

THE ANTI-DISCRIMINATION DIRECTIVES
2000/43/EC AND 2000/78/EC:
An in-depth analysis

**References for a preliminary ruling
and the role of the national judge**

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References for a preliminary ruling and the role of the national judge

- I. JUDICIAL FUNCTIONS IN THE EUROPEAN COMMUNITIES
- II. COMMUNITY COURTS AND NATIONAL JUDGES
- III. THE PRELIMINARY RULING
 - A. *CONCEPT AND CHARACTERISTICS*
 - B. *CATEGORIES*
 - a) Preliminary rulings on interpretation
 - 1. Demarcations
 - 2. Acts eligible for interpretation
 - b) Preliminary rulings on validity
 - C. *THE REFERENCE PROCEDURE*
 - a) In the national court
 - 1. The duty or option to refer
 - 2. Format
 - 3. Timing
 - 4. Contents
 - b) In the Community court
 - 1. The written procedure
 - 2. The oral procedure
 - D. *THE JUDGMENT*
- IV. PRELIMINARY RULINGS ON DIRECTIVES 2000/43 and 2000/78
 - A. *DIRECTIVE 2000/43/EC*
 - B. *DIRECTIVE 2000/78/EC*

I. JUDICIAL FUNCTIONS IN THE EUROPEAN COMMUNITIES

The birth of the European Communities saw the emergence of a new subject on the international stage with a novel feature that distinguished it from the familiar constructs: supranationality, implying that each of its members would transfer part of their sovereignty to the new organism.

As a result of that transfer, the new organisational structure enjoys normative power of its own, and this has given rise to a new judicial system, the Community Legal Order, which is autonomous in relation to the national law of its members and to international law, with an independent system of legal sources and a number of distinctive characteristics.

Like other spheres of law, the Community Legal Order generates its own problems of interpretation and application, and their resolution must be entrusted to independent, impartial bodies.

There are several conceivable options available for attributing such powers. One would be to establish a separate judicial system, made up of judges and courts that function exclusively on behalf of the Community as a whole and deal with all disputes deriving from this field of law. It is not always easy, however, to draw a clear boundary between the Community and the national realm. In fact, the problems that arise frequently relate to both bodies of law at once. Another option would be to take advantage of the judicial systems in the Member States and request national courts and judges to resolve Community issues, too. The problem posed by this option is that the very existence of Community law would be left in the hands of national judiciaries. Another possibility is to have a hybrid system, the salient point being not so much the existence of a common standard as how this standard should be interpreted and applied consistently throughout the Community.

This hybrid system was the option ultimately enshrined in the basic Treaties. These established a number of Community courts with exclusive jurisdiction in the Community sphere, while at the same time attributing to national courts the status of ordinary judge. Successive reforms have done nothing to alter the fundamental essence of this approach.

II. COMMUNITY COURTS AND NATIONAL JUDGES

Within the Community framework, the Community's own courts have not been placed on a par with the courts of Member States, but enjoy a higher status within a hierarchy.

Indeed, the basic Treaties define the European Court of Justice as an institution of fundamental importance whose purpose is to ensure that the law is observed when interpreting and applying the Treaties.

As an international jurisdiction, the Court of Justice therefore displays a number of distinctive characteristics. Provision is made, for example, for an action to be taken for the annulment of a Community instrument; in certain circumstances, the Court may hear direct actions by private individuals; and there is a mechanism for dialogue with national judges. Consequently, the Court is the sole agency of authentic judicial power, whereas legislative power is shared between two distinct institutions: the Council and the European Parliament.

There is, of course, more than one European Court of Justice. Alongside the Court of Justice in the strict sense we find the Court of First Instance, created in 1988 and operational since 1989, and the Civil Service Tribunal, created in 2004 and operational since 2005.

These Community jurisdictions perform the major functions of a judicial system. It falls to the Court of Justice to consider a range of contentious proceedings – actions for failure to fulfil obligations, actions for annulment and actions for omission or failure to act or extra-contractual liability – but also to hear appeals on points of law and reviews, both in response to judgments by the Court of First Instance. Moreover, the Court of Justice is endowed with a number of consultative powers. The Court of First Instance likewise tries contentious proceedings, including direct actions brought by natural or legal persons against acts or failures to act by Community institutions, insofar as such acts are addressed to them or concern them directly as individuals, and it can also admit appeals on points of law against decisions by the Civil Service Tribunal. The latter is a jurisdiction specialised in administrative disputes involving the civil service of the European Union and it rules on proceedings between the Community and its agents.

Nevertheless, although – as we have seen – the Court of Justice of the European Communities plays the role of Community judge *par excellence*, it does not hold exclusive competence for judicial review of the Community’s affairs, as the powers with which it has been vested do not embrace every scenario in which Community law might take effect. In fact, problems relating to the interpretation or application of European rules usually tend to be raised before a national judge in proceedings which have been lodged and pursued under the law of a Member State.

