4

Fundamental Rights Complaints in the Preliminary Reference Procedure

LUCÍA LÓPEZ ZURITA

4.1 INTRODUCTION

The European Union legal order is, following the jurisprudence of the Court of Justice (the Court), a complete system of judicial protection.[1] In this system, the main direct way of access to the Court for individuals is the action for annulment in Article 263 Treaty on the Functioning of the European Union (TFEU). The Treaty grants *locus standi* to challenge the legality of EU acts to 'any natural or legal person against an act addressed to that person or which is of direct and individual concern to him'.[2] However, the narrow interpretation of these standing criteria leaves many individuals without any direct way to challenge EU acts before the Court.[3] The limitation is consequential for individual applicants unable to gain standing, for only the Court has the prerogative to rule on the validity and/or interpretation of EU acts.[4] This is how the procedure for a preliminary ruling in Article 267 TFEU came to the fore: it filled the gaps of access to the Court left by the interpretation of Article 263 TFEU.[5]

The drafting of Article 267 TFEU is minimalistic. It establishes that national courts and tribunals, in case of doubt about the validity or

[1] Case C-50/00 P *Unión de Pequeños Agricultores (UPA)* [2002] ECLI:EU:C:2002:462, para 40. Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review 1625.

[2] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, art 263.

[3] Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

[4] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

[5] For a good summary, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020).

interpretation of EU law, can refer a question to the Court. Preliminary references can question the validity of EU secondary law or seek the correct interpretation of any EU law provision, including primary law.[6] References on validity refer to conformity of EU acts with primary law, including the Charter of Fundamental Rights of the European Union (CFR, the Charter) and general principles, while references on the interpretation of EU law are more commonly questions concerning the compatibility of national law with EU law.[7] Therefore, the preliminary reference procedure offers the possibility to raise, albeit indirectly, breaches by both the Member States and the Union. Advocate General Jacobs in his Opinion on *Jégo Quéré* referred to the preliminary reference procedure as 'an alternative method of proceeding to Article [263]'.[8] The comparison has been amply criticised in the doctrine, and the narrow interpretation of Article 263 TFEU remains contested.[9]

Today, the preliminary reference procedure works for the most part as a decentralised infringement procedure, allowing individuals to challenge the compatibility of national law with EU law.[10] As famously put by Pescatore, the preliminary reference procedure is the 'infringement procedure of the EU citizen'.[11] Unarguably, the procedure has been central to the development of the EU legal order and the integration project.[12] Yet this role of the preliminary reference procedure might not be enough at present. The Union no longer *only produces* EU law but is increasingly involved in its *putting into practice*: the range of EU action is ever growing and so are EU organs and bodies, sometimes with very substantial executive functions. Therefore, the Union has more to say, and more ways to directly affect, via its actions, the lives and, by extension, the fundamental rights, of private persons, both natural and legal. This chapter explores whether the preliminary reference procedure

[6] TFEU, art 267.

[7] Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

[8] Case C-263/02 *Jégo Quéré* [2004] EU:C:2004:210.

[9] For a critical analysis of this interpretation of the Court, see Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International 2001); Hjalte Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 European Law Review 112.

[10] Rene Barents, 'EU Procedural Law and Effective Legal Protection' (2014) 51 Common Market Law Review 1437, 1455.

[11] Pierre Pescatore, 'Van Gend En Loos, 3 February 1963 – A View from Within' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

[12] Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001); Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).

also works as a 'citizens' infringement' procedure against the Union and reflects on whether this is a possibility at all.

The chapter is structured as follows. Sections 4.2 and 4.3 present the possibilities and limitations in the use of the preliminary reference procedure for individuals to bring claims based on breaches of their fundamental rights against the Union. Section 4.4 maps all instances in which private natural and legal persons have used the procedure for a preliminary ruling to bring a claim against the Union for breaches of their fundamental rights since the coming into force of the Treaty of Lisbon.[13] The findings of the mapping are presented in Section 4.5. Section 4.6 identifies how the parties raise this type of claims in the preliminary reference procedure, discusses the accessibility of the procedure for applicants, and assesses the shortcomings of the procedure as a means to redress breaches of fundamental rights by the Union. It argues that these shortcomings have to do with the structure and design of the procedure itself. Section 4.7 concludes.

4.2 USING THE PRELIMINARY REFERENCE PROCEDURE AGAINST THE UNION

This section explores how the preliminary reference procedure might be used to challenge breaches of fundamental rights by the Union. It first describes the types of acts that can be challenged and the grounds that might be used against the Union within the framework of Article 267 TFEU to subsequently reflect on the concrete possibilities for individuals to bring this type of claim via the preliminary reference procedure.

4.2.1 *Challengeable Acts*

The Article includes no rules on standing, and applicants are fully dependent on the national rules for *locus standi*. The only EU limitation regarding standing in Article 267 TFEU is the *TWD* rule:[14] where the applicant unequivocally had or would have had standing to challenge the act with a direct action, the indirect challenge via the preliminary reference procedure is barred.[15] The Court has taken a relatively broad view on when standing for bringing an annulment action is unequivocal,[16] but, generally, this leaves out

[13] Treaty of Lisbon [2007] OJ C306/1.
[14] Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECLI:EU:C:1994:90.
[15] Koen Lenaerts and Others, *EU Procedural Law* (Oxford University Press 2014) 465–467.
[16] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014).

individually targeted acts (e.g., decisions). Therefore, the indirect challenge mostly refers to acts of general application affecting individuals.[17] Typically, the challenge will come through a preliminary reference on the validity of EU provisions, though the Chapter will discuss other possibilities below.

