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How Boundaries Have Shifted

On Jurisdiction and Admissibility in the Preliminary Ruling Procedure[1]

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Abstract

Communication within the preliminary reference procedure is limited by boundaries, seeing that the CJEU, like any court, is bound by the concepts of jurisdiction and admissibility. Non-jurisdiction and inadmissibility lead to the non-answering of questions. Over the years the CJEU has taken different approaches to these concepts. Furthermore, the degree of 'assessment-intensity' on the two concepts has changed. Therefore, boundaries have shifted. This shift, however, comes with a responsibility for both the CJEU and the national referring courts to communicate clearly within the procedure. For the CJEU this relates to a unified approach by making a clear distinction between the concepts of jurisdiction and admissibility in its judgments and orders including in the operative part. This would serve the purpose of legal predictability. For the national courts this shift comes with the responsibility to provide enough information for the CJEU, so that an informed assessment on jurisdiction and admissibility can be made.

1 Introduction

As lawyers of EU law, we are all familiar with the preliminary reference procedure. Therefore, I do not need to tell lawyers specialised in EU law that that procedure is a procedure of (judicial) cooperation between courts, tribunals and judges at the national and European level. That cooperation aims to ensure that Union law is applied in a unified manner.[2] In other words, judicial cooperation, aiming at achieving uniform application and therefore judicial coherence, travels in the preliminary reference procedure vehicle.

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1 All views expressed herein are strictly personal.

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2 Case 16/65, *Schwarze* [1965] ECR 00877.

The key element of the preliminary reference procedure is communication.[3] And, just as in real life, communication within the preliminary reference procedure presents various challenges. On the one hand, national courts are challenged with asking a 'good' preliminary question in a particular case, whilst, on the other hand, the CJEU is challenged with providing an answer to the particular question referred bearing in mind that its response should fit well in other Member States each with their own distinct legal order.[4]

That being said, communication within the preliminary reference procedure is limited by boundaries. As any court, the CJEU must deal with the concepts of jurisdiction and admissibility. *Non*-jurisdiction and *in*admissibility lead to the *non*-answering of questions. This article seeks to explore these boundaries via an analysis of the concepts of jurisdiction and admissibility.

With the principal premise set out, this article aims to uncover the development of and the different approaches that the CJEU has taken when faced with these two concepts. As a starting point, we can already note that the different approaches employed by the Court have led to shift in the boundaries of communication. By this, I refer to the degree of 'assessment-intensity' adopted by the Court when it comes to jurisdiction and admissibility: the more intense the assessment of jurisdiction and admissibility, the more likely the CJEU will leave questions unanswered. That degree of assessment-intensity has changed over time resulting in the shift to which I refer.

Additionally, I modestly aim to introduce a stricter distinction between the two concepts of jurisdiction and admissibility. The CJEU, as we will see, uses those concepts interchangeably in the operative part of its orders and judgments and, occasionally, it simply states that the preliminary questions do not need answering.[5] In doing so, the CJEU refrains from making a strict distinction

3 S. Prechal, 'Communication within the Preliminary Rulings Procedure: Responsibility of the National Courts', *MJ 4* (2014), p. 754.

4 Arjen Meij, 'The Rules of the Game Party Autonomy in the EU Courts', in: J-H. Reestman c.s. (eds), *De regels en het spel, Opstellen over Recht, Filosofie, Literatuur en Geschiedenis aangeboden aan Tom Eijsbouts* (Den Haag: T.M.C. Asser press 2011), p. 261-273: The Court's rulings usually stay as close as possible to the facts provided by the national court, but they simultaneously use abstract wording referring more generally to circumstances such as those at stake in the case at hand.

5 This doesn't include not answering a preliminary question in the situation that the answer to that question is not necessary in light of the answer given on a previous question. In such cases the Court will simply state that in light of the answer given, answering the following question is not necessary. For an example: joined Cases C-307/00 to C-311/00, *Oliehandel Koeweit and Others* [2003] ECR I-01821.

between jurisdiction and admissibility.[6] So why are the concepts of jurisdiction and admissibility important? And why should a stricter distinction be made between the two, seeing that the result is, in any event, that preliminary questions are left unanswered?

Jurisdiction and admissibility are two different concepts as can be inferred from Article 53, paragraph 2 of the Rules of Procedure of the Court. Jurisdiction relates to the authority to make a certain kind of decision.[7] In my opinion, for the CJEU it means the authority to give an answer to a question from a certain entity (*rationae personae*), in a certain field of law (*rationae materiae*), which is applicable at a specific time (*rationae temporis*). Although the CJEU needs the facts of a referred case to establish its jurisdiction, once it has established a lack of jurisdiction, it cannot delve into the merits of the reference. Therefore, I see jurisdiction as an absolute boundary.[8] If the CJEU does have jurisdiction though, it can proceed to examine the merits of the reference and, as a result, assess whether the preliminary reference meets, for instance, certain procedural requirements. Those requirements can be categorized as criteria for admissibility.[9] And if those criteria aren't met, the national court, in given circumstances, can refer again whilst 'correcting its mistakes' in such a manner that the CJEU can give a ruling. A lack of jurisdiction cannot be 'corrected' in the same way.[10]

In short, a clear distinction between jurisdiction and admissibility (in the operative part of judgments and orders) contributes to clear communication towards the national court and as a result contributes to legal predictability.

In part 2 of this contribution the concept of jurisdiction will be addressed. Part 3 proceeds to examine the concept of admissibility. In both parts, the developments in jurisprudence will be addressed. A suggestion aimed at delineating a stricter distinction between jurisdiction and admissibility will be developed as well. Part 4 will outline conclusions and recommendations.

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6 D. Anderson, 'The admissibility of preliminary references' (1994) 14 (1) *YEL*, p. 181; R. Barents, *EU-Procesrecht* (Deventer 2010), p. 395; Opinion in Case C-497/12, *Gullotta en Farmacia di Gullotta Davide & C.* not yet reported, paragraph 15.

7 Torben Spaak, 'Explicating the Concept of Legal Competence', Concepts in the Law, 2008. Available at SSRN: ssrn.com/abstract=1014402, p. 1.

8 See also: V. Heiskanen, 'Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration', *ICSID Review* (2013), p. 3-6.

9 K. Sevinga, 'Bevoegdheid van het Hof van Justitie: de ene interne situatie is de andere niet', *NTER* juli 2014, nr. 6, p. 200; Opinion in Case C-497/12, *Gullotta and Farmacia di Gullotta Davide & C.* not yet reported, paragraph 22.

10 Opinion in Case C-497/12, *Gullotta and Farmacia di Gullotta Davide & C.* not yet reported, paragraph 22.

2 Limits in Answering Preliminary Questions: Jurisdiction

2.1 Jurisdiction of the CJEU

Every court can determine its own competence or jurisdiction. This is no different for the CJEU.[11] To have competence is to have the possibility by performing a special kind of act, to change legal positions.[12] Strictly speaking, the CJEU cannot change legal positions whilst answering preliminary questions from a referring national court, only the latter can. However, the referring national court is obliged to take the answers of the CJEU on the preliminary questions into account when it gives a judgment in the pending case.[13]

The jurisdiction of the CJEU is enshrined in the Treaties. The preliminary reference procedure as we know it today, was first enshrined in the Treaty establishing the European Economic Community (EEC-Treaty). Article 164[14] of the EEC-Treaty provided that the Court shall ensure that in the interpretation and application of the Treaty the law is observed. In Article 177 of the EEC-Treaty the jurisdiction of the CJEU was specified. Articles 164 and 177 of the EEC-Treaty, in essence, haven't changed as a result of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Article 164 of the EEC-Treaty is now Article 19 of the Treaty on European Union (TEU) and Article 177 of the EEC-treaty is now Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Article 267 TFEU now holds the basis of the preliminary ruling procedure. In that provision the conditions for the procedure are set out. Two of those conditions relate, in my opinion, to the jurisdiction of the CJEU.[15] The jurisdiction of the CJEU depends on 1) the *actor* making the referral and 2) the *subject matter* of the reference. The other conditions in Article 267 TFEU relate, in my opinion, to admissibility which we will expand upon in part 3.

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11 Catherine Barnard & Eleanor Sharpston, 'The Changing Face of Article 177 References', *CML Rev.* 1997, p. 1123 en 1157; Christine Gray, 'Advisory opinions and the European Court of Justice', *ELR* 1983, p. 29.

12 Spaak 2008, p. 7; Gerard Conway, 'Conflicts of Competence Norms in EU law and the legal Reasoning of the ECJ', *German Law Journal*, Vol. 11 No. 09, p. 973.

13 Case 29/68, *Milch-, Fett- und Eierkontor v. Hauptzollamt Saarbrücken* [1968] ECR 00207; Case 52/76 *Benedetti v. Munari* [1977] ECR 00163; Case 69/85, *Wünsche v. Germany* [1986] ECR 00947; | Case C-446/98, *Fazenda Pública* [2000] ECR I-11435.

