

STRENGTHENING *UNIVERSITY* COOPERATION *OSIJEK – PÉCS*

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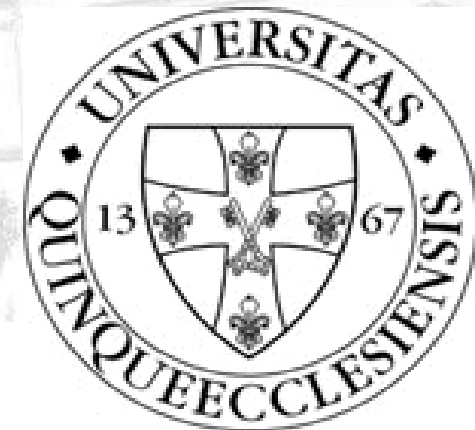


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EU Law – Institutions of the European Union

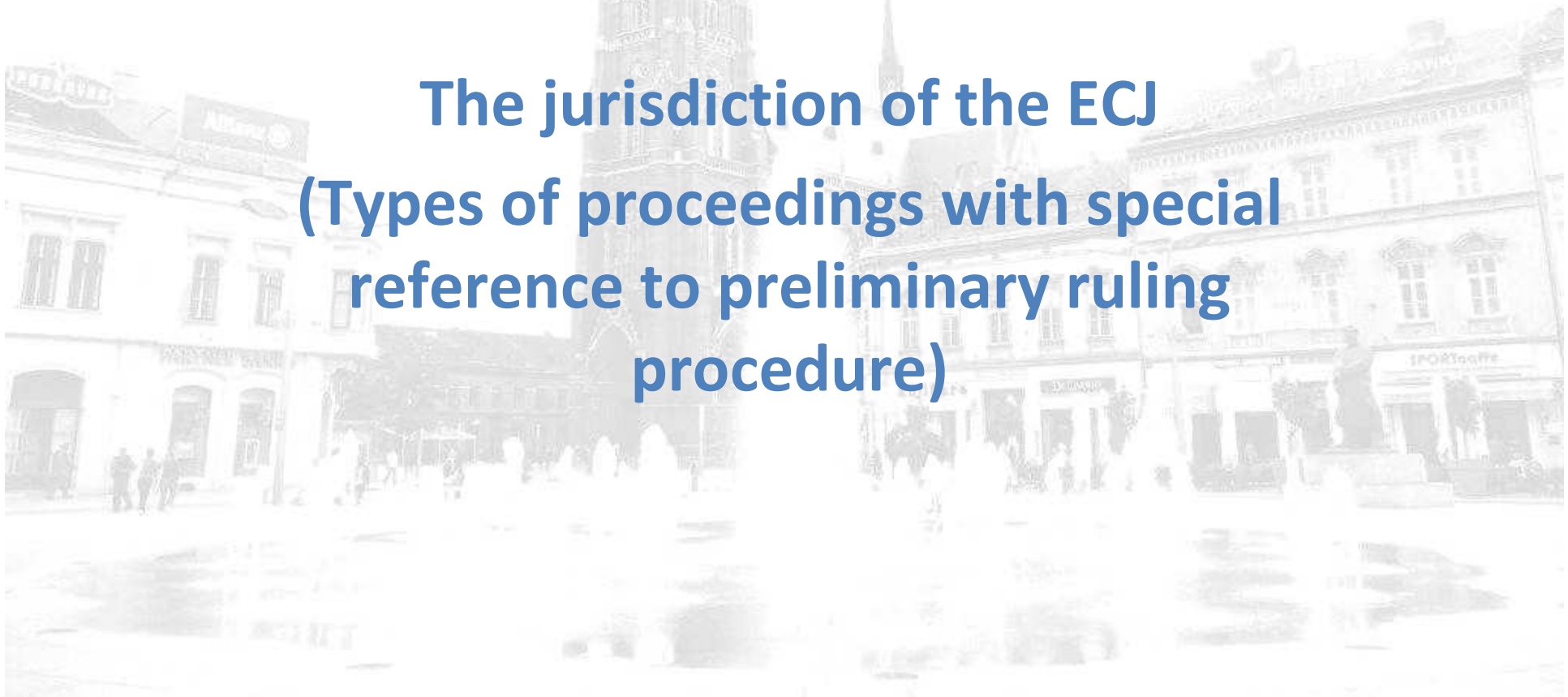
Osijek 25-27 April 2012

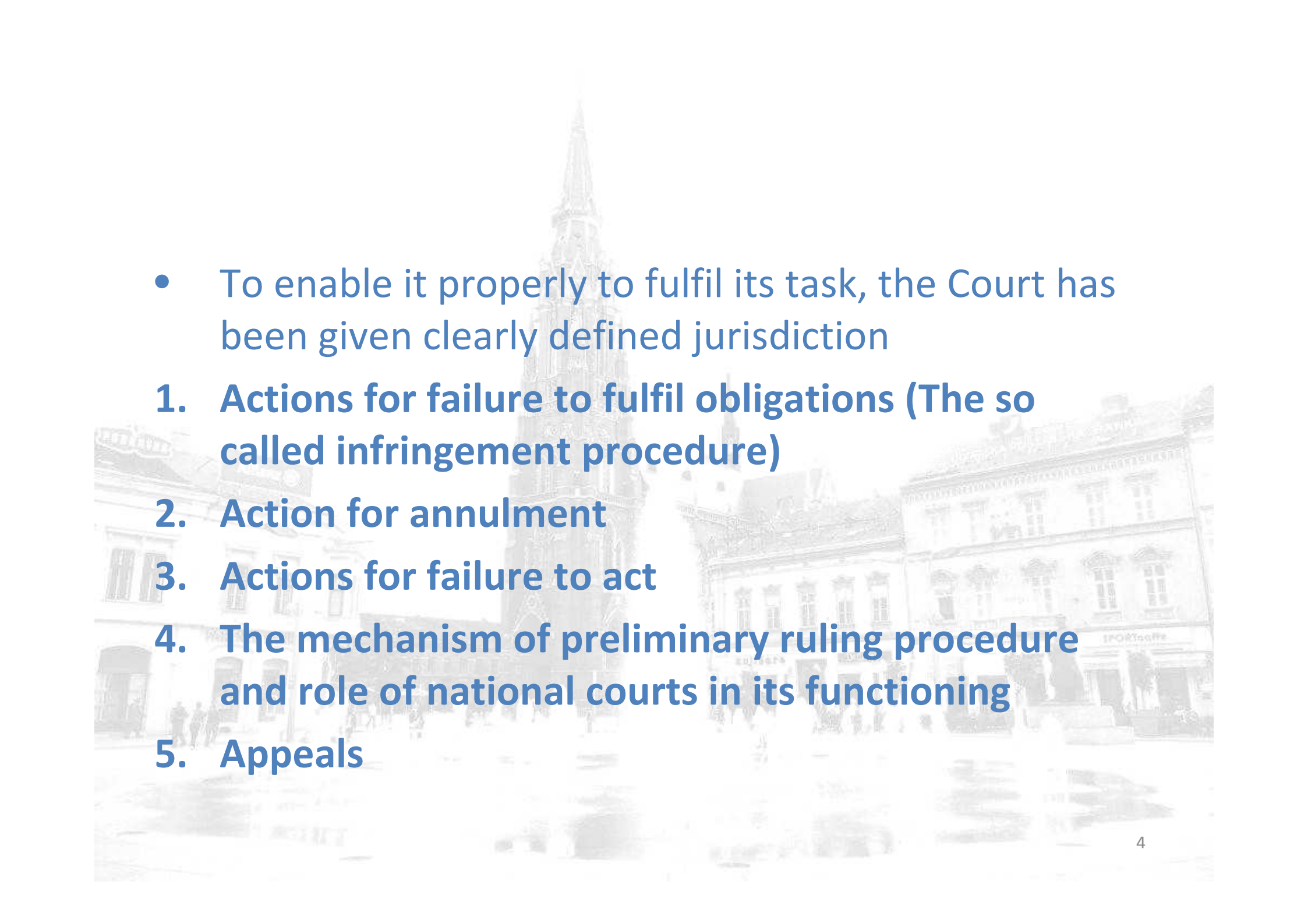
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Part II

