

Do's and don'ts. Referring requests for a preliminary ruling to the Court of Justice on the basis of the Charter of Fundamental Rights of the European Union

INTRODUCTION

The Charter of Fundamental Rights of the European Union of December 1, 2009¹ (hereinafter referred to as the ‘the Charter’) has become a part of binding primary law of the European Union (hereinafter referred to as the EU)². As it has been stated in the Commission staff working document on the Application of the EU Charter of Fundamental Rights in 2016³, the EU courts of Justice of the European Union (the Court of justice, the Court) have increasingly referred to the Charter in their decisions. The number of decisions citing the Charter in their reasoning increased from 43 in 2011 to 87 in 2012 and then to 113 in 2013 and 210 in 2014, respectively. After a decline in numbers down to 167 in 2015, *it increased again reaching the number of 221 in 2016*. In general, the trend reflects an overall increase in decisions with references to the Charter.

The Court of Justice of the European Union (hereinafter, the Court of Justice, the Court) exercises its jurisdiction envisaged in Part 1 of Article 19 of the Treaty on European Union (hereinafter called TEU) and guarantees, inter alia, that in the interpretation and application of the Charter the law is respected. The process of giving preliminary rulings envisaged under Article 19 (3b) of the TEU, and Article 267 of the Treaty on the Functioning of the European Union (hereinafter called TFEU) is probably the most efficient and most frequently applied practical tools of exercising the above-mentioned jurisdiction. In the course of the process, the Court of Justice can ensure a uniform interpretation and application of the European Union law in all the Member States, whereas national courts of the Member States⁴ have a possibility to raise questions related to provisions of the Charter, in accordance with the preliminary ruling procedure.

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** All views expressed are strictly personal.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

² More details on history of adopting the Charter: Jarass, H. D. Charta der Grundrechte der Europäischen Union. Kommentar. Munich, 2013, p. 7 and subsequent.

³ Commission staff working document on the Application of the EU Charter of Fundamental Rights in 2016, Brussels, 18.5.2017. SWD(2017) 162 final

⁴ The term „national court“ is used as a synonym subsequently in the text.

At first view it may seem that a decades-long cooperation process between national courts and the Court of Justice⁵ should not raise questions for the national courts concerning possibilities or ways of initiating a preliminary ruling proceedings or potential difficulties it may encounter. Undoubtedly, every essential change in the legal system of the European Union brought by a revision of the valid Treaties or adopting new Treaties may influence the functioning of some independent or long-established legal institutions of the European Union.

It should be noted that national courts since December 1, 2009, for more than seven years have had a possibility to refer to the Court of Justice concerning resolution of preliminary questions or interpretation and/or application of particular provisions of the Charter or on any other provision of a legal act read in conjunction with the Charter, following a preliminary ruling procedure. It is, therefore, possible to assess the experience of national courts gained when exercising the above-mentioned possibility.

This study aims at examining whether preliminary questions on the interpretation of provisions of the Charter are duly worded by national courts and establishing the fields where national courts need additional methodological assistance or training to ensure they make proper references to the Charter provisions when preparing requests for a preliminary ruling.

In pursuit of the objective, the authors were not following a well-trodden path, i.e., were not carrying out a theoretical analysis of the Charter provisions but chose to examine some particular negative examples that best illustrate practical difficulties national courts encounter. The subject of the study is decisions and orders where the Court of Justice decided that preliminary questions referred by a national court related to the interpretation of the Charter were inadmissible for consideration or were excluded from the jurisdiction of the Court. It is worth emphasizing that unconventionality of the study is reinforced by the fact that most orders of the Court of Justice were not translated into all the EU languages and are available only in the language of procedure and in French; besides, currently, formal statistics on which particular grounds preliminary questions related to interpretation of the Charter were rejected as inadmissible or considered as excluded from the Court's jurisdiction is not automatically managed or organized.

Accordingly, in pursuit of the objective of the study, the authors use logical, linguistic, systemic methods of document analysis and seek to analyze and draw conclusions on which particular cases and on which grounds the Court rejected requests for a preliminary ruling as inadmissible⁶ where national courts raised questions on the interpretation and/or application of the Charter. The authors make efforts to draft recommendations: what national courts should do in order to avoid

⁵Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings. Court of Justice of the European Union (OJ 2016, C 439, p. 1) (paragraph 2). See, also, Judgment of 6 September 2016, *Petruhhin* (C-182/15, ECLI:EU:C:2016:630, paragraph 19 and case-law cited); Judgment of 24 April 2012, *Kamberaj* (C-571/10, Publié au Recueilnumérique; ECLI:EU:C:2012:233, paragraph 40 and case-law cited) etc.

⁶ In this case a refusal to admit for consideration is understood widely as covering the following cases: where an order for reference is declared inadmissible; where the Court decides that it does not have jurisdiction to consider the order for reference; when there is no need to take the Court's decision.

mistakes in future. The analysis of decisions covers the period between December 1, 2009 and February 28, 2017; the decisions have been made after analyzing preliminary questions on, first, the interpretation of provisions of the Charter and, second, the interpretation of provisions of European Union law relating them with the Charter provisions.

1. Importance and content of general and specific requirements imposed on requests for preliminary rulings on the interpretation of the Charter provisions

Annual reports of the Court of Justice and Commission make it clear that there is an increase in both total number of requests for preliminary ruling⁷, and the number of requests based on provisions of the Charter.

