty of Lisbon (Official Journal C 306, 17.12.2007, pp. 1–271, hereafter Treaty of Lisbon) and is as of 2020 known as the Court of Justice of the European Union (Lexology, 2009). Located in Kirchberg, Luxembourg it has two courts, the Court of Justice and the General Court.

The main purpose of the Court of Justice of the European Union is to oversee the implementation of the Union law, interpret and validate the legislative acts and to some extend enforce the privileges and obligations of EU institutions, Member States and citizens of the EU. CJEU works in accordance with the legislation of the European Union, namely primary, secondary and supplementary law. Primary law consists of the Treaty on European Union (hereafter also as TEU), the Treaty on Functioning of European Union (hereafter also as TFEU), protocols, and annexes to the Treaties (Official Journal C 326, 26.10.2012 P. 0001 – 0390, hereafter also as the Treaties) and The Charter of Fundamental Rights of the European Union (Official Journal C 326, 26.10.2010 P. . 0391 – 0407). Secondary legislation mainly consists of regulations, directives, decisions, opinions and recommendations. Resolutions, declarations, policy guidelines, programmes and inter-institutional agreements are also part of the secondary law (EUR-Lex, 2020). Case law, international agreements,

general principles and fundamental rights are usually part of the supplementary law (EUR-Lex, 2018b).

1.1 General Court

General Court is composed of two judges from each member state. With the United Kingdom leaving the European Union in January 2020, there are now 54 judges in the court formerly known as the Court of First Instance. Their term's length is six years and can be renewed. Their independence needs to be beyond doubt. The judges also elect their president every three years. The president is one of the judges serving in the General Court at that moment. Providing the level importance and legal complexity of each case, the judges can form a chamber of one, three, five or in some cases fifteen judges. This court does not have advocate generals (hereafter also as AG). Providing AG is needed to resolve the case, one of the judges is to take that position (Court of Justice of the European Union, n.d.).

According to Article 256 TFEU, General Court has jurisdiction over proceeding such as (but not limited to) settling disputes between the EU and its servants, judgements in breaches of contracts concluded by or on behalf of the EU, legal actions brought by a Member State or EU institution against an EU institution.

1.2 Court of Justice

The second body of the Court of Justice of the European Union is the European Court of Justice or simply the Court of Justice. Composed of a judge from each member state, one registrar and eleven advocate generals the cases in the ECJ are dealt by either the full court, the chamber of three or five or the grand chamber of fifteen. The full court assembles in cases of extreme importance or when suggested by the Statue of the Court. Grand chamber takes place if a party in the proceeding requests so or if a case is deemed to be important and complex. Chambers of five or three is reserved for other cases. Both judges and advocate generals have a renewable term of six years. They have to decide which judge among them will be their president for the term of three years, which can also be renewed (Court of Justice of the European Union, n.d.). Appendix 2 presents the composition of the European Court of Justice as of December 31st, 2019.

In the jurisdiction of the ECJ are proceedings such as (but not limited to) appeals to judgements of the General Court, infringement procedures against a Member State, validity and interpretation of legislative acts or the Treaties through preliminary rulings.

2 PRELIMINARY RULING PROCEDURE

Preliminary ruling procedures are one of the most important mechanisms of the European Union. They provide uniformity and application of the Union Law in all Member States.

2.1 Introduction to Preliminary Ruling Procedure

The provisions of preliminary rulings are given in Article 267 TFEU, where the European Court of Justice was given jurisdiction over these cases. Article 256 (III) TFEU may allow the General Court to determine specified preliminary rulings, however, this option is yet to be exercised (Craig & de Búrca, 2011).

National courts or tribunals may request a preliminary ruling. This can only be done at the court's discretion and the wish expressed by the parties can be disregarded. In 1997, the ECJ decided that not every court or tribunal of a Member State may impose a question to the ECJ. According to ECJ case 54/96 Dorsch [1997], "a number of factors must be taken into account, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent." The court in question must be part of the ordinary judicial system of a Member State and needs to give rulings in domestic proceedings. In most cases, arbitrary courts cannot request a preliminary ruling, since they are not operating under the judicial system of a Member State.

Preliminary rulings are used to interpret the Treaties and to validate or interpret the acts of EU institutions such as regulations and directives. Even non-binding acts such as recommendation or opinion can be interpreted, especially in order for a Member State to correctly interpret an act that will smoothen the process of applying EU law. International agreements are also part of the legal order of the EU and thus can be interpreted with a preliminary ruling. When an interpretation of legislation is given, a national court or tribunal must follow the decision or guidelines of the ECJ and apply them to the case in the procedure. The answer to the preliminary ruling is then used as a precedent and is applied to cases of a similar background. When requesting a preliminary ruling to check the validity of secondary legislation, legislation is deemed non-existent if it is ruled that it is not in accordance with the Treaties. If the act in question is ruled valid, its validity may be challenged again under different circumstances and different preliminary ruling. The national court or tribunal cannot declare the EU act invalid. This is an exclusive competence of the ECJ, as seen in ECJ case 314/85 Foto-Frost [1987].

The question can only be imposed if a national court or tribunal considers that the decision of the ECJ is of utmost importance for the final judgement. This should be done as soon as it is deemed impossible to give a judgement. The national court or tribunal can decide not to ask a question, however in cases when there is no judicial remedy under the national law, the preliminary decision is required. In that case, the national court or tribunal would act beyond their competences. In the abstract theory, there is no judicial remedy in the cases, when an appeal cannot be given. In that case, the decision was already made by the highest court of the national judicial hierarchy. In concrete, no judicial remedy may happen in the lower court, where an appeal to the higher court is not possible, as there are no financial

requirements to start the procedure on that court (Court of Justice of the European Union, 2018).

ECJ case 283/81 CILFIT [1982] (hereafter CILFIT) introduced an exception. Despite the lack of the judicial remedy, national court or tribunal may refuse to request a preliminary ruling. It needs to deem that the potential question is irrelevant to the final judgement or that the European Court of Justice has already given the interpretation of a similar situation. Additionally, when the correct application of the Union law is "so obvious as to leave no scope for any reasonable doubt, the national court or tribunal may refuse to refer.

When a question is submitted to the ECJ, the decision must be given. There are however some exceptions, where ECJ declined its jurisdiction. The Court may deny the preliminary ruling if there is no connection between the question that was asked and the actual facts of the case. Questions with fictive or hypothetical nature will also be rejected. When the ECJ believes that the question lacks factual and legal material that is required to give a sufficient answer, it may deem the question inadmissible.

The preliminary ruling must thus include:

- The referring court or tribunal (the current formation is optional) and full contact details;
- The parties to the main proceedings and their representative (with full contact details; some names or details might be redacted if considered necessary);
- The subject matter of the dispute in the main proceedings and the relevant facts
- The relevant legal provisions (a precise reference to national provisions or national case law in the question and EU provision that needs validation or interpretation);
- The grounds for the reference (reasons in national or EU provisions that have caused the reference, optionally with arguments of the parties)
- The question referred for a preliminary ruling (a separate question that can be understood without the factual background of the case; national court or tribunal may briefly state their point of view regarding the answer to the question)
- The possible need for specific treatment (if necessary, the anonymity of the parties might be requested; in some cases, especially if a case deals with a person in custody or if other fundamental rights are in question, ECJ is requested to act with the minimum of delay).

There are also some formal aspects of the request, such as font size. These documents are required to be sent to the Registry of the Court of Justice in Luxembourg. The preliminary ruling itself is free of charge. National court or tribunal must however decide about other costs incurred. Legal aid is available for parties with insufficient funds (Court of Justice of the European Union, 2018).

2.2 Competences of the European Court of Justice in regards to the Preliminary Ruling Procedure

Article 5 TEU states that the European Union only has competences over the policies and areas that were conferred by the Member States in the Treaties. Competences that are not specified in the Treaties remain the jurisdiction of the Member State (EUR-Lex, n.d.). The so-called principle of conferral divides policy areas into so-called exclusive, shared and supporting competences, which can be seen in Appendix 3.

It is thus clear that ECJ acts in accordance with the conferred competences when interpreting or validating legislation of the Union. The judgements must however be done in the light of precedence or supremacy of EU law over national law. National law must not be incompatible with EU law. The provisions of the Union must not be ignored as stated in ECJ case 6/64 Costa v E.N.E.L [1964]. According to ECJ case 106/77 Simmethal II [1978] a contradicting national provision must be discarded even if adopted after the provision of the Union. The Precedence of EU law in more detail is however beyond the scope of the thesis.[1]

Direct effect of the European law is one of the most important mechanisms that enables the functionality of the preliminary ruling procedure. The direct effect was established in one of the first preliminary rulings of the ECJ, a landmark ECJ case 26/62 van Gend & Loos [1963] (hereafter van Gend & Loss). The judgement recognised that both primary and secondary law confers the rights and obligations to not only the European Union and the Member States but also to the citizens of the Union. The direct effect, one of the fundamental mechanisms of the Union, thus gave the individuals the right to invoke the Union provision against a Member State (so-called vertical direct effect) or in some cases against another legal or natural individual (so-called horizontal direct effect). This principle is usually enforceable with preliminary rulings, which enables the implementation and to some extend uniformity of the Union law (EUR-Lex, 2015). The further explanation of the direct effect would be beyond the scope of the thesis.[2]

2.3 Preliminary Rulings and the Free Movement of Goods

Union policies and internal actions are defined in the third part of the TFEU. One of the vital provisions of this part concern the establishment of the internal market and thus the creation of the Four Fundamental Freedoms of the European Union, namely the free movement of goods, services, persons and capital. The creation of the Schengen Treaty and thus the Schengen Area further strengthened the functionality of four freedoms (European Commission, n.d.).

[1] For the Precedence of the EU law, see ECJ case 6/64 Costa v E.N.E.L. [1964] and ECJ case 106/77 Simmenthal II [1978] for more information.
[2] For the Principle of Direct Effect, see ECJ case 26/62 van Gend & Loos [1963] for more information.

2.3.1 Brief Introduction to Free Movement of Goods

Free movement of goods discarded the custom duties such as tariffs, charges having equivalent effect, quantitative restrictions (also known as quotas) and measures equivalent to quantitative restrictions (hereafter also as MEQR) between the Member States. It moreover established common custom duties on products of third countries. The Union provisions dealing with the free movement of goods ranging from Article 28 TFEU to Article 37 TFEU. Especially Articles 34 and Article 35 TFEU are prohibiting the use of quotas and MEQR on both imports and exports, while Article 36 TFEU provides a range of justified reasons for such restrictions.

One must however acknowledge that the Member States were always inventive when trying to justify economic protectionism or prioritize national goods over goods of other Member States. As soon as the Treaties and the secondary legislation were introduced, numerous rules had to be discarded. While some obvious barriers to trade were quickly removed, there were numerous examples of cases, where it was argued that the barrier does not exist or that it is justified on the reasons provided by Article 36 TFEU. Such barriers were challenged on the ECJ. There is thus no doubt that preliminary rulings had an enormous impact on the free movement of goods. Numerous preliminary rulings were launched especially due to the MEQR. Case law in the area of free movement of goods is thus one of the most important supplementary laws of the EU.

2.3.2 Effect of Preliminary Ruling Procedures on the Free Movement of Goods

During ECJ case 7/68 the Commission v Italy [1968], a product needed to be defined. Just a year later in the case featuring the same parties, charges of equivalent effect were defined. ECJ case 2/73 Geddo [1973] introduced the term measures equivalent to quantitative restriction (MEQR) to the legislation of the EU.

Preliminary rulings were crucial for the development of combat against MEQR on (primarily) imports, with several cases of great significance. Landmark ECJ case 8/74 Dassonville [1974] (hereafter Dassonville) further defined MEQR. It was however deemed that the Dassonville formula was too restrictive. The famous judgement of ECJ case 120/78 Cassis de Dijon [1979] (hereafter Cassis) thus established the so-called Rule of Reason to the case law and provided an alternative to the justification under Article 36 TFEU. There was an emphasis on the protection of general public interest. Furthermore, a concept of mutual recognition or in other words removal of dual burden was introduced.

It most judgements, conclusions of previous cases are taken into account. The concept of mutual recognition was for example confirmed in ECJ case 261/81 Rau [1982]. It is however evident that especially Dassonville formula focused on product-related barriers of trade, whereas there are cases, where a product itself is not as much of an issue comparing to the selling arrangement of the case. In joined ECJ cases 267/91 & 268 /91 Keck and Mithouard

[1993] (hereafter Keck), the focus was on selling arrangements. As soon as the national provision focuses on selling arrangement and is not discriminatory in law as well as in fact, the provision is excluded from MEQR of Article 34 TFEU.

Joined ECJ cases 158/04 & 159/04 Alfa Vita [2006] proved that the artificial demarcation between product-related and selling arrangement provision is questionable, whereas in some cases barrier to trade is a result of neither. ECJ case 112/00 Schmidberger [2003] dealt with the barrier to trade resulting from freedom of expression and assembly. It is however clear that a Member State needs to actively ensure and promote the free movement of goods, as stated in the judgement of ECJ case 265/95 Coordination Rurale [1997].

While the discrimination in law was obvious, the discrimination de facto is not always clear as seen in ECJ case 322/01 Deutscher Apothekerverband [2003]. It was reaffirmed that discrimination in fact can be assumed as market access hindrance or border crossing hindrance. ECJ case 110/05 Highway Code [2009] (hereafter Highway Code) caused the evolution of the Keck formula. Prohibition on the usage of the product is neither a restriction of product modality nor a selling arrangement. The ruling included yet another possible type of measure equivalent to quantitative restriction.

While the mentioned cases mostly focus on imports, the MEQR on exports is a bit narrower. While ECJ case 53/76 Bouhelier [1977] transferred the Dassonville formula to exports, ECJ case 15/79 Groenveld [1979] distanced exports from imports since comparison of treatment was required of goods for export and goods for domestic market. In ECJ case 205/07 Gysbrechts [2008] it was observed that the comparison of treatment brought several flaws to the established formula. Modification of Dassonville, Cassis and Keck formula on the emphasis on market exit was suggested. Even though the goal of all mentioned formulas is to enable free movement of goods, the modification was discarded.

As mentioned, Article 36 TFEU and the rule of reason established by the Cassis judgement may justify a restriction that was recognised under Articles 34 and 35 TFEU. The restriction must however be proportionate to the aim pursued. A national provision must thus pass the proportionality test. The measure must be suitable, necessary and proportionate to the sense that its harm to the free movement of goods is not greater than the national interest pursued. It is much easier to justify a restriction in the area with minimum harmonisation since a Member State has much larger discretion when deciding upon the level of protection in that area. In numerous preliminary references, however, a national provision was justifiable, yet it did not pass the proportionality test.

