

Preliminary rulings in criminal matters after Lisbon: the experience of Estonian courts

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Abstract: This article examines the operation and limits of the preliminary reference procedure under Article 267 of the TFEU in criminal proceedings, drawing on the experience of Estonian courts following the entry into force of the Lisbon Treaty. Based on a comprehensive analysis of all preliminary references submitted from Estonia in criminal matters, as well as cases in which references were requested but declined, the article identifies a clear institutional pattern: in practice, preliminary references have been submitted exclusively by the Supreme Court, while lower courts have refrained from doing so. Although this concentration may enhance doctrinal coherence, it also narrows the multi-level judicial dialogue envisaged by Article 267 of the TFEU. The Estonian experience further reveals significant variation in the practical and normative impact of preliminary rulings. Some decisions have produced systemic consequences, reshaping investigative practice and prompting legislative reform even where the outcome of the referring case remained unchanged, whereas others have had only dispute-specific effects. Particular attention is devoted to the

temporal dimension of the preliminary reference procedure. Under Estonian law, the submission of a preliminary reference does not suspend limitation periods, creating a risk that proceedings may become time-barred before the Court of Justice delivers its judgement. This structural feature may undermine the dispute-resolving function of Article 267 of the TFEU and may thereby influence judicial willingness to refer. By comparing cases in which references were made with those in which they were declined, the article argues that the assessment of necessity under Article 267 of the TFEU cannot be reduced to a mechanical application of the CILFIT and CIM criteria and, instead, requires a context-sensitive exercise of judicial judgement, balancing systemic importance, case-specific relevance, and procedural constraints. The Estonian experience thus illustrates both the value and the practical limits of the preliminary reference mechanism in criminal proceedings.

Keywords: *Article 267 of the TFEU, criminal procedure, judicial discretion, limitation periods, preliminary reference procedure, Supreme Court of Estonia*

1. Introduction: the role of preliminary rulings in European criminal law after the Lisbon Treaty

Since the Treaty of Lisbon entered into force, preliminary rulings of the Court of Justice of the European Union (CJEU) have assumed a central role in the interpretation and application of EU law in criminal matters. This development is closely linked to the expansion of the Court's jurisdiction following the end of the transitional period on 1 December 2014, when the CJEU acquired full competence over matters previously falling within the former Third Pillar. Prior to that date, judicial review in criminal law was limited, and access to the preliminary ruling procedure was significantly narrower than that applicable to First Pillar instruments (Baker, 2015).

With the extension of its jurisdiction, the preliminary ruling mechanism has taken on broader constitutional significance, becoming a “cornerstone of EU constitutional law” and exerting considerable influence on the development of both procedural and substantive principles of European criminal law across the Member States (Passalacqua and Costamagna, 2023; Heffernan, 2023).

Pursuant to Article 267 of the TFEU, the CJEU has jurisdiction to give preliminary rulings, at the request of national courts, on the interpretation of the Treaties and the validity and interpretation of acts of the institutions. Through this mechanism, national courts at all levels may refer questions arising in pending proceedings in order to obtain authoritative guidance on EU law. Unlike the primarily *ex post* nature of the Strasbourg system, the preliminary ruling procedure allows issues of EU law to be clarified within ongoing national proceedings, thereby integrating judicial dialogue directly into domestic adjudication (Heard and Shaeffer, 2011).

Although Article 267 of the TFEU formally provides for an urgent preliminary ruling procedure (PPU), Estonian experience demonstrates that even ordinary preliminary ruling proceedings in criminal matters may last between one and two years. Where domestic limitation periods continue to run during that time, the availability of the PPU does not in itself eliminate the structural tension between the temporal design of Article 267 of the TFEU and the time-sensitive logic of criminal adjudication.

At the same time, the preliminary ruling system reflects structural limitations inherent in the division of competences between the CJEU and national courts. Individuals cannot compel a national court to make a reference, even where EU law is invoked. Article 267(3) of the TFEU nevertheless imposes an obligation on courts of last instance to refer questions of EU law that are necessary for the resolution of the dispute. In its landmark judgement in ‘CILFIT and Lanificio di Gavardo SpA v. Ministry of Health’ (1982), the Court of Justice held that a court of last instance must refer where the question is relevant, has not previously been answered, and is not a case of *acte clair*. Four decades later, in ‘Consorzio Italian Management e Catania Multiservizi’ (2021), the Court clarified that national courts must give reasons when declining to refer.

While the ‘Consorzio Italian Management’ case strengthened the duty to provide reasons, it did not eliminate the margin of judgement inherent in the CILFIT doctrine. As Maher observes, “despite the categorical nature of Article 267 TFEU, courts of last resort do exercise discretion under the CILFIT test” (Maher, 2022, p. 269). The decision whether to request a preliminary ruling therefore remains embedded in national judicial assessment, with the consequence that, where no reference is made, it remains uncertain how the CJEU might have interpreted EU law in the case concerned.

Moreover, even where a reference is made, the referring court determines the factual and legal framework within which the CJEU operates. The order for

reference constitutes the primary source through which the Court becomes acquainted with the dispute. Although the CJEU may seek clarification, it rarely challenges the referring Court's description of national law or of the facts. This procedural configuration underscores the largely unidirectional character of the preliminary reference procedure and highlights the significant influence of national courts over both the decision to refer and the framing of the questions submitted (Passalacqua and Costamagna, 2023, pp. 330–334, 343).