In 2015, a total of 436 requests for a preliminary ruling were referred to the Court of Justice. The Commission's report on application of the Charter of fundamental rights of the EU in 2015⁸ clearly shows that over the year 2015, national courts submitted requests for a preliminary ruling requesting the interpretation of provisions of the Charter; courts from the Member States made 36 such requests, i.e., requests to interpret provisions of the Charter, the number accounts for eight percent of the total of requests for a preliminary ruling.⁹

Requests to interpret provisions of the Charter are special requests in the sense that in cases where a national court intends to refer to the Court of Justice a request to interpret provisions of the Charter, a national court, inter alia, has to make sure that the specific requirement envisaged under Article 51 (1) is met: provisions of the Charter are addressed to the Member States only when they are *implementing* the Union law.

This specific requirement is determined by the fact that the legal doctrine gives special attention to the interpretation and application of Article 51 (1) of the Charter.¹⁰

⁷ From 436 in 2015 to 453 in 2016: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ti_pubpdf_qdaq170011tn_pdfweb_20170424153519.pdf

⁸http://ec.europa.eu/justice/fundamental-rights/files/2015_annual_charter_report_en.pdf

⁹The number of requests over previous years, respectively: 27 requests in 2011; 41 in 2012 and 2013; 43 in 2014. http://ec.europa.eu/justice/fundamental-ights/files/2015_charter_report_full_version_en.pdf The Commission has not made available the data from 2016.

¹⁰A detailed scientific analysis of the application and interpretation of Article 51 (1) of the Charter is not an aim of this article. For more details on the issue see: LENAERTS, K. The EU Charter of Fundamental Rights: scope of application and methods of interpretation. De Rome à Lisbonne: mélanges en l'honneur de Paolo Mengozzi. 2013 (p. 107-143); ROSAS, A. "Implementing" EU law in the Member States: some observations on the applicability of the Charter of Fundamental Rights. Mélanges en hommage à Albert Weitzel. 2013(p. 185-200); KRONENBERGER, V. Quand « mise en œuvre » rime avec « champ d'application »: la Cour précise les situations qui relèvent de la Charte des droits fondamentaux de l'Union européenne dans le contexte de l'application du ne bis in idem: CJUE, 26 février 2013, Hans Åkerberg Fransson, aff. C-617/10. Revue des affaires européennes = Law & European affairs. 20e année (2013), 1 (p. 147-159); JACQUÉ, J. P. La Cour de justice face à l'article 51 de la Charte des droits fondamentaux: timidité ou perspectives d'ouverture. Scrutinizing internal and external dimensions of European law = Les dimensions internes et externes du droit européen à l'épreuve: liber amicorum Paul Demaret. Vol. I (2013) (p. 211-228); ŽALTAUSKAITĖ-ŽALIMIENĖ, S. Interpretation

In addition to the above-mentioned specific requirement, both Article 267 of the TFEU and Article 94 of the Rules of Procedure as well as Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings worked out by the Court of Justice (hereinafter called Recommendations)¹¹ set requirements to be met by all requests for a preliminary ruling irrespective of the subject of the request (i.e., Treaty, Charter, regulation, directive, etc.).

A national court willing a preliminary ruling procedure be initiated and carried out smoothly and efficiently, and receive an interpretation of the Charter provisions by the Court of Justice should not only properly assess the significance of individual elements of a preliminary ruling procedure but also follow all the general requirements for a preliminary ruling requests.

Article 94 of Rules of Procedure of the Court of Justice sets requirements to be met by a request for a preliminary ruling referred by a national court. The Court of Justice, in its efforts to ensure efficient preliminary ruling proceedings and understanding the necessity to remind and further explain some provisions of the Rules of Procedure set forth guidelines for national courts in the form of the above-mentioned Recommendations¹². The Court of Justice drew national courts' attention to the fact that in case where a request for a preliminary ruling does not meet the requirements the Court will be obliged to decide that the preliminary questions are excluded from its jurisdiction and it cannot answer a preliminary question from a national court or declare a request inadmissible¹³. Both the case law of the Court of Justice and legal doctrine¹⁴ emphasize the importance of meeting the requirements envisaged under Article 94 of Rules of Procedure.

In accordance with Article 94 of Rules of Procedure, in addition to the questions referred to the Court, a request for a preliminary ruling should contain the following: a short summary of the subject-matter of the dispute and relevant findings of fact as determined by the referring court, or, at least, an account of the facts on which the questions are based; the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case law; a statement of the reasons which prompted the referring court to inquire about the interpretation or validity on certain provisions of European Union law, and the relationship between those

and application of the European Union Charter of Fundamental Rights. Lithuanian legal system under the influence of European Union Law. Vilnius (2014) (p. 543-573) and others.

¹¹Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings. Court of Justice of the European Union (OJ 2016, C 439, p. 1).

¹²Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings. Court of Justice of the European Union (OJ 2016, C 439, p. 1).

¹³Recommendations, point 15.

¹⁴ See more on the issue: PRECHAL, S. Communication within the preliminary rulings procedure: responsibilities of the national courts. *Maastricht journal of European and comparative law: MJ*. Vol. 21 (2014), no. 4, p. 754-762; COUTRON, L. La motivation des questions préjudicielles. Renvoi préjudiciel et marge d'appréciation du juge national = Preliminary ruling procedure and margin of appreciation of the national judge. 2015, p. 101-155 etc. See, also, order of the President of the Court of 19 March 2014, *Grimal* (C-550/13, not published, EU:C:2014:177, paragraph 16); Order of 8 September 2016, *Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraphs from 22 to 32); Order of 11 January 2017, *Bondjellal*, C-508/16, not published, EU:C:2017:6, paragraph 20); etc.

provisions and the national legislation applicable to the main proceedings (it is sometimes called a motivation of the necessity for a preliminary ruling). The above-mentioned requirements are imposed irrespectively of the subject of a request for a preliminary ruling, i.e. including the cases where the preliminary questions referred are related to the interpretation of provisions of the Charter, and a mere failure to meet the requirements may serve as reason to admit a request inadmissible.

