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ERA Seminar

The Fight against Discrimination

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The Role of the National Judge:

Preliminary Rulings

I The foundations of the ECJ's jurisdiction to give preliminary rulings

Art. 234 EC

Art. 68 EC in respect of the matters dealt with in Title IV ("Visas, asylum, immigration and other policies related to the free movement of persons")

Art. 35 EU in respect of the matters dealt with in Title VI ("Provisions on police and judicial cooperation in criminal matters")

II The characteristics of references for preliminary rulings

A three-stage process: a **question** referred by a national court to the ECJ, the **procedure** before the ECJ and the **reply** by the ECJ to the national court.

Questions referred to the ECJ

A question referred to the ECJ must meet four major criteria: first of all, it must be raised by a **court or tribunal (1)**; secondly, it must be a question on the **interpretation** or **validity** of a **Community law provision (2)**; thirdly, depending on the court or tribunal involved, the question must be **voluntary** or **compulsory (3)**; fourthly, the question must meet certain **substantive requirements (4)**.

1. ***The question must be raised by a court or tribunal***

The preliminary ruling procedure is an instrument of judicial cooperation between the ECJ and a national judge. This has two consequences:

a. It is a procedure that is not open to the parties.

b. It is a procedure that is available exclusively to courts or tribunals as consistently defined by the Court of Justice based on the following criteria:

- **the legal basis of the institution,**
- **its durability,**
- **the binding force of its jurisprudence,**
- **adversarial proceedings,**
- **the application of the rules of law by this institution,**
- **its independence.**

- Examples of jurisdictions that are considered to be courts or tribunals within the meaning of Art. 234 EC include:

  An Italian judge seized of a request for an injunction, comparable to the French proceedings for order to pay debts

  A French examining magistrate

  A judge asked to grant an interim injunction

- Examples of jurisdictions that are not considered to be a court or tribunal within the meaning of Art. 234 EC include:

  A public prosecutor's office

  An arbitration tribunal that has no binding force

  Independent competition authorities

2. ***The interpretation or validity of a Community law provision***

a. In this type of proceeding, the Court of Justice has no jurisdiction to rule on the compatibility of national provisions with Community law.

b. A question on the *validity* of a Community law provision can only relate to secondary law (directives, regulations, decisions).

c. On the other hand, a question on the interpretation of Community law may be related to both primary and secondary law.

3. ***Voluntary or compulsory reference***

a. The reference of a question is compulsory for

- national courts or tribunals against whose decisions there is no judicial remedy under national law

  The supreme courts of the Member States,

  All other courts or tribunals against whose decisions there is no judicial remedy (judgment of 4 June 2002, C-99/00 *Lyckeskog* [2002] ECR I-4839): this notion does not apply to a court of appeal whose decisions can only be appealed before a supreme court if said court has allowed such appeal).

  This obligation (to refer) is therefore in keeping with the strategic position of supreme courts: in accordance with their traditional function of unifying law, the task of supreme courts is to ensure the correct and effective application of Community law by the other national courts and tribunals.

  The scope of and exceptions to this obligation were defined in the ECJ's judgment of 6 October 1982, *Cilfit* (C-283/81, [1982] ECR 3415). According to this judgment, courts or tribunals are not obliged to refer a question to the ECJ:

  - **When the question raised is identical to a question on which the Court has already ruled;**

  - **When the Community provision in question has already been interpreted by the Court of Justice;**

  - **When the correct application of Community law is so obvious as to leave no scope for any reasonable doubt** (the so-called "*acte clair*" doctrine, known in particular in French administrative law).

  In the latter case, a national court or tribunal is only relieved of the obligation to refer if it is convinced that the correct application of Community law is equally obvious both for the courts and tribunals of the other Member States and for the European Court of Justice itself. The ECJ has therefore considerably restricted the possibility to dispense with the obligation to refer in cases where it has not yet itself interpreted the Community provision in question.

- Cases involving the validity of a Community provision

  The *Foto-Frost* judgment (C-314/85, [1987] ECR 4199): National jurisdictions can reject the defence of the unlawfulness of a Community provision. However, under no circumstances can they declare that a Community provision is invalid. **The ECJ has exclusive jurisdiction to declare Community provision void**.

