Supreme
Court

JUDICIAL DIALOGUE BEFORE EU MEMBERSHIP

Ukraine’s Experience and Lessons for Future Preliminary References under Article 267 TFEU

Ian Bernaziuk, Doctor of Law, Professor
Judge of the Administrative Cassation Court of the Supreme Court (Ukraine), Scientific Expert, CEPEJ-GT-CYBERJUST (Council of Europe)

EUROPEAN JUDICIAL TRAINING NETWORK (EJTN)

AD/2026/09 — The Preliminary Ruling Procedure: Strengthening the Dialogue Between National Courts and the CJEU — Advanced

Court of Justice of the European Union, Luxembourg
22–23 October 2026

AGENDA

1. Article 267 TFEU: Purpose, Function and Judicial Responsibilities
2. The Supreme Court (Ukraine) and the Unity of Case Law
3. Exceptional Legal Problems: Mechanism and Criteria
4. Practical Experience of the Supreme Court (Ukraine)
5. Model Administrative Cases
6. Judicial Dialogue under Protocol No. 16 to the Convention
7. Two Ukrainian Advisory Opinion Procedures: From Request to Domestic Decision
8. Lessons from the Case Law of the Court of Justice of the European Union
9. Key Conclusions

Article 267 TFEU — A System of Judicial Cooperation

TFEU, Article 267 (ex Article 234 TEC) https://eur-lex.europa.eu/eli/treaty/tfeu_2016/art_267/oj

Article 267 TFEU establishes cooperation between national courts and the Court of Justice to ensure the uniform interpretation and application of EU law.

The Court of Justice (and, since October 2024, the General Court in certain specific areas) rules on the interpretation of the Treaties and on the validity and interpretation of acts of the EU institutions, bodies, offices and agencies.

The national court establishes the facts, applies the ruling and decides the dispute.

The Right and the Duty to Refer: Judicial Responsibility under Article 267 TFEU

TFEU, Article 267 https://eur-lex.europa.eu/eli/treaty/tfeu_2016/art_267/oj

A national court may request a preliminary ruling where a decision on a question of EU law is necessary to enable it to give judgment.

A court against whose decisions there is no judicial remedy under national law must refer such questions, subject to the exceptions recognised in the case law of the Court of Justice.

The Supreme Court (Ukraine): Ensuring the Unity of Case Law

Law of Ukraine No. 1402-VIII on the Judiciary and the Status of Judges (2016), Articles 36 and 45 https://zakon.rada.gov.ua/laws/show/1402-19#Text

The Supreme Court is the highest court in Ukraine's judicial system and ensures the consistency and uniformity of judicial practice.

Its Grand Chamber acts as a court of cassation in the cases defined by procedural law in order to ensure the uniform application of law.

The Supreme Court fulfils this systemic role by resolving legal questions that matter for an indefinite number of cases, not by correcting every individual decision.

Exceptional Legal Problems: The Ukrainian Mechanism for Developing the Law

Code of Administrative Procedure of Ukraine, Articles 346–347 https://zakon.rada.gov.ua/laws/show/2747-15#Text

Under Article 346(5), a cassation panel or chamber may transfer a case to the Grand Chamber where it raises an exceptional legal problem and the transfer is necessary for the development of law and uniform judicial practice.

The transfer requires a reasoned ruling. If the Grand Chamber finds no grounds for it, the case is returned and cannot be transferred again (Article 347(6)).

Unlike Article 267 TFEU, this mechanism transfers the entire pending case to another formation of the same court rather than requesting an interpretation from a separate supranational court.

Resolving Exceptional Legal Problems as a Means of Ensuring the Uniform Application of Law

Ian Bernaziuk, Resolving an Exceptional Legal Problem as a Means of Ensuring the Uniform Application of Law (Supreme Court, 2019, in Ukrainian)
https://supreme.court.gov.ua/supreme/pres-centr/zmi/655976

The exceptional legal problem mechanism reconciles individual adjudication with the Supreme Court's responsibility for legal certainty and the development of law.

A functional similarity exists between the Ukrainian referral mechanism and the advisory opinion procedure under Protocol No. 16 to the European Convention on Human Rights.