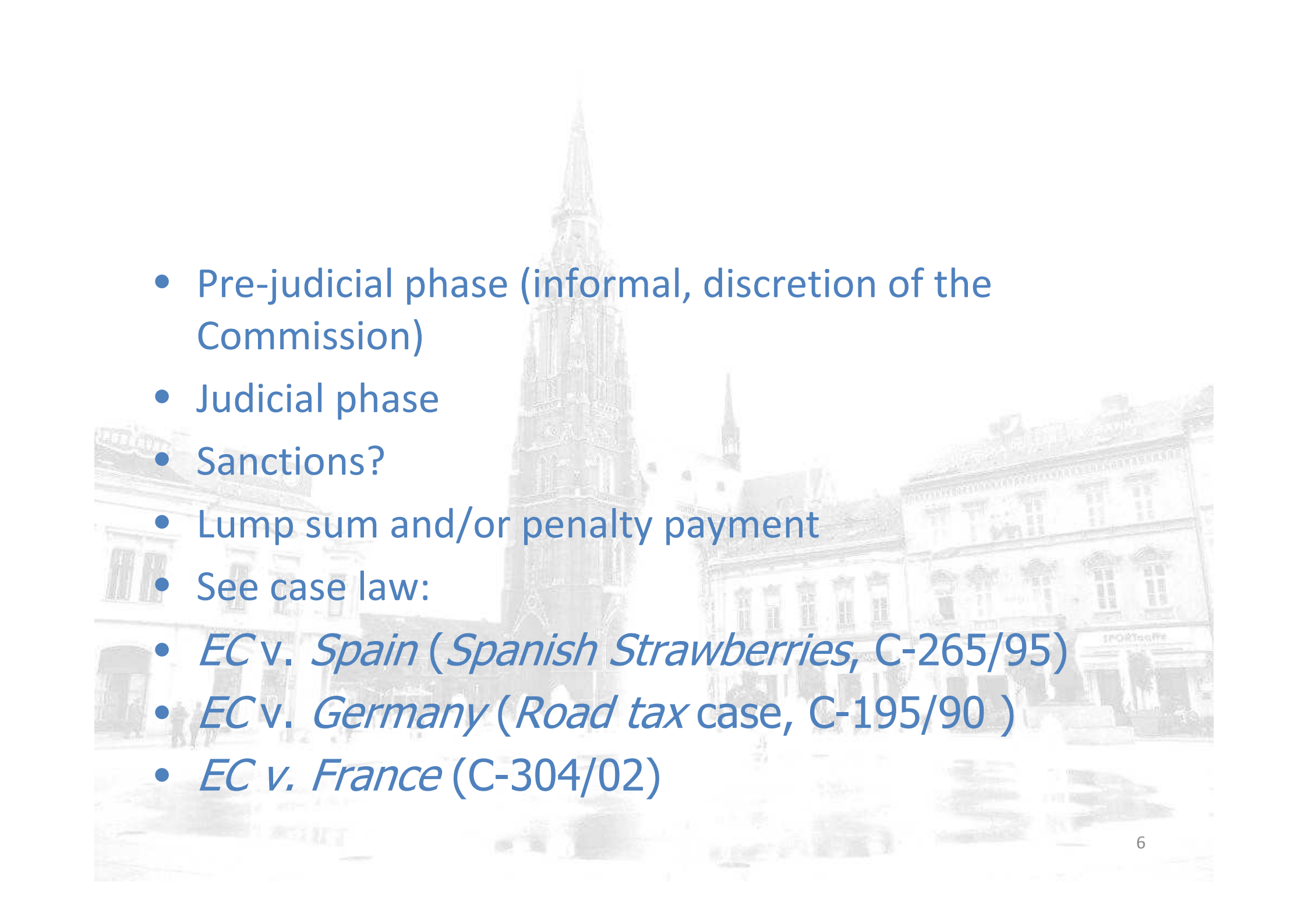
**The jurisdiction of the ECJ
(Types of proceedings with special
reference to preliminary ruling
procedure)**



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- To enable it properly to fulfil its task, the Court has been given clearly defined jurisdiction
 1. **Actions for failure to fulfil obligations (The so called infringement procedure)**
 2. **Action for annulment**
 3. **Actions for failure to act**
 4. **The mechanism of preliminary ruling procedure and role of national courts in its functioning**
 5. **Appeals**

1. Infringement procedure

- Reason: „*Failure to fulfil an obligation under the Treaties*”
- Treaties?
- It is the only procedure that empowers the ECJ to directly review validity of Member State law
- Defendant is always MS (usually national parliament but also...)
- The action may be brought by the Commission - as, in practice, is usually the case - or by a Member State.

