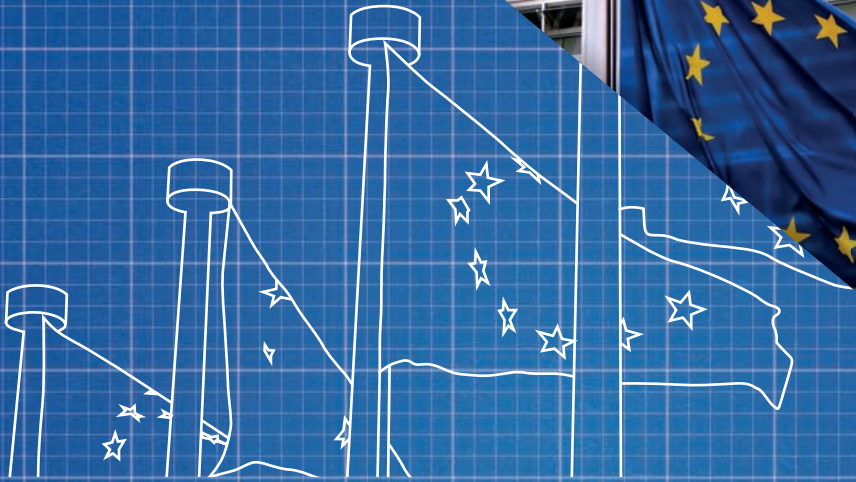


Penelope Kent



# Blueprints

Your plan for learning

# EU Law

# Blueprints

## EU Law

The General Court was empowered from 2003 to hear preliminary rulings in areas provided by the Statute of the Court. Where the General Court considers that the case involves the unity or consistency of EU law, it may refer it to the Court of Justice for a ruling under Article 256(3) TFEU (ex 225(3) TEC). The Court of Justice may also hear appeals from preliminary rulings of the General Court where there is a serious risk to the unity or consistency of EU law. Nevertheless the General Court has made *no* preliminary rulings so far, demonstrating the continuing reliance placed on the authoritative nature of rulings by the Court of Justice under Article 267.

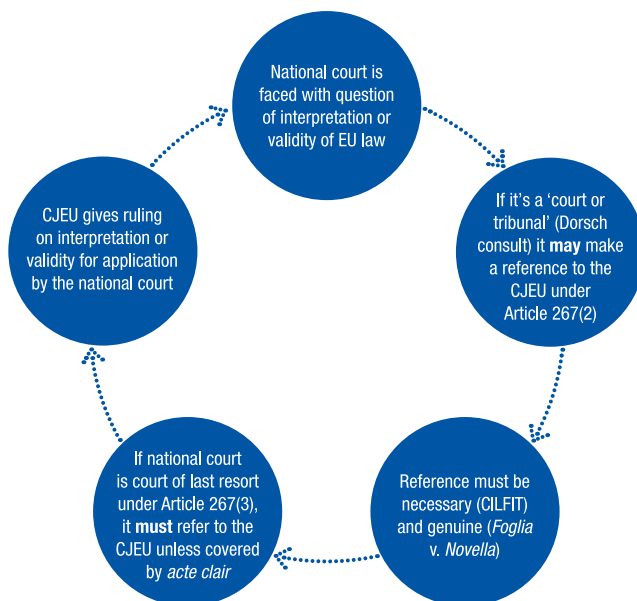
## SPECIALISED COURTS

### The Civil Service Tribunal

Article 257 TFEU (ex 225A TEC) provides that Parliament and the Council may establish specialised courts (previously known as judicial panels) attached to the General Court to hear certain cases at first instance. There is a right of appeal on points of law to the General Court. The first of these panels, the EU Civil Service Tribunal, was established in 2004 to handle the large volume of staff cases (employment disputes involving staff employed by the EU institutions).

### Direct actions in the Court of Justice

The procedures under Articles 258 TFEU (ex 226) and 263 TFEU (ex 230 TEC) are particularly important. They are examples of *direct actions* where the procedure begins and ends in the Court (unlike the preliminary reference procedure under Article 267 which begins in the national courts).