Consequently, the decentralised delivery of judicial functions in the Community means, in the chosen system, that national courts are responsible for the ordinary guarantee of Community law. When they hear a case, they must apply Community norms directly and immediately, granting them primacy over any domestic norms with which they might conflict.

The national judge performs this task in various ways: by applying Community law; by interpreting it and interpreting domestic law in the light of its provisions; by recognising the state’s responsibility for non-compliance; by taking precautionary action with suspensory effect to protect Community rules; or – and this is the option which concerns us here – by making a reference for a preliminary ruling.

In this respect, the national judge assumes the role of a “*common*” judge under Community law, whose task is to ensure that European rules are protected in the courts. This function has not been attributed exclusively to a particular jurisdiction or to specific national judges. Any member of the judiciary can monitor the subordination of domestic law to Community law, resulting in the paradox that a citizen may apply to a judge of his or her country requesting that the court pronounce a statute of that country invalid.

III. THE PRELIMINARY RULING

A. CONCEPT AND CHARACTERISTICS

Community and national courts are not self-contained compartments, as there are instances when the latter need input from the former in order to perform their tasks. Provision was made to permit this collaboration in the form of the reference for a preliminary ruling, which “*requires the national court and the Court of Justice, both*

keeping within their respective jurisdiction, to make direct and complementary contributions to the working out of a decision”¹.

The reference procedure is based on a sharing of jurisdiction between the national judge and the Community judge. It is the responsibility of the national judge to decide on the merits of the case before the court in the light of the direct effect of Community laws, while the duty of the Community judge is to reply to any questions about the interpretation or validity of Community law which the national judge, prior to making a ruling, believes must be answered for the proper resolution of the proceedings.

The object of the preliminary ruling, then, is to ensure the consistent application of Community law or, to be more precise, *“ensuring that in all circumstances this law is the same in all states of the community”².*

The key characteristics of a reference for a preliminary ruling are as follows:

- It has the effect of staying proceedings in the national court. The question to be referred will arise while the national judge is hearing a case, and making a reference to the Community judge entails suspending these proceedings until an answer has been received. They will then be resumed and the case will be resolved in the light of the preliminary ruling.

- The procedure in the Community court is non-contentious, without parties, although the participants in the principal proceedings, the Member States and certain Community institutions may submit comments. This is because the implications of the procedure exceed the interests of the parties. As the Court of Justice has declared, it is *“based on a non-contentious procedure irrespective of any steps taken by the parties to the proceedings and in the course of which such parties are merely invited to submit observations within the legal framework set out by the court making the reference”³.*

- The procedure is carried out from judge to judge. This means that the initiative rests with the national judge, who takes the decision to submit a reference; in this he is not bound by any request from the parties, and even if such a request is made, he is not obliged to pursue it⁴. Secondly, he wields the power to *“determine the questions”*, and

¹ ECJ Judgment of 1 December 1965, Schwarze, C-16/65, ECR/EN p. 877.

² ECJ Judgment of 16 January 1974, Rheinmühlen, C-166/73, ECR p. 33.

³ ECJ Order of 18 October 1979, Sirena Srl, C-40/70, ECR p. 3169.

⁴ ECJ Judgment of 16 June 1981, Salonia, C-126/80, ECR p. 1563.

“the parties may not change their tenor or have them declared to be without purpose”⁵. Thirdly, it is also his prerogative to withdraw a reference for a preliminary ruling after it has been filed⁶. Furthermore, the reference occurs “*ex officio*”, meaning without the intervention of any other judicial or administrative body. The Community judge, on the other hand, may reject the question if it has been poorly worded or lacks substance, or for other reason.

B. CATEGORIES

The Treaty provisions governing references for a preliminary ruling distinguish between questions of interpretation and questions of validity, depending on the reason for the reference.

a) Preliminary rulings on interpretation

1. Demarcations

Interpreting implies defining the content of a provision when its significance and purpose cannot be clearly deduced from the wording^[kv1].⁷ This does not mean that the wording is necessarily obscure or deficient, merely that it is open to question.

This includes: establishing the precise meaning and scope of the provisions of Community law and of the concepts – such as “discrimination” – on which these provisions are implicitly or explicitly founded⁸; determining whether the Community rule may or must be restricted or complemented by national legislation⁹; defining the point in time when a rule shall apply or the time frame within which it shall operate¹⁰; defining the extent to which Community law applies to territories and persons – for example, whether it is applicable to companies with a head office outside the Community¹¹.

The Court of Justice can, of course, only interpret Community law and has no powers to interpret domestic law. This devolves upon the national judge: the Court has “no jurisdiction to give a preliminary ruling on the question [...] that pertains to national

⁵ ECJ Judgment of 9 December 1965, *Hessische Knappschaft*, C-44/65, ECR/EN p. 965.