In giving a preliminary ruling, the CJEU does not determine whether a Member State has infringed EU law in the abstract. Rather, it provides authoritative guidance on interpretation, leaving it to the national court to apply that interpretation, disapply conflicting national provisions where necessary, and ensure that the outcome of the proceedings complies with EU law. The normative impact of a preliminary ruling may therefore vary considerably: in some instances, it produces systemic legislative change; in others, it clarifies a narrow issue with limited spill-over effects.

This article analyses the role and significance of preliminary rulings of the CJEU in Estonian criminal proceedings. For the purposes of this study, the term 'criminal proceedings' is understood broadly to include misdemeanour proceedings, which in the Estonian legal system constitute a category of minor criminal offences capable of resulting in a finding of guilt and the imposition of a penalty. The article examines all preliminary rulings delivered in criminal matters referred from Estonia to date, as well as cases in which a request for a preliminary ruling was raised before national courts but ultimately not submitted to the CJEU.

The analysis seeks to assess the extent to which preliminary rulings have acted as catalysts for the development of Estonian criminal law and procedure, the intensity of their systemic impact, and the practical challenges encountered in the operation of the preliminary ruling mechanism in criminal proceedings. By focusing on the interaction between the preliminary ruling mechanism and domestic procedural constraints—particularly limitation rules and evidentiary doctrine—this article also seeks to contribute to the broader discussion on the practical effectiveness of Article 267 of the TFEU in criminal matters. It should be noted that, while references submitted to the CJEU are systematically recorded, no comprehensive data exist concerning requests raised before lower courts but not referred. The analysis therefore necessarily relies on publicly available Supreme Court case law.

2. Preliminary references from Estonia in criminal matters: a general overview

Since the entry into force of the CJEU's expanded post-Lisbon jurisdiction, a small but significant body of preliminary rulings in criminal matters has emerged from Estonia. To date, all four of such requests formally submitted to the CJEU in criminal cases have originated from the Supreme Court of Estonia, the court of last instance. This stands in contrast to civil and administrative proceedings, in which courts of first and second instance have also engaged with the preliminary ruling mechanism.

Although limited in number, these preliminary references span a broad range of substantive and procedural issues, including access to electronic communications data in criminal investigations ('H.K. v. Prokuratuur', 2021), mutual recognition of probation measures ('A.P. (Mesures de probation)' 2020), the personal scope of recovery obligations in the context of EU agricultural support ('R.M. and E.M. v. Eesti Vabariik', 2024), and the interpretation of EU rules on controls of cash entering or leaving the Union ('Maksu- ja Tolliamet v. UT (Alenopik)', 2025). Taken together, they provide a valuable empirical foundation for assessing how the preliminary ruling mechanism operates in practice within the Estonian criminal justice system and how the CJEU has influenced national criminal law and procedure.

Not all contentious issues raised by the parties during national proceedings have resulted in a formal request to the CJEU. In at least one significant case, the defence explicitly sought a reference to the CJEU, yet the Supreme Court ultimately decided not to submit the question (Supreme Court of Estonia, 2016b).

Beyond their substantive scope, the Estonian preliminary references also reveal important insights into the temporal operation of the preliminary ruling mechanism in criminal proceedings. The time elapsed between the submission of a request and the delivery of the CJEU's judgement has varied considerably. In the 'Prokuratuur' case, the judgement was delivered approximately two years and four months after the request was lodged, whereas in the 'A.P.' case, the corresponding period was just over one year. In the 'R.M. and E.M.' case, the proceedings before the Court lasted around one year and eight months, while in the most recent case, 'Alenopik', the judgement was delivered after approximately one year and five months. These timeframes suggest that, while the preliminary ruling procedure

does not offer an immediate resolution of legal uncertainty, it has generally operated within roughly one to two years in Estonian criminal cases. This temporal dimension is particularly relevant in criminal proceedings, where the duration of proceedings can directly affect individual rights and the effectiveness of judicial protection.

Against this background, the following section provides a detailed examination of each of the Estonian criminal cases that have either resulted in a preliminary ruling or raised questions concerning the use of the preliminary ruling mechanism. By analysing the questions referred, the reasoning of the CJEU, and the subsequent responses of the Supreme Court of Estonia, the article seeks to assess both the scope and the intensity of the impact of preliminary rulings on domestic criminal law, as well as the implications of decisions not to request a ruling.

3. Case-law analysis: preliminary rulings in Estonian criminal proceedings

3.1 A systemic turning point in criminal procedure: access to communications data (‘H.K. v. Prokuratuur’, 2021)

The first preliminary reference from Estonia in criminal proceedings was submitted in November 2018 in ‘H.K. v. Prokuratuur’ (2021), a case concerning access by public authorities to traffic and location data in criminal proceedings. The reference arose from criminal proceedings in which the prosecution relied, *inter alia*, on communications data obtained during the pre-trial investigation pursuant to a general data-retention obligation under national law and accessed on the basis of authorisations issued by the prosecution.

The defence challenged the admissibility of those data, arguing that both the general obligation to retain traffic and location data laid down in Section 111¹(2) of the *Electronic Communications Act* (ECA) and the authorisation mechanism provided for in Section 90¹(2) of the *Code of Criminal Procedure* (CCP) were incompatible with Article 15 of ‘Council directive 2002/58/EC’ (2002) and the settled case law of the CJEU concerning the general and indiscriminate retention of communications data. The Supreme Court admitted the appeal on points of law on 30 May 2018 and, on 12 November 2018, decided to stay the proceedings and submit a request for a preliminary ruling.

