

# The role of the national judge in applying the EU anti-discrimination directives: practical tips for submitting a preliminary ruling request

APPLYING EU ANTI-DISCRIMINATION LAW - SEMINAR FOR MEMBERS OF THE JUDICIARY – ERA

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## Summary

- Where to find information about preliminary ruling procedure?
- Who can (and who has to) submit a request for a preliminary ruling?
- What should be the questions about?
- When and how to ask?
- What should be included in a request for a preliminary ruling?
- What happens after a request for a preliminary ruling is lodged?
- What to expect from the Court?



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# Sources governing the preliminary ruling procedure

- Article 267 TFEU
- Statute of the Court of Justice of the European Union ('Statute') (Art. 23)
- Rules of Procedure of the Court of Justice ('RoP') (Art. 93 et seq.)
  
- See also Recommendations to national courts on the use of the preliminary ruling procedure



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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."



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## Originator of the request

- The competence to initiate preliminary ruling proceedings
- “A court or tribunal of a Member State”: concept of EU law, assessed against a number of factors:

A body established by law, permanent, its jurisdiction is compulsory, procedure is *inter partes*, applies rules of law, independent

Examples in the field of anti-discrimination directives:

C-394/11, *Belov*, 31 January 2013, par. 38): a question referred by Komisia za zashtita ot diskriminatsia (Commission for Protection against Discrimination)

C-407/98, *Abrahamsson*, 6 July 2000, par. 29): a question referred by Överklagandenämnden för Högskolan (Universities' Appeals Board)

- See also Art. 100 RoP (withdrawal of a request)



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## Obligation to refer

Case C-416/17 *Commission v France* (4 October 2018) the first infringement case (Article 258 TFEU) concerning the failure of a national court (French Conseil d'Etat) to refer a preliminary question when there was an obligation to do so (see par. 105 - 114)

The national court of last resort “is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt [...]” (par. 110) [so-called CILFIT exceptions to the obligation to refer (Case 283/81, 6 October 1982)]

Questions concerning the invalidity of an act of EU law (Foto-Frost 314/85, 22 October 1988)



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# Obligation to state reasons for not referring

Possible implications under Article 6(1) of the ECHR

“...where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – in particular, where the refusal proves arbitrary ...”

[see e.g. *Somorjai v. Hungary*, 28 August 2018, § 56; *Schipani v. Italy*, 21 July 2015, §§ 70-73; *Dhahbi v. Italy*, 8 April 2014, §§ 33-34; *Ullens de Schooten v Belgium and Rezabek*, 20 September 2011, §§ 56 to 62]



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# Object of the question

Interpretation or validity of EU law (as opposed to interpretation of national law and resolution of the specific case)

For the national court to set out the relevant elements of law and fact which make, in its view, provisions of EU law applicable to the case at hand

NB: questions concerning the Charter of Fundamental Rights of the EU: Article 51(1) of the Charter → a rule of EU law other than the Charter itself must be applicable



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## Further requirements

Questions cannot be hypothetical (the Court will not issue an opinion on a general question of EU law)

The response to the questions asked must be relevant for the resolution of the pending case

The case must (still) be pending before the referring court



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## The content (Art. 94 RoP)

- Subject matter and facts
- National and EU law provisions relevant for the case
- Reasons why the national court considered the request necessary
- Questions referred (in a clearly identified part of the request)
- Identification of the referring court and of the parties
- [Summary of the positions of the parties]
- [View of the referring court as to the reply to be given to the questions posed]
- Reasons for special procedural treatment, i.e. expedited (Art. 105 of the RoP) or urgent (Art. 107 of the RoP) procedure (the latter only possible in matters falling under the area of freedom, security and justice)



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# Anonymisation

In all requests for preliminary ruling brought after 1 July 2018 (but in some cases used already before)

The method of anonymisation and the name of the case: depends on whether a legal person is also a party (1) or whether both parties to the main proceedings are natural persons (2)

1. name of the legal person is used
2. initials (other than the real ones)

Distinctive element to be added (in brackets) to facilitate the identification of the case (the name of a legal person involved in the case (other than a legal person that is a party to the proceedings) or the subject matter of the case) see e.g. judgment of 26 June 2017, C-451/16 MB (Change of gender and retirement pension)



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# Dealing with a request for a preliminary ruling

The request is in principle translated into all official languages of the EU and served on all the interested parties (Art. 23 of the Statute, Art. 98 RoP). NB: annexes are not translated → all the relevant information must be included in the text of the request

Once the request is submitted, the referring court will in principle not have an opportunity to express itself in the proceedings

- Unless the Court of Justice requests further information concerning the case
- See also Art. 97(3) RoP on the representation of the parties



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# What to expect

- Opinion of the Advocate general (in some cases)
- Judgment
- Order
- Art. 99 RoP: question is identical to a question on which the Court has already ruled, where the reply may be clearly deduced from existing case-law or where the answer admits of no reasonable doubt
- Art. 53 (2) RoP: where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible
- Art. 100 (2) RoP: withdrawal



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