This thesis focuses on the preliminary rulings in the area of free movement of goods. Cases in detail, especially in regards to factual background, are beyond the range of this thesis. Appendix 4 shows the summary and decision-making in the preliminary ruling procedure concerning Measures Equivalent to Quantitative Restrictions.

3 THE NEED FOR OPTIMIZING THE PRELIMINARY RULING PROCEDURE

The main goal of this thesis is to analyse, how to optimize preliminary rulings, especially in the area of the free movement of goods. One must analyse if an optimization is even needed. The main reason for optimization is to improve something and to make it closer to perfection. Yet we cannot improve something that is already perfect. One must thus question the perfection of the system before making proposals for improvement.

Treaty of Lisbon provided numerous reforms to the preliminary rulings procedure. Since its entry into force, any national court or tribunal may request a preliminary ruling, whereas only the courts or tribunals of the last instance could do that before 2009. The European Court of Justice was given larger jurisdiction since former Article 35 that concerned police and judicial cooperation in criminal matters was repealed. Under the former article, a Member State may give the jurisdiction in that area to the ECJ, which was no longer necessary. Moreover, the preliminary ruling procedure was extended to acts of bodies, agencies and offices of the European Union. Furthermore, an urgent preliminary ruling was established. If a person is in custody due to the pending case, the ECJ must give a ruling with a minimum delay (Court of Justice of the European Union, n.d.).

There are however numerous issues that are still present. These problems have nonetheless lead to the present day stasis, a situation where the national court or tribunal may feel that there is no need for a preliminary ruling and where uniformity of EU law may undermine the EU law itself.

3.1 Ideals of the Preliminary Ruling Procedure

In the view of the EU, a preliminary ruling is ideal for multiple reasons. While preliminary ruling does interpret and validate the Union law, it also determines, whether the national law is valid. While uniformity of law is of great importance for the Union law, one may wonder if it is of the necessity to the European Union itself.

The preliminary ruling procedure is one of the finest examples of discourse in the Union. It may be used in inquisitive nature, where the main goal of the national court is to ensure proper implementation, or in confrontational, where the national courts refer to the ECJ once more in hopes of reconsideration. Through preliminary rulings, the national court may influence the policy-making of the EU. Yet this dialogue has serious restrictions. Both parties and the ECJ are present in the case, while only the Council, the Commission and the other Member States can make observations. This excludes all private parties that may be affected by the ruling. While the Member States may submit observations and thus influence the decision, private parties do not enjoy the same privilege, unless being one of the parties, and are thus isolated (Craig & de Búrca, 2011).

Ideally speaking, the preliminary ruling procedure is the greatest consequence of cooperation between the CJEU and the courts and tribunals of the Member States. The emphasis on cooperation has always been an important aspect of the Treaties. National courts make sure that the Union law is properly interpreted and enforced and ECJ makes sure that such enforcement is done properly in the light of the Treaties. There is no preliminary ruling without a request from a national court and there is no judgement of the preliminary ruling without the ECJ.

The symbiosis of the legal bodies is, however, "deteriorating in disguise", as there is a slight shift from cooperation to coordination. It seems as the ECJ lacks trust towards the national courts. While it is true that some courts, especially the ones of lower instance, lack the full insight of the Union law, one must recognise that, in the light of uniformity and exclusivity to interpret and validate Union law, ECJ rarely transfers its powers to the national courts. A Member State obliges itself to respect the decision of the Court by referring to the ECJ. Even though the final decision of the case on hand is done by the national court, the decision is largely coordinated by the ECJ (Craig & de Búrca, 2011). The ECJ is therefore in an unfavourable position. On one hand, ECJ wants to maintain the uniformity and enforcement of the EU law. On another, it needs to persist a friendly relationship with the national courts, since they are the partners that enforce the Union law. This was seen in ECJ case 129/00 the Commission v Italy [2003]. Even though a Member State failed to fulfil obligations, the law implemented by the Italian judiciary was not breaching the law, but rather its construction and application of the administrative authorities and thus avoiding the condemnation of the partner institution (Komárek, 2006). This case thus confirms that despite the need to coordinate rather than cooperate, the shift is done with precaution.

The persistent need for the uniformity and the lack of trust of the ECJ towards national courts has created some sort of "supremacist supervision", a state where the ECJ is deemed as a perfectionist. Lately, the fear that the national court will make an error as the provision is implemented is far greater than the fear that provision will not be implemented at all. Moreover, it can be argued that every mature legal system has a certain trade-off between uniformity on one hand and efficiency, legal certainty and duration of the case on another. The uniformity is nonetheless still a priority of the ECJ (Craig & de Búrca, 2011).

The European Court of Justice may refuse the request for the preliminary ruling. The presented questions should not be manufactured, hypothetical or moot questions, since the issue discussed may never materialise in reality. The question that is presented must be relevant to the case at issue, which has to have a sufficient factual and legal basis. The question itself must not be incomprehensive or unintelligible. Exceptions are however possible as seen in ECJ case 260/07 Pedro IV Servicios [2009]. The Court acknowledged that the referring court failed to provide essential information of the dispute. Referred questions were relevant the Union law yet answers would be irrelevant to the outcome of the case. The judgement was however given, as the Court decided that the ruling was admissible

on grounds of cooperation between European and national court and desire for uniformity of EU law.

The Court may however paraphrase a question if it deems that it can assist in the final decision of the national court and if it is not obvious that the question has no relation to the factual background. In ECJ case 429/05 Franfinance [2007], the court found both questions admissible, despite the lack of jurisdiction of the ECJ, as a result of the minimum harmonisation requirements of the EU directive. The Court accepted the reference and paraphrased to the point where it belonged to the jurisdiction of the ECJ. Moreover, it can provide an interpretation of the EU provision even though the referring court was not referring to that particular provision. This was done in ECJ case 275/06 Productores de Música [2008], because it was obvious that the outcome was linked to the provisions of the EU. It is thus evident that the ECJ may answer poorly formulated or seemingly hypothetical questions. It is however questionable if this was done due to cooperation or disguised coordination.

The main essence of the case law is usually the innovation of the ECJ. While numerous interpretations steam directly from the Treaties (or secondary and supplementary law), an interpretation is often a result of creative perception of the legislative texts. In some cases, the imagination of the ECJ is beyond the jurisdiction of the ECJ or even the European Union, while it may even be contradictory to the Treaties. In ECJ case 352/98 Bergaderm [2000], this issue was emphasised. The decisions of the CJEU cannot be reviewed on any court or tribunal, since there is no court of a higher instance. The issue is thus almost biblical: "Only the court without a breach may judge other courts, because of a breach". The national courts may be accountable[3] for misunderstanding an interpretation, even though the misunderstanding may be caused when interpreting the Union legislation in the first place (Komárek, 2006). Lack of accountability of the ECJ may discourage the national court to impose a question in the first place.

3.2 Refusal to refer to the European Court of Justice

Only a national court or tribunal that has no judicial remedy must refer a question. When the validity of a secondary legislative act of the Union is in question, a request for a preliminary ruling must be made. National courts with the judicial remedy on the other hand have an entitlement rather than an obligation to refer the case to the European Court of Justice.

The preliminary ruling can be asked if the answer is of utmost importance to the pending case. In accordance to the CILFIT judgement, a national court my refuse to refer under certain conditions. It however seems clear that national courts often misinterpret the "reasonable doubt" that is provided in the judgement. One needs to be aware that the

[3] For State Liability, see joined ECJ cases 6/90 & 9/90 Francovich [1991], joined ECJ cases 46/93 & 48/93 Brasserie [1996], joined ECJ cases 178/94, 179/94, 188/94, 189/94 & 190/94 Dillenkofer [1996] and ECJ case 224/01 Kobler [2003]

language used in the EU legislation is usually peculiar and that EU legislation is translated into numerous European languages. Despite possible language differences, all translated legislations are equivalent to one another. While legislation may not "leave no scope for any reasonable doubt" in one language, the same may not be said for a different language and it is thus suggested to compare one translation to another, which is rarely done and not to full extend. The Austrian Supreme Court sometimes refers to the English and the French version, the British Supreme Court may refer to French, German, Spanish and Dutch versions, while Slovene Supreme Court compared Slovene legislation to English, French and German. Supreme Court of Lithuania once compared its legislation to all languages except Hungarian and Irish. The application of the CILFIT criteria is not fully utilized and is used to either justify reference to the ECJ or the lack of it (Courts of the European Union, 2019).

In 1974, just a year after joining the European Communities, the Court of Appeal of England and Wales refused to seek answers from the European Court of Justice in the case EWCA Civ 14 Bulmer v Bollinger [1974] (hereafter Bulmer v Bollinger). The Master of Rolls, the president of the said court, argued that it is up to judges in the ECJ to interpret the law and the role of national courts to apply it. He claimed that the English judge has the discretion to refer to the ECJ if he considers it necessary. ECJ would not listen to the English judge if the case was not considered necessary. He further claimed that the point referred needs to be conclusive, meaning that one interpretation would give judgement for the plaintiff and another to the defendant. He assured that a reference is not necessary if a similar judgement exists and there are no new circumstances. It is also up to the English court to decide if the point of the EU provision is reasonably clear and free from doubt. He also mentioned that referring to the ECJ at this point in the procedure would be too sudden. The facts of the actual case may make the reference to the ECJ completely unnecessary. Furthermore, he decided not to refer, because of the time needed to get the ruling and the fact that such amount of cases would overload ECJ. In 1974, only nine judges formed the ECJ and division to smaller chambers was not possible. Each case required all nine judges and such cases would only make the procedure much slower than it already is. The question asked must serve solely for interpretations without facts of the case (which are to be included in other section of the request), which may affect the final judgement. He believed that the cases of lower difficulties and importance should be decided upon the discretion of the national judge. One must also take into account the expenses since the preliminary ruling would delay the national ruling and cause additional expenses.

3.3 The Institutional Issues and the Legal Culture of the National Court

There are no clear guidelines on whether a national court should refer to the ECJ or not. It is not clear if it is necessary and appropriate to involve ECJ in the procedure. This has led to the question in the style of Hamlet: "To refer or not to refer, that's the (preliminary) question." According to research, a number of cases that are referred to the ECJ are rather low. Only Luxembourg and the Netherlands have submitted more than 45% of their cases to

the ECJ from the 2004-2014 period. All other Member States submitted less than 30% of all cases. Additionally, a study was conducted among 32 judges from Slovenia and Croatia. While some may argue that the lack of preliminary rulings indicates the rise of Euroscepticism, this is not the conclusion of the research performed in 2019. The profile of the judge greatly influences the decision. The judge may decide based on the factors such as knowledge of the procedure, previous experiences, knowledge of foreign language and effect on reputation. In some cases, workload, quotas, time constraints and the resources of the court play an enormous part as well. The workload of the courts of first and second instances is large and one cannot imagine how additional work required for the preliminary ruling would fit in the schedule. Since the preliminary procedure takes a few months to be resolved, the judges may not meet quotas that are common in Croatian courts. In the Slovene case, judges are facing time standards, some sort of upper time limit for each case to be resolved. Such restrictions affect the decisions of the judges, as one may face lower judicial grade, sanctions or even dismissal. Moreover, there is a lack of resources. In some Member States, only a supreme court may have enough human resources to start the procedure. It can be concluded that workload and institutional structure greatly affects the references for the preliminary rulings and thus the uniformity of the law of the European Union (Glavina, 2019).

It may appear that the national court doubts the application of the EU provision to the Member State. Directives, a mechanism of the secondary law of the European Union, are not directly applicable and need to be transposed to the national law. A litigant cannot refer to the directive if transposition is yet to take place. If the period to transpose is yet to elapse, the litigant is powerless, if the time did elapse, the litigant may request an infringement procedure (EUR-Lex, 2018a). The similar issue is the absence of the Union legislation in the official language of the new Member State. In ECJ case 161/06 Skoma-Lux [2007], an importer of wine and wine-merchant could not be prosecuted for failing to provide correct custom classification at the border. In 2004, the importer committed such offence on seven occasions. The Official Journal of the European Union did not yet contain the necessary legislation in the Czech language and thus an individual is not obliged to that legislation even if that individual would obtain information through other means. Numerous cases also steam from poorly translated legislation (Bobek, 2008). While a failure to transpose a directive or language barriers does not directly adverse preliminary ruling procedure, it is worth noting that such issues may confuse the national court, which may consequently refer an irrelevant question to the ECJ.

The lack or abundance of the references for preliminary rulings may be a result of the legal culture of each Member State. In that sense, it is important to recognise the Dutch culture. Eight out of the first ten preliminary rulings were originating from the Netherlands. The Netherlands is known for its legal internationalism, problem-solving, which was most evident in the van Gend & Loos case that introduced the direct effect to the EU law, something that was already established in the Dutch law. One also needs to recognise

Germany, a country with 2641 completed judgements of preliminary rulings (Court of Justice of the European Union, 2020a). Germany is for example notorious for guaranteeing basic democratic values, well established rights-based legal culture. The landmark case of Cassis is just one of the examples of the effect of German legal culture. On the other hand, a former member of the Union, UK, was considered more conservative and "burdened with the constitutional armour" (Craig & de Búrca, 2011). Appendix 6 shows the average preliminary ruling procedures by a Member State per year. Even though Germany refers the largest amount of cases on yearly basis, factors such as (but not limited to) the total population, gross domestic product, size largely influence the desire to impact the EU law. Since most references are made at the discretion of the judge that is highly affected by the legal culture of a Member State, one may question the legitimacy of the preliminary rulings as the protector of uniformity and the link between the EU law and national law.

3.4 European Court of Justice and the lack of Jurisdiction or Misinterpretation of the Case

In some cases, the ECJ has no jurisdiction to answer the question. While in some cases, the reasoning is clearly justified (e.g. ECJ case 291/96 Criminal proceedings against Grado and Bashir [1997], where refusing to use the title "Herr" (or in English translation "Mister") was the reason for the preliminary ruling), this is not always the case. Numerous preliminary rulings from newly accessed Member States of 2004 were refused as the questions were outside the framework of Community law and no connection to the Treaty's provisions was detected. (Bobek, 2008).

In ECJ case 328/04 Vajnai [2005], a vice-president of the Hungarian Workers' Party was prosecuted in 2003 (a year before Hungary joined the EU) on the grounds that he was wearing the red five-point star. While totalitarian symbols were forbidden under Hungarian law, the prohibition was not in force in (e.g.) the Italian Republic and thus it may contradict freedom of expression and it may be seen as the discriminatory measure. The court thus ordered that it had no jurisdiction to answer the question. The similar order was given in ECJ case 302/06 Koval'ský [2007], where an owner of the private land could not be compensated for the electrical installations place on the private land. It was once more ruled that it was outside the Court's jurisdiction to answer the question of the ruling, despite the possible contradiction to the right to property.

