



Co-funded by the
European Union

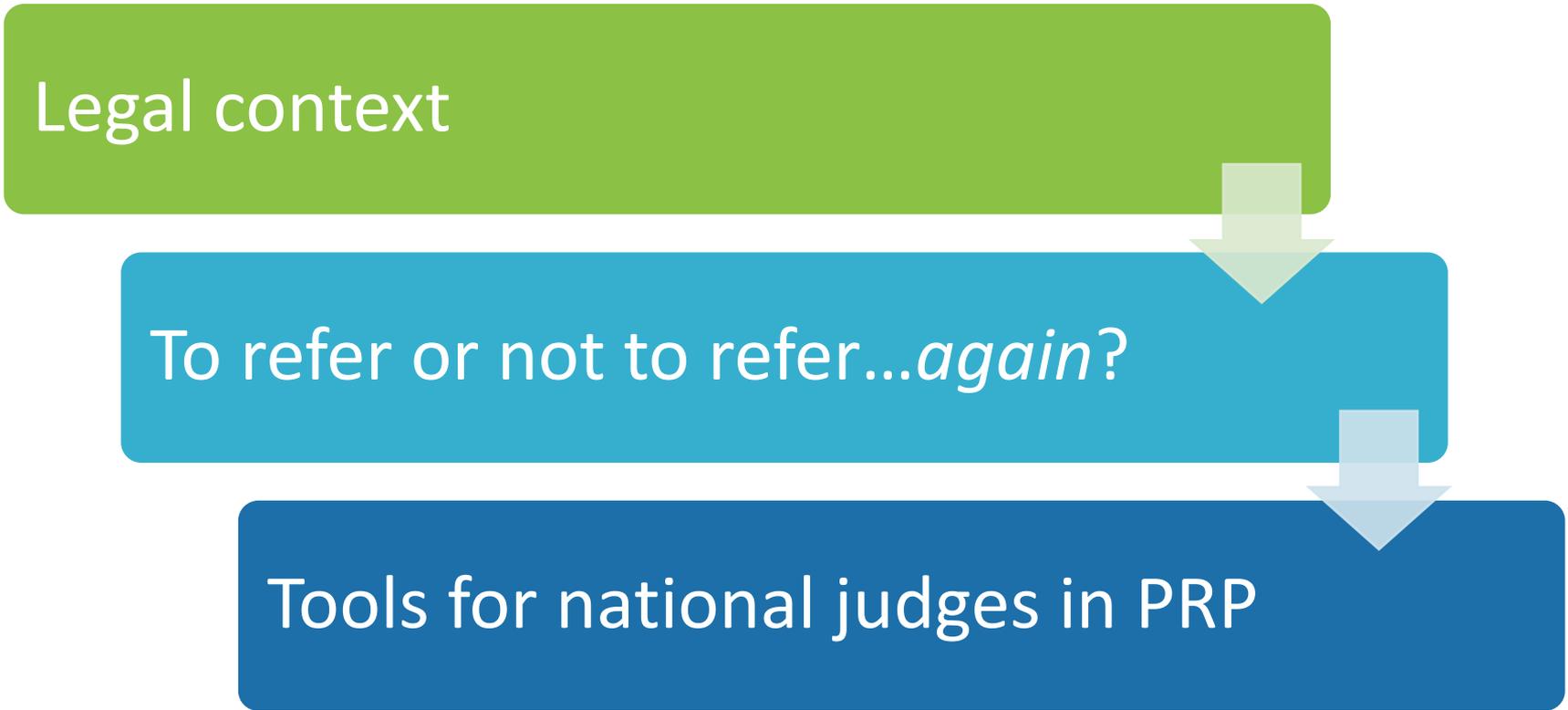


From judge to judge: recommendations on a preliminary reference

Judge Beatrice Ramascanu
16 October 2023, Bucharest

Structure

Legal context



```
graph TD; A[Legal context] --> B[To refer or not to refer...again?]; B --> C[Tools for national judges in PRP];
```

To refer or not to refer...*again?*

Tools for national judges in PRP

Article 267 TFUE



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



(a) **the interpretation** of the Treaties;



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

Article 267 TFUE

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





Article 267 TFUE

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions **there is no judicial remedy** under national law, that court or tribunal **shall bring** the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.