How to Identify an Exceptional Legal Problem: Quantitative and Qualitative Criteria

Sources: Grand Chamber of the Supreme Court (Ukraine), ruling of 4 July 2024, case No. 360/917/23 https://reyestr.court.gov.ua/Review/120232709
V. Kosovych, Pravo Ukrainy, 2020, No. 3, pp. 218–232 (in Ukrainian) https://doi.org/10.33498/louu-2020-03-218

Quantitative criterion: the problem arises not in a single case but in an indefinite number of existing or potential disputes.

Qualitative criteria: legislative ambiguity, legal gaps and the need for analogy, inconsistent case law (including directly conflicting cassation conclusions) and difficulties in ensuring proportionality.

The referring court must show not only that a legal problem exists, but that it is exceptional.

Supreme Court (Ukraine): Judicial Guarantees and Legal Certainty after Judicial Reform

Sources: Administrative Cassation Court, ruling of 16 August 2022, case No. 640/26846/20 https://reyestr.court.gov.ua/Review/105852414
Grand Chamber, judgment of 16 February 2023 https://reyestr.court.gov.ua/Review/109303277

The dispute concerned the calculation of judicial remuneration used to determine the lifetime maintenance of a retired judge following changes in Ukraine's judicial system.

The cassation panel identified an exceptional legal problem involving the interaction of successive legislative regimes and the need for consistent treatment of retired judges.

The Grand Chamber accepted the case but remitted it on procedural grounds (wrong defendant), without ruling on the exceptional problem (16 February 2023).

Supreme Court (Ukraine): Social Protection and Conflicting Legislative Standards

Sources: Administrative Cassation Court, ruling of 17 January 2024, case No. 240/19227/21 https://reyestr.court.gov.ua/Review/116396696
Grand Chamber, judgment of 4 April 2024 https://reyestr.court.gov.ua/Review/118297146

The case concerned pension supplements for non-working pensioners residing in territories affected by radioactive contamination following the Chornobyl disaster.

The legal problem involved the conflict between social protection legislation and subsequent statutory rules limiting the use of the minimum wage as a calculation basis.

The Grand Chamber accepted the case; its judgment of 4 April 2024 has since been applied by the Administrative Cassation Court in numerous similar cases.

Supreme Court (Ukraine): Access to Court and the Protection of Vulnerable Persons

Sources: Administrative Cassation Court, ruling of 26 April 2024, case No. 360/917/23 https://reyestr.court.gov.ua/Review/118662287
Grand Chamber, ruling of 4 July 2024 https://reyestr.court.gov.ua/Review/120232709

The dispute concerned statutory financial assistance for graduates belonging to the category of orphans and children deprived of parental care.

The cassation panel identified an exceptional legal problem concerning the scope of prosecutorial representation of State interests where the effective protection of vulnerable persons might otherwise be at risk.

The Grand Chamber returned the case: in its view, the exceptional character of the problem had not been substantiated, and the divergence could be resolved within the Administrative Cassation Court. The panel decided the case on 2 October 2024.

Model Administrative Cases: Preventing Inconsistent Judgments Before They Multiply

Code of Administrative Procedure of Ukraine, Articles 290–291 https://zakon.rada.gov.ua/laws/show/2747-15#Text

Where numerous typical administrative cases are pending, a first-instance court may request the Supreme Court to hear a model case as a court of first instance.

The model judgment provides legal conclusions to be taken into account when deciding typical cases with corresponding characteristics.

This early-response model of judicial coordination is not a preliminary reference procedure within the meaning of Article 267 TFEU.

Protocol No. 16: Ukraine’s Existing Mechanism of International Judicial Dialogue

Protocol No. 16 to the Convention (CETS No. 214), official Ukrainian text https://zakon.rada.gov.ua/laws/show/994_002-13#Text

Protocol No. 16 entered into force for Ukraine on 1 August 2018. Ukraine designated the Supreme Court as the court authorised to request advisory opinions.

The procedure allows designated highest courts to seek advisory opinions on questions of principle concerning the interpretation or application of Convention rights in pending cases.

Unlike preliminary rulings under Article 267 TFEU, advisory opinions are not binding (Article 5). In both mechanisms, the national court decides the dispute.