**Figure 3.2** The preliminary reference procedure under Article 267 TFEU

Under Article 258 TFEU enforcement proceedings may be brought by the Commission against a Member State in breach of its obligations under the Treaties. The Court may impose penalties (lump sum or daily penalties) under Article 260 TFEU (ex 228 TEC) if the Member State does not comply with a judgment. Article 263 provides another type of direct action, to review the legality of acts of the Council and the Commission (i.e. to challenge a regulation, directive or decision). The Court can also rule on failure to act under Article 265 TFEU (ex 232 TEC) and the inapplicability of an act of general application under Article 277 TFEU (ex 241 TEC), as well as to award compensation under Article 340 TFEU (ex 288 TEC) for loss caused by the EU institutions.

## APPLICATION

Imagine that the Council and Parliament have adopted a directive requiring Member States to develop a 'green' transport policy to deal with carbon emissions. The UK wants to challenge the directive as it considers that transport policy should be left to the Member States. It could bring an action against the Council and Parliament in the Court of Justice under Article 263 TFEU, seeking to have the directive annulled. Spain has ignored the directive. The Commission could bring enforcement proceedings under Article 258 TFEU.

## PRELIMINARY RULINGS AND THE DEVELOPMENT OF EU LAW

### Take note

From a student perspective, the preliminary reference procedure is the procedure you will encounter most often when studying EU law.

It is hard to overstate the importance of the preliminary reference procedure under Article 267 TFEU in the development of EU law (see Figure 3.2). It provides a mechanism by which a national court may ask the Court of Justice to clarify the meaning of EU law or rule on its validity, providing a uniform interpretation of EU law throughout the Member States.

The procedure is 'essential for the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states in the Community', as the Court declared in Case 166/73 *Rheinmühlen*

*v. Einfuhr-und Vorratsstelle Getreide*. An importer in Germany appealed against refusal of an export rebate based on a point of Community law to the Federal Tax Court, which upheld his appeal and sent back the case for decision to the regional court, which referred questions to the Court of Justice for interpretation. The importer appealed against the decision to refer. However, the Federal Tax Court made a further preliminary referral to clarify the scope for a reference. The Court of Justice held that a lower court cannot be prevented by national law from making a referral, but must be free to refer if it considers that applying the decision of a higher court would infringe EU law.

Once a reference has been made to the Court of Justice, proceedings in the national court are suspended until the Court has ruled. It is the function of the national court, with the benefit of the ruling from the Court of Justice, to apply the law and reach a decision on the facts.

Article 267 has played a key role in developing the constitutional principles of EU law, particularly direct effect, indirect effect and *State liability*. The Court of Justice has used requests for preliminary rulings to declare its views on the EU legal order in seminal cases such as Case 26/62 *Van Gend en Loos*, Case 6/64 *Costa v. ENEL*, and Case C-6/90 *Francovich*, filling the gaps left by the Treaties. These cases are considered in Chapters 7 and 8.

### Take note

It is important to remember that the Court of Justice does not act as an appellate court under Article 267 but supports national courts which make the final decision to apply the law. As its jurisdiction under Article 267 is restricted to EU law, the Court cannot interpret domestic law or rule on its validity under EU law.

## PRELIMINARY RULINGS UNDER ARTICLE 267 TFEU

### CORNERSTONE

#### Article 267(1)

Article 267(1) empowers ‘any court or tribunal of a Member State’ to make a reference to the Court of Justice to clarify the meaning or validity of EU law.

It does not matter what the body making the reference is called. The criteria to establish whether a body is a ‘court or tribunal’ under Article 267 were established in Case C-54/96 *Dorsch Consult* (referral from the Federal Supervisory Board in Germany seeking clarification of a procedure for awarding public service contracts under a directive).