The acts that can be challenged under Article 267 TFEU are much broader than for Article 263 TFEU. The drafters of the Lisbon Treaty rewrote Article 267 TFEU, which now allows referral of questions on the 'validity and interpretation of acts of the institutions, bodies, offices and agencies'. The terms are intended to cover practically every EU act,[18] and so Article 267 TFEU also allows for the indirect challenge of all sorts of non-binding acts, including recommendations, statements, communications, and notices, regardless of whether they are directly applicable or have binding effect.[19] Theoretically, it could also open the way to challenge any action exercised directly by the Union on the ground. In those cases, however, there might be no written acts or implementing measures at the Member State level, so what concretely to challenge might be problematic.[20]

4.2.2 *Types of Questions*

How can private parties concretely challenge acts of the Union via the preliminary reference procedure? The obvious way to challenge EU acts is through references on validity. Preliminary references on validity are judicial review cases, in which the legality of an EU act, usually a piece of secondary legislation, is challenged on grounds of not complying with the provisions of primary law. As stated, with the exception of instances in which the private applicant would have had standing to challenge the EU measure under Article 263 TFEU,[21] Article 267 TFEU includes no limitations on who can challenge the EU act. This is similarliy the case when the act that is challenged is of no relevance, and the Court has no problem in examining questions of validity after one or more rulings on the interpretation of the EU provision.[22]

[17] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625.

[18] Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16) 115.

[19] Ibid.

[20] For a good analysis of the question, see Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532. She proposes the action for damages as an alternative.

[21] Lenaerts and Others (n 15) 465.

[22] See, for instance, case C-393/99 *Hervein and Others* [2002] ECLI:EU:C:2002:182. See further Morten Broberg and Niels Fenger, *The Procedure before the Court of Justice* (Oxford University Press 2021).

The Court generally tries to avoid the annulment of EU acts and particularly secondary legislation.[23] The Court prefers reading directives in a manner consistent with primary law and generally exercises restraint as per the political, economic, and social grounds behind the piece of legislation.[24] Indeed, the Court states that secondary legislation must be 'interpreted as to not affect its validity'.[25] It is therefore unsurprising that most validity challenges under Article 267 TFEU are generally unsuccessful.

Questions of validity frequently coexist with questions of interpretation in the same order for reference. It is possible for a national court to refer questions on interpretation that hint at a possible breach of primary law, including rights of the Charter, by a piece of secondary legislation, without directly questioning the validity of the provision. These references connect the interpretation of EU secondary legislation to primary law in a manner that questions EU legislation itself, thus coming close to a 'fake validity' question.[26] This ultimately relates to the relationship between primary and secondary law,[27] and the Court has two main ways of replying. It can reformulate the question to specifically acknowledge the validity issue underlying the reference, and thus give a validity ruling,[28] or leave the question as one of interpretation. In the latter case, the Court will try to interpret secondary law so as to fit within the limits of primary law. In *Sturgeon*, for instance, the Court read the regulation on compensation to passengers[29] in the light of primary law to find that passengers of delayed flights had the same right to compensation as passengers of cancelled flights.[30]

[23] Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16); Lenaerts and Others (n 15).

[24] Sacha Prechal, 'Individuals Challenging Directives in EU Courts' (2022) 59 Common Market Law Review 41, 48.

[25] Joined Cases C-402/07 and C-432/07 *Sturgeon* [2009] ECLI:EU:C:2009:716.

[26] The expression belongs to Michał Krajewski.

[27] Phil Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52 Common Market Law Review 461. See also Gareth Davies, 'Legislative Control of the European Court of Justice' (2014) 51 Common Market Law Review 1579.

[28] For instance, in Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECLI:EU:C:2009:358. The national court had addressed several questions on interpretation, but the Court interpreted that the referring court 'raises, although not expressly, a question concerning the validity' and therefore 'wishes to ask the Court for a ruling on the validity'.

[29] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

[30] Sacha Garben, 'Sky-High Controversy and High-Flying Claims? The *Sturgeon* Case Law in Light of Judicial Activism, Euroscepticism and Eurolegalism' (2013) 50 Common Market Law Review 15.

4.2.3 *Types of Grounds*

Article 267 TFEU allows private applicants to raise any infringement of their fundamental rights by the Union. Not only that, but breaches of fundamental rights are 'a favourite ground' to challenge the legality of directives and were already before the entry into force of the Charter.[31] As the duty for the Union to comply with the fundamental rights of the Charter is recognised in Article 51(1) CFR,[32] there is no need for applicants to prove any implementation of EU law under Article 51 CFR, for they are directly challenging an act of an institution.[33] Similarly, and at least theoretically, there is no need for questions on the compatibility of the Union act with national law, that is, there is in principle no need for any measures at the national level for the private applicant to be able to challenge the EU act,[34] though typically some sort of implementing measures are needed in the national legal orders to be able to bring a claim to a national court.

Moreover, it should be considered that the same claim can be framed in different ways for what concerns fundamental rights. For instance, in *Schecke*,[35] two applicants challenged the regulation obliging the disclosure of data on the recipients of EU funds, including recipients of Common Agricultural Policy funds, on grounds of their fundamental right to the protection of personal data. Nevertheless, they could have challenged it on grounds of a breach of their personal dignity, as their concern related more to the impact on their daily lives.[36] Similarly, a much older case like *Mulder*,[37] which deals with the protection of legitimate expectations for milk producers who wished to re-enter the market, clearly involves the freedom to conduct a business or property, even if the case does not use the language of fundamental rights.

4.3 INHERENT LIMITATIONS IN THE PROCEDURE

After reflecting on the concrete ways in which acts of the Union might be challenged using the preliminary reference procedure, this section reflects on

[31] Prechal (n 24) 43.
[32] Sonia Morano-Foadi and Stelios Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17 European Law Journal 595, 601.
[33] Angela Ward, 'Article 51 – Field of Application' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: a commentary* (2nd edn, Hart 2021) 1573.
[34] Ibid 1574.
[35] Case C-92/09 *Volker und Markus Schecke* [2010] ECLI:EU:C:2010:662.
[36] Morano-Foadi and Andreadakis (n 30) 608–609.
[37] Joined Cases C-104/89 and C-37/90 *Mulder (milk quotas)* [1992] ECLI:EU:C:1992:217.

the limitations inherent to it. These limitations go beyond a mere comparison with the direct action of Article 263 TFEU and look at how the structure, aims, and working of the procedure might constrain the position, capacity, and possibilities of private parties to challenge breaches of their fundamental rights. To be sure, these limitations are common to any kind of challenge under Article 267 TFEU but become particularly relevant when those challenges concern potential breaches by the Union.