  On the other hand, the national judge may, **in proceedings for an interim injunction**, suspend the application of a Community act on two conditions:

- The national judge must at the same time refer the question of the validity of the Community provision concerned to the ECJ for a preliminary ruling.

- The national judge must respect the same three conditions that a Community judge has to observe in proceedings relating to an application for interim measures: the national court entertains serious doubts as to the validity of the Community measure; there is urgency, i.e. the application of the provision in question poses a threat of serious and irreparable damage to the applicant; the national court takes due account of both the Community's interests (in the application of Community law) and the applicant's interests (C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415; C-466/93, *Atlanta* [1995] ECR I-3799; C-68/95, *T-Port* [1996] ECR I-6065).

b. The reference of a question is voluntary.

It is (usually) in the parties' interest that a question should be referred to the ECJ as early as possible, instead of waiting until the case is heard before the court of last resort.

However, the national judge alone decides on the timing of a reference to the ECJ.

It is usually also in the interest of good administration of justice to refer a question to the ECJ after an adversarial debate.

4. *The conditions for referring questions to the ECJ*

a. The principle and its exceptions

According to the established practice, it is exclusively within the purview of the national judge to decide – taking due account of the particularities of the case involved – whether it is necessary to refer a question to the ECJ for a preliminary ruling and whether the questions put to the ECJ are pertinent.
If the question raised deals with the interpretation or validity of a Community provision, the Court of Justice is obliged to give a ruling.
It is only in certain **exceptional** circumstances that the Court of Justice can examine its own jurisdiction and reject a request for a preliminary ruling as inadmissible. A request for a preliminary ruling may be rejected in three cases:

- If a legal dispute is purely fictitious (judgment of 11 March 1980, C-104/79, *Foglia/Novello* [1980] ECR I-745);

- If it is obvious that there is no connection between the interpretation or assessment of the validity of Community law requested by the national judge and the reality or the object of the principal lawsuit (judgment of 26 January 1990, C-286/88, *Falciola* [1990] ECR I-191);

- If a question is raised on the validity of a **specific Community act** such as a decision by the Commission declaring that state aid granted to an enterprise is incompatible with Community law. If the enterprise has not brought an action against the Commission's decision before the Court of First Instance within the period prescribed, which it could have done, the enterprise cannot plead the unlawfulness of the Commission's decision in the framework of proceedings for the recovery of the aid. The Court of Justice considered that this would be tantamount to circumventing the rules relating to nullity actions and the strict time-limits, which would be incompatible with the requirements of legal certainty

(judgment of 9 March 1994, C-188/92, *TWD v Bundesrepublik Deutschland* [1994] ECR I-833).

b. Substantive requirements to be met by a reference

A question referred to the Court for a preliminary ruling may be submitted in any form admitted under national law for interlocutory proceedings. References made by German courts are based on a court decision.

It is only the decision of the national court that is communicated to the parties that are entitled to take part in the proceedings. These are mainly the governments of the Member States and the Community institutions. The decision of the national court is translated into all the languages (Art. 104(1) ECJ Rules of Procedure).

The national court's decision must be sufficiently complete and contain all the pertinent information to allow the Court as well as the other parties entitled to take part in the proceedings to understand the facts and the legal issue of the main proceedings:

- It must contain a succinct presentation of the subject matter of the main proceedings as well as the relevant facts;
- It must reproduce the text of the provisions of domestic law relied on;
- It must identify, as precisely as possible, the relevant provisions of Community law;
- It must specify the reasons why the national court or tribunal has raised questions on the interpretation or validity of certain Community provisions;
- It must include, where appropriate, a summary of the essential arguments of the parties in the main proceedings;
- It must contain the precise wording of the question(s) to be answered.

Originally, once the referring court had informally submitted the request for a preliminary ruling, it was no longer involved in the matter until the ECJ gave its preliminary ruling with the answers to the questions raised. Under Art. 104(5) ECJ Rules of Procedure, the Court of Justice may now request clarification from the national court.

The proceeding

1. *General rules*

Apart from some particularities, the procedure is the same as that in direct actions. It is subdivided into a *written part*, an *oral part* and the *ruling* (judgment or judicial order).

