

The reference for preliminary ruling: practical advice for lawyers

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Article 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.

What is the purpose of the reference for a preliminary ruling?

- Designed to ensure the uniform interpretation and application of EU law across the Member States – fundamental problem in that the national courts apply it?
- Cooperation between national courts and the Court of Justice
- Helpful for national courts but:
 - Court of Justice will not rule on hypothetical questions;
 - Court of Justice will not apply EU law to the facts in the national proceedings
- For most litigants, it is the only way that the assertion of an EU law right can be determined in Luxembourg, i.e. indirectly

Validity of EU acts

- National court can reject a plea that an EU act is invalid but cannot declare EU acts to be invalid
- If a national court has doubts as to such validity, it must make a reference

What is a “court or tribunal” for the purpose of a reference for preliminary ruling?

- Which courts can make a reference? Any “court or tribunal” – an autonomous concept of EU law:
 - Is the body established by law?
 - Is it permanent?
 - Does it exercise binding jurisdiction?
 - Is the procedure *inter partes*?
 - Is it subject to the rule of law?
 - Is it independent?

Whether and when to make a reference: a decision for the national court

- Is it *acte clair* (or *acte éclairé*)?
- Are the facts and national law sufficiently clear to make a reference?
- Principle of good administration (general principle of EU law) – likely only to be appropriate for reference to be made after both sides have been heard
- The precise question(s) to be referred also a matter for the national court
- If court is court of final instance, this may require a reference to be made

What role does a legal practitioner play before the national court?

- First of all: is it in the interests of your client for a reference to be made? The effect will be to stay the national proceedings – delay and increased legal costs
- How should the questions be worded?
- How likely is a judge to make a reference in your jurisdiction?
- The extent to which the parties' lawyers have any input will largely be determined by national procedure

DISCUSSION

- Discuss in your groups the role that a legal practitioner plays where the decision whether or not to refer and the questions to be referred are a matter for the national court
- What factors would affect your advice to your client as to the position that should be advocated for?

What are the key sources on procedure before the Court?

- Statute of the Court (Protocol No. 3 to the Treaties)
- The Court's Rules of Procedure and Supplemental Rules of Procedure
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), concerning the issues of whether to refer and the form of the reference
- Practice Directions to Parties Concerning Cases Brought Before the Court

The order for reference

- Rules of Procedure, Article 94
- Formal requirements – none, but must be succinct and clear, without unnecessary detail – it will be translated into all the official languages of the European Union
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings – Annex sets out the essential elements of an order for reference
- Recommendations have guidance on what is helpful: precise references to national and EU provisions, if necessary summary of the parties' arguments, possibly the referring court's own suggested answer to the question(s)
- Questions must be set out separately and must be comprehensible on their own terms
- Referring court is invited to anonymise personal data

When the order for reference is received

- Language of the case is the language of the referring court
- Anonymisation of natural persons if not already done by the referring court (introduced in 2018)
- Immediate translation into all the official languages and notification to the Member States
- Notification to whichever institution, body, office or agency that adopted the relevant act

Procedure at the Court of Justice: parties

- All parties to the national proceedings entitled to be parties before the Court (determined by national law)
- Other parties cannot intervene in a reference for preliminary ruling – only in contentious proceedings
- The possibility of being joined as a party in the national proceedings just before the reference is made – again, a matter for national procedural rules

Procedure at the Court of Justice: the written stage

- e-Curia platform: most parties will use this method of lodging documents
- Time limit – two months from the notification, plus a further ten days for distance
- Observations will be translated into the other languages but any annexes do not get translated
- All observations due simultaneously; no opportunity to reply in writing to the observations of other parties and/or Member States

Procedure at the Court of Justice: the oral stage

- Parties can participate even if they have not put in written observations
- Court will assign times for submissions to each party
- Number of judges in the formation will depend on the importance of the issue of law
- *Juge-rapporteur* and Advocate General
- The translators will be translating your oral submissions while you are speaking – provide a speaking note to the translators beforehand and don't speak too fast

When and how can a reference be withdrawn?

- The national court can withdraw the reference
- If the national proceedings become moot or are settled between the parties then the question becomes hypothetical and the referring court must withdraw the reference
- The question may be decided in an earlier reference that is heard and decided after the making of the reference
- Recommendations, paragraph 27: referring court should join all the pending cases before it to the reference so that the settlement of one “lead” case does not have the effect of rendering the reference hypothetical

Legal costs

- The Court will find that the national court should decide on the costs of the parties to the national proceedings
- Member States etc to bear their own costs
- Grey area if Member State in a party to the national proceedings?
- Legal aid is possible if a party has insufficient means and is not covered by legal aid provision within the national proceedings – Rules of Procedure, Article 115

The national proceedings after the ruling is given

- What happens next may depend on the stage of the national procedure at which the reference was made
- Although the judgment will be binding on the point of EU law, there may still be arguments to be made as to the application of the binding ruling to the facts of the case

DISCUSSION

- Discuss in your groups the importance of the written and oral stages in the procedure for a reference for preliminary ruling

The urgent or PPU procedure

- Only applies in the Area of Freedom, Security and Justice – i.e. governed by Part Three, Title V TFEU
- Subject matter lends itself to urgency
- In extremely urgent cases, the Court can dispense with the written stage of the procedure, but generally just very short timeframes for each stage in the procedure
- On average, takes 66 days

The expedited procedure

- Used in very few cases – exceptional
- Applies when there is a need for expedition in a case that does not fall within the Area of Freedom, Security and Justice
- Usually requested by the referring court, but the President can, exceptionally, apply it of his own motion
- No significant differences in procedure, but shorter timeframes throughout
- Generally concluded within 3-6 months

A new departure: references to the General Court

- First provided for in the amendments agreed via the Treaty of Nice
- Provision now found in Article 256(3) TFEU:

The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

A new departure: references to the General Court

- Request submitted by the Court - proposed new Article 50b to be inserted into the Statute
- Court has to deal with “requests that are not only more numerous but also increasingly complex or sensitive”
- General Court now has two judges per Member State (54 in total) and has some specialised chambers
- The Court therefore takes the view that transferring the necessary competence to the General Court in certain specified areas of law “is necessary, in the interests of the proper administration of justice”
- Where the reference relates to a clearly identifiable area of law and is sufficiently separable from other areas of EU law
- The specified areas raise few issues of principle and there is a large body of case law of the Court
- Areas all give rise to a sufficiently high volume of references such as to impact on the workload of the Court

A new departure: references to the General Court

- Areas identified: VAT, excise duties, Customs Code and tariff calculation of goods, compensation and assistance to passengers, greenhouse gas emissions trading
- Chambers to be designated for the purpose of hearing references in these areas
- Advocate Generals to be appointed (but, as with the Court, no Opinion may be required in a given case)
- Possibility of formations of more than five judges
- All references still to be submitted to the Court and the Court will decide whether to transmit to the General Court on the strict basis of the areas of law that are engaged
- General Court will be able to refer it back if necessary