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Reference for a preliminary ruling: practical advice for lawyers

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How to convince a national judge to make a preliminary reference to the CJEU?

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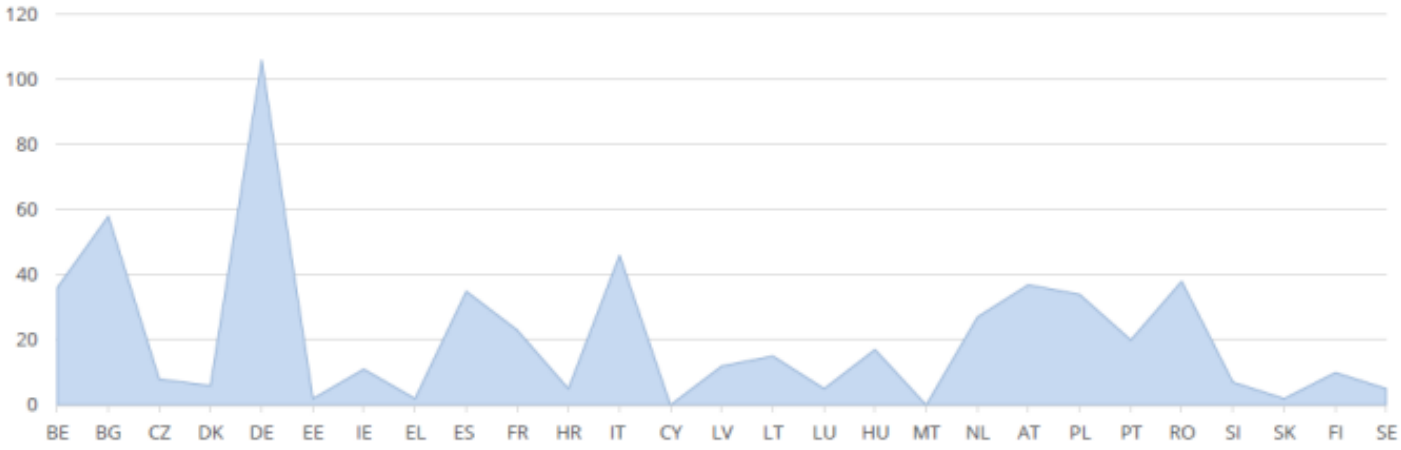
The legal need to convince a national judge (see also TFEU Article 267 and TEU Article 19)

- Pursuant to Article 267 (2) TFEU (Treaty on the Functioning of the European Union), only a "court or tribunal" of a Member State has the right to make a reference for preliminary ruling
- The CJEU interprets the terms "court or tribunal" as independent terms of Union law, irrespective of how they are construed on a national level

How active are your courts with references?

