

BETWEEN INTERPRETATION AND APPLICATION OF EU LAW: CASE-TAILORED CJEU JUDGMENTS IN THE PRELIMINARY RULING PROCEDURE

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The division of roles between the CJEU and national courts in the preliminary ruling procedure is clearly defined, at least on paper. The CJEU interprets EU law and the referring national court applies this interpretation to the case pending before it. In the literature, there are often complaints that this is different in practice and that the CJEU all too often steps into the domain of the national judge by not limiting itself to only interpreting EU law but also applying the interpretation to the national legal or factual context. Too much case specificity may put the referring court in a difficult position, especially in cassation appeals when the facts have already been established. Little is known as to whether the CJEU adheres to the clear ‘separation of functions’. This contribution analyses to what extent and why the CJEU abides by this division. It examines 55 judgments delivered during the period between 1 January 2020 and 22 March 2021 in response to questions from courts in five EU Member States (the Netherlands, Ireland, the Czech Republic, Sweden and Greece). This structured case law analysis aids the identification of factors that contribute to outcome-oriented judgments. The article also critically examines the approach of the CJEU from a normative perspective weighing the pros and cons.

1 INTRODUCTION

The division of the roles of the Court of Justice of the EU (CJEU) and national courts in the context of the preliminary ruling procedure is clearly delineated, at least on paper. The CJEU emphasizes that there is ‘a clear separation of functions’ and that it can only interpret EU law and not take cognizance of, or assess the facts of a case.¹ The latter remains the ‘exclusive jurisdiction’ of national courts.² In addition, the CJEU cannot rule on the validity of national laws in the light of EU law.³ This separation is not contested as a matter of fundamental

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¹ National law is traditionally considered part of the facts of the case, rather than the law. Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021) 122; Juliane Kokott, ‘Fact and Law-Finding Issues in the Preliminary Ruling and Infringement Procedures before the ECJ in Tax Matters’ (2019) 2(5) *IBFD International Tax Studies* 9; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin Bergheim* EU:C:2010:503 para 49; Case 6/64 *Costa v ENEL* EU:C:1964:66.

² Case 13/68 *SpA Salgoil v It. Ministry of Foreign Affairs* EU:C:1968:54; Joined Cases C-175/98 and C-177/98 *Lirussi* EU:C:1999:486 para 38.

³ Broberg and Fenger, *Preliminary References* (n 1) 121-122.

constitutional principle.⁴ The CJEU has also *de jure* stuck to this division and does not directly or explicitly determine the outcome of disputes before national courts.⁵ Judicial practice of the CJEU does, however, not always match these constitutional parameters. While the CJEU does not make findings of fact as such, it often renders quite case-tailored responses in which its guidance goes beyond mere interpretation of EU law, tending towards application of EU law to the case at hand. It thus frequently arrives at a conclusion on the basis of an application or weighing of the facts in the case at hand.⁶ The CJEU sometimes supplements, or even corrects, the (referring court's understanding of the) facts.⁷ In other cases, the CJEU is so directive that it leaves little room for a national court to make its own assessment and, hence, usurps the court's jurisdiction.⁸ In *Josemans*, for example, the CJEU concluded that the so-called Maastricht weed pass, which prohibited admission of non-residents to coffee-shops, was justified and proportionate. The CJEU considered the measure appropriate, partly on the basis of factual information provided by the mayor of Maastricht at the hearing to illustrate the nuisance caused by drug tourism. On that basis, the CJEU concluded that 'it is indisputable' that the measure significantly curtails drug tourism.⁹ One judge involved in the case criticised the factual CJEU's 'know-it-all' attitude that simply required the referring court to 'tick the box'.¹⁰ Thus, this case reflects what Davies describes as a disruptive and controversial intervention by the CJEU in national legal orders with the application by the national court as a mere 'formality'.¹¹ The surprisingly honest observation from former CJEU judge Mancini indicates that these cases are not isolated exceptions. He noted that the use of the preliminary reference procedure has shifted from ensuring uniformity in the application of EU law to monitoring national laws for incompatibility with EU law.¹² In relation to such 'monitoring' judgments, he aptly stated: 'the national judge is thus led in hand as far as the door; crossing the threshold is his job, but now a job no harder than a child's play'.¹³

Too much involvement from Luxembourg by way of case-tailored judgments can put the referring court in a difficult position, especially at the cassation stage when the facts have

⁴ Gareth Davies, 'Activism Relocated. The Self-Restraint of the European Court of Justice in its National Context' (2012) 19(1) *Journal of European Public Policy* 76, 78; Gareth Davies, 'Abstractness and Concreteness in the Preliminary Reference Procedure: Implications for the Division of Powers and Effective Market Regulation' in Niamh Nic Shuibne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006).

⁵ The only exception is *Rimševičis* in which the Grand Chamber annulled the decision suspending the Governor of the Central Bank of Latvia from office. Case C-202/18 *Rimševičis v Latvia* EU:C:2019:299 paras 70-71.

⁶ An insufficient description of the facts and (national) legal context in the order for reference can also be a reason for the CJEU to declare the request inadmissible. E.g., Joined Cases C-320/90, 321/90 and 322/90 *Telemarsicabruzzo v Cirstotel* EU:C:1993:26; Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9(3-4) *International Journal of Constitutional Law* 737, 741 and 755. See also e.g. Case C-258/15 *Sorondo v Academia Vasca de Policía y Emergencias* EU:C:2016:873 para 48.

⁷ Broberg and Fenger, *Preliminary References* (n 1) 137.

⁸ Davies, 'Abstractness and Concreteness' (n 4) 232.

⁹ Case C-137/09 *Josemans v Burgemeester van Maastricht* EU:C:2010:774, para 75.

¹⁰ *Ibid*; Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar 2021), 128-129.

¹¹ Davies, 'Activism Relocated' (n 4) 79.

¹² Federico Mancini, *Democracy and constitutionalism in the European Union: Collected Essays* (Bloomsbury Academic 2000) 8.

¹³ Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26(4) *Common Market Law Review* 595.

already been established. This happened to the Dutch Supreme Court in *Ladbroke's* regarding the provision of games of chance via the internet. In its order for reference, the Supreme Court ruled that it has been established in cassation that betting activities are restricted in a coherent and systematic manner.¹⁴ However, the CJEU ruled that this cannot simply be assumed and gave the Supreme Court a difficult task of establishing 'whether the development of the market for games of chance in the Netherlands is such as to demonstrate that the expansion of games of chance is being supervised effectively by the Netherlands authorities [...]'.¹⁵ The Supreme Court subtly overruled this by ruling that the CJEU judgment is strongly interwoven with factual assessments not open to review in cassation.¹⁶ In *Scotch Whisky Association*, the CJEU suggested that the Scottish minimum pricing of alcohol is disproportionate. The referring court, however, disagreed and subsequently decided that the policy is proportionate.¹⁷

Despite these relatively high-profile cases, little is known about the way in which the CJEU actually approaches the 'separation of functions' it propagates.¹⁸ The (older) literature contains several unsubstantiated claims that the CJEU often oversteps this separation.¹⁹ Tridimas mentions the 'substantial' number of outcome cases on free movement and argues that deference cases 'are numerically fewer'.²⁰ Former Advocate General (AG) Jacobs held that the CJEU essentially resolves 'an extremely high proportion of cases'.²¹ Rasmussen held in 2000 that the CJEU interweaves law and facts in such a way that there is little room for manoeuvre for the referring court in more than two thirds of cases, without, however, providing any evidence.²² Nonetheless, beyond these uncorroborated assertions, there is a 'surprising absence of relevant scholarship', as Davies noted as well.²³ The only exception of a systematic study on the actual practice of the CJEU is Zgliniski's analysis of preliminary references and infringement actions dealing with national restrictions in free movement cases in the period 1974-2013 with a specific focus on proportionality assessments.²⁴

The gap in (empirical) research warrants the following research question as to how and when the CJEU renders case-tailored judgments in preliminary rulings in which it not only offers an abstract interpretation but applies this interpretation in the specific case (see Section 2 for a further explanation). This article is of academic relevance for three reasons. First, it fills an empirical gap by examining the actual practice of the CJEU on the basis of a structured case law analysis of preliminary references in all areas of EU law (how?). Second, this empirical analysis enables us to identify the factors that explain when the CJEU does

¹⁴ HR 13 June 2008 NL:HR:2008:BC8970 (*Ladbroke's v Sporttotalisator*) para 4.16.

¹⁵ Case C-258/08 *Ladbroke's v Sporttotalisator* EU:C:2010:308 para 37.

¹⁶ *Ladbroke's v Sporttotalisator* (n 14) para 2.9.4.

¹⁷ Case C-333/14 *The Scotch Whisky Association v Lord Advocate for Scotland* EU:C:2015:845; *Scotch Whisky Association & Ors v The Lord Advocate & Anor* [2017] UKSC 76 para 63; Jurian Langer and Wolf Sauter, 'The Consistency Requirement in EU Law' (2018) 24 *Columbia Journal of European Law* 39, 70.

¹⁸ Davies, 'Abstractness and Concreteness' (n 4) 215.

¹⁹ Cf. Jan Zgliniski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55(5) *Common Market Law Review* 1341, 1370.

²⁰ Tridimas (n 6) 740 and 745.

²¹ Francis Jacobs, 'The Effect of Preliminary Rulings in the National Legal Order' in Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) 29.

²² Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37(5) *Common Market Law Review* 1071, 1101.

²³ Davies, 'Abstractness and Concreteness' (n 4) 211.

²⁴ Zgliniski (n 19).

render case-tailored judgments and when it does not (when?). Third, this structured case law examination also provides a basis for an informed and balanced discussion of the (dis)advantages of case-tailored judgments that have only partly been identified in the literature to date.

The structure of this article is as follows. Section 2 presents the article's conceptual and methodological framework. Section 3 discusses several abstract CJEU judgments in which the CJEU only provides an (abstract) interpretation of EU law, while Section 4 provides a thematic discussion of a selection of noteworthy case-tailored judgments (how?). Both sections aim to identify reasons for the case-tailored approach of the CJEU (when?). Section 5 puts the structured case law analysis in a broader academic context and examines the desirability of case-tailored responses from a more normative perspective.

2 CONCEPTUAL AND METHODOLOGICAL FRAMEWORK

This article uses three conceptual categories (see Figure 1). The first category includes case-tailored judgments in which the CJEU's guidance goes beyond mere interpretation of EU law, tending towards application of EU law to the case at hand (category 1). Such case-tailored judgments contain a 'ready-made solution to the dispute', leaving a limited margin for manoeuvre for the national court, if at all.²⁵ The third category at the other end of the spectrum consists of cases in which the CJEU limits itself to an abstract interpretation of EU law.²⁶ Note that this binary division is at times rather unsatisfactory. It is often difficult for courts to clearly differentiate between application and interpretation, just as it is difficult for a researcher to make this classification.²⁷ AG Ruiz-Jarabo Colomer stated: 'there is a very fine distinction between interpretation and application, because it is difficult to interpret a rule without applying it or to apply it without interpreting it'.²⁸ What is more, CJEU judgments addressing multiple questions can contain elements of both abstract interpretation and case-tailored application.²⁹ For this reason an intermediate category (2) is introduced for cases that contain both elements or that are difficult to categorize.³⁰

²⁵ This definition reflects to a certain extent what Tridimas calls 'outcome cases'. The notion of 'case-tailored' was chosen, because an abstract interpretation can also amount to an outcome case. Tridimas (n 6) 739.

²⁶ One might also wonder whether 'pure' abstract cases are even possible. Note that abstract cases can also leave no or a limited margin to the referring court. Tridimas (n 6) 739; Jeffrey Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44(3) *The American Journal of Comparative Law* 421.

²⁷ One could argue that it is nearly impossible for a court to deliver a judgment without considering the facts. In the US, the expression 'mixed questions of law and fact' is used. Kokott (n 1); Lord Reed, 'EU Law of the Supreme Court (The Sir Thomas More Lecture for 2014)' (12 Nov 2014)

<www.supremecourt.uk/docs/speech-141114.pdf> accessed 1 October 2023; Factual and contextual 'stories' are simply essential to courts; cf. Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

²⁸ Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio – Cash & Carry* EU:C:2004:373 point 35.

²⁹ Tridimas (n 6) 740.