One of the first actual judgements of cases from newly accessed Member States happened in 2006 in ECJ case 302/04 Ynos [2006]. A contract in the area of real estate was formed in 2002. Unfair consumer practices were detected when the contract was seemingly concluded, which happened after the Hungarian accession to the Union. The preliminary ruling was requested on such grounds. ECJ gave the judgement, yet it still refused the jurisdiction on cases with factual background prior to accession, despite the possible effect of the cases in the present day.

Until the end of 2008, there were only 53 requests for the preliminary ruling from the Member States that joined after 2004. Republic of Slovenia and Republic of Malta requested their first preliminary ruling in 2009, 5 years after accession to the European Union. Appendix 5 shows the total amount of references for the preliminary ruling by a Member State and the year of the first reference. Even though the 4-year gap between the landmark year of 1957 and the first preliminary ruling (the Netherlands in 1961) is included, a Member State needs on average 3 years to refer their first question to the preliminary ruling (Court of Justice of the European Union, 2020a). This may indicate three things. New Member States do not practice EU law at all, new Member States have already mastered EU law or the new Member States are discouraged from requesting a preliminary ruling (Bobek, 2008).

It may occur that the answer to the question referred was almost impossible to be interpreted by the national court. It may happen that the ECJ failed to deal with the arguments that were opposing the position of the judgement. In some cases, the second reference was required. It was argued that the ECJ misunderstood the applicable national provisions or that provided interpretation was not sufficient for the outcome. Most of these misunderstood judgements are however extremely rare, yet it is something that should be avoided at all costs (Craig & de Búrca, 2011).

Only a national court or tribunal that is a part of the national judicial system may refer a question and practice Union law. This was evident in ECJ case 248/16 Achmea [2018], where a so-called Bilateral Investment Treaty (hereafter BIT) was established by the Netherlands and Czechoslovakia (and thus Slovakia after the so-called "velvet divorce"). According to the BIT, a dispute needs to be settled on the arbitration court. Slovakia, now a Member State, tried to appeal a judgement of the arbitration court in Frankfurt am Main. Slovakia argued that the arbitration is not compatible with the law of the EU (especially with Articles 267 and 344 TFEU). The arbitration court is however not a part of the judicial system of a Member State and therefore cannot request a preliminary ruling. However, since BIT had an adverse effect on the autonomy of the EU law, it was understood as incompatible with the Treaties of the EU. Under different circumstances, preliminary questions cannot be requested by courts that are not in the judicial system of a Member State.

3.5 Overcapacity of the European Court of Justice as a result of the Current Stasis

As argued in the Bulmer v Bollinger, the preliminary ruling procedure can be a time-wasting procedure. The referring court needs to submit its question and lawyers need to prepare their briefs. The case needs to be considered admissible to refer and thoroughly studied by the advocates general. The case needs to be discussed in court with the possibility of oral hearings and written observations and the court needs to make a judgement upon opinions, facts and the provisions of the EU law.

In case of urgency, Urgent preliminary procedures are an option. Judgement with minimum delay is however reserved for severe cases. The urgency of cases needs to be approved by the President of the CJEU. Only 41 requests for urgent procedure out of 78 were granted from 2015 until 2019 (Court of Justice of the European Union, 2020a). This procedure is in force from 2008 onwards, is considered much faster and can be done in electronic form. It is mainly connected to ruling on the area of freedom, security and justice (European Commission, 2008).

The economic perspective of each party of the procedure must be understood. The litigant wants to challenge national provisions by referring to the EU law. The main initiative is to gain (economic) benefit as a result of the EU provision that may grant him benefit. National court uses the option of preliminary ruling to influence the policy-making of the EU and make judgements, which are much harder to appeal. ECJ enforces its orientation of uniformity of law and integration on the Union level, which is otherwise not always favoured by the Member States. This consequently affected "the market of preliminary ruling procedures" and it is clear that the supply cannot keep up with the demand (Tridimas & Tridimas, 2004).

An extensive duration of a preliminary ruling, especially the ones that are not urgent, may discourage a preliminary ruling in the first place. In 2019, the average duration of a preliminary ruling procedure was 15,5 months, whereas an average duration of an urgent preliminary procedure was 3,1 months (Court of Justice of the European Union, 2020a). In the example of free movement of goods, the revenue lost due to the duration of the preliminary ruling and the ruling before the national court may deter the trader to continue the operations abroad. The preliminary ruling may thus hinder the free movement of goods, while it is ironically one of the mechanisms of the EU to combat such hindrance.

On the other hand, ECJ completed 601 preliminary rulings procedures in 2019. If we include public holidays and other work-free days, the ECJ resolves more than a case and a half in a day. We must consider that there were 28 judges in the ECJ last year that were divided either in the chamber of three, five, grand chamber of fifteen or full court. We can conclude that the productivity of the ECJ is rather astonishing (in total, 865 cases were completed), but also recognise that the burden of the Court is disturbing (Court of Justice of the European Union, 2020a).

Numerous optimizations happened in the past 20 years, when analysing the workload. As seen from Appendix 7, the duration of a preliminary ruling procedure has severely decreased (25,5 months on average in 2003 compared to 15,5 months on average in the year 2019). This can however be attributed to the addition of 13 new judges, due to enlargements of 2004, 2007 and 2013. One must however be disturbed by the growth of preliminary ruling procedures in both absolute and relative terms as seen from Appendix 8. In 1999, 192 preliminary rulings were completed, which represented 49% of all completed cases. In 2004, a year of the largest enlargement up to date, only 40% of completed cases were preliminary

rulings (264 in absolute terms). In 2019 however, 601 preliminary ruling judgements were delivered (69% of total judgements). One could argue that this is due to the recent enlargements, which is however not the case. In 2019, 641 new preliminary rulings were requested. Member States that joined the EU before 2004 submitted 455 requests. Thus only 186 requests were made by new Member States (29% of the total), which makes the enlargement of EU a rather irrelevant factor to the increase of cases. If we consider that the number of other procedures has not increased proportionally to the preliminary ruling procedure (264 other completed cases in 2019 compared to 203 other completed cases in 1999), it is clear that optimization of preliminary rulings is needed (Court of Justice of the European Union, 2020a). Appendix 9 further illustrates the rise of new preliminary ruling procedures in each year from 1961 onwards. Even with the increase of the Member States from 6 to 27, it is clear that the increase in workload of the ECJ is not even remotely proportionate to the increase of the workforce.

4 TOWARDS AN OPTIMAL SYSTEM OF THE PRELIMINARY RULING PROCEDURE OF THE EUROPEAN COURT OF JUSTICE

One could argue that Union law is a product of the European legal culture, the materialisation of the Union ideals. In analogy, European law is a child of the European Union. It can be argued that the child is a "tabula rasa", a blank paper that will be filled with the ideals of the parents and the consequences of the environment. After WWII, unity and cooperation was the ideal of the Union. This ideal was materialised with the Treaties. As stated in Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights …". The environment, in which the "child was born", is however conflicted. WWII and the Cold War left deep wounds in the Member States and thus bringing the departed European family to one Union was an important challenge for the future of the continent. Union law had to be suitable and necessary for all parties. The CJEU and especially ECJ had to be one of the parental figures. It was obvious that in theory, the Union law will be enforced by the Member States. It is however clear that it should be enforced properly. Every situation may have different circumstances and require a different ruling. It is up to the ECJ to interpret the Union law and help the Union law to be properly adapted to each Member State.

4.1 The current State of Affairs as the test of the European Union

Distrust of ECJ towards national courts was already discussed. One must however understand that the feeling is mutual to some extent. Tensions are present especially in relations between citizens and the EU. Citizens simply are not prepared to confer too many rights to the EU, which was seen in 2004, when there was a discussion about the Constitution of the EU. The Constitution, which is beyond the scope of this thesis, was ratified by 10

Member States. It was a complete shock when the Netherlands (and France) voted against the ratification of the Constitution on a referendum. Even though Dutch people are known for their pro-European stance, they refused to go beyond the current conferral (The Guardian, 2005). This has led to the institutional crisis of the EU, which seemingly ended with the Treaty of Lisbon.

In 2004, the trust in institutions of the EU was shaken, which can also be seen from one of the questions of the Eurobarometer survey, provided in Appendix 10, where citizens were asked whether decisions in the following areas should be made solely by the Member States or jointly with the EU. Citizens strongly support the joint fight against terrorism (86%), combat against human trafficking (81%), fight against organised crime (76%) or joint fight against drugs (73%). On the other hand, some areas such as police (30%), urban crime prevention (32%) or education (33%) should not be dealt on the EU level according to asked citizens. Only 33% of asked citizens believed that justice, the area that has a significant application to this thesis, should be dealt jointly with the EU (European Commission, 2005). It must be recognised that in a similar survey, conducted in 2019, 54% of Europeans believed that more action should be taken on the EU level, as seen from Appendix 11 (European Commission, 2019b).

It is however clear that Euroscepticism is becoming an issue that cannot be ignored. This was with no doubt seen with the departure of the United Kingdom from the EU. There were numerous arguments for the so-called Brexit, such as immigration policies, bureaucracy, budget contribution. Moreover, the European Union was compared to the Third Reich, since its main goal is to unify Europe (About-Britain.com, n.d.). Even if this absurd comparison is taken with the grain of salt, one must realise that there is a certain trade-off between total conferral of competences to the EU on one hand and the principle of a sovereign nation on another. Euroscepticism is a popular topic, especially in the light of the United Kingdom that left the EU on 1.2.2020. Even after the Brexit referendum, 30% of asked Europeans believed that the future would be better outside the European Union, as seen from Appendix 12 (European Commission, 2017).

The European Union is facing one of the worst crises in modern times. The topics of the European institutions are, (but not limited to) COVID-19, financial recovery, asylum policy, Euroscepticism, combatting climate change, EU-China and EU-USA relations (on the emphasis of the development of 5G), enlargement of EU. This is one of the greatest tests of the EU and the potential judicial failure may have grave consequences.

It is obvious that the current situation of the preliminary ruling procedure is far from optimal. Despite the essence of cooperation between the courts, it is clear that neither wants that. On one hand, ECJ wants to coordinate and enforce uniformity and integration of the EU. On another hand, national courts want to be autonomous and have an impact in Union decision-making. There are too many obstacles when an interpretation is needed. Additionally, the ECJ is overburdened, which is just a result of a system that needs some minor and major

reforms. Numerous solutions were suggested when trying to reform the preliminary ruling procedure. This thesis will focus on the possible delegation of the preliminary ruling procedure to the national courts. Afterwards, some other solutions, which are widely discussed among scholars, will be mentioned.

4.2 Delegation of the preliminary ruling procedure from the European Court of Justice to national court or tribunals

The sole purpose of the preliminary ruling procedure is to ensure that the national courts can properly enforce the Union law. While the outcome of each case is decided by the national court, a decision needs to be done in the light of the ECJ and its interpretation. It is however clear that the current mechanism needs to mature. One may anticipate that the next step of the Union law is the step, where Member States are fluent in the Union law and can use the Union provisions properly without the intervention of the ECJ. Ideally, the national courts and tribunals would make interpretations of the EU law that would align with the interpretation of the ECJ.

4.2.1 Adjustments of the Member States

There are however many obstacles that prevent the ECJ to allow delegation of interpretation to the national courts. Some of these obstacles rise from the national judicial systems and the Member States themselves. It is worth noting that some of these issues manifestly dissuade the ECJ from conferring its competence. The solution to some of these issues would ease the process of delegation, but the presence of such issues nonetheless does not affect the current position of the ECJ. Moreover, the proposed solutions to each issue may not be optimal or may not be compatible with the current judicial system. Solutions are presented in order to begin the movement towards the optimal system.

4.2.1.1 Commitment to the Rule of Law

In recent years, the national governments are resistant to Union law. The most infamous example is the judicial reform of Poland in 2017. With the national provision, the Disciplinary Chamber was formed within the Polish Supreme Court among other controversial decisions. In the light of fighting corrupt judges still affiliated with the former communist regime, the newly formed chamber may launch a disciplinary proceeding against such judges. Judges that are thought to be under the political influence would no longer be authorised to make rulings. The reformed system could quickly escalate to the dismissal of the judges that implement EU law, which is not suitable to the Polish government. European institutions stated their concerns in regards to rule of law in Poland, national courts of other Member States were hesitant about the future cooperation with Polish courts due to uncertainty about the independence and impartiality of Polish institutions. As a result,

numerous protests took place and an infringement procedure was launched (Court of Justice of the European Union, 2020b).

Even though Member States are obliged to respect Article 2 TEU, which found the EU on the principle of rule of law (among others), this rule of law cannot be granted in every Member State. Every year, the World Justice Project, one of the leading global organisations for the promotion of rule of law, releases a so-called Rule of Law Index. The index, composed of eight main factors, has revealed some alarming results. Hungary was the 60th country on the global list. While some Member States (Cyprus, Ireland, Latvia, Lithuania, Luxembourg, Malta and Slovakia), were excluded from 128 countries in the research, Hungary was the worst-ranked country in the EU, EFTA & North America region as seen from Appendix 13 (World Justice Project, 2020). Not only do Hungary and Bulgaria rank relatively low compared to the developed countries, but the overall ranking of six EU countries also deteriorated compared to the previous year.

It is of great importance to enforce the rule of law. It is hard to imagine delegating the interpretation of Union law if the national judicial system lacks independence. Enforcing the rule of reason was seen in the budget discussion of the European Union in 2020. The €750 billion, intended for Member State as a COVID-19 pandemic recovery package, was proposed to be conditioned with the obligation to respect the rule of law (Agence France-Presse, 2020). The proposition was strongly opposed by the governments of Hungary, Poland, Slovenia and the Czech Republic. The allocated recovery package was received without stricter commitments to the rule of law (Banks, 2020).

4.2.1.2 Structural Reform of the National Judicial System

Awareness and knowledge about the law of the European Union are additional obstacles to the delegation. The lower courts may lack knowledge about the Union law or lack resources to explore the Union law that has an impact on the current case (Glavina, 2019). This is especially evident in newly accessed countries that are not yet accompanied by the knowledge of the Treaties. One of the possible solutions is to modify the enlargement policy of the EU, especially the so-called "Acquis Communautaire". The 35 chapters, which were introduced with the Copenhagen criteria, need to be fulfilled by a candidate country to join the EU (European Commission, 2019a). Acquis could be modified in the sense that the Member State must have the foundation for interpreting and enforcing Union law. While it is irrational to demand the national judges of potential Member States to be fluent in the law of the EU (as they may not even join the EU for other reasons), it should be possible to enforce that the candidate country has the resources and infrastructure necessary for future fluency. The candidate country would for example need to ensure that the educational institutions would provide appropriate courses of EU law. All obstacles in the judicial branch should be removed and the resources of the courts should be sufficient. Moreover, the European Union should ensure that all the necessary acts are properly translated as soon as

the candidate country joins the EU. The commitment to the proper foundation is the basis of the smooth implementation of EU law and may lead to optimization in the case of potential delegation.