Rules of Procedure- Article 99

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question **may be clearly** deduced from existing case-law or where the answer to the question referred for a preliminary ruling **admits of no reasonable doubt**, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

Preliminary ruling procedure

“the judicial system as thus conceived has as its **keystone the preliminary ruling procedure provided for in Article 267 TFEU**, which, by setting up a **dialogue** between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of **securing uniform interpretation of EU law** (see, to that effect, judgment in van Gend & Loos, EU:C:1963:1, p. 12), thereby serving to ensure **its consistency, its full effect and its autonomy** as well as, ultimately, the particular nature of the law established by the Treaties.

(Opinion 2/13, para 176)



Objectives

Uniform
interpretation
and
application of
EU law

- **legal unity within the EU**
- **protection of individual rights**
- **development of EU law**

Judicial dialogue in the European judicial space



Shared responsibility

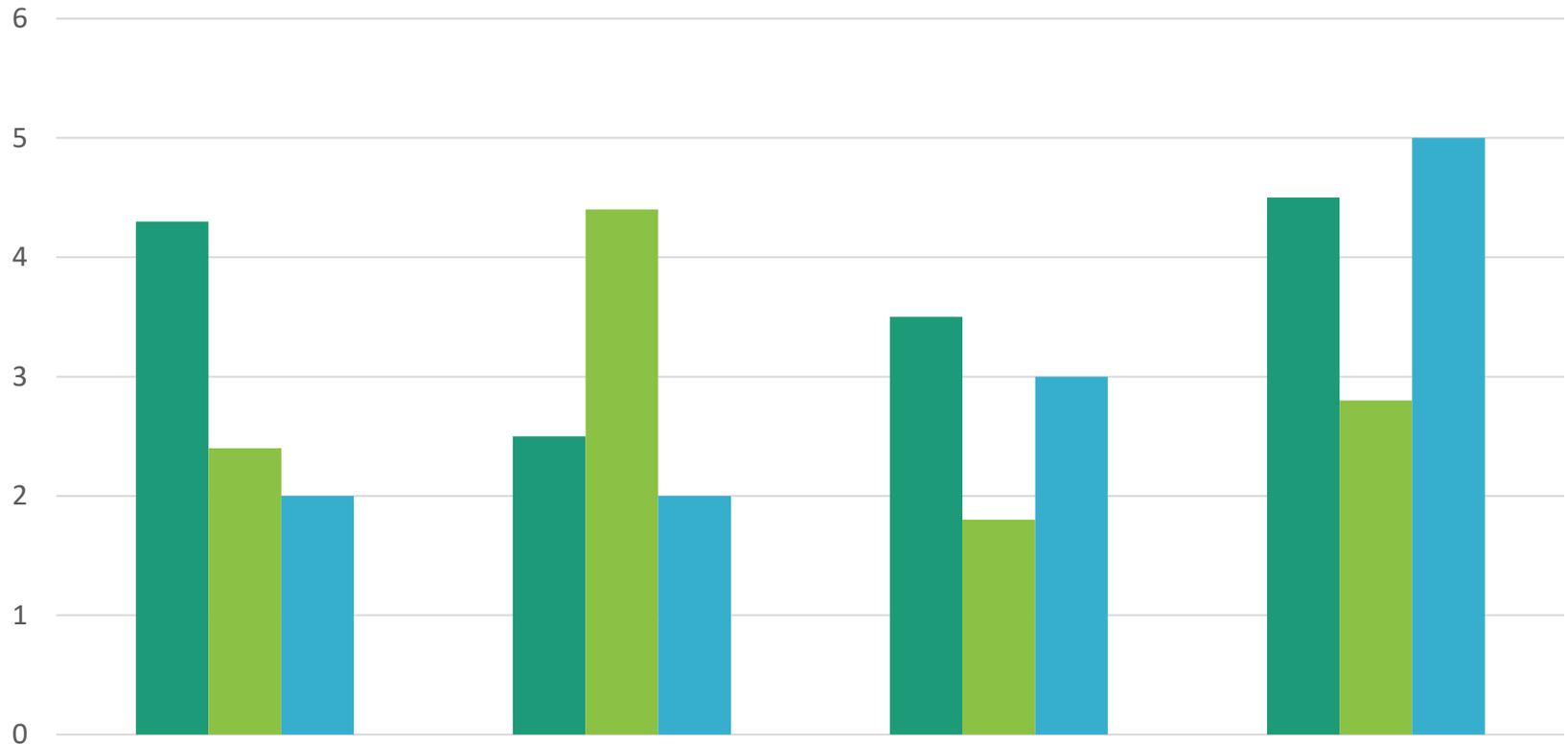
- When ruling on the interpretation/validity of EU law, the Court **makes every effort to give a reply which will be of assistance** in resolving the dispute in the main proceedings
- but it is for the referring court or tribunal **to draw case-specific conclusions**, if necessary by disapplying the rule of national law held incompatible with EU law.