14 With the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Article 164 of the EEC-Treaty became Article 220 of the EC-Treaty.

15 See in that respect Case C-482/10, *Cicala* [2011] ECR I-14139, point 13.

2.1.1 The Actor Making the Reference

According to Article 267 TFEU, only a court or a tribunal of a Member State has jurisdiction to refer questions to the CJEU. Therefore, the CJEU doesn't have jurisdiction to answer questions if the referring actor is not a court or tribunal within the meaning of Article 267. The categorisation of an actor as a 'court or tribunal of a Member State' is governed by Union law.[16] This means that an actor can be a court or tribunal according to national law, but this does not necessarily mean that that same actor is a court or tribunal within the meaning of Article 267 TFEU. Since Union law does not define 'court' or 'tribunal', it has been left to the CJEU to determine whether the referring actor satisfies this condition. Regarding this question, the CJEU takes into account a number of non-exhaustive (well-known) factors. It uses those factors as a guideline to establish whether an actor is a court or tribunal. The CJEU takes into account 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.[17] Some factors, like independency, weigh more heavily than other factors, like the *inter partes* condition.[18]

In most cases, the referring actor is a traditional court or tribunal and the CJEU has no trouble establishing jurisdiction. Furthermore, it follows from case law that administrative bodies exercising functions of an administrative nature[19], bodies with an advisory task and audit offices are not courts or tribunals within the meaning of Article 267 TFEU.[20]

Occasionally, however, the CJEU is confronted with actors that are not traditional courts or tribunals, but which nonetheless do have some characteristics of such a court or tribunal. In that respect, a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU when it is performing judicial functions, but, when exercising other functions, of an administrative nature for example, it cannot be recognized as such.[21] In a more recent judgment, the CJEU found the Bulgarian *Komisia za zashtita ot diskriminatsia*, a body re-

16 Case 54/96, *Dorsch Consult* [1997] ECR I-04961, point 23; Case C-17/00, *De Coster* [2001] ECR I-09445, point 10; Case C-203/14, *Consorci Sanitari del Maresme* not yet reported, point 17.

17 Although the CJEU applied these factors in earlier cases (e.g. Case 61/65, *Vaassen* [1966] ECR 00261; Case 14/86, *Pretore di Salò v. X* [1987] ECR 02545) it listed those factors for the first time in Case 54/96, *Dorsch Consult* [1997] ECR I-04961, point 23; for a recent judgment see Case C-203/14, *Consorci Sanitari del Maresme* not yet published, point 17.

18 Barents 2010, p. 354-355.

19 Case C-192/98, *ANAS* [1999] ECR I-08583, point 22.

20 Barents 2010, p. 354-355.

21 Case C-394/11, *Belov*, point 40.

sponsible for promoting equal treatment referred to in Article 13 of Directive 2000/43, not to be a court or tribunal within the meaning of Article 267 TFEU because its decision at the end of proceedings is similar in substance to an administrative decision and does not have a judicial nature in the meaning of Article 267 TFEU.[22] The CJEU did conclude the Austrian *Schienen-Control Kommission* to be a 'court or tribunal' within the meaning of Article 267 TFEU since it met all the requirements. According to the CJEU, that body is established as a permanent body and it is established by law. Moreover, it has compulsory jurisdiction, it applies rules of law, it is independent and the procedure before it is *inter partes*. Furthermore the *Schienen-Control Kommission* is governed by the ordinary law of administrative procedure, and its decisions cannot be set aside by administrative decisions, but may be the subject of proceedings before the *Verwaltungsgerichtshof*.[23]

Regarding conventional arbitration tribunals, the CJEU has stated that such a tribunal is not a court or tribunal of a Member State within the meaning of Article 267 TFEU where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator. The CJEU makes an exception where the arbitration tribunal is established by law, its decisions are binding on the parties and its jurisdiction does not depend on their agreement.[24]

2.1.2 Subject Matter

As noted above, jurisdiction of the CJEU relates to the authority of the CJEU to give an answer to a question, not only from a certain entity, but also relating to a certain field of law applicable at a specific time. For example: if a question of the referring court relates to the validity of provisions in the Treaties, the CJEU has no authority to give an answer, because Article 267 TFEU only gives it authority to interpret the provisions in the Treaties. The same goes for preliminary questions related to Article 276 TFEU.[25] Article 276 TFEU provides that the CJEU shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the

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22 *Ibid.*
23 Case C-136/11, *Westbahn Management*.
24 Case C-555/13, *Merck Canada* not yet reported.
25 M. Broberg & N. Fenger, *Preliminary references to the European Court of Justice* (Oxford 2014), p. 151.

safeguarding of internal security. In other words: the CJEU has no authority whatsoever in that respect. The same goes for jurisdiction relating to applicability of Union law at a certain time. For example: the CJEU has jurisdiction to interpret Union law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union.[26]

But most importantly, it follows from Article 267 TFEU that the CJEU can give a preliminary ruling concerning the interpretation and validity of Union law. The field of law on which the CJEU has judicial jurisdiction is therefore confined to *Union* law only. As a main rule, Article 267 applies to all EU measures falling within the scope of the TEU and the TFEU.[27] That means the CJEU has neither authority to give a ruling concerning the validity and interpretation of domestic law nor authority to give a ruling concerning the validity and interpretation of international law.[28]

In the very early judgments, the CJEU made clear that 'by Article 177 the Court, when giving a preliminary ruling, is entitled only to pronounce on the interpretation of the Treaty and of acts of the institutions of the Community, but can neither apply them to a particular case nor give judgment by means of this Article on the propriety of a measure of a domestic character.'[29] In its famous *Costa-ENEL* judgment,[30] the CJEU stated that 'Article 177 is based upon a clear separation of functions between national courts and the Court of Justice, it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.'

Nevertheless, in those early years, the Court shied away from ruling that it had no jurisdiction to give a ruling. In fact, it gave the impression that it was delighted to receive preliminary references from national courts.[31] It dealt with jurisdiction issues by extracting from the elements of the case those questions of interpretation or validity which in fact fell within its jurisdiction. According to the Court, this is justified by the need to reach a serviceable interpretation

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26 Case C-321/97, *Andersson and Wåkerås-Andersson* [1999] ECR I-03551, point 31; Case C-302/04, *Ynos* [2006] ECR I-00371, point 36; Case C-168/06, *Ceramika Paradyż* [2007] ECR I-00029, point 22; Case C-254/14, *VG Vodoopskrba* not yet reported, point 10.

27 Broberg & Fenger 2014, p. 109.

28 M. Broberg, 'The Preliminary Reference Procedure and Questions of International and National Law', *YEL* (2009) 28 (1), p. 362.

29 Case 100/63, *Kalsbeek* [1964] 00565; Case 20/64, *S.A.R.L. Albatros* [1965] ECR 00029; Case 24/64 *Dingemans* [1964] ECR 00647.

30 Case 6/64, *Costa-v. E.N.E.L* [1964] ECR 00585.

31 Barnard & Sharpston 1997, p. 117; Michael O' Neill, 'Article 177 and Limits to the Right to Refer: an End to the Confusion?' *EPL* 1996, Volume 2, Issue 3, p. 379; Opinion in Case 497/12, *Gullotta en Farmacia di Gullotta Davide & C.* not yet reported, paragraph 3.

of the provisions.[32] In other words, the CJEU reformulated questions in a way that it could answer those of the referring court while remaining within its jurisdiction. Thus the assessment of jurisdiction was not very intense. It wasn't until the judgment in *Adlerblum*[33], a judgment given on 17th of December 1975, that the Court ruled it had no jurisdiction to give an answer to the questions referred to it by the national court. That question concerned the classification under French social security legislation of a benefit awarded under German Compensation Law. According to the CJEU that question pertains to national law alone and thus does not come within its jurisdiction.

So it is clear that, as far as *jurisdiction* goes, the CJEU doesn't interpret domestic law and that it doesn't apply Union law given that those two aspects are within the domain of the national court.[34] That comes down to the clear separation of functions between the national courts, on the one hand, and the CJEU, on the other, as stated in the *Costa-ENEL* judgment. As a result, the separation of functions between national courts and the CJEU does not permit the latter to take cognizance of the facts of the case or to find fault with the grounds for making the request for interpretation.[35] As we will see in the next paragraphs, the CJEU later on does permit itself to take cognizance of the facts of the case and to find fault with the grounds for making the request for interpretation.

2.2 Jurisdiction: Union Law and the Purely Internal Situation

Since Article 267 TFEU doesn't give the CJEU jurisdiction to decide on the validity of the laws of the Member States, nor does it give the CJEU jurisdiction to interpret the laws of the Member States,[36] it follows that the CJEU has no jurisdiction to answer questions in a case where the EU act in question does not apply directly to the main proceedings, for example, in purely internal situations.[37] In this regard, the question necessarily arises as to

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32 Case 56/65, *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 00235; Case 20/67, *Firma Kunstmühle Tivoli v. Hauptzollamt Würzburg* [1968] ECR 00199. Also: Barnard & Sharpston 1997, p. 1117.