In its reference, the Supreme Court sought clarification on three interrelated issues: whether access to traffic and location data in criminal proceedings constitutes a serious interference with fundamental rights; whether the intensity of such interference may depend on the volume of data accessed or the duration of retention; and whether a public prosecutor may qualify as an “independent administrative authority” for the purposes of prior review under ‘Council directive 2002/58/EC’ (2002).

In its judgement of 2 March 2021, the CJEU held that traffic and location data enable very precise conclusions to be drawn regarding private life and therefore constitute a serious interference with fundamental rights. The Court further clarified that a public prosecutor does not satisfy the requirement of independence for the purposes of such prior review.

Following the preliminary ruling, the Supreme Court of Estonia delivered its final judgement on 18 June 2021. It held that Section 111¹(2) of the ECA, which imposed a general and indiscriminate obligation to retain traffic and location data, was incompatible with EU law. It further found that Section 90¹(2) of the CCP was likewise incompatible with EU law insofar as it permitted access to such data solely on the basis of authorisation by the prosecution. Both provisions were therefore disapplied in the resolution of the case.

At the same time, the Supreme Court emphasised that incompatibility with EU law does not automatically render evidence inadmissible under national law. Admissibility had to be assessed on the basis of domestic evidentiary rules, taking into account the seriousness of the infringement, the degree of fault attributable to the authorities, the gravity of the offence, and whether the same information could have been obtained by other lawful means. Applying these criteria, the Court excluded all communications data obtained on the basis of prosecutorial authorisations, which were found to be insufficiently reasoned and in breach of the requirement of strict necessity. Nevertheless, the conviction was upheld, as the accused’s guilt had been established to a significant extent on the basis of other evidence independent of the contested data.

Despite not affecting the outcome of the individual proceedings, the judgement had immediate and far-reaching consequences for Estonian criminal procedure.

In practice, however, it soon became apparent that the tightening of procedural safeguards did not resolve the structural incompatibility

underlying the retention regime. In its order of 13 May 2024 in criminal case No. 1-24-1694, the Tartu Court of Appeal emphasised that even where requests for communications data are made in compliance with the CCP and on the basis of judicial authorisation, this does not render their use lawful where the legal basis for retention itself is incompatible with EU law. The Court found that the data continued to be retained pursuant to a general retention obligation imposed by the State rather than for the provider's independent commercial purposes, and that such retention therefore remained unlawful (see *Explanatory memorandum*, 2025, p. 3).

As a practical consequence, the prosecution refrained from requesting communications data, as no legally secure distinction could be drawn between lawfully and unlawfully retained data (see *Explanatory memorandum*, 2025, p. 3).

This situation led to the preparation of a new legislative solution. As a result of the amendment, it will no longer be permitted in criminal and misdemeanour proceedings to use communications data retained by service providers pursuant to a general and indiscriminate retention obligation. The amendment provides that law enforcement authorities will henceforth be entitled in criminal and misdemeanour proceedings to request and use only those communications data that service providers retain for their own commercial purposes (*Explanatory memorandum*, 2025, p. 1). At the time of writing, however, the draft remains pending and has not yet entered into force.

Taken together, the 'Prokuratuur' case illustrates a structural paradox inherent in the preliminary ruling mechanism. While the interpretation of EU law provided by the CJEU produced profound systemic effects on national criminal procedure, it had no bearing on the outcome of the referring case itself.

This paradox raises the question of whether a preliminary reference was objectively necessary. Article 267 of the TFEU does not permit abstract clarification detached from a concrete dispute; the interpretation sought must be necessary for resolving the case before the referring court ('Foglia v. Novello', 1980, para. 11; 'CILFIT', 1982, para. 10; 'Consorzio Italian Management e Catania Multiservizi', 2021, para. 51). Even courts of last instance are not obliged to refer where the EU-law issue cannot affect the outcome, subject to an obligation to give adequate reasons ('Consorzio Italian Management e Catania Multiservizi', 2021, para. 51).

In the 'Prokuratuur' case, however, the conviction did not depend on the

contested communications data. This raises a normative question as to whether a reference is justified where the interpretation sought has no bearing on the outcome of the case, notwithstanding its broader systemic impact.

3.2 Preliminary rulings with a more limited scope: sector-specific clarifications

In contrast to ‘Prokuratuur’, which had a far-reaching impact on criminal procedure and the protection of fundamental rights, the remaining three preliminary rulings referred from Estonia addressed more narrowly defined legal issues. While significant within their respective regulatory contexts, these cases primarily led to sector-specific clarifications rather than systemic changes. Two of the preliminary rulings (in the cases of ‘R.M. and E.M.’ and ‘Alenopik’) concerned the application of specific EU regulatory frameworks within (quasi-)criminal proceedings. By contrast, one case (‘A.P.’) concerned mutual recognition and supervision of probation measures, focusing on the enforcement phase of criminal sanctions rather than the determination of criminal liability.

3.2.1 Application of EU regulatory frameworks in criminal proceedings (‘R.M. and E.M. v. Eesti Vabariik’, 2024; ‘Alenopik’, 2025)

While the preliminary reference in the case ‘R.M. and E.M.’ did not concern the determination of criminal liability as such but rather financial liability arising from criminal conduct, the reference in ‘Alenopik’ concerned a question of EU law that was directly decisive for establishing misdemeanour liability.