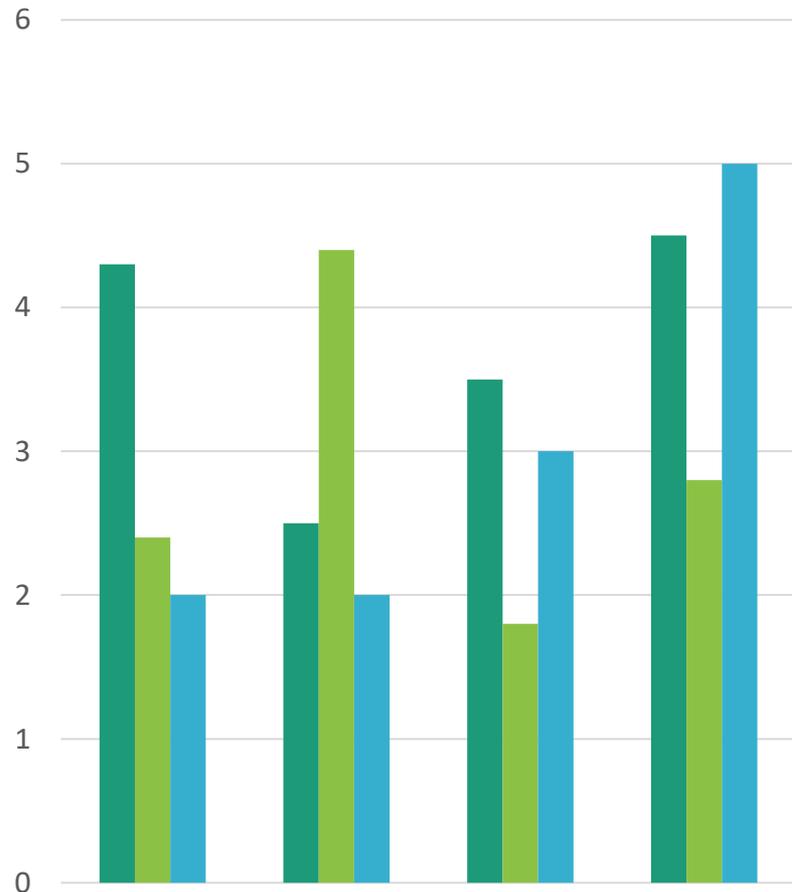
(RECOMMENDATIONS to national courts and tribunals in relation to the initiation of preliminary ruling proceedings)



Statistics 2022

- 546
- 67.74%





Member States

- Germany 98
- Italy 63
- Bulgaria 43
- Spain 41
- Poland 39
- Romania 29
- Netherlands 28
- Hungary 28

VALIDITY



- *all* national courts are under an unreserved obligation to refer to the Court such questions
- no jurisdiction for national courts to determine the validity of acts of the EU institutions
- The *CILFIT* exceptions are *not applicable* to the duty to refer a question on *validity*

Exceptions to the duty to refer- *CILFIT*



the question is irrelevant for
the resolution of the dispute -
no way to affect the outcome
of the case



the provision of EU law in
question has already been
interpreted by the CJEU (**acte
éclairé**)



the correct interpretation of EU
law is so obvious as to leave no
scope for any reasonable doubt
(**acte clair**)
'no reasonable doubt'

CILFIT - 283/81

- **“acte clair”**

- correct application of EU law is so obvious as to leave no scope for any reasonable doubt

“Tool kit”:

- to all courts of the other Member States
 - in all language versions
 - in all different legal terminologies
 - in the light of Union law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’

- **“acte éclairé”** - question has been already interpreted by the ECJ

- Similar case
- No matter what proceedings





C-561/19 - Consorzio Italian Management, Catania Multiservizi SpA

- paradigm shift
- From subjective judicial doubt to a **more objective imperative** of securing uniform interpretation of EU law
- In other words, **the duty to refer** a question for a preliminary ruling **should not be focused primarily on the correct answers, but rather on identifying the right questions.**

(Opinion of AG Bobek, 15 April 2021)

Facts

- public contract for cleaning services for *Rete Ferroviaria Italiana SpA* (tender procedure)
- *Consiglio di Stato* - preliminary ruling - C-152/17, 19 April 2028

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, and the general principles underlying that directive are to be interpreted as not precluding national rules, such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by that directive.