From Ratification to Practice: Ukraine’s Implementation of Protocol No. 16

Sources: Law of Ukraine No. 2156-VIII of 5 October 2017 ratifying Protocols Nos. 15 and 16 https://zakon.rada.gov.ua/laws/show/2156-19#Text

Ratification secured Ukraine’s participation in the advisory opinion mechanism, but domestic implementation raised questions about the competent judicial formation, referral criteria and suspension of proceedings.

Draft Law No. 3120 (2020), intended to regulate this domestic procedure, has not been adopted.

Despite this gap, the Supreme Court submitted its first request in June 2025 and its second in December 2025.

Advisory Opinion I: Religious Autonomy, the Right to a Home and Access to Court

Grand Chamber of the Supreme Court (Ukraine), ruling of 25 June 2025, case No. 607/15144/20 https://reyestr.court.gov.ua/Review/128876517

The dispute concerned a former nun's right to use a monastic cell and the relationship between national civil law and the internal autonomy of religious organisations.

The Grand Chamber asked whether monastic premises constitute a "home" under Article 8 of the Convention and whether national courts have jurisdiction over such a dispute.

The Panel of the ECtHR Grand Chamber accepted the request on 15 September 2025.

European Court of Human Rights: The Status of Monastic Premises and the Right of Access to Court

ECtHR [GC], Advisory Opinion on the status of monastic premises and the jurisdiction of the courts to examine a dispute concerning them, Request No. P16-2025-001, 5 March 2026 https://hudoc.echr.coe.int/eng?i=003-8474673-12010815

Monastic premises, including cells, may constitute a “home” under Article 8, read in the light of Article 9, where a person has sufficient and continuous links to them.

The applicability of Article 6 depends on whether the asserted civil right is at least arguable under domestic law, an assessment primarily entrusted to the national court.

The opinion was delivered unanimously.

After the Advisory Opinion: The Grand Chamber's Judgment and Dissent

Sources: Grand Chamber of the Supreme Court (Ukraine), judgment of 9 September 2026, case No. 607/15144/20 https://reyestr.court.gov.ua/Review/139924670

Dissenting opinion of six judges of the Grand Chamber https://reyestr.court.gov.ua/Review/140021532

The Grand Chamber held that the dispute fell within the jurisdiction of national civil courts, as the claimant relied on secular law and sought a remedy known to national civil law.

It nevertheless dismissed the claim: the cell was not ordinary housing, and without an independent civil-law title, granting access would interfere with the monastery's autonomy protected by Article 9.

Six judges dissented. In their view, read in the light of the advisory opinion, the dispute was an internal church matter outside national jurisdiction, and the proceedings should have been closed.

Advisory Opinion II: A Statutory Tax Penalty of UAH 63.86 Million

Administrative Cassation Court, ruling of 4 December 2025, case No. 240/3843/24 https://reyestr.court.gov.ua/Review/132336169

The dispute arose from a statutory penalty of UAH 63,860,222.48 imposed for selling fuel and alcoholic beverages through a duly registered cash register that had not been included in the relevant retail licences.

The Supreme Court asked whether national courts may apply a lower penalty than that fixed by mandatory legislation and how proportionality should be assessed under Article 1 of Protocol No. 1.

The Panel of the ECtHR Grand Chamber accepted the request on 16 February 2026.

European Court of Human Rights: Proportionality of a Fixed-Rate Tax Penalty

ECtHR [GC], Advisory opinion on the proportionality of a fixed-rate tax penalty and whether a national court is empowered to apply a lower penalty, Request No. P16-2026-001, 29 September 2026 https://hudoc.echr.coe.int/eng?i=003-8648077-12325389

Article 1 of Protocol No. 1 requires the domestic legal system, considered as a whole, to provide safeguards against an individual and excessive burden.

The Convention does not prohibit automatic statutory penalties where the sanction itself is proportionate, and it does not prescribe a specific mechanism for proportionality review.

Whether national courts may reduce a statutory sanction is a matter of domestic law; the Convention neither confers nor requires such a power.

Returning to National Proceedings: Judicial Responsibility after an Advisory Opinion

Administrative Cassation Court, ruling of 7 October 2026, case No. 240/3843/24 https://reyestr.court.gov.ua/Review/140400671

Following the advisory opinion of 29 September 2026, the Supreme Court resumed the proceedings.

The dispute remains for the national court to decide under domestic law, taking into account the Convention standards clarified by the ECtHR.