³⁰ This category does not entirely reflect what Tridimas terms 'guidance cases'. Guidance can be abstract or concrete, thereby it was decided not to use this term. This category is especially for cases in which one can argue whether the CJEU's assessment of the facts in the light of the law ('qualification' of the facts) belongs to interpretation or can already be seen as application, especially when the subsequent application by the national court is merely mechanical. Davies, 'Abstractness and Concreteness' (n 4) 216; cf. Broberg and Fenger, *Preliminary References* (n 1) 138.

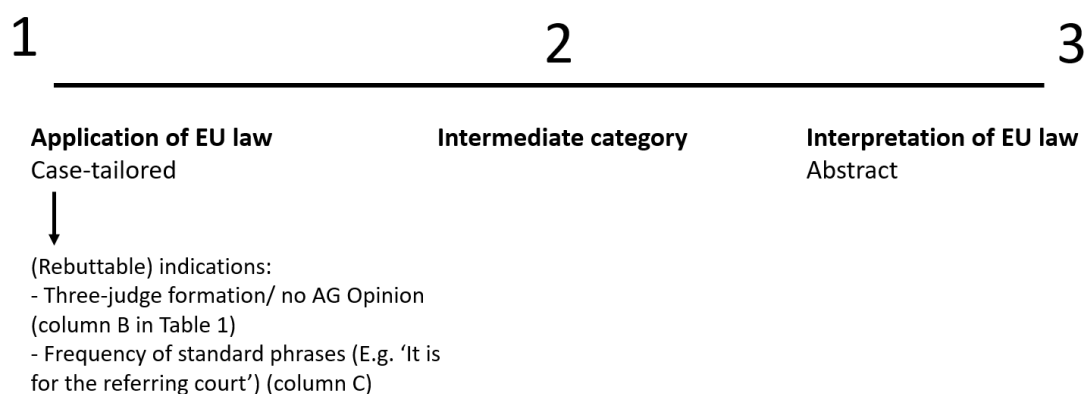


Figure 1: The interpretation/ application continuum

To answer the research question, ‘mundane rulings in diverse policy areas’ (not only high-profile judgments or free movement cases) were included in the analysis.³¹ All CJEU judgments rendered in the period between 1 January 2020 and 22 March 2021 were examined. Different Member States were selected to obtain a relatively representative picture, where judgments from a common law jurisdiction country (Ireland) and four different civil law countries, namely a Central European state that acceded relatively recently in 2004 (the Czech Republic), a Nordic country (Sweden), a Southern European country (Greece) and a North-western European country (the Netherlands) were subject to scrutiny.³² The search resulted in a total of 55 CJEU judgments (see Appendix 1 for Table 1 with the overview of cases).³³

In order to classify the CJEU judgments two methodological approaches were taken. First, judgments have been ‘categorised’ in relation to two aspects: the handling of the case (see column B in Table 1) and the frequency of standard phrases (see column C in Table 1). Several standard phrases used by the CJEU were taken as an indication of a more case-tailored judgment.³⁴ These include such expressions as ‘It is for the referring court to ascertain...’ and ‘Subject to the verification(s)...’. As will be discussed in Section 4, such phrases seem to imply - at least in theory - a certain margin of manoeuvre for the referring court, but in fact they give little leeway as to the application of the findings to the particular case at hand. Other phrases such as ‘In the present case/instance...’ and ‘According to the referring court...’ are treated as mere indications for a case-tailored answer, requiring a more comprehensive careful analysis of the entire judgment. In addition, the way in which the

³¹ Davies, ‘Abstractness and Concreteness’ (n 4) 211-212.

³² For feasibility reasons, Member States with a high absolute number of references were deliberately not included. E.g., Germany (125 references), Italy (59) and Spain (57).

³³ This time period does not preclude an analysis of other relevant judgments falling outside the defined parameters of the case study sample. Two cases were found in which the referring court had withdrawn the questions, namely Case C-133/20 *European Pallet Association v PHZ* EU:C:2020:557; Case C-512/20 *Alpes Provence v ECB* EU:C:2021:101.

³⁴ Cf. the approach of Daniel Sarmiento relying on the ‘complex use of both language and silence’. Daniel Sarmiento, ‘The Silent Lamb and the Deaf Wolves’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury Publishing 2012); Davies also discussed particular ‘techniques’ used by the CJEU. Davies, ‘Abstractness and Concreteness’ (n 4) 222.

CJEU handled a case also constitutes a useful indication. A judgment rendered by a three-judge formation without an AG Opinion suggests that the questions did not raise novel or difficult points related to the interpretation of EU law.³⁵ Instead, such cases tend to involve questions concerning the application of previous case law to a slightly different factual or legal constellation. Note, however, that this aspect is - just as the presence of standard phrases - merely treated as an indication. Not all CJEU judgments rendered in a three-judge formation without AG Opinion are necessarily case-tailored.

The categorisation is obviously not sufficient in itself, as mentioned before.³⁶ An in-depth and close analysis of judgments, in conjunction with Opinions of AGs, is thus essential. Case comments and articles in academic and legal professional journals were consulted, if available, to facilitate this analysis and the categorization of the CJEU judgments. When possible and available, the implementing or follow-up judgment of the referring court was analysed as well with the view of identifying the referring court's appreciation of the response of the CJEU. A short or oral follow-up judgment was also considered to be an indication that the CJEU rendered a case-tailored judgment, settling the dispute easily.

3 ABSTRACT INTERPRETATION

25 of 55 judgments belong to the category of abstract cases, as Table 1 also shows. Interestingly, there are notable differences between the five studied EU Member States. In the cases of both the Netherlands and Ireland, the majority of referred cases resulted in abstract guidance (5 out of 9 and 14 out of 26, respectively), whereas fewer abstract cases were rendered in Czech and Swedish cases (2 out of 8 and 4 out of 11, respectively). It seems that there is a correlation between case-tailored judgments and 'easy' legal questions that are decided in a three-judge formation without an AG Opinion. In the case of Ireland, only 1 out of 9 cases was dealt with in the latter way, and, in the case of the Netherlands, it was 9 out of 26, whereas this occurred in 4 out of 8 Czech cases and 6 out of 11 Swedish cases. This section discusses the legal areas (Section 3.1) and the type of questions (Section 3.2) with which the CJEU is more likely to adhere to abstract interpretation.

3.1 SUBJECT MATTER AND LEGAL AREA

It is perhaps not surprising that the CJEU remains at an abstract level and does not engage with the substance of the criminal proceedings before the referring courts since this very much involves matters of weighing of (factual) evidence.³⁷ In two cases concerning European

³⁵ E.g. Article 20 of the Statute of the CJEU.

³⁶ Table 1 suggests that the frequency of standard phrases *alone* is not indicative at all. The same is true of the handling of the case. Nonetheless, a combination of the two types of indicators gives a slightly different picture: in 20 of the 25 category 3 judgments no or only a very limited number of indicators was present. The five exceptions are: Case C-446/18 *Agrobot CZ* EU:C:2020:369; Case C-363/19 *Konsumentombudsmannen* EU:C:2020:693; Case C-330/19 *Exter BV v Staatssecretaris van Financiën* EU:C:2020:809; Joined Cases C-229/19 and 289/19 *Dexia Nederland BV* EU:C:2021:68; and Case C-814/18 *Ursa Major Services* EU:C:2020:27.

³⁷ Such criminal cases are also different from tax and VAT cases discussed in Section 4.1, especially considering the fundamental rights of suspects right to fair hearing, including *audi alteram partem*.

arrest warrants (EAWs), the CJEU remained at an abstract level.³⁸ In *L and P*, the Amsterdam District Court determined that the deterioration of the rule of law in Poland is so serious that no suspect is guaranteed a right to a fair trial and an independent judge.³⁹ The Court asked the CJEU whether Article 47 of the Charter and Article 19 TEU preclude a surrender of *all* suspects. However, the CJEU ruled that, even if there are structural or fundamental deficiencies, a concrete and precise verification, that takes into consideration the personal situation of that person, the nature of the offense and the actual context, is still required. The CJEU did not discuss the facts and the situation of L and P at all. The CJEU provided a similar abstract interpretation of EU law in a case concerning the return of a convicted person to the executing Member State after a final criminal sentence.⁴⁰ The CJEU also adhered to its legal task in an Irish EAW case related to the grounds for the refusal to execute an EAW for offences committed in third states.⁴¹ In the migration law area, the CJEU for example answered *in abstracto* a highly specific and peculiar legal question regarding the rules on admissibility in the previously applicable Procedures Directive 2005/85,⁴² as well as questions about access to the labour market of so-called Dublin claimants in the light of the Reception Conditions Directive 2013/33/EU.⁴³

3.2 THE NATURE OF THE QUESTIONS

The possibility of an abstract judgment is higher when questions concern regulations, the validity of EU law or constitutional principles of EU law. When the CJEU is asked to interpret a specific provision for the first time an abstract response is more likely as well. For instance, a request for a preliminary ruling from a Swedish court regarding Article 16(6) of Regulation 714/2009 on conditions for access to the network for cross-border exchanges of electricity and the concept of cross-border interconnection constitutes an example where such an approach is used.⁴⁴ Another example is a Swedish case regarding a provision in the Code about the extinction of a customs debt.⁴⁵

³⁸ Cf. the conclusion of Martufi that the CJEU has tried to mitigate the impact of Article 47 of the Charter on national procedural autonomy. Adriano Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust' (2022) 59(5) Common Market Law Review 1371.

³⁹ Joined Cases C-354/20 PPU and 412/20 PPU *L & P* EU:C:2020:1033.

⁴⁰ Case C-314/18 *SF* EU:C:2020:191.

⁴¹ The CJEU, nonetheless, made a factual determination on a minor point that was not addressed by the referring court. In its request, the Irish High Court mentioned an optional ground for non-execution of an EAW in Article 4(1) that relates to double criminality/correspondence of offences. The CJEU, following AG Kokott's Opinion, ruled that this ground 'cannot apply in the circumstances of the main proceedings' and referred to 'the description of the facts'. It also determined that 'it appears that the acts committed by JR are punishable in Lithuania and Norway by a custodial sentence for a maximum period of at least three years'. This factual engagement played no role before the referring High Court in its follow-up judgment. *Minister for Justice and Equality v Gustas* [2019] IEHC 558; Case C-488/19 JR EU:C:2021:206; *Minister for Justice & Equality v Gustas (Approved)* [2021] IEHC 572.

⁴² Those legal-technical questions stemmed from the Irish opt-out of the new Procedures Directive 2013/32/EU; Case C-616/19 *M.S. v Minister for Justice and Equality* EU:C:2020:1010.

⁴³ The CJEU was asked to choose between two competing interpretations of EU law existing in Irish legal practice. Joined Cases C-322/19 and 385/19 *KS v The International Protection Appeals Tribunal* EU:C:2021:11; Liam Thornton, 'Clashing Interpretations of EU Rights in Domestic Courts' (2020) 26(2) European Public Law 243.

⁴⁴ Case C-454/18 *Baltic Cable AB v Energimarknadsinspektionen* EU:C:2020:189.

⁴⁵ Yassine El Bojaddaini, 'Combinova. Custom debt. Use of Good Concerns only Use beyond Processing Operations. Court of Justice' (2021) H&I 193 (case note). The judgment, however, contains a reference to the

3.2[a] Interpretation of regulations

The majority of cases in which questions were raised regarding the interpretation of regulations resulted in abstract answers (13 of 21). In contrast, only 10 of 26 cases dealing with directives resulted in abstract answers. It is not surprising that the CJEU is better equipped to refrain from a case-tailored response geared towards the national dispute when interpreting regulations.⁴⁶ Nonetheless, questions regarding the interpretation of regulations are not by definition abstract.⁴⁷ Regulations are directly applicable in every Member State and do not have to be transposed into national law.⁴⁸ Transposition is not even allowed. This differs for directives. Directives have to be transposed into national law. This also means that, when preliminary questions are asked regarding the interpretation of directives, a significant amount of national law inevitably comes into play, especially when questions essentially relate to whether the implementation of specific legislation conflicts with EU law (Section 4.2[a]).⁴⁹

The national legal and factual context is particularly irrelevant in relation to regulations in areas where the EU has exclusive competence, such as the customs union with its external customs tariffs, at least, when these are no classification-related questions (see Section 4.1[a] for such case-tailored classification cases). For example, *X BV* concerned the regulation on import duties in the poultry and eggs sectors and the Community Customs Code.⁵⁰ A question was also asked in *Exter BV* about this Code and the application of a preferential tariff measure.⁵¹ *De Ruiter* focused on (implementing) regulations on the common agricultural policy and reductions in direct payments due to non-compliance with the specific requirements.⁵²

3.2[b] Validity of EU law

The CJEU also by and large adheres to the division in handling questions about the validity of EU law. Certainly, in relation to validity questions, it is obvious that the CJEU restricts itself to an interpretation of EU law. In *Donex Shipping*, the CJEU limited itself to answering abstract questions about the validity of the regulation that imposes a definitive anti-dumping

factual situation in its operational part; Case C-476/19 *Allmänna ombudet hos Tullverket v Combinova* EU:C:2020:802 para 25.