In the ‘Alenopik’ case, the Supreme Court of Estonia submitted a request in December 2023 concerning the interpretation of Article 3(1) of ‘Council regulation (EU) 2018/1672’ on controls of cash entering or leaving the Union. The issue was how to determine the applicable exchange rate where the European Central Bank (ECB) does not publish one. The case arose from misdemeanour proceedings concerning cross-border transport of cash at the EU’s external border. The defendant disputed the exchange rate used by the Estonian Tax and Customs Board to assess whether the 10,000 euro declaration threshold in Article 3(1) had been exceeded. As the ECB does not publish an exchange rate for the Ukrainian hryvnia, the Supreme Court considered the interpretation of EU law decisive for determining liability.

In its judgement of 30 April 2025, the CJEU held that, where the ECB does not publish an exchange rate for a particular currency, it falls on the Member States to determine the applicable rate, provided that it corresponds to the exchange rates used in practice for converting the currency into euros.

However, the preliminary ruling ultimately had no bearing on the outcome of the individual case. By the time the judgement was delivered, the limitation period for the misdemeanour proceedings had expired. Under Estonian law, limitation periods are not suspended while a case is pending before the CJEU. Consequently, the Supreme Court terminated the proceedings on 22 May 2025 (Supreme Court of Estonia, 2025a).

The earlier case of ‘R.M. and E.M.’ concerned whether EU law permits recovery of fraudulently obtained agricultural subsidies not only from the formal beneficiary but also from individuals who intentionally participated in the fraud. The reference arose from criminal proceedings in which the defendants had been convicted of subsidy fraud involving EU-funded agricultural support.

On 29 February 2024, the CJEU held that Articles 54 and 56 of ‘Council regulation (EU) 1306/2013’ (2013), read in conjunction with Article 35(6) of ‘Commission delegated regulation (EU) 640/2014’ (2014) and Article 7 of ‘Council regulation 2988/95’ (1995), allow recovery from persons who intentionally participated in the irregularity. Following the preliminary ruling, the Supreme Court confirmed, in its judgement of 26 April 2024, that the conditions for recovery were satisfied (Supreme Court of Estonia, 2024).

Taken together, ‘Alenopik’ and ‘R.M. and E.M.’ illustrate the ways in which EU regulatory frameworks intersect with national criminal proceedings. Although their systemic impact was limited compared to the case of ‘Prokuratuur’, these rulings contributed to legal certainty within their respective sectors. At the same time, the ‘Alenopik’ case exposed a structural tension: even where the CJEU provides decisive interpretative guidance, the duration of the preliminary ruling procedure may render that guidance ineffective in the individual case because of limitation.

Notably, in both groups of cases, the initiative to request a preliminary ruling came from the Supreme Court rather than from the parties. This reflects the fact that EU-law issues in criminal proceedings often arise indirectly through sector-specific regulatory frameworks. The temporal implications of a reference—particularly the absence of suspension of limitation—may also discourage parties from seeking a reference. The Supreme Court’s *ex*

officio engagement thus highlights its role in safeguarding the uniform interpretation of EU law.

3.2.2 Mutual recognition and the enforcement phase of criminal sanctions ('A.P.', 2020)

On 11 December 2018, the Supreme Court of Estonia submitted a request for a preliminary ruling concerning the interpretation of Council Framework Decision 2008/947/JHA (2008) on mutual recognition of probation measures. The question was whether a custodial sentence suspended solely on the condition of refraining from committing a new intentional offence during the probation period falls within the material scope of the Framework Decision.

The case arose from proceedings concerning the recognition and enforcement in Estonia of a criminal judgement delivered by a court of another Member State. The Supreme Court questioned whether such a conditional suspension constituted a 'probation measure' or an 'alternative sanction' within the meaning of the Framework Decision.

In its judgement of 26 March 2020, the CJEU held that Article 1(2), read together with Article 4(1)(d), must be interpreted as covering such a suspension, provided that the obligation is apparent from the judgement or a related decision. It is for the issuing Member State to determine the conditions of suspension, enabling the executing Member State to identify the relevant probation measures.

Following the preliminary ruling, the Supreme Court of Estonia (2020a), in its decision of 20 May 2020, accepted that the Framework Decision was applicable. However, by the time the case was resolved, the probation period had expired, and the proceedings were terminated. Thus, as in the 'Alenopik' case, the temporal dimension limited the practical impact of the ruling in the individual case.

3.3 Requests for preliminary rulings not referred: the boundaries of judicial engagement

This section examines instances in which requests for preliminary rulings were raised before the Supreme Court but did not result in a reference to the CJEU. Five such decisions were identified. One raises principled issues concerning EU procedural rights; the others concern narrower or procedurally driven situations.

Given the structure of the Estonian system of appeals, it is reasonable to assume that most legally significant requests in criminal matters reach the

Supreme Court. The cases discussed therefore provide a representative, albeit limited, picture of non-use by a court of last instance.

3.3.1 A principled refusal to refer

The Supreme Court's order of 4 May 2016 arose from pre-trial detention proceedings against A.K., who had been detained on suspicion of accepting a bribe and committing money laundering (Supreme Court of Estonia, 2016a). The detention order issued by the county court was challenged by the defence before the Court of Appeal.

One of the defence's central arguments concerned access to the evidence underlying the detention request. According to the defence, the county court had failed to allow access to the evidence on which the prosecutor relied in seeking detention. In the defence's view, this violated the right to effectively challenge detention under Article 5(4) of the *European Convention of Human Rights* (ECHR) and Article 7(1) of 'Council directive 2012/13/EU' (2012) on the right to information in criminal proceedings.