This section takes the perspective of private applicants and examines three main groups of limitations. First, the preliminary reference procedure establishes a system of judicial cooperation in which private parties are entirely dependent on national law and the national courts for the indirect challenge of EU acts. This makes any challenge 'long and uncertain' for applicants.[38] Secondly, the preliminary reference procedure is not a 'real judicial remedy for the parties',[39] which seriously limits the possibilities of the parties within the procedure.[40] Thirdly, the procedure was conceived to ensure the uniformity of EU law[41] and plays a central role in EU integration,[42] which results in a central position of the Court within the procedure.

4.3.1 *First Limit: The Central Role of National Courts*

The first limitation faced by private parties in the procedure is that they are fully dependent on national law and procedures to bring such claims to the Court. Indeed, unlike Article 263 TFEU, Article 267 TFEU includes no rules on standing because those are national. Even when national law grants standing before the national court, private parties depend fully on national courts to decide that a reference is needed.

According to the Rules of Procedure of the Court,[43] national courts are not obliged to send a preliminary reference, but if they decide to do so, it is entirely up to them how to draft the preliminary questions and the rest of the elements in the order for reference.[44] Furthermore, the national courts can

[38] Schermers and Waelbroeck (n 9) 452.

[39] Ibid.

[40] Schermers and Waelbroeck (n 9).

[41] Pierre Pescatore, 'Les Travaux Du "Groupe Juridique" Dans La Négociation Des Traités de Rome' (1981) 34 (1/4) Studia Diplomatica 159, 159.

[42] Thomas de la Mare and Catherine Donnely, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul P Craig and Grainne de Búrca (eds), *The evolution of EU law* (Oxford University Press 2011); Alter (n 12).

[43] Rules of Procedure of the Court of Justice [2012] OJ L265/1.

[44] According to Article 94 Rules of Procedure, the order for reference must contain the text of the questions, a summary of the subject matter of the dispute and the relevant facts, the relevant national law, and an account of the reasons justifying the referral.

also attach a pre-emptive opinion[45] or provisional answer,[46] that is, share their views as to how the question at issue should be resolved (e.g., whether the claim of the private party should be granted or if the secondary provision should be annulled).[47] However, the Court does not seem to be too interested in the opinions of its national counterparts, and the influence of these pre-emptive opinions seems rather modest.[48]

Finally, the influence of the parties in the drafting of the question differs greatly from one country to another: in some Member States, referring judges limit their intervention to the verification and submission of the questions, while others give the parties no real chance to influence the question.[49]

4.3.2 *Second Limit: The Reduced Role of the Parties in the Proceedings*

The preliminary reference procedure is a non-contentious,[50] 'special' procedure that aims to ensure the uniformity of EU law throughout the territory of the European Union.[51] To do so, it 'instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties'.[52] Technically, there are no parties to the proceedings,[53] and the Court has stated that 'the parties in the main action are merely invited to state their case within the legal limits laid down by the national court'.[54] In this sense, Sarmiento writes that 'it could

[45] Stacy A Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45 European Journal of Political Research 527.

[46] Rob van Gestel and Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019).

[47] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJ C380/1, art. 17 and Annex I. Compare to Rules of Procedure, art. 94.

[48] Anna Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' (2022) 47 European Law Review 310.

[49] Morten Broberg, 'Preliminary References as a Means for Enforcing EU Law' in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 105.

[50] Barents (n 9) 1455. Lucía López Zurita, 'The Survival of the Fitted? Individual Protection in the European Court of Justice's Preliminary Ruling Procedure' (PhD thesis, European University Institute 2021).

[51] Case C-6/64 *Costa Enel* [1964] ECLI:EU:C:1964:66.

[52] Case C-210/06 *Cartesio* [2008] ECLI:EU:C:2008:294.

[53] K P E Lasok, *Lasok's European Court Practice and Procedure* (3rd edn, Bloomsbury Professional 2017) 1258.

[54] Case C-62/72 *Bollman* [1973] ECLI:EU:C:1973:24, para 4. The case is still quoted by the Court (for instance, see Case C-2/06 *Kempter* [2008] ECLI:EU:C:2008:78, para 41).

be said, quite radically, that the legal situation of the parties becomes a secondary concern for the ECJ'.[55]

The Rules of Procedure of the Court offer individuals who are a party in the main proceedings the possibility, not obligation, to intervene in defence of their position before the Court.[56] The parties might submit written observations[57] and oral pleadings (though these tend to be very brief),[58] explaining their legal arguments or their version of the facts submitted. According to Article 23 of the Statute and Article 96 of the Rules of Procedure of the Court, the Member States, the European Commission, the institution that adopted the act in dispute, and the parties to the main proceedings (determined by national law) can submit observations to the Court. Therefore, by the time the claim makes its way to Luxembourg, a whole new set of parties is added to the case.

Parties to the case are only allowed to submit observations regarding the reply to be given to the question, thus they are in the same position as the different Member States and other institutions that might intervene in the proceedings but without the knowledge and resources available to them.[59] The purpose of the observations is to clarify the scope of the dispute and the answers to be given to the questions.[60] There is only one round of written pleadings, and there is no opportunity to reply in writing to the submissions of the other parties.[61] Parties are not supposed to comment on the referred question itself, as this is part of the exclusive prerogative of the national court, nor can they change the content of the question.[62] The possibility that the parties could influence the Court to consider other arguments seems fairly limited.[63]

[55] Daniel Sarmiento, 'Amending the Preliminary Reference Procedure for the Administrative Judge' (2009) 2 Review of European Administrative Law 29, 35.

[56] It should be noted that the parties in the main proceedings are automatically parties in the procedure before the Court (Rules of Procedure, art. 23(2)), following the rules of representation and attendance in the national legal system (Rules of Procedure, art. 97).

[57] Rules of Procedure of the Court, art 57(1).

[58] Schermers and Waelbroeck (n 9) 649. They speak of an opportunity for 'extremely succinct oral comment'.

[59] For instance, speaking of the Commission, Azoulai writes that it 'has appropriated for itself the language of jurisprudence'. Pascal Mbongo and Antoine Vauchez, *Dans La Fabrique Du Droit Européen: Scènes, Acteurs et Publics de La Cour de Justice Des Communautés Européennes* (Bruylant 2009) 158.

