REFERENCE FOR A PRELIMINARY RULING: PRACTICAL ADVICE FOR LAWYERS

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MAIN POINTS. APPROACH

- Key issues in understanding the preliminary reference mechanism
- The urgent preliminary ruling procedure (PPU)
- Practical advice
  - Questions to be considered by lawyers

- References to Case-law
- References to Background documents

ART. 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

- 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.
- Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
- If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

I. KEY ISSUES
1. THE LEGAL NATURE OF THE REFERENCE FOR A PRELIMINARY RULING

- Art. 267 TFEU enshrines a cooperation mechanism
- A network, not a pyramid. (Constitutional) link between the CJ and the MS courts and tribunals
- Decentralised enforcement of EU law
  - Proceedings before the CJEU: actions brought against the institutions, bodies or offices of the EU (Art. 263, 265, 270, 272 TFEU) or against the MS (Art. 258-259 TFEU)
  - National courts: competent to virtually adjudicate all other disputes involving EU law or related to the application of EU law by the MS or within the MS
- A national court is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless, *inter alia*, a case is pending before and the answer provided by the CJEU is necessary in the adjudication
  - (link; necessity & relevance; not hypothetical questions, but relevant to resolution of dispute; relevance to stage at which reference should be made)
- Form of dialogue - does not take place within a triangular relationship, therefore it excludes any other court than the Court of Justice and the referring one – relevant in recent RoL cases - Case C-564/19, *RS*, C-430/21, *RS*)

C-234/17 - CRIMINAL MATTERS CONCERNING XC AND OTHERS

- 39. In order to ensure that **the specific characteristics and the autonomy of the EU legal order are preserved**, the Treaties have **established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law** (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).
- 40. In that context, **it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law** (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited, and Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 175).
- 41. **The judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU**, which, **by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the objective of securing uniform interpretation of EU law** (see, to that effect, judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1, p. 23), **thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties** (Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 176).

C-234/17 - CRIMINAL MATTERS CONCERNING XC AND OTHERS

- 42. In accordance with settled case-law, Article 267 TFEU **gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriat**e (judgment of 5 July 2016, Ognyanov, C 614/14, EU:C:2016:514, paragraph 17 and the case-law cited).
- 43. In addition, **it must be borne in mind that, under the third paragraph of Article 267 TFEU, when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice, where a question relating to the interpretation of EU law is raised before it** (see, to that effect, judgment of 9 September 2015, Ferreira da Silva e Brito and Others, C 160/14, EU:C:2015:565, paragraph 37 and the case-law cited).
- 44. Lastly, according to the settled case-law of the Court, **the national courts called upon, within the exercise of their jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means** (see, to that effect, judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraphs 21 and 24, and of 6 March 2018, SEGRO and Horváth, C 52/16 and C 113/16, EU:C:2018:157, paragraph 46 and the case-law cited).

1. KEY ISSUES
2. THE OBJECT OF THE REFERENCE FOR A PRELIMINARY RULING

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".

The Court of Justice

- is precluded from giving preliminary rulings on the validity of primary sources (as opposed to their interpretation) or on the validity of its own judgments;
- has no jurisdiction to rule on validity and interpretation of national law
- has no jurisdiction to rule on compatibility of national law with EU law

BUT: it has pushed the limits of Article 267 TFEU by giving preliminary rulings on interpretation of national law dealing with "purely" internal situations when its provisions reproduce or make reference to the contents of EU provisions.

REASONS: concepts and provisions taken from EU law should be interpreted uniformly irrespective of the circumstances in which they are to apply.

C-60/05 - WWF ITALIA AND OTHERS V REGIONE LOMBARDIA

18. In that regard, it must be borne in mind that, in accordance with settled case-law, although in a reference for a preliminary ruling the **Court cannot give a ruling either on questions which fall within the national law of the Member States or on the compatibility of national provisions with Community law, it can, however, supply a ruling on the interpretation of Community law so as to enable the national court to decide the case before it** (see, inter alia, Case C-150/88 Parfümerie-Fabrik 4711 [1989] ECR I-3891, paragraph 12, and Case C-124/99 Borawitz [2000] ECR I-7293, paragraph 17).