⁴⁶ The CJEU, for example, provided a mere legal interpretation in response to a question about the rules of jurisdiction applicable to consumer contracts in the context of claims for compensation from airlines for delays on the basis of the Flight Compensation Regulation 261/2004. Case C-215/18 *Libuše Králová v Primera Air Scandinavia* EU:C:2020:235, para 46.

⁴⁷ The CJEU, for example, held in relation to Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters that ‘an action of that type’ in the case at hand is not a ‘civil and commercial matter (*acta iure gestionis*)’. It determined that the action does not fall within the scope of the Regulation because it did not involve an exercise of public powers (*acta iure imperii*). Case C-186/19 *Supreme Site Services v Supreme Headquarters Allied Powers Europe* EU:C:2020:638 para. 68.

⁴⁸ See also Article 288 TFEU.

⁴⁹ E.g. Case C-806/18 *JZ* EU:C:2020:724.

⁵⁰ Case C-160/18 *X BV v Staatssecretaris van Financiën* EU:C:2020:190.

⁵¹ Case C-330/19 *Exter BV* (n 36).

⁵² Case C-361/19 *De Ruiter vof v Minister van Landbouw, Natuur en Voedselkwaliteit* EU:C:2021:71.

duty on certain iron or steel fasteners that originate from China.⁵³ In *Facebook Ireland and Schrems*, the validity of the EU-US Privacy Shield took centre stage.⁵⁴

3.2[c] *Constitutional classics of EU law*

Another type of questions that tends to result in abstract judgments relates to important constitutional doctrines or principles of EU law, such as direct effect and primacy of EU law. One Irish example deals with the (legal) possibilities for national courts to refuse to declare that a directive relating to veterinary medicinal products has not been correctly transposed, because the package leaflet was only in the English and not in the Irish language. AG Bobek noted that this case contained the ‘genuine EU law constitutional polyphony: direct effect, primacy, procedural autonomy, effective judicial protection, the overall effectiveness of national enforcement of EU law’.⁵⁵ The CJEU refrained from the (factual) argument of the Irish government to justify non-transposition of the directive in a remarkably short judgment consisting of merely 10 substantive paragraphs.⁵⁶ In his elaborate and more detailed Opinion, AG Bobek went considerably further than the CJEU, engaging substantively with the ‘case at hand’ and ‘exceptional circumstances’ that justify non-transposition.⁵⁷

4 BEYOND ABSTRACT INTERPRETATION: CASE-TAILORED JUDGMENTS

During the period under investigation, 30 cases emerged in which the CJEU went beyond merely providing an explanation of EU law. 15 judgments are in category 1 and include answers that essentially settle the disputes. 15 judgments belong to the intermediate category 2. This section discusses particular subject matters and legal areas (case-tailored tariff classification, VAT deductions and copyright and trademark cases) that are prone to a case-tailored response (Section 4.1). It subsequently focuses on the nature of questions (case-tailored) that frequently leads to case-tailored judgments, such as questions about the conformity of national law with EU law and proportionality (Section 4.2). The last subsection analyses how national courts can prompt the CJEU to give case-tailored answers (Section 4.3).

4.1 SUBJECT MATTER AND LEGAL AREA

4.1[a] *Customs tariff and VAT classifications*

Questions relating to the level of VAT or level of customs tariffs are almost by definition factual in nature.⁵⁸ According to Davies, these cases are the ‘most spectacular example of

⁵³ Case C-104/19 *Donex Shipping and Forwarding BV v Staatssecretaris van Financiën* EU:C:2020:539 para 71.

⁵⁴ Case C-311/18 *Data Protection Commission v Facebook Ireland Ltd and Maximilian Schrems* EU:C:2020:559.

⁵⁵ Opinion of AG Bobek in Case C-64/20 *UH v An tAire Talmhaíochta Bia agus Mara* EU:C:2021:14 point 1.

⁵⁶ Case C-64/20 *UH v An tAire Talmhaíochta Bia agus Mara* EU:C:2021:207.

⁵⁷ Opinion of AG Bobek in Case C-64/20 *UH* (n 56) points 91-98.

⁵⁸ Cf. in relation to VAT, Opinion of AG Kokott in Case C-115/16 *N Luxembourg 1 v Skatteministeriet* EU:C:2019:134 point 106.

Court's specificity'.⁵⁹ One of them is, for example, a request for a preliminary ruling from the Netherlands, *Rensen Shipbuilding*, which involved a question of whether imported ship hulls are destined for inland shipping or sea shipping and, hence, which import duties had to be paid.⁶⁰ Interestingly, the CJEU gave the referring court a slap on the wrist by pointing out that there is a lack of factual information in the order for reference. However, this did not prevent the CJEU from delving into the case. The CJEU concluded that the imported hulls are not suitable for seafaring ships when they are fully loaded and in adverse weather conditions. The CJEU also based its conclusions on submitted expert statements, which held that ships with dimensions such as those in question would only be able to sail within approximately 21 nautical miles from the coast in adverse weather conditions.⁶¹ On this basis, the CJEU concluded that these ships cannot be regarded as ships designed and built for navigation on the high seas.⁶² This practically settled the dispute in the national proceedings.

The CJEU also went quite far in a case referred by the Dutch Supreme Court regarding the application of a reduced VAT rate for aphrodisiac capsules and drops that are taken orally and sold in erotica shops. The CJEU ruled that a product that contains no or a negligible amount of nutrients cannot be classified as food, and, thus, concluded that 'although it would appear from the information before the Court that that is the case in so far as concerns the aphrodisiacs at issue in the main proceedings, that is a matter for the referring court to ascertain'.⁶³ It is for a good reason that this CJEU judgment was described in the literature as a 'no-brainer' for the Supreme Court, as it had no choice but to merely repeat the CJEU judgment.⁶⁴ Likewise, a Czech court asked a highly specific question about the classification of 'the product known as 'Bob Martin Clear 50 mg spot-on solution for cats''. The Czech court mentioned two possibilities, namely heading 3004 or heading 3808. In a three-judge formation, the CJEU opted for the latter, 'subject to the assessment by the referring court of all the facts at its disposal'.⁶⁵

It is noteworthy that the CJEU attempts to obfuscate the factual nature of classification cases by consistently repeating the mantra that 'its task is to provide the national court with guidance on the criteria which will enable the latter to classify the relevant products correctly in the Combined Nomenclature, rather than to effect that classification itself'.⁶⁶ This creates the impression that there is still room for manoeuvre by including the usual caveats. It is, nonetheless, evident that the CJEU *de facto* carries out the classification. Cohen aptly stated that 'To say that the Court merely interpreted but did not apply the relevant provisions of Community law is to indulge what can only be described as disingenuous formalism or a formalist fiction'.⁶⁷

⁵⁹ Davies, 'Abstractness and Concreteness' (n 4) 225.

⁶⁰ Case C-192/19 *Rensen Shipbuilding v Inspecteur van de Belastingdienst Rotterdam* EU:C:2020:194.

⁶¹ *ibid* para 26.

⁶² *ibid* para 37.

⁶³ Case C-331/19 *Staatssecretaris van Financiën v X* EU:C:2020:786 para 37.

⁶⁴ Bart van Osch, 'Alles wat Eetbaar is, is Niet Altijd Eten voor de Btw' (2021) 19 BtwBrief 12.

⁶⁵ Case C-941/19 *Samohyl group v Generální ředitelství cel* EU:C:2021:192.

⁶⁶ *ibid* para 28.

⁶⁷ Cohen (n 26) 430-431.

4.1[b] VAT deduction

The CJEU also adopted a case-tailored approach in two cases dealing with VAT deduction (the right to recover VAT on costs incurred). This is evidenced by a Swedish case that was decided by a three-judge formation without an AG Opinion. The case-tailored nature is not inconceivable because the referring court essentially asked whether the CJEU's approach in a previous case (*Pactor Vastgoed*) is applicable to a specific Swedish situation.⁶⁸ The CJEU ruled quite specifically ('subject to verification by the national court') that the purchaser of immovable property is not entitled to deduct VAT when the seller has already done so.⁶⁹

The CJEU adopted a similar approach in the VAT case *Stichting Schoonzicht*.⁷⁰ This case concerned a dispute between a foundation and tax authorities about the revision of VAT deduction because the foundation had changed its plans for the use of the apartment complex. In its judgment, the CJEU delved into the facts and concluded ('in the present case...') on the basis of the order for reference that the foundation had built an apartment complex consisting of seven apartments and that it had deducted the VAT on the costs of the construction of this complex. After completion, the foundation rented out four of these apartments, exempt from VAT. This means that the deduction of VAT incurred was higher than otherwise allowed. Based on this conclusion, the tax authorities were within their rights to demand a revision of the deduction, according to the CJEU.⁷¹ The CJEU compared the Dutch rules with those in a Polish case where the 'legal and factual context [was] different'.⁷² The CJEU ruled that the VAT Directive does not preclude the Dutch capital goods adjustment scheme. This case-tailored response caused some problems for the referring Dutch Supreme Court, because the CJEU construed the implications of the legislative amendment incorrectly when presenting the facts by equating appropriation for taxable purposes with exempt rental. The CJEU created the impression that the foundation's intention towards the use of the property had changed rather than that there had been an amendment of the law.⁷³ This incorrect case-tailored response can be partly attributed to the order for reference that did not state the facts fully.⁷⁴ The Supreme Court is thus also to blame for having failed to clearly outline the implications of the amendment of the Dutch law. The CJEU's misunderstanding eventually had no effect on the settlement of the dispute. The Supreme Court dismissed the appeal in cassation and ruled that the CJEU judgment is correct, irrespective of the reasoning used by the CJEU.⁷⁵

4.1[c] Comparability analysis and different treatment in tax cases

The CJEU has also opted for a case-tailored approach in tax law cases involving a so-called comparability analysis. The CJEU examines the comparability of a cross-border situation

⁶⁸ Case C-622/11 *Pactor Vastgoed* ECLI:EU:C:2013:649; Case C-787/18 *Skatteverket v Sögård Fastigheter AB* EU:C:2020:964 para 32.

⁶⁹ Case C-787/18 *Sögård Fastigheter AB* (n 68) paras 61 and 69.

⁷⁰ Case C-791/18 *Stichting Schoonzicht v Staatssecretaris van Financiën* EU:C:2020:731.

⁷¹ *ibid* paras 34-36.

⁷² Case C-500/13 *Gmina Międzyzdroje v Minister Finansów* EU:C:2014:1750 paras 54-55.

⁷³ The (taxed) integration levy had expired months before the commissioning as a result of this amendment to the law. Case C-791/18 *Stichting Schoonzicht* (n 70) paras 15-16.

⁷⁴ J. Sanders and T.D.J. Korevaar, 'Schone Schijn in de Zaak Schoonzicht?' (2021) 33 BtwBrief 8.

⁷⁵ HR 27 November 2020 NL:HR:2020:1884 para 2.2.

with an internal situation in relation to the purpose of the national provisions. The rationale is to prevent a difference in the tax treatment of a company in a Member State (that benefits from certain tax advantages) and another company incorporated in another Member State (that is excluded from the same advantages), which dissuades companies from using their freedom of establishment.

