

Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations

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Abstract

The CJEU has no jurisdiction to rule in purely internal situations, save for three exceptions. As easy as this may sound, the CJEU's case law is not entirely consistent and created uncertainty for national courts. This article critically examines how the CJEU has dealt with purely internal situations. It shows that the CJEU should be stricter in defending its gates. Instead of turning the three exceptions into the rule, the CJEU should treat the three exceptions as they were originally envisaged: Exceptions. The recent Grand Chamber in *Ullens de Schooten* is a step in the right direction. A stricter approach makes it necessary that the CJEU looks a bit more over the national judge's shoulder, which changes the cooperative dynamic by putting the CJEU into a more vertical position vis-à-vis national courts. National courts can, however, escape this more conflictual setup by providing more detailed information as to the fulfillment of one of the three exceptions.

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A. Introduction

Traditionally, EU law only prohibits restrictions on free movements between Member States, and not within single Member States.¹ Additionally, a mere theoretical possibility of a cross-border situation is not enough for internal market freedoms to apply, as the Court of Justice of the European Union (CJEU) has consistently recognized. The CJEU has thus declined to rule on purely internal situations where the facts of the case are confined to one Member State and where there are no cross-border elements that provide a link with EU law.² The CJEU has, however, formulated three exceptions when it has jurisdiction to rule on such purely internal situations: When cross-border effects cannot be excluded (*Oosthoek*), when national law makes EU law applicable by way of a so-called *renvoi* in situations outside the scope of EU law (*Dzodzi*), and when national law prohibits reverse discrimination (*Guimont*).³ The purely internal situation doctrine functions as a “gatekeeper” to the preliminary ruling procedure from a procedural point. This doctrine is not solely a technical procedural matter. It governs the scope of EU law and delimits the jurisdiction of the CJEU to rule on EU law from the competence of the national court to interpret and apply national law. In addition, the way in which the doctrine is applied also affects the workload of the CJEU and the functioning of the preliminary ruling procedure.⁴ If the CJEU’s jurisdiction is too broad, it might hamper the ability of the CJEU to deliver judgments expeditiously while simultaneously guaranteeing their quality.⁵

¹ See Treaty on the Functioning of the European Union, art. 28, 30, 34, 35, 49, 56 and 63, Oct. 26, 2012, 2012 O.J. (C 326/47) 1; Pedro Caro de Sousa, *Catch Me if you Can? The Market Freedoms’ Ever-Expanding Outer Limits*, 4 EUR. J. LEGAL STUD. 169 (2011).

² See Case 98/86, *Ministère Public v. Mathot*, 1987 E.C.R. 00809; Case 20/87, *Ministère Public v. André Gauchard*, 1987 E.C.R. 04879; Case C-134/95, *USSL n° 47 di Biella v INAIL*, 1997 E.C.R. I-195; Case C-108/98, *RI.SAN.*, 1999 E.C.R. I-5219, paras. 18–23; Case 180/83, *Hans Moser v. Land Baden-Württemberg* 1984 E.C.R. 02539, para. 18; Case C-299/95, *Friedrich Kremzow v. Republik Österreich*, 1997 E.C.R. I-02629, para. 16; Case C-97/98, *Jägerskiöld*, 1999 ECR I-7319, para. 42.

³ Note that the CJEU seems to suggest that there is a fourth category when national law applies to and has effects on nationals of other Member States. See *Joined Cases ECJ, C-197/11 and C-203/11, Libert*, ECLI:EU:C:2013:288, Judgment of 8 May 2013. See also ECJ, *Case C-268/15, Ullens de Schooten*, ECLI:EU:C:2016:874, para. 51, Judgment of 15 November 2016; Case 286/81, *Oosthoek*, 1982 E.C.R. 4575; and *Joined Cases 297/88 and C-197/89, Dzodzi*, 1990 E.C.R. I-3763; Case C-448/98, *Guimont*, 2000 E.C.R. I-10663.

⁴ See Jurian Langer, *The Preliminary Ruling Procedure: Old Problems or New Challenges?* (Dec. 29, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885256; Maria Dicosola, Christina Fasone, and Irene Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, 16 GERMAN L. J. 1326 (2015).

⁵ See Opinion of Advocate General Wahl at para. 3, *Case C-497/12, Gullotta and Farmacia di Gullotta Davide & C.* (July 2, 2015), https://curia.europa.eu/jcms/jcms/j_6/en/.

The three exceptions have been there for quite some time, but it seems that the CJEU has easily found applicable exceptions in some recent cases and has been particularly eager to stretch the exceptions to accept jurisdiction, especially in the *Oosthoek* line of cases.⁶ It seems that the CJEU has incorporated the three exceptions into the rule.⁷ In other words, the CJEU is not guarding its gates very carefully. With respect to the other two exceptions (*Dzodzi* and *Guimont*), the CJEU has not so much broadened their use, but has simply continued its accommodating approach in the great majority of cases, despite heavy criticism from Advocates General (AGs) and academics in the 1990s and early 2000s.⁸ The CJEU, for example, still establishes its jurisdiction by simply assuming that national courts are obliged to also accept the CJEU interpretation in *renvoi* cases where national law conforms to EU law in situations falling outside the scope of EU law.⁹ Nonetheless, the CJEU's approach has not been entirely consistent especially in recent cases where the CJEU guards the gates more carefully. In these cases, the CJEU is stricter in determining whether it could answer preliminary rulings.¹⁰ The seemingly inconsistent approach of the CJEU could be especially problematic for national courts dealing with possible purely internal situations and who wonder whether these have a sufficient link with EU law.¹¹

Given the importance of the purely internal situation doctrine as well as the uncertainty for national courts, it is surprising that this issue has not received much academic attention, at least in journals in the English language.¹² It is thus essential to give an overview of how the CJEU has dealt with the three exceptions to the general rule even though it has no jurisdiction to rule on purely internal situations. In addition, this Article assesses the CJEU's recent case law critically in the light of the academic literature and Opinions of Advocates General. In doing so, this article asks the CJEU for clearer guidance, especially with a view to addressing the uncertainty for national courts in this regard. Before the three exceptions are examined separately in sections D through F, a broader framework will be sketched as to the

⁶ See Tribunal Supremo, Case C-168/14, Grupo Itevelesa and others, ECLI:EU:C:2015:685, para. 36, Judgment of 3 June 2015; ECJ, Joined Cases C-340/14 and C-341/14, Trijber and Harmsen, ECLI:EU:C:2015:641, para. 41, Judgment of 1 October 2015; Klaas Sevinga, *Bevoegdheid van het Hof van Justitie: de ene interne situatie is de andere niet*, NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT (2014).

⁷ See Case C-203/09, *Volvo Car Germany*, 2010 E.C.R. I-10721, paras. 23–31.

⁸ See Opinion of Advocate General Jacobs, Case C-28/95 and Case C-130/95, *Leur Bloem/Giloy* (Sept. 17, 1996), https://curia.europa.eu/jcms/jcms/j_6/en/.

⁹ See ECJ, Case C-345/14, *Maxima Latvija*, ECLI:EU:C:2015:784, Judgment of 26 November 2015.

¹⁰ See ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 48, Judgment of 13 Feb. 2014; ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, ECLI:EU:C:2013:791, paras. 25–26, Judgment of 5 December 2013; Opinion of Advocate General Wahl, *supra* note 5, at para. 37.

¹¹ See *infra* notes 110–114.

¹² But see Sevinga, *supra* note 6; Sacha Prechal, *Interne situatie en prejudiciële vragen*, SEW (2015) <https://www.ris.uu.nl/ws/files/17853881/19.pdf>.

relationship between the CJEU and national courts in section B, as well as the conceptual difference between the jurisdiction of the CJEU and the (in)admissibility of the questions posed by national courts in section C.

B. The Broader Context: The Relationship Between the CJEU and National Courts

The broader and underlying theme of this article about a seemingly technical issue is the relationship between the CJEU and national courts in the context of the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU). This procedure is the “keystone” of the EU legal system and the power of national courts to make a reference “constitutes the very essence of the [Union] system of judicial protection.”¹³ It is the “jewel in the crown” of the CJEU and the “most fundamental element in the constitutional architecture of the [EU] legal order.”¹⁴ The CJEU has contributed significantly to shaping and transforming EU law and the constitutionalization of the EU on the basis of Article 267’s procedure and the willingness of courts to make use of it.¹⁵ The rest of this Section will theorize the relationship between the CJEU and national courts.

The CJEU has consistently held that there is “clear separation of functions between the national courts and the Court.”¹⁶ The CJEU interprets EU law, while the national courts apply this interpretation to the facts of the case. This distinction between application and interpretation is also relevant when deciding to refer. The CJEU clearly connects the assessment of the facts by national courts to the courts’ decision to refer “in the light of the particular circumstances of the case.”¹⁷ The CJEU has emphasized consistently since *Costa/ENEL* that it is not for the CJEU to question the reasons for submitting a question.¹⁸ It has emphasized that national courts have the “widest discretion” to decide the necessity

¹³ See ECJ, Opinion 2/13, EU:C:2014:2454, para. 176, Judgment of 18 December 2014; Case C-300/99 P, *Area Cova and others v. Council*, 2001 E.C.R. I-983, para. 54.

¹⁴ See Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, 36 TEX. INT’L L. J. 556, 559 (2001); J.H.H. Weiler, *The European Court, National Courts and References for Preliminary Rulings—The Paradox of Success: A Revisionist View of Article 177 EEC*, ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS (Henry G. Schermers, C.W.A. Timmermans & A.E. Kellerman, eds. 1987).

¹⁵ See generally Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUD. (1994).

¹⁶ See ECJ, Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400, para. 15, Judgment of 16 June 2015.

¹⁷ See *id.*

¹⁸ See *id.*; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1195.

and relevance of their questions.¹⁹ The CJEU is “in principle bound to give a ruling” on questions about the interpretation of EU law because they enjoy “a presumption of relevance.”²⁰ Note that this dichotomy between interpretation and application has been criticized on the grounds that one cannot only interpret the law in abstract without any regard to the facts.²¹ It is therefore not surprising that the CJEU has in practice not stuck closely to this dichotomy and has in some judgments discussed the direction of application, without explicitly admitting so.²²

This separation of functions could be put in a broader perspective as well, focused more on the nature of the relationship between the CJEU and national courts. There are conflicting views on this theme. On the one hand, there are those who argue that this relationship is based, primarily, on cooperation. This is also how the CJEU seems to portray the preliminary reference procedure in its judgments. It has held numerous times that “Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts.”²³ Scholars who take a “constitutional pluralist” perspective primarily accentuate dynamics of cooperation and construe the relationship as horizontal and heterarchical. This “theory” posits, among others, that national constitutions are the supreme source of EU law, that there is no hierarchical relationship, and that both national courts, as well as the CJEU, each claim final authority.²⁴ The theory primarily emphasizes the fact that the CJEU depends entirely on the national courts for their willingness to submit questions forcing the CJEU to be “humble and thankful” for the referring courts’ engagement with it.²⁵ National courts are thus essentially the gatekeepers of the procedure.²⁶ The fact that many constitutional courts

¹⁹ Case 146/73, *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1974 E.C.R. 139.

²⁰ See Joined Cases C-570/07 and C-571/07, *Blanco Pérez*, 2010 E.C.R. I-4629, paras. 35–36; C-280/06, *ETI*, 2007 E.C.R. I-10893, para. 20; Case C-300/01, *Salzmann*, 2003 E.C.R. I-4899, para. 31.

²¹ See Daniel Sarmiento, *The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law*, in *CONSTITUTIONAL PLURALISM IN THE EU AND BEYOND* 309 (M. Avbelj & J. Komárek eds., 2012).

²² See ECJ, Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514, Judgment of 5 July 2016; Case C-137/09, *Josemans*, 2010 E.C.R. I-13019.

²³ See ECJ, Case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630, para. 18, Judgment of 6 September 2016.

²⁴ See Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, 16 *GERMAN L.J.* 1795 (2015).

²⁵ See Sarmiento, *supra* note 21, at 291.

²⁶ See Takis Tridimas, *The ECJ and the National Courts. Dialogue, Cooperation, and Instability*, in *THE OXFORD HANDBOOK OF EUROPEAN UNION LAW* 407 (Anthony Arnall & Damian Chalmers eds. 2015).

have been reluctant to turn to the CJEU for help fits well within this model.²⁷ The *CILFIT* exceptions to the obligation of the highest courts to refer under Article 267(3) TFEU can also be interpreted as widening the autonomy of national courts.²⁸ Likewise, the use of open norms, such as proportionality, or “silent” judgments in which the CJEU avoids giving a full answer also confer discretion on national courts and supports a vision of cooperating courts.²⁹ In addition, the CJEU does not possess a coercive monitoring mechanism guaranteeing compliance with its ruling leaving the final say to the referring court.³⁰

On the other hand, there are those who approach the relationship primarily from the perspective of a hierarchy and opine that Article 267 is not a purely non-committal vehicle.³¹ They point to the binding force of the judgments of the CJEU.³² The CJEU’s judgment in *Köbler* illustrates the hierarchical dimensions. In this judgment, the CJEU determined that Member States are also liable for infringements of EU law by national courts of the last instance.³³ The CJEU made clear that the Austrian court was not entitled to withdraw its request for a preliminary ruling because the *CILFIT* requirements had not been fulfilled.³⁴ With *Köbler*, the CJEU placed itself at the top of the judicial hierarchy. This could also be deduced from its definition of “sufficiently serious breach” including a “manifest breach of the case law of the Court in the matter.”³⁵ The CJEU reaffirmed *Köbler* more recently in *Ferreira da Silva* and suggested that the refusal of the Portuguese court to refer could constitute a breach of Article 267 TFEU and give rise to liability.³⁶

²⁷ Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring the Techniques of “Hidden Dialogue,”* 21 KING’S L.J. 257 (2010); Monica Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure,* 16 GERMAN L.J. 1331 (2015).