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- Pre-judicial phase (informal, discretion of the Commission)
 - Judicial phase
 - Sanctions?
 - Lump sum and/or penalty payment
 - See case law:
 - *EC v. Spain (Spanish Strawberries, C-265/95)*
 - *EC v. Germany (Road tax case, C-195/90)*
 - *EC v. France (C-304/02)*

2.2. Action for annulment

- direct way of review of validity of EU law
- the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the EU
- The ECJ has exclusive jurisdiction over actions brought by a MS or by one EU institution
- The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals

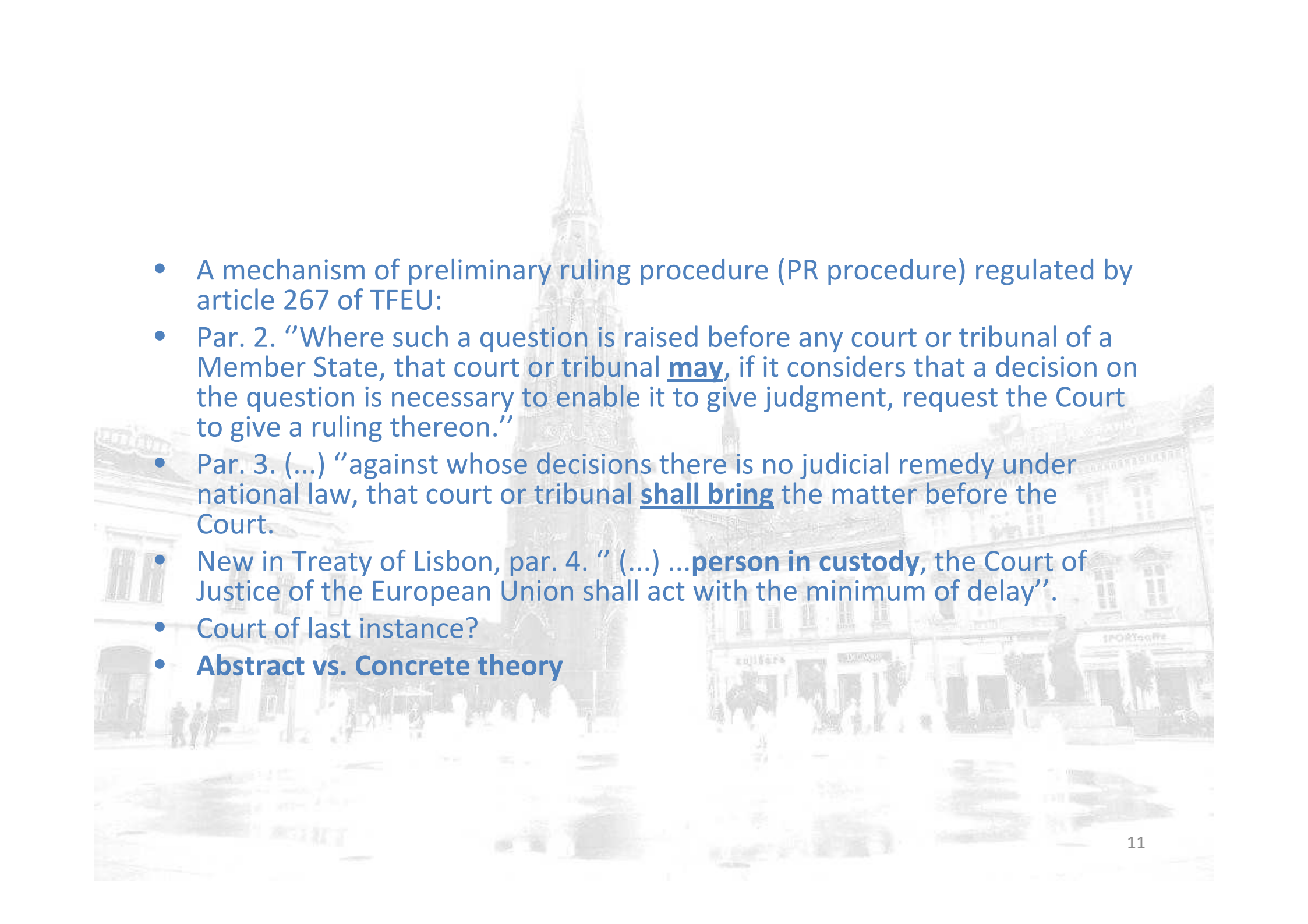
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- 1. Privileged applicants** (MS, European Parliament, Council and the Commission) – they do not have to show any legal interest to bring the action
 - 2. Semi-privileged** (Nice Treaty granted such right to the Court of Auditors and the ECB. The Lisbon Treaty expanded the list with the Committee of the Regions) – ‘in order to protect their own prerogatives ’’
 - 3. Non-privileged** (fizičke i pravne osobe) – the contested act must be addressed to the plaintiff or must concern him or her directly and individually


2.3. Actions for failure to act

- Enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed.
- This type of action is the other side of the coin to annulment procedure.
- May be brought only after the institution concerned has been called on to act.
- Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures.

2.4. Preliminary ruling procedure

- National Courts (NC) as European courts are primarily responsible for the application of EU Law
- EU law would remain a dead letter if it is not properly applied in the MS
- National judges as the keystone of the EU judicial system
- But, NCs do not have full jurisdiction to decide disputes on EU Law brought before them
- The European Court of Justice (ECJ) hold the sole power to declare act of EU law invalid and have the final word in questions of interpretation of EU Law

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- A mechanism of preliminary ruling procedure (PR procedure) regulated by article 267 of TFEU:
 - Par. 2. “Where such a question is raised before any court or tribunal of a Member State, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”
 - Par. 3. (...) “against whose decisions there is no judicial remedy under national law, that court or tribunal **shall bring** the matter before the Court.
 - New in Treaty of Lisbon, par. 4. “ (...) ...**person in custody**, the Court of Justice of the European Union shall act with the minimum of delay”.
 - Court of last instance?
 - **Abstract vs. Concrete theory**

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- Main tool in ensuring the ***uniformity of application*** of EU Law in the Member States
 - There is strong consensus over the importance of PR procedure both for uniform application of EU Law but also for the whole process of the European integration
 - Most of the landmark judgments by the ECJ (e.g. *Van Gend en Loos*, *Costa v. ENEL* and *Simmenthal*) were delivered in PR procedure

Role of ECJ in course of preliminary ruling procedure

- Separation of powers
- The role of ECJ is to give an interpretation of EU law or to rule on its validity,
- NC applies ruling to the factual situation in the main proceeding
- The PR procedure is only one step of the national procedure
- The effectiveness of this system is based on healthy dialogue and direct cooperation between NC and ECJ

Which courts can refer?

- Art. 267: “...any court or tribunal of a Member State...”
- without defining the term court.
- an EU law concept
- The ECJ has never given complete definition of that expression, but rather stated some elements:
 1. established by law,
 2. apply rules of law in deciding,
 3. end up proceedings with binding decisions of definitive character,
 4. be established as lasting,
 5. conduct procedure *inter partes*,
 6. be independent,
 7. its jurisdiction must be compulsory

Obligation to refer?

- Third paragraph of Article 267 ToFEU (the courts of last instance)
- Abstract vs. Concrete theory
- In *Costa v ENEL*, the ECJ considered the *Giudice conciliatore* to be the court of last instance in the sense of par. 3. *Giudice* was judge against whose decisions an appeal usually lies. However, in the case in question this was not so, as it involved a very small amount of money.