The Court of Appeal rejected the argument. It held that, under Estonian law, the decision whether to grant access to evidence in detention proceedings did not fall within the court's competence. Pursuant to Section 341(3) of the CCP, access to evidence relevant to detention was to be decided by the prosecutor. The court nevertheless emphasised that the detention request and detention order had to contain sufficient information to enable the suspect effectively to exercise their defence rights and challenge detention, and it found that this requirement had been satisfied.

Before the Supreme Court, the defence reiterated that the detention proceedings had not been fair. Without knowing the content of the evidence relied upon by the prosecution, the suspect could not effectively contest the detention request. The defence further argued that leaving access to evidence solely to the discretion of the prosecutor—who had an interest in securing detention—was incompatible with the principle of equality of arms. Section 341(3) of the CCP was therefore said to be contrary to Article 7(1) of 'Council directive 2012/13/EU' (2012) and to require disapplication. Alternatively, a preliminary ruling should be sought from the CJEU on the interpretation of Article 7(1).

The Supreme Court identified the central issue as to whether, and to what extent, access to evidence relied upon in detention proceedings may be restricted. It accepted that such access is closely linked to the right to a

fair trial, the right to be heard, and the principle of equality of arms, as recognised in ECtHR case law. At the same time, it held that this right is not absolute and that, at the pre-trial stage, restrictions may be justified to protect the effectiveness of the investigation, prevent interference with evidence, or safeguard the rights of others (Supreme Court of Estonia, 2016b, pp. 11–12).

In examining Article 7 of ‘Council directive 2012/13/EU’ (2012), the Supreme Court concluded that, read together with Article 7(4) and the recitals, the directive permits partial restrictions on access to evidence where disclosure would seriously endanger fundamental rights or where it is strictly necessary to protect an important public interest. Interpreting the directive in the light of ECtHR case law, the Court found no unresolved doubts as to its meaning and therefore declined to request a preliminary ruling. It upheld the compatibility of Section 341(3) of the CCP with EU law, while emphasising that courts remain competent to assess the lawfulness and proportionality of any restriction and, where necessary, to disregard evidence to which access has been unjustifiably restricted when deciding on detention (Supreme Court of Estonia, 2016b, pp. 14 et seq.).

The Supreme Court’s refusal to request a preliminary ruling has been the subject of considerable critical discussion in Estonian legal scholarship. Commentators have questioned whether the Court’s interpretation of Article 7(1) of ‘Council directive 2012/13/EU’ could be regarded as sufficiently clear to dispense with a reference under Article 267(3) of the TFEU.

A central point of criticism concerns the structure of Article 7 of the Council directive. While Article 7(4) expressly permits restrictions in certain circumstances, that exception is formulated with reference to paragraphs 2 and 3, which regulate access to evidence more generally. Article 7(1), by contrast, specifically concerns access to documents essential for effectively challenging detention and is not expressly subject to the same limitation. On this basis, it has been argued that the Supreme Court’s conclusion—that access to evidence relevant to detention may also be restricted under Article 7(1)—represents only one possible interpretation of the directive (Soo, 2016; Lõhmus, 2016).

Scholars have further noted that, at the time of the order, Article 7 of ‘Council directive 2012/13/EU’ (2012) had not yet been interpreted by the CJEU. The provision could therefore not be regarded as *acte éclairé*. Nor, it is argued, did the case meet the conditions of *acte clair*. The matter was

ultimately decided by the full composition of the Criminal Chamber following disagreements within the smaller panel, suggesting that the interpretation was not self-evident. The order relied on extensive systematic interpretation, including recitals (Soo, 2016; Lõhmus, 2016), even though the CJEU case law makes it clear that recitals cannot override the wording of operative provisions. It has therefore been suggested that, where grammatical and systematic interpretations point in different directions, clarification should have been sought from the CJEU (Soo, 2016).

A further strand of criticism relates to the Estonian Supreme Court's reliance on the ECtHR case law. While Article 52(3) of the Charter requires Charter rights corresponding to ECHR rights to be given the same meaning and scope, EU law may afford more extensive protection. It has therefore been argued that the Court should have considered independently whether Article 7(1) of 'Council directive 2012/13/EU' establishes a higher standard than Article 5(4) of the ECHR (Soo, 2016; Lõhmus, 2016).

Importantly, the circumstances of the case did not compel refusal. Although the applicant had been released from detention by the time the order was delivered, the interpretative issue was not rendered obsolete and had broader implications for national criminal procedure (Lõhmus, 2016). Some commentators have therefore concluded that the Supreme Court was under an obligation to request a preliminary ruling under Article 267(3) of the TFEU.

Case No. 3-1-1-110-15 (Supreme Court of Estonia, 2016b) thus occupies a borderline position between principled judicial autonomy and a missed opportunity for judicial dialogue. On the one hand, the Court engaged in a detailed interpretation of Article 7 of 'Council directive 2012/13/EU' (2012), grounded in ECtHR case law and systematic reasoning. On the other hand, the absence of prior CJEU interpretation and the existence of competing readings raise doubts as to whether the conditions for dispensing with a reference were fully satisfied.

Against this background, the case illustrates the structural tension inherent in the preliminary ruling system between national courts' responsibility to apply EU law and the CJEU's exclusive authority to provide binding interpretations. While courts of last instance are not obliged to refer every EU-law question, this case shows how the boundary between legitimate interpretation and encroachment upon the CJEU's interpretative role may become blurred in sensitive areas such as pre-trial detention and defence

rights. The decision does not amount to a manifest breach of Article 267 of the TFEU, but it exemplifies a form of principled non-use that remains open to debate and underscores the importance of judicial dialogue where the scope of EU procedural rights has not yet been definitively clarified.