²⁸ See Sarmiento, *supra* note 21, at 313.

²⁹ See Gareth Davies, *Activism Relocated. The Self-Restraint of the European Court of Justice in its National Context,* 19 J. EUR. PUB. POL’Y 76 (2012).

³⁰ See Sarmiento, *supra* note 21, at 309.

³¹ See generally Christiaan Timmermans, *The Magic World of Constitutional Pluralism,* 10 EUR. CONST. L. REV. (2014).

³² For a clear statement of the ECJ in this direction, see ECJ, Case C-62/14 Gauweiler v. Deutscher Bundestag, ECLI:EU:C:2015:400, at para. 16.

³³ See Case C-224/01, *Köbler v. Republik Österreich*, 2003 E.C.R. I-10239. This judgment was later confirmed in Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica italiana*, 2006 E.C.R. I-5177. The CJEU also determined that Italian legislation limiting state liability for damage caused by courts of last instance breached EU law. See Case C-379/10, *Commission v. Italy* 2011 E.C.R. I-180.

³⁴ See *Köbler*, Case C-224/01 at paras. 117–18.

³⁵ See *id.* at para. 56; Thomas de la Mare & Catherine Donnelly, *Preliminary Rulings and EU Legal Integration: Evolution and Stasis,* THE EVOLUTION OF EU LAW 377 (Paul Craig & Grainne De Búrca eds. 2015).

³⁶ The CJEU held that “in circumstances such as those of the case in the main proceedings,” the Portuguese court was obligated to refer. The Portuguese court was wrong to consider the answer to be *clair* because of the conflicting decisions of lower courts regarding the interpretation of the concept of a “transfer of a business” and the fact that

This short overview shows that there are contrasting claims. It is not the purpose of this Article to discuss the merits of the conflicting viewpoint, although it seems reasonable to conclude that both cooperative, as well as hierarchical elements, exist together in the case law of the CJEU.³⁷ De la Mare and Donnelly also argued that the CJEU has continued with its cooperation discourse with the idea of “sweetening the bitter pill of the CJEU’s own repositioning” in *Köbler*.³⁸ The overview also raises the question how these two different approaches relate to the issue of the purely internal situation. A lenient approach on the side of the CJEU where it easily applies one of the three exceptions and/or whereby it simply relies on, and does not question, the assessment of the national courts fits best with the cooperational model presenting national courts as gatekeepers. By contrast, a more restrictive approach where the CJEU more critically examines the request of national courts turns the dialogue into a hierarchical relation, because the CJEU is “second guessing” and thus judging the preparatory work of national courts. It also means that the CJEU is “looking over the shoulder of the national judge.”³⁹ This more detailed and careful assessment on the part of the CJEU requires it to grapple with questions about national laws and examine the factual situation.⁴⁰ When the CJEU pursues the latter approach and declines all too easily questions by national courts potentially upsets the spirit of cooperation and decrease the trust of national courts and their willingness to engage with the CJEU.⁴¹

It is a rather delicate task for the CJEU to find a right balance between these considerations. Finding a right and clear balance is extremely relevant, as sketched already in the introduction. First, the preliminary ruling procedure only works effectively if the “rules of the game” are unequivocal and understood by the CJEU and national courts.⁴² As will be

that concept frequently gives rise to difficulties of interpretation in various Member States. See ECJ, Case C-160/14, *Ferreira da Silva v. Estados português*, ECLI:EU:C:2015:565, paras. 44–45, Judgment of 9 September 2015.

³⁷See Tridimas, *supra* note 26, at 407.

³⁸See de la Mare and Donnelly, *supra* note 35, at 377.

³⁹Catherine Barnard & Eleanor Sharpston, *The Changing Face of Article 177 References*, 34 COMMON MKT. L. REV. (1997). The tendency in the CJEU case law after *Foglia* to decline jurisdiction was also heavily criticized as being “disturbing and perplexing.” Salius Lukaskaleda, *Extension of the Preliminary Ruling Procedure Outside the Scope of Community Law: “The Dzodzi Line of Cases,”* 4 EUR. INTEGRATION ONLINE PAPERS 6 (2000); Giuseppe Tesauero, *The European Court and National Courts*, 13 Y.B. EUR. L. 12 (1993); Anthony Arnall, *The Evolution of the Court’s Jurisdiction Under Article 177 EEC*, 18 EUR. L. REV. (1993); David O’Keeffe, *Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility*, 23 EUR. L. REV. 509 (1998).

⁴⁰See Opinion of Advocate General Jacobs at para. 57, Case C-306/99, *BIAO*, 2003 E.C.R. I-1, (Jan. 7, 2003), https://curia.europa.eu/jcms/jcms/j_6/en/.

⁴¹See Opinion of Advocate General Jääskinen at para. 35, Case C-393/08, *Sbarigia v. Azienda USL RM/A*, 2010 E.C.R. I-6337 (July 1, 2010), https://curia.europa.eu/jcms/jcms/j_6/en/.

⁴²See Barnard & Sharpston, *supra* note 39, at 1168.

further substantiated below, the current uncertainty with respect to the jurisdiction of the CJEU in relation to purely internal situations is especially problematic for national courts. Second, balance is also warranted from the perspective of the workload of the CJEU. Several authors note that the system of the reference procedure is under pressure and a “victim of its own success” because of the exponential increase in cases, especially since the mid-2000s.⁴³ So far, the CJEU managed to cope with the growing caseload and even reduced the average duration of the procedure, but according to some to the detriment of the quality of argumentation in CJEU judgments.⁴⁴ It is expected that the CJEU is confronted with more referred cases because of the enlarged automatic jurisdiction of the CJEU after December 1, 2014 in the field of police and judicial cooperation, including areas such as migration and criminal law. The delay caused by a preliminary ruling is also a factor influencing the national courts’ willingness to refer.⁴⁵ A too lenient approach of the CJEU in accepting cases, leading to more cases and a bigger delay, could further deter courts from referring questions when a preliminary ruling would be especially warranted.

C. Jurisdiction and Admissibility: What’s in the Name?

When the CJEU is confronted with a purely internal situation which lacks any connection with the free movement provisions, the CJEU generally declines to answer the question. The rationale is that because the Treaty provisions do not apply in such situations, an answer from the CJEU is not relevant to solve the dispute.⁴⁶ In these cases, the CJEU employs several approaches to refrain from answering. The CJEU can declare that it does not have jurisdiction to deal with the matter.⁴⁷ It can declare the questions inadmissible.⁴⁸ It can also simply hold that it is not necessary to answer the question or that EU law is inapplicable.⁴⁹

⁴³See de la Mare and Donnelly, *supra* note 35; Diana-Urania Galetta, *European Court of Justice and Preliminary Reference Procedure Today: National Judges, Please Behave!*, VERFASSUNG UND VERWALTUNG IN EUROPA. FESTSCHRIFT FÜR JÜRGEN SCHWARZE ZUM 70. GEBURTSTAG 674–91 (U. Becker et al. eds., 2014).

⁴⁴See Eleanor Sharpston, *Making the Court of Justice of the European Union More Productive*, MAASTRICHT J. OF EUR. AND COMP. L. (2014); Jan Komarek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 32 EUR. L. REV. 482–83 (2007).

⁴⁵See Supreme Court of the Netherlands, Case 14/01680, ECLI:NL:HR:2015:3608, Judgment of 22 December 2015.

⁴⁶Prechal, *supra* note 12, at 494.

⁴⁷ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 49–50, Judgment of 13 Feb. 2014.

⁴⁸See *id.* at paras. 39–40.

⁴⁹See Prechal, *supra* note 12, at 494.

These different routes and the concepts of (non)jurisdiction and (in)admissibility are used interchangeably by the CJEU even though they are different.⁵⁰ Jurisdiction is governed by the principle of conferral and acts as a limit to the CJEU's competence.⁵¹ Based on Article 267 of the TFEU, the CJEU has the authority to give answers to questions about EU law which are posed by a national "court or tribunal of a Member State" in an area of law over which it has competence. This means that it does not have jurisdiction to rule on the validity of the Treaties, the validity and interpretation of national law or international law. Only when the CJEU has jurisdiction can it analyze the admissibility of the questions. Admissibility relates to the question as to whether the order for reference fulfills the procedural requirements or admissibility criteria and includes the sufficiency of information provided by referring court. Inadmissibility can subsequently be corrected by the referring national court in a new request for a preliminary ruling which repairs the previous "error of procedure."⁵² Alternatively, the CJEU can request the national court to provide clarification based on Article 101 of the Rules of Procedure. These two options are not possible when the CJEU lacks jurisdiction.⁵³

It seems more logical that the CJEU deals with possibly purely internal situations in the context of the (in)admissibility of the questions rather than in relation to its jurisdiction.⁵⁴ This is because the forthcoming analysis illustrates that the CJEU has in principle accepted jurisdiction to deal with purely internal situations in three different types of cases. Only when it is beyond doubt that the exceptions are not applicable and that the situation is not governed by EU law, would it seem logical for the CJEU to declare that it has no jurisdiction.⁵⁵ Examining the presence of a sufficient cross-border element as an admissibility issue would also imply that this assessment is conducted at an early stage as a procedural matter instead of in the context of the substantive consideration of the questions. The CJEU did so in

⁵⁰ Ramona Grimbergen, *How Boundaries Have Shifted. On Jurisdiction and Admissibility in the Preliminary Ruling Procedure*, 8 REV. EUR. ADMIN. L. 40 (2015); Case C-245/09, *Omalet*, 2010 E.C.R. I-13771, paras. 18–19; Opinion of Advocate General Wahl, at para. 44, Case C-207/13, *Wagenborg Passagiersdiensten BV*, (May 13, 2014), https://curia.europa.eu/jcms/jcms/j_6/en/; Opinion of Advocate General Wahl, *supra* note 5, at para. 15; Opinion of Advocate General Jääskinen at paras. 29–38, Case C-393/08, *Sbarigia v. Azienda USL RM/A*, 2010 E.C.R. I-6337 (July 1, 2010).

⁵¹ Opinion of Advocate General Wahl, *supra* note 5, at paras. 16, 21; ECJ, Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 40, Judgment of 15 November 2016.

⁵² *See id.* at para. 21; ECJ, C-281/15, *Sahyouni*, ECLI:EU:C:2016:343, para. 32, Judgment of 12 May 2016.

⁵³ Grimbergen, *supra* note 50, at 41.

⁵⁴ Prechal, *supra* note 12, at 495.

⁵⁵ This also seems to be the approach of the CJEU in *Ullens de Schooten*, even though the CJEU places more emphasis on the fact that it has jurisdiction in relation to the principle of non-contractual liability. ECJ, Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 41–44, Judgment of 15 November 2016; *See also* ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 49–50, Judgment of 13 Feb. 2014.

Berlington where the CJEU accepted jurisdiction after determining that several customers to the Hungarian amusement arcades were EU citizens holidaying in Hungary and that it was far from inconceivable that operators from other Member States would be interested in opening a casino.⁵⁶ In other cases, such as *Trijber*, the CJEU nonetheless examined the connection with EU law and the cross border elements at a later stage in the context of the substantive consideration of the questions.⁵⁷

The rest of the article will not expand on the (conceptual) difference between the notions of jurisdiction and admissibility, but focuses more on the way in which the CJEU has applied those notions to the purely internal situation doctrine.

D. The *Oosthoek* Exception: Cross-border Effects Cannot be Excluded

*I. The Recent *Oosthoek* Case Law of the CJEU*

One exception to the general rule that the CJEU has no jurisdiction to hear purely internal situations are cases in which a cross-border effect cannot be excluded. In its case law starting from *Oosthoek*, the CJEU has answered questions in such situations on the basis that it is not unthinkable that nationals of other Member States may, in similar situations, be faced with the contested national measures adopted by the Member State.⁵⁸ The classical judgment in this respect is the free movement of goods case of *Smanor* which dealt with a French company selling deep-frozen yogurt on the French market that contested the French consumer protection law which restricted the use of “yogurt” to fresh yogurt only. The facts in this case were thus confined to one single Member State. The CJEU replied to the question of the French court and examined the French law without excluding the possibility that such products may be imported from other Member States. The CJEU did note that its ruling should not be applied in relation to *Smanor* in the national court proceedings.⁵⁹ In addition

⁵⁶See ECJ, Case C-98/14, *Berlington*, ECLI:EU:C:2015:386, para. 23–28, Judgment of 11 June 2015; see also Tribunale Supremo, Case C-168/14, *Grupo Itevelesa and others*, ECLI:EU:C:2015:685, para. 36, Judgment of 3 June 2015; Case C-384/08, *Attanasio Group Srl v Comune di Carbognano*, 2010 E.C.R. I-2055, para. 24.