[60] Practice Directions to the Parties Concerning Cases Brought Before the Court [2020] OJ L421/1, art 10.

[61] Ibid art 33.

[62] Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16) 359.

[63] 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.

4.3.3 *Third Limit: The Procedural Freedom of the Court*

The raison d'être of the preliminary reference procedure is ensuring the uniformity of EU law.[64] This function necessarily coexists with the other goals and roles that the procedure has come to fulfil within the EU legal order, notably providing the Court with a tool to carry out its judicial law-making and guaranteeing the effective judicial protection of individuals, even if in an indirect manner.[65] In other words, this is not a procedure primarily oriented to provide a remedy to the parties.

The consequence of the peculiar nature and divergent goals of the preliminary reference procedure is the central role of the Court within it. The Court enjoys a degree of control over the proceedings that is remarkable in comparison both to other proceedings before the Court and to other international courts. Such freedom becomes apparent when the broader framework of the procedure is explored. This includes the Rules of Procedure of the Court, which have been reformed following concrete proposals of the Court,[66] the non-public, internal guidelines of the Court,[67] and its case law.

Given the configuration of the procedure as a cooperation between courts and the limited role of the parties, the treatment of the concrete questions depends greatly on the Court. This concerns matters including the attribution of the case to a chamber and a judge rapporteur,[68] the interaction with the parties,[69] the capacity of the Court to change the scope of the questions,[70] or the extent to which it conducts a proportionality test or

[64] Pescatore (n 41); Van Gestel and De Poorter (n 46).
[65] Van Gestel and De Poorter (n 46) 156.
[66] Urška Šadl and Others, 'Law and Orders: The Orders of the European Court of Justice as a Window in the Judicial Process and Institutional Transformations' (2022) 1 European Law Open 549.
[67] Court of Justice of the European Union, 'Guide Pratique Relative Au Traitement Des Affaires Portées Devant La Cour de Justice' [2020] OJ L042I/1.
[68] Silje Synnøve Lyder Hermansen, 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union' (2020) 27 Journal of European Public Policy 1127; Christoph Krenn, 'A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice' in Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez (eds), *Researching the European Court of Justice: methodological shifts and law's embeddedness* (Cambridge University Press 2022).
[69] Síofra O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart 2002); Lenaerts and Others (n 15).
[70] Urška Šadl and Anna Wallerman Ghavanini, '"The Referring Court Asks, in Essence": Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-Making Approach?' (2019) 25 European Law Journal 416; Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16).

defers to the national courts.[71] An analysis of each procedural factor is beyond the scope of this chapter,[72] but some examples serve to show the extent of this procedural freedom. For instance, the allocation of cases at the Court to a *juge rapporteur* is an exclusive prerogative of the President, not subject to any sort of procedural constraint.[73] Similarly, none of the procedural instruments regulating the preliminary reference procedure mention reformulation, but the Court has coined the practice and reverts to it frequently. For the type of cases discussed in this chapter, the Court reformulates to turn questions of validity into questions of interpretation or vice versa. The latter is the most frequent scenario, but it is also the case, albeit less frequently, that the referring court sends questions exclusively on interpretation, which the Court reformulates as validity questions.[74] The Court might also reformulate the question to limit the review of the EU provision at stake or add other grounds to those submitted to review the legality of the EU act.[75]

The influence of the private parties in the procedural treatment of the case is limited. To continue with the examples above, Member States and other institutions might request that a Grand Chamber hear the case, but this possibility does not extend to other parties in the proceedings. As for reformulation, the submissions of the parties might influence the Court to reformulate the questions,[76] but they cannot force the Court to do so.[77]

[71] Jan Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55 Common Market Law Review 1341; Lucía López Zurita and Stein Arne Brekke, 'A Spoonful of Sugar: Deference at the Court of Justice' (2023) *Journal of Common Market Studies*, available at https://doi.org/10.1111/jcms.13547 (last accessed May 2024).

[72] Many can be cited for a comprehensive analysis of the procedure. See among others Lenaerts and Others (n 15); Lasok (n 53); Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16); Christoph Krenn, *The Procedural and Organisational Law of the European Court of Justice: An Incomplete Transformation* (Cambridge University Press 2022); López Zurita, 'The Survival of the Fitted?' (n 50).

[73] Krenn, 'A Sense of Common Purpose' (n 68).

[74] Lenaerts and Others (n 15) 469.

[75] Ibid.

[76] Broberg (n 49). See also Ricardo García Antón, *La Cuestión Prejudicial y La Fiscalidad Directa* (European University Institute 2015); Ricardo García Antón, 'The Reformulation of the Questions Referred to the CJEU for a Preliminary Ruling in Direct Taxation: Towards a Constructive Cooperation Model' (2015) 24 EC Tax Review 258; David W K Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002). Broberg and Fenger however state that the reformulation is rarely influenced by the submissions of the parties see Broberg (n 49) 106.

[77] Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16) 361.

4.4 EMPIRICAL MATERIAL AND RESEARCH PROCESS

This section explains the research process behind the mapping of the cases in this chapter. The process consists of two main steps: first, a search of all relevant cases and, secondly, the qualitative coding of those cases to gather information regarding the applicants, the framing of the claims, and the treatment of the fundamental rights. All of these are relevant to understand the actual and potential use of the preliminary reference procedure for challenging breaches of fundamental rights by the Union.

First, I collected all preliminary rulings containing the word *validity* and with a mention of the Charter of Fundamental Rights (in any part of the ruling) in the Curia database from the entry into force of the Treaty of Lisbon (1 December 2009) to the end of 2022.[78] I repeated the search in the dataset IUROPA to ensure that no ruling was missing.[79] After manually eliminating false positives,[80] the dataset contains fifty-four preliminary rulings on validity and validity and interpretation. The dataset includes any case in which validity was mentioned, even if the Court ended up not ruling on the validity of the EU provision.

A limitation of the study must be acknowledged. The analysis relies solely on the judgments of the Court, without considering the orders for reference of the national courts or the actual submissions of the parties, due to the fact that they are not publicly available. Yet those materials are analysed through their summaries in the judgment of the Court, which means that the analysis relies on the information provided by the Court and cannot take account of silences or omissions in the judgments.