Preliminary reference concerning validity of EU law

- Art. 267 does not make distinction between requests concerning validity and those for interpretation.
- Since the case *Foto-Frost*, the judicial review of EU acts was centralised
- The consequence of the case *Foto-Frost* is that the national court confronted with the possibly invalid EU act cannot decide on its invalidity and leave it disappplied on its own, but has to initiate preliminary ruling proceedings on invalidity in front of the ECJ

Hypothetic questions

- In *Foglia (No 2)* the ECJ made clear that it would be the ultimate decider of the scope of its own jurisdiction
- If necessary, it would have to examine the circumstances of the reference in order to determine whether the court's jurisdiction had been properly invoked, but it would not answer hypothetical questions
- The ECJ too might refuse to accept a request for a preliminary ruling if there:
 1. is an absence of a genuine dispute
 2. it is not provided with the factual information
 3. or the question concerns the compatibility of national law with community law as the ECJ can only interpret EC law

When to refer

- Is not defined neither by Treaty neither by Statute or ROP
- Discretion of national judge
- The courts of last instance are in obligation to refer the question BUT
- No reference to the ECJ need be made if:
 1. the question of EU law is irrelevant, or
 2. the relevant provision has already been interpreted by the ECJ
 3. or the correct application of EC law is so obvious as to leave no room for doubt (so called *acte clair*)

Form of request

- **In any form allowed by national law**
- According to Information note of the ECJ the order for reference must (point 22):
 1. include a **brief account of the subject-matter** of the dispute and the relevant findings of fact,
 2. set out the **tenor of any applicable national provisions**
 3. identify the **EU law provisions** relevant to the case as accurately as possible
 4. explain **the reasons** which prompted the national court to raise the question of the interpretation or validity of the EU law provisions,
 5. include, if need be, a **summary of the main relevant arguments of the parties** to the main proceedings
 6. view on the answer to be given to the questions referred (**green light procedure**)

Effect of ECJ's rulings

- Preliminary ruling binds the national court that requested the judgment as well as all bodies, which may have to decide the same case on appeal.
- Although the decision is binding, the court may request a second preliminary ruling in the same case.
- Interpretation vs. validity?



Specialised types of PR procedure

Simplified, accelerated and urgent preliminary ruling procedure

The simplified procedure

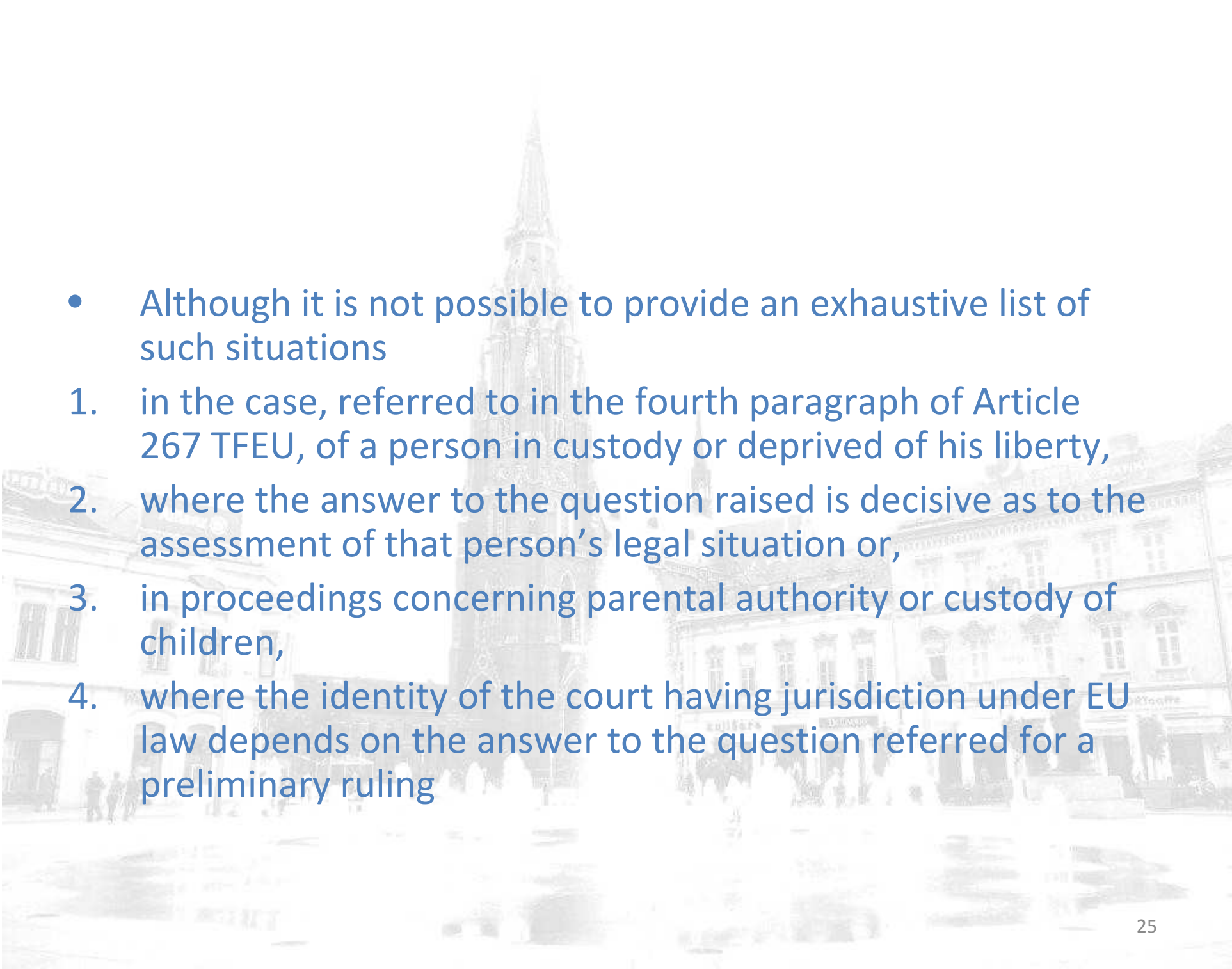
1. Where a question referred for a preliminary ruling is **identical** to a question on which the Court has already been called on to rule, or
2. where the answer to the question admits of **no reasonable doubt** or
3. may be **clearly deduced from existing case-law**,
 - the ECJ may, after hearing the AG, give its decision by **reasoned order**, citing in particular a previous judgment relating to that question or the relevant case-law.


Accelerated procedure

- At the request of the national court
- matter of **exceptional urgency**
- derogation from the provisions of RoP
- The Court of Justice is very reluctant to apply such procedures (a few of the rare examples include cases [C-189/01](#), *Jippes*, and [C-127/08](#), *Metock*).