### CORNERSTONE

A body is a ‘court or tribunal’ if it:

- (a) is permanent;
- (b) is independent;
- (c) has compulsory jurisdiction;
- (d) applies legal rules;
- (e) hears cases between parties (Case C-54/96 *Dorsch Consult*).



## Bodies found to be a ‘court or tribunal’ under Article 267

Case	About	Importance
Case 246/80 <i>Broekmeulen</i>	Dutch appeal committee refused the applicant's registration as a GP.	Found to be a ‘court or tribunal’ under Article 267(2) as it made final decisions by an adversarial procedure subject to appeal to the courts.
Case 14/86 <i>Pretore di Salò v. Persons Unknown</i>	A magistrate acting as both prosecutor and investigating judge.	Although some of magistrate's functions were not judicial, he was regarded as a ‘court or tribunal’ as his decisions were legally binding and he was exercising a public function.
Case C-210/06 <i>Cartesio Oktató és Szolgáltató bt</i>	<i>Cartesio</i> , a limited partnership, appealed to an appellate court in Hungary against refusal of registration of the transfer of its company seat to Italy.	An appellate court hearing an appeal from a lower court responsible for maintaining a commercial register was regarded as a court or tribunal under Article 267 as it was exercising a judicial function adversely affecting the applicant, but was not covered by the obligation to refer under Article 267(3).

It is essential to apply the *Dorsch Consult* criteria, particularly whether a body is *exercising a judicial function*, to decide whether it is a court or tribunal. If the lower court in *Cartesio* had been taking a purely administrative decision on company registration, it would not have been a court under Article 267. Article 267(3) did not apply although there was limited scope for appeal under national law and the decision appealed was not suspended. A key factor is the element of *public control or participation*, found to be lacking in the following, held *not* to constitute a court or tribunal:

- The Council of the Paris Bar (arising from a request for a declaration that a member of the Paris Bar denied access to a court in Germany was entitled to provide legal services under EU law (Case 138/80 *Borker*)).
- An arbitrator appointed under a private contract (Case 102/81 (*Nordsee Deutsche Hochseefischerei GmbH*)). The Court of Justice found that the parties had removed their dispute from the court structure by opting for resolution through an arbitration clause. The arbitrator could not therefore be regarded as a court or tribunal.

## Discretionary referrals under Article 267(2)

Any court or tribunal not covered by the obligation to refer has discretion to refer to the Court under Article 267(2) when it considers that a reference is *necessary*.

In Case 283/81 *CILFIT* a group of textile firms brought an action in the Italian courts arising from their refusal to pay a government levy on wool from outside the EU. The central question was whether wool should be regarded as an animal product as such products were outside the scope of the Regulation applying the levy. The Italian Ministry of Health argued that there was no need to refer to the Court as it was obvious that wool was an animal product. The Italian Supreme Court nevertheless decided to make a referral to the Court which provided guidance on the need to refer.

## CORNERSTONE

### Case 283/81 *CILFIT*

A referral is *not* necessary when the:

- question of EU law is irrelevant to the decision;
- question has already been decided by the Court of Justice;
- correct interpretation is so obvious as to leave no room for doubt (*acte clair*).

While the *CILFIT* guidelines were drawn up in relation to the mandatory jurisdiction under Article 267(3) they also apply to discretionary jurisdiction under Article 267(2). It is clear from the decision that preliminary references must be considered in relation to the special features of EU law, particularly the need for a uniform interpretation despite the existence of texts in different languages and use of concepts and terminology unlike national legislation.

Some commentators including the legal academic Rasmussen (1989) have argued that the *CILFIT* criteria are almost meaningless. What matters is how national courts are encouraged to reach their own decisions on matters of EU law. In practice many national courts have exercised their independence by failing to refer questions that were necessary to resolve a dispute. The statistics accompanying the 2010 Report of the Court of Justice on references from 1952–2010 show that only Malta, Slovakia and Slovenia made *no* referrals from their highest courts. In the UK the House of Lords made 44 references.