Analysis of the case-law of the Court of Justice has established that over the reference period from December 1, 2009 to February 28, 2017, in some 79 cases where courts of Member States requested an interpretation of provisions of the Charter the Court decided that a request for a preliminary ruling was inadmissible or excluded from the jurisdiction of the Court¹⁵. Out of the total of 79, in case of 57, the Court decided that it did not have jurisdiction to consider requests for a preliminary ruling on interpretation of provisions of the Charter, this decision was based on the specific requirement under Article 51 (1) of the Charter. As many as 72 percent of national courts' requests for a preliminary ruling were rejected in fact due to their failure to meet the requirements set out in Article 51 (1) of the Charter whereas in the case of the remaining 28 percent it was due to failure to fulfill different general requirements applied to all requests for a preliminary ruling irrespectively of their subject matter.

It should be noted that on February 23, 2012, the Court of Justice adopted a decision in case *Åkerberg Fransson* (C-617/10)¹⁶ where it, inter alia, provided the interpretation of the notion of *implementation of European Union law* (emphasis added by the authors) under Article 51 (1) of the Charter¹⁷. It seems that at this moment in 2012, national courts have been issued clear guidelines to ensure that a national court aiming at having its preliminary questions on interpretation of provisions of the Charter admitted by the Court for consideration, should first of all make sure and be able to provide proof for the Court that the requirement envisaged in the provision of the Charter to be met by Member States has been fulfilled.

Analysis of the Court's decisions and orders adopted during the period from February 23, 2012 to February 28, 2017 shows that in some 35 cases out of the total of XX, where national courts submitted requests on the interpretation of provisions of the Charter, decisions were made that the Court of Justice did not have jurisdiction

¹⁵No official statistics concerning the criterion is available. To the authors' knowledge, no such calculations have been carried out. The data has been collected using manual search in the Court of Justice website with the help of keywords related to the Charter where the search was narrowed to decisions and orders adopted under preliminary ruling proceedings.

¹⁶Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, ECLI:EU:C:2013:105).

¹⁷Before the adoption of this judgement, national courts in different surveys used to state that they were not often checking whether a question raised in the cases pending before them falls in the Charter's *ratione materiae*. When such a question arises they most often check whether a state applies or implements the European Union law (for example, transpose a directive's provision into the national law, implement regulations, apply 'Treaties' provisions, etc.); or whether due to the public interest a Member State adopts measures that can be in breach of the fundamental freedoms of the Union and whether there is a link with the European Union law. See more: Application of the Charter of Fundamental Rights of the European Union by national courts = L'application de la Charte des droits fondamentaux de l'Union européenne par les tribunaux nationaux = La aplicación de la Carta de los Derechos Fundamentales de la Unión Europea por los tribunales nacionales. 2012.

to answer all or some of the preliminary questions submitted thereto, decisions were based on Article 51 (1) of the Charter. It is clear from the analysis of the cases at the Court of Justice that even after the decision was adopted in case *Åkerberg Fransson* (C-617/10), national courts still encounter difficulties or questions on how to prepare the wording of requests for a preliminary ruling on interpretation of provisions of the Charter. Accordingly, case-law of the Court of Justice will be further analyzed to assess how national courts follow the requirement to provide a proper and due wording of a subject-matter and content in a request for a preliminary ruling and subsequently analysis of meeting other requirements will follow.

2. Content and subject-matter of a request for a preliminary ruling: analysis of requirements based on specific examples of cases at the Court

In accordance with Article 267 (1) of TFEU, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaties as well as the Charter and/or the validity and interpretation of acts of institutions, bodies or agencies of the Union¹⁸. Irrespective of what kind of an act of the European Union law a national court asks the Court of Justice to interpret (Treaties, Charter, regulation, etc.), it should be emphasized that the Court can consider a Member State court's request for a preliminary ruling only in those cases where the European Union law is applicable in the main proceedings.

This aspect becomes ever more significant in cases when a national court decides to submit a request for a preliminary ruling concerning the interpretation of provisions of the Charter. It is worth reminding in this case that the Charter contains a specific provision defining its scope with regard to all member states. Article 51 (1) envisages that provisions of the Charter apply to the Member States only in those cases where they implement the European Union law.

The Recommendations drawn up by the Court of Justice show that despite different cases of such implementation, a national court when considering whether it should or should not refer to the Court of Justice a request for a preliminary ruling on the interpretation of provisions of the Charter and/or provisions of the European Union legal acts in relation to provisions of the Charter, should establish and in its request for a preliminary ruling present clear and unequivocal information proving that the legal provision applied in the main proceedings before the referring court is other than the European Union law provision.