The questionable structure of the national court was already discussed. As seen from the study that is focusing on Croatian and Slovene national courts, numerical and time standards are present. With the larger deviation from suggested standards, a judge may face a sanction or even a dismissal (Glavina, 2019). It is completely clear that the duration of the case should be definite. It is useful to compare the actual duration of all annual procedures to time standards. This way, the court may pinpoint their weaknesses and move towards optimised procedures. This could however be an issue when given the authority to interpret Union law. The judge would have to properly interpret the Union law and acknowledge the impact of the judgement on the uniformity of the EU law. The extended duration of the procedure would however result in a larger deviation from suggested standards. Potential sanctions could thus prevent proper judgement.

The modification in this area should be considered. It must be realised that abolishing such standards could result in lower productivity of the court. One may thus modify the standards in the sense that there is a division of policy areas according to the competences of the EU. Time standards, which are usually set by comparing the duration of previous judgements, would remain unchanged in the policy areas, where the EU has supporting competences. The impact of these judgements on the EU law is minimum. If the EU has exclusive or shared competences in the pending case, the standards should be either ignored or adjusted to the level comparable to the other Member States. Another option is that as soon as the judge determines that an interpretation of the EU legislation is needed, a request for this case to be excluded from time standards could be made. The transfer of preliminary rulings would be much easier if the standards are modified and adjusted to the new workload.

4.2.1.3 Cooperation: from CILFIT criteria and beyond

There should be a larger inclusion of the CILFIT criteria. It is obvious that the meaning of some Union provisions may be lost in the translation. The comparison to the legislation of a few other languages is usually done. It rarely happens that all languages are considered (Courts of the European Union, 2019). The cooperation between national courts of a Member States may thus be significant. When the interpretation is needed, the national court would consult national courts of other Member States. As soon as all versions offer no explanation "so obvious as to leave no scope for any reasonable doubt", the request for interpretation may be considered.

According to the CILFIT criteria, the national court may refuse to refer if the ECJ has already given an interpretation on a similar case. There is however an abundance of case law. The total number of preliminary ruling procedures until 2019 was 11358 (Court of Justice of the European Union, 2020a). Most judgements of the CJEU are available in all official

languages of the EU. It is however up to the national judge to select and examine the existing cases and interpret whether the judgement is applicable to the case in hand. In the area of free movement of goods, there are numerous judgements, which need to be taken into account. There is a severe lack of guidelines, even though there are mechanisms that could determine if the national provision is hindering trade. A simplified mechanism is that the provision that hinders imports or exports may be justified based on the protection of specified interests. If the provision passes the so-called "proportionality test", it is compatible with the Union law. This mechanism is more complicated, yet it was confirmed in a preliminary ruling several times. Since the supplementary law developed to that extend, there might be a need to codify it. Codification would provide clear guidance and as soon as the guidelines cannot determine the result of the current issue, the preliminary ruling may be considered. The national court may be given a larger margin of discretion when deciding on the applicability of the guidelines.

Additionally, another measure can be considered. When the judgement was made in the absence of the preliminary ruling and in the absence of the defined guidelines in the codified case law, the national court is obliged to inform the ECJ. The ECJ examines the judgement from the perspective of uniformity of the Union law. If it is declared that the judgement does not hinder the aim of the legislative act pursued, the judgement is codified and added to the guidelines. It is however worth noticing that the process of the codification of the case law could be time-consuming. The resources used may be beyond the aim pursued.

4.2.2 Adjustment of the European Court of Justice

In many cases, the Member State is at fault. There are however still some principles of the EU that affect the possible delegation of interpretation.

4.2.2.1 Moving away from the total uniformity of EU law

Article 20 of the Charter of Fundamental Rights declares that everyone should be equal before the law. It is thus expected that the Treaties and secondary legislation should have a uniform application. It can be argued that only the perfectly uniformed Union law will lead to the EU based on non-discriminatory principles. In the case of free movement of goods, the functionality of the internal market is largely influenced by the uniformity of the Union provisions (Komárek, 2007).

On the contrary, uniformity may be impractical in this area. The sole existence of Article 36 TFEU and Cassis formula that enables the protection of justified restrictive measures makes uniformity almost impossible. This can be evident from the Highway Code, where the prohibition to use trailers for motorcycles on the Italian highways was not contrary to EU law. This prohibition was justified, did in fact pass the proportionality test and was thus not considered a MEQR. One can say that from the legal perspective the compatibility of the

code had no effect on the uniformity of law. From the factual point of view, motorists may no longer use trailers on Italian highways. Having a perfect uniformity may be catastrophic for some Member States. If the ECJ announced the provision in the Highway Code as a MEQR, the Italian government would have to ensure the better quality of highways. In the financial crisis of 2008, this could even further harm the economy of the Italian Republic.

It is clear that the uniformity has numerous advantages. There would be no free movement of goods in practice without abolishment of custom duties. If the trader would have to pay for an inspections of goods in country of origin, all countries where goods are in transit and once more in the country of the destination, there would be no incentive to export at all. Yet even with the uniformity and Article 36 TFEU, there is a chance that the product cannot be sold in one Member State and is at the same time available in all other Member States

There should be a "division" of EU legislation. On one hand, there should be policy areas, where uniformity would result in a large benefit on the European Union and the Member States as a whole. Preliminary rulings in this area should be the focus of the ECJ. On another hand, in policy areas, where the benefit of uniformity is not that evident, the importance of uniformity should not be beyond the duration of the procedure and judicial efficiency. The delegation in this area should be recommended.

4.2.2.2 Involvement of the EU policy-making

The division of the policy areas by the need of uniformity could also be reflected in the policy-making. While the complexity of the ordinary legislative procedure is beyond the scope of this thesis, a simplified infographic can be found in Appendix 14. The most common tools of the legislative branch of the EU are regulations and directives. While describing both mechanisms is beyond the scope of the thesis, the main difference between both mechanisms is transposition. When regulation becomes binding on the level of EU, it becomes binding to all Member States and citizens. The directive needs to be transposed to the national legislation in the specified period. Institutions of the EU also specify the level of harmonisation of a directive. In the case of minimum harmonisation, Member States may set higher standards than recommended by the EU. When there is maximum harmonisation, Member States are limited by the set standards. It is thus up to the Member States to decide how the goal of the directive will be pursued (EUR-Lex, 2018a). It is easier to justify a protective measure of a restriction in case of the minimum harmonisation. It can thus be argued that the issue with the directives of minimum harmonisation should be addressed to the ECJ only if the goal pursued is not achieved or if the disparity caused has a severely adverse impact on the functionality of the EU.

The legislators may influence the optimization in a different way. When the European Commission launches the proposal for new legislation, it usually holds public consultations. Each stakeholder may submit its observations and concerns about the new legislation and may even point out articles of the proposed legislation, which may be controversial

(European Parliament, n.d.). European Commission may address such hypothetical issues. With more awareness about the public consultations, the legislative bodies may properly address all concerns. Legislators should be challenged with controversial questions that have a high likelihood of occurrence in the future and will thus impact the workload of the ECJ. ECJ should refuse a reference for the preliminary ruling if it involves manufactured, hypothetical or moot question. If the legislation is properly formulated the amount of hypothetical will be less frequent and even the actual issues that request interpretation may be reduced.

4.2.2.3 Transformation of the role of the Advocate General

The abolishment of the opinion delivered by the advocate general is common suggestion when trying to optimize the procedure. It may be argued that since their opinion is not binding to the judges of the ECJ, it only extends the duration of the procedure. One must however consider the trade-off of the issue. In most cases, the opinion introduces another legal aspect, which could be impacted by the decision. It presents the issue from numerous aspects and gives the ECJ the necessary suggestions. Completely abolishing the opinion would likely result in a longer length of the procedure since the legal aspects would have to be explored by judges of the proceeding. Moreover, some aspects of the law may be accidentally overlooked, which would harm EU law as a whole.

Providing the part of the preliminary rulings are delegated to the national courts, the metamorphosis of the AG could be of great significance. If the national court deems that the interpretation of the Union legislation is beyond their power, they could refer the question to the advocate general. AG could provide quick observation and opinion, offer a different legal perspective and suggest the outcome of the national ruling. It could also suggest the national court to consider requesting the preliminary ruling to the ECJ. The opinion of the AG could then be used for the preliminary ruling in ECJ. Moreover, the exclusive privilege of delivering opinions of advocate generals could be extended to experts of a certain policy area (Craig & de Búrca, 2011).

4.3 Other Suggestions towards an Optimal System

Numerous suggestions that were introduced in this thesis may require a complete reformation of the judicial systems and hierarchy of the European Union. Even though the ECJ has too much workload, delegating a part of the preliminary ruling procedures would result in smaller authority over national courts and smaller chances of enforcing an integrative and uniform legal system. The disguised coordination is however something that is not enjoyed by the national courts. While the delegation may not be the optimal solution, it is an option that should be considered. There are however numerous other options discussed by scholars. The easiest one could be to increase the number of judges in the ECJ. While this may resolve the excess workload, it will not solve other mentioned issues.

One of the possible optimization methods was given in the Treaties itself. Article 256(III) TFEU confers the General Court jurisdiction to hear preliminary rulings in specific areas laid down by the Statute. This option is yet to be exercised, mainly due to the obvious reason. Even though the General Court is composed of two judges from each Member State, the overburden of the court is significant. In 2019, 874 cases were completed and there were 939 new cases. At the end of the year, 1398 cases needed judgement. The average duration of the proceeding was 19,7 months. It is clear that the solution provided by the treaties is not feasible, at least not in the present situation (Court of Justice of the European Union, 2020a).

Another suggestion is prioritizing the references received by its importance on the Union law. Before bringing the issue to the court, it may be determined if the case is of great importance to the judicial system or uniformity (Craig & de Búrca, 2011). Cases of significant importance may be decided, while cases with smaller magnitude may be given to smaller chambers or even refused. In theory, this suggestion is great. In practice, however, it is likely that prioritizing would be influenced by the conflict of interests. Due to the subjectivity of the prioritizing, such filtration would be imperfect and would hinder the parties affected by cases of lesser importance.

There are many suggestions that would move the current procedure towards an optimal system. It is however clear that all involved parties will have to change the attitude towards the procedure. A change will be needed in order to move towards the so-called Pareto efficiency point, the conceptual optimal point, where all parties will be better off.

CONCLUSION

European Union, the uniting force on the old continent, has its own legislation, the primary and secondary law. Considering the EU law and national law have to coexist, the question of compatibility is presented to the national court on numerous occasions. Without the proper understanding of the certain EU provision, the national court or tribunal may have to request a preliminary ruling to the ECJ, one of the judicial bodies of the EU, in order to receive an interpretation. The judgements in the preliminary ruling procedure had the largest impact on the development of the case law, which is a part of the supplementary law of the EU. The importance of the preliminary rulings is evident in the area of free movement of goods. Through this procedure, one of the fundamental freedoms of the EU gained a materialised idea of the measures equivalent to quantitative restrictions, one of the most used mechanisms to hinder the free movement of goods. Preliminary rulings also provided wider reasoning for the justification of protective measures of their national interests.

It is however clear that the preliminary rulings, the greatest example of cooperation between ECJ and national courts, are in need of optimization. The idea of cooperation is slowly being replaced by the idea of coordination. The idea of a total uniformity of EU law has created numerous issues, especially for the newly accessed Member States. The fear of an error and

thus exclusivity of interpretation had a severe effect on the national courts. Even when they have enough resources to refer a question, they may refuse, due to the overburden of the court and the belief that their judgement is will suffice the case. Despite the tensions, the amount of workload is higher than ever. It is clear that optimization is needed. Especially in the current global crisis, the motto: "United we stand, divided we fall" is of great importance. The judicial failure would be just one more failure of the EU. The "Brexit" may serve the Union as the warning that failures should be reduced as much as possible. There are however many obstacles present. While numerous suggestions are on the floor, such as transfer of cases to the General Court of the European Union or prioritization of the preliminary rulings, this thesis argues about the delegation of the preliminary rulings to the national courts.

There are numerous obstacles. The rule of law of some Member States needs to be improved. There should be some serious structural modifications of the national judicial systems. There should be more emphasis on existent mechanisms. The ECJ could provide clear guidelines when the interpretation of EU provisions is in question. Moreover, the ECJ should reconsider its desire for total uniformity of EU law, especially when the prioritization of it results in a slower and less efficient judicial system.

While there are numerous arguments and obstacles against the proposition, it can be argued that the delegation could remove the burden of the court and unite the Member States. In analogy, the overprotective father, named ECJ, should allow its most precious child, which is named EU law, to enjoy the beauty of the complicated judicial systems of the Member States. Mistakes will happen, EU law and the benefits for the Member States may get hurt, but even if things go wrong, the EU law can still return to his father, which will observe the child in any case. Even without the analogy, it is clear that optimization is needed. The EU needs to be united more than ever and the tolerance of the Member States to absorb the structural faults of the system should not be taken for granted.

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APPENDICES

Appendix 1: Povzetek (Summary in Slovene language)

Predhodna vprašanja so glavno orodje pri razlagi Evropskega prava in najlažji način ohranitve enotnosti prava EU. Četudi ta zaključna naloga poda določene rešitve, je glavni namen ozaveščanje o problematiki predhodnih vprašanj.

Mehanizem predhodnih vprašanj je definiran v 267. členu Pogodbe o Delovanju Evropske Unije (PDEU). Predhodna vprašanja lahko postavijo le sodišča, ki sodijo v sodni red članic, ko so mnenja, da ima razlaga evropskega določbe izjemen pomen na končno sodbo primera. Evropsko sodišče lahko vprašanje zavrne, če oceni, da vprašanje ni povezano s trenutnim primerom oziroma je hipotetične narave. Slabo strukturirana oziroma nerazumljiva vprašanja so lahko zavrnjena. Državno sodišče ima pravico, da ne postavi vprašanja, v kolikor že obstaja predhodno vprašanje s podobnimi dejstvi oziroma v kolikor je interpretacija več kot očitna. Državno sodišče mora med drugim navesti, katera državna zakonodaja je vprašljiva ter razlaga katerega Evropskega akta je potrebna. V kolikor je potrebno urgentno predhodno vprašanje, more to biti jasno razvidno iz zahteve.