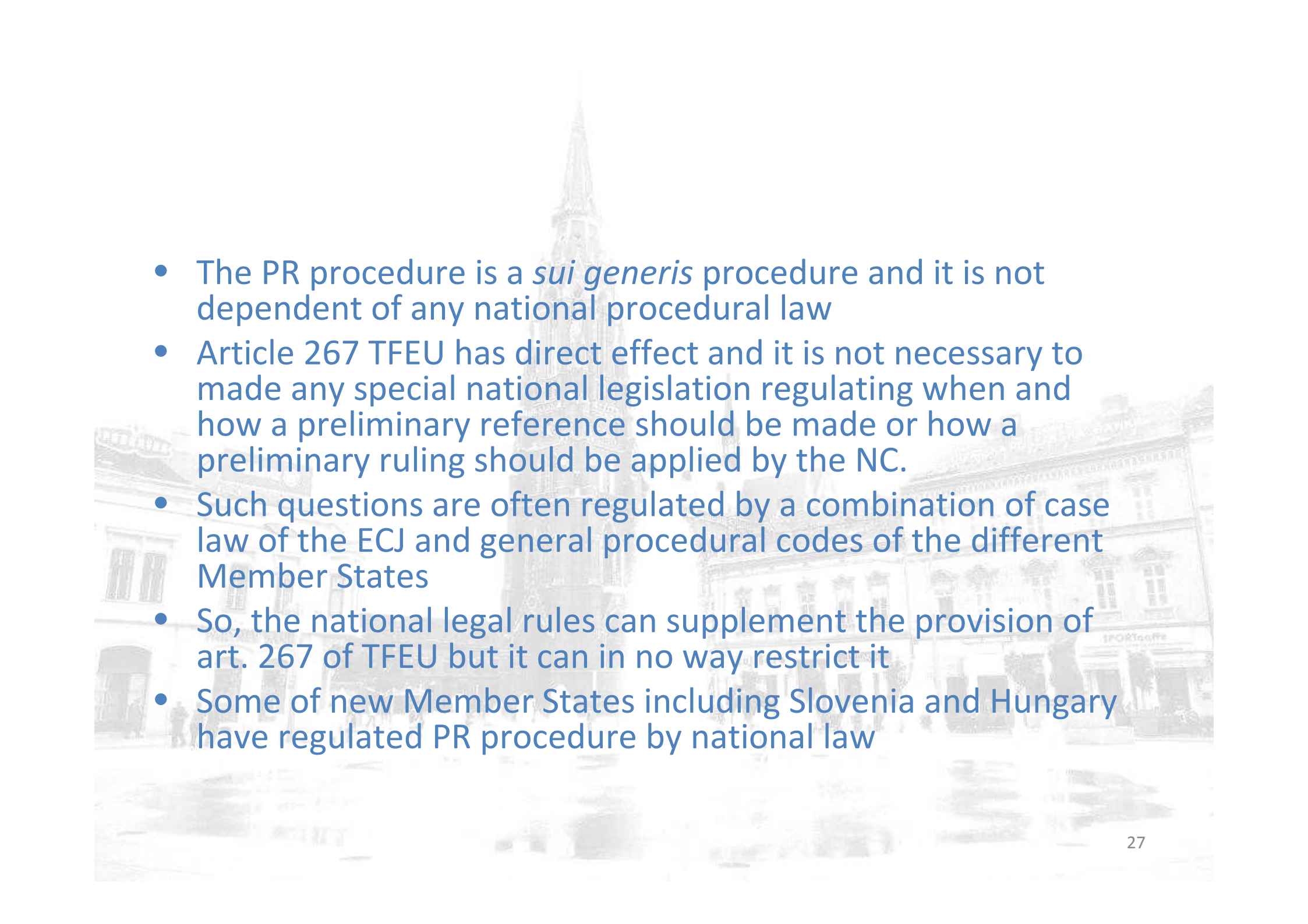
The Urgent preliminary ruling procedure- PPU

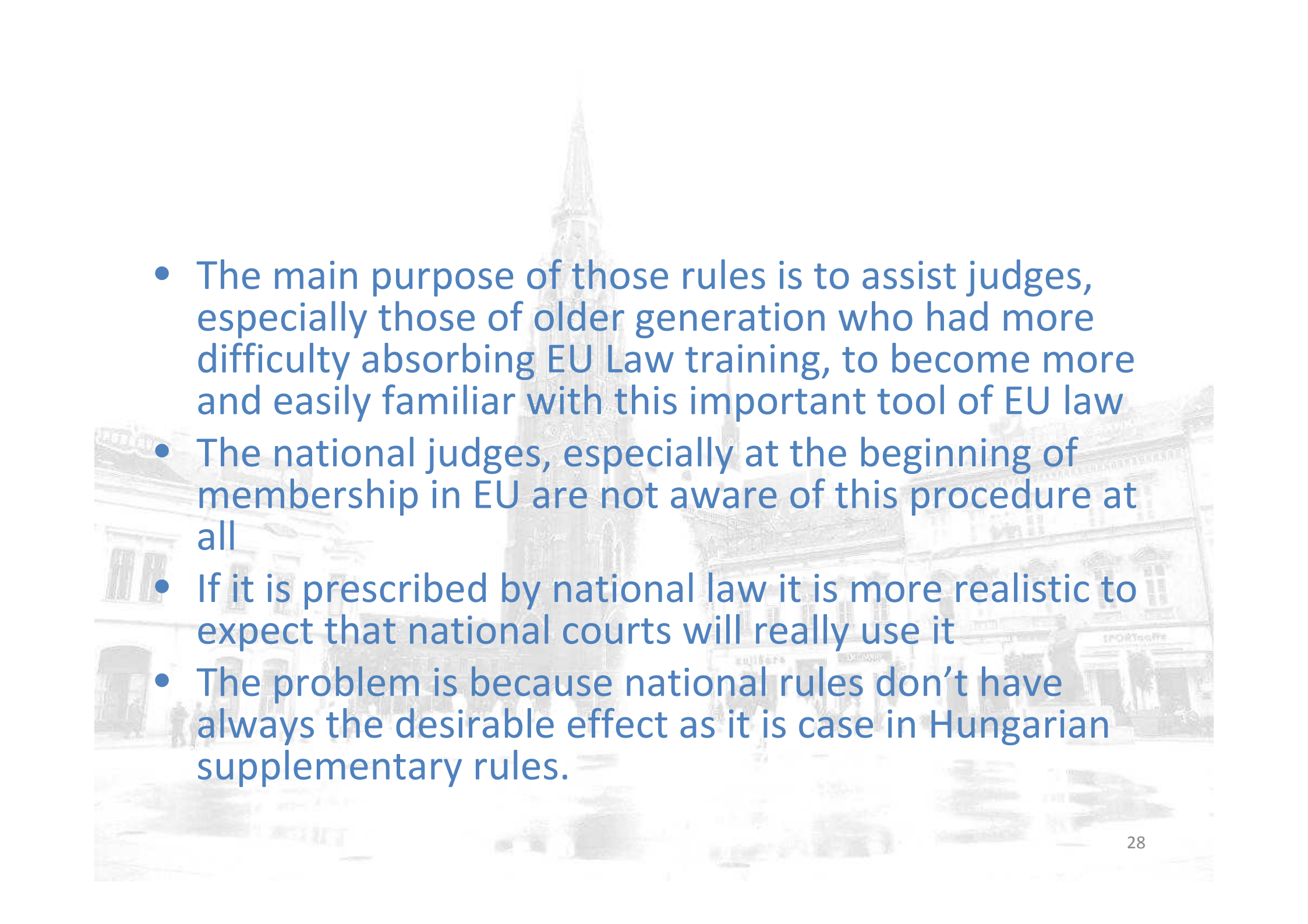
- French; *procédure préliminaire d'urgence*
- *Only in the areas covered by Title V of Part Three of the TFEU, which relates to the area of freedom, security and justice*
- At the request of national judge or *ex officio*
- Simplifies the various stages of the proceedings before the Court, but its application entails significant constraints for the Court and for the parties and other interested persons participating in the procedure