I. KEY ISSUES
3. DISCRETIONARY / MANDATORY REFERENCES

- Preliminary rulings on the interpretation of EU law:
  - a distinction is made between discretionary and mandatory referrals.
  - Article 267 (2) TFEU: courts and tribunals "may" make a request for a preliminary ruling - lower courts which have an unfettered discretion to decide whether and when to refer to the EC
  - Article 267 (3) TFEU: courts and tribunals against whose decisions there is no judicial remedy under national law "shall" refer - an obligation is imposed on national courts or tribunals adjudicating at last instance (this comprises not only final appellate courts in each Member State, but also all courts which decide a case in the last instance) to refer
    - EXONERATION: the doctrine of *acte clair & acte éclairé* (Case 283/81 *CILFIT*).
- Preliminary rulings on the validity of acts of EU institutions: all national courts and tribunals must refer to the ECJ if in doubt as to the validity of the relevant act (Case 314/85 *Foto Frost)*
  - Own motion (without request) (C-312/93 *Peterbroeck)*

I. KEY ISSUES
4. ADMISSIBILITY & CONSEQUENCES

- The ECJ has rarely refused to give a preliminary ruling;
  - Exception: when a referred question has no relevance to the main dispute,; when a referring court has not provided sufficient factual and legal background in its reference; if the referral represents an indirect way to elude the conditions set by Art. 263 TFEU
- A preliminary ruling on the interpretation of EU law is binding on the referring court and has retroactive effect unless the ECJ decides otherwise.
- A preliminary ruling on the validity of EU law entails that if the ECJ declares an act invalid all national courts and tribunals, not only the referring court, have to set aside that act.
  - Although the ECJ has no power to replace an invalid act it has authorised itself to replace invalidated provisions by appropriate alternatives while the adoption of required measures by the institution concerned is awaited.

C-173/09-GEORGI IVANOV ELCHINOV V NATSIONALNA ZDRAVNOOSIGURITELNA KASA

26. It is settled case-law that Article 267 TFEU gives national courts **the widest discretion in referring** matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case (…). **National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate**

28. However, it must be pointed out that **the possibility** thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before, if necessary, disapplying directions from a higher court which prove to be contrary to European Union law **cannot be transformed into an obligation** (see, to that effect, Case C 555/07 Kücükdeveci [2010] ECR I 0000, paragraphs 54 and 55).

29. Secondly, it must be borne in mind that it is settled case-law that **a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts** of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings (...).

30. It follows from those considerations that the national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, **is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with European Union law**.

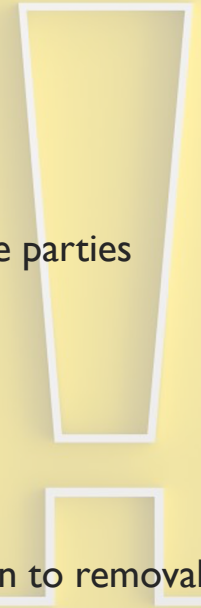
I. KEY ISSUES
5. "COURT" AND "TRIBUNAL" AS AUTONOMOUS CONCEPTS

AUTONOMOUS CONCEPTS

- Uniformity in the application of EU law requires the definition to be independent of the national equivalent concepts
- The CJEU has taken the "functional" approach to the determination of the meaning of "court or tribunal" under Article 267 TFEU, as opposed to the "literal" approach which would limit the possibility of making a reference to bodies qualified as called "court" or "tribunal" under national law

THE *DORSCH CONSULT* CRITERIA (CASE C-54/96)

- Whether the body is established by law, i.e. it must not be established by private parties
- Whether it is permanent, i.e. it must not exercise a judicial function only on an occasional basis
- Whether its jurisdiction is compulsory, i.e. there must be no alternative remedies available to the parties
- Whether its procedure is adversarial
- Whether it applies rules of law rather than principles of fairness
- Whether it is independent
  - the body in question must act as a third party in relation to the parties to the dispute;
  - members of the body must enjoy the safeguards which ordinarily apply to judiciary in relation to removal from office and re-assignment
  - members of the body must have no interest in the outcome of the proceedings apart from the strict application of the rule of law;
- Whether it is called upon to give a decision of a judicial nature



I. KEY ISSUES
6. THE INTERPLAY BETWEEN THE ECHR AND THE CFREU

IS THE REFERENCE FOR A PRELIMINARY RULING A PROCEDURAL RIGHT?