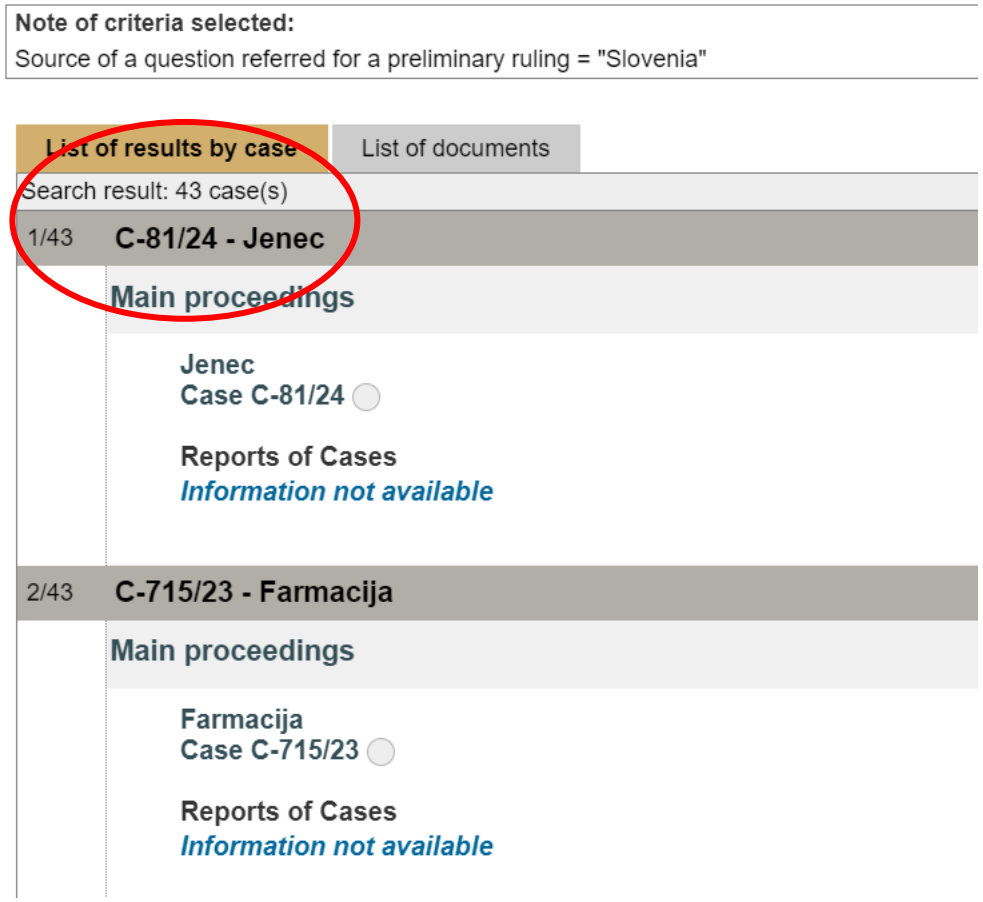
As regards references for a preliminary ruling, the number of cases brought in 2021 increased slightly (567 in 2021 compared to 556 in 2020). Those questions, which are referred from national courts of all the Member States of the European Union, show the excellent cooperation between those courts and the Court of Justice so that the Court of Justice may ensure, in particular, the uniform interpretation and consistent application of EU law throughout the European Union. In 2021, the highest number of requests for a preliminary ruling to the Court of Justice were made, respectively, by the German (106), Bulgarian (58), Italian (46), Romanian (38), Austrian (37), Belgian (36), Spanish (35) and Polish (34) courts. In particular, the increase in the number of references for a preliminary ruling from the courts and tribunals of Bulgaria (58 in 2021 compared to 28 in 2020) and of Romania (38 in 2021 compared to 20 in 2020) was particularly significant.