As has been mentioned earlier, the Court of Justice does not have jurisdiction to provide answers to preliminary questions where the legislative situation of the main proceedings does not fall under the scope of the European Union law and provisions of the Charter indicated by the referring national court cannot serve as grounds for

¹⁸ Article 267 of TFEU shall be read together with provisions of other Treaties establishing the system of the European Union institution and their powers as well as powers of other EU institutions and organs: for example, Article 13 of TEU establishes an institutional framework of the EU and names the institutions; Article 288 of TFEU envisages the legal acts to be adopted by the EU institutions; Article 228 of TFEU envisages powers and the main principles of performing duties of the European Ombudsman.

the jurisdiction of the Court¹⁹. In cases where information served by a national court's request for a preliminary ruling on the subject matter and relevant findings of facts does not prove that in the case at the national court its matter of dispute falls under the scope of the European Union law and that the question on the interpretation of law is related to the European Union law and its implementation at a Member State, the Court of Justice, in accordance with Article 53 (2) of the Rules of Procedure may decide to give a decision by reasoned order stating that the case is manifestly excluded from its jurisdiction.

The Court of Justice having adopted the above-mentioned decision in case *Åkerberg Fransson* (C-617/10), a detailed interpretation on the application of the provision was presented. As part of the study on the case-law of the Court of Justice relevant to Article 51 (1) of the Charter, further analysis will be carried out of decisions and orders adopted after *Åkerberg Fransson* (C-617/10) decision where the Court decided that it does not have jurisdiction to provide answers to preliminary questions on the interpretation of provisions of the Charter as it was not proved that the requirement to be met by Member States as stated in Article 51 (1) was not fulfilled.

Efforts will be made to analyze examples which show whether national courts serve all the relevant information to the Court of Justice to prove the following: a) the subject matter in the main proceedings falls in the scope of the European Union law, and b) questions on the interpretation of law are related to the European Union law and its implementation in a Member state as it is understood according to Article 51 (1) of the Charter, i.e. the special requirement has been met in accordance with which the dispute in the main proceedings is related to the interpretation and application of a provision of the European Union law other than the Charter.

a) Conforming to a general requirement on relevance of the dispute in the main proceedings to the European Union law

A national court, when submitting a request for a preliminary ruling, is required to indicate reasons or give arguments why it needs an interpretation of the European Union law or/and some particular provisions of the Charter. The case *Striani and Others* (C-299/15) serves as an example where the Court of Justice decided that the national court in its request to interpret, among others, provisions of the Charter, did not submit at least minimum explanations²⁰ on why it raised questions on the interpretation of the European Union law. Accordingly, in cases *Leśniak-Jaworska and Głuchowska-Szmulewicz* (C-520/13)²¹ as well as in *Stylinart* (C-282/14), the Court also decided that it did not have jurisdiction to answer a preliminary question requesting the interpretation of provisions of the Charter as the request for a

¹⁹ Recommendations, point 10.

²⁰ Order of 16 July 2015, *Striani and Others* (C-299/15, not published, EU:C:2015:519, paragraphs 23 and 31).

²¹ See: Judgment of 2 July 2015, *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:436), where due to failure to submit reasons why the national court needed the interpretation of the Charter provision the Court of Justice declared requests for a preliminary ruling clearly and manifestly inadmissible.

preliminary ruling did not contain at least minimal explanations why the national court was of the opinion that there existed a relation between the law applied in the main proceedings and the European Union law²².

In case *Balázs and Papp* (C-45/14) *Fővárosi Ítéltábla*, Regional Court of Appeal, Budapest, Hungary, submitter three preliminary questions, in fact inquiring on the conformity of provisions of the Criminal Procedure Code of Hungary with provisions of the Charter. The Court of Justice made a reference to the requirement to be met by Member States set in Article 51 (1) of the Charter and pointed out that the dispute in the main proceedings was related only with the application of provisions of the national Criminal Procedure Code that had no links with the European Union law. The Court also emphasized that the request for a preliminary ruling did not contain any information providing grounds that the dispute in the main proceedings was related to the interpretation and application of the European Union law provision whereas a mere reference to a provision of the Charter was not sufficient grounds to believe that the Court had jurisdiction to interpret the Charter's provisions²³.

In case *C* (C-122/15), the subject of the preliminary ruling request was provisions of a directive and a request to provide the interpretation thereof in relation to the provisions of the Charter. The Court stated that taking into consideration the fact that a national act of law applied in the main proceedings did not implement any provision of the European Union law and no other directive on taxation could be applied in the dispute of the main proceedings. The Court decided that the provisions of the Charter that the national court asked to interpret could not be efficiently referred to in this particular case²⁴.

The *Grondwettelijke Hof* (Constitutional Court, Belgium) in case *Pelckmans Turnhout* (C-483/12) wanted to learn whether relevant provisions of the Charter and TFEU as well as principles of equality and non-discrimination embedded therein are to be interpreted as preventing application of national law provisions of the main proceedings envisaging, with some particular exceptions, a ban for traders to open their shops seven days a week and a requirement to choose one day a week free of duty. The Court of Justice pointed out that the request for a preliminary ruling did not contain any information elements suggesting that the situation as described in the main proceedings is within the scope of the application of the European Union law,

²²Order of 11 December 2014, *Stylinart* (C-282/14, ECLI:EU:C:2014:2486, paragraph 21).

²³Order of 19 June 2014, *Balázs and Papp* (C-45/14, ECLI:EU:C:2014:2021). A court in Hungary was hearing a dispute in the main proceedings where police officers were accused of exceeding powers in carrying out checks on Roma persons during a patrol at a marketplace. Having heard the appeal lodged by the officers, on indictment against them, a decision was made that the indictment did not meet requirements. Later a new indictment was adopted where the above-mentioned officers were accused one more time of exceeding their powers concerning the actions mentioned above. At the national court a question was raised about a provision of the Hungarian Code of Criminal Procedure envisaging requirements to be met by indictments and whether the provision was harmonized with Articles 47, 50 and 54 of the Charter.