V skladu z načelom prenosa pristojnosti ima EU pristojnost le pri področjih, ki so specificirana v pogodbah. V skladu s primarnostjo Evropskega prava mora biti državna zakonodaja skladna z Evropskimi pravnimi akti. Načelo neposrednega učinka pa omogoča, da se državljani držav članic lahko neposredno sklicujejo na večino pravnih aktov EU v kolikor so pravice, ki so jim bile dodeljene s temi akti, kršene. Predhodna vprašanja so tako v veliki večini rezultat državnih aktov, ki niso skladne z zakoni EU in hkrati kratijo pravice in svoboščine, ki so bile pravnim in fizičnim osebam dodeljene.

Odločitve predhodnih vprašanj so sestavni del sodne prakse EU. Razvoj sodne prakse EU je v veliki meri vplival na svobodni pretok blaga. Ena izmed štirih temeljnih svoboščin EU je definirana v PDEU, veliko določil pa izhaja ravno iz sodne prakse. Ta je vplivala predvsem na 34. člen PDEU, ki prepoveduje količinske omejitve in ukrepe, enakovredne količinskim omejitvam pri uvozu. Ravno ti ukrepi so bili na podlagi predhodnih vprašanj podrobno opredeljeni in ločeni od ukrepov, ki le varujejo državne interese, specificirane v 36. členu PDEU. Prav tako so predhodna vprašanja opredelila podobne ukrepe, ki se nanašajo na izvoz.

Četudi se tudi predhodna vprašanja skozi čas razvijajo, pa je vprašljivo, če je trenuten proces najbolj primeren za EU. Predhodna vprašanja so odličen primer dialoga in sodelovanja med EU in članicami. Pomembnost sodelovanja je očitna, saj Evropsko sodišče ne more razložiti Evropskega prava in skrbeti za enotnost le tega, če državno sodišče ne zahteva predhodnega vprašanja. Obenem pa Evropsko sodišče zagotovi, da lahko državna sodišča s pravilno razlago zakonodaje omočijo kompatibilnost državnih pravnih aktov in s tem izogib postopku ugotavljanja kršitev držav članic. Vseeno pa je vedno večji občutek, da se simbiotski vodoravni odnos med sodišči spreminja v navpični odnos. Glavni razlog za to je, da se želi Evropsko sodišče izogniti možnosti napake državnega sodišča oziroma možnosti, da se

Evropski pravni akti sploh ne upoštevajo. Želja po t.i. »vrhovnemu nadzoru« je vidna tudi pri vprašanjih, ki v teoriji niso zadostne za začetek postopka, a jih Evropsko sodišče vseeno sprejme. Obstaja pa tudi majhna verjetnost, da inovativnost Evropskega sodišča pri odločitvi presega dano pristojnost oziroma je celo v nasprotju z pravom EU. Odgovornost sodišča pa je lahko vprašljiva, saj je to najvišje sodišče pravnega sistema EU in pritožba na odločitve v teoriji ni mogoča.

Državna sodišča se lahko izognejo predhodnemu vprašanju na podlagi mnenja, da razlaga nima neposrednega vpliva na končno odločitev. Četudi lahko v primeru nejasnosti Evropske zakonodaje razlago najdejo v prevodu akta v drugemu Evropskemu jeziku, se interpretacija aktov v drugih jezikih redko zgodi. Včasih pa si državni sodniki pridržijo pravico do lastne interpretacije na podlagi preobremenjenosti Evropskega sodišča. Domnevno nepomembna razlaga bi lahko tako dodatno obremenila Evropsko sodišče kot tudi podaljšala primer na državnemu sodišču. Ravno to je dodaten problem za državne sodnike, saj so nekateri obremenjeni s časovnimi standardi in priporočili, ki narekujejo priporočen čas primera oziroma priporočeno število primerov na leto. Prav tako je predvsem na sodiščih nižje stopnje manj verjetno, da bo sodnik vešč v Evropskemu pravu oziroma da bo imel zadostne pogoje za preučitev in oddajo predhodnega vprašanja po zahtevanih standardih.

Velik vpliv ima tudi pravna kultura posamezne države. Nemčija je primer države, ki se pogosto nanaša na Evropsko pravo (2641 predhodnih vprašanj do leta 2019), medtem ko je na primer Združeno Kraljestvo precej bolj zadržano (665 predhodnih vprašanj do leta 2019) in je Evropsko Unijo v letu 2020 tudi zapustilo. Specifičen primer pa so države, ki so nove članice EU. Evropsko sodišče lahko zavrne vprašanja, kjer se je jedro spora zgodilo pred priključitvijo v EU. Prav tako je lahko v prvih letih po priključitvi problem slabo prevedena Evropska zakonodaja oziroma možnost, da zakonodaja v uradnemu jeziku še ne obstaja. Potrebno je poudariti, da državna sodišča nimajo dodatnih stroškov s tem, da postavijo predhodno vprašanje. V teoriji lahko tako državno sodišče naslovi neomejeno število referenc.

Vse omenjeni vodi v preobremenjenost Evropskega sodišča, kar je še posebej razvidno v zadnjih letih. Preobremenjenost se najlažje vidi v statistični primerjavi med letoma 1999 in 2019. Leta 1999 je bilo odgovorjenih 192 predhodnih vprašanj, kar je 49% vseh končanih primerov v temu letu. V letu 2019 je sodišče razložilo 601 predhodnih vprašanj, kar predstavlja 69% vseh primerov. Resda moramo upoštevati dejstvo, da je Evropska Unija v temu času doživela priključitev trinajstih novih držav, a te države so odgovorne le za 29% vseh novih primerov v letu 2019. Povprečna dolžina predhodnih vprašanj se je sicer precej skrajšala. V letu 2003 je povprečen primer trajal 25,5 mesecev medtem ko so v letu 2019 za odgovor potrebovali v povprečju 15,5 mesecev. Glavne zasluge za to ima verjetno dejstvo, da je Evropsko sodišče imenovalo 13 novih sodnikov novo priključenih držav članic.

Prihodnost Evropske Unije je že nekaj let vprašljiva. Leta 2004 je zavrnitev Evropske Ustave povzročila institucionalno krizo EU. Kriza je prisotna še danes, četudi je Lizbonska pogodba

(veljavna od 2009) situacijo nekoliko oblažila. Vseeno pa so problemi kot sta birokratski model EU in medel ter neenoten odziv na imigrantsko krizo povzročili rast t.t. evroskepticizma. Največji primer tega je t.i. Brexit, izhod Združenega Kraljestva iz EU. V letu 2020 vladajo po svetu izredne razmere zaradi pandemije COVID-19, EU pa se je znašla v središču tehnološke bitke za razvoj t.i. 5G med ZDA in Kitajsko. Ravno Brexit je dokazal, da mora biti EU precej bolj odločna in učinkovita na mnogih področjih.

Izboljšanje predhodnih vprašanj je ključnega pomena za boljši pravni sistem. Načinov za izboljšavo je veliko. Upoštevati pa je potrebno dejstvo, da možne predlogi morda niso najboljši za vse oziroma znajo problem predhodnih vprašanj rešiti le za kratek čas oziroma navidezno. Ena izmed možnih rešitev je imenovanje dveh sodnikov iz vsake države namesto enega, kot je to trenutno v navadi. Možnost je ponujena tudi v PDEU, saj lahko del primerov prevzame Splošno sodišče. Četudi ima Splošno sodišče dva sodnika iz vsake države, je večje tudi število primerov pred sodiščem (874 opravljenih in 939 novih primerov v letu 2019 ter 1398 čakajočih primerov ob koncu tega leta), kot tudi povprečna dolžina primera (19,7 mesecev). Naslednja rešitev je izbiranje primerov na podlagi pomembnosti. Evropsko sodišče bi se tako ukvarjalo le s pomembnimi primeri za prihodnost EU. To pa bi lahko vodilo v površno razlago subjektivno nepomembnih primerov in s tem škodo tistih, udeleženih v primer.

Možna rešitev, ki je poudarjena v zaključnemu delu pa je prenos nekaterih predhodnih vprašanj na državna sodišča oziroma večja svoboda državnih sodišč pri razlagi Evropskega prava. Delegacija teh primerov pa bi zahtevala nekaj kompromisov in konkretnejših sprememb. Nekatere države Evropske Unije se morajo bolje zavezati k spoštovanju vladavine prava. Četudi je glavni namen časovnih standardov državnih sodišč to, da se primeri rešijo v razumnemu času, bi morali v primerih, ki imajo občuten vpliv na Evropsko pravo, veljati blažji standardi oziroma ignoriranje le teh. Priključitev EU bi se moralo do večje mere pogojevati z zagotovilom, da bodo sodišča lahko v razumnem času vešča v uveljavi in spoštovanju Evropskega prava. Večji poudarek bi moral biti na sodelovanju državnih sodišč EU. Državna sodišča zelo redko preverijo ostale jezikovne različice Evropske zakonodaje, četudi je razlaga v drugih jezikih lahko več kot očitna. Z lažjo interpretacijo bi se obseg primerov pred Evropskim sodiščem zmanjšal.

Pomemben korak k samostojni interpretacij državnih sodišč pa je večji poudarek pri razvoju jasnih navodil, ki izhajajo iz sodne prakse EU. V kolikor nudi sodna praksa odgovor na nejasnost v pravu Evropske Unije, posredno predhodno vprašanje ni potrebno. Trenutni obseg sodne prakse pa močno oteži iskanje primerne sodbe. Nekakšna kodifikacija sodne prakse bi sicer najverjetneje predstavljala obsežen in drag projekt, a bi občutno olajšala delo tako državnega kot Evropskega sodišča. Državna sodišča bi se odločala na podlagi jasnih določil teh navodil in imela do neke mere svobodo interpretacije. Odločitev, ki jo sprejme državno sodišče, bi se lahko z odobritvijo Evropskega sodišča nato dodalo v navodila. V primerih, kjer navodila vseeno niso dovolj jasna, bi lahko asistenco pri razlagi zakona nudili

generalni pravobranilci. V kolikor mnenje generalnega pravobranilca ni zadostno za končno odločitev, se zadeva naslovi na Evropsko sodišče.

Potrebno je tudi preučiti pomembnost enotnosti Evropskega prava, ki v teoriji omogoči enakost vseh državljanov pred zakonom. Vseeno je potrebno razumeti, da je enotnost vprašljiva predvsem na primeru prostega pretoka blaga. 36. člen PDEU, ki omogoča, da so določeni ukrepi kompatibilni, četudi omejijo pretok blaga. Ta člen sicer dovoljuje le ukrepe, ki učinkovito varujejo zdravje, moralo in podobne vrednote javnega interesa, in so posledično izvzeti iz definicije »ukrepa, enakovrednega količinski omejitvi«. V striktno legalnem smislu lahko govorimo o enotnosti prava, četudi v praksi ta člen vodi v to, da je lahko izdelek omejeno tržen oziroma celo prepovedan v eni državi Evropske Unije in obenem dostopen v vseh ostalih. Zagotavljanje enotnosti Evropskega prava, ki je eden izmed glavnih namenov predhodnih vprašanj, je v teoriji resda učinkovito za enakost pred zakonom, a do neke mere škodljivo, predvsem v primeru, ko se postavi pred učinkovitost pravnega sistema in pomembnostjo hitre odločitve. Enotnost bi tako morala biti poudarjena le takrat, ko pretirana neenotnost povzroči izjemno neugodne posledice za delovanje notranjega trga in ostalih funkcij Evropske Unije.

Seveda je pomembno razumeti, da rešitev problematike predhodnih vprašanj ni preprosta. Namen te zaključne naloge ni najti najboljše rešitve za trenutni sistem, temveč le ozaveščati o vidnih (trenuten porast predhodnih vprašanj v tako absolutnem kot relativnem smislu) ter nevidnih (odnos med sodišči in strukturne ovire) problemih, ki so v času, ko je celotna Evropska Unija na preizkušnji, moteč dejavnih in le izboljšava le teh lahko zagotovi čvrst pravni sistem Evropske Unije.

Zaključna naloga črpa večino podatkov iz zakonodaje Evropske Unije ter sodne prakse, ki je posledica predhodnih vprašanj. Znanstveni članki na področju prava in sorodna literatura je bila uporabljena pri dodatnemu razumevanju zakonodaje ter nekaterih sodb. Članki iz spletnih virov, t.i. Eurobarometer ter različne publikacije Pravnega Sodišča Evropske Unije so prispevali k boljši ilustraciji problematike predhodnih vprašanj.

Appendix 2: Composition of the European Court of Justice (as of December 31st 2019)

Source: Court of Justice of the European Union (2020c)

First row, from left to right: Maciej Szpunar, *First Advocate General* (Poland); **Michail Vilaras**, *President of Chamber* (Greece); **Alexander Arabadjiev**, *President of Chamber* (Bulgaria); **Rosario Silva de Lapuerta**, *Vice-President of the Court* (Spain); **Koen Lenaerts**, *President of the Court* (Belgium); **Jean-Claude Bonichot**, *President of Chamber* (France); **Alexandra (Sacha) Prechal**, *President of Chamber* (Netherlands); **Eugene Regan**, *President of Chamber* (Ireland); **Marek Safjan**, *President of Chamber* (Poland).