In a Czech tax law case, *Aures*, the Supreme Administrative Court asked whether freedom of establishment permits a taxpayer, when relocating a company's head office, to claim a tax loss incurred in the host state in previous years in another Member State. After examining the Czech legislation and 'the chronology of the relevant facts of the case', the CJEU concluded that companies were *not* in a comparable situation.⁷⁶ Mittendorfer and Riedl questioned the CJEU's engagement with Czech law from the perspective of role division and Article 19 TEU. They noted that the CJEU needs detailed knowledge of the objective of national norms, which is sometimes absent, causing the CJEU to render inaccurate judgments.⁷⁷ The CJEU also employed a comparability analysis in a different tax context, namely the deduction of interest. In *Lexel AB*, the Swedish Supreme Administrative Court approached the CJEU regarding Swedish legislation that does not permit a company in a group of associated companies to deduct interest expenses in relation to a debt owed to another associated company. As also noted by the CJEU, the referring court essentially asked whether Swedish legislation restricts the freedom of establishment, contrary to Article 49 TFEU. The judgment constitutes eleven paragraphs, with details of the Swedish legislative framework on interest deductibility rules. The CJEU concluded, without an AG Opinion, that there is a difference in treatment that cannot be justified on the basis of the fight against tax evasion and tax avoidance or balanced allocation of the power to impose taxes.⁷⁸ This relatively strong conclusion can be attributed to the submissions of the Swedish tax agency during the hearing. These submissions differed from the agency's position, outlined in the order for reference.⁷⁹ As the CJEU noted, it was discovered at the hearing that the objective was not merely to counter purely artificial and fictitious arrangements, but also debts resulting from transactions.⁸⁰

It is for this reason that the CJEU has — with reference to the institutional framework of Article 267 TFEU — deliberately left the determination of objectives of the national legislation to the referring court in other cases.⁸¹ One example found in our selection is *Köln-Aktiefonds Deka*, referred by the Dutch Supreme Court.⁸² The Dutch court asked about the

⁷⁶ Case C-405/18 *Aures v Odvolací finanční ředitelství* EU:C:2020:127 paras 38 and 49.

⁷⁷ Markus Mittendorfer and Mario Riedl, 'The Comparability Analysis of the Court of Justice of the European Union in the Light of the *Aures* Case' (2021) 30(4) EC Tax Review 166, 171.

⁷⁸ Case C-484/19 *Lexel AB v Skatteverket* EU:C:2021:34 paras 41, 57, 70 and 77.

⁷⁹ Alexander Tale, 'Targeted Interest Deduction Limitation Rules post-Lexel' (HARN60 Master Thesis 2020) <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=9087799&fileId=9087804>> accessed 1 October 2023, referring to Coen Deij, 'Är Undantaget Från Tioprocentregeln Förenligt med EU-rätten?' (2021) 2 Svensk Skattetidning 75. Note that the general conclusion of the CJEU in para 56 led to criticism in the literature for its considerable consequences: João Nogueira, 'Opinion Statement CJEU-TF 1/2021 on the CJEU Decision of 20 January 2021 in *Lexel AB* (Case C-484/19) concerning the Application of the Swedish Interest Deductibility Rules' (2021) 61 European Taxation Journal; the Dutch Supreme Court asked follow-up questions. HR 2 September 2022 NL:HR:2022:1121.

⁸⁰ See also Case C-484/19 *Lexel AB* (n 78) para 53.

⁸¹ Case C-419/16 *Federspiel v Bolzano* EU:C:2017:456; Case C-347/09 *Dickinger v Ömer* EU:C:2011:582 para 51.

⁸² Case C-156/17 *Köln-Aktiefonds Deka v Staatssecretaris van Financiën* EU:C:2020:51; Rita Szudoczky and Balázs Károlyi, 'The CJEU's Approach to the Objectives of Progressive Turnover-Based Taxes: Respect for

compatibility of Dutch legislation precluding the refund of withheld dividend tax for non-resident investment funds when they do not meet certain shareholder requirements. The CJEU ruled that these requirements are in principle not prohibited by EU law because evidentiary requirements ‘also appear to be imposed’ on resident investment funds, which the referring court still had to verify.⁸³ However, the CJEU did indeed find the obligation to redistribute the accruing profits problematic, although subject to the usual disclaimer:

In the present case, it is for the referring court, which has sole jurisdiction to interpret national law, taking account of all the elements of the tax legislation at issue in the main proceedings and the national tax system as a whole, to determine the main objective underlying the condition for redistribution of profits.⁸⁴

The CJEU subsequently provided the referring Supreme Court with some guidelines that mention two possible legitimate objectives to justify the restriction. It therefore provided some reflection on the present case,⁸⁵ but left the assessment and application to the Supreme Court.⁸⁶

The difference between *Aures/Lexel* and *Köln-Aktienfonds Deka* illustrates the inconsistent approach of the CJEU in the application of the comparability test.⁸⁷ It is not surprising that AG Kokott even recommended abandoning the test altogether because of its vagueness and because ‘all situations are comparable in some respect, even if they are not identical’.⁸⁸

4.1 [d] Copyright and trademark cases

Copyright cases are also prone to a case-tailored approach. On the basis of the Copyright Directive 2001/29/EC, authors have the exclusive right to authorize or prohibit any communication of their works to the public. There has been burgeoning case law on what exactly constitutes a ‘communication to the public’ in the sense of Article 3 of the Directive. AG Szpunar rightly observed that ‘few questions in EU law have given rise to as many rulings of the Court in so little time [...] Such extensive, albeit necessarily disparate, case-law has even been dubbed a “labyrinth” and the Court itself as “Theseus”’.⁸⁹ The case law analysis

the Member States’ Fiscal Sovereignty or Authorization for Circumventing EU Law?’ (2022) 50(1) *Intertax* 82, 85.

⁸³ Case C-156/17 *Köln-Aktienfonds Deka* (n 82) para 66.

⁸⁴ *ibid* para 79.

⁸⁵ According to De Wilde the CJEU even exceeded its jurisdiction with its tentative conclusion that there was a restriction in the case at hand and the identification of two possible justifications. Maaren de Wilde, ‘Als Dispariteiten “Voorwaardelijk Belemmerende Zonderonderscheidmaatregelen” worden...’ [2020] *Nederlands Tijdschrift voor Fiscaal Recht* 1.

⁸⁶ The CJEU judgment is a good example of a guidance case belonging to category 2. An indication for this is that PG Wattel adopted his fifth (!) conclusion in this high-profile case. Conclusion in HR 16 April 2021 NL:PHR:2020:531. In addition, the literature criticized the CJEU for not serving ‘clear wine’. *Vakstudie Nieuws (V-N)* 2020/9.10.

⁸⁷ Hein Vermeulen and Vassilis Dafnomilis, ‘CJEU Decision in *Bevola* (Case C-650/16): A Missing Piece in the Marks & Spencer (Case C-446/03) Puzzle’ (2019) 59 *European Taxation* 89; Peter Wattel, ‘Non-Discrimination à la Cour: The CJEU’s (Lack of) Comparability Analysis in Direct Tax Cases’ (2015) 55 *European Taxation* 542.

⁸⁸ Opinion of AG Kokott in Case C-405/18 *Aures v Odvolací finanční ředitelství* EU:C:2019:879 point 30.

⁸⁹ Opinion of AG Szpunar in Case C-753/18 *Stim and SAMI* EU:C:2020:4; more than 20 judgments and orders have been rendered since Case C-89/04 *Mediakabel* EU:C:2005:348; Birgit Clark and Julia Dickenson,

in the chosen sample includes two Swedish cases. Szkalej referred to ‘banal and perhaps annoying factual circumstances’ in these cases.⁹⁰ In *BY*, the CJEU needed only fifteen paragraphs to determine that transmission of a protected work - a photograph - to a court by electronic means as evidence does not constitute a ‘communication to the public’.⁹¹ In *Stim and SAMI*, the CJEU needed only fourteen paragraphs to reach the same conclusion for the hiring of motor vehicles equipped with a radio. Only four paragraphs engage directly with the specific context, while the remainder are essentially a repetition of earlier case law.⁹² The brevity of the CJEU’s analysis and the absence of an AG Opinion suggests that the case did not involve novel questions of EU law, but rather questions concerning the application of a previous interpretation to a different case.

A similar case-tailored tendency occurs in trademark cases. In a Swedish trademark case, the CJEU went beyond merely providing an abstract interpretation. It could have simply determined that ‘it will be for the referring court to determine, in the context of its overall analysis by reference to the actual situation in the case, whether the systematically arranged colour combinations, as shown in the applications for registration, are capable of conferring an inherent distinctive character on the signs in question’.⁹³ Nonetheless, in the subsequent paragraphs, the CJEU hinted that the marks are ‘not indissociable’.⁹⁴

4.2 THE NATURE OF THE QUESTIONS

Except for specific subjects and areas of law, certain types of questions are susceptible to a case-tailored answer from the CJEU. Questions about the compatibility of national law often lead to an interpretation of EU law that practically settles the matter (Section 4.2[a]). While questions about proportionality traditionally belong to the domain of national judges, some cases discussed in this section show that this has not always been the case (Section 4.2[b]).

4.2[a] Conformity of national law with EU law

It is perhaps not surprising that the CJEU goes beyond an abstract interpretation of EU law in cases related to the conformity of national law with EU law.⁹⁵ Zgliniski concluded that the

‘Theseus and the Labyrinth? An Overview of “Communication to the Public” under EU Copyright Law: after Reha Training and GS Media Where are We Now and Where do We Go from There?’ (2017) 5 European Intellectual Property Review 265.

⁹⁰ Kacper Szkalej, ‘Looking for the Edge of Article 3 InfoSoc Directive and Finding it Twice – in a Car and in the Court’ (*Kluwer Copyright Blog*, 25 November 2020) <<http://copyrightblog.kluweriplaw.com/2020/11/25/looking-for-the-edge-of-article-3-infosoc-directive-and-finding-it-twice-in-a-car-and-in-the-court/>> accessed 1 October 2023.

⁹¹ This case also dealt with a more principled legal question that involved the balance of copyrights with the right to an effective remedy. Case C-637/19 *BY v CX* EU:C:2020:863.

⁹² Case C-753/18 *Stim v Fleetmanager Sweden* EU:C:2020:268, paras 32-35.

⁹³ Case C-456/19 *Aktiebolaget Östgötatrafiken* ECLI:EU:C:2020:813 para 37; cf. Davies, ‘Abstractness and Concreteness’ (n 4) 222.

⁹⁴ Case C-456/19 *Aktiebolaget Östgötatrafiken* (n 93) para 43; Lavinia Brancusi, ‘The Procrustean Fitting of Trade Marks under the Requirements of Clear and Precise Subject-Matter in the EU Trade Mark Law — A Case of Position Marks’ (2022) 25(1) *The Journal of World Intellectual Property* 45, 62-63.

⁹⁵ It is for this reason that the preliminary reference procedure has been called ‘citizens’ infringement procedure’. Bruno de Witte, ‘The Impact of *Van Gend en Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions’ in Antonio Tizzano et al (eds), *50th Anniversary of the Judgment Van Gend en Loos: 1963-2013* (Office des publications de l’Union européenne 2013) 93, 95; Pierre Pescatore, ‘Van Gend en Loos, 3 February 1963 – A View from Within’ in Miguel Poiras Maduro and Loïc

CJEU went beyond just interpreting EU law in no fewer than 117 of the 160 referred cases dealing with national restrictions of free movement.⁹⁶ The CJEU famously determined in *Placanica* that,

although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.⁹⁷

In *Varkens in Nood*, the CJEU ruled that access to justice in environmental matters covered by the Aarhus Convention should not be made conditional on prior participation in the authorization procedure for the extension and modification of a pigpen. However, the CJEU went beyond just providing an explanation. In fairly explicit terms, it commented on the compatibility of Article 6:13 of the Dutch General Administrative Law Act with Article 9(2) and (3) of the Aarhus Convention.⁹⁸ The CJEU stated that

it follows, subject to findings of fact to be made by the referring court, that a person such as LB, who is not part of the ‘public concerned’ within the meaning of the Aarhus Convention, cannot rely on an infringement of Article 9(2) of that convention on the ground that she does not have access to justice in the main proceedings.⁹⁹

The CJEU offered more leeway to the national court with respect to Article 9(3), although it did not give *carte blanche* as to the application of its interpretation. It considered that the limitation of the right to an effective remedy within the meaning of Article 47 of the Charter was justified because, ‘in the present case’, the conditions were met, inter alia with regard to the requirement of proportionality.¹⁰⁰

Another interesting conformity case is *JZ* on the criminalization of illegally staying third-country nationals and the Return Directive 2008/115/EC. The Dutch Supreme Court explicitly asked about the compatibility of a provision in the Dutch Criminal Code (Article 197 Sr.) with EU law. In its answer (and not in the section ‘the main proceedings and the question referred for a preliminary ruling’), the CJEU presented the conflicting interpretations of the Dutch provision advanced by the parties.¹⁰¹ The CJEU did not take sides but merely outlined the implications of both options in the light of the principle of legality and the ECHR. At first glance, it seems that the CJEU judgments allowed the Supreme Court a great deal of freedom in settling the dispute. However, this is not the case. The judgment shows that the CJEU found little or no problem in Article 197 Sr. This is also apparent from the final judgment of the Supreme Court and the conclusion of PG Silvis.

Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 3, 7.

⁹⁶ Zgliniski (n 19) 1371.

⁹⁷ Joined Cases C-338/04, 359/04 and 360/04 *Placanica* EU:C:2007:133 para 37.

⁹⁸ Case C-826/18 *Varkens in Nood* EU:C:2021:7 para 59.

⁹⁹ *ibid* para 46.

¹⁰⁰ *ibid* paras 65-67.

¹⁰¹ Cf. Marq Wijngaarden, 14 JV 1317 (2020).

Silvis, like the Supreme Court, wrote only one short paragraph on the assessment of the requirements, concluding that Article 197 Sr is not in conflict with the Return Directive.¹⁰²

4.2[b] Proportionality assessment

Proportionality is a ‘highly contested’ and context-specific matter, often requiring a proper factual assessment.¹⁰³ For this reason, the CJEU generally refrains from a proportionality assessment because this is very much a factual exercise for national courts to conduct.¹⁰⁴ Nonetheless, it enters this factual area and decides on proportionality, as illustrated by *Josemans* and *Scotch Whiskey Association* discussed in the introduction.¹⁰⁵ According to Davies, ‘a half-understanding’ of the factual situation did not prevent the CJEU from ‘drawing sweeping conclusions’.¹⁰⁶ Several commentators likewise observed an inclination in the case law of the CJEU to increasingly give detailed guidance.¹⁰⁷

The case law analysis yielded two case-tailored judgments that involve proportionality of criminal sanctions. Interestingly, no cases related to free movement were found, and this is an area of law that often requires factual proportionality assessments by the CJEU. *K.M.* is a prime example of where the CJEU delved into the proportionality. This case also exemplifies that cases handled by the CJEU in a three-judge formation without an AG Opinion tend to be case-tailored rather than answer (new) questions of law. The Irish Court of Appeal’s question dealt with the proportionality of a criminal sanction, namely a conviction on indictment in addition to a fine, for the mandatory forfeiture of all fish and fishing gear found on board the boat, also in the light of Article 49(3) of the Charter. The CJEU admitted that the referring court should decide on such an assessment, but noted that it ‘may provide it with all the criteria for the interpretation of EU law which may enable it to determine whether that is the case’.¹⁰⁸ It subsequently noted the Irish observation (‘subject to the verifications, which is for the referring court to carry out’) that the Irish legislative framework stipulates that sanctions should vary in relation to the seriousness of the infringement.¹⁰⁹ With the same ‘subject to the verifications’ caveat, the CJEU hinted quite explicitly that, due to the seriousness of the infringement, sanctions are ‘necessary to deprive

¹⁰² HR 1 December 2020 NL:HR:2020:1893 para 3.4.3; Conclusion of P.G. Silvis, HR 1 December 2020 NL:PHR:2020:935 para 16.

¹⁰³ Davies, ‘Activism Relocated’ (n 4) 80-81; Davies, ‘Abstractness and Concreteness’ (n 4) 218.

¹⁰⁴ E.g. Case C-145/88 *Torfaen Borough Council v B & Q plc*. EU:C:1989:593; Case C-438/05 *International Transport Workers’ Federation v Viking Line ABP* EU:C:2007:772; Case C-73/08 *Bressol e.a.* EU:C:2010:181; Case C-135/08 *Rottmann v Bayern* EU:C:2010:104; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Bloomsbury Publishing 2012) 225-227; Hanna Eklund, ‘The Margin of Discretion and the Boundary Question in EU Fundamental Rights Law’ (2022) 59(5) *Common Market Law Review* 1407, 1425-1426.

¹⁰⁵ Zgliniski distinguishes five types of (de)centralization on a spectrum between complete deferral to the national court and a proportionality assessment by the CJEU itself. Zgliniski (n 19) 1349; see also Case C-372/04 *Watts v Bedford Primary Care Trust* EU:C:2006:325; Case C-341/05 *Laval v Byggnadsarbetareförbundet* EU:C:2007:809. UK courts have been critical about the inconsistency in the CJEU’s case law on the principle of proportionality. *R (Lumsdon & Ors) v Legal Services Board* [2015] UKSC 41, para 23; see also Dorte Sindbjerg Martinsen, ‘Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion’ (2011) 18 *Journal of European Public Policy* 944.

¹⁰⁶ Davies, ‘Abstractness and Concreteness’ (n 4) 218.

¹⁰⁷ E.g. Langer and Sauter (n 17).

¹⁰⁸ Case C-77/20 *K.M.* EU:C:2021:112 para 39.

¹⁰⁹ *ibid* para 51.

those responsible of the economic benefit derived from their infringement. It also appears to have a dissuasive effect'.¹¹⁰

In a Czech case, a three-judge formation of the CJEU examined the proportionality of sanctions in a consumer context. Specifically, a penalty for a creditor's failure to comply with a pre-contractual obligation to assess consumer's creditworthiness is nullity of a credit agreement, which means that a creditor is no longer entitled to the agreed interest and costs. A consumer may raise an objection of nullity within a specified period of three years after the conclusion of the agreement. Even though the CJEU noted that it is for national courts, 'which have sole jurisdiction to interpret and apply national law', to determine the effectiveness, proportionality and dissuasiveness of sanctions, providing quite concrete guidance,¹¹¹ it concluded that the penalty was proportionate and 'genuinely dissuasive'.¹¹² In this conclusion, the CJEU went further than AG Kokott, who also touched on the matter but included a note of warning that the assessment depends on the enforcement of rules in practice. She also held that the matter 'remains largely unclarified, despite being raised at the hearing'.¹¹³ However, the CJEU referred to the submission of the European Commission and concluded, without being explicit, that the limitation period does not align with the principle of effectiveness.¹¹⁴

4.3 THE REFERRING COURT STEERS TOWARD A CASE-TAILORED RESPONSE

As several of cases discussed above illustrate, a referring court partly controls the answers it receives from Luxembourg. As Tridimas noted, 'specificity may be demand-led'.¹¹⁵ The more technical and concrete the question is, the more specific is the answer. In contrast, limited (factual) information tends to result in abstract answers.¹¹⁶ The more detailed the questions are, the more detailed are the answers.¹¹⁷ Therefore, referring courts should consider the level of abstraction at which they submit their questions.

A helpful illustration of how particular questions affect the way in which the CJEU approaches the references is the Czech case of *BONVER WIN*.¹¹⁸ The referring Supreme Administrative Court steered the CJEU in the direction of a case-tailored answer by asking about the application of Article 56 TFEU on free movement of services to a municipal decree, prohibiting a betting service in Děčín, a town situated approximately 25 km from the German border. The betting service, *BONVER WIN*, claimed, on the basis of a witness statement, to have customers from other Member States. The CJEU concluded quite simply

¹¹⁰ The CJEU left some room for the referring court to assess the 'overall level of the sanctions'. Case C-77/20 *K.M.* (n 108) para 52.

¹¹¹ Case C-679/18 *OPR-Finance v GK* EU:C:2020:167 paras 26-27.

¹¹² *ibid* paras 29-31.

¹¹³ Opinion of AG Kokott in Case C-616/18 *Cofidis v YU* EU:C:2019:975 point 81.

¹¹⁴ Case C-679/18 *OPR-Finance* (n 111) paras 34-40.

¹¹⁵ Tridimas (n 6) 751.

¹¹⁶ The CJEU often uses the argument that the referring court is better placed when it lacks knowledge and information itself. Zgliniski (n 19) 1375-1377; Broberg and Fenger, *Preliminary References* (n 1) 389-391.

¹¹⁷ Krommendijk (n 10) 128-129.

¹¹⁸ Case C-311/19 *BONVER WIN v Ministerstvo financí ČR* EU:C:2020:981.

on the basis of settled case-law that existence of foreign consumers is not ‘purely hypothetical’.¹¹⁹

The *formulation* of the questions can also impact a response from the CJEU. For example, this is what occurred in the Dutch social security case *AFMB*.¹²⁰ The question of how to assess in which Member State an international truck driver is covered by social insurance (in a Member State of an employer with whom an employment contract had been concluded (in this case, AFMB was established in Cyprus) or in a Member State of an employer who actually has authority over the driver (in this case, the transport company in the Netherlands with which fleet management agreements have been concluded) was central to this case. The CJEU opted for the latter. The referring court more or less forced the CJEU to take a position because of the conditional formulation of the preliminary questions. The Tribunal asked a second and a third question, in the event that the CJEU were to rule that AFMB is the employer. Therefore, it seems that the Tribunal wanted a decision from the CJEU, based on the facts. This also emerged from the third question, ‘do the facts and circumstances (of the dispute in the main proceedings) constitute a situation that should be interpreted as an abuse of EU law and/or an abuse of EFTA law? If so, what is the consequence thereof?’ The CJEU’s conclusion that the Dutch transport company was the employer was based on the Tribunal’s order for reference. The CJEU referred to the referring court several times, which would still have to examine certain aspects under the guise of ‘subject to verification by the referring court’.¹²¹ Despite these caveats, the CJEU discussed the case in detail and mentioned the facts that the drivers were selected by the transport company, that the wage costs were de facto borne by the transport company and that the transport company was de facto authorised to dismiss drivers.¹²² This case-tailored factual determination did not cause any problems in this case because the CJEU relied on the information provided by the referring court.

Maintaining questions, despite the CJEU hinting at an *acte clair* or *éclairé*, can also push the CJEU in a more case-tailored direction. Case *Solak* on social security for Turkish migrant workers under the EEC-Turkey Association Agreement serves as an example for this approach. The CJEU’s Registry informed the referring court of another judgment, *Çoban*, that involved identical questions and asked whether the referring tribunal wished to maintain the reference. The Tribunal maintained the request. The CJEU subsequently answered the questions by means of an order mimicking its earlier judgment in *Çoban*.¹²³ However, the CJEU did not limit itself to repeating the earlier answer but went even further by engaging with the specific facts in *Solak*, namely the situation of a Turkish national who was not completely and permanently incapacitated for work and who, at the time of his departure to Turkey, was still in the regular labour market in the Netherlands. The CJEU also discussed the fact that Solak had renounced his Dutch nationality.¹²⁴ This is similar to the Czech VAT case *Herst*.¹²⁵ The Prague Regional Court referred questions about multiple transactions in a

¹¹⁹ Since the Czech court did not ask about the compatibility of the decree with EU law. Case C-311/19 *BONVER WIN* (n 118) para 32.

¹²⁰ Case C-610/18 *AFMB v Raad van bestuur van de Sociale Verzekeringsbank* EU:C:2020:565.

¹²¹ *ibid* paras 76-79.

¹²² *ibid* para 79.

¹²³ Case C-677/17 *M. Çoban v Raad van bestuur Unw* EU:C:2019:408.

¹²⁴ Case C-258/18 *Solak v Raad van bestuur Unw* EU:C:2020:98 paras 54 and 58.