²⁴Judgment of 2 June 2016, *C* (C-122/15, ECLI:EU:C:2016:391, paragraphs from 28 to 29). In this case, a request for a preliminary ruling was referred by *Korkeinhallinto-oikeus* (Supreme Administrative Court, Finland) in proceedings brought by C challenging the decision of Finland's tax authority to apply a supplementary tax charged at a rate of 6 % on a retirement pension income which, after deduction of the pension income allowance, exceeds EUR 45 000 per annum.

besides, neither the above-mentioned request nor the written observations of other interested parties submitted to the Court of Justice proved that the main proceedings had any links with the provisions of the Charter the national court asked to be interpreted. The Court stated that it did not have jurisdiction to answer the preliminary question²⁵.

An analogous decision was made by the Court in case *Pańczyk* (C-28/14) where it was stated that on the grounds of the documentation submitted to the Court stating that the dispute in the main proceedings arose on legality of the decision to revise and reduce a police officer's retirement pension, besides in the request for a preliminary ruling there was no information proving that the national law applied in the main proceedings implemented the European Union law²⁶.

It is worth emphasizing that in cases where a national court indicates that there is a link with the European Union law an indirect statement of an effect is not sufficient.

In case *Siragusa* (C-206/13), the Court of Justice indicated, inter alia, that a mere circumstance that a national law may have an indirect effect on the functioning of the common agricultural system cannot be a sufficient proof of a link between the national law and the European Union law; the Court, therefore, decided that it was not proved that it had jurisdiction to interpret one of the Charter's provisions²⁷.

In conclusion, one of the examples of improper efforts to use the Charter's provisions as grounds is the fact that a national court in its request for a preliminary ruling does not submit any information to prove that the dispute in the main proceedings is linked with a national legal provision and is in some way linked with the EU law and its application.

b) Meeting the specific requirement of a link between the dispute in the main proceedings and application and interpretation of a provision of an European Union law other than the Charter

In case *Rîpanu* (C-407/15), *Curteade Apel Bacău* (Court of Appeal, Bacău, Romania) decided to refer a question to the Court of Justice, the national court deliberated on a dispute on Mr. Rîpanu's dismissal after a criminal case was initiated against him on the basis of a complaint lodged against him. The national court asked for an interpretation of Article 47 of the Charter with an aim to find out whether this particular provision of the Charter was compatible with the national law in accordance with which decisions adopted by *Curtea Constituțională* (Constitutional Court, Romania)

²⁵Judgment of 8 May 2014, *Pelckmans Turnhout* (C-483/12, EU:C:2014:304, paragraphs 14, 22 and 23), see also: Order of 10 November 2016, *Pardue* (C-321/16, ECLI:EU:C:2016:871).

²⁶Order of 12 June 2014, *Pańczyk* (C-28/14, ECLI:EU:C:2014:2003). In this case *Sąd Okręgowy w Częstochowie* (Regional Court, Częstochowa, Poland) asked to interpret the Charter's provisions as there were doubts on compatibility of the national law and the Union law. See also: Order of 7 May 2015, *Pondiche* (C-608/14, ECLI:EU:C:2015:313) *Tribunalul Sibiu* (Regional Court, Sibiu, Romania), referred a request for a preliminary ruling concerning a dispute on dependent child allowances and asked the Court to interpret provisions of the Charter; Order of 25 September 2014, *Kárász* (C-199/14, ECLI:EU:C:2014:2243), *Fővárosi Közigazgatási és Munkügyi Bíróság* (Budapest Court of Public Administration and Labour, Hungary) in a dispute of suspension of the payment of a retirement pension decided to refer to the Court of Justice for an interpretation of one of the Charter's provisions.

²⁷Judgment of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 29).

became binding only on the day of their promulgation by the Official Journal; for this reason other national courts were not able to be guided by them during the period between the day the decisions were adopted and the day they were made public by the Official Journal irrespective of a stay in proceedings or a necessity to revise a court decision adopted during the period²⁸.

The Court of Justice made reference to the requirement embedded in Article 51 (1) of the Charter and stated that the reference for a preliminary ruling did not contain any information to prove that the dispute in the main proceedings was related to the interpretation and application of a provision of the European Union law other than the Charter. The Court emphasized that the dispute in the main proceedings was linked with decisions adopted by *Curtea Constituțională* (Constitutional Court) and compliance with this court's decision in time; they had no links with the national law adopted due to implementation of the European Union law as it is understood under the above-mentioned provision of the Charter. The Court of Justice therefore decided that it did not have jurisdiction to answer the preliminary question.

In case *Široká* (C-459/13), *Najvyšší súd Slovenskej republiky* (Supreme Court, Slovakia) requested an interpretation of provisions of the TFEU and the Charter necessary to adopt a decision in a case questioning legality of a national law provision of parental duty of ensuring vaccination of their underage children against certain diseases. The national court decided that the question on mandatory or non-mandatory vaccination administered on underage children envisaged under the national law as a preventive measure should be considered taking into consideration the European Union law. The Court of Justice in answering the preliminary questions submitted thereto indicated that the article of the TFEU the interpretation of which was requested by the national court does not envisage a parental duty of ensuring vaccination of their underage children therefore it was not possible to assess whether the national law envisaging such a duty was harmonized with a provision of the Treaty. The Court stated that the request for a preliminary ruling did not submit any information whether the national law applied in the main proceedings was related to a provision of the European Union law other than the Charter and decided that it did not have jurisdiction to answer the preliminary questions in the case²⁹.