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- Although it is not possible to provide an exhaustive list of such situations
 1. in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty,
 2. where the answer to the question raised is decisive as to the assessment of that person's legal situation or,
 3. in proceedings concerning parental authority or custody of children,
 4. where the identity of the court having jurisdiction under EU law depends on the answer to the question referred for a preliminary ruling



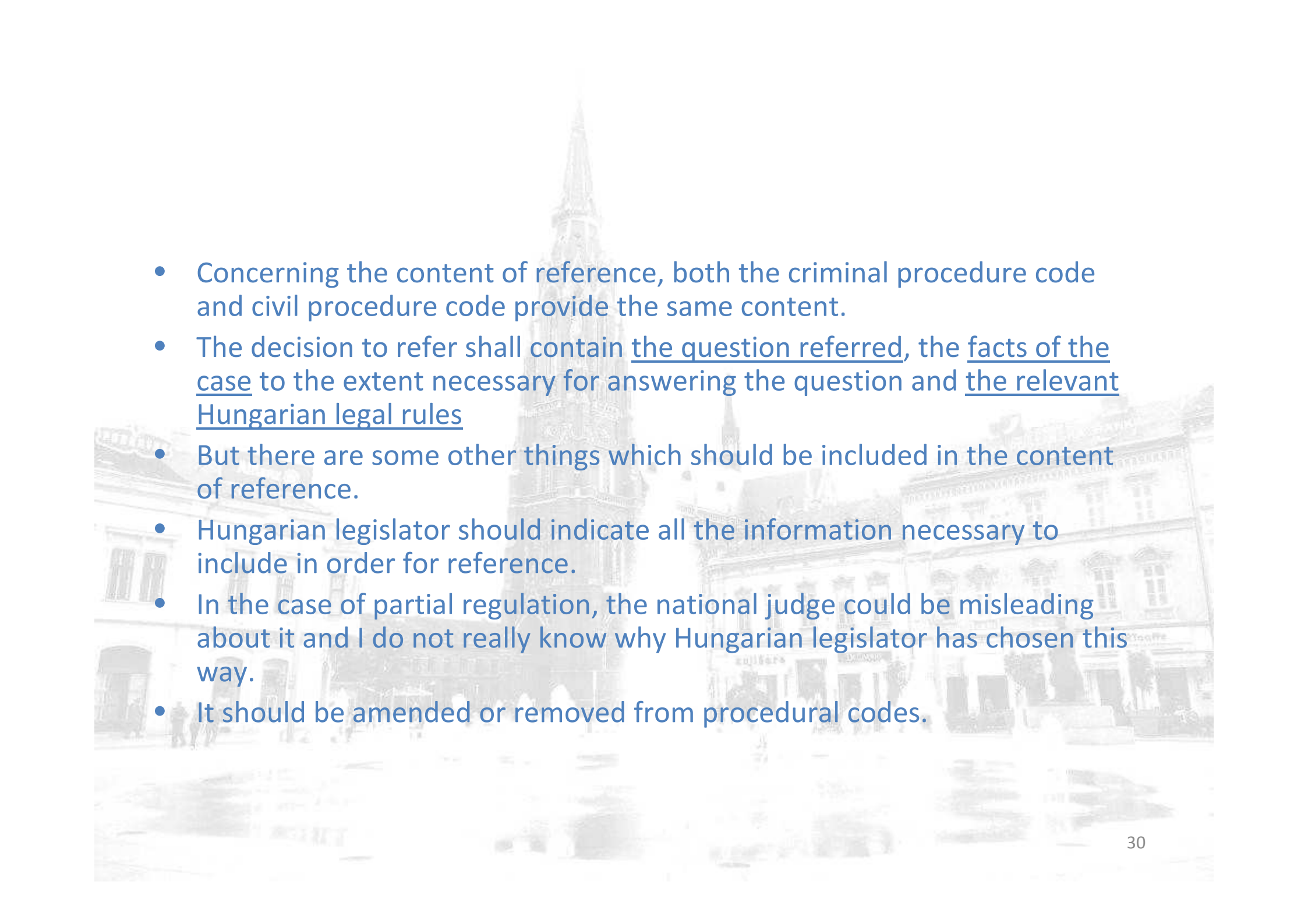
**Implementation of Preliminary Ruling
Procedure in the legal systems of New
Member States and experiences for future
Member States as Croatia**