2. *Institution of proceedings*

The proceeding begins with the communication of the national court's decision in the original version, accompanied by a translation into the official language of the State to which it is addressed. The court's decision is communicated to the parties, the governments of the Member States and the

Commission, as well as to the Council or the European Central Bank if the question raised involves the interpretation or validity of an act adopted by either of these two institutions, and to the European Parliament and the Council if the question raised involves the validity or interpretation of an act jointly adopted by these two institutions.

The translation of the national court's decision is provided by the European Court of Justice. If the national court's decision is too long (e.g. more than 30 pages), the Court of Justice may prepare a summary of the decision and communicate this summary instead of the original.

All addressees are invited to submit written observations to the ECJ within a period of two months from notification; however, they are not obliged to do so. If they fail to submit observations, they do not forfeit any other procedural rights; this means that they can still take part in the oral hearing. Only the Commission has committed itself vis-à-vis the Court of Justice to submit written observations on each case brought before the ECJ. The two-month period is a preclusive period. It cannot be extended. Where a party fails to meet this deadline, its written observations will not be considered.

The Court of Justice communicates the written statements received to the other parties that take part in the proceedings.

Under the ECJ's Rules of Procedure, the procedure before the Court in the case of a reference for a preliminary ruling also includes an **oral part** (Art. 104(4) ECJ Rules of Procedure). Today, the oral part is no longer mandatory. The hearing is only held if one of the parties that take part in the proceeding submits an application. If a party wishes a hearing, said party has to submit an *application setting out the reasons* for the hearing within a period of three weeks (which may be extended) from the service of all the written statements. However, the requirements to be met by the statement explaining the reasons are not very stringent.

Whether such an application should be submitted is a matter to be decided by the parties that take part in the proceedings. It must be borne in mind that a hearing provides the only opportunity to respond to the "hostile" arguments presented in the written statements of the other parties that take part in the proceedings. In these circumstances, a hearing is all the more necessary if the party concerned has not submitted any written statement. In fact, even if a party has not submitted any written observations, this does deprive the party concerned of the right to ask for a hearing in order to present its arguments.

Sometimes the referring national court and the parties that take part in the proceedings have a diverging understanding of the facts. In such circumstances, a hearing may be useful. Nevertheless, it must be borne in mind that the presentation of the facts is incumbent *exclusivel*y on the referring court and that the ECJ feels obliged to use this presentation as the authoritative basis of its ruling.

Pursuant to Art. 19 of the ECJ's Statute, any lawyer authorised to practise before a court of a Member State of the EU may represent a party in a procedure before the Court of Justice. As a general rule, parties **must be represented** or accompanied by a lawyer. Art. 104(2) ECJ Rules of Procedure provides for an exception in respect of the preliminary ruling procedure insofar as the Court of Justice shall take account of the rules of procedure of the national court or tribunal which made the reference.

3. *The oral part*

This part of the proceeding includes the hearing in the narrower sense and the Opinion of the Advocate General. However, if a case raises no new point of law, the Court of Justice may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General (Art. 20 (4) ECJ Statute).

Two reasons justify this possibility. First of all, the workload of the advocates-general, whose number had not been increased after the European Union's enlargement, had to be decreased. Secondly, dealing with a case without the Advocate-General's Opinion considerably reduces the length of proceedings, especially if none of the parties has submitted an application for a hearing.
This provision is used quite extensively. Currently, 35 per cent of all cases submitted to the Court of Justice are judged without submissions by the Advocate-General. However, the workload has not been reduced as much as originally anticipated. The advocates-general now deal exclusively with complicated and time-consuming cases.

The Court of Justice generally dismisses any application by parties to reopen the oral procedure in order to submit written observations in response to the Opinion of the Advocate-General or any other application that is aimed at making statements in response to the Advocate-General's Opinion (judicial order C-17/98, *Emesa Sugar*, Rep. 2000, I-665). This does not apply if the Advocate-General proposes a solution that is based on a ground that has not yet been discussed, or only insufficiently so, between the parties to the proceedings (decision of 30 March 2004, C-147/02, *Alabaster*, [2004], para. 35).