¹²⁵ Case C-401/18 *Herst s.r.o. v Odvolací finanční ředitelství* EU:C:2020:295.

cross-border supply chain. The Court acknowledged ‘the significant factual similarities’ to an earlier Czech case brought before the Court, *Arex CZ*.¹²⁶ Even though the referring court was aware of this judgment, the CJEU nonetheless sent the judgment to it and asked whether it wanted to maintain its request and/or all questions. The referring court subsequently decided to withdraw five of the initial eight questions. The CJEU did not answer one of the three remaining questions, while another one was answered against the advice of AG Kokott who noted that it concerned a question of national law.¹²⁷ It is evident that *Herst* primarily entails a judgment in which the CJEU merely applied the interpretation that it had already provided previously.¹²⁸

4.4 INTERIM CONCLUSION

In the majority of cases studied, the CJEU adopted case-tailored answers in which its interpretation of EU law comes closer to its application in practice. This often settles the dispute and leads to no or only short written follow-up judgments by the referring court.¹²⁹ This section shows that several factors contribute to a case-tailored CJEU judgment. Case-tailored answers are more likely to be received in specific legal areas, such as customs, VAT and copyright, as well as certain types of questions, such as those about the conformity of national law with EU law.¹³⁰ The referring court has also considerable influence on the CJEU through the formulation of the questions or by deciding to maintain specific questions despite earlier CJEU judgments.¹³¹ The CJEU has a tendency not to dismiss questions that it had already answered, but to still give a referring court something in return. A referring court can also opt for a more detailed answer by including a provisional answer in the order for reference.¹³²

¹²⁶ Case C-414/17 *AREX CZ v Odvolací finanční ředitelství* EU:C:2018:1027.

¹²⁷ The CJEU essentially repeated its settled case law about the relationship between a directive and national law. Opinion of AG Kokott in Case C-401/18 *Herst s.r.o. v Odvolací finanční ředitelství* EU:C:2020:295 points 75-78.

¹²⁸ See also AG Kokott who mentioned that the CJEU receives ‘once again’ a question on this issue and ‘has already dealt with situations of this kind a number of times’ - Opinion of AG Kokott in Case C-401/18 *Herst* (n 127) points 1-2. The CJEU was also aware of this when it held that ‘The aim of the national court in referring questions to the Court is to determine whether the first of those conditions is met in the present case’ - Case C-401/18 *Herst* (n 125) para 35. For criticism on the factual nature of the questions: *Vakstudie Niems (V-N)* 2020/24.13.

¹²⁹ In an Irish environmental case, the CJEU also issued a rather factual-oriented judgment. There was, hence, no need for the referring High Court to issue a written judgment. Case C-254/19 *Friends of the Irish Environment Ltd v An Bord Pleanála* EU:C:2020:680 paras 33, 36 and 47. Another example is an Irish copyrights dispute about the right of the performers to equitable remuneration. This case involved two clashing interpretations: one based on Irish law and one based on EU law. The CJEU sided with the latter interpretation. That essentially settled the dispute, as the referring High Court also noted itself: ‘the interpretation advocated for by RAAP prevailed’. Recorded Artists Actors Performers Limited v Phonographic performance (Ireland) Limited & ors (Approved) 2021 IEHC 22, para 13; Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland)* EU:C:2020:677.

¹³⁰ Cf. Broberg and Fenger, *Preliminary References* (n 1) 139.

¹³¹ The CJEU can also be ‘forced’ to apply EU law to the facts of the case through follow-up questions after the initial abstract answers, as happened in the UK Sunday trading saga. Case C-169/91 *Council of the City of Stoke-on-Trent v B & Q plc*. EU:C:1992:519; Cohen (n 26) 438.

¹³² For an example of the latter, Case C-922/19 *Stichting Waternet v MG* EU:C:2021:91 paras 58-62.

5 AN APPRAISAL OF CASE-TAILORED JUDGMENTS

The previous two sections provided a typology of how the CJEU has complied with the ‘separation of functions’ between it and national courts in practice. It was shown that the CJEU does not adhere to this division and has gone beyond the mere interpretation of EU law in the majority of cases. This last substantive section discusses from a more normative perspective whether or not a case-tailored approach of the CJEU is desirable. This question suggests that the CJEU can to a large extent decide in a conscious way which approach to use. As discussed in Section 2, there is a fine line between interpretation and application. A case-tailored judgment is often inevitable if the interpretation of the CJEU can lead to only one specific result. In addition, the type of cases and questions asked may leave the CJEU no alternative, as discussed in Section 4. Having provided this caveat, this section starts with an assessment of the advantages of such an approach (Section 5.1), followed by an assessment of the risks (Section 5.2).

5.1 ADVANTAGES OF CASE-TAILORED JUDGMENTS

There are certainly solid arguments in favour of a case-tailored approach. Four arguments, based on user-friendliness, legal certainty, uniformity and effectiveness of EU law respectively, can be discerned in this regard. A first advantage is user-friendliness. Case-tailored answers are often helpful to a specific referring court and litigating parties.¹³³ Previous research has shown that national court judges usually appreciate a reflection of the CJEU on application of an abstract interpretation to a specific dispute.¹³⁴ Provided that the CJEU bases its judgment on correct facts and has a correct appreciation of national law, judges do not find it objectionable that the CJEU does not neatly adhere to the division.¹³⁵ Certainly among Dutch administrative judges, there seems to be a growing awareness that it is necessary to prevent the CJEU from issuing overly abstract judgments.¹³⁶ Apart from the judge involved in *Josemans*, national court judges have not at all felt ‘emasculated and infantilised’ by overly concrete answers.¹³⁷ This is also the impression that CJEU judges have of their national counterparts. Bay Larsen noted that judges generally do not want a wide margin of appreciation.¹³⁸ Former CJEU référendaire Sarmiento likewise noted that national courts want a practical and useful response and do not just refer ‘for the sake of abstract clarity or academic concern’.¹³⁹ The rendering of useful case-tailored answers thus contributes to the cooperative dynamic between Luxembourg and national courts, as the CJEU itself has

¹³³ E.g. Case C-25/11 *Varzim Sol – Turismo v Fazenda Pública* EU:C:2012:94, para 30.

¹³⁴ Krommendijk (n 10) 134-138.

¹³⁵ R (on the application of Newby Foods Ltd) v Food Standards Agency [2019] UKSC 18, para 69; Newby Foods Ltd, R (on the application of) v Food Standards Agency [2017] EWCA Civ 400, para 49; cf. Davies, ‘Abstractness and Concreteness’ (n 4) 227.

¹³⁶ Krommendijk (n 10) 127; Joined Cases C -148/13 to 150/13 *A v Staatssecretaris van Veiligheid en Justitie* EU:C:2014:2406; Case C-579/13 *P & S v Commissie Sociale Zekerheid Breda* EU:C:2015:369 para 49.

¹³⁷ This runs counter to the expectation of Davies, ‘Abstractness and Concreteness’ (n 4) 232.

¹³⁸ Bay Larsen as discussed by Anna Wallerman, ‘Book review: Renvoi Préjudiciel et Marge d’Appreciation du Juge National, Elefteria Neframi’ (2016) 53(6) *Common Market Law Review* 1805, 1807.

¹³⁹ Sarmiento (n 34) 298; Broberg and Fenger, *Preliminary References* (n 1) 387.

consistently determined as well.¹⁴⁰ A case-tailored answer is also beneficial from a litigant's perspective in terms of avoiding costs and delays.¹⁴¹ An additional interpretation limits the discussion between the parties and can, thus, facilitate the settlement of the dispute.¹⁴²

In addition to enhanced clarity for the referring court, a judgment from the CJEU that moves beyond mere interpretation could also broadly contribute to more legal certainty.¹⁴³ Abstract judgments are often criticised in the literature for a failure to provide clarity and guidance.¹⁴⁴ One example is *FNV v Van den Bosch Transporten*, which dealt with the secondment of (Eastern European) drivers in international road transport and the question whether they are entitled to remuneration in line with the Dutch collective labour agreement.¹⁴⁵ The CJEU ruled that a worker is a posted worker in the territory of a Member State when the work has a sufficiently close connection with that territory. This requires an overall assessment of factors such as the nature of the work, the extent to which the worker's activities are territorially linked and the proportion of those activities in the territory of each Member State in the transport service as a whole. Because of the abstract judgment, the implications were not immediately obvious.¹⁴⁶ The literature therefore criticised the vagueness and the limited number of factors mentioned by the CJEU.¹⁴⁷ Similar dissatisfaction was also expressed in response to the CJEU judgment in *Dexia* regarding unfair contractual terms.¹⁴⁸

A third advantage of case-tailored judgments is that they are helpful from the perspective of the uniform application of EU law, especially in areas of law in which Member States are reluctant to comply with EU law. This consideration explains not only the reasons why national courts refer their questions to the CJEU, but also the temptation of the CJEU to continue answering 'easy' and rather case-tailored questions.¹⁴⁹ The former can be illustrated with reference to the classification cases discussed in Section 4.1[a]. National courts do not make references because they are in doubt but because they want the CJEU to

¹⁴⁰ E.g. 'in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary' - Case C-142/05 *Mickelsson* EU:C:2009:336 para 41; Zglinski (n 19) 1369; John Cotter, *Legal Certainty in the Preliminary Reference Procedure. The Role of Extra-Legal Steadying Factors* (Edward Elgar 2022) 195.

¹⁴¹ Tridimas (n 6) 754; Broberg and Fenger, *Preliminary References* (n 1) 393.

¹⁴² See e.g. CBB 12 September 2016 NL:CBB:2016:270. This is especially the case if the CJEU determines or hints that a particular provision of national law does not comply with EU law. See e.g. Case C-153/14 *K. & A. v Minister van Buitenlandse Zaken* EU:C:2015:453.

¹⁴³ Cf. Opinion of AG Kokott in Case C-401/18 *Herst* (n 127) point 3; Joxerramon Bengoetxea et al, 'Integration and integrity in the legal reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 43.

¹⁴⁴ E.g. in relation to the fair balance between property rights and other fundamental rights. Peter Oliver and Christopher Stothers, 'Intellectual property under the Charter: Are the Court's scales properly calibrated?' (2017) 54(2) *Common Market Law Review* 517.

¹⁴⁵ Case C-815/18 *FNV v Van den Bosch Transporten* EU:C:2020:976.

¹⁴⁶ Incidentally, the CJEU offers more clarity with regard to the third question of whether the binding nature of collective agreements should be determined on the basis of national law. Case C-815/18 *FNV* (n 145) para 71.

¹⁴⁷ Anne van der Mei, in TRA 2021/39; Edith Franssen, in JAR 2021/16.

¹⁴⁸ The CJEU reminded the referring court of the division of tasks and held that 'it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case'. Joined Cases C-229/19 and 289/19 *Dexia* (n 36) para 45; Charlotte Pavillon, 'De prejudiciële procedure als abstracte onredelijk bezwarend-toets' (2017) 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 700.

¹⁴⁹ Cf. Philipp Schroeder, 'Seizing opportunities: the determinants of the CJEU's deference to national courts' [2023] *Journal of European Public Policy* 1.

provide a binding *erga omnes* ruling in a field of law that is considerably harmonized.¹⁵⁰ In this way, in the words of a Dutch referring judge, ‘the whole of Europe knows where we stand’ instead of classifying a product in a different and more disadvantageous way than in other EU Member States.¹⁵¹ Dissimilar tariffs could disrupt trade flows and, hence, distort competition. Case-tailored judgments thus contribute to a level playing field for businesses and consumers and avoid ‘forum-shopping’.¹⁵² Case-tailored judgments are thus especially warranted in areas in which national judges tend towards non-compliance by doing their utmost to justify national measures.¹⁵³ As Rasmussen noted, the CJEU prevents courts from drawing unintended consequences from an abstract dictum.¹⁵⁴ The issue of uniformity could partly explain a steady rise in the number of case-tailored VAT group cases. This area of law is noted for considerable non-compliance with CJEU judgments in some Member States.¹⁵⁵ In a Swedish VAT case, *Danske Bank*, the question was whether a Swedish branch of a bank established in another Member State (Denmark) constitutes an independent taxable person. The CJEU disposed of the case in a three-judge formation without an AG Opinion. It determined explicitly that the Danish VAT group and the Swedish branch in that company do not form a single taxable person. The CJEU also differentiated the facts of this case from the factual basis of an earlier *Skandia* case.¹⁵⁶

A related fourth advantage of case-tailored answers has materialized more recently in the context of rule of law backsliding in several EU Member States. If the CJEU were to remain on an abstract level, this could reduce the effectiveness of its judgments considerably and EU law more generally. This is especially problematic in relation to violations of fundamental common EU values as laid down in Article 2 TEU. The Hungarian *IS* case provides a good example.¹⁵⁷ A Hungarian judge asked about the conformity with EU law of disciplinary proceedings instituted against him following a reference, as well as the power of the Kúria (Supreme Court) to declare the request for a preliminary ruling unlawful. Legally, the answer to the questions was quite evident in light of the established case law. However, this did not prevent the Grand Chamber from issuing this principled judgment, most probably to send a strong signal to the Hungarian (judicial) authorities. The Grand Chamber simply elucidated the application of well-known principles to the Hungarian context and reflection on the Kúria decision.¹⁵⁸ Earlier, the CJEU ruled in a quite straightforward way that the Polish Disciplinary Chamber is not independent, even though it left the official (and rather formalistic) decision to the referring court.¹⁵⁹ These explicit pronouncements can

¹⁵⁰ Opinion of AG Kokott in Case C-115/16 *N Luxembourg 1 v Skatteministeriet* EU:C:2019:134 point 106.