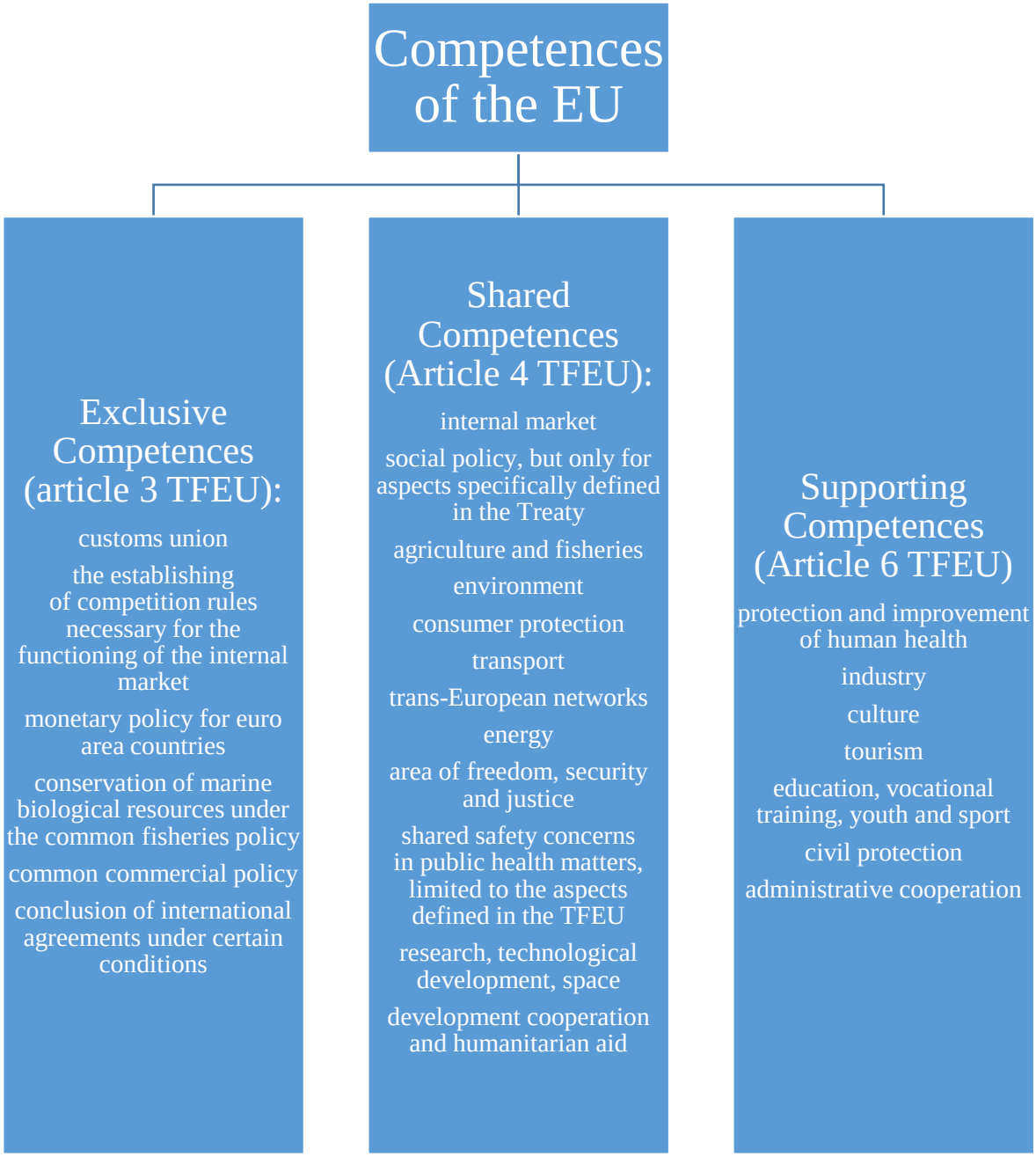
Second row, from left to right: Marko Ilešič, *Judge* (Slovenia); **Juliane Kokott**, *Advocate General* (Germany); **Lucia Serena Rossi**, *President of Chamber* (Italy); **Siniša Rodin**, *President of Chamber* (Croatia); **Peter George Xuereb**, *President of Chamber* (Malta); **Irmantas Jarukaitis**, *President of Chamber* (Lithuania); **Endre Juhász**, *Judge* (Hungary); **Jiří Malenovský**, *Judge* (Czech Republic).

Third row, from left to right: François Biltgen, *Judge* (Luxembourg); **Daniel Šváby**, *Judge* (Slovakia); **Thomas von Danwitz**, *Judge* (Germany); **Lars Bay Larsen**, *Judge* (Denmark); **Eleanor Sharpston**, *Advocate General* (United Kingdom); **Camelia Toader**, *Judge* (Romania); **Christopher Vajda**, *Judge* (United Kingdom); **Küllike Jürimäe**, *Judge* (Estonia).

Fourth row, from left to right: Nuno José Cardoso da Silva Piçarra, *Judge* (Portugal); **Michal Bobek**, *Advocate General* (Czech Republic); **Manuel Campos Sánchez-Bordona**, *Advocate General* (Spain); **Constantinos Lycourgos**, *Judge* (Cyprus); **Henrik Saugmandsgaard Øe**, *Advocate General* (Denmark); **Evgeni Tanchev**, *Advocate General* (Bulgaria); **Gerard Hogan**, *Advocate General* (Ireland).

Fifth row, from left to right: Niilo Jääskinen, *Judge* (Finland); **Priit Pikamäe**, *Advocate General* (Estonia); **Giovanni Pitruzzella**, *Advocate General* (Italy); **Andreas Kumin**, *Judge* (Austria); **Nils Wahl**, *Judge* (Sweden); **Alfredo Calot Escobar**, *Registrar* (Spain).

Appendix 3: List of competences of the European Union



Adapted from EUR-Lex (n.d.)

Appendix 4: Summary and Decision Making of Preliminary Rulings concerning Measures Equivalent to Quantitative Restrictions

When a reference for a preliminary ruling is made on the grounds of free movement of goods, there are numerous factors to consider. In usual proceedings some steps that will be described in this summary are excluded. In numerous cases, some steps are avoided as it may be obvious that for example a certain provision can be justified under protection of public health and thus several steps are avoided. One must however recognise that new Union provisions and nation provisions are developing on regular basis and it is thus clear that numerous issues that might be present to the ECJ, may not be described in the steps below. Numerous cases contributed to the development of this summary. Moreover, for further details on these steps, please refer to the suggested cases.

1. **A national court or tribunal request a preliminary ruling, the court recognises it and the proceedings take place.**
2. **Is the question in the scope of free movement of goods?**
    a. **Is the issue of the proceeding a product?** (Something "which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.[4]") If affirmative, move to step 2.b. If negative, free movement of goods is not applicable.
    b. **Is the product consider a product of European Union?** (Product originates in a Member State or is in free circulation in a Member State.) If affirmative, move to step 2.c. If negative, free movement of goods is not applicable.
    c. **Is the border-crossing character present?** (National provision in question is limiting product to cross the border.) If affirmative, move to step 3. If negative, free movement of goods is not applicable.
3. **Is the national provision considered a Custom Duty** (each financial burden, classified as a custom duty, levied when importing or exporting a product) **or a Quantitative Restriction** (any total or partial prohibition on imports or exports)? If affirmative, the national provision is incompatible with the Union law. If negative, move to step 4.
4. **Is the following sentence applicable?** The national provision consists of any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense … even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product?[5] If affirmative, move to step 4.a. If negative, move to step 5.

[4] See ECJ case 7/68 the Commission v Italy [1968]
[5] See ECJ case 24/68 the Commission v Italy [1969]

a. **Is the charge at issue considered a public interest** (e.g. quality labels for individual service, awards, statistical information, inspection fees for animals, which is obligatory, uniform, and do not exceed the cost of actual inspection) **or is imposed for both domestic and foreign goods in order to be on market?** If affirmative, the national provision is compatible with the Union law. If negative, this is a Charge having Equivalent Effect to Custom Duty and is thus incompatible with the Union Law.

5. **Can we apply a vertical direct effect?** (Legislative, administrative or judicial organs of a Member State are responsible for the issue at hand.) If affirmative, move to step 6. If negative, move to step 5.a.
    a. **Can we apply the so-called quasi vertical direct effect?** (A private entity is responsible for trade hindrance, yet the said entity is the only one that can produce a document (e.g. a certificate, licence) that enables the market entry to the foreign company.[6]) If affirmative, move to step 6. If negative, the issue is beyond the scope of free movement of goods.
6. **Can the national provision be defined within the Dassonville formula?** ("All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[7]") If affirmative, move to step 7. If negative, the national provision is compatible with the Union law.
7. **Is the national provision restricting imports?** If affirmative, move to step 8. If negative, move to step 10.
8. **Can the national provision be excluded from Article 34 TFEU?[8]**
    a. **Are there requirements that need to be met by goods that are already lawfully marketed in another Member State, yet such requirements bring additional costs or other obstacles?** If affirmative, move to step 9. If negative, move to step 8.b
    b. **Does national measure treat products imported from other Member States less favourably in comparison to domestic goods?** If affirmative, move to step 9. If negative, move to step 8.c.
    c. **Does the national measure hinder access of a foreign product to the market of the Member State?** If affirmative, move to step 9. If negative, the national provision is compatible with the Union law.
9. **Can the national provision be justified with Cassis formula and the rule of reason?**
    a. **Is the national provision recognized "as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the**

[6] See ECJ case 171/11 DVGW [2012]
[7] See ECJ case 8/74 Dassonvile [1974]
[8] See joined ECJ cases 267/91 & 268/91 Keck and Mithouard [1993] and ECJ case 110/05 Highway Code [2009]

fairness of commercial transactions and the defence of the consumer?[9]" If affirmative, move to step 12. If negative, move to step 9.b.

b. **Is the national provision justified under "further requirements of public interest"** (e.g. the protection of the environment, the stability of the social security system and the maintenance of the press pluralism)**?**[10] If affirmative, move to step 12. If negative, move to step 9.c.

c. **Does the national provision act accordingly to protect the rights and freedoms laid down in The Charter of Fundamental Rights of the European Union?**[11] If affirmative, move to step 12. If negative, move to step 11.

10. **Can the national provision be defined within the Groenveld formula**[12]**?**

a. **Does a national provision restrict export in a sense that there is a difference in treatment between domestic trade and export trade?** If affirmative, move to step 10.b. If negative, the national provision is compatible with the Union law.

b. **Does the national provision result in an advantage of national production for the domestic market in comparison to the national production for export trade?** If affirmative, move to step 11. If negative, the national provision is compatible with the Union law.

11. Can the national provision be justified under Article 36 TFEU?

a. **Does the national provision protect public morality?**[13] If affirmative, move to step 12. If negative, move to step 11.b.

b. **Does the national provision protect public policy and public security?**[14] If affirmative, move to step 12. If negative, move to step 11.c.

c. **Does the national provision protect health and life of humans, animals or plants?**[15] If affirmative, move to step 12. If negative, move to step 11.d.

d. **Does the national provision protect national treasures possessing artistic, historic or archaeological value?**[4] If affirmative, move to step 12. If negative, move to step 11.e.

e. **Does the national provision protect industrial and commercial property** (e.g. patents, trademarks, copyrights…)**?** If affirmative, move to step 12. If negative, a national provision is not compatible with the Union law.

12. Does the national provision pass the proportionality test?

a. **Is the national provision suitable to the pursued aim?** If affirmative, move to step 11.b. If negative, the national provision is not compatible with the Union law.

b. **Is the national provision necessary, meaning that there is no alternative measure that would be less restrictive?** If affirmative, move to step 11.c. If negative, the national provision is not compatible with the Union law.

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[9] See ECJ case 120/78 Cassis de Dijon [1979]
[10] See ECJ case 368/95 Familiapress [1997]
[11] See ECJ case 112/00 Schmidberger [2003]
[12] See ECJ case 15/79 Groenveld [1979]
[13] See ECJ case 34/79 Henn [1979] and ECJ case 121/85 Conegate [1986]
[14] See ECJ case 72/83 Campus Oil [1984] and ECJ case 367/89 Richardt [1991]
[15] See ECJ case 272/80 Maatschappij [1981], ECJ case 174/82 Sandoz BV [1983], ECJ case 178/84 Purity Requirement for Beer [1987], joined ECJ cases 1/90 & 176/90 Aragonesa [1991] and ECJ case 366/04 Schwarz [2005]

c. **Is the national provision proportionate, meaning the benefits gained by a national provision outweighs the harm caused to the free movement of goods?** If affirmative, the national provision is compatible with the Union law. If negative, the national provision is not compatible with the Union law.

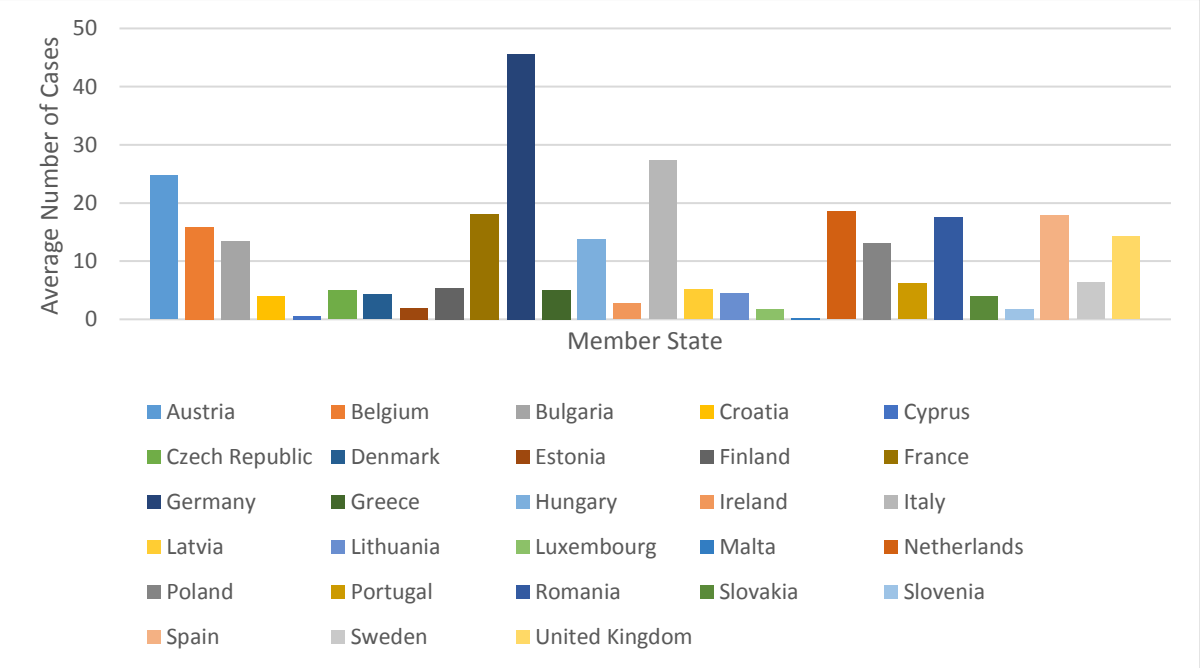
Appendix 5: Total number of Preliminary Ruling Procedures by Member State and the year of first reference

Member State	Number of Preliminary Rulings	Year of Accession	Year of first Preliminary Ruling
Austria	593	1995	1995
Belgium	919	1957	1967
Bulgaria	161	2007	2007
Croatia	24	2013	2014
Cyprus	9	2004	2008
Czech Republic	74	2004	2005
Denmark	196	1973	1975
Estonia	30	2004	2007
Finland	128	1995	1996
France	1052	1957	1965
Germany	2641	1957	1965
Greece	190	1981	1986
Hungary	207	2004	2004
Ireland	125	1973	1976
Italy	1583	1957	1964
Latvia	77	2004	2008
Lithuania	68	2004	2006