REFLECTION

## Recent referrals from UK courts to the Court of Justice

The UK courts are now more willing to refer to the Court of Justice than in the early years when they were dissuaded by Lord Denning's guidance in *Bulmer v. Bollinger* (overruled by *CILFIT*). For example, in Case C-206/01 *Arsenal Football Club v. Matthew Read* the Chancery Division of the High Court asked the Court of Justice to interpret Directive 89/104 in a dispute between Arsenal Football Club and an unauthorised merchandise seller to establish whether the use of the cannon and shield emblems on shirts infringed Arsenal's exclusive trademark. The Court found that a proprietor could rely on the directive to prevent unauthorised use of a sign identical to a validly registered trademark.

The Chancery Division again referred to the Court in Case C-324/09 *L'Oreal v. eBay International AG* over L'Oreal's dissatisfaction with counterfeit products sold through eBay. After writing to eBay to express its concerns, L'Oreal brought proceedings in Member States including the UK, alleging trademark infringement. The Court of Justice (Grand Chamber) interpreted Directive 2004/48 which it found required Member States to ensure that national courts dealing with intellectual property rights could order online sellers to end infringements.

## There must be a genuine question of EU law

The Court of Justice held it will not rule on an artificially fabricated question (Case 104/79 *Foglia v. Novello* (No. 1) and Case 244/80 (No. 2)). *Foglia and Novello* (No. 1) arose from a contract between two Italian wine merchants to sell wine to a third party in France subject to a condition that one (Foglia) should not be liable for charges contrary to EU law. When the French authorities imposed a tax on the wine entering the country, it was paid by Foglia who tried to recover the cost from Novello. The Italian court referred questions for a ruling but the Court refused to answer on the basis that they were ‘concocted’ to obtain a ruling on national law (validity of the French tax). Undeterred, the Italian court made a further reference in *Foglia v. Novello* (No. 2). The Court of Justice again declined to rule, holding it was entitled to confirm its own jurisdiction and must ensure that the preliminary reference procedure is ‘not employed for purposes . . . not intended by the Treaty’. The Court stated that its function under Article 267 was to assist in administration of justice in the Member States, not to give advisory opinions on general or hypothetical questions.

The refusal to rule in *Foglia v. Novello* was hard for the parties, as there may have been a genuine dispute between them. The Court used the second *Foglia* reference to assert its authority over national courts, reminding them of the division of responsibilities. The decision was criticised by academics such as Bebr (1980) who asks whether we can be sure of distinguishing a test case and a fabrication, but supported by Wyatt (1982) who argues that the Court must be free to determine its own jurisdiction.

## REFLECTION

The Court refused to rule in Case C-83/91 *Meilicke v. Meyer* because it considered the question to be artificially constructed to test an academic lawyer’s theories of company law. It also refuses to rule where the question appears ‘manifestly irrelevant’ to the decision. In Case C-343/90 *Dias v. Director da Alfandega do Porto* on interpretation of EU law on a tax on motor vehicles which did not apply to light commercial vehicles, the Court refused to rule whether the tax applied to vintage cars, deeming it irrelevant.

The Court summed up its position in Case C-130/95 *Giloy*, stating that it will only reject a request for a reference ‘if it appears that the procedure laid down in Article [267] has been misused and a ruling elicited from the Court by means of a contrived dispute, or it is obvious that EU law cannot apply’. In practice it also refuses to hear cases where the national court fails to provide enough information on the background, as in Case 157/92 *Pretore di Genova v. Banchemo* where the Court rejected a request from an Italian court as it had not been sufficiently informed about the Italian tobacco monopoly forming the context of the case.

The 2012 Recommendation to national courts and tribunals on initiation of preliminary reference proceedings makes the following observation about the position of the national court with discretion to refer:

[A] national court or tribunal may, in particular, when it considers that sufficient guidance is given by the case law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of general interest for the uniform application of European Union law, or when the existing case law does not appear to be applicable to a new set of facts.