3.3.2 Manifestly unfounded or over-broad requests

An early example of a request for a preliminary ruling that did not lead to a reference can be found in the Estonian Supreme Court's judgement of 22 February 2016 (No. 3-1-1-109-15). In that case, the defence submitted an extensive request inviting the Supreme Court to refer no fewer than twelve questions to the CJEU, later supplemented by two additional questions submitted by a co-accused. The questions covered a wide range of issues, including the right to deduct input VAT in allegedly fictitious transactions, the criminal nature of tax proceedings, the applicability of procedural guarantees derived from the ECHR, and the alleged personal liability of public officials for breaches of EU law.

The Supreme Court rejected the request, characterising it as manifestly unfounded. It emphasised that, pursuant to Article 267 of the TFEU, a preliminary ruling may be sought only where the outcome of the case depends on the interpretation or validity of EU law. According to the Court, several of the questions raised were not related to EU law at all, while the remaining questions—inasmuch as their content could be discerned—were hypothetical in nature and not based on the facts established in the criminal proceedings. As such, they were not relevant to the resolution of the case.

This decision illustrates the boundaries of the preliminary ruling mechanism in criminal proceedings and underscores that its activation presupposes a clearly formulated, case-specific question of EU law. It clearly demonstrates that the mere invocation of EU law, fundamental rights, or the case law of the ECtHR is insufficient where the proposed questions lack a direct connection to the factual and legal issues that are decisive for the national court's ruling.

3.3.3 Non-use based on the absence of EU harmonisation and fundamental criminal law constraints

In Judgement No. 4-24-2034/52 (of 4 June 2025), the Supreme Court of Estonia (2025b) declined to request a preliminary ruling concerning GDPR-related issues in a misdemeanour case because the proceedings were time-barred. As limitation constitutes an absolute procedural obstacle under

Estonian law, the Court terminated the proceedings without addressing the substantive EU-law questions. It further held that the GDPR does not harmonise limitation periods and that applying a longer limitation retroactively would violate legal certainty.

Similarly, in Judgement No. 4-24-2178/40 (of 12 June 2025), the Supreme Court of Estonia (2025c) refrained from considering the merits of a request concerning ‘Council directive (EU) 2016/97’ (2016) on insurance distribution because the limitation period had expired.

In Judgement No. 1-18-9594/31 (of 29 May 2020), the Supreme Court of Estonia (2020b) resolved the case on decisive domestic grounds, rendering the EU-law arguments moot.

These cases demonstrate that non-use of the preliminary ruling mechanism may follow from domestic procedural logic—particularly limitation—rather than from reluctance to engage in judicial dialogue. They further illustrate how limitation can foreclose substantive engagement with EU law irrespective of its potential relevance.

3.3.4 Non-use based on decisive national law: substantive resolution and procedural foreclosure

A further example of a request for a preliminary ruling that did not result in a reference can be found in the Supreme Court of Estonia (2020b) judgement of 29 May 2020 (No. 1-18-9594/31). In that case, the defence argued that the interpretation of Article 11 of the *Agreement between the European Community and Ukraine on the facilitation of the issuance of visas*, read in conjunction with Article 45(1) of the TFEU, raised a question of EU law requiring clarification by the CJEU. According to the defence, Ukrainian nationals holding valid visas were entitled to move freely within the EU without being subject to a fixed time limit of stay in a specific Member State, provided that the overall duration of stay indicated in the visa was not exceeded. On this basis, the defence contended that the 90-day limit laid down in national law was incompatible with EU law.

The Court of Appeal rejected the request for a preliminary ruling, considering that the relevant provisions of EU law were clear and did not give rise to any interpretative uncertainty. Although the defence reiterated the request before the Estonian Supreme Court, the latter did not engage with the EU law arguments in its reasoning. Instead, the Supreme Court resolved the case on purely domestic grounds, holding that the offence in question could

be committed only by an employer, and that the individual defendant, as a member of the management board of a legal person, lacked the specific personal characteristic required to fulfil the statutory elements of the offence. As a result, both the individual and the legal person were acquitted, and the Supreme Court explicitly stated that it was unnecessary to take a position on the remaining arguments raised in the cassation.

This case illustrates a distinct form of non-use of the preliminary ruling mechanism, in which potentially relevant EU law arguments were raised by the defence but ultimately rendered moot by the national court's reliance on a decisive rule of domestic criminal law. Rather than rejecting the request as manifestly unfounded, the Estonian Supreme Court effectively bypassed the EU law issue by resolving the case on alternative grounds, thereby avoiding the need to assess whether a reference under Article 267 of the TFEU was required.

A similar outcome, grounded in procedural rather than substantive considerations, is illustrated by the Supreme Court of Estonia (2025c) judgement of 12 June 2025 (No. 4-24-2178/40) in a misdemeanour case. In that case, the defence requested that the Supreme Court seek a preliminary ruling from the CJEU concerning the interpretation of Article 2(1)(1) of 'Council directive (EU) 2016/97' (2016) on insurance distribution, insofar as it was relevant for determining the scope of the offence laid down in Estonian law. The defence argued that the national courts had failed to properly define the concept of 'distribution' and that access to an insurer's IT system did not amount to the transfer of insurance distribution activities within the meaning of EU and national law.

The Estonian Supreme Court declined to examine the substance of these arguments. It held that the limitation period applicable to the misdemeanour had expired and that limitation constituted an absolute procedural obstacle to further proceedings. As a result, the Court refrained from both assessing the merits of the alleged offence and considering whether a preliminary ruling from the CJEU was necessary. Referring to its earlier case law discussed in the previous subsection, the Supreme Court reiterated that, in the absence of pending proceedings, the conditions for initiating the preliminary ruling procedure under Article 267 of the TFEU were not met.