33 Case 93/75, *Adlerblum v. Caisse nationale d'assurance vieillesse des travailleurs salariés* [1975] ECR 02147; Broberg & Fenger 2014, p. 138.

34 Broberg & Fenger 2014, p. 137.

35 The distinction between interpretation and application of Community law was seen as the dividing line between the respective functions of the Court of Justice and the national courts (Koen Lenaerts, 'Form and Substance of the Preliminary Rulings Procedure', in: D. Curtin & T. Heukels (eds), *Institutional Dynamics of European Integration, Essays in honour of Henry G. Schermers, Volume II* (Dordrecht: Martinus Nijhoff Publishers 1994), p. 356; Case 20/64, *S.A.R.L. Albatros* [1965] ECR 00029.

36 Broberg & Fenger 2014, p. 137.

37 E.g. Case C-111/12, *Ordine degli Ingegneri di Verona e Provincia and Others*, point 35; Broberg & Fenger 2014 p. 139.

how the CJEU handles the answering of questions in situations that are considered as 'purely internal situations'. A 'purely internal situation' is usually a situation governed by national law falling outside the field of application of EU law.[38] A purely internal situation can also relate to the Treaty-freedoms. In that respect a purely internal situation is a situation where the facts of the case relate to a situation pertaining to one Member State and therefore no 'cross-border element' can be established.[39] In this situation, the Court has consistently held that the Treaty freedoms do not apply in 'purely internal situations'.[40]

So how then does the CJEU handle the answering of questions in 'purely internal situations'? In that respect, I shall review some of the Court's case law with a view to exposing its willingness to answer these types of questions.

2.2.1 The Early Years: Jurisdiction

In one of the first judgments to consider a 'purely internal situation' – the *Saunders*-judgment[41] – the Court held that the reply to the referred question depended on the determination of the *scope* of Article 48 of the EEC-Treaty (free movement of workers) in conjunction, in particular, with the general principle expressed in Article 7 of the EEC-Treaty (non-discrimination). As to the scope of the provisions on freedom of movement for workers, the Court considered that those provisions could not be applied to situations that are *wholly internal* to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community Law. After concluding that Article 48 EEC-Treaty didn't apply in the situation of Saunders, the CJEU then gave an answer. In the operative part of the judgment the Court ruled that the situation of the main procedure was a wholly domestic situation,

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38 Enzo Cannizzaro, 'Producing 'reverse discrimination' through the exercise of EC competences', *YEL*, 1997 (1), p. 32.

39 Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234', *ELR* 2006, 31 (5), p. 690; E. Steyger, 'Vrij Verkeer en Mededinging: de Interne Situatie', *SEW* 2014, p. 66.

40 Ritter 2006, p. 690. In Case 115/78, *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 00399, the Court has found that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a member state. In relation to the freedom of goods, the Court has considered that the purpose of that provision is to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported goods. A difference of treatment as between goods, which is not capable of restricting imports or of prejudging the marketing of imported goods, does not fall within the prohibition contained in that Article (Case 355/85 *Driancourt v. Cognet* [1986] ECR 03231 and Case 98/86 *Ministère public v. Mathot* [1987] ECR 00809). See also the Opinion in joined Cases C-159/12 to 161/12, *Venturini*, paragraph 26.

41 Case 175/78, *The Queen v. Saunders* [1979] ECR 01129.

which fell outside the scope of the rules contained in the EEC-Treaty.[42] The Court did, however, *not* rule that it had no jurisdiction.

The same reasoning was followed in the *Moser*-judgment.[43] In that case though, the German government challenged the jurisdiction of the CJEU. The German government emphasized that Moser is a German national and has never worked or resided in a Member State other than the Federal Republic of Germany, thus his situation falls entirely outside the scope of Article 48 of the Treaty. In that respect, the CJEU stated 'that the circumstances relied upon by the German Government relate to the substance of the questions submitted by the national court. Consequently, whilst they may be relevant to an answer to those questions, they are not relevant in determining whether the Court has jurisdiction to rule on the request for a preliminary ruling.'

In conclusion: in those early judgments considering the 'purely internal situation', the CJEU related the question of whether EU law is applicable in the main proceeding to the scope of EU law. According to the CJEU in the *Moser*-judgment it has jurisdiction to give an interpretation on that scope. So in earlier judgments, if a situation fell outside the field of application of EU law, the CJEU in the operative part of its judgment would answer accordingly but it would not rule it had no jurisdiction.[44]

2.2.2 No Jurisdiction

As time passed, the CJEU saw the 'purely internal situation' in a different light, i.e. sometimes in the light of jurisdiction and sometimes in the light of admissibility. It started to relate the applicability of Union law to its jurisdiction. Therefore, one could say that the CJEU started assessing its jurisdiction more intensely.

In that respect, the judgment of the Court in *Annibaldi* is relevant.[45] Mr Annibaldi was refused permission to plant an orchard within the perimeters of a regional park. He brought an action against that refusal. He claimed that the Italian law was contrary to the provisions of the EC Treaty, in particular Articles 40 and 52 thereof, to the general principles of law, in particular those concerning property, carrying on business and equal treatment by the national

42 The Court applied the same reasoning in Case C-332/90, *Steen v. Deutsche Bundespost* [1992] ECR I-00341.
43 Case 180/83, *Moser v. Land Baden-Württemberg* [1984] ECR 02539.
44 See also Case C-299/95, *Kremzow v. Republik Österreich* [1997] ECR I-02629.
45 Case C-309/96, *Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-07493; Broberg 2009, p. 263.

authorities and to the Italian Constitution. The CJEU first examined whether the national legislation fell within the scope of Union law, in particular Article 40 EC Treaty. As the CJEU came to the conclusion that the national legislation in the case of Mr Annibaldi applied to a situation which does not fall within the scope of Union law (and therefore was a purely internal situation), it ruled in the operative part of the judgment it had no *jurisdiction*.[46]

The Court gave a similar reasoning in the *Omalet* judgment[47] as far as the free establishment of services is concerned. The Court stated, under the heading 'The court's jurisdiction', that the dispute in the main proceedings does not present any link to the situations envisaged by Article 49 EC Treaty, so that the provision does not apply and it doesn't have jurisdiction to answer the questions. However, as it came to that conclusion, in the operative part of the judgment, it ruled the reference for a preliminary ruling to be *inadmissible*.[48]

Another example is found in a more recent order[49] in the case *Paola*. In that order, the Court held that Directive 2004/80 provides for compensation only where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident. Because the situation at issue in the main proceedings didn't fall within the scope of Directive 2004/80, but within the scope of national law alone, the CJEU ruled in the operative part of the order it had no *jurisdiction* to answer the question put by the referring court.

2.2.3 Jurisdiction as per Question

In the abovementioned judgments, *Annibaldi* and *Omalet*, the referring courts asked two preliminary questions. The CJEU did not examine its jurisdiction one preliminary question at a time.

In recent judgments however, the CJEU sometimes examines jurisdiction one question at a time. In its judgment *Airport Shuttle Express*[50], the CJEU held it had no jurisdiction to answer a preliminary question on the interpretation of Article 49 TFEU (freedom of establishment), because that provision cannot be applied to activities which have no factor linking them with any of the situations

46 See also: Case C-302/06, *Koval'sky* [2007] ECR I-00011; Case C-361/07, *Polier* [2008] ECR I-00006.

47 Case C-245/09, *Omalet* [2010] ECR I-13771

48 In Case C-393/08, *Sbarigia* [2010] ECR I-06337, the Court ruled the reference for a preliminary ruling inadmissible, because the EU provisions in question weren't applicable in a context such as that of the main proceedings.

49 Case C-122/13, *Paola C*; see also Case C-246/14, *De Bellis and Others* not yet reported, in which the referring court asked a question concerning the interpretation of the principle of the protection of legitimate expectations in a purely internal situation.

50 Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express* not yet reported.

governed by EU law and which are confined in all relevant respects within a single Member State.

The referring court however also asked questions relating to Articles 101 and 102 TFEU. The CJEU ruled those questions to be inadmissible because the orders for reference did not provide the Court with the factual and legal information necessary for it to be able to determine the circumstances in which legislation such as that at issue in the main proceedings might fall within the scope of Articles 101 TFEU and 102 TFEU. In other words: the CJEU could not determine its jurisdiction for those two questions, because it didn't receive sufficient information from the referring court. In part 3 we will further elaborate on the admissibility of preliminary questions and the duty of the referring court to provide the Court with sufficient information.