⁵⁷See ECJ, Joined Cases C-340/14 and C-341/14, *Trijber and Harmsen*, ECLI:EU:C:2015:641, para. 41, Judgment of 1 October 2015. See also ECJ, C-292/12, *Ragn-Sells AS v. Sillamäe Linnavalitsus*, ECLI:EU:C:2013:820, paras. 69-74, Judgment of 12 December 2013.

⁵⁸In *Oosthoek*, the CJEU applied Article 34 TFEU in relation to both domestic and imported products. See Case 286/81, *Oosthoek*, 1982 E.C.R. 4575

⁵⁹See Case 298/87, *Smanor*, 1988 E.C.R. 4489, paras. 8-10 (referring to what the court did following the CJEU judgment in *Smanor* and the “curious situation” to which AG Jacobs referred). See also Opinion of Advocate General Jacobs, *supra* note 8, at para. 63; Cyril Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234, 12*, available at <https://ssrn.com/abstract=95424>; Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731 (2002).

to the free movement of goods,⁶⁰ the CJEU has issued comparable judgments in relation to the other free movement provisions, capital,⁶¹ services,⁶² and establishment.⁶³ The rest of this section focuses on the recent free movement case law of the CJEU, except for citizenship cases.⁶⁴ Competition law cases will also be left aside.⁶⁵

In *Attanasio Group*, the Third Chamber of the CJEU⁶⁶ used—the now-often used expression—“it is far from inconceivable” that nationals from other Member States have been or are interested in establishing themselves, for the first time.⁶⁷ In this case, an Italian company was denied a permit to construct a service station selling fuel, because another company was granted a permit a short distance from the site envisaged by Attanasio. The

⁶⁰ See also Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, *Lancry v. Direction Générale des Souanes et. al.*, 1994 E.C.R. I-3957; Case C-293/02, *Jersey Produce Marketing Organization v. Jersey Potato Export Marketing Board*, 2005 E.C.R. I-9543; Case C-72/03, *Carbonati Apuani v. Comune di Carrara*, 2004 E.C.R. I-8027.

⁶¹ See Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch v. Bürgermeister der Landeshauptstadt Salzburg, et. al.*, 2002, E.C.R. I-2157.

⁶² See Case C-6/01, *Anomar v. Estado português*, 2003 E.C.R. I-8621.

⁶³ See Case C-250/03, *Mauri v. Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano*, 2005 E.C.R. I-1267.

⁶⁴ One could especially point to the case law of the CJEU on EU citizenship in this context, *Zambrano* in particular. See Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, 2011 E.C.R. I-1177. See ECJ, Case C-304/14, *Secretary of State for the Home Division v. CS*, ECLI:EU:C:2016:674, Judgment of 13 September 2016; ECJ, Case C-165/14, *Rendón Marín v. Administración del Estado*, ECLI:EU:C:2016:675, Judgment of 13 September 2016. See also Dimitry Kochenov, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, 19 Eur. L. J. (2013); Nic Shuibhne, *supra* note 59, at 740.

⁶⁵ Articles 101 and 102 TFEU prohibit anti-competitive practices “which may affect trade between Member States.” The CJEU adopted a broad definition by determining “it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.” An actual impact on trade is not required, but the disputed practice must only be capable of having such an effect. Nor does it matter that all facts are confined to one Member State only. See Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235; Paul Craig and Grainne de Búrca, *EU LAW: TEXT, CASES, AND MATERIALS 1025* (2015); Kamiel Mortelmans, *Towards Convergence in the Application of the Rules on Free Movement and on Competition*, 38 COMMON MKT. L. REV. 613 (2001).

⁶⁶ Note that in *Centro Europa 7* the CJEU also answered the questions on whether it is possible that operators in other Member States would be interested. See Case C-380/05, *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità*, 2008 E.C.R. I-349, para. 66.

⁶⁷ The CJEU seems to have taken this “far from inconceivable” logic from procurement cases where this has been used by the CJEU in relation to the tendering of public service concessions. *Centro Europa 7*, for example, referred to two judgments in the field of public procurement for support. See *id.* at para. 66; Case C-87/94, *Commission v. Belgium*, 1996 E.C.R. I-2043, para. 33; Case C-458/03, *Parking Brixen v. Gemeinde Brixen*, 2005 E.C.R. I-8585, para. 55. See also Case C-231/03, *Coname v. Comune di Cingia de' Botti*, 2005 E.C.R. I-7287, paras. 17-18.

refusal stemmed from Italian regulations providing for mandatory minimum distances between such stations.⁶⁸ In a subsequent case, *Blanco Pérez*, the Grand Chamber also subscribed to this logic.⁶⁹ That case was about two Spanish pharmacists challenging Spanish rules which limited the opening of new pharmacies in Asturias even though they had not made use of the Treaty freedoms. The CJEU held that it cannot exclude foreigners who also want to run a pharmacy in Asturias. The eagerness of the CJEU to examine the Spanish measure also seems to stem from the fact that the measure was indirectly discriminatory because the selection process for new pharmacies favored pharmacists who had pursued their professional activities in the region of Asturias.⁷⁰ This judgment illustrates that the CJEU tends to focus on the nature and substance of the national measure which is “capable of producing effects which are not confined to that Member State” rather than the facts of the case.⁷¹ In other words, while the factual elements are restricted to one individual Member State, the relevant legal elements are not.⁷² The judgment also exemplifies that the CJEU seems eager to answer requests with the idea to “seize the moment,” because it remains uncertain whether another court will refer a similar case, which has cross-border elements, in the future.⁷³

The “far from inconceivable” phrase has since been repeated in other cases in a mantra-like way, sometimes in a slightly different wording (e.g. “it is by no means inconceivable that”⁷⁴ or “it is conceivable”).⁷⁵ One example includes *Libert*, which dealt with Flemish legislation that made the transfer of immovable property in certain communes dependent upon a sufficient connection between the potential buyer and the communes. The CJEU again simply stipulated that it is by no means inconceivable that natural or legal persons in other

⁶⁸ The CJEU eventually held that the rules are more advantageous to operators already established in Italy and, hence, discourage or even preclude access to operators from other Member States. See *Attanasio Group Srl v Comune di Carbognano*, Case C-384/08 at para. 24.

⁶⁹ *Blanco Pérez*, Joined Cases C-570/07 and C-571/07 at para. 40.

⁷⁰ See *id.* at paras. 117–22. According to AG Wahl, the potential restrictive effects were evident in *Venturini*. See Opinion of Advocate General Wahl at para. 67, Joined Cases C-159/12 to C-161/12, *Venturini v. ASL Varese et. al.*, (Sept. 5, 2013), https://curia.europa.eu/jcms/jcms/j_6/en/.

⁷¹ Opinion of Advocate General Geelhoed at para. 88, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch v. Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommision des Landes Salzburg*, 2002, E.C.R. I-2157 (Nov. 20, 2001), https://curia.europa.eu/jcms/jcms/j_6/en/; Caro de Sousa, *supra* note 1, at 169–73.

⁷² See Opinion of Advocate General Wahl, *supra* note 5, at para. 34.

⁷³ See Ritter, *supra* note 59, at 12.

⁷⁴ See Joined Cases ECJ, C-197/11 and C-203/11, *Libert*, ECLI:EU:C:2013:288, para. 34, Judgment of 8 May 2013.

⁷⁵ ECJ, Case C-265/12, *Citroën Belux*, ECLI:EU:C:2013:498, para. 33, Judgment of 18 July 2013, https://curia.europa.eu/jcms/jcms/j_6/en/.

Member States were or are interested.⁷⁶ In *Venturini*, three Italian owners of para-pharmacies requested an authorization to sell medicinal products and proprietary drugs for veterinary use for which a prescription is required but the cost of which is wholly borne by the customer. Their request was rejected based on Italian law and because those products could only be sold in pharmacies. *Venturini* itself accepted that there was no actual cross-border element, but the CJEU noted that the legislation potentially had restrictive effects on the possibility for operators based in other Member States to become established in Italy because “it is far from inconceivable” that nationals in other Member States had or have an interest in operating pharmacies.⁷⁷ In addition, in *Trijber*, the CJEU held that one cannot speak of purely internal situations when there is a probability that services may be enjoyed by nationals of other Member States and service providers from other Member States may wish to establish themselves in the Netherlands.⁷⁸ Despite the fact that in this case both the service provider and the recipients were Dutch, this situation—without much discussion and against the Opinion of AG Szpunar—fell within the scope of the freedom of establishment and the Services Directive.⁷⁹

There are several recent cases in which the CJEU applied a stricter approach and did not answer the referred questions.⁸⁰ Those cases illustrate that the CJEU, contrary to the previous judgments, clearly expects national courts to substantiate their findings that economic operators in other Member States were affected or interested in pursuing an economic activity.⁸¹ In *Ragn-Sells*, the CJEU was confronted with a company that contested

⁷⁶See Joined Cases ECJ, C-197/11 and C-203/11, *Libert*, ECLI:EU:C:2013:288, para. 34, Judgment of 8 May 2013.

⁷⁷See ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, ECLI:EU:C:2013:791, paras. 25-26, Judgment of 5 December 2013. In a subsequent and rather similar case about para-pharmacies, *Gullotta*, the CJEU declared the questions inadmissible because the national court failed to explain why the national legislation does not comply with the EU Treaties, and consequently the CJEU could not give a useful answer. See ECJ, Case C-497/12, *Gullotta and Farmacia di Gullotta Davide & C. v. Ministero della Salute*, ECLI:EU:C:2015:436, Judgment of 2 July 2015.

⁷⁸See ECJ, Joined Cases C-340/14 and C-341/14, *Trijber and Harmsen*, ECLI:EU:C:2015:641, para. 41, Judgment of 1 October 2015.

⁷⁹The CJEU thus avoided, contrary to the opinion of AG Szpunar, ruling on the much-debated question as to whether the Directive 2006/123 applies to such purely internal situations. See Opinion of Advocate General Szpunar at paras. 48-49, Joined Cases C-340/14 and C-341/14, *Trijber and Harmsen* (July 16, 2015), https://curia.europa.eu/jcms/jcms/j_6/en/. See also Catherine Barnard, *Unravelling the Services Directive*, 45 COMMON MKT. L. REV. 323, 351–52 (2008); Gareth Davies, *The Services Directive: Extending the Country of Origin Principle, and Reforming Public Administration*, 32 EUR. L. REV. 232, 241–43 (2007). The Dutch Council of State was seemingly dissatisfied with the CJEU dodging of its question and referred the same question in Case C-31/16, *Visser Vastgoed*.

⁸⁰See ECJ, Case C-282/15, *Queisser Pharma*, ECLI:EU:C:2017:26, paras. 38-43, Judgment of 19 January 2017.

⁸¹AG Kokott noted in relation to *Duomo Gpa* that the CJEU did not accept the “general, unsupported and not further substantiated statement” that nationals of other MS might potentially have an interest. See Opinion of Advocate General Kokott at para. 32, Joined cases C-162/12 and C-163/12, *Airport Shuttle Express*, (Feb. 13, 2014), https://curia.europa.eu/jcms/jcms/j_6/en/. In *Duomo Gpa*, the CJEU based itself on the written submissions of the Commission to conclude that it is “far from inconceivable” that there is such an interest. See ECJ, Joined Cases C-

the awarding of a service concession for the collection and transport of waste produced in the Estonian Municipality of Sillamäe. In this case the CJEU held that Articles 49 and 56 TFEU do not apply to this situation, because there was nothing in the case file suggesting that undertakings in other Member States were interested in treating waste in Sillamäe.⁸² While the CJEU did not require an actual interest in the previous cases and found a mere probability sufficient, the CJEU was more strict in *Ragn-Sells*.⁸³ In *Sbarigia*, the CJEU declared the request inadmissible, because the questions were not relevant for the outcome of the dispute. This case involved an owner of a pharmacy located in the touristy historical center of Rome which had applied for an exemption from the obligatory holiday closure period because of the considerable increase in the number of consumers in this period.⁸⁴ The CJEU considered it unclear how a decision on exempting a pharmacy from the opening hours might affect economic operators in other Member States.⁸⁵ In addition, what also seemed to matter in *Sbarigia*, and what makes this case different from the previous ones, is that the applicant did not call into question the general system of rules on opening times and holidays for pharmacies, but only tried to obtain an exemption from that system.⁸⁶

Two other cases worthy of closer inspection are *Airport Shuttle Service* and *Crono Service*. *Airport Shuttle Express* concerned a dispute about the suspension of the authorization to operate a car and driver-for-hire service because the operator used garages in the territory of another municipality. This ran counter to the Italian law which provided that it is compulsory to exclusively use a garage situated in the territory of the municipality which issued the authorization for the service in question and that the service must begin and end at that garage. The CJEU held that it does not have jurisdiction, because it was not clear how this law affects economic operators from other Member States.⁸⁷ This Italian law was also contested in *Crono Service*. The CJEU again held in similar terms that it cannot be presumed that the law has any cross-border impact. It subsequently pointed out that the national court

357/10 to C-359/10, *Duomo Gpa v. Comune di Baranzate*, ECLI:EU:C:2012:283, para. 28, Judgment of 10 May 2012; see also ECJ, Joined Cases C-692/15 to C-694/15, *Security Service v. Ministero dell'Interno*, ECLI:EU:C:2016:344, paras. 23–25, Judgment of 12 May 2016.