⁶ ECJ Judgment of 9 March 1978, *Simmenthal*, C-106/77, ECR p. 629.

⁷ Opinion of the Advocate-General in the case of *Van Gend & Loos*, C-26/62, ECR/EN p. 1.

⁸ ECJ Judgment of 9 July 1969, *Portelange*, C-10/89, ECR p. 309.

⁹ ECJ Judgment of 6 June 1972, *Schlüter*, C-94/71, ECR p. 307.

¹⁰ ECJ Judgment of 11 March 1965, *Van Dijk*, C-33/64, ECR/EN p. 97.

¹¹ ECJ Judgment of 13 July 1972, *Italy*, C-48/71, ECR/EN p. 527.

law alone”¹². It follows that it lacks the power to establish that a national provision is incompatible with Community law. Therefore it does not have the power to rule on the interpretation or validity of national provisions¹³ or the compatibility of a national statute or provision with the Treaty or with law derived therefrom, except when hearing an action for failure to fulfil an obligation¹⁴, although *“it may nevertheless extract from the wording of the questions formulated by the national court, having regard to the facts stated by the latter, the elements which come within the interpretation of community law for the purpose of enabling that court to resolve the legal problem which it has before it.”*¹⁵

Similarly, the Court may not apply Community law to a particular case, as a distinction is drawn between interpretation and application. Consequently the national judge must formulate his question in abstract terms, which does not prevent the Court of Justice from reformulating that question or extracting *“from the elements of the case those questions of interpretation or validity which alone fall within its jurisdiction”*¹⁶.

With this same purpose in mind, the Court of Justice is entitled to transform a question of validity into a question of interpretation¹⁷, to complete the question that has been formulated¹⁸, to formulate the question itself if the data supplied is imprecise¹⁹, to alter the sequence of questions or cluster them in order to provide a global answer²⁰, to refrain from answering an aspect of the question if it deems this unnecessary or if it has already been answered in response to a previous question or if it is not essential to resolving the main proceedings²¹, to interpret provisions of Community law that have not been mentioned in the reference²² or to deduce from the elements supplied by the national judge which Community provisions should be the object of interpretation²³.

¹² ECJ Judgment of 17 December 1975, Adlerblum, C-93/75, ECR p. 2147, and many others.

¹³ ECJ Judgment of 3 July 1974, Casagrande, C-9/74, ECR p. 773; of 1 December 1977, Kuyten, C-66/77, ECR p. 2311; of 12 October 1978, Eggers, C-13/78, ECR p. 1935; of 12 July 1979, Grosoli, C-223/78, ECR p. 2621; etc.

¹⁴ ECJ Judgment of 15 July 1964, Costa- ENEL, C-6/64, ECR/EN p. 585.

¹⁵ ECJ Judgment of 21 March 1972, SAIL, C-82/71, ECR p. 119.

¹⁶ ECJ Judgment of 30 June 1966, Technique Minière, C-56/65, ECR/EN p. 235.

¹⁷ ECJ Judgment of 1 December 1965, Schwarze, C-16/65, ECR/EN p. 877 and of 13 December 1979, Liselotte Hauer, C-44/79, ECR p. 3727.

¹⁸ ECJ Judgment of 6 April 1962, De Geus, C-13/61, ECR/EN p. 45.

¹⁹ ECJ Judgment of 6 May 1971, Cadillon, C-1/71, ECR p. 351; of 14 July 1971, Muller, C-10/71, ECR p. 723.

²⁰ ECJ Judgment of 4 February 1965, Albatros, C-20/64, ECR/EN p. 29.

²¹ ECJ Judgment of 4 April 1968, Tivoli, C-20/67, ECR/EN 199; and of 21 March 1985, Celestri, C-172/84, ECR p. 963.

²² ECJ Judgment of 20 March 1986, Tisier, C-35/85, ECR p. 1207.

²³ ECJ Judgment of 20 April 1988, Guy Bekaert, C-204/87, ECR p. 2036.

In sum, *“in the event of questions having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice [...], the Court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law which, having regard to the subject-matter of the dispute, require an interpretation or, as the case may be, an assessment of validity.”*²⁴

On the other hand, the Court may not rule on the facts of the case being heard, nor on the motives which may have prompted the national court to refer questions. The Court has itself reasoned that *“the considerations which may have led a national court to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court when hearing an application for a preliminary ruling”*²⁵, that the Court has no powers *“to investigate the facts of the case or to criticise the grounds and purpose of the request for interpretation”*²⁶ and, in addition, that it is *“not for this Court to pronounce on the expediency of the request for a preliminary ruling”*²⁷.