As for the operative part of the judgment in *Airport Shuttle Express*, the CJEU ruled that it 'does not have jurisdiction to answer the requests [...] for a preliminary ruling [...] to the extent that those requests concern the interpretation of Article 49 TFEU. Those requests are inadmissible to the extent that they concern the interpretation of other provisions of EU law.'

In the recent order in the *Tudoran* case[51] the CJEU also examined jurisdiction per preliminary question. It answered the first preliminary question by ordering that the Directive in question did not apply to the dispute in the main proceedings. In that respect the Court did not order it had no jurisdiction as it did in the *Paola* case. Furthermore, the Court ordered it had no jurisdiction to answer the third question, because the referral didn't present any link to EU law. The fifth question was inadmissible because the order for reference didn't provide the necessary concrete information required to establish a link between Articles 49 and 56 TFEU and the national legislation applicable in the situation in the main proceedings, of which all relevant aspects are confined within a single Member State.

As can be concluded from the abovementioned case law, as far as the 'purely internal situation' is concerned, at this point a clear distinction between jurisdiction and admissibility in the operative part of judgments and orders is not made. Advocate-General Jääskinen has observed that the Court has adopted a variety of approaches in preliminary ruling cases whose scope is purely national.[52] He describes four situations: There is one series of decisions in which the Court has declared, by way of judgment, that the Treaty provisions invoked

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51 Case C-92/14, *Tudoran* not yet reported, see also: Case C-82/13, *Società cooperativa Madonna dei miracoli* and Case C-313/12, *Romeo*.

52 Opinion in Case C-393/08, *Sbarigia* [2010] ECR I-06337, paragraph 29-38.

cannot be applied to activities which are confined in all relevant respects within a single Member State[53] and the question whether that is the case depends on a determination of facts that is for the national court to make.[54] He noted that in a second series of decisions, it is declared, by way of order, that the relevant European Union law does not preclude the national legislation in question.[55] A third approach consists in noting that the national legislation in question is outside the scope of European Union law and that the subject matter of the dispute is not connected in any way with any of the situations contemplated by the provisions of the Treaties. In such cases, the Court has ruled, by way of order, that it clearly has no jurisdiction to answer the question referred.[56] Finally, in a fourth series of decisions, the Court undertakes a substantive examination of the provisions of European Union law of which an interpretation is sought, in so far as the national law at issue in the main proceedings would be applied in a cross-border situation, even if all elements of the case in the main proceedings are confined within a single Member State.[57]

Advocate-General Jääskinen suggested that the problem raised by the 'purely national' nature of a situation would be best resolved by addressing its substance, in the context of the interpretation of the provisions at issue, rather than as a question of the Court's jurisdiction, examined in terms of the admissibility of the questions referred.[58]

2.2.4 Towards a More Unified Approach

Over the years, the CJEU assessed its jurisdiction more intensely by relating it to the applicability of Union law. A boundary shifted. By doing so, a clear distinction between jurisdiction and admissibility isn't made. Such a distinction in the operative part of a judgment or order however contributes to the communication towards the national court. In that respect I would suggest that the CJEU should only rule that it has no jurisdiction when 1) the actor is not a court or tribunal of a Member State in the meaning of Article 267 TFEU or 2) the CJEU has no authority on the subject matter e.g. because the referral doesn't concern EU law or jurisdiction of the CJEU is excluded by the Treaties or Union law.

53 Paragraph 30; for example, Case C-60/91, *Batista Morais* [1992] ECR I-02085.
54 Paragraph 30; for example, Case C-332/90, *Steen v. Deutsche Bundespost* [1992] ECR I-00341.
55 Paragraph 31; for example, Case C-104/08, *Kurt* [2008] ECR I-00097.
56 Paragraph 32; for example, Case C-302/06, *Koval'sky* [2007] ECR I-00011.
57 Paragraph 33; for example, Case C-6/01, *Anomar and Others* [2003] ECR I-08621.
58 Opinion in Case C-393/08, *Sbarigia* [2010] ECR I-06337, paragraph 34.

Concerning the subject matter of the referral, the CJEU is guided by the principle that its answers should be as useful as possible for the national court to give a judgment in the pending case.[59] A useful answer can only be given when the piece of Union law is applicable in the context of the main proceedings. Although the CJEU cannot apply the provisions that are referred for interpretation to the facts of the main proceedings, part of the interpretation of Union law is determining the scope of Union law (acts of the institutions and the provisions in the Treaties) and thus if the referred provisions are applicable in the situation at hand.[60] So when the CJEU has to assess the applicability of Union law, and it can do so on its own motion[61], it has the jurisdiction to do so. If the conclusion is that the referred provisions do not apply in the context of the main proceedings and, as a result, the main proceedings are governed by national (or international) law, the CJEU has no jurisdiction to answer the questions. For the referring court it is then clear that it need not concern itself with EU law in the pending case. This goes for the purely internal situation governed by national law falling outside the field of application of EU law, which was the case in *Paola* judgment, as for the purely internal situation relating to the Treaty-freedoms, which was the case in the *Omalet* judgment. This also would be in accordance with settled case law of the CJEU stipulating that it has no jurisdiction to examine the compatibility of national legislation falling outside the scope of EU law with the Charter of Fundamental Rights.[62]

Because an order for a reference can hold several preliminary questions relating to different provisions of Union law, the situation can arise according to which the CJEU has jurisdiction to answer certain questions of that order, but at the same time it doesn't have jurisdiction to answer other questions of that order or it doesn't have enough information to examine its jurisdiction. That

59 R. Barents, 'Rechter en Partijen in het EU-Procesrecht', *SEW* 2010, 4; Case C-236/98 *Jämställdhetsombudsmannen* [2000] ECR I-02189; Case C-162/06, *International Mail Spain* [2007] ECR I-09911.

60 Broberg 2009, p. 262-263, Niamh Nic Shuibhne, 'Free movement of persons and the wholly internal rule: time to move on?', *CML Rev.* 2002, p. 731.

61 Case C-313/12, *Romeo*, point 20.

62 Case C-206/13, *Siragusa* not yet reported. In Case C-457/09, *Chartry* [2011] ECR I-00819, the CJEU considered that: '[a]lthough the right to an effective legal remedy, guaranteed by Article 6(1) of the ECHR, referred to by the national court, constitutes a general principle of Union law and was reaffirmed by Article 47 of the Charter, the fact remains that the order for reference does not contain any specific information enabling the subject-matter of the dispute in the main proceedings to be considered to be connected with EU law. The dispute in the main proceedings, between a Belgian national and the Belgian State concerning taxation of activities carried out within the territory of that Member State, is not connected in any way with any of the situations contemplated by the provisions of the EC Treaty on the free movement of persons, of services, or of capital. Moreover, that dispute does not concern the application of national measures by which that Member State implements EU law.' The CJEU ruled in the operative part of the order that it had no jurisdiction.

was the situation in the *Airport Shuttle Express* judgment. That should not pose a problem as long as a clear distinction is made between jurisdiction and admissibility per question in the operative part of the judgment. The operative part of the judgment should be clear as to which question is left unanswered due to lack of jurisdiction and which question is left unanswered due to procedural defects. As a result, the referring court can be made aware which questions could potentially be referred in the future by repairing procedural defects.[63]

2.3 Jurisdiction: Union Law and the Purely Internal Situation – the Exceptions

As far as jurisdiction goes, we established in the foregoing paragraph that the CJEU came to relate its jurisdiction to the applicability of Union law and, as a result, started to assess its jurisdiction more intensely by leaving questions unanswered.

However, increasingly the CJEU has been confronted with the situation that EU law is not applicable in the main proceedings on its own motion, but it is applicable in the main proceedings as a result of the law of a Member State which activates EU law. This situation can be the result of 'spontaneous harmonisation', modelling of national legislation upon EU law provisions or application by analogy.[64]

Since EU law does not apply directly and the situation therefore falls outside the scope of Union law, only domestic law applies. Additionally, as stated above, the CJEU is not authorised to give an interpretation of domestic law. Thus, one could say that the CJEU does not have jurisdiction to answer the questions in

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63 In this respect, the order in Case C-82/13, *Società cooperativa Madonna dei miracoli*, is worth mentioning. In the operative part of the order the CJEU ruled 1) it manifestly lacks jurisdiction to answer the questions referred by the Consiglio di Stato (Italy) and 2) as to the remainder, the request for a preliminary ruling is manifestly inadmissible. The operative part isn't clear as to what part of the request for a preliminary ruling is inadmissible.

