



Seminar for judges and prosecutors entitled:  
„APPLYING EUROPEAN ANTI-DISCRIMINATION LAW”.  
Thessaloniki, ESDI, 24 November 2023

## The application of EU law & the preliminary reference to the CJEU

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Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

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## The question referred to the CJEU

- I. The conditions for the correct submission of a preliminary question.
- II. When is it mandatory for a national judge to refer a question for a preliminary ruling?
- III. Reasons for refusing a party's request for a preliminary ruling.
- IV. What is the usefulness of the preliminary question for the national judge?

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## Article 267 TFEU

The CJEU rules on preliminary rulings:

- a) on the **interpretation** of the **Treaties**,
- (b) on the **validity** and **interpretation of acts** of the institutions or other bodies or agencies of the Union.

**A court or tribunal** of a Member State before which such a question arises **may**, if it considers that a decision on the question is **necessary to enable it to** give its own judgment, refer the question to the Court of Justice for a ruling.

A court or tribunal of a Member State before which such a question is raised in **a case pending before it** and whose decisions are not subject to domestic remedies **must** refer the question to the Court of Justice.



## I. Basic conditions

- (a) **Court of Justice** of a Member State
- b) ... which has doubts as to the interpretation or validity of provisions of **EU law**
- (c) ... provisions **relating** to the pending case



## I. Basic conditions

### (a) Court of Justice of a Member State

*It is settled case-law that, in order to assess whether the applicant institution is a 'court or tribunal' within the meaning of Article 267 TFEU - a matter which falls exclusively within the ambit of European Union law - the Court takes into account a number of elements, such as the **establishment** of that institution **by law**, its **permanence**, the **binding nature** of its jurisdiction, the **adversarial nature** of the proceedings before it, the **application of rules of law** by that institution and its **independence**.*

CJEU (Grand Chamber) of 21.01.2020, C-274/14, *Banco de Santander*, para. 51

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## I. Basic conditions

### b) ... which has doubts as to the interpretation or validity of provisions of European Union law

- primary law (interpretation only) and secondary law (interpretation or validity): directives, regulations, decisions, recommendations and opinions
- the question is inadmissible in the event of non-application of Union law
- rewording of a question on the interpretation of national law

CJEU (Grand Chamber) of 16.06.2015, C-62/14, *Peter Gauweiler*, para 26

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## I. Basic conditions

### (c) ... provisions relating to the pending case

*"the preliminary question mechanism does not entrust the Court of Justice with the task of giving advisory opinions on general or hypothetical questions, but of contributing to the administration of justice within the Member States"*

*Foglia* judgment (C-244/80)

HOWEVER: Evidence that the question is solvable

CJEU (Grand Chamber) of 5.12.2006, C-94 and 202/04, *Cipolla*, para. 40



## II. Obligation to submit a preliminary question

Opportunity or obligation?

|                          | Non-appealable decision | Irrevocable decision |
|--------------------------|-------------------------|----------------------|
| Issues of interpretation | OPPORTUNITY             | OBLIGATION           |
| Validity check           | OBLIGATION              | OBLIGATION           |



## II. Obligation to submit a preliminary question

### A. Always an obligation when the validity of an EU provision is at issue

- **Legal basis:** a combination of Articles 267 and 263 TFEU (appeals for review of the legality of EU legislative acts)

These two avenues of judicial review establish a "*complete system of legal remedies designed to entrust the CJEU with the task of reviewing the legality of acts of the institutions*".

CJEU, C-294/83, *Les Verts*

- **Competence** of the national judge to rule in **favour of validity**

... because the national court, 'in so doing, *does not affect the substance of the Community act*'.

CJEU, C-314/85, *Foto-Frost*



## II. Obligation to submit a preliminary question

### B. On a question of interpretation of an EU provision, only the court whose decision is not subject to appeal has an obligation to submit

- **Justification:** to prevent the development of established national case-law which deviates from the rules of European law

CJEU, C-495/03, *Intermodal*

- Special case of **provisional measures:** obligation exists only when the issue will not be dealt with in the main proceedings

CJEU, C-35/82, *Morson*



## II. Obligation to submit a preliminary question

### C. Exceptions to the obligation to submit a question on a question of interpretation of EU law

Two exceptions established through case law:

- 1) The question which the national court intends to put to the CJEU is identical to a question which has already been referred to it and on which it has already ruled in the past (*acte éclairé*).
- 2) The correct interpretation of European law is so obvious that there is no need for a preliminary question (*acte clair*).



## II. Obligation to submit a preliminary question

### **On the one hand, the CJEU sets strict criteria for the "clear act"**

- The solution should be equally obvious in the courts of all Member States,
- by comparing the various linguistic renderings and any differences in legal concepts in national laws.
- in the light of all the provisions of EU law

*C-283/81, CILFIT*

*CJEU of 06.10.2021, C-561/2019, Consorzio*

### **On the other hand, the CJEU yields to the power of the national judge to declare the "clear act" himself.**

*CJEU, C-495/03, Intermodal*

*CJEU, C-72/14 and C-197/14, X and van Dijk*



## II. Obligation to submit a preliminary question

### Consequences of a "breach" of the obligation

**A.** Order of the national court to pay damages to a party for miscarriage of justice for failure to submit a question referred for a preliminary ruling