In case *Marinkov* (C-27/16), *Administrativen sad Sofia-grad* (Sofia Administrative Court, Bulgaria) requested an interpretation of provisions of a directive in relation to the provisions of the Charter. The Court of Justice, in answering the preliminary questions referred thereto, first, concluded that the directives the interpretation of which the national court requested were not applicable in the legal situation analyzed in the main proceedings and, second, decided that taking into consideration the fact that the directives were not applicable in the main proceedings and the reference for a preliminary ruling did not contain any elements of information proving that the legal situation dealt with in the main proceedings was related to a provision of the European Union law other than the Charter and that the applicable national law was

²⁸Order of 18 February 2016, *Rîpanu* (C-407/15, ECLI:EU:C:2016:167).

²⁹Order of 17 July 2014, *Široká* (C-459/13, ECLI:EU:C:2014:2120).

intended to be used to implement the European Union law, the Court decided that it did not have jurisdiction to answer the preliminary questions³⁰.

It is worth noticing that the legal acts of the European Union do not fix a number of preliminary questions Member States can submit. The Court of Justice has the power to decide that it does not have jurisdiction to consider one or several preliminary questions referred thereto by a national court. As an example, in case *Dano* (C-333/13), *Sozialgericht Leipzig* (Social Court, Leipzig, Germany) submitted a request for a preliminary ruling as it was considering a dispute between Mrs. E. Dano and her son F, and *Jobcenter Leipzig* where the latter refused to grant them minimum benefits: Mrs. E. Dano was refused a subsistence benefit envisaged in German legal acts and her son was not granted a social benefit as well as heating subsidies. The national court referred to the Court of Justice a request to interpret provisions of the Treaties, regulations and Charter. The Court considered the request and decided that it did not have jurisdiction to answer one of the preliminary questions where the national court requested an interpretation of provisions of the Charter with the aim of establishing whether Member States have an obligation to grant the EU citizens minimum non-contributory benefits in cash that give a possibility to permanently reside in the country or Member States may only provide means to enable a person return to his/her country of origin. The Court noted that taking into consideration the fact that the European Union law does not regulate conditions of granting specific non-contributory benefits in cash, Member States can decide about the social protection guaranteed with the help of such benefits. The Court of Justice stated that considering the fact that Member States when approving conditions on specific non-contributory benefits in cash and their scope under the national law do not implement the European Union law; thus it has no jurisdiction to answer the preliminary question on the interpretation of the Charter's provisions³¹.

The Court also decided that it did not have jurisdiction to answer one of six preliminary questions in case (C-92/14)³². First, the Court decided that provisions of the Treaty and directives to be interpreted are not applied in the main proceedings and, second, stated that the request for a preliminary ruling did not give any particular data on the basis of which it would be possible to state that the subject of the main proceedings was related to other provisions of the European Union law or that the case covered national legal acts implementing the European Union law as read under Article 51 (1) of the Charter³³.

³⁰Order of 8 December 2016, *Marinkov* (C-27/16, ECLI:EU:C:2016:943, paragraphs from 48 to 51).

³¹Judgment of 11 November 2014, *Dano* (C-333/13, EU:C:2014:2358, paragraphs from 85 to 92).

³²Order of 3 July 2014, *Tudoran* (C-92/14, EU:C:2014:2051, paragraphs from 46 to 48).

³³ On the same grounds: Judgment of 8 December 2016, *Eurosaneamientos and others* (C-532/15 and C-538/15, ECLI:EU:C:2016:932) the Court of Justice stated that it did not have jurisdiction to answer the questions in both cases: *Audiencia Provincial de Zaragoza* (Provincial Court, Zaragoza, Spain) and *Juzgado de Primera Instancia de Olot* (Court of First Instance, Olot, Spain) where the Spanish courts wanted to know whether Article 47 of the Charter should be interpreted as meaning to prohibit application of national law provisions as the ones applied in the main proceedings under which a client is deprived of a possibility to efficiently appeal against fees received by a lawyer where a fee, in a client's opinion, is excessive and not in proportion with the work carried out.

The case-law of the Court of Justice also proves that even if a national court decides to ask for an interpretation of the Charter provisions and provides grounds for its request by the fact that the dispute in the main proceedings is related to the application or interpretation of a provision of the European Law other than the Charter, the court nevertheless has to make sure that the other legal act concerning which the court refers preliminary questions can be a subject of such request and whether a national court may request the Court of Justice to interpret it.