64 Saulius Lukas Kaleda, 'Extension of the Preliminary Rulings Procedure Outside the Scope of Community law: "The Dzodzi Line of Cases"', 2000, *European Integration Online Papers*, Vol. 4, No 11, at eiop.or.at/eiop/texte/2000-011a.htm, p. 2; Silvere Lefevre, 'The interpretation of Community Law by the Court of Justice in Areas of National Competence', *ELR* 2004 29 (4), p. 502; Broberg & Fenger 2014, p. 139 ff. Broberg & Fenger distinguish four kinds of situations: 1) cases where a question of procedural or of jurisdiction in the main proceedings requires the classification of a EU act; 2) cases where a national law or private contracts state that EU law shall apply, even though the circumstances do not fall within the scope of application of EU law; 3) cases where, other than in the context of an obligation under EU law to implement or enforce an EU act in national law, a Member State has chosen to model purely national legislation upon EU law provisions and 4) cases concerning the Treaty-freedoms where according to the law of a Member State, the protection of the citizens may not be weaker in situations which are not governed by EU law than in situations which are so governed.

some of aforementioned situations.[65] However, as will become clear in the next paragraph, the CJEU has found itself bound to answer questions in cases where the domestic law provision activates EU law. Therefore, in that respect, it could be said that the CJEU assesses its jurisdiction less intensely by encroaching on a field normally reserved to national jurisdiction. Consequently, a boundary has shifted.

In consideration of this, we will proceed to address another development, namely the way the CJEU interprets the existence, or not as the case may be, of a cross-border element concerning the Treaty freedoms.

2.3.1 The CJEU Encroaching Fields of National Jurisdiction

The very first case in which the CJEU encroached on a field of national jurisdiction is the *Thomasdünger* case.[66] This case concerned the importation of goods from France to Germany. The situation was clearly outside the scope of the Common Customs Tariff, since customs duties were no longer levied within the common market. However, the EU rules were binding by force of the national provisions setting rates for charges.[67] The CJEU answered the preliminary questions stating that 'it is sufficient to point out that, except in exceptional cases in which it is clear that the provision of Community law which the Court is asked to interpret does not apply to the facts of the dispute in the main proceedings, the Court leaves it to the national court to determine in the light of the facts of each case whether the preliminary ruling is necessary in order to decide the dispute pending before it.'

However, the second, more renowned case, namely that of *Dzodzi*,[68] in which the CJEU was confronted with a situation in which EU law was 'activated' by national law, is in fact considered as the starting point of this approach by the CJEU.[69] In that case, the CJEU gave a more elaborate justification on the interpretation of EU law in a 'purely internal situation'.[70] The case dealt with 'reverse discrimination'. Reverse discrimination refers to situations in which nationals or products of a Member States are disadvantaged because they are subject to a national regulatory measure while nationals or citizens that can

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65 Ritter 2006, p. 692.
66 Case 166/84, *Thomasdünger v. Oberfinanzdirektion Frankfurt am Main* [1985] ECR 03001; Lefevre 2004, p. 503.
67 Kaleda 2000, Annex 1.
68 Joined Cases C-297/88 and C-197/89, *Dzodzi v. Belgian State* [1990] ECR I-03763.
69 Lefevre 2004, p. 503; Lord Mance, 'The interface between national and European law', *ELR* 2013, 38(4), p. 439.
70 Lefevre 2004, p. 503.

show a link to EU law, even though they are from the same Member State, and nationals or products from other Member States, are protected from that national measure by virtue of EU law.[71]

Mrs Dzodzi was a Togolese married to a Belgian national. After the death of her husband, she sought residence in Belgium. The CJEU established that the situation was purely internal. The national court however referred to a Belgian law, which was introduced specifically to avoid the discrimination of its own nationals who cannot establish a factor connecting their situation to Union law. Thus, Belgian law activated EU law in order to reverse the reverse discrimination.

The CJEU found that 'it does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that Article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State.' According to the CJEU it is 'manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.'[72]

Further examples could be provided here.[73] However it is more pertinent, considering the scope of this contribution, to delineate the mechanism applied in every case. That mechanism can be summed up as follows: in the case that national law, whether it is the principle to avoid reverse discrimination, a piece of national legislation[74], or an agreement under contract law[75], 'activates' EU law in a 'purely internal situation' the CJEU will answer questions on the interpretation of the EU provisions.

As has already been mentioned, the CJEU has accepted jurisdiction in situations that lack a factual cross-border element. Probably the first example of such a case is the *Oosthoek* judgment. Although the facts giving rise to the case related to a single Member State, the CJEU pointed out that certain cross-

71 Ritter 2006, p. 691; Cannizzaro 1997, p. 29; Shuibhne 2002, p. 731; Broberg & Fenger 2014, p. 149.
72 Points 36 ff.
73 For a more recent example: Joined Cases C-570/07 and 571/07, *Blanco Pérez and Chao Gómez* [2010] ECR I-04629, point 39.
74 Case C-28/95, *Leur-Bloem v. Inspecteur der Belastingdienst* [1997] ECR I-04161 and Joined Cases C-297/88 and C-197/89, *Dzodzi v. Belgian State* [1990] I-03763.
75 Case C-88/91, *Federconsorzi v. AIMA* [1992] I-04035, Broberg & Fenger 2014, p. 143.

border effects of the challenged domestic legislation could not be ruled out.[76] In such cases where there is no factual cross-border element, but a potential cross-border element, the CJEU does not consider the situation to be a purely internal one falling outside its jurisdiction. A more recent example is the *Libert* judgment.[77] That case dealt with Flemish legislation that makes a transfer of immovable property, in certain communes, subject to verification of the existence of a 'sufficient connection' between the prospective buyer or tenant and those communes. The Flemish government claimed that the provisions of EU law relied upon are not applicable, because the actions in the main proceedings, which concern either Belgian nationals resident in Belgium or undertakings established under Belgian law, are confined within one single Member State. The CJEU however dismissed that claim and considered that it is by no means inconceivable that individuals or undertakings established in Member States other than the Kingdom of Belgium have been or are interested in purchasing or leasing immovable property. In other words: a potential cross-border element exists and the CJEU will answer referred questions.

2.3.2 Assessing the Boundaries of Jurisdiction

In cases where the CJEU answers preliminary questions in situations in which EU law is not directly applicable, it could be said a boundary has shifted. The CJEU assesses its jurisdiction less strictly. The CJEU could answer the national court in outlining that, in the situation of the main proceedings, EU law is not applicable directly and therefore it has no jurisdiction. However, the CJEU is guided by the principle that its answers should be as useful as possible so that the national court can issue a judgment in the pending case.[78] A useful answer can only be given when the piece of Union law in question is applicable in the context of the main proceedings. In the aforementioned case law, Union law is applicable albeit as a result of domestic law. Thus an answer of the CJEU is useful for the referring court. Furthermore, as the CJEU stated in its *Dzodzi* judgment that an answer to questions in a situation where Union law is (indirectly) applicable contributes to a uniform interpretation of EU law, thereby fulfilling the aim of the preliminary reference procedure. Although controversy exists on the case law concerning answering questions

76 Case 286/81, *Oosthoek* [1982] ECR 04575; C-Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94, *Pistre and Others* [1997] ECR I-02343, point 45; Opinion in joined Cases C-159/12 to 161/12, *Venturini*, paragraph 33.

77 Joined Cases C-197/11 and C-203/11, *Libert and Others*.

78 R. Barents, 'Rechter en partijen in het EU-procesrecht', *SEW* 2010, 4.

in areas of national competence,[79] in my opinion, answering questions in those situations is justified.

However, with this shift in boundary comes a greater responsibility for the CJEU in assessing its jurisdiction in these 'exceptional' (purely internal) situations. In light of communication between the Court and the national referring court, and as Advocate General Wahl has pointed out, questions relating to a 'purely internal situation' should only be answered under strict conditions. In other words, jurisdiction should be assumed by the Court only in situations in which it is absolutely clear that Union law is actually 'activated' by domestic law.[80]

In the case of *Guimont* the CJEU was asked to answer preliminary questions in a 'purely internal situation' concerning the freedom of goods.[81] The CJEU found that a response was necessary because 'it is not obvious that the interpretation of Community law requested is not necessary for the national court. Such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those, which a producer of another Member State would derive from Community law in the same situation.'[82] It seems that the CJEU wasn't sure if the national law required a reversion of reverse discrimination (as for example the Belgian law did in the *Dzodzi* case). Therefore, it cannot be ruled out that the CJEU answered a question in a hypothetical (theoretical) situation[83] or even in a purely internal situation in which the CJEU lacked jurisdiction.

In its judgment of the 21st of December 2011 in the case of Ms *Cicala,* the CJEU however set strict conditions. It found that 'it cannot be considered [...] that the renvoi to EU law as a means of regulating purely internal situations is, in this case, unconditional so that the provisions referred to by those questions are applicable without limitation to the situation at issue in the main proceed-

79 Broberg 2009, p. 373; Kaleda 2000, p. 16; Opinion in in joined Cases C-159/12 to 161/12, *Venturini*, paragraph 19.

80 Opinion in joined Cases C-159/12 to 161/12, *Venturini*, paragraph 50-51.

81 Case C-448/98, *Guimont* [2000] ECR I-10663.

82 This ruling doesn't seem consistent with an earlier judgment in Case C-346/93, *Kleinwort Benson v. City of Glasgow District Council* [1995] ECR I-00615, in which the CJEU found that, in order for it to give a ruling, the reference by national law to the Community provisions must be 'direct and unconditional'; and the application of EU law provision must be 'absolutely and unconditionally' binding on the national court. See also Ritter 2006, p. 694; Broberg & Fenger 2014, p. 145.