4. *The accelerated procedure*

Under Art. 104a ECJ Rules of Procedure, the ECJ may decide to apply an accelerated procedure. Such a procedure must be proposed by the Judge-Rapporteur. Unlike Art. 62a ECJ Rules of Procedure, Art. 104a does not provide for an application to be lodged by the parties or other interested persons. Even if the same applies to the referring court, a suggestion to this effect will not be entirely disregarded.

The Court of Justice uses this type of procedure with great care (see judgment of 12 July 2001, C-189/01, *Jippes e.a.* [2001] ECR I-5689). Each accelerated procedure disturbs the normal course of proceedings and leads to delays in other cases.

The reply to (a) question(s) referred for a preliminary ruling

The Court of Justice rules on questions submitted by way of a judgment or an order.

Under Art. 104(3) ECJ Rules of Procedure, the Court of Justice may rule **by way of an order** in three cases:

- when a question referred to the Court is identical to a question on which the Court has already ruled (Art. 104(3) para. 1, first alt. ECJ Rules of Procedure),
- when the answer to such a question may be clearly deduced from existing case law (Art. 104(3) para. 1, second alt. ECJ Rules of Procedure),
- when the answer to the question referred to the Court admits no reasonable doubt (Art. 104(3) para. 2 ECJ Rules of Procedure).

The possibility to give a ruling by way of a judicial order enables the Court of Justice to save resources because it can dispense with an oral procedure and with the Advocate-General's Opinion. However, if an order is to be issued under para. 2, the Court of Justice has to inform the referring national court beforehand and give an opportunity to the persons referred to in Art. 23 of the Statute to submit any observations.

The Court of Justice has a relatively large degree of discretion in its efforts to give a useful reply to the referring jurisdiction.

The Court of Justice, for instance, often rephrases the question if it is worded in such a way that the Court has no jurisdiction to answer it. This mainly applies to questions where the referring national

court asks if a certain national provision is compatible with Community law. Such a question must be rephrased because in a reference for a preliminary ruling the Court of Justice only has jurisdiction to interpret Community law.

The Court of Justice may also replace a Community law provision (which it is asked to interpret) by the text that is actually applicable. The Court also takes the liberty, when asked a question on the validity of a Community provision, first of all to interpret said provision, also in order to prevent the provision from being declared null and void where possible. This also applies to the opposite case when a question on interpretation is referred to the Court if there are doubts about the validity of the provision in question.

However, the Court of Justice must remain within the limits of the problem of law posed by the referring court's decision. The Court is prevented from going beyond these limits by, among other things, the right to a fair trial of the parties which were only able to present their observations on the basis of the national court's request for a preliminary ruling.

Effects of preliminary rulings

As far as their *temporal effect* is concerned, preliminary rulings have an *ex tunc* effect, i.e. they are effective retroactively as of the date when the Community provision in question was adopted. However, the Court of Justice has the possibility, exceptionally and upon application of a party to the proceedings, to limit the temporal effect of a preliminary ruling to the date of issue of the judgment. In this case, the interpretation will be effective *ex nunc*, i.e. as of the date of the judgment. This temporal limitation does not affect parties which, prior to the judgment or the pendency of the reference (controversial), have lodged an appeal before national courts or in administrative proceedings.

In preliminary rulings that affect the invalidity of a Community provision, the Court of Justice has applied Art. 231(2) EC *mutatis mutandis*.

This jurisprudence is currently under close scrutiny in the case C-292/04, *Meilicke*, which is pending before the Court.

As far as the *effects of preliminary rulings on the other national jurisdictions* are concerned, it is necessary to distinguish between rulings on the interpretation and rulings on the validity of Community provisions. It is indisputable that rulings in which the Court of Justice declares that a Community provision is null and void apply *erga omnes*. As far as rulings on the interpretation of Community law are concerned, there is a dispute among scholars with regard to the arguments and less with regard to the outcome: such rulings also apply *erga omnes*. However, any court has the right to refer a question to the ECJ once again on the interpretation or validity of a Community provision; of course, this applies to questions on validity only if the Court of Justice has previously refused to declare a provision invalid.