⁸²See ECJ, Case C-292/12, *Ragn-Sells AS v. Sillamäe Linnavalitsus*, ECLI:EU:C:2013:820, para. 72, Judgment of 12 December 2013.

⁸³The Dutch referring court in *Trijber* also pointed to the seemingly stricter approach of the CJEU in *Ragn-Sells*. See ECJ, Dutch Council of State, ECLI:NL:RVS:2014:2488, para. 4.10, Judgment of 9 July 2014.

⁸⁴See Case C-393/08, *Sbarigia*, 2010 E.C.R. I-6337.

⁸⁵The CJEU mentioned this in a subsequent case, *Venturini*, when it compared both cases. See ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, ECLI:EU:C:2013:791, paras. 27, Judgment of 5 December 2013.

⁸⁶See Case C-393/08, *Sbarigia*, 2010 E.C.R. I-6337, para. 24.

⁸⁷See ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 48, Judgment of 13 Feb. 2014.

had failed in its orders for reference to establish any cross-border interest and did not explain why the Italian rules could hinder foreign operators.⁸⁸ The CJEU subsequently declared that it did not have jurisdiction to answer the questions.⁸⁹ In both *Airport Shuttle Service* and *Crono Service*, the CJEU used an additional notion in order to determine whether an answer is useful, which echoes the third exception relating to the prohibition of reversed discrimination—see section F. The CJEU held that a question is useful “if its national law were to require it to allow a national to enjoy the same rights as those which a national of another Member State would derive from EU law in the same situation.” In these two cases, the CJEU denied such usefulness by only referring to foreign companies “in the same situation as the applicants,” i.e. companies that are “already . . . pursuing an economic activity on a stable and continuous basis from an establishment located in Italy.” By applying this fiction, the CJEU was able to conclude that foreign companies are not affected, also because there was nothing to indicate how economic operators from other Member States might be affected.⁹⁰ These judgments are thus indicative of a stricter approach of the CJEU, because it could also be argued, in the same way as in the cases previously discussed, that it is not far from inconceivable that nationals of other Member States might be affected by the Italian law, which is capable of producing effects beyond Italy, especially in the border region.⁹¹ In pursuing the latter route, the CJEU would also take the contested national measure as the departure point as it has done in the cases discussed earlier. The approach of the CJEU in the two stricter Italian cases, which has not been applied afterwards by the CJEU, primarily takes the factual situation as the starting point.

In other cases, the CJEU has left the question of its jurisdiction and/or the admissibility of the questions in the middle. In its Grand Chamber judgment in *Rina*, the CJEU examined an Italian law requiring the registered offices of companies classified as certification bodies to be situated within the territory of the Italian Republic. It did so without paying any attention to the question of admissibility or jurisdiction of the questions, even though Attorney General (AG) Cruz Villalón held that there is “a somewhat hypothetical element,” because

⁸⁸See ECJ, Joined Cases C-419/12 and C-420/12, *Crono Service v. Roma Capitale*, ECLI:EU:C:2014:81, para. 37, Judgment of 13 February 2014.

⁸⁹This was not only based on the limited information in the order for reference, but also because the question concerned Article 49 TFEU, whereas the applicants sought market access to particular Italian regions not so much to establish themselves, but to provide services in the transport sector on an ad hoc basis. The latter is not governed by Article 56 TFEU, but rather by Title VI in Part Three TFEU, which concerns the common transport policy. *See id.* at paras. 40–44.

⁹⁰The CJEU held that the applicants were already authorized to operate a car and driver hire service, but their authorizations were temporarily suspended because they did not meet several conditions. They merely aimed to strike out some conditions and were thus not challenging the general system of rules governing car and driver hire or the way in which authorizations are granted. *See* ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 39, Judgment of 13 Feb. 2014.

⁹¹Opinion of Advocate General Kokott, *supra* note 81, at paras. 40–41.

the three companies challenging the measure were at that time only providing certification services in Italy.⁹² The Commission expressed the same view during the hearing.⁹³ Similarly, in *Ottica New Line* a company contested the authorization of a request of a competitor to establish an optician's shop in a Sicilian town because it was in breach of an Italian law's limits relating to population density and on the distance between opticians' shops. Even though AG Jääskinen held that the facts of this case were confined to one Member State only, even a single region, without any cross-border elements, the CJEU paid no attention whatsoever to the admissibility/jurisdiction question and immediately went to the merits of the case.⁹⁴

II. A Critical View on Oosthoek: Unclear Criteria and a Too Welcoming CJEU

The rather welcoming approach of the CJEU in (some of) the *Oosthoek*-cases has been criticized on various grounds. First of all, at a more fundamental level, the CJEU has been criticized for using Article 267 TFEU as a "back-door mechanism" to enlarge its own jurisdiction and to extend the benefits of EU law to all EU citizens, including Member States' own nationals.⁹⁵ The "far from inconceivable" logic that a national measure can have potential consequences which are not restricted to a single Member State, is inherent in the internal market. The criterion of "far from inconceivable" seems particularly easy to fulfill in relation to services because a cross-border element could always be identified from the perspective of both service suppliers as well as service recipients.⁹⁶ Hence, almost all national measures that affect businesses can potentially be brought within the scope of EU law because it is nearly impossible to completely exclude the possibility that national laws lack cross-border effects.⁹⁷ The CJEU's easy identification of a cross-border element in *Trijber*, relying on the mere possibility that service recipients are non-nationals, means that there will almost always be a cross-border element.⁹⁸ By applying EU law to all EU citizens, including Member States' own nationals in purely internal situations, the CJEU can be

⁹²See ECJ, Case C-593/13, *Rina v. Rina Services SpA*, ECLI:EU:C:2015:399, para. 14, Judgment of 16 June 2015. Likewise, in *Femarbel*, the CJEU did not pay attention either to the applicability of the Services Directive and answered the preliminary references even though the dispute was a purely internal situation. See ECJ, Case C-57/12, *Femarbel*, ECLI:EU:C:2013:517, Judgment of 11 July 2013

⁹³ See *id.* at para. 15.

⁹⁴See ECJ, Case C-539/11, *Ottica New Line di Accardi Vincenzo*, ECLI:EU:C:2013:591, Judgment of 26 September 2013; ECJ, Case C 539/11, *Ottica New Line di Accardi Vincenzo*, ECLI:EU:C:2013:41, para. 13, Opinion of 30 January 2013.

⁹⁵See Ritter, *supra* note 59, at 5; Grimbergen, *supra* note 50, at 58.

⁹⁶See Caro de Sousa, *supra* note 1, at 177; Ritter, *supra* note 59, at 4.

⁹⁷See Grimbergen, *supra* note 50, at 58.

⁹⁸ See also Case C-98/14, *Berlington*, ECLI:EU:C:2015:386, para. 23–28, Judgment of 11 June 2015.

criticized for interfering with the Member States' autonomy and competencies going beyond the competencies assigned to it and the EU.⁹⁹ This interference is especially remarkable given that the CJEU has never really explained the rationale behind its case law on purely internal situations and the "far from inconceivable" logic.¹⁰⁰ It seems that the approach of the CJEU can primarily be explained by the wish to counter the effects of the reverse discrimination stemming from the four fundamental freedoms.¹⁰¹ This is because of the seemingly perverse outcome that national measures are contrary to EU law when they are applied in cross-border situations, but are perfectly legal in purely internal situations.¹⁰² Nationals or products of a Member State are disadvantaged because a national rule applies to them, while the same rule does not apply to nationals/products from other Member States because that violates EU law. This outcome seems to have been the main driver of the CJEU—for a further discussion of reverse discrimination, see Section F. The CJEU has not really addressed the more principled question of how to balance state autonomy and alleviate such reverse discrimination.¹⁰³

As said before, the purely internal situation functions as a "gatekeeper" to the preliminary ruling procedure from a procedural point. A refusal on the part of the CJEU to answer questions, as in *Airport Shuttle Express* and *Crono Service*, does not say anything about the legality of the national measure from a substantive point of view. It simply means that the measure should be challenged by a different person whose case includes a cross-border element or alternatively by the Commission in the context of an infringement procedure under Article 258 TFEU.¹⁰⁴ In enabling natural or legal persons to challenge national measures in purely internal situations, the CJEU essentially broadens indirect access to the CJEU. In doing so, the CJEU basically acknowledges the possibility of "my brother's keeper," situations where nationals challenge restrictive national measures on behalf of persons in

⁹⁹See Ritter, *supra* note 59, at 3, 12; Opinion of Advocate General Darmon at paras. 10–11, Joined Cases C-297/88 and C-197/89, *Dzodzi v. Belgian* (July 3, 1990), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹⁰⁰See Stefan Enchelmaier, *Always at your Service (Within Limits): The CJEU's Case Law on Article 56 TFEU (2006-11)*, 36 EUR. L. REV. 615, 618 (2011).

¹⁰¹See Opinion of Advocate General Stix-Hackl at para. 17, Case C-60/00, *Carpenter v. State* (Sept. 13, 2001), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹⁰²Maduro aptly observed that "EC law obliges States to treat nationals of other Member States in a way which — by reasons of their own policies and aims—they did not originally intend to treat their own nationals". Miguel Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, THE FUTURE OF REMEDIES IN EUROPE 127 (Claire Kilpatrick, Tonia Novitz and Paul Skidmore eds., 2000).

¹⁰³See Caro de Sousa, *supra* note 1, at 174, 177.

¹⁰⁴See *id.* at 175; ECJ, Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 49, Judgment of 15 November 2016.

other Member States.¹⁰⁵ The problem with this lenient approach is that it could lead to never-ending litigation by individuals and legal persons challenging many rules and regulations that obstruct their businesses in their drive towards unlimited deregulation and a “market without rules.”¹⁰⁶ This risk has become more pertinent recently, because of the broad and unclear criterion of “far from inconceivable.” It is not difficult to argue that it is fulfilled, as the Dutch CJEU Judge Prechal also noted recently.¹⁰⁷

Nonetheless, at the same time, it should be acknowledged that an overly strict approach on the part of the CJEU might also be undesirable. If national courts or the parties must prove that there is not only a potential interest, but that persons from other Member States are actually interested in offering a certain service, this could give rise to problems with respect to delivering sufficient proof. In addition, if the CJEU were to require that breaches of fundamental freedoms be contested by persons who have already made use, or are trying to use, such freedoms, this would prevent the CJEU from examining national measures which considerably hamper access to that respective market.¹⁰⁸ In this context, one could argue that it is undesirable to declare a question inadmissible for being purely internal if there is a reasonable chance that the same issue will occur in a case with cross-border elements. The case at hand, which is purely internal, shows that the issue as such is not merely hypothetical and that economic operators are affected. In terms of efficiency and legal certainty, it then seems justifiable to anticipate cross-border situations, instead of waiting until they actually occur.

Leaving aside what the correct approach is, the current problem is the seeming inconsistency in CJEU case law. Sousa observed in this context that the CJEU is using the purely internal situation doctrine strategically as a way to decide which cases it wants to handle itself and which should be left to national courts.¹⁰⁹ The more liberal approach of the CJEU in *Blanco Pérez* and *Trijber* can be contrasted with the CJEU’s reluctance to answer in *Sbarigia* and *Ragn-Sells*. It is therefore unsurprising that in *Venturini* the opposing parties were both able to bolster their arguments with reference to the case law of the CJEU. While *Venturini* and

¹⁰⁵ Prechal therefore proposed that the CJEU uses a “Schutznorm,” a relativity requirement, which means that the CJEU examines whether the EU law provision relied on also seeks to protect the interests of the plaintiff(s). Prechal at the same time noted that the case law of the CJEU does not wholeheartedly support this (yet). See Prechal, *supra* note 12, at 495–96.

¹⁰⁶ See Opinion of Advocate General Tizzano at para. 63, Case C-442/02, *Caixabank France v. Ministère de l'Économie* (Mar. 25, 2004), https://curia.europa.eu/jcms/jcms/j_6/en/; Opinion of Advocate General Tesouro at paras. 1, 28, Case C-292/92, *Hünernmund v. Landesapothekerkammer Baden-Württemberg* (Oct. 27, 1993), https://curia.europa.eu/jcms/jcms/j_6/en/; Ritter, *supra* note 59, at 12–13; Caro de Sousa, *supra* note 1, at 176, 178.

¹⁰⁷ See Prechal, *supra* note 12, at 495.

¹⁰⁸ See Opinion of Advocate General Wahl, *supra* note 70, at para. 36.

¹⁰⁹ See Caro de Sousa, *THE EUROPEAN FUNDAMENTAL FREEDOMS: A CONTEXTUAL APPROACH* 181, 186 (2015).

the Commission referred to *Blanco Pérez*, the defendant based its arguments on *Sbarigia*. The inconsistent approach is especially problematic for national courts confronted with purely internal situations.¹¹⁰ The Dutch Council of State, for example, pointed to the seemingly stricter approach of the CJEU in *Ragn-Sells* in its referral in *Trijber*.¹¹¹ It is unclear how national courts should explain the way in which foreign market operators might be affected. What is the required level of potentiality or inconceivability? Is it necessary to prove that companies in other Member States have actually expressed their interest? How many foreign clients are needed? What is the threshold?¹¹² Even Judge Prechal noted that the jurisprudence of the CJEU lacks clarity in this respect.¹¹³ It is particularly the criterion of “far from inconceivable” that is not sufficiently distinct and which has therefore led to criticisms that the CJEU uses purely internal situation arbitrarily in determining which cases it wants to rule on.¹¹⁴

The uncertainty could also affect the uniform application of EU law. On the one hand, some national courts, following the strict approach of the CJEU, rightly or wrongly, refrain from putting questions to the CJEU because they think that the CJEU cannot help them in such purely internal situations. On the other hand, other courts might be tempted to forward questions all too eagerly in the hope of benefitting from the accommodating approach of the CJEU. In the first scenario, this could mean that national measures conflicting with EU law remain unchallenged, because courts wait for a case with a factual constellation involving cross-border elements. Such non-compliant national measures are more easily remedied by courts following the second scenario.