It is evident that the Court of Justice in its jurisprudence sometimes has to remind that despite what is envisaged in Article 6 (3) TEU, the fundamental freedoms envisaged as general principles in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter called ECHR) make a part of the European Union law. Notwithstanding the requirement of Article 52 (3) of the Charter the established rights corresponding to the rights guaranteed by the ECHR shall be given the same meaning and scope as the one provided by the above-mentioned convention. As long as the EU has not joined the Convention, it is not a legal instrument officially integrated into the EU legal system. The Union law therefore does not regulate a relation between the ECHR and Member States' legal systems nor describes consequences that should be established by a national court in cases where there is a collision between the rights guaranteed by the above-mentioned convention and national law provisions³⁴. The Court of Justice receives preliminary questions where a national court raises questions on compatibility of a national provision with some particular provisions of TFEU, ECHR and Protocol to the Convention as well as the Charter's provisions; the Court then states that the Union law does not regulate relations between the ECHR and Member States' legal systems nor defines consequences that should be established by a national court in case of a collision between the rights guaranteed under this Convention and national law provisions. The Court is not obliged to adopt a decision where a request for a preliminary ruling is related to the ECHR and the Additional Protocol to the Convention³⁵, as these issues are excluded from its jurisdiction³⁶. It is noteworthy that national courts in their wording of preliminary questions „make efforts“to highlight a link between the ECHR and the Charter's provisions³⁷.

³⁴Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, ECLI:EU:C:2013:105, paragraph 41); Order of 5 February 2015, *Petrus* (C-451/14, ECLI:EU:C:2015:71, paragraph 15) and others.

³⁵Judgment of 12 December 2013, *Dirextra Alta Formazione* (C-523/12, ECLI:EU:C:2013:831, paragraph 20).

³⁶Order of 25 February 2016, *Aindaps* (C-520/15, ECLI:EU:C:2016:124, paragraphs 18 and 22 case-law cited).

³⁷The Court of Justice decided that it did not have competence to interpret provisions of ECHR and Protocols to it also in these cases where national courts “indirectly” asked to interpret ECHR provisions: Order of 7 February 2013, *Pedone* (C-498/12, ECLI:EU:C:2013:76); Order of 7 February 2013, *Gentile* (C-499/12, ECLI:EU:C:2013:77); Order of 8 May 2013, *T* (C-73/13, ECLI:EU:C:2013:299); Order of 7 November 2013, *Lorrai* (C-224/13, ECLI:EU:C:2013:750) and others.

3. Assessment of meeting other general requirements

Requirement a request to be made by „a court or a tribunal“. Under Article 267 (2) TFEU, only a court of a Member State may submit a request for a preliminary ruling to the Court of Justice. In some specific cases, requests for a preliminary ruling raising questions on the interpretation of the Charter provisions were not considered due to the reason that the Court of Justice decided that it did not have jurisdiction to answer the preliminary questions because they were submitted by an institution which was not a court or a tribunal of a Member State in the strict sense of Article 267 of the TFEU (cases *Margarit Panicello* (C-503/15), *Krikorian and Others* (C-243/14)³⁸, *Belov* (C-394/11),³⁹ and *Epitroposton Elegktikou Synedriou* (C-363/11).

Requirement to submit all important relevant finding of fact in the main proceedings.

The Court of Justice may use as grounds only the facts submitted by a national court thus a national court should submit all the significant facts related to the main proceedings⁴⁰. Case *Uber Belgium* (C-526/15)⁴¹ may serve as an example where the Court of Justice stated that the national court did not submit a detailed description of the service provided as well as its nature and ways of rendering in the dispute of the main proceedings and the Court could not clearly establish what kind of service that was⁴². In case *SKP* (C-433/11)⁴³, the Court of Justice also emphasized that it can adopt a decision on the interpretation of the Union law only on the basis of facts submitted by a national court and stated that the request for a preliminary ruling did not meet this requirement.

Requirement to submit relevant provisions of the law. It should be stressed that a national court referring preliminary questions to the Court of Justice shall indicate all significant legal provisions in the main proceedings and submit all the legislative information related to the national law applied in the main proceedings. In case *Leśniak-Jaworska and Gluchowska-Szmulewicz* (C-520/13),⁴⁴ in a reference for a preliminary ruling referred concerning a dispute between two prosecutors and Regional Public Prosecutor's Office, Płock on remuneration-setting procedure in case of prosecutors and where a court from Poland referred the preliminary question asking to interpret the Charter's provision, the Court of Justice stated that the national court did not submit sufficient information on significant provisions of

³⁸ Order of 6 November 2014, *Krikorian and others* (C-243/14, ECLI:EU:C:2014:2357).

³⁹ Judgment of 31 January 2013, *Belov* (C-394/11, ECLI:EU:C:2013:48).

⁴⁰ See as example: Judgment of 19 December 2013, *Endress*, C-209/12, EU: C:2013:864, paragraph 19 and case-law cited).

⁴¹ Order of 27 October 2016, *Uber Belgium* (C-526/15, not published, EU: C:2016:830).

⁴² The dispute in the main proceedings was concerning an appeal on terminating the practice of transfer of requests for paid transportation services in Brussels – capital region to drivers who do not hold an operation permit under the national law

⁴³ Order of 8 November 2012, *SKP* (C-433/11, EU:C:2012:702).

⁴⁴ Order of 27 March 2014, *Leśniak-Jaworska and Gluchowska-Szmulewicz* (C-520/13, not published, EU:C:2014:263).

national law that enable other parties submit applications and written observations under Article 23 of the Rules of Procedure⁴⁵.

Requirement a question not to be hypothetical or repeated. In case *Di Donna* (C-492/11)⁴⁶, after preliminary questions were submitted, the Constitutional Court admitted that provisions of the legal act applied in the main proceedings were in breach of the Constitution. The Court decided that after the Constitutional Court adopted its decision, the preliminary questions obtained a hypothetical nature and there was no necessity to adopt a preliminary ruling. Whereas in case *Antonio Gramsci Shipping and Others* (C-350/13)⁴⁷, the Court of Justice took notice of the fact that the decision to seize assets requested to be recognized and implemented in the main proceedings was annulled and the national court that had referred preliminary questions related to the interpretation of the Charter's provisions did not have to decide the dispute, therefore the preliminary questions became hypothetical.