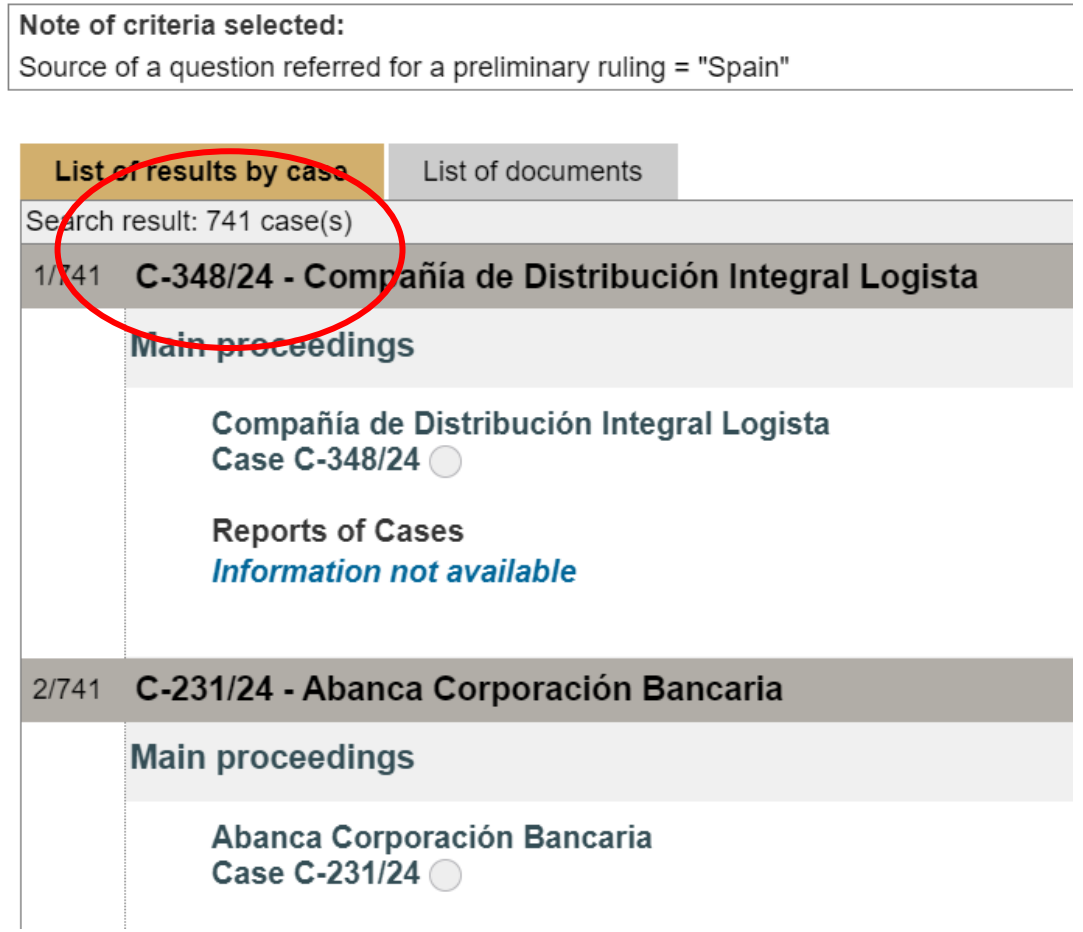
References for a preliminary ruling to the Court of Justice from the courts of the Member States (2021)



BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	Total
36	58	8	6	106	2	11	2	35	23	5	46		12	15	5	17		27	37	34	20	38	7	2	10	5	**567**

States with a small number of references





What are the main convincing points?

In line with Article 267 TFEU, a preliminary reference may be submitted if two premises are met jointly:

(1) a question of EU law is raised before a national court; and

(2) a decision on that question is necessary for the national court to give judgment on the case at hand

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What may motivate a national judge?

Bringing up the issue by a representative of one of the parties

What may motivate a national judge?

- Quality help to enforce the:

„Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01)“

The referral must be drafted simply, clearly and precisely given that it will need to be translated to allow other Member States to submit their observations

What may motivate a national judge?

- Encouragement.

C-210/06: CARTESIO:

„the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.“

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The urgent preliminary ruling procedure (PPU)

Urgent preliminary ruling procedure (Rules of Proceedure the court art 107-114)

- A procedure applying only in cases involving questions relating to freedom, security and justice
- In particular, it limits the number of parties permitted to submit written observations and allows, in cases of extreme urgency, for the written stage of the procedure to be omitted before the CJEU

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Urgent preliminary ruling procedure (Rules of Proceedure the court art 107-114)

Reasons for the application of the urgent preliminary ruling procedure:

- Risk of deterioration of the parent/child relationship ((Aguirre Zarraga (C-491/10 PPU, EU:C:2010:828); Mercredi (C-497/10 PPU, EU:C:2010:829))
- Deprivation of liberty (Kadzoev (C-357/09 PPU, EU:C:2009:741); Bob-Dogi (C-241/15, EU:C:2016:385))
- Risk of interference with fundamental rights (C. K. and Others (C-578/16 PPU, EU:C:2017:127))

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Do not forget about expedited procedure (Rules of Proceedure the court art 105-106)

- A procedure where the nature and exceptional circumstances of the case require it to be handled quickly
- An expedited procedure must be sought only when particular circumstances create an emergency that warrants a quick CJEU ruling on the questions referred
- This could arise, for example, if there is a serious and immediate danger to public health or to the environment, which a prompt decision by the CJEU might help to avert, or if particular circumstances require uncertainties concerning fundamental issues of national constitutional law and of EU law to be resolved within a very short time