In conclusion, the CJEU should offer more guidance and be more explicit about the exact factors to be considered so that national courts stop wasting time and resources on requests

¹¹⁰ Several Dutch courts, for example, determined that the operation of ferries between the Dutch mainland and islands in the Dutch part of the Wadden Sea amounts to a purely internal situation, while the Trade and Industry Appeals Tribunal did not even address this matter, seemingly assuming that EU law applied, because it referred a question for a preliminary ruling. See Dutch Council of State, ECLI:NL:RVS:2011:BU5444, para. 2.5.3, Judgment of 23 November 2011; District Court Leeuwarden, ECLI:NL:RBLEE:2012:BY5837, para. 9.6.2, Judgment of 12 December 2012; Dutch Trade and Industry Appeals Tribunal, ECLI:NL:CBB:2013:BZ6922, Judgment of 15 April 2013. The case was settled and struck out. Case ECJ, C-207/13, *Wagenborg Passagiersdiensten BV*, Judgment of 13 May 2014. By contrast, another Dutch court determined that a ferry service, which is primarily used by students and day-trippers from the region, could affect the trade between Member States. District Court Rotterdam, ECLI:NL:RBROT:2013:BZ5824, para. 10.1, Judgment of 28 March 2013.

¹¹¹ See Dutch Council of State, ECLI:NL:RVS:2014:2488, para. 4.10, Judgment of 9 July 2014.

¹¹² See *id.*; Enchelmaier, *supra* note 100, at 618.

¹¹³ See Prechal, *supra* note 12, at 495.

¹¹⁴ See Nic Shuibhne, *supra* note 59, at 741; Caro de Sousa, *supra* note 1, at 178. AG Kokott also held that the criterion is in need of clarification. See Opinion of Advocate General Kokott, *supra* note 81, at para. 32.

which will never be answered.¹¹⁵ At the same time, it is not only the CJEU who should be blamed for its relaxed approach. National courts also have an important responsibility for ensuring that their request for a preliminary ruling also includes a detailed and clear overview of the factual and national legal context of the case to enable the CJEU to determine whether there is a sufficient cross-border element.¹¹⁶ This also means that the CJEU itself will be spared unnecessary references which solely relate to internal situations.

E. The *Dzodzi* Exception: National Law Makes a Renvoi to EU Law in Situations Outside the Scope of EU Law

I. The Recent Dzodzi Line of Cases

The CJEU has also accepted jurisdiction and/or declared questions admissible when EU provisions are made applicable by national law in situations outside the scope of EU law with a *renvoi*. In such situations, national law voluntarily adopts the same approach as EU law, something which has been referred to as “spontaneous harmonization.”¹¹⁷ The CJEU has not only been willing to consider *renvois* in national legislation but has even answered questions in relation to references in private law provisions in contracts.¹¹⁸ While *Thomasdüniger* was the first judgment in which the CJEU pursued this line, it was in *Dzodzi* that the CJEU extensively set the contours of this second exception.¹¹⁹ In the latter case, Belgian law referred to EC law and stipulated that in some case third-country partners of Belgians

¹¹⁵ One fruitful starting point for the CJEU might be *Belgacom*, a public procurement case, where the CJEU offered more yardsticks in determining whether there is a certain cross-border interest even though there were no economic operators who had actually manifested their interest. The CJEU held that such an interest might be derived from the financial value of the planned agreement, from the location where it is to be performed or its technical characteristics. See ECJ, Case C-221/12, *Belgacom NV*, ECLI:EU:C:2013:736, paras. 28 and 31, Judgment of 14 November 2013. These yardsticks were subsequently applied in other (procurement) cases as well. See Joined Cases C-25/14 and C-26/14, *UNIS*, ECLI:EU:C:2015:821, para. 28, Judgment of 17 December 2015; Joined Cases C-458/14 and C-67/15, *Promoimpresa*, ECLI:EU:C:2016:558, para. 66, Judgment of 14 July 2016. See also Case C-380/05, *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità*, 2008 E.C.R. I-349, para. 67 (referring to the earlier referenced “market in question”).

¹¹⁶ This responsibility of national courts also avoids the misuse of the preliminary ruling procedure. This responsibility also stems from the duty of loyal cooperation under Article 4(3) TEU. See Prechal, *supra* note 12; Galetta, *supra* note 43.

¹¹⁷ See Opinion of Advocate General Jacobs, *supra* note 57, at para. 43; Kaleda, *supra* note 59, at 2.

¹¹⁸ See Case C-73/89, *Fournier v Van Werven*, 1992 E.C.R. I-5621; Case C-88/91, *Federconsorzi v AIMA*, 1992 E.C.R. I-4035.

¹¹⁹ In *Thomasdüniger*, the German court asked for an interpretation of the Common Customs Tariff in a situation outside the scope of the Tariff but where the Tariff was made applicable by German rules. Without paying much attention to this scope question, the CJEU merely held that “except in exceptional cases in which it is clear that the provision of Community law . . . does not apply to the facts of the dispute . . . the Court leaves it to the national court to determine . . . whether a preliminary ruling is necessary.” See Case C-166/84, *Thomasdüniger v. Oberfinanzdirektion Frankfurt am Main*, 1985 E.C.R. 3001, para. 11.

needed to be treated as if they were EU nationals in order to avoid reverse discrimination. AG Darmon held that the question should be declared inadmissible because there was no link with EC law.¹²⁰ The CJEU disagreed because it held that it is not for the CJEU to examine the relevance of questions posed by national courts. The CJEU thus declared that it has jurisdiction because “it is manifestly in the interest of the Community legal order that in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is applied.”¹²¹

Dzodzi was reaffirmed in what the CJEU itself has referred to as “the *Dzodzi* line of cases.”¹²² This line of cases is, however, not entirely consistent. In some cases, the CJEU examines more vigorously the *renvoi* to EU law. In *Kleinwort Benson*, the CJEU determined that the reference to EU law must be “direct and unconditional” and that the application of EU law needs to be “absolutely and unconditionally” binding on a national court. The CJEU did not consider it sufficient that the national court is obliged to merely take account of the CJEU’s case law.¹²³ Nonetheless, in subsequent cases such as *Leur-Bloem*, the CJEU reaffirmed the “*Dzodzi* principle” and dropped the more restrictive *Kleinwort Benson* approach.¹²⁴ In this case, Dutch provisions made EU law indirectly applicable by using a language similar to the Taxation of Mergers Directive, but not word for word. Even though no explicit reference to EU law was made, the intention of the Dutch legislature was that the Dutch law would be interpreted in the same way as the Directive.¹²⁵ Instead of applying the direct and unconditional *renvoi* test of *Kleinwort Benson*, the CJEU coupled the *Dzodzi* logic of “forestalling future differences” with the notion of “same solutions” approach. It declared that it is in the EU’s interest for the CJEU to answer questions “where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law.”¹²⁶ In other cases, the CJEU also noted in very general terms that the national provision refers to EU law while not paying much attention to *Kleinwort Benson* criteria.¹²⁷ In other cases, the CJEU also accepted indirect and implicit references to EU

¹²⁰See Opinion of Advocate General Darmon, *supra* note 99.

¹²¹See Joined Cases 297/88 and C-197/89, *Dzodzi*, 1990 E.C.R. I-3763, para. 37.

¹²²See Case C-130/95, *Giloy v. Hauptzollamt Frankfurt am Main-Ost*, 1997 E.C.R. I-4291, para. 23; Case C-28/95, *Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen*, 1997 E.C.R. I-4161, para. 27.

¹²³See also Opinion of Advocate General Tesouro at para. 10, Case C-346/93, *Kleinwort Benson v. City of Glasgow* (Jan. 31, 1995), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹²⁴See Ritter, *supra* note 59, at 8; Takis Tridimas, *Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling Procedure*, 40 COMMON MKT. L. REV. 34 (2003).

¹²⁵See Opinion of Advocate General Jacobs, *supra* note 8, at para. 13, 43.

¹²⁶See *Leur-Bloem*, Case C-28/95 at para. 32.

¹²⁷See Case C-247/97, *Schoonbroodt v. Belgian*, 1998 E.C.R. I-8095, para. 15; Case C-222/01, *British American Tobacco v. Hauptzollamt Krefeld*, 2004 E.C.R. I-4683. *But see* Case C-2/97, *IP*, 1998 E.C.R. I-8597, paras. 59–62.

law.¹²⁸ In *BIAO*, the CJEU considered questions admissible even though German provisions did not reproduce the EU law *verbatim*, but the CJEU especially attached weight to the factor that its interpretation would be binding on the referring court.¹²⁹ The latter finding was, however, disputed by AG Jacobs.¹³⁰ In *Kofisa Italia*, a 1972 Italian decree on VAT referred to customs legislation. The Italian court asked the CJEU about the Community Customs Code, but this Code did not exist when the decree came into existence in 1972.¹³¹ In addition, both the Italian government and the Commission noted that they are unsure whether the national dispute would be solved by applying EU rules.¹³² The CJEU, nonetheless, held that there was nothing in the file suggesting that the referring court could depart from the CJEU's interpretation of the Customs Code.¹³³ This latter notion that there is nothing in the case file indicating otherwise has since then be repeated in other cases as well.¹³⁴

In several recent cases, the CJEU has also used the "same solutions" idea from *Leur-Bloem* in a mantra-like way. The CJEU has simply stated that it should answer questions in cases where, in regulating purely internal situations, domestic legislation seeks to adopt the same solutions as those in EU law, such as the avoidance of discrimination against its own nationals (see section F), any distortion of competition and the provision for a single procedure in comparable situations as such solutions.¹³⁵ The CJEU easily accepted to answer questions in *Unamar* and *Quenon* about agency contracts for the sale of banking services and insurance falling outside the scope of a directive on self-employed commercial agents negotiating the sale or the purchase of only goods. It simply noted that the Belgian legislature had decided to apply the same treatment to agency contracts for goods and those relating to services.¹³⁶ This rather easy reliance on the intention of the legislature is also

¹²⁸See Case C-1/99, *Kofisa Italia v. Ministero delle Finanze, Servizio della Riscossione dei Tributi*, 2001 E.C.R. I-207, paras. 30–32; Case C-267/99, *Adam*, 2001, E.C.R. I-7467, paras. 27–32; Ritter, *supra* note 59, at 9.

¹²⁹See Case C-306/99, *BIAO*, 2003 E.C.R. I-1, para. 92.

¹³⁰ AG Jacobs noted that the parties were unable to satisfactorily explain the approach of German courts. See Opinion of Advocate General Jacobs, *supra* note 40, at paras. 50, 61.

¹³¹ See *Tridimas*, *supra* note 124, at 36.

¹³²See Opinion of Advocate General Ruiz-Jarabo at para. 47, C-1/99, *Kofisa Italia* (Sept. 26, 2000), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹³³ *Kofisa Italia*, Case C-1/99 at para. 31.

¹³⁴See Case C-3/04, *Poseidon Chartering v. Marianne Zeeschip VOF, et. al.*, 2006 E.C.R. I-2505, para. 18.

¹³⁵ See e.g. Case C-482/10, *Cicala v. Regione Siciliana*, 2011 E.C.R. I-14139, para. 18; Case C-203/09, *Volvo Car Germany*, 2010 E.C.R. I-10721, paras. 24, 25.

¹³⁶See ECJ, Case C-338/14, *Quenon v. Beobank & Metlife Insurance*, ECLI:EU:C:2015:795, paras. 16–18, Judgment of 3 December 2015; ECJ C-184/12, *Unamar*, ECLI:EU:C:2013:663, paras. 30–31, Judgment of 17 October 2013.

visible in other cases.¹³⁷ The CJEU has been especially lenient in EU competition law and (implicit) references to Article 101 TFEU.¹³⁸

As with the first exception, the CJEU's approach has not been entirely consistent. The CJEU sometimes employed a stricter approach enforcing the *Kleinwort Benson* criteria based on the order for reference or from the file submitted to the Court.¹³⁹ In *Nolan*, the CJEU held that it is necessary to verify on the basis of "sufficiently precise indications" whether the *renvoi* is made in a direct and unconditional way.¹⁴⁰ The CJEU concluded that this was not the case because the respective Directive was not "automatically applicable" in situations as in the case at hand.¹⁴¹ In *Agafitei*, the CJEU declared the reference inadmissible, especially because it was unclear whether the Romanian legislature intended to adopt the "same solutions."¹⁴² In *Parva Investitsionna Banka*, the referring court sought an interpretation of Regulation No. 1896/2006, which created a European order for payment procedure to fill a lacuna in the Bulgarian legislation. The CJEU, based on a relatively detailed analysis, felt that very general references to international treaties and general principles of Bulgarian law are not enough in the light of the *Kleinwort Benson* requirements.¹⁴³ Likewise, in other cases the CJEU declared questions inadmissible because it was not clear that it was necessary for the

¹³⁷ See e.g. ECJ, Case C-522/12, *Isbir v. DB Services GmbH*, ECLI:EU:C:2013:711, paras. 28–31, Judgment of 7 November 2013; Case C-352/08, *Modehuis A. Zwijnenburg*, 2010 E.C.R. I-4303, para. 33; ECJ, Case C-603/10 *Pelati*, ECLI:EU:C:2012:639, paras. 15–20, Judgment of 18 October 2012. The CJEU has been willing to disregard the intention of the legislature in *Nolan*, where it held that there was no Union interest to protect uniformity, because the EU legislature had stated unequivocally that the relevant Directive did not apply to a precise area in relation to which the UK made that Directive applicable. See ECJ, Case C-583/10, *U.S.A. v. Nolan*, ECLI:EU:C:2012:638, para. 56, Judgment of 18 October 2012.