Facts

- 28 October 2018, the parties asked the *Consiglio di Stato* to refer other questions for a preliminary ruling

❖ procedural bars

❖ successive or continuous proposal of questions for a preliminary ruling

❖ abuse of procedure

C-561/19

1. In accordance with Article 267 TFEU, is a national court whose decisions are not amenable to appeal required, in principle, to make a reference for a preliminary ruling on a question concerning the interpretation of EU law even where the question is submitted to it by one of the parties to the proceedings after that party has lodged its initial pleading, or even after the case has been set down for judgment for the first time, or indeed even after a reference has already been made to the Court of Justice of the European Union for a preliminary ruling?





Again?

- Same proceedings
- difficulties in understanding or applying the judgment
- Refers “new considerations which might lead the Court to give a different answer to a question submitted earlier”

Clarifications - *acte claire*

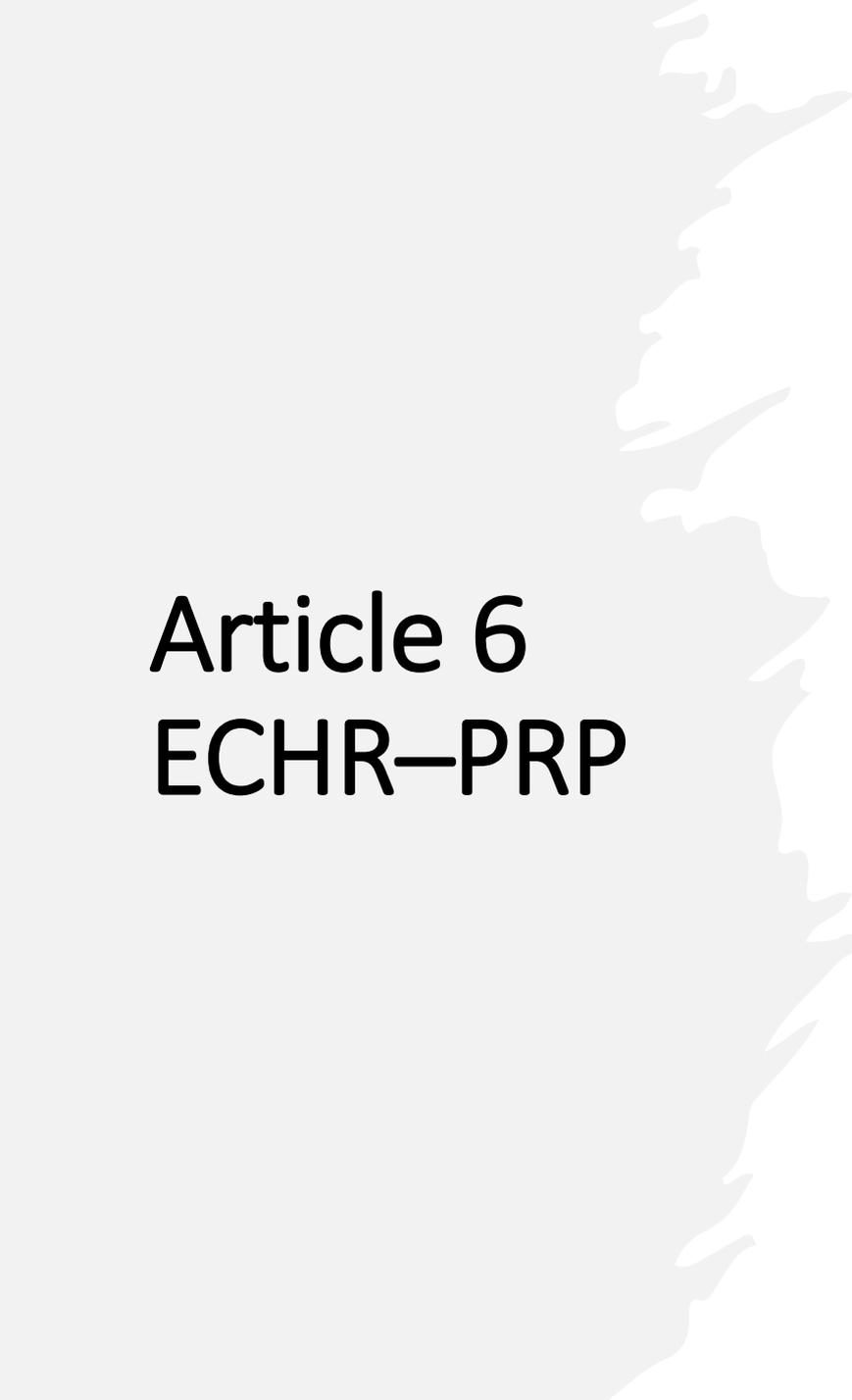
Diverging lines of case-law

- among the courts of a Member State or
- between the courts of different Member States