Parties in proceedings before a national court do not themselves submit references directly to the CJEU.

BUT

- In several Member States, the obligation of a court of last instance to refer is further reinforced by a constitutional guarantee, allowing the affected party to sue in constitutional court for an arbitrary refusal to refer (Germany, Austria, Spain, Czech Republic, and Slovenia)
- In October 2018, in *European Commission v French Republic,* the CJEU found for the first time a violation of Article 267(3) TFEU by a national court of last instance, which qualifies as infringement of EU law
- The illegal refusal to refer may result in liability proceedings against the MS – damages due to individuals to whom a prejudice was created
- Courts of last instance violate Article 6 ECHR if they provide no reasoning for a refusal to refer an EU law question to the CJEU (ECtHR, *Dhahbi v. Italy*)

II. THE URGENT PRELIMINARY RULING PROCEDURE (PPU)
PROCÉDURE PRÉJUDICIELLE D'URGENCE

The urgent procedure is based on Article 23a of the Statute and the detailed rules are provided by Articles 107 to 114 of the Rules of Procedure.

"1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.

2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred".

The urgent procedure applies *only* in the area of freedom, security and justice, that is, EU law relating to asylum and immigration and judicial cooperation in civil and criminal matters, and only in urgent matters where it is necessary for the CJEU to rule very quickly.

II. THE URGENT PRELIMINARY RULING PROCEDURE (PPU)
PROCÉDURE PRÉJUDICIELLE D'URGENCE

- There is no exhaustive set of criteria stating when it is to apply. However, Article 267 TFEU states that if a question of EU law is raised "in a case pending before a court or tribunal of a Member State with regard to a person in custody, the CJEU shall act with the minimum of delay".
- Generally, a matter is considered urgent :
- (1) where subject is in custody or otherwise deprived of liberty and
- (2) where the continued deprivation of liberty is affected by the outcome of the preliminary ruling.
- The number of parties authorised to lodge written observations can be limited, the length of written submissions and the time to submit them can be limited, and the written procedure is generally conducted electronically. In extremely urgent cases, the written procedure may be omitted entirely.
- The average time for consideration of a preliminary ruling is about 18 months *Cf.*
- *Celmer* Case (C-216/18 PPU): the High Court of Ireland determined on 12 March 2018 that a preliminary reference was necessary and invited submissions of the parties on the questions to be asked. The CJEU delivered its ruling on the questions on the 25 July 2018, just over four months later, despite hearing the case in Grand Chamber" .

III. PRACTICAL ADVICE

QUESTIONS TO BE CONSIDERED BY LAWYERS

- Is the reference possible in my case?
- Is the reference useful in my case?
- How do I persuade the judge to make/not to make a reference?
- How can I help the judge?
- Can I influence the question / order for reference?
- How do I approach the written observations?
- Will a hearing always be organized?
- What happens during the oral hearing?

III. PRACTICAL ADVICE

- IS THE REFERENCE POSSIBLE IN MY CASE?
  - Is there a connection between EU law and my case?
  - If there is a connection:
    - Is the application of EU law clear? Is there a doubt about the validity of EU law incident in the case?
    - Is the answer provided by the CJEU in interpretation necessary for the national court to adjudicate?
- IS THE REFERENCE USEFUL FOR MY CASE?
  - The reference will allow the CJEU to rule on points of EU law (additional support for the national court)
  - The reference fulfils strategic purposes
  - Even if not made, the reference will reinforce my legal arguments (consistent interpretation of national law)

III. PRACTICAL ADVICE

- HOW DO I PERSUADE THE NATIONAL JUDGE TO MAKE THE REFERENCE?

  - underline the EU law dimension of the case

  - explain the possible shortcomings of the situation before the national court (interpretation not clear; absence of previous case law at CJEU; need of consistent interpretation)

  - put forward the national judges' mandate as EU law judges

  - put forward the MS' liability for illegal refusal to refer

- HOW DO I PERSUADE THE NATIONAL JUDGE NOT TO MAKE THE REFERENCE?

  - EU law is not applicable / relevant for the case

  - EU law is clear

  - Even interpretation provided by the CJEU will not decisively impact on the adjudication of the case at the national level

III. PRACTICAL ADVICE

HOW CAN I HELP THE NATIONAL JUDGE? /

CAN I INFLUENCE THE ORDER FOR REFERENCE?