¹³⁸ See Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, 2006 E.C.R. I-11987, para. 22; C-280/06, *ETI*, 2007 E.C.R. I-10893, para. 24; ECJ, Case C-172/14, *ING Pensii v. Consiliul Concurenței*, ECLI:EU:C:2015:272, Judgment of 16 July 2015; *Maxima Latvija*, Case C-345/14 at para. 13. Those judgments can be contrasted with cases in which the CJEU applies the *Kleinwort Benson* criteria more clearly. See ECJ, Case C-32/11, *Allianz v. Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160, Judgment of 14 March 2013; Case C-413/13, *FNV Kiem v. Staat der Nederlanden*, ECLI:EU:C:2014:2411, Judgment of 4 December 2014.

¹³⁹ See Case C-470/13, *Generali-Providencia Biztosító Zrt v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, ECLI:EU:C:2014:2469, para. 25, Judgment of 18 December 2014.

¹⁴⁰ See Case C-583/10, *U.S.A. v. Nolan*, ECLI:EU:C:2012:638, para. 48, 18 October 2012.

¹⁴¹ See *id.* at para. 49.

¹⁴² See Case C-310/10, *Ministerul Justiției și Libertăților Cetățenești v. Agafitei*, 2011 E.C.R. I-5989, para. 43.

¹⁴³ See Case C-488/13, *Parva Investitsionna Banka and Others*, ECLI:EU:C:2014:2191, paras. 21–36, Judgment of 9 September 2014.

referring court to rely on an interpretation of EU law to establish the meaning of the applicable national rules.¹⁴⁴

Another good example is *Cicala*, where the CJEU explicitly restated the *Kleinwort Benson* restrictions by noting that the reference to EU law's applicability was not made in a direct and unconditional way in the national law. The CJEU held that the *renvoi* was tied too generally to unspecified principles without identifying specific rules of EU law with respect to the duty to state reasons, such as Article 296 TFEU or Article 41(2)(c) of the Charter.¹⁴⁵ Neither did the referring court explain whether the *renvoi* also sets aside the Italian rules dealing with the obligation to state reasons. This also meant that the latter provisions "are applicable without limitation" to the case at hand, as a result of which the *renvoi* is not unconditional either. There is consequently no "definite interest" of the EU in guaranteeing uniformity of interpretation of those EU law provisions.¹⁴⁶ The CJEU hence declined jurisdiction. In two subsequent cases, *Romeo* and *De Bellis*, the CJEU also held that it has no jurisdiction and reiterated this view in questions about the same Italian legal provision, noting that the referring court failed to provide any evidence to the contrary.¹⁴⁷ The referring court did not, for example, show that the objective of the (general) *renvoi* is to guarantee that internal situations and situations falling within the scope of EU law are treated identically.¹⁴⁸

II. A Critical View on *Dzodzi*: A Partial Application of the Stricter *Kleinwort Benson* Criteria

The *Dzodzi* line of cases has been fervently criticized in academic literature and has met fierce resistance from Advocate Generals in the 1990s and early 2000s.¹⁴⁹ Despite these fundamental objections and heavy AG criticism, the CJEU has not really reconsidered its *Dzodzi* judgment as the preceding analysis shows as well.¹⁵⁰ An illustration of this is that the

¹⁴⁴See ECJ, Case C-92/14, *Tudoran*, ECLI:EU:C:2014:2051, para. 41, Judgment of 3 July 2014; ECJ, Case C-139/12, *Caixa d'Estalvis i Pensions de Barcelona*, ECLI:EU:C:2014:174, para. 46, Judgment of 20 March 2014; ECJ, Case C-351/14, *Estrella Rodríguez Sánchez*, ECLI:EU:C:2016:447, Judgment of 16 June 2016.

¹⁴⁵See Case C-482/10, *Cicala*, 2011 E.C.R. I-14139, para. 25.

¹⁴⁶See *id.* at para. 29.

¹⁴⁷See Case C-313/12, *Romeo*, ECLI:EU:C:2013:718, para. 33, Judgment of 7 November 2013; Case C-246/14, *De Bellis*, ECLI:EU:C:2014:2291, Judgment of 15 October 2014.

¹⁴⁸See Case C-313/12, *Romeo*, ECLI:EU:C:2013:718, para. 31–32, Judgment of 7 November 2013.

¹⁴⁹See Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at para. 22.

¹⁵⁰See the request for a reconsideration in Opinion of Advocate General Tesauro, *supra* 123, at para. 27; Opinion of Advocate General Jacobs, *supra* note 40, at para. 1.

Dzodzi and *Leur-Bloem* logic is cited almost three times as much as *Kleinwort Benson*.¹⁵¹ What's more, the analysis above shows that there is still not much consistency between both lines of cases.¹⁵² It is therefore somewhat surprising that the criticism in the literature and among AGs seems to have evaporated in recent years.¹⁵³ AG Kokott even "defended" the *Dzodzi* line of cases in the competition case of *ETI* by arguing that the rationale behind the CJEU uniformly interpreting EU law in purely internal situations is ensuring legal certainty by creating comparable competition conditions for all operators.¹⁵⁴ Others, including AG Wahl, also noted that the text of Article 267 TFEU does not preclude the CJEU from ruling on *renvoi* cases, because it merely provides that a question of interpretation of EU rules must be "raised before any court or tribunal of a Member State" when "it considers that a decision on the question is necessary to enable it to give judgment." Several AGs also argue, in line with the CJEU approach discussed in section B, that the generous approach of the CJEU coincides with the spirit of cooperation between the CJEU and national courts.¹⁵⁵ Even though the *Dzodzi* line of cases is no longer heavily criticized, it remains worthwhile to repeat some of the earlier comments and critically discuss the case law in the light of this. Instead of suggesting that the CJEU should do away with its approach, the main aim of the following overview is to explain that there is a need for the CJEU to employ a more consistent and stricter approach in line with *Kleinwort Benson*.

One point of criticism relates to the fact that the CJEU bases its jurisdiction on national law instead of EU law proper.¹⁵⁶ The CJEU extends the scope of EU law through unilateral and

¹⁵¹ Twenty-three judgments with references to "Dzodzi" and twelve judgments with references to "Kleinwort Benson" were found relevant because the CJEU, and not the parties, that referred to these cases in relation to the jurisdiction of the CJEU or the admissibility of the questions and not so much in relation to the material legal issues involved. Relevant references to "Leur Bloem" were found in nineteen judgments of which six also included a reference to "Dzodzi." Searches conducted on Apr. 13, 2016 on curia.europa.eu.

¹⁵² Opinion of Advocate General Jacobs, *supra* note 40, at para. 40.

¹⁵³ AG are currently not questioning the approach of the CJEU, but primarily call for a greater consistency and a more careful examination. *E.g.* Opinion of Advocate General Tizzano at para. 28, C-6/01, *Anomar* (Feb. 11, 2003), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹⁵⁴ See Opinion of Advocate General Kokott at para. 54, C-280/06, *ETI* (July 3, 2007), https://curia.europa.eu/jcms/jcms/j_6/en/. The objective of achieving the single market is also often the idea behind the legislature's choice to use the wording as laid down in EU law for purely internal situations as well. See Opinion of Advocate General Jacobs, *supra* note 8, at para. 13 (articulating the argument of the Dutch State Secretary).

¹⁵⁵ See *e.g.* AG Wahl's defense of the "relatively generous" approach by the CJEU in Opinion of Advocate General Wahl, *supra* note 70, at paras. 29–30. Lenaerts also held that the *Dzodzi* principle falls within the interpretative jurisdiction of the CJEU. See Koen Lenaerts & Dirk Arts, *Procedural Law of the European Union*, para. 6023 (Sweet & Maxwell 1999).

¹⁵⁶ This was specifically brought up by AG Jacobs, one of the most vocal opponents of an all too welcoming CJEU approach. See Opinion of Advocate General Jacobs, *supra* note 8, at para. 69; Opinion of Advocate General Jacobs, *supra* note 40, at paras. 62–63.

independent references in national laws.¹⁵⁷ It could also be argued that by promoting the application of EU law beyond its original scope, the CJEU is assuming powers not assigned to it by the Treaties, creating a tension with the principle of attributed competences.¹⁵⁸ Given this points of criticism, AG Darmon referred to the *Dzodzi* line of cases as an “ill-defined cooperation” falling “outside the confined and precise aims of the preliminary ruling mechanism,” while Rasmussen spoke about an “erroneous interpretation” of Article 267 TFEU.¹⁵⁹

There are also some more practical problems that could result from the reliance on national law for the CJEU’s jurisdiction in such purely internal situations. One consequence could be that there is considerable divergence across Member States as to the jurisdiction that the CJEU enjoys and hence the protection that individuals can derive from EU law, albeit indirectly.¹⁶⁰ In Member States where there are many *renvois* this jurisdiction and protection could be more extensive. In addition, the reliance on national law could create an imbalance in the sense that the Commission cannot start infringement proceedings in relation to Member State’s (in)actions following CJEU’s rulings in the *Dzodzi* type of situations. This is because those purely internal situations formally fall outside of the scope of EU law so that it might be difficult to speak of a Member State’s failure to fulfill an obligation under the Treaties in the sense of Article 258 TFEU.¹⁶¹

The third point of criticism is that in the *Dzodzi* line of cases the CJEU is interpreting EU law “irrespective of the circumstances in which it is applied” as the CJEU itself has consistently asserted.¹⁶² This means in essence that the CJEU is interpreting EU law outside its proper context thereby risking to neglect all important factors or being deceived by irrelevant aspects related to the particular set-up of the respective national legal system.¹⁶³ AG Jacobs illustrated this problem with reference to *Leur-Bloem* dealing with a purely domestic transaction involving a restructuring of the ownership of companies which appears to have hardly any connection with the transactions envisaged in the Tax Directive on cross-border

¹⁵⁷See Opinion of Advocate General Darmon, *supra* note 99, at paras. 8–9.

¹⁵⁸See Opinion of Advocate General Tesauro, *supra* 123, at paras. 25, 27; Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at paras. 33–35; Opinion of Advocate General Jacobs, *supra* note 40, at para. 59.

¹⁵⁹ Opinion of Advocate General Darmon, *supra* note 99, at para 12; Hjalte Rasmussen, *Remedying the Crumbling EC Judicial System*, 37 *Common Mkt. L. Rev.* 1083 (2000).

¹⁶⁰See Opinion of Advocate General Jacobs, *supra* note 8, at para. 69.

¹⁶¹See *id.* at para. 44.

¹⁶²See *id.* at para. 50. For later reaffirmations, see e.g. Case C-413/13, *NV Kunsten Informatie en Media*, para. 18, (Dec. 4, 2014), <https://curia.europa.eu/>.

¹⁶³ See *id.* at para. 52. See also Opinion of Advocate General Jacobs, *supra* note 40, at paras. 52–57; Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at paras. 30–32.

mergers to which the Dutch provisions made a *renvoi*. The domestic restructuring might also be carried out for reasons primarily related to the Dutch system which are completely different from those foreseen in this Directive relating to removing tax obstacles for cross-border groupings and avoiding tax avoidance.¹⁶⁴ Given this different context, there is hardly a “focus for debate” for the CJEU which can only be remedied by drawing from “fictitious situations.”¹⁶⁵ The latter is not free from problems. AG Jacobs pointed to the CJEU’s own case law in which the CJEU underlines the importance of taking account of a different context when interpreting provisions in different documents.¹⁶⁶ Because of such potential different contexts, it is not evident that the CJEU’s interpretation in *renvoi* cases will also be relevant and useful for the national court to solve the dispute in the main proceedings.¹⁶⁷

The *Dzodzi* line of cases can be criticized for the CJEU’s heavy dependence on the whims of the national judiciary. The reluctance on the part of the CJEU to examine the *Kleinwort Benson* conditions stems from an idea that given the earlier discussed division of functions between the national courts and the CJEU it is only for national courts to examine the exact scope of the national reference to EU law, see section B.¹⁶⁸ This deferential approach is also visible in the often repeated notion that:

Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter of domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State.¹⁶⁹

The generous approach could be particularly problematic in *renvoi* cases when it is unclear whether the referring court is also legally bound by the CJEU’s interpretation of EU law.¹⁷⁰

¹⁶⁴See *id.* at paras. 53 and 58.

¹⁶⁵See *id.* at paras. 54–55.