Luxembourg	102	1957	1963
Malta	4	2004	2009
The Netherlands	1076	1957	1961
Poland	197	2004	2005
Portugal	203	1986	1989
Romania	211	2007	2007
Slovakia	60	2004	2006
Slovenia	27	2004	2009
Spain	591	1986	1986
Sweden	152	1995	1995
United Kingdom	655	1973	1974

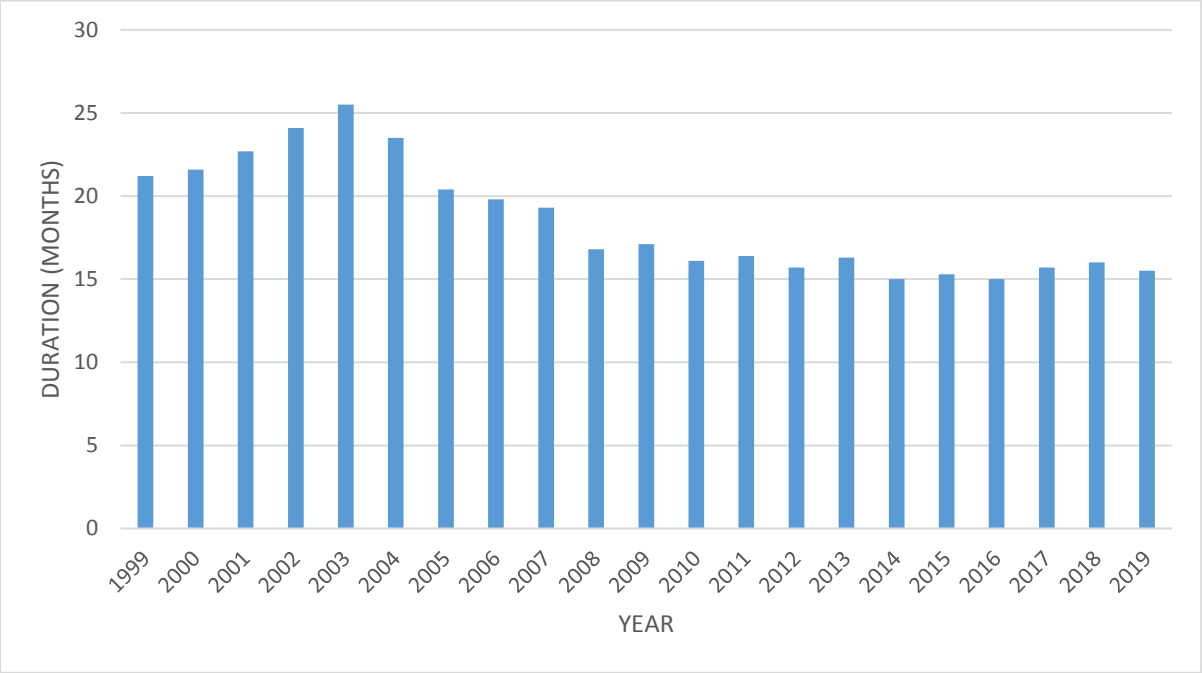
Adapted from Court of Justice of the European Union (2020)

Appendix 6: The average Preliminary Ruling Procedures by Member States (per year)



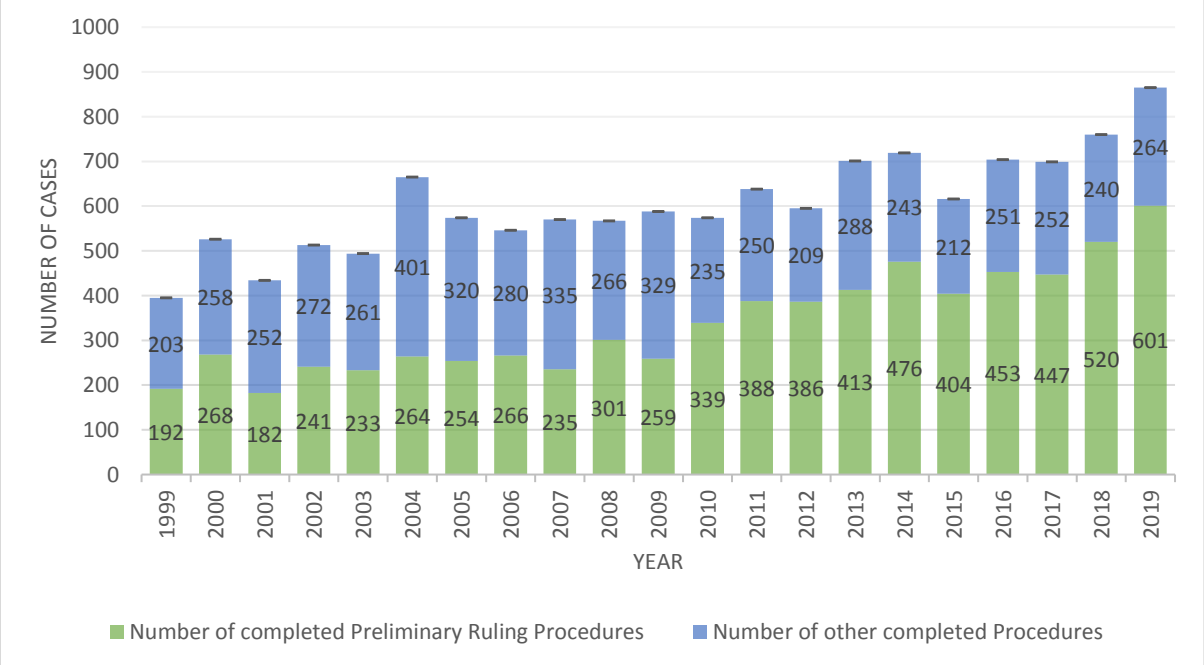
Adapted from Court of Justice of European Union (2020)

Appendix 7: Duration of Preliminary Ruling Procedure of European Court of Justice (in months)



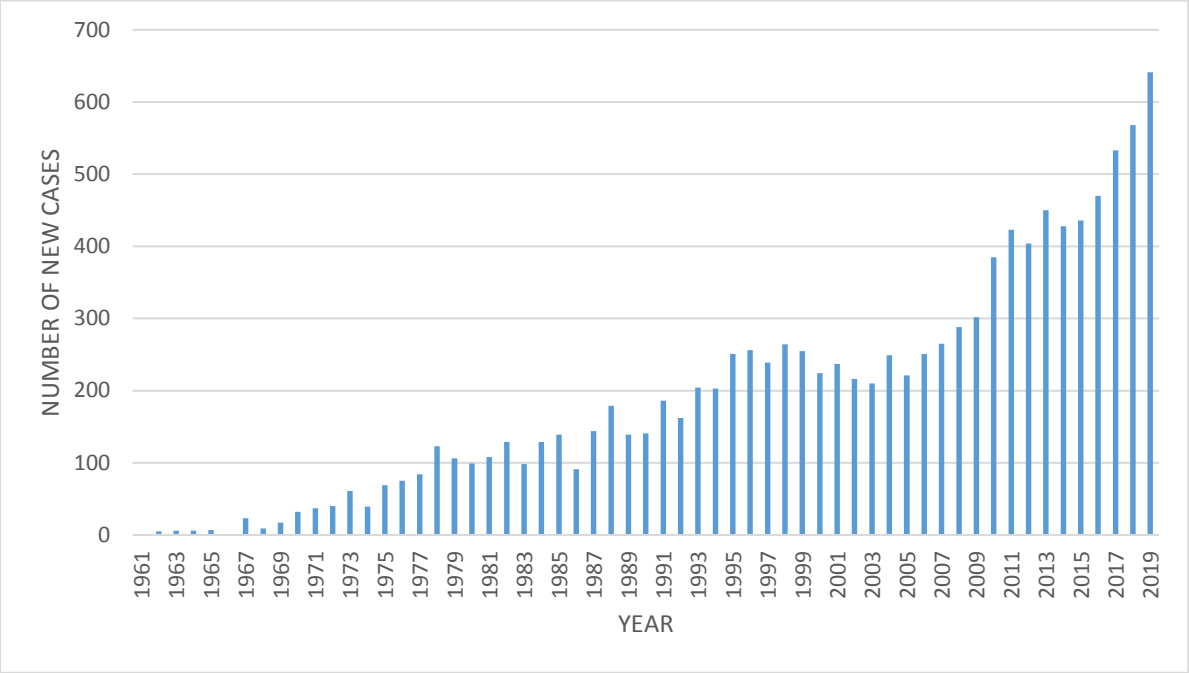
Adapted from multiple publications on Judicial Activity of Court of Justice of European Union from year 1999 to year 2019.

Appendix 8: All completed procedures of the European Court of Justice with distinction between preliminary ruling procedures and other completed procedures



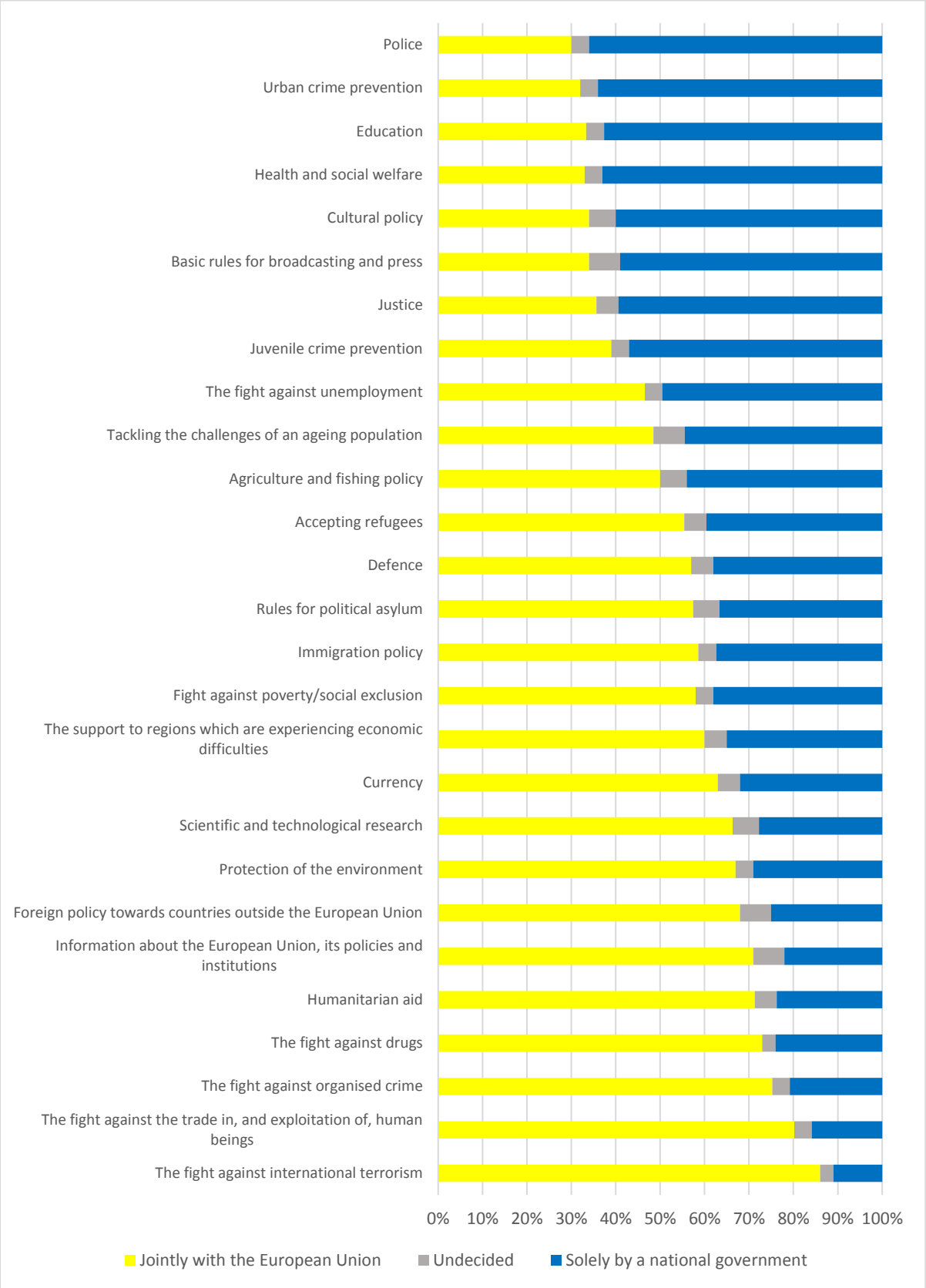
Adapted from publications on Judicial Activity of Court of Justice of European Union from year 1999 to year 2019.

Appendix 9: Number of new preliminary ruling procedures in the European Court of Justice (1961-2019)



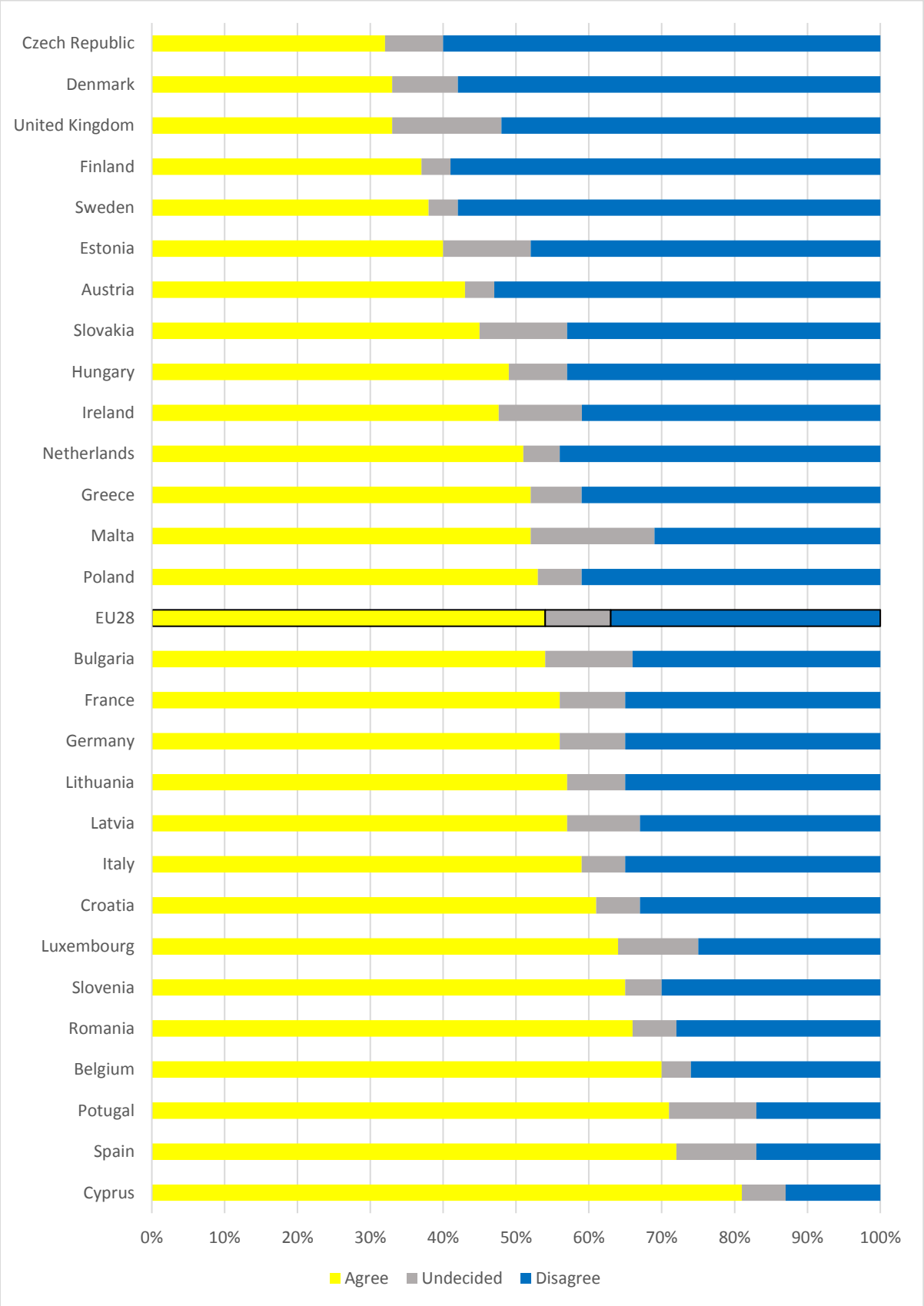
Adapted from Court of Justice of the European Union (2020)

Appendix 10: Question from the Eurobarometer: "Should a decision be made by the national government or jointly with the European Union in the following areas?"