83 Ritter 2006, p. 696.

ings.'[84] As Advocate General Wahl stated, it is for the CJEU to uphold these strict conditions and for the referring court to convince the CJEU that domestic law 'activates' EU law unconditionally and without limitation.[85] In this respect, the referring judge has to provide all the pertinent information and evidence in such a way that the CJEU can assess its jurisdiction. Therefore, the importance of Article 94 of the Rules of procedure must be emphasized.[86]

The same goes for situations relating to the Treaty freedoms that lack a factual cross-border element. With a 'broader' interpretation of the purely internal situation, by including situations which relate to national legislation with a *potential* cross-border element, comes a greater responsibility in setting clear boundaries on jurisdiction. Is it really enough to establish that a cross-border effect cannot be ruled out, as the CJEU essentially found in the *Libert* judgment?[87] That would mean a significant extension of the jurisdiction of the CJEU, because how can anyone ever rule out that national legislation does not potentially have a cross-border effect?[88] Since however the CJEU does rule it that has no jurisdiction in some cases that lack a factual cross-border element, there apparently are limits to the potentiality of a cross-border element. For instance, in the *Crono Service* case, the CJEU found that as the disputes before the referring court are of a local nature and all the facts of those cases are confined within a single Member State, it cannot be presumed that the legislation at issue in the main proceedings will have any cross-border impact. There is nothing in the orders for reference to suggest that those disputes are of cross-border interest or that they are linked with any of the situations governed by EU law.[89]

For national courts it has to be predictable to a certain extent, which situations are perceived as internal and in which the CJEU thus lacks jurisdiction. In other words: I think it would benefit legal predictability as well as national courts when deciding whether or not to refer, to know how 'certain' a potential cross-border effect of national legislation has to be and if the CJEU would set some conditions as to the certainty of the potentiality. Predictability in this respect would also benefit the CJEU, because national courts will not refer if they know, with a certain amount of certainty, that a particular situation is in fact perceived as an internal situation. Just as the CJEU has significant responsibility in this respect, so does the referring judge. In order for the CJEU to assess

84 Case C-482/10, *Cicala* [2011] ECR I-14139, point 19. More recent: Case C-313/12, *Romeo*.
85 Opinion in Case C-497/12, *Gullotta and Farmacia di Gullotta Davide & C.* not yet reported, paragraph 43.
86 Opinion in joined Cases C-159/12 to 161/12, *Venturini*, paragraph 50-52 and 58.
87 See also Case C-159/12 to 161/12, *Venturini*, point 26.
88 Sevinga 2014, p. 202.
89 Joined Cases C-419/12 and C-420/12, *Crono Service and Others* not yet reported, point 37.

the potentiality of a cross-border effect of national legislation, the referring judge should explain with precision the scope of applicability of that national legislation.

3 Limits in Answering Preliminary Questions: Admissibility

3.1 Introduction

As jurisdiction in the preliminary rulings procedure in my opinion only relates to the referring actor and the subject matter, the other criteria set in Article 267 TFEU would thus relate to admissibility. As we will see in the next paragraph, as far as the criterion of necessity goes, the CJEU however, assesses that criterion in light of its jurisdiction but also in light of admissibility. Additionally, sometimes the CJEU states in the operative part of judgments and orders that an answer to the questions is not necessary. After the Court has determined it has jurisdiction to give a preliminary ruling as far as the actor and the subject matter are concerned, the CJEU can go into the merits of the preliminary reference and by doing so, assess whether the reference meets the other criteria in Article 267 TFEU. To that extent, Article 267 TFEU addresses the referring national court. Those criteria will be the subject of paragraph 3.2. As will become clear, the CJEU has also developed admissibility criteria on the content of the referral in its case law.

3.2 Necessity

The requirements derived from Article 267 TFEU under which a national court can make a reference are that 1) a case needs to be pending before the referring court and 2) a decision on the preliminary question is necessary to enable the referring court to give judgment in that pending case.[90] Essentially both criteria relate to necessity. If a case is no longer pending before the referring court, a decision on the referred question is, as a result, no longer necessary. In its case law over the years, the CJEU further developed the requirement of necessity.

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90 Case C-338/85, *Pardini v. Ministero del commercio con l'estero* [1988] ECR 02041. In that judgment the CJEU found that from both the wording and the scheme of Article 177 it follows that only a national court or tribunal which considers that the preliminary ruling requested 'is necessary to enable it to give judgment' may exercise the right to bring a matter before the Court. That right is therefore limited to a court or tribunal which considers that a case pending before it raises questions of Community law requiring a decision on its part.

As mentioned above, the requirement of necessity relates, at least in my modest opinion, rather to admissibility than to jurisdiction. Taking into account that the national referring court is the one to establish the grounds and purpose of the request for a preliminary ruling[91] and therefore is the one to assess the necessity of a preliminary request, the CJEU has to go into the merits of the preliminary ruling in order to assess that necessity. The CJEU can only do so once it has established its jurisdiction.

3.2.1 Necessity in the Early Years

Just as the CJEU in the early years did not rule it had no jurisdiction to give a ruling on the referred questions, neither did it rule that references for a preliminary ruling or preliminary questions were inadmissible. As far as the requirement of necessity goes, the Court, in its early case law, upheld the strict separation of functions mentioned before. It held that 'as regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.'[92]

In fact, the CJEU barely reviewed the necessity of questions and the content of a ruling for a preliminary reference.[93] As long as the reference had not been withdrawn by the referring court, the Court considered a reference for a preliminary ruling, pursuant to Article 177 of the Treaty, as having been validly brought before it.[94]

3.2.2 A Closer Look at Necessity

However, in the late twentieth century the CJEU was confronted with an ever-increasing caseload and because of that, the CJEU started assessing the criterion of necessity more intensely.[95] The increasing complexity of the questions referred also contributed to this development.[96] The CJEU

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91 Case 6/64, *Costa-v. E.N.E.L* [1964] ECR 00585.

92 For example: Case 13/68, *Salgoil, v. Ministero del commercio con l'estero* [1968] ECR 00453; Case 83/78, *Redmond* [1978] ECR 02347.

93 Sionaidh Douglas-Scott, *Constitutional law of the European Union* (Edinburgh 2002), p. 234.

94 Case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* [1978] ECR 00629, point 10.

95 Anderson 1994, p. 180; Douglas-Scott 2002, p. 235; for an overview of the development of relevant case law in this respect: Barnard & Sharpston 1997.

96 Barnard & Sharpston 1997, p. 1125.

began reviewing the merits of references for a preliminary ruling.[97] This development started with the two famous *Foglia/Novello* judgments.[98] The first case involved a contract between Foglia, an Italian wine merchant, and Novello, the buyer of the wine. Novello refused to reimburse Foglia for charges levied by the French authorities as agreed in the contract of sale. Novello argued that those charges contravened Article 95 EEC. The referring court stated that it needed to assess whether the charges levied by the French authorities were in accordance with Article 95 EEC. Both Foglia and Novello were of the opinion that those charges were in violation of that provision and wrote essentially identical observations. According to the CJEU, it appeared that the parties to the main action sought to obtain a ruling that the French tax system is invalid by inserting a clause in their agreement in order to induce the national court to give a ruling. The CJEU found the dispute to have an artificial nature and ruled that the questions asked by the national court, having regard to the circumstances of the case, do not fall within the framework of its duties under Article 177 of the Treaty. In the operative part of the judgment, the CJEU ruled it had no jurisdiction.

Novello contested the first *Foglia/Novello* judgment before the national court which requested a second preliminary ruling. In *Foglia/NovelloII*, the CJEU found that according to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, is a matter for the national court. Nevertheless, it is for the CJEU, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court.

With those two judgments, the CJEU seemed to be departing from the 'strict separation of functions', at least partially,[99] seeing that the Court seemed to move into the fact-finding domain,[100] but also into the assessment of the need to obtain an answer to the referred questions. Thus, the CJEU intensified its assessment on the criterion of necessity and left questions unanswered.

As is clear from the operative part of the *Foglia/Novello* judgments, the CJEU assesses the genuine nature of a dispute in light of jurisdiction. As mentioned the criterion of necessity relates in my opinion to admissibility. In the *Foglia/Novello* judgments, a national court in the sense of article 177 EEC made

97 Michael O'Neill, 'Article 177 and limits to the right to refer: an end to the Confusion?', *EPL* 1996, Volume 2, Issue 3, p. 379.
98 Case 104/79 *Foglia v. Novello* [1980] ECR 00745 and Case 244/80 *Foglia v. Novello* [1981] ECR 03045.
99 Kaleda 2000, p. 6.
100 Barnard & Sharpston, p. 1122.

the requests and the subject matter related to European law. As a result, the CJEU had jurisdiction and it could move into the domain of assessment of the national court by reviewing the necessity of the preliminary request.