¹⁶⁶See *id.* at para. 56; ECJ, Case C-221/11, *Demirkan*, ECLI:EU:C:2013:583, para. 47, Judgment of 24 September 2013.

¹⁶⁷See Opinion of Advocate General Tesauro, *supra* note 123, at para. 15.

¹⁶⁸ See *e.g.* Case C-48/07, *Les Vergers du Vieux Tauves*, 2008 E.C.R. I-10627, para. 27; Joined Cases C-439/07 and C-499/07, *KBC Bank*, 2009 E.C.R. I-4409, para. 60; Case C-352/08, *Modehuis A. Zwijnenburg*, 2010 E.C.R. I-4303, para. 34; ECJ, Case C-603/10, *Pelati*, ECLI:EU:C:2012:639, para. 19, Judgment of 18 October 2012.

¹⁶⁹ See Joined Cases 297/88 and C-197/89, *Dzodzi*, 1990 E.C.R. I-3763, at para. 42; Case C-28/95, *Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen*, 1997 E.C.R. I-4161, para. 33. *E.g.* Case C-48/07, *Les Vergers du Vieux Tauves*, 2008 E.C.R. I-10627, para. 27.

¹⁷⁰ It is remarkable that the CJEU itself acknowledged in *Fournier* that it is only for the national court to give a meaning to provisions of national law “which it considers appropriate, without being bound in that regard by the

When the CJEU does not take up this issue, it is essentially performing tasks it refused to do for good reasons, namely by giving answers that are “purely advisory and without binding effects.”¹⁷¹ It seems logical that the CJEU closely scrutinizes the national court’s obligations in relation to the CJEU’s interpretation.¹⁷² It should be welcomed that the CJEU did so in *Allianz*. In this case, the CJEU was confronted with the Hungarian competition law which used “identical concepts” as Article 101 TFEU, even though no explicit references were made to EU law in the text of the Hungarian legislation. The Explanatory Memorandum, however, justified the legislative proposal on the basis of requirements of EU law.¹⁷³ The CJEU accepted jurisdiction and attached value to the fact that the order for reference showed that the Hungarian Supreme Court is bound by the CJEU’s interpretation of Article 101 TFEU.¹⁷⁴ But even when the national court is obliged on paper to apply the interpretation of the CJEU in a purely internal situation, this still does not completely preclude national courts from disregarding the CJEU interpretation because they might argue that the context of the CJEU’s interpretation is different or that the situation falls outside the scope of EU law.¹⁷⁵ The obligation for national courts to apply EU law provisions and the CJEU’s interpretation thereof can also be changed by the legislature or court judgments when that requirement stems from case law.¹⁷⁶ It is unclear what legal consequences ensue when courts depart from the requested CJEU interpretation in *renvoi* situations. As stated above, it is unlikely that the Commission can start infringement proceedings, nor does state liability on the basis of *Köbler* seem to offer a suitable form of redress.¹⁷⁷ One related issue which has not been solved yet by the CJEU is the question as to whether there is also an obligation on the part

meaning which must be attributed to the same expression as used in the Directive.” See Case C-73/89, Fournier, 1992 E.C.R. I-5621, para. 23. AG Tesouro held that this acknowledgment by the CJEU of the lacking binding effects “raise[s] serious doubts”. See Opinion of Advocate General Tesouro, *supra* note 123, at para. 24.

¹⁷¹See Opinion 1/91, 1991 E.C.R. I-6079, para. 4; Case C-346/93, Kleinwort Benson, 1995 E.C.R. I-615, para. 24.

¹⁷²AG Darmon held that the CJEU should not give “advice of the kind which a legal expert is sometimes called upon to give in a domestic court when it is required to apply foreign law.” See Opinion of Advocate General Darmon, *supra* note 99., at para. 12. The absence of any binding force of EU law was also the reason for AG Mancini’s refusal to answer questions in *Thomasdünger*. See Opinion of Advocate General Mancini, Case C-166/84, *Thomasdünger* (May 15, 1985), https://curia.europa.eu/jcms/jcms/_6/en/.

¹⁷³See ECJ, Case C-32/11, *Allianz v. Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160, paras. 3–5, Judgment of 14 March 2013.

¹⁷⁴See *id.* at paras. 18 and 22.

¹⁷⁵See Opinion of Advocate General Jacobs, *supra* note 8, at para. 70; Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at para. 38. Tridimas also expressed doubts as to whether CJEU judgments are binding in cases where the facts fall outside the scope of EU law. See Tridimas, *supra* note 124, at 36.

¹⁷⁶See Opinion of Advocate General Jacobs, *supra* note 40, at para. 50; Opinion of Advocate General Jacobs, *supra* note 8, at para. 43.

¹⁷⁷See *supra* notes 33–36; Jasper Krommendijk, “Open Sesame!” *Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer*, 42 EUR. L. REV. 57–58 (2017).

of the highest national courts to refer in *renvoi* cases. This does not seem to be the case. There is no obligation to apply EU law because EU law only applies on the basis of national law.¹⁷⁸ There is likely significant uncertainty on the part of the highest courts about this, especially in the light of the recent case law of the CJEU and ECtHR with respect to their duties to refer.¹⁷⁹

In light of these four lines of criticism, the CJEU should more strictly apply the two-pronged test of *Kleinwort Benson*.¹⁸⁰ The community should welcome the CJEU's increasing willingness to examine the *renvoi*.¹⁸¹ As outlined in section B, this is not an easy task for the CJEU. When the CJEU has to examine the question of whether its interpretation in *renvoi* situations is binding for the referring court, the CJEU must grapple with questions about national laws because the CJEU essentially has to judge the work of the national court.¹⁸² The CJEU should also avoid doing "guesswork" and conducting this analysis on the basis of its own specialist knowledge because this could mean that not all Member States are treated equally.¹⁸³ So it is safest for the CJEU to rely on the national court. This, however, means that the CJEU only knows that the EU is applicable because the referring national court tells it so.¹⁸⁴ As with the first *Oosthoek* exception, the stricter approach on the part of the CJEU should be coupled with increased efforts on the part of national courts to show that the *Kleinwort Benson* criteria are fulfilled and that they are obliged to follow the requested interpretation of the CJEU. It is the responsibility of national courts to offer enough information so that it is clear for the CJEU that an answer is "objectively required."¹⁸⁵ This is easier said than done. There is currently a perverse encouragement in the sense that

¹⁷⁸See Tridimas, *supra* note 124, at 37.

¹⁷⁹See ECJ, Case C-160/14, *Ferreira da Silva v. Estados português*, ECLI:EU:C:2015:565, paras. 44–45, Judgment of 9 September 2015; ECJ, Joined Cases C-72/14 and C-197/14, *X and van Dijk*, ECLI:EU:C:2015:564, Judgment of 9 September 2015; *Dhahbi v Italy*, App. No. 17120/09 (Apr. 8, 2014), <http://hudoc.echr.coe.int/eng?i=001-142504>; *Schipani and Others v Italy*, App. No. 38369/09 (Oct. 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156258>. See also Opinion of Advocate General Jacobs, *supra* note 40, at para. 64.

¹⁸⁰This is also more in line with the CJEU's case law, beginning with *Telemarsicabruzzo*, finding that questions need not be answered because the referring court failed to clarify the factual and legislative context of its questions. See Joined Cases C-320/90 to 322/90, *Telemarsicabruzzo*, 1993 E.C.R. I-393; Case C-234/12, *Sky Italia*, ECLI:EU:C:2013:496, paras. 30–33. AG Jacobs considered the *Dzodzi* line of cases to be "irreconcilable" with this case law. See Opinion of Advocate General Jacobs, *supra* note 8, at para. 51.

¹⁸¹See *supra* notes 139–148. See also ECJ, C-281/15, *Sahyouni*, ECLI:EU:C:2016:343, para. 25–33, Judgment of 12 May 2016; ECJ, Joined Cases C-692/15 to C-694/15, *Security Service v. Ministero dell'Interno*, ECLI:EU:C:2016:344, paras. 26–31, Judgment of 12 May 2016.

¹⁸²See generally *Barnard & Sharpston*, *supra* note 39.

¹⁸³See Opinion of Advocate General Kokott, *supra* note 81, at para. 53.

¹⁸⁴See *Enchelmaier*, *supra* note 100, at 617.

¹⁸⁵See *Ritter*, *supra* note 59, at 12.

national courts wishing to shield their own Member State's legislation from scrutiny can easily circumvent the CJEU's by not including anything in the order for reference. With such a "bad" reference, a national court could thus fulfil its obligation to refer, but still prevent scrutiny by the CJEU.

A stricter CJEU approach might eventually result in a lower number of requests being answered, at least in the short term before national courts become accustomed to the stricter approach of the CJEU. This raises the question as to how problematic it is from the perspective of EU law when the CJEU declines to answer more questions for failing to specify the factual and especially legal context or for not satisfying the *Kleinwort Benson* criteria. The rationale of the *Dzodzi* line of cases is primarily "forestalling future differences" in order to guarantee the uniformity of EU law. The CJEU has, however, never really specified these risks for the uniformity.¹⁸⁶ AG Jacobs noted that the risks for the uniformity of EU law are only indirect and temporary and that such "remote threats" can easily be challenged when an erroneous interpretation is also applied in a situation governed by EU law.¹⁸⁷ It could even be argued that by easily accepting *renvoi* cases, the CJEU is increasing its own case docket and thereby delaying the length of proceedings of "genuine" references which might discourage national courts from sending requests and thereby paradoxically affecting the uniformity of EU law.¹⁸⁸ On a more pragmatic note, the CJEU could decrease its workload and save its own resources, something which still seems desirable in the light of the record number of references.¹⁸⁹

In summary, national courts should carefully show in their request for a preliminary ruling why they consider the *Kleinwort Benson* criteria to be fulfilled in *renvoi* cases. The CJEU should assess more intensely than it has done before whether those criteria are fulfilled.

¹⁸⁶See Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at para. 36.

¹⁸⁷See Opinion of Advocate General Jacobs, *supra* note 8, at para. 49; AG Darmon also noted that the unity of the EU legal order is not affected by purely internal situations. See Opinion of Advocate General Darmon, *supra* note 99, at paras. 8–9.

¹⁸⁸See Opinion of Advocate General Ruiz-Jarabo, *supra* note 132, at para. 41.

¹⁸⁹This is also desirable in the light of the potentially large number of situations in which Member States make EU law applicable outside the scope of EU law application. See Ritter, *supra* note 59, at 10; Opinion of Advocate General Jacobs, *supra* note 8, at paras. 62, 66; Opinion of Advocate General Tesauro, *supra* 123, at para. 26.

F. The *Guimont* Exception of Prohibiting Reverse Discrimination

I. The Recent *Guimont* Case Law of the CJEU

One particular expression of the third exception is articulated in the line of cases starting with *Guimont* in which the CJEU gives a potential useful reply in case the national law of the Member State prohibits reverse discrimination of its own nationals and grants them the same rights as nationals of other Member States. Mr. Guimont, a French national, was prosecuted for selling “Emmenthal” in France even though this label could on the basis of French legislation only be used for cheese with a hard rind of yellow color.¹⁹⁰ AG Saggio recommended not to answer the question because “it cannot be of any relevance” in a dispute of a purely internal nature.¹⁹¹ The CJEU then held that “a reply might be useful to it [the national court] if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.”¹⁹² The difference between this “*Guimont* principle” and the *Dzodzi* logic is that the national court does not need to prove that national law actually prohibits reverse discrimination, nor is the CJEU examining this “not further substantiated possibility.”¹⁹³ *Guimont* had thus been referred to as an even more “relaxed version of *Dzodzi*” heralding a shift to an even more deferential approach of the CJEU whereby the CJEU is answering a question that might eventually not be raised, “just in case.”¹⁹⁴

The *Guimont* principle has subsequently been used in other cases.¹⁹⁵ In several cases, especially the older ones, the CJEU does not examine at all whether the national law actually requires that the Member State’s own national must be allowed to enjoy the same rights as those which a national of another Member State would derive from EU law in the same situation.¹⁹⁶ When the CJEU is checking that, it does so in a rather marginal way. In *Susisalo*,

¹⁹⁰See Case C-448/98, *Guimont*, 2000 E.C.R. I-10663.

¹⁹¹See Opinion of Advocate General Saggio at para. 7, Case C-448/98, *Guimont* (Mar. 9, 2000), https://curia.europa.eu/jcms/jcms/j_6/en/.

¹⁹²See Case C-448/98, *Guimont*, 2000 E.C.R. I-10663, para. 23.

¹⁹³See Ritter, *supra* note 59, at 8; Opinion of Advocate General Kokott, *supra* note 81, at para. 46.

¹⁹⁴See Enchelmaier, *supra* note 100, at 617; Ritter, *supra* note 59, at 9; Opinion of Advocate General Tizzano, *supra* note 123, at para. 24.

¹⁹⁵*E.g.* Joined Cases C-94/04 and C-202/04, *Cipolla v. Miloni*, 2006 E.C.R. I-11421, para. 31; Case C-250/03, *Mauri v. Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano*, 2005 E.C.R. I-1267, para. 21.