(duty of the judge, the lawyer assists)

- Form and content of a reference:
  - Article 94 Rules of Procedure of the Court (dispute/facts, national provisions, reasons for request, summary of arguments, questions)
  - Recommendations issued by CJEU
- Suggest the questions and frame the reference
- Make sure the grounds are accurate
- Make sure the context is accurately explained and the need of the referral is convincingly explained
- Explore a possible agreement with the other party in respect with the question referred

III. PRACTICAL ADVICE

HOW DO I APPROACH THE WRITTEN OBSERVATIONS?

- Two months from notification by the Registrar of the Court to the parties (Article 23 of Statute), shorter period for expedited or accelerated procedures
- Do not exceed 15 pages (try to keep shorter)
- Do not repeat either the facts or the legal background
- Provide the Court with a clear structure, use short sentences, make precise points
- Facilitate translation
- Avoid national legal terminology
- Suggest answers

III. PRACTICAL ADVICE

WILL A HEARING ALWAYS BE ORGANISED?

A hearing is organised – whether or not a request to that effect has been submitted – where the Court deems it to have an added value by potentially contributing to a better understanding of the factual or the legal context of the main proceedings and the precise EU law issues that they raise, and therefore to determining the answers which the Court could provide to the preliminary questions.

Moreover, a hearing will always be held if a preliminary ruling is dealt with under an expedited or urgent procedure.

III. PRACTICAL ADVICE

- **HOW TO PREPARE FOR THE HEARING?**
- **The Court may submit** to the participants, in advance of the hearing date, **questions** that they are expected to reply to in the course of the hearing.
- **The Court may** also **suggest in writing that the parties focus on one or more specific issues** when presenting oral argument.
- Arrive at least 45 minutes before the hearing starts. Ask for the name or number of the courtroom (*salle d'audience*) and identify the closest robing room (*salon des avocats*) where you may put your robes on.
- Lockers, computers with printers and an internet connection are available.
- Making photocopies at the Court is not possible.
- Take a seat at the desks in front of the bench. Your clients may sit on the front row of the seating immediately behind these desks.
- Your team must be seated sufficiently close by so as to assist you without disturbing the hearing.
- Free high-speed broadband Wi-Fi access is available in the courtroom Look for the "Guest" network. No password is required

III. PRACTICAL ADVICE

WHAT WILL HAPPEN DURING THE ORAL HEARING?

A few minutes before the hearing begins, the court usher will invite the lawyers to meet the judges to talk about the timing of the interventions, the order in which the parties take the floor and the points on which the Court wants them to focus or questions that members envisage asking

- Focus on the two or three most important points while showing that you are ready to deal with all other points
- Address any relevant developments in the case-law since the date of filing of your last written submissions.
- The Court's task is to provide an interpretation of EU law that can be applied in all Member States - the focus must therefore be on the law

III. PRACTICAL ADVICE

WHAT WILL HAPPEN DURING THE ORAL HEARING?

- The order of interventions is set by the President and starts with the presentation of the parties' arguments, generally in this order: first those of the main proceedings before the referring court, then the Member States in alphabetical order and, finally, the institutions of the Union.

- Where questions put by the Court follow, they will have to be answered in the same order in which they are asked, although questions may be asked only to certain participants.

- Lawyers are advised to prepare on every aspect of the case, including the factual background and the national legal context, in order to answer concisely, limiting oneself to dealing with the points specifically raised.

- Before the end of the hearing, the representatives of the parties or the other participants have the opportunity, if they consider it necessary, of replying briefly. Those replies, of a maximum duration of five minutes each, do not constitute a second round of oral submissions. They are designed only to enable the lawyers to react succinctly to observations made or questions put during the hearing by the other participants or by the members of the Court.

RESSOURCES

EU Treaties, Regulations and Directives

CJEU Judgments, Opinions, Orders and Pending Cases

CJEU Rules of Procedure and Information Notes

CJEU Registry

Charterpedia

https://eur-lex.europa.eu/EN/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html

Practical Guidance for Advocates before the Court of Justice in Preliminary Reference cases,

https://ks.echr.coe.int/en/web/echr-ks/

https://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf

The HELP course on the interplay between the Convention and the Charter (to be released in September 2023)

The CJEU training video on The Preliminary ruling for lawyers (soon to be released)