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Expedited procedure (Rules of Proceedure the court art 105-106)

Reasons for the application of the expedited preliminary ruling procedure:

- Particular severity of the legal uncertainty to which the reference for a preliminary ruling relates (Wightman and Others (C-621/18, EU:C:2018:851)
- Risk of serious environmental damage

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The written observations

Written observations

- Rules of Procedure of the Court of Justice, Chapter V
- STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION
- PRACTICE DIRECTIONS TO PARTIES CONCERNING CASES BROUGHT BEFORE THE COURT
- DECISION OF THE COURT OF JUSTICE of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia

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Written observations: E-Curia

- The Court’s recommended method of lodging a procedural document is via the e-Curia application. This allows the lodging and service of procedural documents by exclusively electronic means, without it being necessary to provide certified copies of the document transmitted to the Court or to duplicate that transmission by sending the document by post. (see DECISION OF THE COURT OF JUSTICE of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia)

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Written observations

- Article 23 within two months of a notification from the Court, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court
- Where a request for a preliminary ruling is served on them by the Court, those persons may thus submit, if they wish, written observations in which they set out their point of view on the request made by the referring court or tribunal

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Written observations

- Although the statement must be complete and include, in particular, the arguments on which the Court may base its answer to the questions referred, it is not necessary, on the other hand, to repeat the factual and legal background of the dispute set out in the order for reference, unless it requires further comment
- Subject to special circumstances or specific provisions of the Rules of Procedure providing for a restriction of the length of the documents because of the urgency of the case, written observations lodged in a preliminary ruling should not exceed 20 pages

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The oral phase

Logistics

- Be there early!
- Security check may take some time
- Not all securty personel may speak English

Photo from Court of Justice of the European Union LinkedI

Clothing

What do you have to wear?

Representatives are required (subject to exceptions) to present oral argument in court dress, standing behind the lectern provided for that purpose.

Each representative must bring his or her own gown

Photo from Court of Justice of the European Union Linked

Hearing and the pleading

- Where the defendant is a Member State, the language of the case shall be the official language of that State
- Speakers standing behind the lectern must always use the microphone; it can be switched on and off using the button at the base of the microphone. For the purpose of providing simultaneous interpretation, speakers are advised to speak slowly
- If you do decide to read out a written text which you have prepared, please send it if possible, in advance to the Interpretation Directorate by email (interpret@curia.europa.eu). This will help the interpreters to prepare for the hearing

Photo from Court of Justice of the European Union Linked

Hearing and the pleading

Do not exceed the time allowed for opening argument as indicated in the letter of notice to attend the hearing

As a general rule, the speaking time is fixed at 15 minutes. However, that time may be made longer or shorter depending on the nature or the specific complexity of the case