It “must be particularly **vigilant** in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the **objective** pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law.” (para. 49)

Duty to give reason according to *CILFIT* 2

Art. 267 TFEU read in the light of Art. 47 par. 2 of the
Charter



Article 6 ECHR—PRP

- ECHR does not guarantee, as such, any right to have a case referred by a domestic court to the CJEU for a preliminary ruling.
- Article 6 § 1 requires the domestic courts **to give reasons** for any decision refusing to refer a question for a preliminary ruling, especially where the applicable law allowed for such a refusal only on an exceptional basis
- *CILFIT doctrine*

Dhahbi v. Italy

8 April 2014

- Italian Court of Cassation had ignored the applicant's request to have a preliminary question referred to the CJEU on obligation to give reasons for refusing to refer to CJEU in order to determine whether the Euro-Mediterranean Agreement allowed the authorities to refuse to pay the allowance in question to a Tunisian worker.
- **Violation of Article 6 § 1 ECHR**

Article 6 ECHR and PRP



- Article 6 requires that national courts whose decisions were not open to appeal under domestic law **give reasons**, based on the applicable law and the exceptions laid down in CJEU case-law for their refusal to refer a preliminary question on the interpretation of EU law.
- They should set out their reasons for considering *CILFIT* doctrine
 - that the question was not relevant,
 - that the provision had already been interpreted by the CJEU, *acte claire*
 - or that the correct application of EU law was so obvious as to leave no scope for reasonable doubt, *acte éclairé*

...Reasoning

- The Court emphasises in this connection that the right to a reasoned decision serves the general rule enshrined in the Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons
- The rule of law and the avoidance of arbitrary power are principles underlying the Convention.
- In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society

Violation of Article 6 ECHR

- **Baltic Master Ltd. v. Lithuania**, 16 April 2019
- **Sanofi Pasteur v. France**, 13 February 2020
- **Bio Farmland Betriebs S.R.L. v. Romania**, 13 July 2021
- **Rutar and Rutar Marketing d.o.o. v. Slovenia**, 15 December 2022
- **Georgiou v. Greece**, 14 March 2023

Article 6 ECHR and PRP

NO VIOLATION – *from the specific circumstances of the case*

- **Lack of arbitrariness**
- **No manifestly unreasonable**
- **Procedure as a whole**
- **The specificity of the domestic proceedings**

No violation of Article 6

- **Baydar v. The Netherlands**, 24 August 2018
- **Harisch v. Germany**, 11 April 2019
- **Repcevirág Szövetkezet v. Hungary**, 30 April 2019

C-561/19, „Cilfit 2”

- Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law **must comply** with its obligation to bring before the Court of Justice a question concerning the interpretation of EU law that has been raised before it, **unless** it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.



C-561/19, „Cilfit 2”

The existence of such a possibility must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union.



C-561/19, „Cilfit 2”



Such a court or tribunal cannot be relieved of that obligation merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings. However, it may refrain from referring to the Court a question for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal, subject to compliance with the principles of equivalence and effectiveness.

“subjective-objective”...