This case exemplifies a form of non-use grounded in procedural foreclosure, where the expiry of the limitation period prevents any substantive engagement with EU law. Unlike situations in which a request is rejected

as unfounded or unnecessary, the non-use in this instance follows from the structural logic of criminal procedure, under which limitation operates as an absolute bar to judicial dialogue irrespective of the potential relevance of EU law to the underlying legal issues.

4. Concluding reflections on preliminary references in criminal proceedings: lessons from Estonia

Estonian criminal-procedure practice reveals a clear institutional pattern in the use of the preliminary-reference mechanism: in criminal matters, requests under Article 267 of the TFEU have to date been submitted exclusively by the Supreme Court, while lower courts have refrained from doing so. As a result, the assessment of whether a question of EU law warrants a reference has become *de facto* concentrated at the level of the court of last instance, reflecting an institutional expectation that only questions considered unavoidable and fundamental justify engaging the CJEU. Although such concentration may promote doctrinal coherence, it narrows the multi-level judicial dialogue envisaged by Article 267 of the TFEU and may slow the integration of EU-law standards into everyday criminal practice. By contrast, in civil and administrative litigation, Estonian first-instance courts have made use of the preliminary-reference procedure to obtain early clarification of key EU-law issues, a practice that can streamline national proceedings and, in some instances, reduce the need for further appellate review.

A closer examination of the Supreme Court's practice reveals that decisions to submit preliminary references and decisions to decline to do so have been roughly balanced in numerical terms. A purely quantitative comparison, however, is insufficient to assess compliance with the requirements of EU law. From a substantive perspective, refusals to refer appear particularly in cases where the parties—most often the defence—have expressly raised the need for a preliminary ruling. At the same time, it cannot be excluded that EU-law issues may remain unnoticed or unraised for strategic reasons by the parties. In such situations, no obligation arises to give reasons for not referring, with the consequence that potentially significant EU-law questions may remain entirely unaddressed in domestic proceedings.

The Estonian cases further indicate that, while the initiative to raise EU-law arguments has frequently originated from the parties, the final

decision whether to refer has consistently rested with the Supreme Court. There are also instances in which the Court has submitted a reference *ex officio*, without a corresponding request from the parties. The pattern that emerges is that the Supreme Court is prepared to make use of Article 267 of the TFEU on its own initiative, but primarily where the interpretation of EU law is likely to have a wide-ranging and systemic impact on criminal-procedure practice as a whole.

One important factor explaining the reluctance of lower courts to submit preliminary references in criminal matters is the temporal dimension of the procedure. Estonian practice shows that the interval between the submission of a request and the delivery of a judgement by the CJEU in criminal and minor-offence cases has typically ranged from slightly over one year to just over two years. In the context of criminal proceedings, such durations acquire particular significance when viewed against the domestic regime governing limitation.

Under Estonian law, limitation constitutes an absolute procedural bar. Once the limitation period has expired, the court is required to terminate the proceedings irrespective of their substantive merits. Crucially, the submission of a preliminary reference does not suspend or interrupt the running of limitation periods. Limitation therefore continues to run while the case is pending before the CJEU. This feature of the domestic procedural framework has far-reaching implications for the practical operation of Article 267 of the TFEU.

From the perspective of the principle of effectiveness (*effet utile*), national procedural rules must not render the exercise of rights derived from EU law practically impossible or excessively difficult. Where the submission of a preliminary reference—potentially even a mandatory one under Article 267(3) of the TFEU—creates a real risk that proceedings will become time-barred before the CJEU delivers its judgement, the preliminary-reference mechanism risks being deprived of its dispute-resolving function. The answer of the CJEU may arrive only after the national court is legally obliged to terminate the proceedings, thereby confining the ruling to prospective normative clarification rather than influencing the outcome of the case in which it was sought.

The problem is particularly acute in minor-offence (misdemeanour) proceedings, where the general limitation period is two years. Given that preliminary ruling proceedings may last up to, or even slightly beyond,

that period, obtaining a ruling in such cases often entails a serious risk of automatic termination. In practical terms, the preliminary-reference mechanism may thus become effectively inaccessible in misdemeanour proceedings. This outcome is difficult to justify, especially as Estonian law provides for interruption or suspension of limitation in various other procedural situations, yet excludes the situation in which a national court seeks authoritative clarification of EU law. The asymmetry is striking: domestic procedural events may halt limitation, but a reference to the CJEU—an act aimed at ensuring the correct application of Union law—does not. This structural design creates a disincentive for courts to initiate preliminary references in time-sensitive cases and risks undermining the practical effectiveness of Article 267 of the TFEU in the field of criminal and minor-offence law.

In criminal cases, the tension is mitigated by longer limitation periods, but it does not disappear. Multi-level domestic proceedings may already span several years before a case reaches the Supreme Court. Where a reference is made at a late procedural stage, the additional duration of the preliminary ruling procedure may significantly prolong adjudication. Although the Supreme Court has held that such delay does not in itself violate the reasonable-time requirement, the interaction between preliminary references and limitation may still influence judicial strategy and willingness to refer.