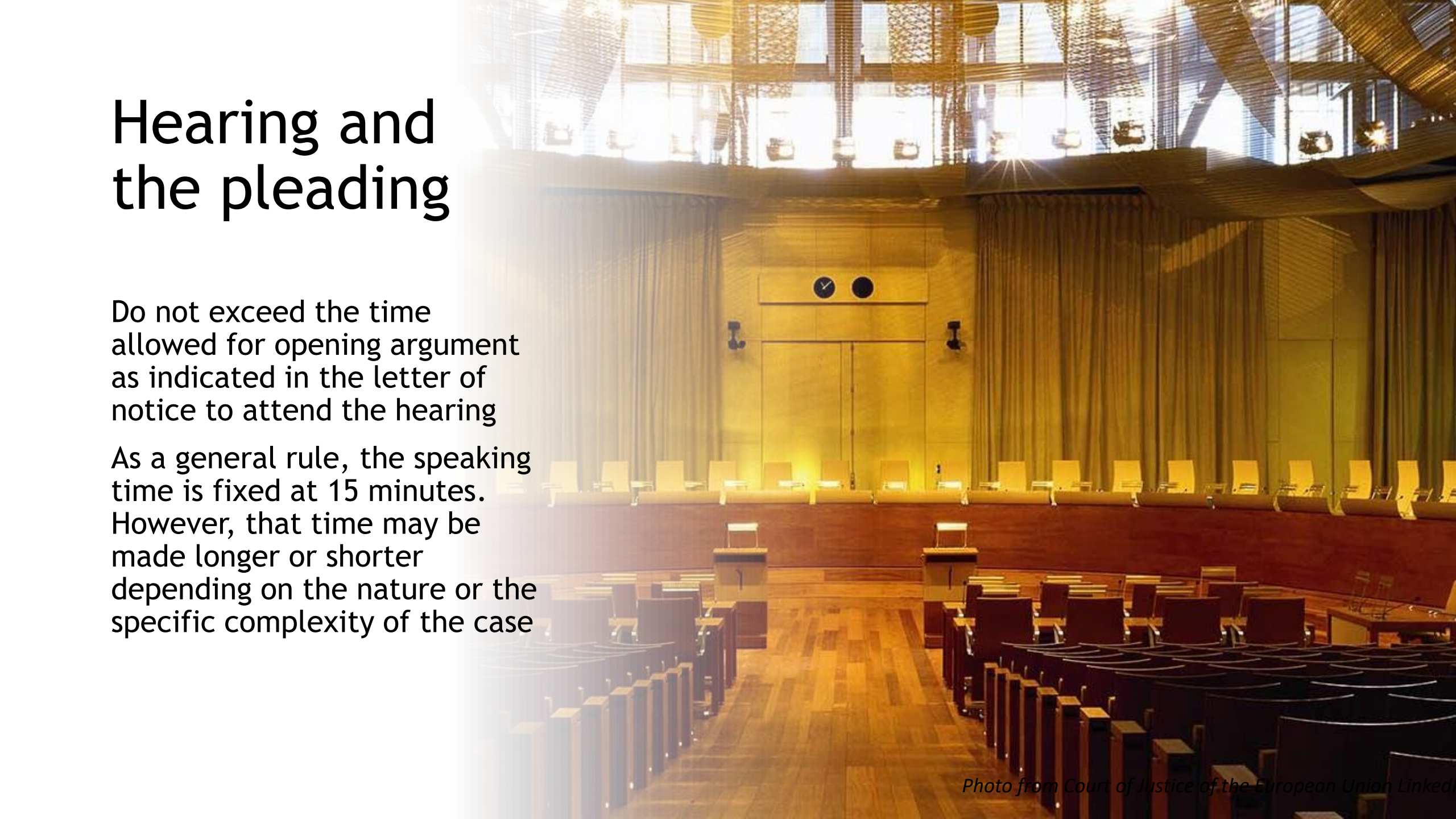
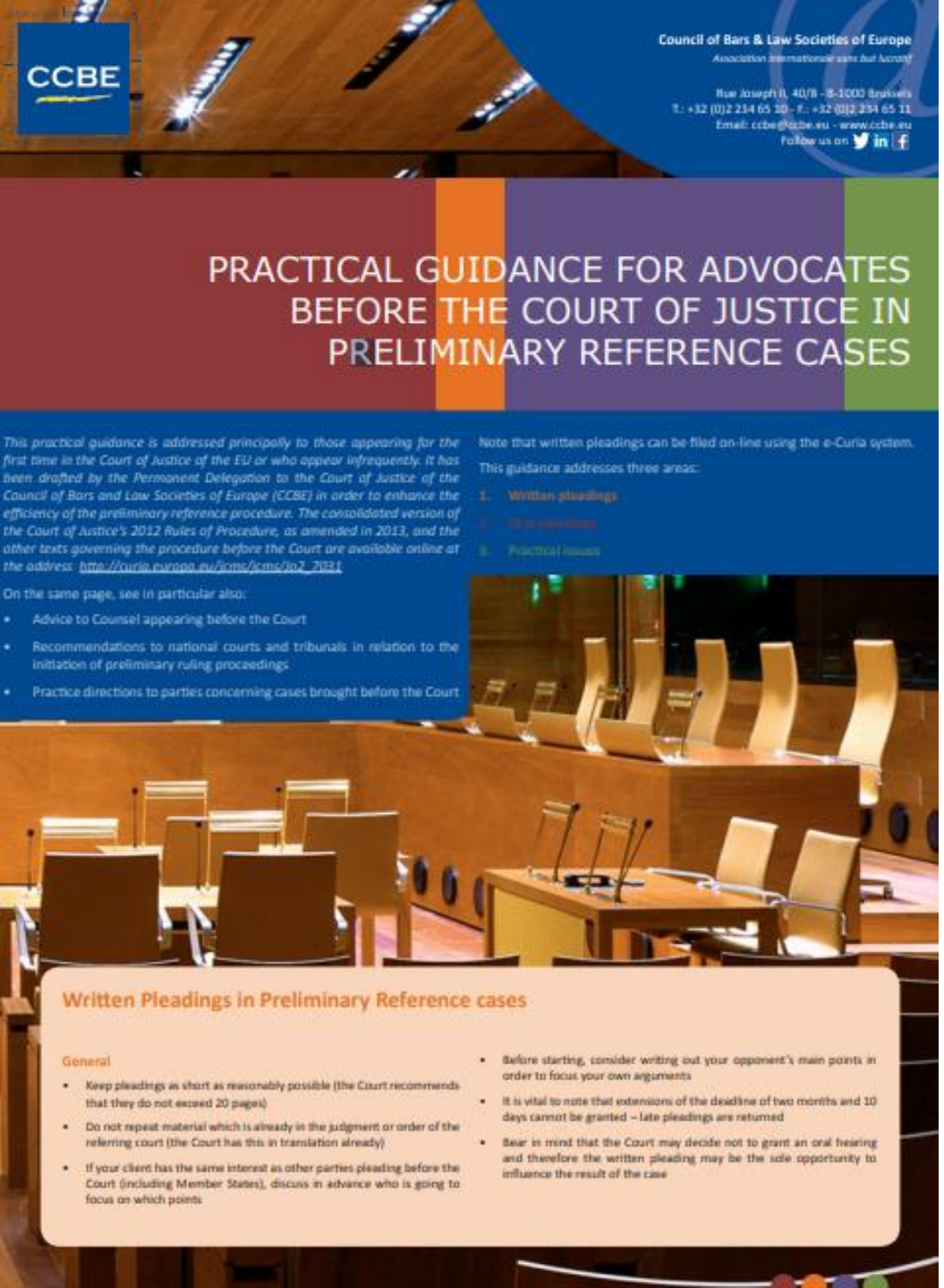