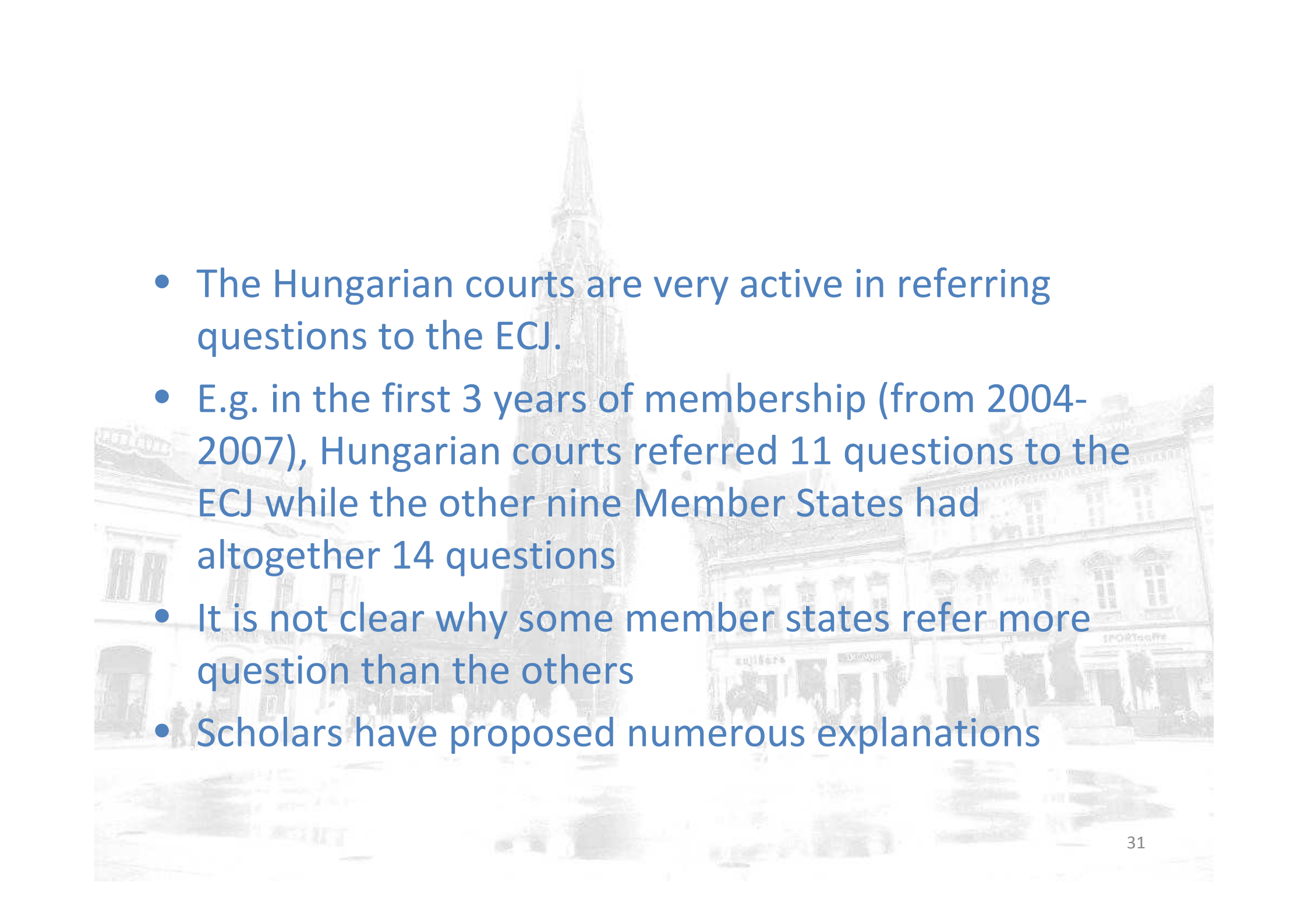
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- The PR procedure is a *sui generis* procedure and it is not dependent of any national procedural law
 - Article 267 TFEU has direct effect and it is not necessary to made any special national legislation regulating when and how a preliminary reference should be made or how a preliminary ruling should be applied by the NC.
 - Such questions are often regulated by a combination of case law of the ECJ and general procedural codes of the different Member States
 - So, the national legal rules can supplement the provision of art. 267 of TFEU but it can in no way restrict it
 - Some of new Member States including Slovenia and Hungary have regulated PR procedure by national law

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- The main purpose of those rules is to assist judges, especially those of older generation who had more difficulty absorbing EU Law training, to become more and easily familiar with this important tool of EU law
 - The national judges, especially at the beginning of membership in EU are not aware of this procedure at all
 - If it is prescribed by national law it is more realistic to expect that national courts will really use it
 - The problem is because national rules don't have always the desirable effect as it is case in Hungarian supplementary rules.

Preliminary ruling procedure in Hungary

- The PR procedure is implemented or it is better to say that it is supplemented by national law.
- The aim of amendments of the Hungarian procedural rules regarding the PR procedure is to remove any suspicion and uncertainties about this procedure.
- The both procedure codes prescribe the suspension of national proceedings as mandatory
- It is not good solution to completely terminate procedure while waiting the ECJ's ruling.

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- Concerning the content of reference, both the criminal procedure code and civil procedure code provide the same content.
 - The decision to refer shall contain the question referred, the facts of the case to the extent necessary for answering the question and the relevant Hungarian legal rules
 - But there are some other things which should be included in the content of reference.
 - Hungarian legislator should indicate all the information necessary to include in order for reference.
 - In the case of partial regulation, the national judge could be misleading about it and I do not really know why Hungarian legislator has chosen this way.
 - It should be amended or removed from procedural codes.

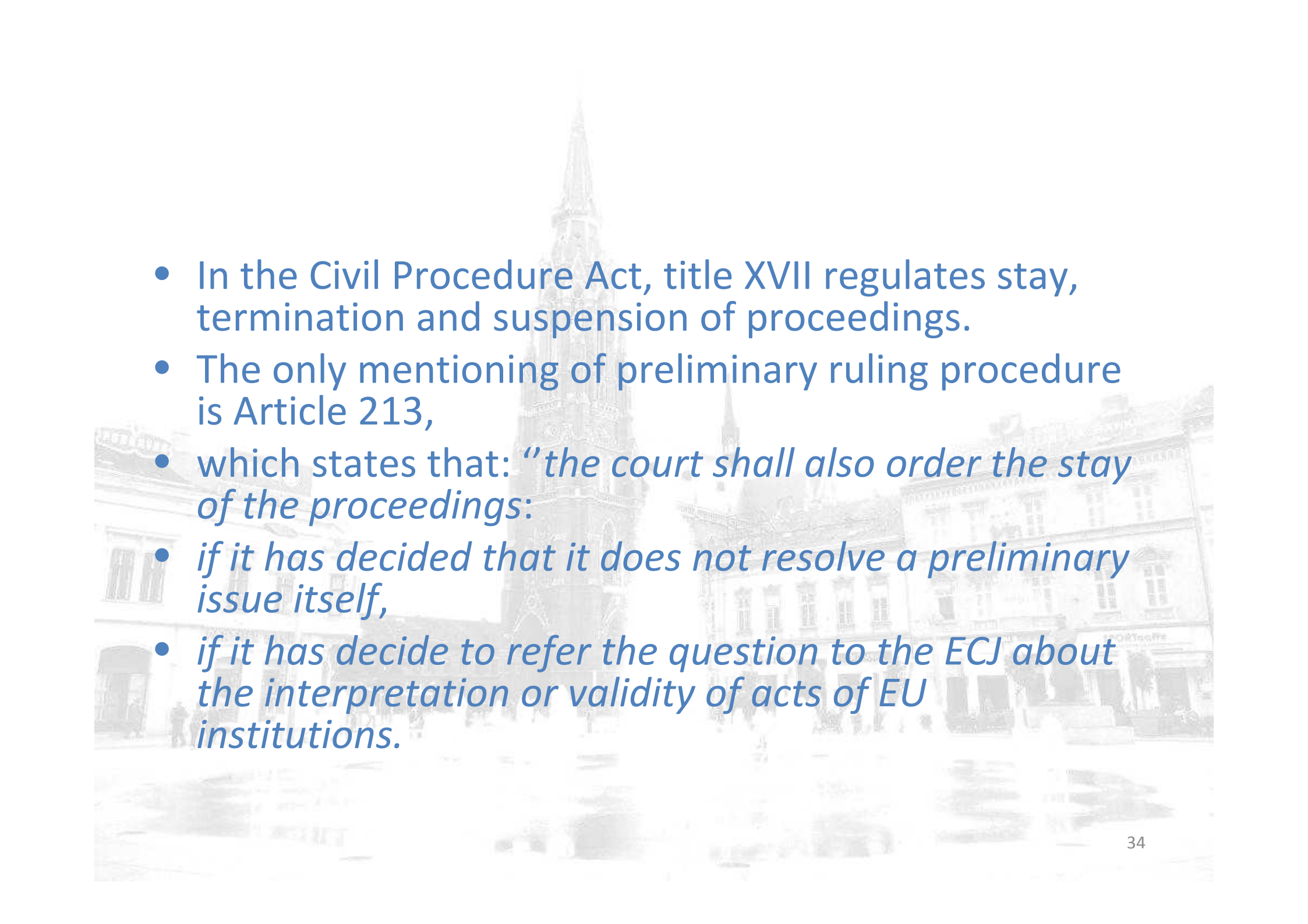
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- The Hungarian courts are very active in referring questions to the ECJ.
 - E.g. in the first 3 years of membership (from 2004-2007), Hungarian courts referred 11 questions to the ECJ while the other nine Member States had altogether 14 questions
 - It is not clear why some member states refer more question than the others
 - Scholars have proposed numerous explanations