In the judgments following the *Foglia/Novello* judgments, the CJEU further explored its assessment on necessity, showing that it intensified the assessment on the criterion of necessity. For example, in the *Meilicke* case, the CJEU once more established that it was being asked to give a ruling on a hypothetical problem, without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it.[101] In the operative part of the judgment however, the CJEU didn't rule it had no jurisdiction, it ruled that it is not appropriate to answer the questions.

3.2.3 Today: Established Case Law on Necessity

The aforementioned development in the case law on the requirement of necessity resulted in a 'presumption of relevance' in favour of questions on the interpretation of Union law referred by a national court. The CJEU found that it is a matter for the national court to define, and not for the CJEU to verify, in which factual and legislative context they operate. However, it declines to rule on a reference for a preliminary ruling from a national court where it is quite obvious that the interpretation of Union law that is sought is unrelated to the actual facts of the main action or to its purpose or where the problem is hypothetical.[102] The term 'quite obvious' suggests a reticent attitude in the assessment of necessity and relevance of the referred questions by the CJEU, because it follows from Article 267 TFEU, that it is in the domain of the national court to determine the necessity of the reference and the relevance of the questions. The CJEU assesses *per* question whether a response to the question is necessary and if not, the Court rules that particular question inadmissible.[103] This is in contrast to necessity relating to situations in which a genuine dispute doesn't exist or the case is no longer pending. In those situations, the CJEU relates necessity to jurisdiction.

As far as the requirement of necessity relating to a pending case goes, the CJEU has, over the years, consistently held that a case needs to be pending before the national court so that the preliminary ruling by the Court, once pronounced,

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[101] Case C-83/91, *Meilicke v. ADV-ORGA* [1992] ECR I-04871; also: C-343/90, *Lourenço Dias v. Director da Alfândega do Porto* [1992] ECR I-04673. In this case the CJEU did give an answer to the referred questions.

[102] For example: Case C-210/06, *Cartesio* [2008] ECR I-09641. For a recent overview of the requirements: Case C-19/14, *Talasca* not yet reported.

[103] For example in Case C-567/07, *Woningstichting Sint Servatius* [2009] ECR I-09021.

can actually be considered by the referring court.[104] Since 2012, the Rules of Procedure of the Court contain a specific provision relating to this requirement. This provision enables the CJEU to examine necessity and relevance – and especially the question of whether the parties still have a legal interest in the case – of the referral at any time. Article 100 of the Rules of Procedure stipulate that the CJEU shall remain seized of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the CJEU. The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment being served on the interested persons referred to in Article 23 of the Statute.

According to the second paragraph of this provision, however, the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled. This second paragraph relates to the situation in which it is questionable whether the applicant in the main proceedings (still) has a legal interest in the case, but the referring court has not withdrawn its reference for a preliminary ruling.[105] If such a situation exists, answering the questions is no longer necessary and would result in an advisory opinion or the answering of hypothetical questions. In line with the *Foglia/Novello* judgments, Article 100 relates to jurisdiction. However, in a situation governed by Article 100, paragraph two of the Rules of Procedure, the CJEU does not rule it lacks jurisdiction. It simply states in the operative part of the judgment or order that it is not necessary to give a ruling on the request for a preliminary ruling.[106]

Although the examination by the CJEU on the necessity of a preliminary ruling in light of the question of whether a request is necessary (because an applicant lost every legal interest) can go quite deep.[107] In practice the CJEU, when in doubt, will ask the referring court whether a ruling is still necessary and on what grounds.[108] In that respect, the CJEU is of the opinion that it is in the domain of the national court to determine the necessity of the reference and relevance of the questions. For the referring court, a duty lies in explaining

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104 Case 338/85, *Pardini v. Ministero del commercio con l'estero* [1988] ECR 2041, point 11; Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, point 28; Case C-314/96, *Djabali/Caisse d'allocations familiales de l'Essonne* [1998] ECR I-01149 point 18; Case C-155/11, *Mohammad Imran* [2011] ECR I-05095.

105 M.A. Gaudissart & S. van der Jeught, 'Het nieuwe reglement voor de procesvoering van het Hof van Justitie, een overzicht van de belangrijkste wijzigingen', *SEW* 2013, nr. 4, p. 167.

106 For example: Case C-155/11, *Mohammad Imran* [2011] ECR I-05095; Case C-492/11, *Di Donna*.

107 For example: Case C-180/12, *Stoilov I Ko EOOD*.

108 It did so in the *Imran*-order and the *Stoilov I Ko EOOD*-judgment. Other examples are: Case C-470/12, *Pohotovost'* not yet reported; Case C-648/11 *MA and Others* in which the referring court had anticipated in its reference by stating that it had to determine BT's claim for damages; Case C-350/13, *Antonio Gramsei Shipping and Others* not yet reported; Case C-336/08, *Reinke* [2010] I-00130; Case C-252/11, *Šujetová*.

to the CJEU, in respect of its national procedural law, why a reference is still necessary.

3.3 Requirements on the Content of the Referral

3.3.1 The Early Years

The CJEU, in the early years, did not rule references for a preliminary ruling or preliminary questions to be inadmissible. Occasionally, the CJEU left a question unanswered because the national court did not provide the CJEU with enough information[109], but this was rather uncommon. As stated, the Court considered a reference for a preliminary ruling, pursuant to Article 177 of the Treaty, as having been validly brought before it, as long as the reference had not been withdrawn by the referring court.[110]

3.3.2 Development of Requirements on the Content of the Referral

The *Foglia/Novello* judgments were a stepping-stone to the development of requirements on the content of the referral. The first judgments in which the CJEU developed these requirements were the *Meilicke* case[111], followed by the *Telemarsicabruzzo* judgment[112], the *Banchero* order[113] and the judgment in the *Grau Gomis* case[114]. In all these cases, the CJEU pointed out that the need to provide an interpretation of Union law, which will be of use to the national court, renders it necessary that the national court defines the factual and legislative context of the questions it is asking, or at the very least, explains the factual circumstances on which those questions are based.

Except for the operative part of the judgment in the *Telemarsicabruzzo* case, in which the CJEU stated that the questions did not require answers, the CJEU consistently rules a reference, either in its entirety or partially, inadmissible in the case the request does not meet the procedural requirements. In 1996, the CJEU adopted an information note on references by national courts for preliminary rulings[115] in which the CJEU included these requirements. Today these

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109 Case 52/76 *Benedetti v. Munari* [1977] ECR 00163.
110 Case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* [1978] ECR 00629.
111 Case C-83/91, *Meilicke v. ADV-ORGA* [1992] ECR I-04871.
112 Joined Cases C-320/90 to C-322/90, *Telemarsicabruzzo v. Circostel and Others* [1993] ECR I-00393.
113 Case C-157/92, *Pretore di Genova v. Banchero* [1993] ECR I-01085.
114 Case C-167/94, *Grau Gomis and Others* [1995] ECR I-01023.
115 The information note has since been updated in 2005 and published in the *OJ* of the EU (C 143, 11 June 2005).

requirements are still in the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, which have replaced the information note.[116]

3.3.3 Today: Article 94 of the Rules of Procedure of the Court

The requirements relating to the content of a request, as developed in the case law of the CJEU, appear not only in the Recommendations but also expressly in Article 94 of the Rules of Procedure of the Court. According to Article 94, the request for a preliminary ruling shall contain:

a. 'a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
b. the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
c. a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

That the CJEU now assesses these requirements intensely can be deduced from recent case law stating that the requirements concerning the content of a request for a preliminary ruling appear expressly in Article 94 of the Rules of Procedure of the Court of which the national court is supposed, in the context of the cooperation instituted by Article 267 TFEU, to be aware of and which it is bound to observe scrupulously.[117] This intense assessment can be explained by the fact that the CJEU needs to first and foremost establish its jurisdiction. In case the referral contains too little information, the CJEU is unable to make that assessment.[118] As we have seen above, the CJEU needs to determine the scope of EU law, whether national law activates EU law or whether a situation is purely internal. It would be impossible to make that assessment in the absence of sufficient information.[119] Moreover, as the CJEU sometimes encroaches on an area of national jurisdiction, it is especially important, like Advocate General Wahl pointed out, to provide the CJEU with sufficient information. If therefore, the preliminary reference and/or the questions it contains, do not meet the re-

116 The latest Recommendations date from sixth of November 2012, following the adoption of the new Rules of Procedure on September 25, 2012 (2012/C 338/01).
117 Case C-19/14, *Talasca* not yet reported, point 21; Prechal 2014, p. 756.
118 Prechal 2014, p. 757.
119 As was the case concerning the questions related to Article 101 and 102 TFEU in the Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express* not yet reported.

quirements set in Article 94 of the Rules of Procedure, either the referral will be inadmissible, or single questions will be inadmissible.