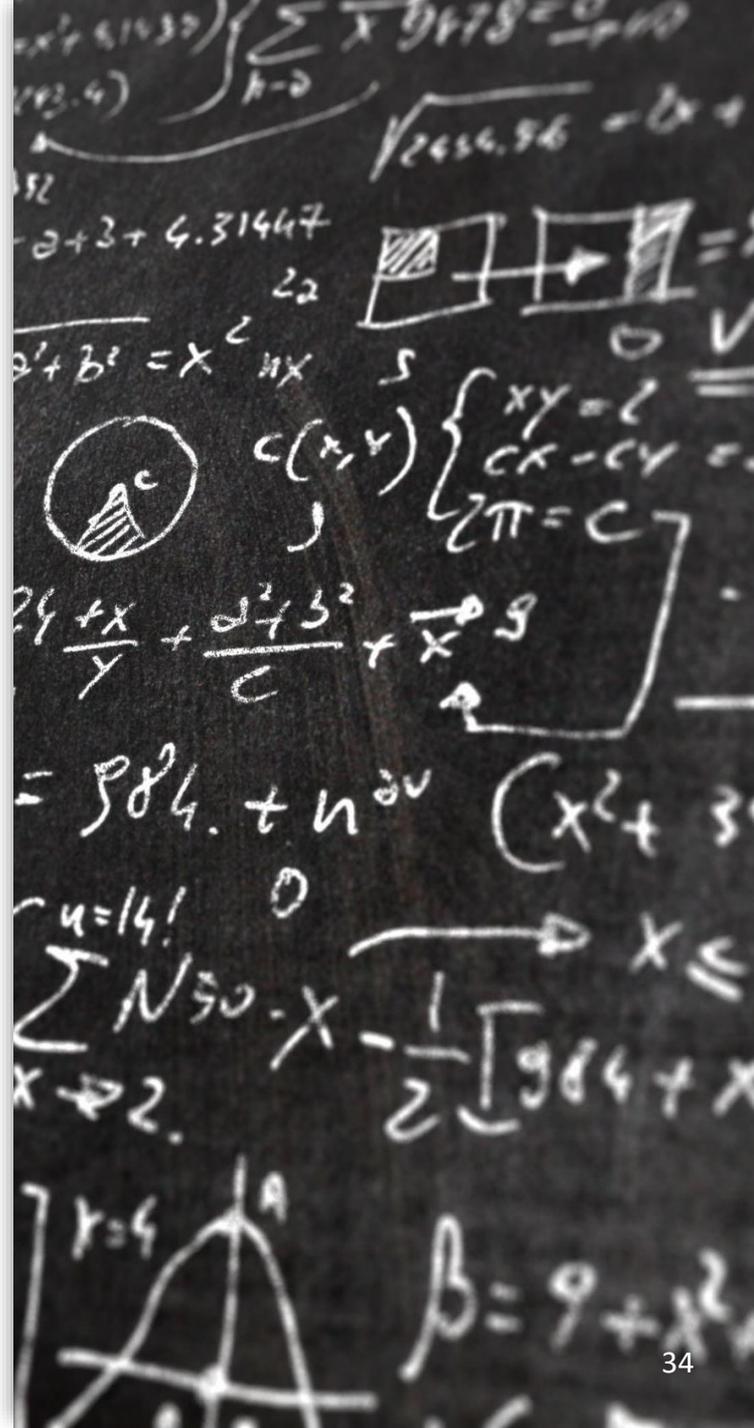


“coming across a “true” *acte clair* situation would, at best, seem just as likely as encountering a unicorn”
(Advocate General Wahl)

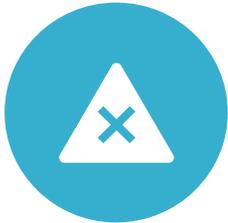
“those elements that are stated in *objective* terms are simply unattainable, at least for mortal national judges not possessing the qualities, time, and resources of Dworkin’s Judge Hercules (comparing (all) language version; interpreting each provision of EU law in the light of EU law as a whole, while having a perfect knowledge of its state of evolution at the date on which that provision is interpreted)”
Advocate General Bobek)

Lost in translation?

- the different language versions are all equally authentic
- one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision
- EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union (Judgment of 24 March 2021, A, C-950/19, EU:C:2021:230, para 37)
- Not an obligation to examine, in that regard, each of the language versions of the provision
- it must bear in mind those divergences between the various language versions of that provision **of which it is aware, in particular when those divergences are set out by the parties and are verified**



Proper reasoning



cannot be 'swept under the carpet' without proper reasoning, by simply stating in one sentence that 'all is clear and beyond reasonable doubt'.



If a point of EU law is validly raised during national judicial proceedings, then that case is likely to be, in so far as concerns **the applicability of other elements of EU law, within the scope of EU law.**



any national decision taken in relation to Article 267 TFUE is an instance of implementation of EU law under Article 51(1) of the Charter.



(AG Bobek)

Tools for national judges

- EUR-LEX
- Multilingual display
- <https://eur-lex.europa.eu/legal-content/EN-IT-FR/TXT/?from=EN&uri=CELEX%3A32019R1111>
- **Risk of divergences** – courts of other Member States
 - Parties
 - CURIA –Search form
 - <https://curia.europa.eu/juris/recherche.jsf?language=en#>
 - Network of Court coordinators



Thank you for your attention!

beatrice.ramascanu@
gmail.com