The mapping relies on the close scrutiny of the decisions in the dataset to observe a series of factors. Each judgment of the dataset was hand-coded with the variables presented below. For clarity, the variables are separated into three different groups. Alongside the information described below, the mapping also takes into account the size of the chamber hearing the case and the EU institutions, organs, or bodies intervening before the Court, as well as elements related to the procedural treatment at the Court.

4.4.1 *Claimants*

The chapter is concerned solely with cases with private parties as applicants. The private applicants might be natural persons, private companies, or NGOs.

[78] <www.curia.europa.eu>.

[79] Stein Arne Brekke and Others, 'The CJEU Database Platform: Decisions and Decision-Makers' [2023] Journal of Law and Courts, 1. All data is available open-access in <www.iuropa.pol.gu.se>.

[80] For instance, cases on the 'validity' of a European arrest warrant.

The information is collected from the section on the factual background of the case in the ruling.[81]

4.4.2 *Framing of the Claim*

The goal of this set of variables is to understand how the claim is framed by the applicants and/or the national court. First, I record whether the reference concerns solely the validity of an EU act or provision or also includes questions on interpretation.

Secondly, I record who brought the question of invalidity to the reference. Within the limitations acknowledged above, this might have been brought up by the applicants in the case or afterwards by the national court.

Thirdly, I record if the claim is framed as a breach of fundamental rights or the Charter is used as any other provision, without a specific fundamental rights framing. The difference is subtle, insofar as in both cases there is a link to fundamental rights. It mostly reflects a difference in the degree to which fundamental rights are central to the claim. For the former, the applicants argue that the breach affects one or more of their fundamental rights, whereas for the latter they mention provisions of the Charter but do not specifically argue that what is at stake is a violation of fundamental rights.

Finally, I record whether the referring court included a pre-emptive opinion on how the Court should reply to the question regarding the validity of the EU act or provision and the existence of a breach of fundamental rights and whether the use of fundamental rights can be traced back to the applicants or the referring court.

4.4.3 *Fundamental Rights Treatment*

The variables in this category focus on how the Court treats the fundamental rights component of the case (if applicable) in the ruling. I first record the extent to which the Court engages with the analysis of the fundamental rights at stake in the case. The Court might disregard completely the fundamental rights aspect of the case, engage minimally, or engage in a detailed or extensive manner.

Secondly, I record any mention of the Charter in the operative part of the ruling. The reason for this is that the operative part, or *dispositif*, sets the boundaries of the reply to the national court. It is nothing short of a

[81] Usually under the heading 'The dispute in the main proceedings and the questions referred for a preliminary ruling'.

prescription in which the Court establishes the binding interpretation of European Union law and incidentally decides, within the limits of Article 267 TFEU, on the compatibility of the national measure with European Union law.[82]

Finally, I record the final result in the case: whether the Court annuls the act completely or partially, does not give a ruling on the validity of the provision, or rejects the existence of a breach of fundamental rights.

4.5 PRIVATE APPLICANTS AND FUNDAMENTAL RIGHTS IN THE PRELIMINARY REFERENCE PROCEDURE: A MAPPING

The results of the mapping exercise are summarised in Table 4.1.

4.5.1 *Claimants*

Most of the applicants are individuals, that is, natural persons (48%), followed by private companies (39%), and NGOs (6%).[83] The latter usually bring the case to Court on behalf of a group of individuals. For instance, in *Centraal Israëlitisch Consistorie*, a Jewish association challenged the legality of measures restricting the ritual slaughter of animals on behalf of the Jewish community in Belgium.[84]

The variety in the individual applicants mirrors the diversity of policy areas displayed in Figure 4.1: alongside company owners and farmers,[85] we find asylum seekers,[86] or benefits recipients.[87] As for the claims, unsurprisingly, there is more variety in the claims coming from private applicants: challenges to European arrest warrants,[88] instances of discrimination because of disability or religion,[89] the possible invalidity of the asylum system,[90] etc. In the cases in which the applicant is a private company, the claims mostly concern exports,

[82] For the difference between grounds and operative part applied to a model see Kálmán Pócza, Gábor Dobos, and Attila Gyulai, 'How to Measure the Strength of Judicial Decisions: A Methodological Framework' (2017) 18 German Law Journal 1557.

[83] This seems consistent with previous studies, see Damian Chalmers and Mariana Chaves, 'The Reference Points of EU Judicial Politics' (2012) 19 Journal of European Public Policy 25; López Zurita 'The survival of the Fitted?' (n 50).

[84] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* [2020] ECLI:EU:C:2020:1031.

[85] For instance, *Volker und Markus Schecke* (n 35).

[86] Case C-601/15 PPU N. [2016] ECLI:EU:C:2016:84.

[87] Case C-363/12 Z. [2014] ECLI:EU:C:2014:159.

[88] Case C-649/19 *Spetsializirana prokuratura* [2021] ECLI:EU:C:2021:75.

[89] Case C-356/12 *Glatzel* [2014] ECLI:EU:C:2014:350.

[90] Case C-601/15 PPU N. [2016] E CLI:EU:C:2016:84.

TABLE 4.1 *Private applicants and fundamental rights in the preliminary reference procedure*

VARIABLES	PERCENTAGE (%)
Claimants	
Individual applicants	48
Private companies	39
NGOs	6
Framing of the Claim	
Framed as validity and interpretation	65
Framed solely as validity	35
Validity raised by referring court	61
Validity raised by applicant	39
Preemptive opinion by referring court	35
Order for reference contains references to FRs	80
Claim framed in FRs terms	70
framed by the applicants	39
framed by the national court	61
Fundamental Rights Treatment	
FRs analysis by the CJEU	81
minimal analysis	34
extensive analysis	55
Mention of the Charter in operative part	44
Incompatibility with EU law	20
Invalidity of the EU act	15