¹⁵¹ Krommendijk (n 10) 106.

¹⁵² European Federation for Cosmetic Ingredients, R (on the application of) v The Secretary of State for Business, Innovation and Skills & Ors [2014] EWHC 4222 (Admin), para 25; The Gibraltar Betting and Gaming Association Ltd, R (on the application of) v HMRC [2015] EWHC 1863 (Admin), paras 13-14; Broberg and Fenger, *Preliminary References* (n 1) 390.

¹⁵³ Davies, ‘Activism Relocated’ (n 4) 81.

¹⁵⁴ Rasmussen (n 22) 1102.

¹⁵⁵ Siqalane Taho, ‘Companies Call for EU VAT Grouping Overhaul and Harmonisation’ (*International Tax Review*, 18 May 2022) <www.internationaltaxreview.com/article/2a7cstq7ub837k1olodmo/companies-call-for-eu-vat-grouping-overhaul-and-harmonisation> accessed 1 October 2023.

¹⁵⁶ Case C-812/19 *Danske Bank A/S v Skatteministeriet* EU:C:2021:196 para 32.

¹⁵⁷ Case C-564/19 *IS* EU:C:2021:949.

¹⁵⁸ *ibid* paras 74-75 and 77.

¹⁵⁹ Joined Cases C-585/18, 624/18 and 625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court) v Sąd Najwyższy* EU:C:2019:98 paras 132-154.

partly be attributed to the limited and reluctant role of the European Commission as guardian of the treaties, as evidenced by the decreasing number of infringement procedures.¹⁶⁰ The CJEU seems to compensate for the silence from Berlaymont by extending a helping hand to the referring courts.¹⁶¹ Especially these rule of law cases could reflect a deliberate strategy by the CJEU to establish itself as a hierarchically superior court by rendering case-tailored judgments.¹⁶²

5.2 DISADVANTAGES AND RISKS OF CASE-TAILORED JUDGMENTS

An overly case-tailored approach has four risks: erroneous interpretations of national law and facts, inconsistencies in the case law and legal uncertainty, exponential growth in case-tailored references as well as pressure on the CJEU's workload.

First, the CJEU's engagement with a national factual or legal context can create difficulties in specific cases, especially in cassation appeals when the facts have already been established, as mentioned in the introduction.¹⁶³ There are several older cases that illustrate this risk, among which is *Ten Kate Holding Musselkanaal* on state liability for damages due to the violation of the ban on producing and selling protein from pork fat.¹⁶⁴ The CJEU held that 'contrary to what the Hoge Raad assumed', the Standing Veterinary Committee did discuss requests for authorisation but did not take a position.¹⁶⁵ The Supreme Court disregarded this particular fact established by the CJEU and explicitly ruled that the CJEU judgment was partly based on facts that were not considered by the Supreme Court.¹⁶⁶ The *Ladbroke's* case discussed in the introduction is another illustration of the difficulties of overly specific CJEU judgments, even though the Dutch Supreme Court eventually managed to find a way to settle the case.¹⁶⁷ A Dutch case concerning the tariff classification of Sonos zone players, a wireless music system, also led to some resentment among judges from the Dutch Supreme Court.¹⁶⁸ The CJEU established of its own motion some facts regarding how the zone players were presented to consumers on the Sonos website.¹⁶⁹

¹⁶⁰ Roger Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75(4) *World Politics* 779.

¹⁶¹ E.g. Speech of President Lenaerts during FIDE (2021) <<https://fide2020.eu/fide-2020/recordings/>>. National courts frequently refer to the CJEU for politico-strategic reasons to obtain support vis-à-vis the executive or legislature. Krommendijk (n 10) 89-109.

¹⁶² Rasmussen (n 22) 1101-1102.

¹⁶³ Too much reliance on the referring court in relation to the facts can also be tricky when the CJEU decides to handle purely internal situations. Jasper Krommendijk, 'Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 *German Law Journal* 1359.

¹⁶⁴ Case C-511/03 *Ten Kate Holding Musselkanaal* EU:C:2005:625.

¹⁶⁵ *ibid* para. 39.

¹⁶⁶ HR 22 December 2006 NL:HR:2006:AZ3083 (*Staat v Ten Kate Holding Musselkanaal*) paras 2.2.1-2. This solution has been applied in the past, for example, by the UK Supreme Court. E.g. *North Wales Training and Enterprise Council Ltd v Astley & Ors.* [2006] UKHL 29; *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15.

¹⁶⁷ See *supra* n 16.

¹⁶⁸ Case C-84/15 *Sonos Europe BV v Staatssecretaris van Financiën* EU:C:2016:184.

¹⁶⁹ This did not prevent the Supreme Court from reaching a final decision. It subtly referred to this finding of the CJEU by pointing out both the fact that the CJEU had based its reasoning on the description of the Supreme Court as well as the fact that the Zoneplayer is offered to the consumer as a wireless system for the reproduction of hi-fi stereo sound; HR 8 July 2016 NL:HR:2016 para 2.3; In another case the CJEU held that

These few older cases are clear exceptions. That is confirmed by the fact that the case samples do not include CJEU judgments that caused insurmountable problems.¹⁷⁰ The only exception is the Dutch consumer case *A, B and C*, where the CJEU went beyond the separation of functions.¹⁷¹ Although the CJEU normally leaves considerable room for national courts to assess whether terms are unfair, in this case, the CJEU provided some specific guidelines.¹⁷² However, some of this concrete application to the national situation was incorrect, according to the referring court.¹⁷³ This case illustrates that too much specificity is not risk-free, although the District Court ultimately managed to avoid a real confrontation with the CJEU. However, problematic ‘interference’ by the CJEU could, especially in the long run, be detrimental to the legitimacy of the CJEU from the perspective of national courts and could affect the willingness of national courts to make references.¹⁷⁴

A second problem concerns wider effects of the CJEU’s overly case-tailored case law beyond the case at hand. As Tridimas aptly observed, ‘excessive recourse to the outcome approach might in fact reduce rather than help legal certainty’.¹⁷⁵ This is because it is more difficult to derive statements of legal principle and precedents from case-tailored judgments.¹⁷⁶ Former Dutch Supreme Court Judge Van Vliet criticised the CJEU for often acting as a judge of the facts. In his view, the factual tax case law results in an absence of a clear red line.¹⁷⁷ The more case-tailored CJEU’s guidance is, the higher is the probability of creating inexplicable inconsistencies, as was also noted in relation to the CJEU’s comparability test (Section 4.1[c]). Previous research revealed, for instance, that national court judges have been critical about the CJEU’s factual and ‘not entirely consistent’ case law on the ‘communication to the public’, as discussed in Section 4.1[d].¹⁷⁸

A third problem with extremely case-tailored judgments is that they implicitly encourage national judges to ask further questions related to cases in which the factual constellation differs slightly.¹⁷⁹ This problem of ‘factual’ jurisprudence has been recognized

the statement of facts was inadequate. It based itself on the written and oral observations. Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* EU:C:1994:195 para 13; Cotter (n 140) 206.

¹⁷⁰ This observation holds true for the Netherlands and Ireland whose follow-up judgments of national courts, if available, were examined.

¹⁷¹ Case C-738/19 *A v B* EU:C:2020:687 paras 23-26 and 31-32; cf. Candida Leone, ‘CJEU in C-738/19: Limits to Global Assessment of Term’s Fairness’ (*Recent European Consumer Law*, 10 September 2020) <<https://recent-ecl.blogspot.com/search?q=%2FC-738%2F19>> accessed 1 October 2023.

¹⁷² The CJEU held: ‘In the present case, it is apparent from the request for a preliminary ruling [...]’. Case C-738/19 *A v B* (n 171) para 35.

¹⁷³ The CJEU assumed that the claim for payment of the profits acquired as a result of the prohibited subletting is based on Article 6:104 of the Dutch Civil Code. In its final judgment, however, the Court pointed out that this claim is also (independently) supported by Article 7.18 of the general terms and conditions of the Code. In the final judgment, the Amsterdam District Court concluded that both clauses are not unfair, even when the cumulative effect is taken into account. Rb. Amsterdam 28 January 2021 NL:RBAMS:2021:388 paras 4.5-6.

¹⁷⁴ Krommendijk (n 10) 165-167.

¹⁷⁵ Tridimas (n 6) 754.

¹⁷⁶ Broberg and Fenger, *Preliminary References* (n 1) 393; Davies, ‘Abstractness and Concreteness’ (n 4) 232, 243.

¹⁷⁷ Henk Bergman and Bart van Zadelhoff, ‘Met die BTW kan het zo weer Afgelopen Zijn’ (2017) 90 *Weekblad Fiscaal Recht*.

¹⁷⁸ *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, para 179; Krommendijk (n 10) 132-134.

¹⁷⁹ Cf. Michal Bobek, *National Courts and the Enforcement of EU Law. Institutional Report. The XXIX FIDE Congress in The Hague* (Eleven International Publishing 2020) 61, 87-88; Broberg and Fenger, *Preliminary References* (n 1) 393; see for a discussion Karoline Spies, ‘CJEU VAT Case Law in 2020: Evergreens, Revivals and New Trends’ (2021) 49 *Intertax* 606, 607.

by several AGs, most notably AG Jacobs in *Wiener*.¹⁸⁰ Therefore, he called for ‘self-restraint’ and cautioned against national courts making even more references for ‘further clarification’ when the facts of the cases differ (slightly) from the factual background of the cases where the CJEU has already provided answers to similar questions.¹⁸¹ AG Jacobs stated that

this Court would [...] be going beyond its functions under Article [234 EC] if it were to rule on all aspects of repackaging and relabelling that might be undertaken by parallel importers in relation to different types of product. Once the Court has spelt out the essential principle or principles, it must be left to the national courts to apply those principles in the cases before them.¹⁸²

Such extrapolation is especially warranted in ‘technical fields’, such as customs and VAT or copyright and trademark cases discussed in Section 4.1.¹⁸³ Several AGs have subsequently expressed similar concerns. AG Sharpston held, for example, that

I would then hope that national courts will play their part robustly in applying the principles to the facts before them without further requests to fine-tune the principles. Every judge knows that ingenious lawyers can always find a reason why a given proposition does or does not apply to their client’s situation. It should not however, in my view, be for the Court of Justice to adjudicate on such detail for evermore.¹⁸⁴

In a similar fashion, AG Ruiz-Jarabo Colomer called on the CJEU to avoid replacing the national court.¹⁸⁵ AG Bobek argued for more room for national courts to reach a decision based on the case law of the CJEU.¹⁸⁶ Some national courts, especially UK courts, have strictly observed this distinction between the interpretation and application of established principles of EU law and have, thus, been reluctant to refer questions primarily concerned with application.¹⁸⁷ This approach can be a source of inspiration for other national courts, especially in light of the recent *Consozjo (CILFIT 2.0)* judgment, where the CJEU limited the obligation to refer to doubts about the correct *interpretation* of EU law and the concrete correct application of EU law.¹⁸⁸

A fourth related problem is the workload of the CJEU. It is no secret that the CJEU has to cope with significant pressure and an ever-growing number of requests.¹⁸⁹ The CJEU

¹⁸⁰ Opinion of AG Jacobs in Case C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich* EU:C:1997:552 point 15. See also Opinion of AG Fennelly in Case C-220/98 *Estée Lauder Cosmetics* EU:C:2000:8 point 31; Opinion of AG Gullman in Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories* EU:C:1994:34 point 9.

¹⁸¹ Opinion of AG Jacobs in Case C-338/95 *Wiener* (n 180) point 15.