CJEU, C-160/14, *Ferreira da Silva*

**B.** Conviction of a Member State for breach of EU law

CJEU, C-416/17, *Commission v France*

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## Frequency of enquiries from Greece

|                 | 2018 | 2019 | 2020 | 2021 | 2022 | 5 years    |
|-----------------|------|------|------|------|------|------------|
| <b>GREECE</b>   | 3    | 5    | 2    | 2    | 4    | <b>16</b>  |
| <b>BELGIUM</b>  | 40   | 38   | 35   | 35   | 30   | <b>178</b> |
| <b>BULGARIA</b> | 20   | 24   | 29   | 49   | 43   | <b>165</b> |

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### III. Reasons for rejecting a request for a preliminary ruling

#### Established ECHR case law:

A national court's refusal to refer a case to the CJEU, rejecting a party's request, may "violate the principle of a fair trial if it appears arbitrary"

- **Judgment of the ECtHR, 2014, *Dhahbi v. Italy* (17120/09)**

Case of implicit rejection.

- **ECtHR Judgment, 2019, *Baltic Master v. Lithuania* (55092/16)**

The national court considered the interpretation of the European Union legislation to be obvious, without, however, specifying the elements which would make it obvious



### III. Reasons for rejecting the request

- **ECtHR of 13.02.2020, *Sanofi Pasteur v. France* (25137/16)**

French Cour de cassation: the action brought by Sanofi Pasteur is dismissed "without the need to refer a question to the CJEU for a preliminary ruling".

ECHR: Whereas:

1. No reference was made to any of the CILFIT cases to justify the rejection, and
2. The Cour de cassation had referred a question to the CJEU in a similar case

Conclusion: In the absence of **specific reasons** for rejecting the request, Article 6, para. 1, ECHR is breached.





### III. Reasons for rejecting the request

**Judgment of the ECtHR, 14.03.2023, *Georgiou v. Greece* (57378/18)**

Case of implied rejection of a request for a preliminary question by the Supreme Court in a criminal case.

The CJEU requires the Supreme Court to refer a question for a preliminary ruling in this case or to answer, with sufficient reasons, why it considers that there is no obligation to refer a question.

The case will be brought back through 525 CPC.



### IV. What is the usefulness of the preliminary question?

**The main objectives served by the mechanism of Article 267 TFEU are:**

- Last resort for judicial protection
- Uniform interpretation and application of Union law
- Lever for the development of Union law



#### IV. What is the usefulness of the preliminary question?

##### CASE STUDY

Two married women, a Greek and a Spanish woman living in Spain, have a child. Because they wish the child to be provided with a Greek passport, they present to the competent Greek authorities a Spanish birth certificate which lists the Greek woman as Mother A and the Spanish woman as Mother B, but without specifying which one of them bore the child.

The authorities responsible for issuing passports, applying Greek legislation, require the issuance of a Greek birth certificate from the Special Registry of Athens. The Special Registry of Athens refuses to recognise the Spanish birth certificate because the Greek legal system does not recognise marriage between two women, nor does it recognise a relationship between the child of the biological mother and her cohabiting partner.

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#### IV. What is the usefulness of the preliminary question?

##### CASE STUDY

Two married women, a Bulgarian and a Spanish woman living in Spain, have a child. Because they wish the child to be issued with a Bulgarian passport, they present to the competent Greek authorities a Spanish birth certificate which lists the Bulgarian woman as Mother A and the Spanish woman as Mother B, but without specifying which one of them bore the child.

The passport issuing authorities, applying Bulgarian legislation, require a Bulgarian birth certificate. However, the Special Registry Office refuses to recognise the Spanish birth certificate because the national legal order does not recognise marriage between two women, nor does it recognise a relationship between the child of the biological mother and her cohabiting partner.

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**Two options are available to the national judge:**

**A.** To apply national law, rejecting the appeal of the married women.

**B.** Refer a question for a preliminary ruling on the interpretation of Union law infringed by national legislation (right of free movement, right of Union citizens to an identity card (see Directive), Charter of Fundamental Rights).

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**Judgment of the CJEU (Grand Chamber) of  
14.12.2021, C-490/2020, Pancharevo**

64. In particular, Article 2 of the International Convention [on Children] establishes for children the principle of non-discrimination, which requires that [...] the right to be registered with the civil registry and the right to acquire a nationality shall be guaranteed without the child being subjected to any discrimination on the basis of the sexual orientation of his or her parents.

65. In those circumstances, to deprive the child in question of a relationship with one of his parents in the exercise of his right to freedom of movement [...] on the ground that his parents are of the same sex would be contrary to the fundamental rights guaranteed to that child by Articles 7 and 24 of the Charter.

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**Judgment of the CJEU (Grand Chamber) of  
14.12.2021, C-490/2020, Pancharevo**

[...] the Member State of which the child in question is a national shall be obliged [...] to recognise, like any other Member State, **the document issued by the host Member State which** enables the child in question to exercise with any of the persons mentioned above his or her right of free movement and residence in the territory of the Member States.

RESULT: What Member States wanted to avoid when adopting Regulation 2016/1191 on the authentication of documents.

Question: Judicial activism by the CJEU or simply respect for the principle of legality?

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**IV. What is the usefulness of the preliminary  
question?**

This simple case, which was brought before an administrative court in Sofia, was the reason for the Union's legislation:

**Proposal for a Regulation** on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parental responsibility and the creation of a European Certificate of Parental Responsibility.

<https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=celex%3A52022PC0695>

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*Thank you  
for your attention!*

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