The table summarises the findings. The findings are organised following Section 4.4. First, the variables referring to claimants, followed by those concerned with the framing of the claim, and finally the variables concerned with the treatment of the fundamental rights component of the case. The figures in the right-hand column indicate the percentage of the total of cases (n = 54), except where the variable is in italics, where the figure shown is a percentage of the subset of cases in which the main variable is recorded. For instance, for the variable 'FRs analysis by the CJEU', the figure of 81% relates to the total number of cases, whereas the 'minimal analysis' figure (34%) is the proportion of that 81% of cases.

taxes, and licences. This corresponds neatly to the policy areas described in the figure. The two most common policy areas are approximation of laws and fundamental rights, followed by freedom of establishment and services and the Area of Freedom, Security, and Justice. It is also interesting to note that many cases have 'agriculture and fisheries' as a policy area, which has to do with the many cases concerning the Common Agricultural Policy and other EU funds,

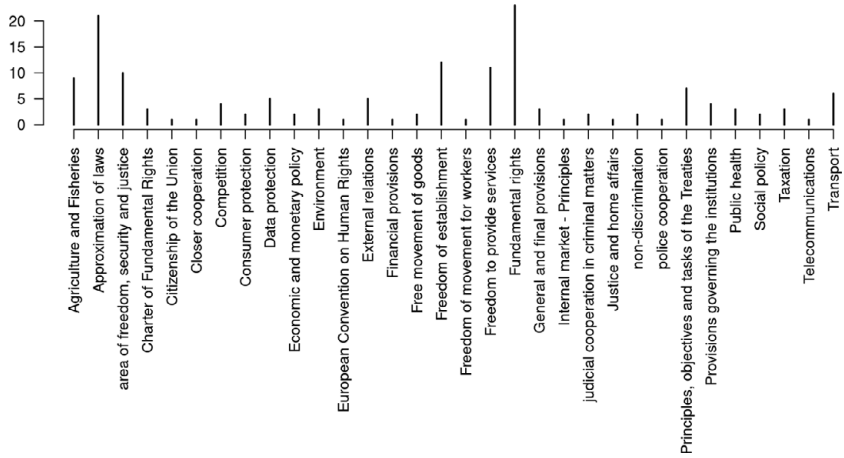

FIGURE 4.1 Policy areas of the cases in the dataset
This figure displays the policy areas of the cases in the dataset. It relies on the classification of the Court, which assigns one or more relevant policy areas to the case.

where EU decisions directly affect the legal position of the parties, including their fundamental rights.

4.5.2 *Framing of the Claim*

As for the framing, most of the references include questions on both validity and interpretation (65% compared with 5% on validity only). Issues of validity are predominantly raised by national courts (61%). Sometimes the applicant did not raise any issue of invalidity.[91] On other occasions, the applicant specifically signalled the national implementation as the origin of the breach in their fundamental rights[92] or expressly rejected the existence of any issue of validity.[93] Applicants less frequently raise the potential invalidity of the provision, and on occasion invalidity is raised as an alternative to considering the national measures compatible with EU legislation.[94]

The second aspect of the framing of the claim, as discussed in Section 4.4, concerns the use of fundamental rights, that is, whether the claim is framed as a breach of fundamental rights or the Charter is used as any other provision, without a specific fundamental rights framing. Table 4.1 shows that nearly all

[91] Case C-362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, specifically stating that the applicant did not raise invalidity.
[92] Case C-1410/20 *Caracciollo* [2021] ECLI:EU:C:2021:368.
[93] Case C-160/20 *Stichting Rookpreventie Jeugd*,[2022] ECLI:EU:C:2022:101.
[94] Case C-336/19 *Centraal Israëlitisch Consistorie van België* [2020] ECLI:EU:C:2020:1031.

preliminary questions refer expressly to one or more provisions of the Charter (80% of cases), but a significantly lower number of claims are framed in fundamental rights terms (57%). For instance, in *Liga van Moskeeën*, the applicants do not merely refer to articles of the Charter but explicitly argue that the regulation they contest constitutes an infringement of their freedom of religion.[95]

As with invalidity arguments, national courts more frequently frame the claim as a fundamental rights breach (48% of those cases with a FRs framing) than applicants do. The right to an effective judicial remedy (Article 47 CFR) is the most referred provision in the questions, followed by the various provisions on equality and non-discrimination (Articles 20–23 CFR) and the right to the protection of personal life and data (Articles 7 and 8 CFR).

National courts include a pre-emptive opinion in 35% of cases. With few exceptions, the pre-emptive opinions argue in favour of the invalidity of the EU act and/or the existence of a breach of fundamental rights in the case. Pre-emptive opinions are overwhelmingly not followed.[96]

4.5.3 *Fundamental Rights Treatment by the Court*

Confirming previous literature in this regard,[97] the Court only exceptionally annuls the EU act (seven cases, including two of partial invalidity). For the most part, the Court annuls regulations. Moreover, in 18% of cases, the Court did not examine the validity of the EU act,[98] because it either considered that issue irrelevant or preferred to focus solely on interpretation.

With regard to the procedural treatment by the Court, some findings should be highlighted. First, and consistent with prior research,[99] stylistic reformulation is frequent in cases dealing with the validity of EU acts: the Court rewrites the questions in most cases.[100] Instances of substantive reformulation serve to consider provisions not mentioned by the national court in its order for reference,[101] reformulate questions on validity as questions on interpretation,[102] and limit the extent of the validity review conducted.[103] Secondly,

[95] Case C-426/16 *Liga van Moskeeën* [2018] ECLI:EU:C:2018:335, para 21.
[96] This is consistent with previous research, see Wallerman Ghavanini (n 48).
[97] Prechal (n 24); Lenaerts and Others (n 15); Broberg and Fenger, *Preliminary References to the European Court of Justice* (n 16).
[98] For example, in Case C-481/19 *Consob* [2021] ECLI:EU:C:2021:84.
[99] Šadl and Wallerman Ghavanini (n 70); López Zurita, 'Survival of the Fitted?' (n 50).
[100] An exception is Case C-102/16 *Vaditrans* [2017] ECLI:EU:C:2017:1012.
[101] Case C-390/15 *RPO* [2017] ECLI:EU:C:2017:174.
[102] Case C-142/20 *Caracciolo* [2021] ECLI:EU:C:2021:368.
[103] Case C-673/20 *Préfet du Gers* [2022] ECLI:EU:C:2022:449.