Court of Justice of the European Union: The Duty to Refer and the Duty to Give Reasons

CJEU [GC], Consorzio Italian Management and Catania Multiservizi, C-561/19, 6 October 2021, EU:C:2021:799 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0561

A court of last instance must refer a necessary question of EU law unless the question is irrelevant, the provision has already been interpreted by the Court, or the correct interpretation leaves no room for reasonable doubt.

When declining to refer, the court must give reasons showing which of these exceptions applies.

Court of Justice of the European Union: Cassation Filters and the Obligation to Consider a Preliminary Reference

CJEU [GC], KUBERA, C-144/23, 15 October 2024, EU:C:2024:881 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62023CJ0144

The Court examined the obligations of a supreme court when deciding whether to grant leave to appeal in a case raising a question of EU law.

National cassation filters cannot exempt a court of last instance from examining whether a preliminary reference is required under Article 267 TFEU.

Where a party seeks a reference, refusing leave to appeal requires reasons why no reference is needed.

Court of Justice of the European Union: Judicial Independence and the Freedom to Refer

Sources: CJEU [GC], IS (Illegality of the Order for Reference), C-564/19, 23 November 2021, EU:C:2021:949 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0564

CJEU [GC], RS (Effect of the Decisions of a Constitutional Court), C-430/21, 22 February 2022, EU:C:2022:99 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CJ0430

In IS, the Court held that Article 267 TFEU precludes a higher court from declaring a request for a preliminary ruling unlawful and precludes disciplinary proceedings against the referring judge.

In RS, the Court held that national judges must be able to examine the compatibility with EU law of legislation upheld by a constitutional court, without risking disciplinary liability.

Court of Justice of the European Union: Judicial Responsibility for Failure to Refer

CJEU [GC], Ferreira da Silva e Brito and Others (II), C-293/24, 8 September 2026, EU:C:2026:723 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62024CJ0293

The Court examined State liability for damage caused by an alleged breach of EU law attributable to a court of last instance, including an alleged failure to make a preliminary reference.

The assessment must take account of the legal and interpretative framework existing when the national court delivered the decision alleged to have caused the damage.

The case follows Ferreira da Silva e Brito I (C-160/14, 2015): an unjustified failure to refer may contribute to State liability where the conditions for a sufficiently serious breach of EU law are met.

KEY CONCLUSIONS

1. Judicial dialogue strengthens legal certainty. Referral mechanisms do not transfer judicial responsibility; they secure authoritative interpretation where legal uncertainty affects more than one case.

2. Ukraine already has relevant experience. Exceptional legal problems, model administrative cases and advisory opinions under Protocol No. 16 address fundamental legal questions in different ways.

3. International interpretation does not replace national adjudication. In both advisory opinion procedures initiated by the Supreme Court (Ukraine), the ECtHR clarified the Convention standards, while the outcome of the dispute remained for the national court.

4. Article 267 TFEU requires independent and reasoned decisions. The Court of Justice's case law on cassation filters, reason-giving, judicial independence and State liability provides essential guidance for Ukraine's future participation.

5. Preparation should begin before the first reference. Judicial training should develop the ability to identify relevant EU law, formulate questions, examine existing case law and give reasoned decisions on whether to refer.

PREVIOUS RESEARCH AND AUTHOR'S CONTRIBUTIONS

1. Bernaziuk Ian. Resolving an Exceptional Legal Problem as a Means of Ensuring the Uniform Application of Law (2019, in Ukrainian) https://supreme.court.gov.ua/supreme/pres-centr/zmi/655976
2. Bernaziuk Ian. The Binding Effect (Preclusive Effect) of Judicial Decisions in Administrative Proceedings (2024, in Ukrainian) https://constitutionalist.com.ua/obov-iazkovist-urakhuvannia-preiudytsijnist-sudovykh-rishen-v-administratyvnomu-sudochynstvi-2/
3. Bernaziuk Ian. The Principle of Proportionality as a Component of the Rule of Law (2024) https://court.gov.ua/storage/portal/supreme/prezentacii_2024/114_principle_of_proportionality_bernaziuk.pdf
4. Bernaziuk Ian. Actio Popularis and the Guaranteed Right of Access to Justice (2024) https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2024_prezent/actio_popularis_bernaziuk.pdf

Supreme
Court

Thanks for your attention!