Photo from Court of Justice of the European Union Linked

Other advice and remarks related to the preparation

- The Judges meet the parties' representatives, wearing court dress, 5 to 10 minutes before the hearing begins
- Be ready for the questions.
- Additional questions from the members of the Court
- Get to know the judges!

Photo from Court of Justice of the European Union Linked



See CCBE practical guidance

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Guides___recommendations/EN_PDL_20150909_Practical-Guidance-for-Advocates-before-the-Court-of-Justice-in-Preliminary-Reference-cases.pdf

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Admissibility issues

Inadmissibility

Rules of Procedure of the Court of Justice Article 53(2) state that where it is clear that:

1) the Court has no jurisdiction to hear and determine a case or

2) where a request or an application is manifestly inadmissible,

the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings

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Application is manifestly inadmissible

- Significant proportion of requests are rejected by the Court of Justice
- The main reasons for inadmissibility – ill-drafting, basing preliminary reference on misconceptions about EU law

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Application is manifestly inadmissible

- Case C-321/17

reference for preliminary ruling was missing a summary statement of the subject-matter of the dispute and of the relevant facts (demanded under Article 94 of the rules of procedure of the court of justice)

- Case C-520/19

reference for preliminary ruling was missing explanations on the reasons for the choice of the provisions of EU law whose interpretation the member state court seeks as well as on the link that it establishes between these provisions and the national legislation applicable to the dispute submitted to it

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Thank you!

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