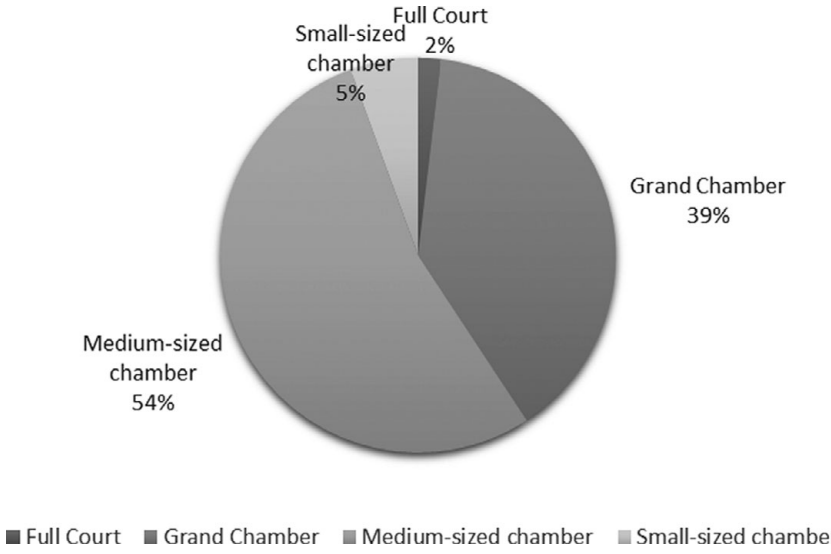

FIGURE 4.2 Case distribution among chambers
This figure shows how the cases are distributed among chambers, using the data of the Court. Over half of the cases are heard by medium-sized chambers (either five or seven judges). Nearly 40% of the cases were heard at the Grand Chamber, whereas only 2% were sent to the full court. Finally, only 5% of cases were heard by small chambers of three judges.

the Court reviews the proportionality in a little over 40% of cases. Thirdly, deference to the national courts is almost absent from the findings, and it is always part of the grounds. In other words, the Court never defers in the operative part.[104]

Finally, Figures 4.2 and 4.3 summarise some relevant information concerning the chambers in which these cases are heard and the EU institutions, organs, and bodies intervening in them. Even if the majority of cases (54%) are heard by medium-sized chambers of five or seven judges, nearly 40% of the cases are heard in the Grand Chamber. As there is no mention in those cases about any Member State's request to have the case sent to the Grand Chamber,[105] this distribution reflects the Court's own perception of the relevance of the case.[106]

[104] López Zurita and Brekke (n 71).
[105] The possibility is established in Rules of Procedure, art. 60. An analysis of the role of the Grand Chamber in Michal Bobek, 'What Are Grand Chambers For?' (2021) 23 Cambridge Yearbook of European Legal Studies 1.
[106] Hermansen (n 68).

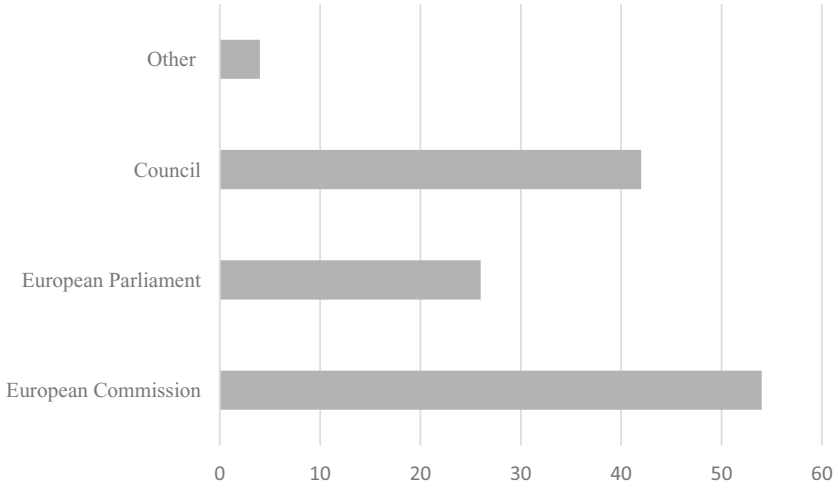

FIGURE 4.3 Intervention of EU institutions
This figure shows which EU institutions intervene in the cases in the dataset, which contains fifty-four cases. Unsurprisingly, the Commission intervenes in practically all cases. The Council intervene in over forty cases, whereas the European Parliament did the same in nearly thirty. Finally, other EU bodies and organs intervened in around five cases.

4.6 PRIVATE APPLICANTS AND FUNDAMENTAL RIGHTS IN THE PRELIMINARY REFERENCE PROCEDURE: AN ASSESSMENT

This section discusses the result of the findings in Section 4.5. As explained in Section 4.3, the focus is on private parties who bring potential breaches of their fundamental rights to the preliminary reference procedure. The section reflects, in the light of the mapping conducted above, on the possibilities, strengths, and shortcomings of the preliminary reference procedure as a means for the protection of fundamental rights that the European Union itself might have breached.

Beginning with the applicants, the findings suggest that the cases analysed concern individuals and legal persons in almost equal measure, with a slightly higher number of natural persons. It is perhaps surprising that only a very small number of cases were brought by NGOs, as it is thinkable that cases concerning the validity or compatibility of EU act are particularly prone to litigation by this type of applicant. Further research is needed to understand to what extent the individual applicants in the case may have been supported by NGOs.

The findings in Section 4.5 further suggest that private applicants, both natural and legal persons, are mostly focused on the national measures or the

implementation of the EU provisions or acts at the national level. Comparatively, fewer applicants 'look behind' the implementing level and up to the EU act where the breach of their rights might have originated. National courts fill in this lacuna by pointing to the possible incompatibility of the EU act with norms of primary law, including the Charter, oftentimes with extensive pre-emptive opinions arguing the case. This happens in 61% of cases and highlights the central role of national courts within the model established by Article 267 TFEU.