¹⁸² Opinion of AG Jacobs in Case C-349/95 *Loendersloot v Ballantine* EU:C:1997:530 point 33.

¹⁸³ *ibid* point 61.

¹⁸⁴ Opinion of AG Sharpston in Case C-348/04 *Boebringer Ingelheim v Swingward* EU:C:2007:249 point 3.

¹⁸⁵ Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio* (n 28) point 35.

¹⁸⁶ Bobek called on the CJEU to revise *CILFIT* for this reason. Opinion of AG Bobek in Case C-561/19 *Consozjo Italian Management v Rete Ferroviaria SpA* EU:C:2021:799; cf. Bobek (n 179) 61 and 88.

¹⁸⁷ Reed (n 27) 14; HMRC v Frank A Smart and Son Ltd (Scotland) [2019] UKSC 39, paras 59 and 64.

¹⁸⁸ Contrast ‘correct interpretation of EU law is so obvious’ with ‘the correct *application* of Community law’. Case C-561/19 *Consozjo Italian Management v Rete Ferroviaria SpA* EU:C:2021:799 para. 39; Case 283/81 *Cilfit and Others* EU:C:1982:335 para. 16.

¹⁸⁹ Broberg and Fenger, *Preliminary References* (n 1) 394-396.

tends to answer all questions and to simply attempt to manage the volume rather than impose measures to limit the inflow of references.¹⁹⁰ One wonders whether this is tenable in the long run, and it raises a question of whether the CJEU should be more selective and critical of incoming requests and focus on interpretation rather than application. Over-specificity undermines the CJEU's fundamental function of *interpreting* EU law.¹⁹¹ This is reflected in the criticism of the CJEU's handling of tariff cases as 'a very wasteful and inefficient way to employ the time'.¹⁹²

6 CONCLUSION

This article analysed how and when the CJEU adheres to the 'separation of functions' between itself and national courts. The empirical evidence culled from a structured doctrinal case law analysis of 55 judgments in relation to five Member States confirms that the interpretation-application division is a fiction or, in the words of Broberg and Fenger, 'more a question of form than a substantive delimitation'.¹⁹³ Rasmussen even talked about a 'smokescreen'.¹⁹⁴ This article showed that case-tailored answers are more likely to be seen in specific legal areas, such as customs, VAT and copyright or in response to specific types of questions regarding conformity of national law with EU law. Even proportionality assessments are frequently dealt with by the CJEU. This article also showed that referring courts can steer the CJEU towards a case-tailored answer by formulating the questions or by deciding to proceed with specific questions, despite existence of earlier judgments of the CJEU.

The high proportion of application cases makes one wonder why the CJEU still sticks to its 'separation of functions' discourse. It is not only in relation to this aspect of its interaction with national courts that the CJEU uses rhetoric that does not match the actual judicial practice. The construction of this interaction in the preliminary ruling procedure as a form of 'cooperation' or 'dialogue' is largely a myth as well.¹⁹⁵ The findings pose a question of whether the CJEU should continue to ignore its own ideal.

The last section of this article discussed several advantages of case-tailored judgments, including user-friendliness, legal certainty, uniformity and the effectiveness of EU law. There are also considerable risks, such as erroneous interpretations of national law and facts, a reduction in legal certainty, inconsistencies and an exponential growth in factual references that lead to an unmanageable workload. This article identified a paradox: too much specificity can lead to more as well as less certainty. It is, thus, difficult to conclude *in abstracto* that the

¹⁹⁰ Tom de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Continuity' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 228.

¹⁹¹ Tridimas (n 6) 754.

¹⁹² Joseph H H Weiler and Jean-Paul Jacqué, 'On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27(2) *Common Market Law Review* 185; cf. Opinion of AG Ruiz-Jarabo Colomer in Case C-30/02 *Recheio* (n 28) point 35.

¹⁹³ Broberg and Fenger, *Preliminary References* (n 1) 139; Cohen (n 26).

¹⁹⁴ Rasmussen (n 22) 1101.

¹⁹⁵ Jos Hoevenaars and Jasper Krommendijk, 'Black box in Luxembourg. The bewildering experience of national judges and lawyers in the context of the preliminary reference procedure' (2021) 46 *European Law Review* 61.

risks outweigh the advantages. In some situations, such as rule of law backsliding, a more case-tailored approach is warranted.¹⁹⁶

Be that as it may, the aforementioned risks are apparent and should be a reason for the CJEU to adhere more closely to the separation of functions that it propagates so forcefully. The former also better reflects the institutional balance, contained in Article 267 TFEU.¹⁹⁷ As Tridimas held, ‘guidance rather than outcome appears the desired default position’.¹⁹⁸ Reducing a case-tailored inclination enables national courts to take a more prominent position in the construction of the EU legal order.¹⁹⁹ How can the CJEU better live up to the propagated division? It is clear that it should tread carefully in order not to upset national courts and not to contradict the spirit of cooperation. If the CJEU suddenly starts declaring too factual or national-oriented questions inadmissible, this could be regarded as a rebuke for referring national courts.²⁰⁰ One possible solution is to provide clearer instructions for national courts, for example in the CJEU’s Recommendations, as to the type of questions that are appropriate to refer. Despite calls in the literature, there is still a persisting lack of clarity in this respect.²⁰¹ The recent *Consozjo (CILFIT 2.0)* is a step in the right direction. It is to be anticipated that the CJEU’s recent change towards *application* in relation to *CILFIT* will also produce trickle-down effects in relation to the way in which the Court responds to references and positions itself on the interpretation-application spectrum.²⁰² This also demands a more mature and restrained attitude from national courts, whereby ‘easy’ questions regarding the application of earlier interpretations of EU law are not simply thrown over the CJEU’s fence. Another option is to acknowledge that there are several areas that are inherently factual-technical and, hence, do not all fit the interpretation-application division. This holds true for classification of the cases in relation to which uniformity and level-playing-field concerns also play a prominent role. One specific solution is creating a separate single EU customs court.²⁰³ In any way, if the CJEU chooses not to abandon or decides to justify its judicial practice, it should reflect upon whether adherence to the ‘separation of functions’ mantra should still be upheld.

¹⁹⁶ E.g. Case C-564/19 *IS* (n 157).

¹⁹⁷ Sarmiento (n 34) 309.

¹⁹⁸ Tridimas (n 6) 756.

¹⁹⁹ Tridimas (n 6) 755; Rasmussen (n 22) 1109.

²⁰⁰ Broberg and Fenger, *Preliminary References* (n 1) 393.

²⁰¹ Tridimas (n 6) 754; Krommendijk (n 163).

²⁰² Morten Broberg and Niels Fenger, ‘If You Love Somebody Set Them Free: On the Court of Justice’s Revision of the Acte Clair Doctrine’ (2022) 59(3) *Common Market Law Review* 711; Case 283/81 *Cilfit* (n 188); Case C-561/19 *Consozjo Italian Management* (n 188).

²⁰³ Davies, ‘Abstractness and Concreteness’ (n 4) 225. The CJEU proposed that the General Court could handle requests for a preliminary ruling on the basis of Article 256(3) TFEU in relation to six areas, including tariff classification. ‘Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union 4-5 (December 2022)’ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> accessed 1 October 2023.

APPENDIX 1 – TABLE 1

A. Information about the case					B. The handling of the reference suggesting case-specific answers			C. The frequency of standard phrases suggesting case-specific answers ^I
Case	Case name	Category ^{II}	Subject matter	Main EU law source ^{III}	No AG Opinion	Three judge formation	Order	
Ireland (9)								
C-77/20	K. M.	1	Proportionality sanction	R	x	x		9
C-739/19	VK v An Bord Pleanála	1	Legal representation	D				4
C-265/19	Recorded Artists Actors Performers	2	Copyright remuneration	D				
C-254/19	Friends of the Irish Environment Ltd	2	Habitat impact assessment	D				4
C-616/19	Minister for Justice and Equality	3	Admissibility Procedures Directive	D				
C-64/20	An tAire Talmhaíochta Bia agus Mara	3	Primacy EU law	D				1
C-488/19	Minister for Justice and Equality	3	Non-execution Arrest Warrant	D				1
C-322/19 & C-385/19	The International Protection Appeals Tribunal	3	Dublin claimant's labour market access	R				1
C-311/18	Facebook Ireland and Schrems	3	Validity EU-US Privacy Shield	d				6
Czech Republic (8)								
C-941/19	Samohýl group	1	Tariff classification	R	x	x		5
C-311/19	BONVER WIN	1	Cross-border element betting services	T				3
C-679/18	OPR-Finance	1	Proportionality sanctions	D		x		6
C-405/18	AURES Holdings	1	Loss utilisation	T				3
C-98/20	mBank	2	Consumer's domicile	R	x	x	x	3
C-401/18	Herst	2	VAT	D				7
C-446/18	A.G.ROBET CZ	3	VAT refund	T		x		5
C-215/18	Prmera Air Scandinavia	3	Compensation delays	R				3
Sweden (11)								
C-812/19	Danske Bank	1	VAT taxable person	D	x	x		1
C-637/19	BY v CX	1	Communication to public	D				1
C-484/19	Lexel AB	1	Interest deductibility	T	x			8
C-787/18	Skatteverket	1	VAT deduction	D	x	x		7
C-753/18	Stim & SAMI	1	Communication to public	D				
C-473/19	Föreningen Skydda Skogen	2	Conservation of birds	D				3

^{II} The following phrases were counted: 'It is for the referring / national court'; 'Subject to (the) verification(s)'; 'In the present case/ instance' and 'According to the information/ documents/ explanation/ referring court'. Note that only the use of standard phrases in the operative part ('The dispute in the main proceedings and the question referred') were counted.

^{III} 1 = case-tailored judgment; 2 = intermediate; 3 = abstract judgment (see Figure 1 and Section 2 for an explanation).

^{III} R = Regulation; D = Directive/ Framework Decision; T = Treaty; d = decision.

C-456/19	Aktiebolaget Östgötrafik	2	Registration trade mark	D	x	x		3
C-476/19	Combinova	3	Community Customs Code	R	x			3
C-363/19	Mezina	3	Health claims	R	x	x		2
C-193/19	A v Migrationsverket	3	Schengen family reunification	R				
C-454/18	Baltic Cable	3	Cross-border electricity exchange	R				1
Netherlands (26)								
C-331/19	X	1	VAT classification	D		x		1
C-192/19	Rensen Shipbuilding	1	Custom classification	R	x	x		3
C-186/19	Supreme Site Services	1	Immunity NATO	R				3
C-791/18	Stichting Schoonzicht	1	VAT deduction	D				2
C-610/18	AFMB	1	Social security	R				5
C-922/19	Stichting Waternet	2	Conclusion consumer contract	D	x	x		11
C-738/19	A	2	<i>Subletting social housing dwelling</i>	D	x	x		6
C-225/19 & C-226/19	RNNS and KA	2	appeal visa refusal	R				1
C-826/18	Varkens in Nood	2	Access to environmental justice	d				2
C-806/18	JZ	2	criminalisation illegal stay	D				3
C-258/18	Solak	2	Social security	R	x	x	x	1
C-354/20 P PU & C-412/20 P PU	L & P	3	Non-execution Arrest Warrant	D				
C-673/19	M & A	3	administrative detention illegal refugee	D				2
C-441/19	TQ	3	Return unaccompanied minor	D				3
C-361/19	De Ruiter	3	common agricultural policy	R				
C-360/19	Crown Van Gelder	3	Complaint customer installation	D				
C-330/19	Exter BV	3	Community Customs Code	R	x	x		
C-229/19 & C-289/19	Dexia Nederland	3	Unfair consumer contracts	D	x			6
C-104/19	Donex Shipping	3	Validity anti-dumping duty	R				1
C-21/19 - C-23/19	P.F. Kamstra Recycling	3	Shipment of waste	R				
C-815/18	FNV	3	Posted workers	D				1
C-814/18	Ursa Major Services	3	European Fisheries Fund	R	x	x		4
C-341/18	Staatssecretaris van Justitie en Veiligheid	3	Schengen Borders Code	R				2
C-314/18	SF	3	Non-execution Arrest Warrant	D				
C-160/18	X BV	3	Community Customs Code	R				
C-156/17	Köln-Aktienfonds Deko	2	Taxation dividends	T		x		10
Greece								
C-760/18	M.V. and Others	2	Fixed-term employment	D	x	x		1

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