Therefore, in the light of admissibility, it would appear logical to take the following steps: Firstly, an assessment needs to be made on whether the reference for a preliminary ruling *as such* contains enough information and meets the requirements of Article 94 of the Rules of Procedure. If this isn't the case, the reference in its totality is inadmissible. In case the reference doesn't contain enough information, the CJEU can neither assess its own jurisdiction, nor whether the preliminary questions are related to the actual facts of the main action or to its purpose, nor whether the problem is hypothetical and nor can it give a useful answer to the questions submitted to it.

Secondly, in case the reference for a preliminary ruling meets the minimal requirements on the required information, the court can assess – if necessary in consideration of each individual question – whether it has jurisdiction and whether it is quite obvious that the interpretation of Union law that is sought, is unrelated to the actual facts of the main action or to its purpose or that the problem is hypothetical. It can also assess if it has enough information *per* preliminary question to render a useful answer. Because these requirements can be qualified as procedural requirements, the referring court, in the case the Court decides a question, or the entire reference is inadmissible, has the opportunity to refer again in the same case, whilst correcting its mistakes.

3.4 Conclusion: Towards a More Unified Approach on Necessity

Over the years, the CJEU started assessing the criterion of necessity more intensely and by doing so, began to encroach upon fields generally reserved for national courts. In this sense, it can certainly be put forward that boundaries have shifted. However, a unified approach in the operative part of the judgments has not followed. The CJEU relates the requirement of the necessity of a preliminary ruling to its jurisdiction, whether the assessment refers to the existence of a genuine dispute or to the assessment of whether a case is still pending before the Court. In the latter cases, the Court does not rule that it lacks jurisdiction, but it states rather that the questions do not require an answer. In the early days however, the CJEU ruled that it lacked jurisdiction. Furthermore, the CJEU assesses the necessity of answering a question *per* question. If it finds the answering of a question unnecessary, it rules the question inadmissible. So necessity assessed per question apparently does not relate to jurisdiction but to admissibility.

In my opinion, by making a clear distinction between jurisdiction and admissibility, a more unified approach in this matter can be achieved and clear

communication to the national courts will be established. As I started this paragraph by stating that jurisdiction only relates to the referring actor and the subject matter and the other criteria thus relate to admissibility, it is not surprising I would suggest relating necessity to admissibility. Therefore, if a ruling on a preliminary request is no longer necessary, on whatever ground, the request is inadmissible. The national referring judge then knows whether he has hit the absolute boundary of jurisdiction, or the less absolute boundary of admissibility.

4 Summary, Conclusions and Recommendations

If the preliminary reference procedure is to reach its purpose of a uniform application of EU law and therefore judicial coherence, communication is key. A good preliminary question results in a useful answer, which contributes to the uniform application of EU law. The first requirement in drafting a good question is that the said question is posed within the limits set by the Treaties and case law of the CJEU. For the referring court, knowledge of those limits is thus essential.

In this paper, the concepts of jurisdiction and admissibility have been addressed. As I have shown, those concepts, constituting the boundaries of the communication between the national courts and the CJEU, have been subjected to different approaches by the CJEU, resulting in a shift of boundaries.

Jurisdiction

Jurisdiction concerns the actor making the referral and the subject matter on which the CJEU has judicial jurisdiction. Most importantly, the Court has jurisdiction to rule on the validity and interpretation of *Union* law only. In the early years, the CJEU set the outlines of its jurisdiction, but it didn't rule that it had no jurisdiction. It simply reformulated questions in a way that it could answer the questions of the referring court while remaining within its jurisdiction. The need to reach a serviceable interpretation of the provisions constitutes as a justification in that respect.

Furthermore, the general notion is that the CJEU has no jurisdiction to answer questions in a case where the EU act in question does not apply directly to the main proceedings, which is usually the case in a 'purely internal situation'. In order to make an assessment of the applicability of EU law, the CJEU however has to determine the scope of EU law. Therefore, the CJEU has jurisdiction to assess whether EU law is applicable in a 'purely internal situation'. In the light of the 'purely internal situation', the CJEU in the operative part of its judgments has used the concepts of jurisdiction and admissibility interchangeably. In my opinion, a distinction between jurisdiction and admissibility in the operative

part of a judgment or order should be made and in that respect I would suggest that the CJEU should only rule it has no jurisdiction when 1) the actor is not a court or tribunal of a Member State in the meaning of Article 267 TFEU or 2) the CJEU has no competence on the subject matter e.g. because the referral doesn't concern EU law or the jurisdiction of the CJEU is excluded by the Treaties.

As time passed, the CJEU has been confronted with the situation that EU law is not applicable in the main proceedings on its own motion (directly), but it is applicable in the main proceedings as a result of the law of a Member State which activates EU law. Because EU law is not directly applicable and the situation therefore falls outside the scope of Union law, only domestic law applies. One could argue that the CJEU therefore does not have jurisdiction to answer questions in that situation. However, according to the CJEU, an answer to questions in a situation where Union law is (indirectly) applicable contributes to a uniform interpretation of EU law, thereby fulfilling the aim of the preliminary reference procedure Although controversy exists on the case law concerning answering questions which encroach upon areas of national jurisdiction, in my opinion, answering questions in those situations is justified. With this shift of boundaries, comes a greater responsibility for the CJEU as to assessing its jurisdiction in these 'exceptional' (purely internal) situations. In the light of communication to the national referring court, questions relating to a 'purely internal situation', should only be answered under strict conditions, for example, in situations where it is absolutely clear that Union law is actually 'activated' by domestic law.

The CJEU has also been confronted with situations relating to the Treaty freedoms where the factual cross-border element was lacking. The Court has accepted jurisdiction in those situations because of a potential cross-border element. With a 'broader' interpretation of the purely internal situation, by including situations which relate to national legislation with a potential cross-border element, comes yet again a greater responsibility in setting clear boundaries on jurisdiction. In that respect, I would suggest some conditions as to how 'certain' a potential cross-border effect of national legislation has to be.

Admissibility

As jurisdiction in the preliminary ruling procedure only relates to the referring actor and the subject matter, the other criteria set out in Article 267 TFEU relate to admissibility. The CJEU also developed admissibility criteria in its case law in this respect.

In the early years, the CJEU held that the national courts, being the only actor fully aware of the facts of the case and of the arguments put forward by

the parties, and given that it will have to pass judgment in the case, are in the best position to appreciate the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling. According to the CJEU, the separation of functions between national courts and the CJEU do not permit the latter to take cognizance of the facts of the case or to find fault with the grounds for making the request for interpretation.

As a result of an ever-increasing caseload and more complex questions, the CJEU began to examine the necessity of preliminary references and its content more closely. By doing so, the Court encroached upon the assessment domain of the referring court. Concerning the requirement of necessity, it is now established case law that the CJEU declines to rule on a reference for a preliminary ruling from a national court where it is quite obvious that the interpretation of Union law that is sought is unrelated to the actual facts of the main action or to its purpose or where the problem is hypothetical. The term 'quite obvious' suggests a reticent attitude in the assessment of necessity and relevance of the referred questions by the CJEU.

Furthermore, the CJEU developed requirements on the content of the referral, which have been included in the 'information note on references by national courts for preliminary rulings'. Since 2012, Article 94 of the Rules of Procedure also contains these requirements and the CJEU assesses more intensely whether or not those requirements are met. If the preliminary reference and/or the questions it contains, do not meet those requirements, either the referral will be inadmissible, or single questions will be inadmissible.

However, a unified approach in the operative part of the judgments is not followed. I would suggest relating necessity to admissibility; Therefore, if a ruling on a preliminary request is no longer necessary, on whatever ground, the request is inadmissible. The national referring judge then knows, whether he has hit the absolute boundary of jurisdiction, or the less absolute boundary of admissibility.

We can conclude there, that determining the limits of the preliminary reference procedure goes hand-in-hand with redefining those limits over the years. That is – in my opinion – not a bad thing. I would say it comes with the territory, seeing that the preliminary reference procedure challenges the national courts as well as the CJEU within the composite legal order that the European Union is. Communication is, as said, the key. In that respect, there lies a responsibility for the CJEU to clearly delineate the boundaries on jurisdiction and admissibility and to clearly specify those boundaries in the operative part of its orders and judgments. For the national referring court, the shift of boundaries went hand-in-hand with a greater responsibility to provide the CJEU with information on facts (applicability of EU and national) law, and the necessity and relevance of

the preliminary reference and its questions. Preferably, that information is provided in the very first contact established with the CJEU, namely in the reference for a preliminary ruling.