The focus of private applicants on the implementing measures at the national level is entirely linked to the fact that the potential breaches concern measures of general application, most commonly secondary legislation, and particularly directives and regulations. The direct challenge of these measures is made difficult by the strict criteria of standing under Article 263 TFEU, and therefore it is only logical that the challenge comes via Article 267 TFEU.

The reliance on some sort of implementing or national measures would indicate that actions of the Union not accompanied by some sort of action at the Member State level are virtually unchallengeable via the preliminary reference procedure, and applicants would have to rely on direct actions. However, this also means that for most cases implementing measures are needed as they are the only way to gain standing to bring a case before a court under national procedural law. This indeed leaves the applicants entirely dependent on the national procedural rules to be able to eventually challenge the EU act itself.

When applicants succeed in getting a reference sent to the Court, the treatment of fundamental rights suggested by the findings is somehow puzzling. Most claims referred directly to provisions of the Charter, be it in the framing adopted by the applicants or later adopted by the referring court in its order for reference. However, fundamental rights are mostly added to the questions in the form of citations of provisions of the Charter. It is less common for the applicants to build their whole argument around a violation of their fundamental rights. What this means is that fundamental rights become a secondary part of the claim. Interestingly, the claims refer mostly to a handful of rights, which do not necessarily correspond to the areas in which the legislation of the Union, and generally acts of the Union, are expanding at present.[107] This indicates a temporal mismatch between the enactment of legislation at the EU level and its effects at the national level,

[107] Urška Šadl, Lucía López Zurita, and Sebastiano Piccolo, 'Route 66. Mutations of the Internal Market Explored through the Prism of Citation Networks' (2023) 21 International Journal of Constitutional Law 826.

which further points to the difficulties of challenging EU acts in the absence of any implementing measures.

Does the framing matter? The sample is too small to draw any definitive conclusion, but the findings suggest as much. It seems that where the claim is more clearly framed as a violation of fundamental rights, rather than just citing the Charter in the preliminary questions, the Court is more likely to declare the measure incompatible. Further research is needed to definitely establish whether this is the case and if it happens only in preliminary rulings concerned with the possible incompatibility of an EU act or provision. Furthermore, a framing of the claims in terms of fundamental rights corresponds to an extensive analysis of the fundamental rights component of the case by the Court, which is substantially less frequent where fundamental rights are not a central part of the reference.

Unsurprisingly, the Court is very reticent to annul EU acts and declared the invalidity of an EU provision only in a handful of cases. The Court prefers to focus on interpretation and measures at the national level. Generally, the findings suggest a high deference towards the EU legislator[108] where the compatibility of EU legislation with the Charter is questioned. Interestingly, the findings suggested that deference towards national courts was almost anecdotal, even when most of the cases included questions of both validity and interpretation that might have justified leaving a margin of manoeuvre to the national courts, which the Court is known to increasingly do.[109] The close connection of these cases, even if focused on interpretation, with the survival of EU acts might explain the reluctance of the Court to give any space to the national courts that might jeopardise it.

The preliminary reference procedure is not a remedy oriented to the redress of breaches suffered by private parties but rather a system of cooperation oriented towards the uniformity of the EU legal order. Section 4.3 argued that this substantially affects and (re)defines the position of the private parties in the proceedings. In cases where the compatibility of the EU legislation is at stake, this becomes particularly apparent. Two of the findings are noteworthy in this regard. First, in the vast majority of cases, at least the Commission and another institution submitted observations and participated in the oral hearings. This fact further points to the salience of the case but also highlights the secondary role of the parties once the case arrives before the Court. Indeed, the analysis of the potential breaches of fundamental rights by the Union before the Court necessarily focuses on the judicial review of legislation, and

[108] This confirms previous research on deference, see Zglinski (n 71).
[109] Ibid.

the concerns and specificities of the private parties' case become secondary. Even if this is certainly always the case in this procedure,[110] it is especially blatant when the validity of Union acts is at stake.

Secondly, almost 40% of the cases in the dataset were allocated to the Grand Chamber. This number is significant (by comparison in the whole of 2022, the Grand Chamber heard only forty-nine preliminary references). In the absence of any recorded request by the Member States to have the cases heard at the Grand Chamber, it is possible to conclude that it was a decision of the Court to hear many of these references in a Grand Chamber, which further suggests that the Court is conscious of the high salience of the cases. In other words, the Court does not perceive these cases as routine, even where the claims in most of them are fairly modest and the possible incompatibility of EU legislation with primary law only tangential to the main issue. Yet that possibility seems to be enough for the Court to allocate the cases in a high proportion to the Grand Chamber.

4.7 CONCLUSION

This chapter explored the possible use of the preliminary reference procedure as a means to challenge Union acts potentially breaching fundamental rights. It focused on the position of private applicants, both legal and natural persons. The chapter described the ways in which Article 267 TFEU allows for this type of challenge and then reflected on the limitations that the procedure poses to the legal position, capacity, and possibilities of the parties to bring forward these claims and obtain redress. It argued that these limitations are inherent to the procedure, and as such common to both preliminary references on interpretation and validity, but become particularly relevant for the latter.

Against this theoretical ground, the chapter mapped all preliminary references on validity and validity and interpretation brought by private applicants and gathered information regarding the applicants themselves, the framing of their claims, and the fundamental rights component of those references. The findings suggested that the preliminary reference procedure is, at least at present, only limitedly used to challenge Union acts for potential breaches of fundamental rights. Importantly, the findings indicate that the focus of the cases is almost always on implementing measures, however tenuous, which brings into question the feasibility of using the procedure to challenge a whole

[110] López Zurita, 'Survival of the Fitted?' (n 50).

array of cases in which measures at the national level have not yet taken place or might never occur.

At the end of the day, validity references turn into judicial review cases, in which the actual claim of the applicants becomes secondary to the check of compatibility of the EU measure against primary law. This seems inherent to the working of the procedure itself and consistent with its goal of ensuring the uniformity of the EU legal order. The context of extreme procedural freedom in which the Court operates in the preliminary reference procedure exacerbates the secondary role of the parties. However, where the action of the Union is growing, and with it its possibilities of encroaching on the lives of natural and legal persons and their fundamental rights, it is worth reflecting on whether the preliminary reference procedure can really complete the patchy system of judicial protection in the Union in this respect.