The implications of limitation are further compounded by the procedural consequences of a reference. Once a preliminary reference is submitted, the national court cannot deliver a final judgement until the CJEU has provided its interpretation. This effectively entails a stay of proceedings in respect of those issues dependent on EU law. While a court of first or second instance may in theory continue procedural steps that do not hinge on the EU-law question—such as the taking of evidence—such partial continuation is often limited in practice. Where the EU-law issue concerns the admissibility of evidence, the interpretation of constituent elements of an offence, or other central legal questions, further progress may be inefficient or strategically risky, as a subsequent interpretation by the CJEU may require reassessment of earlier findings. Although proceedings are not formally frozen in their entirety, their substantive advancement is frequently constrained. When combined with the uninterrupted running of limitation periods, this creates a structural mismatch between the temporal logic of criminal adjudication and the design of the preliminary-reference mechanism.

Another dimension highlighted by the Estonian experience concerns the highly variable range and impact of preliminary rulings in criminal matters.

The analysis of Estonian practice shows that the need for interpretation by the CJEU does not arise solely in relation to provisions affecting criminal liability or the conduct of criminal proceedings but may also emerge at the stage of enforcement and supervision of criminal sanctions. Accordingly, not all references carry the same practical or normative weight. Some rulings—most notably those concerning access to and use of communications data—address procedural measures that are routine, recurring and structurally embedded in criminal investigations. In such cases, a judgement of the CJEU may affect a large number of pending and future proceedings, reshape investigative practice, and prompt legislative reform, even where the outcome of the referring case itself remains unchanged. By contrast, other preliminary references concern narrowly defined substantive elements, exceptional factual constellations, or rarely occurring situations. In those cases, the guidance provided by the CJEU may be decisive for the individual dispute but have little or no spill-over effect beyond it.

This variability of impact deserves further emphasis. The Estonian case law demonstrates that preliminary rulings in criminal matters do not operate at a single normative level. In certain instances, such as ‘Prokuratuur’, the ruling has produced systemic consequences extending well beyond the individual case, reshaping investigative practice and influencing legislative reform. In other cases, the effect has been confined to the clarification of a specific regulatory framework or even to a narrowly defined element of liability. In yet other situations, temporal constraints—most notably limitation—have rendered the CJEU’s interpretation practically irrelevant for the referring case itself. The significance of a preliminary ruling must therefore be understood along a spectrum ranging from structural transformation to dispute-specific clarification and, in some instances, to purely prospective guidance. This heterogeneity further complicates the assessment of necessity under Article 267 of the TFEU, as the systemic importance of a question may not coincide with its decisive relevance for the individual proceedings.

A further aspect that merits attention concerns the evidentiary consequences of violations of EU law. In the ‘Prokuratuur’ case, the Supreme Court clarified that incompatibility with EU law does not automatically render evidence inadmissible under national law. It is important to note, however, that under Estonian criminal procedure, breaches of domestic procedural rules likewise do not, as a rule, lead automatically to the exclusion of evidence. Admissibility is assessed on a case-by-case basis, taking into account the seriousness of the violation and its impact on the fairness of the proceedings.

From this perspective, EU-law violations are not treated more leniently than breaches of domestic law.

An automatic rule excluding evidence in every instance of EU-law infringement would not be consistent with the structure of Estonian evidentiary doctrine, where violations may vary significantly in gravity and constitutional relevance. Nonetheless, a broader structural question arises. If violations of EU law are acknowledged, yet do not necessarily produce tangible procedural consequences, the practical force of Union law may depend heavily on domestic evidentiary frameworks. The effectiveness of Article 267 of the TFEU therefore hinges not only on the formal disapplication of incompatible provisions, but also on whether infringements of EU law carry sufficiently meaningful consequences in domestic proceedings. Otherwise, there is a risk that the primacy of EU law remains formally recognised yet materially attenuated in criminal adjudication.

When specific cases are examined side by side, the inherent complexity of the preliminary-reference mechanism becomes apparent. The central issue is not merely how to frame a request, but whether it is appropriate to turn to the CJEU at all. In the 'Prokuratuur' case (Supreme Court of Estonia, 2021), serious doubts may legitimately be raised as to whether the submission of a preliminary reference was necessary within the meaning of Article 267 of the TFEU, given that the domestic courts consistently held that the conviction did not depend on the contested communications data and that the dispute could be resolved even after those items of evidence were excluded. In such circumstances, the systemic importance of the interpretation of EU law was undoubtedly considerable, yet its decisive relevance for the resolution of the individual dispute was absent. By contrast, in case No. 3-1-1-110-15 (Supreme Court of Estonia, 2016b), the opposite question arose: whether a preliminary reference ought to have been made. In that case, several factors cast doubt on whether the conditions laid down in Article 267(3) of the TFEU for dispensing with a reference were in fact satisfied.

The comparison of these cases brings into sharp focus the core of the preliminary-reference mechanism. The decision whether to make a reference is not governed by a mechanical test but requires a contextual and normative assessment and therefore inevitably involves the exercise of judicial judgement. It is precisely this judgement that enables courts to weigh the systemic importance of a question of EU law against its genuine relevance for the resolution of the dispute at hand.

Taken together, the Estonian experience illustrates that the preliminary-

reference mechanism in criminal proceedings cannot be reduced to a formal or mechanical application of the CILFIT and CIM criteria. Its operation requires a context-sensitive assessment that weighs the genuine necessity of the EU-law question for the resolution of the dispute against its broader systemic implications and the procedural consequences of delay. The effectiveness of Article 267 of the TFEU in criminal matters ultimately depends on preserving a functional connection between interpretation and adjudication, while ensuring that domestic procedural frameworks do not render judicial dialogue practically ineffective.

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