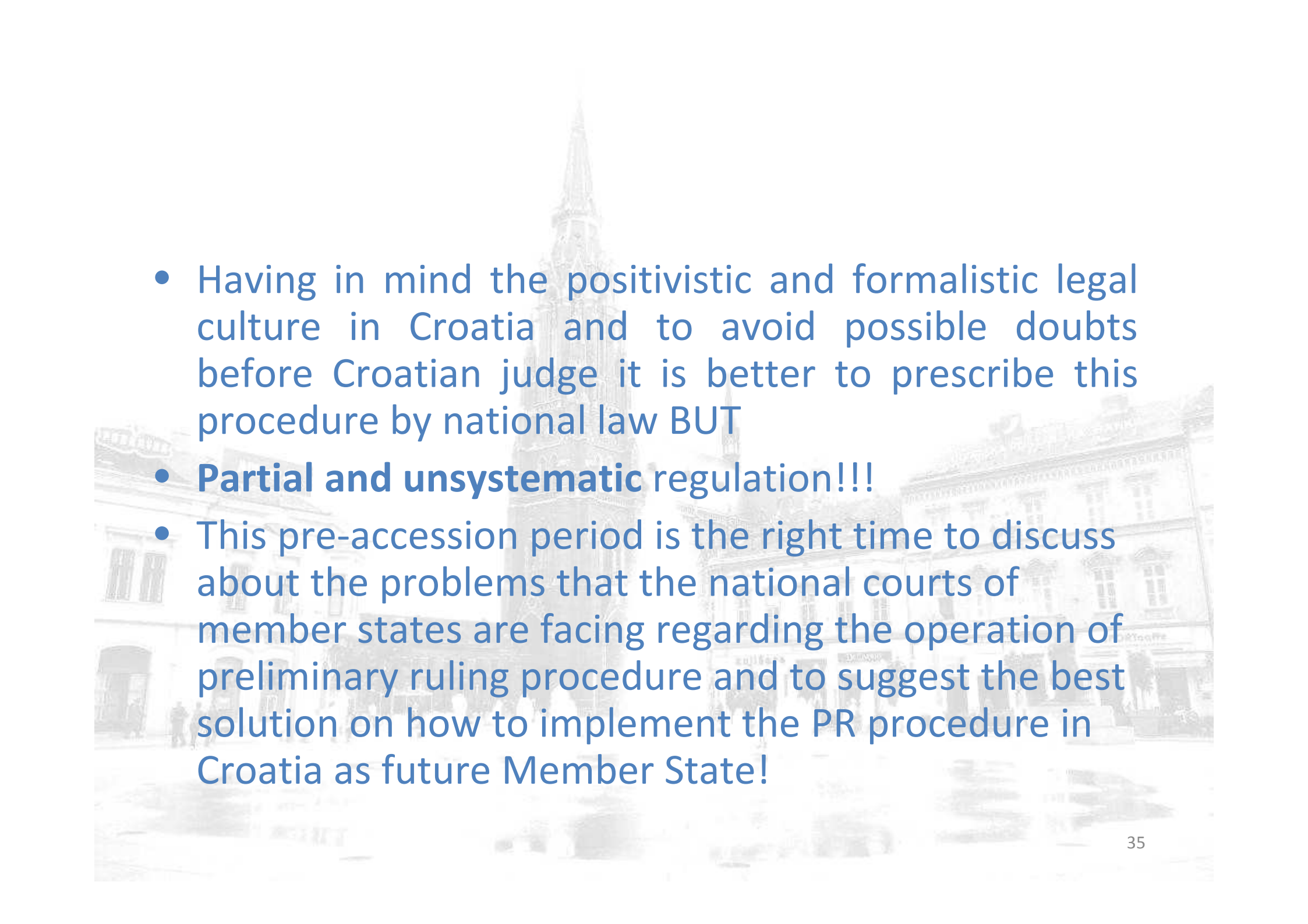
Preliminary ruling procedure in Slovenia

- Is implemented into Slovenian Law by Art. 113a of the Courts Act (*Zakon o sodiščih*)
- Art. 113a incorporates the Article 267 of TFEU but there are also some supplementary rules
- General provision which is applied to all types of courts – the best model
- Slovenian courts were active in submitting references.
- The first one was in case *Detiček* and was decided in PPU

Preliminary ruling procedure in Croatia - *de lege ferenda*

- Regarding criminal procedure, the Croatian Criminal procedure code was recently amended and it has express provision about the possibility of making a reference to the ECJ.
- Article 18 provides that *“If the proceeding court considers that a decision on the question of validity or interpretation of the acts and measures of EU is necessary to enable it to give judgment, the court will stay the proceeding and request the Court to give a ruling thereon.”*
- Obligatory stay of proceedings!?
- There is no also any distinction between the first instance courts and the courts of last instance in the sense of obligation to refer.

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- In the Civil Procedure Act, title XVII regulates stay, termination and suspension of proceedings.
 - The only mentioning of preliminary ruling procedure is Article 213,
 - which states that: *“the court shall also order the stay of the proceedings:*
 - *if it has decided that it does not resolve a preliminary issue itself,*
 - *if it has decide to refer the question to the ECJ about the interpretation or validity of acts of EU institutions.*

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- Having in mind the positivistic and formalistic legal culture in Croatia and to avoid possible doubts before Croatian judge it is better to prescribe this procedure by national law BUT
 - **Partial and unsystematic** regulation!!!
 - This pre-accession period is the right time to discuss about the problems that the national courts of member states are facing regarding the operation of preliminary ruling procedure and to suggest the best solution on how to implement the PR procedure in Croatia as future Member State!

The end!