¹⁹⁶See Opinion of Advocate General Wahl, *supra* note 70, at para. 42; See also Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch*, 2002, E.C.R. I-2157, para. 26; C-451/03, *Servizi Ausiliari Dottori Commercialisti*, 2006 E.C.R. I-2941, para. 29 Case C-6/01, *Anomar*, 2003 E.C.R. I-8621, para. 41; Blanco Pérez, 2010

the CJEU, for example, simply referred to the statements of the representative of the applicant who stated that provisions in the Finnish administrative law ensure that Finnish nationals do not suffer reverse discrimination.¹⁹⁷ In *Duomo GPA*, the CJEU suggested that the national court should merely explain that the lawfulness of the national legislation depends on the CJEU's interpretation.¹⁹⁸

The *Guimont* principle has also been used in conjunction with the *Oosthoek* line of cases about potential cross-border effects. The CJEU used it as an additional reason for its conclusion that it should have jurisdiction and/or that the questions are admissible, after having considered that other nationals might be interested in offering their services.¹⁹⁹ In *Centro Europa 7*, the CJEU left it to the national court to determine the cross-border interest after having determined that undertakings in other Member States have been or would be interested, but held that it is "in any event" necessary to answer the question, because such a reply might be useful if Italian law prohibits reverse discrimination.²⁰⁰ The CJEU has frequently used the following double negative to accept questions: "Since it is *not* obvious that the interpretation of European Union law would *not* be of use in enabling the referring court to proceed to a determination of the case" (emphasis added).²⁰¹

Just as with the *Oosthoek* line of cases, the CJEU has recently adopted a more restrictive approach in some cases, even though the CJEU has not pursued this approach consistently in all cases as illustrated by *Duomo GPA*, *Susisalo*,² and *Garkalns*. Nonetheless, there is clearly a trend towards more intensely examining requests for a preliminary ruling on the basis of the information provided by the national court in the order for reference.²⁰² In *Omalet*, the CJEU declined to answer questions in purely internal situations, because the referring court made clear that Article 49 EC (currently Article 56 TFEU) does not apply to purely internal situations and a rule against reverse discrimination does not exist in the national legal

E.C.R. I-4629, paras. 35–36; C-280/06, ETI, 2007 E.C.R. I-10893, para. 20; Case C-300/01, Salzmann, 2003 E.C.R. I-4899, para. 39.

¹⁹⁷See ECJ, Case C-84/11, *Susisalo*, ECLI:EU:C:2012:374, para. 21, Judgment of 21 June 2012; Opinion of Advocate General Kokott, *supra* note 81, at para. 48.

¹⁹⁸See Joined Cases C-357/10 to C-359/10, *Duomo Gpa*, ECLI:EU:C:2012:283, para. 28, Judgment of 10 May 2012.

¹⁹⁹See ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, ECLI:EU:C:2013:791, para. 26, Judgment of 5 December 2013; ECJ, C-470/11, *Garkalns*, ECLI:EU:C:2012:505, para. 20, Judgment of 19 July 2012.

²⁰⁰Case C-380/05, *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità*, 2008 E.C.R. I-349, para. 68–69.

²⁰¹See Opinion of Advocate General Jääskinen at para. 17, Case C-539/11, *Ottica New Line di Accardi Vincenzo* (Jan. 30, 2013), https://curia.europa.eu/jcms/jcms/j_6/en/. See also ECJ, Case C-327/12, *SOA Nazionale Costruttori*, ECLI:EU:C:2013:827, para. 22, Judgment of 12 December 2013 ("Nothing in the file suggests that the main proceedings will not be settled by application of rules of Community law.").

²⁰²See Opinion of Advocate General Kokott, *supra* note 81, at para. 47.

order.²⁰³ In *Ordine degli Ingegneri di Verona*, the CJEU also based itself on the order for reference and held that national law, as confirmed by constitutional case law, outlaws reverse discrimination.²⁰⁴ Likewise, in other cases, the CJEU declared questions inadmissible because the order did not provide any indications that national law prohibits reverse discrimination.²⁰⁵ In *Paola C.*, the CJEU even held in rather explicit terms that “it is not for the Court to take such an initiative if it is not apparent from the order for reference that the national court is actually under such an obligation.”²⁰⁶

II. A Critical View on Guimont: CJEU is Answering Hypothetical Questions

The criticism expressed earlier in relation to *Dzodzi* is even more warranted in relation to the *Guimont* principle because the CJEU is answering a question that might eventually not be raised “just in case.”²⁰⁷ Ritter aptly described the approach of the CJEU in the following terms: “Dear national court, your question is actually not necessary to rule on the underlying case, but just in case your national law prohibits reverse discrimination (and we won’t bother checking whether that’s actually the case here), we will give you a reply.”²⁰⁸ Such a “theoretical” CJEU judgment conflicts with another strand in the case law of the CJEU whereby the CJEU refused answering hypothetical questions.²⁰⁹ The *Guimont* case law is thus essentially a partial return to pre-*Foglia* liberal case law in which the CJEU exercised more deference towards the national courts’ questions.²¹⁰

In line with the discussion of the criticism in relation to the *Dzodzi* line of cases, the stricter approach of the CJEU in the recent cases discussed at the end of the previous subsection, reflecting the earlier discussed *Kleinwort Benson* criteria, is to be welcomed.²¹¹ The stricter

²⁰³ See *Omalet*, Case C-245/09 at paras. 16–17; Opinion of Advocate General Wahl, *supra* note 70, at para. 45.

²⁰⁴ See ECJ, Case C-111/12, *Ordine degli Ingegneri di Verona e Provincia*, ECLI:EU:C:2013:100, paras. 34–35, Judgment of 21 February 2013.

²⁰⁵ See ECJ, Case C-92/14, *Tudoran*, ECLI:EU:C:2014:2051, para. 41, Judgment of 3 July 2014; ECJ, Case C-139/12, *Caixa d’Estalvis i Pensions de Barcelona*, ECLI:EU:C:2014:174, para. 46, Judgment of 20 March 2014.

²⁰⁶ See ECJ, Case C-122/13, *Paola C.*, ECLI:EU:C:2014:59, para. 15, Judgment of 30 January 2014.

²⁰⁷ See Enchelmaier, *supra* note 100, at 617.

²⁰⁸ See Ritter, *supra* note 59, at 4.

²⁰⁹ See Case 244/80, *Foglia v Novello (II)*, 1981 E.C.R. 3045, para. 18; Opinion of Advocate General Tizzano, *supra* note 123, at para. 24; Opinion of Advocate General Kokott, *supra* note 81, at para. 31; C. Ritter, *supra* note 59, at 11.

²¹⁰ See Ritter, *supra* note 59, at 11; Caro de Sousa, *supra* note 1, at 176.

²¹¹ The merging of the CJEU’s approach in relation to the second and third exception is to be welcomed as well. As mentioned, the *Guimont* principle is basically a more specific form of a *renvoi*. Abandoning the *Guimont* principle as a distinct category is therefore not to be pitied. See Ritter, *supra* note 59, at 12.

CJEU compels national courts to be more diligent in writing their request for a preliminary ruling.

G. Conclusion

The critical discussion of the CJEU case law on the purely internal situation doctrine and its exceptions show that there is a need for the CJEU to be stricter and more careful in defending its gates. The CJEU should apply its *Kleinwort Benson* criteria more stringently in relation to the *Dzodzi* and *Guimont* type of cases. The CJEU should thus signal to national courts that it is guarding its gates more intensely and that national courts should provide more detailed information as to the fulfillment of one of the three exceptions.²¹² Instead of turning the three exceptions into the rule, the CJEU should treat the three exceptions in the way they were originally envisaged: Exceptions. This stricter approach makes it necessary that the CJEU looks a bit more over the national judge's shoulder, which changes the cooperative dynamic by putting the CJEU into a more vertical position vis-à-vis national courts, as discussed in section B.²¹³ National courts can easily avoid an all too conflictual relationship by taking their responsibility offering the necessary information for the CJEU so as to avoid a CJEU that is primarily correcting national courts.

The recent Grand Chamber judgment in *Ullens de Schooten* is a step in the right direction "after many years of disorderly case law."²¹⁴ In that judgment, the CJEU makes clear that the onus is on the referring court to indicate specifically in the order for reference why any of the exceptions apply and what the "connecting factor" with EU law is.²¹⁵ In this context, the CJEU also points to Article 94 of the Rules of Procedure.²¹⁶ This provision stipulates the requirements for the content of the request for a preliminary ruling, including a summary of the subject-matter of the dispute and the relevant findings of fact, the national legal framework and the reasons for submitting a question. Even though this stricter approach of

²¹² One alternative proposal is the application of a *Schutznorm*. This doctrine does, however, not yet have a solid position in EU law, so it seems more logical that the CJEU base itself on its previous case law and builds on the earlier developed criteria. See Prechal, *supra* note 12 and *supra* note 105.

²¹³ See *supra* notes 33–36.

²¹⁴ See Daniel Sarmiento, *The Purely Internal Situation in Free Movement Rules. Some Clarity at Last from the CJEU*, EU Law Analysis, (Nov. 16, 2016), <https://eulawanalysis.blogspot.nl/2016/11/the-purely-internal-situation-in-free.html>.

²¹⁵ See ECJ, Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 54–55, Judgment of 15 November 2016; Joined Cases C-532/15 and ECJ, Case C-538/15, *Eurospan*, ECLI:EU:C:2016:932, paras. 46–48, Judgment of 8 December 2016.

²¹⁶ See *id.* respectively at paras. 55 and para. 47. For earlier references to this article in relation to the purely internal situations, see ECJ, Joined Cases C-692/15 to C-694/15, *Security Service v. Ministero dell'Interno*, ECLI:EU:C:2016:344, paras. 18, Judgment of 12 May 2016; Case C-246/14, *De Bellis*, ECLI:EU:C:2014:2291, Judgment of 15 October 2014.

the CJEU should be commended, it does not settle all problematic issues. This includes the problem that in several *Oosthoek* cases the CJEU simply declared questions admissible, because “it is by no means inconceivable” that undertakings established in other Member States were or are interested in offering the service.²¹⁷ It is still unclear which “specific factors” national courts have to consider. Especially with respect to services such a criterion is not really useful because there will almost always be a cross-border element. The CJEU should thus come up with more detailed criteria in determining whether there is a sufficient cross-border element that provides a link with EU law. It is also preferable that the CJEU decline jurisdiction when it is unclear whether economic operators from other Member States were affected, as in *Airport Shuttle Express* and *Venturini*.²¹⁸

A stricter approach from the CJEU does not necessarily mean that the CJEU should immediately declare a request inadmissible (or decline jurisdiction) when a national court fails to indicate the connecting factors and/or specify the factual and (national) legal context of the case in detail. If the CJEU rejects questions of national courts, who made considerable investments in writing the reference, all too easily, this could offend them. The CJEU should thus carefully reason why a particular reference is not dealt with substantively.²¹⁹ One solution in between would be that the CJEU makes better and more frequent use of Article 101 of the Rules of Procedure. This provision enables the CJEU to request the referring national court to provide clarification on those factual and legal elements that are insufficiently substantiated. So far, the CJEU has been reluctant to make use of this possibility.²²⁰ A more frequent use of Article 101 by the CJEU would at the same time also have the additional benefit of transforming the preliminary ruling procedure into a dialogue and would also give the national court the idea that its questions are taken seriously, even when they are declared inadmissible. Currently, the referring court is no longer involved in the court proceedings after sending its reference to Luxembourg. Dutch judges refer to the

²¹⁷ See *Tribuno Supremo*, Case C-168/14, *Grupo Itevelesa and others*, ECLI:EU:C:2015:685, para. 36, Judgment of 3 June 2015.

²¹⁸ See ECJ, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, ECLI:EU:C:2014:74, para. 48, Judgment of 13 Feb. 2014; ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, ECLI:EU:C:2013:791, para. 25–26, Judgment of 5 December 2013; Opinion of Advocate General Wahl, *supra* note 5, at para. 37.

²¹⁹ The CJEU did so in a relatively extensive judgment of 73 paragraphs in which it carefully explained why the questions were inadmissible. At the same time, the CJEU was willing to point to its previous judgments that would be helpful for the national court in resolving its questions. See ECJ, Case C-351/14, *Estrella Rodríguez Sánchez*, ECLI:EU:C:2016:447, Judgment of 16 June 2016.

²²⁰ In the five-year period from September 13, 2011, to September 13, 2016, only twenty judgments of the CJEU were found where the CJEU used this possibility. Searched *curia* for “request for clarification” as well as “Article 101,” “rules of procedure,” and “clarification.” One explanation for this reluctance could be that national procedural law might require the referring court to reopen the case at a national level in order to hear the parties. It is unclear whether this fear is justified. In one case, it took 1.5 months before the national court answered the request, in another only 1 month. See ECJ, Case C-347/12, *Wiering*, ECLI:EU:C:2014:300, para. 14, Judgment of 8 May 2014; ECJ, Case 351/14, *Estrella Rodríguez Sánchez*, ECLI:EU:C:2016:447, paras. 41–42 Judgment of 16 June 2016.

period leading up to the ruling of the CJEU as the “black hole” and some complain about the procedure as being a “one-way Q&A procedure.”²²¹ A more assertive CJEU and more responsible national courts would also mean that the CJEU could focus on and save its resources for cases where its ruling is really necessary.

²²¹See Marc de Werd, *Dynamics at Play in the EU Preliminary Ruling Procedure*, 22 MAASTRICHT J. EUR. & COMP. L. 1, 152 (2015).