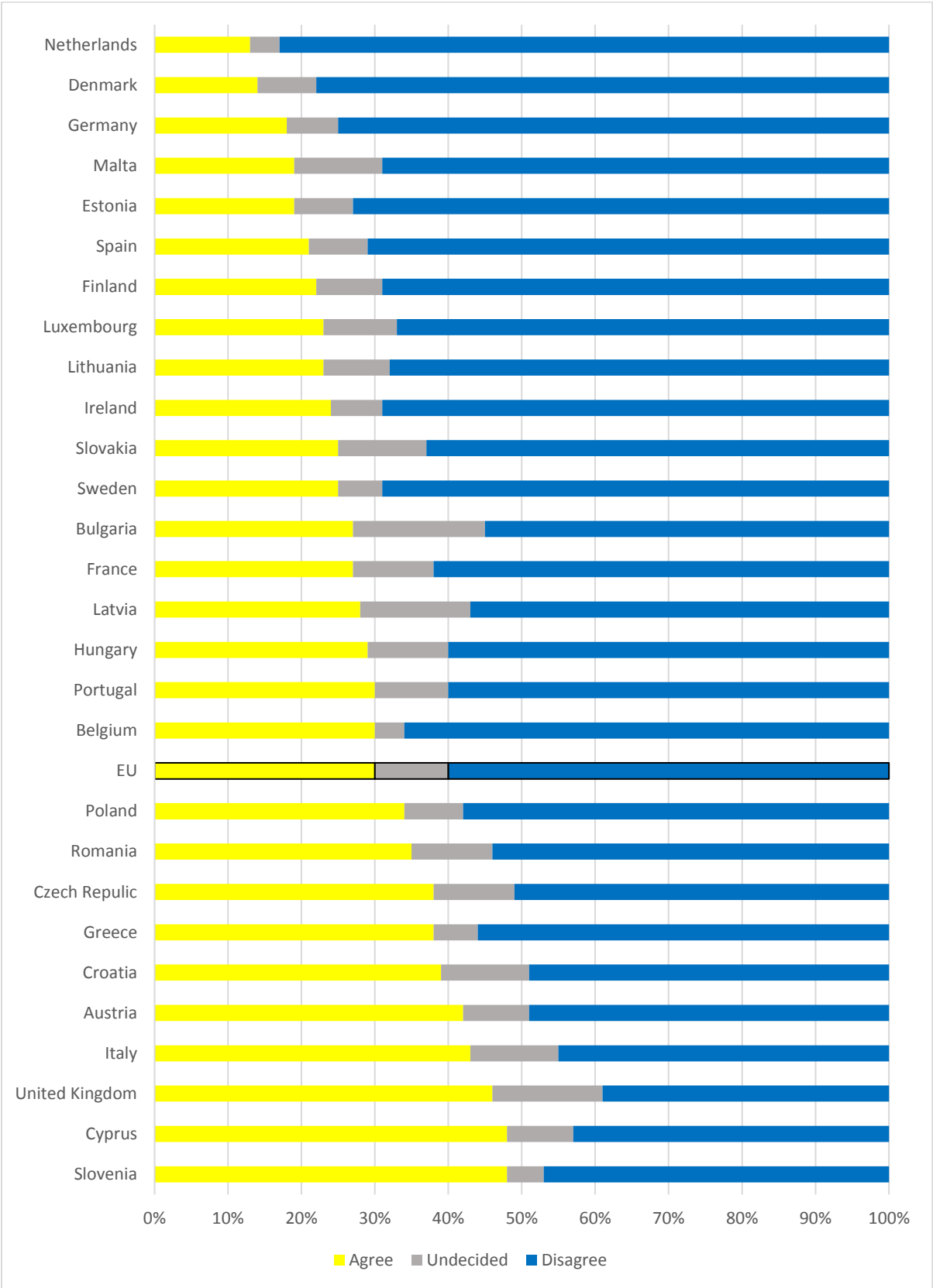
Adapted from Eurobarometer 62 (2005)

Appendix 11: Question from the Eurobarometer: "More decisions should be taken at EU level."



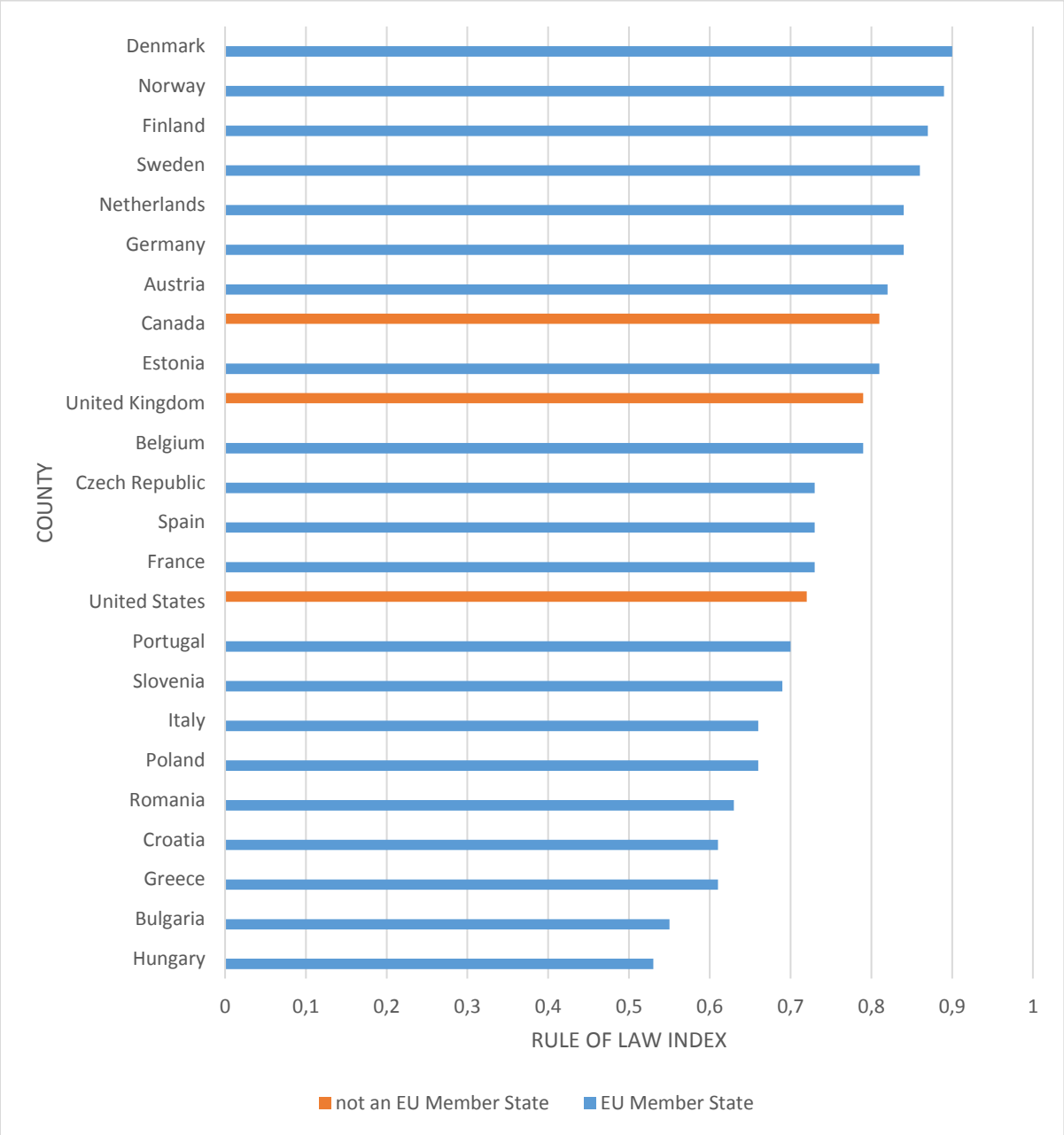
Adapted from Special Eurobarometer 486 (2019)

Appendix 12: Question from the Eurobarometer: "(Our country) could better face the future outside the EU."



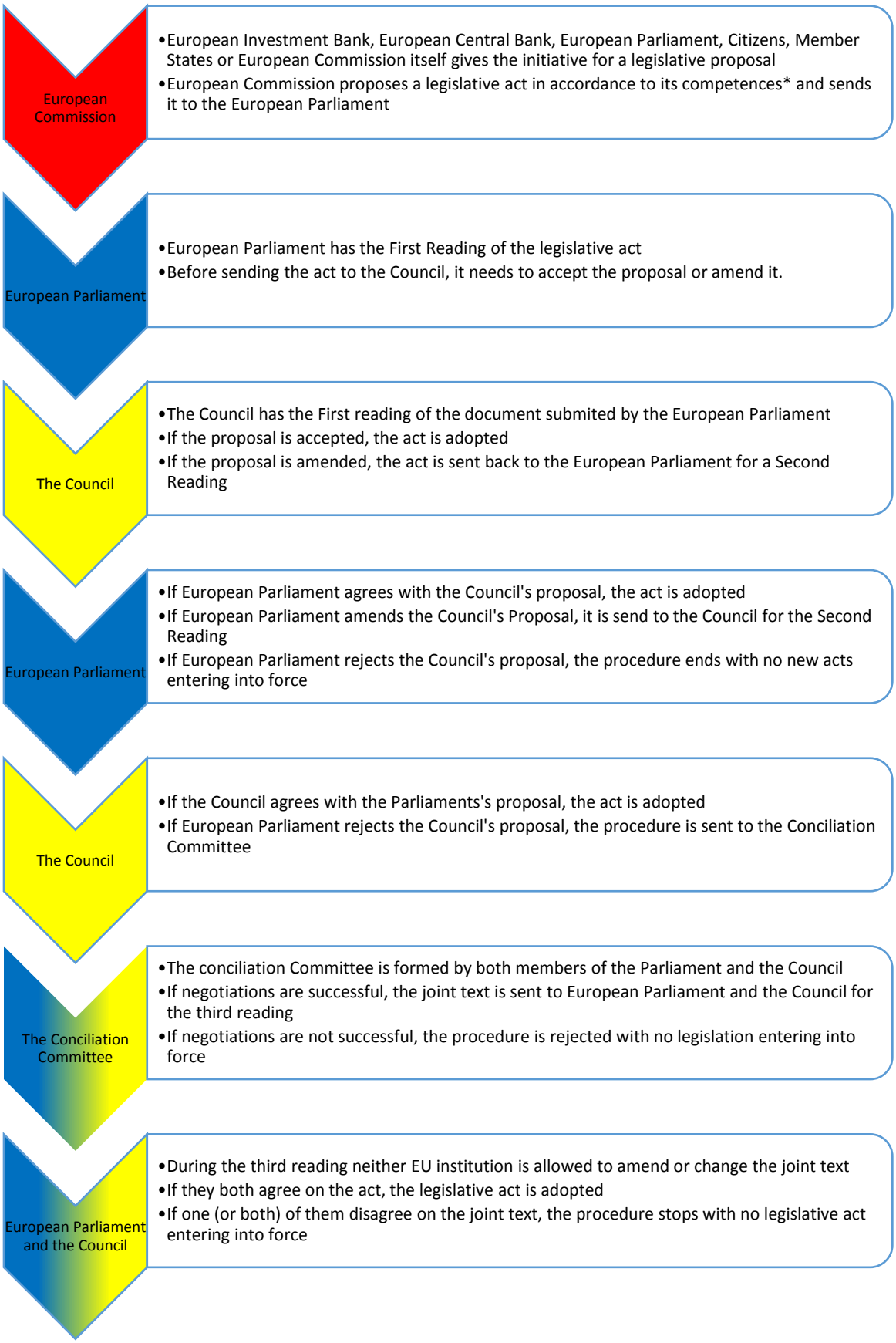
Adapted from Standard Eurobarometer 87 (2017)

Appendix 13: World Justice Project: Rule of Law Index 2020 (EU, EFTA and North America)



Adapted from World Justice Project (2020)

Appendix 14: Infographic of Ordinary Legislative Procedure of the European Union



Adapted from European Parliament (n.d.)

*Competences of the European Union

European Union and its Institutions are limited with Principle of Conferral, Subsidiarity and Proportionality according to the Article 5 TEU. Since the discussion about such principles is beyond the scope of the thesis, these principles can be summarised with three questions that need to be answered during the policy making:

- Does the Union have competences to perform an action? (Principle of Conferral)
- Is completing the action on the EU level best possible way of achieving objectives of the Treaties? (Principle of Subsidiarity)
- Does the content and form not exceed the necessity of objectives needed to be achieved by the Treaties? (Principle of Proportionality)

Affirmative answers means that performing an action on the level of the European Union is the most suitable option (EUR-Lex, 2015).