In the case-law of the Court of Justice one can find examples where national courts refer the same question several times even though the Court has adopted a decision on an identical preliminary ruling proceedings or it does not have jurisdiction to answer preliminary questions of this nature or the courts submit a new order for reference without waiting for the Court's answers to their earlier submitted preliminary questions. The case *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-665/13)⁴⁸ is an example. A request was referred to interpret the Charter's provisions in relation to leaves and a ban on payment of Christmas bonuses or any other 13th or 14th month pays or corresponding allowances for a certain year; the Court of Justice in its order indicated that the national court referred its preliminary questions without waiting for the Court of Justice to adopt a decision in case C-264/12, that had been initiated by the same *Tribunal do Trabalho de Lisboa* that was referring questions analogous to the ones in cases C-128/12 and C-264/12⁴⁹. Having taken into consideration the above-mentioned facts, the Court also reminded that in the case where an order was adopted *Sindicato Nacional dos Bancários do Norte ir kt.* (C-128/12, EU:C:2013:149), *Tribunal do Trabalho do Porto* referred preliminary questions on the Law on the State budget of 2011 that were analogous to the ones referred in the case where an order had been adopted, i.e. *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-264/12, EU:C:2014:2036) on the budget of State of a respective year. In the first order the Court of Justice had decided that it clearly did not have jurisdiction to answer the referred questions as in the request for a preliminary ruling there were no

⁴⁵See also: Order of 29 November 2016, *Jacob and Lennertz* (C-345/16, not published, EU:C:2016:911, paragraphs 16 and 17).

⁴⁶Judgment of 27 June 2013, *Di Donna* (C-492/11, EU:C:2013:428). In case *Giudice di pace di Mercato San Severino* (Italy) the Court was requested to interpret provisions of the European Union law and the Charter concerning the dispute in the main proceedings on compulsory mediation procedure under the Italian law concerning compensation for the damage caused to a motor vehicle.

⁴⁷Order of 5 June 2014, *Antonio Gramsci Shipping and Others* (C-350/13, EU:C:2014:1516).

⁴⁸Order of 21 October 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-665/13, EU:C:2014:2327).

⁴⁹Order of 7 March 2013, *Sindicato dos Bancários do Norte and Others* (C-128/12, not published, EU:C:2013:149); Order of the President of the Court of 26 June 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-264/12, EU:C:2014:2036).

exact data suggesting that a respective law was aimed at implementing the European Union law. The Court, therefore, stated that like in other two cases where the above-mentioned orders had been adopted the Court of Justice did not have a competence to answer the request for a preliminary ruling where was a stay in the consideration awaiting for the Court of Justice to hear the case where an order was adopted in *Sindicato Nacional dos Profissionais de Seguros e Afins* (EU:C:2014:2036).

The above-mentioned preliminary ruling procedures initiated after the Court of Justice was referred preliminary questions from a court in Portugal could serve as an example where national courts that intend to refer to the Court should think about a possibility to join similar cases and refer one joint request for a preliminary ruling or refer an “exemplary request” and have a stay in proceedings of similar cases till they receive an answer from the Court. Recommendations to national courts and tribunals contain such a suggestion.

Conclusions and suggestions

1. As follows from the examples of the case-law of the Court of Justice established after the decision was adopted in case *ÅkerbergFransson* (C-617/10), a large part of requests for a preliminary ruling requesting the interpretation of provisions of the Charter were rejected by the Court of Justice or the Court stated that it did not have jurisdiction under Article 51 (1) of the Charter.

2. The Court of Justice does not have jurisdiction to answer preliminary questions where a legal situation in the main proceedings does not fall in the scope of the Union law and the provisions of the Charter indicated by the referring national court are insufficient to provide grounds for the jurisdiction of the Court.

3. A national court when considering whether to refer or not to refer to the Court of Justice with a request to interpret provisions of the Charter and/or provisions of the Union legal acts in conjunction with the Charter’s provisions should establish and in its request for a preliminary ruling clearly and unambiguously submit information to prove that in the main proceedings pending before it an applied legal rule is other than the Union’s legal rule.

4. When a national court decides to refer to the Court a request to interpret provisions of the Charter and the request is based on the fact that the dispute in the main proceedings is related to the interpretation or application of a provision of the European Union law other than the Charter, the court has to make sure that the legal act concerning which preliminary questions are submitted can be the subject of the reference and whether a national court can refer to the Court of Justice with a request to interpret that particular legal act.

5. Courts of Member States seeking their requests for a preliminary ruling in relation to the application and/or interpretation of the Charter’s provisions were admitted for consideration by the Court of Justice should meet not only the requirement for Member States under Article 51 (1) of the Charter but also requirements under Article 267 TFEU and Article 94 of the Rules of Procedure and take into consideration the explanations in the Recommendations provided by the Court.

6. Discussions at national courts and drawing up conclusions of the application of the Charter at national courts should contribute to establishing problems most frequently faced by courts in the application of the Charter and would help find solutions. Thematic overviews of the jurisprudence of the Court of Justice in terms of application and/or interpretation of some individual provisions of the Charter as well as some particular aspects of preliminary ruling procedure in case where preliminary questions are related to the Charter and their availability in all the official languages should contribute to our efforts to ensure effectiveness and efficiency of preliminary ruling proceedings.