There are few circumstances, however, when the Court of Justice will refrain from answering a question. This will occur if the question relates exclusively to the interpretation of national law²⁸ or international law²⁹ or if it has been asked not for an interpretation but for an opinion³⁰. Likewise, it will not reply if a question has been posed within a framework constructed artificially by one of the parties³¹ or if the question clearly *“bears no relation to the actual nature of the case or to the subject-matter of the main action”*³². Recently, however, there have been some indications of a reversal to this trend.

²⁴ ECJ Judgment of 29 November 1978, Pigs Marketing Board, C-83/78, ECR p. 2347.

²⁵ ECJ Judgment of 5 February 1963, Van Gend & Loos, C-26/62, ECR/EN p. 1; for similar tenor see ECJ Judgment of 5 October 1977, Tedeschi, C-5/77, ECR p. 1555; and of 16 March 1978, Pierik, C-117/77, ECR p. 825.

²⁶ ECJ Judgment of 15 July 1964, Costa ENEL, C-6/64, ECR/EN p. 585.

²⁷ ECJ Judgment of 14 February 1980, Damiani, C-53/79, ECR p. 273; and of 16 December 1981, Foglia, C-244/80, ECR p. 3045.

²⁸ ECJ Judgment of 17 December 1975, Adlerbum, C-93/75, ECR p. 2147.

²⁹ ECJ Judgment of 27 November 1973, Vanderweghe, C-130/73, ECR p. 1329.

³⁰ ECJ Judgment of 22 November 1978, Mattheus, C-93/78, ECR p. 2203.

³¹ ECJ Judgment of 11 March 1980, Foglia, C-104/79, ECR p. 745.

³² ECJ Judgment of 16 June 1981, Salonia, C-126/80, ECR p. 1563; and of 28 November 1991, Durighello, C-186/90, ECR p. I-5773.

2. Acts eligible for interpretation

Notwithstanding the fact that primary law can be submitted for interpretation, let us note that requests for interpretation may also be referred to the Court with regard to “*all acts of the Institutions, without distinction*”³³.

Consequently references for a preliminary ruling may be filed with the Court of Justice in relation to any aspect of Directives 2000/43³⁴ and 2000/78³⁵. This option may be of interest to a national judge called upon to pass judgment on an implementing provision in his own country.³⁶ The reference may also include questions about the direct application of specific provisions in the Directive, and as we shall see later on, such references have, indeed, been made.

It should equally be borne in mind that a request for interpretation may also be filed with regard to judgments from the Court of Justice of the European Communities³⁷.

b) Preliminary rulings on validity

These are questions seeking a judgment on the external or internal legality of acts of the institutions of the Community³⁸, rather than of primary law or, for example, judgments of the European Court itself. Their function, therefore, is to complement the action for annulment, which may only be brought under limited conditions.

In a reference of this nature, the national judge must specify the act or section of an act whose validity is disputed, and the reasons for the challenge.

However, in the field which concerns us here, bearing in mind the characteristics of Directives 2000/43 and 2000/78, it is difficult to imagine questions of validity arising. There is no need, therefore, to consider this type of reference in greater detail.

³³ ECJ Judgment of 6 October 1970, Franz Grad, C-9/70, ECR p. 825.

³⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, p. 22).

³⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, p. 16).

³⁶ ECJ Judgment of 20 May 1976, Mazzalai, C-111/75, ECR p. 657.

³⁷ ECJ Judgment of 16 March 1978, Bosch, C-135/77, ECR p. 855.

³⁸ ECJ Judgment of 18 February 1964, Internationale Crediet, Joined Cases C-73 and 74/63, ECR/EN p. 1.

C. THE REFERENCE PROCEDURE

a) In the national court

1. The duty or option to refer

A reference for a preliminary ruling may only be made by “*a court of a Member State*” or – and this amounts to the same thing – “*a national court*”. There are other bodies in the Member States, however, which occasionally exercise “*quasi-judicial*” functions, and this has prompted the Court of Justice to formulate the Community’s own definition of the concept “*jurisdiction*”, which is not identical to the definitions used in the legislation of different countries. It permits references for preliminary rulings to be made by bodies which are not strictly speaking courts of a Member State as long as they meet certain criteria. The option has been taken up, for example, by a number of administrative and arbitration tribunals, although the principle has attracted vehement criticism.

As for the courts themselves, it should be borne in mind that the entitlement to submit a reference does not apply to every situation or every action, as “*a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature*”³⁹, which is not the case, for example, in voluntary proceedings. The type of procedure, on the other hand, is of no relevance, as a reference may be filed in an ordinary, summary or expedited hearing⁴⁰.

Furthermore, we need to distinguish between courts which have a duty to order a reference for a preliminary ruling and those which may do so but are under no compulsion.

Courts against whose decision there is no judicial remedy under national law shall refer to the Court of Justice if a question of Community law has arisen that is essential to giving judgment. The first implication of this rule is that it applies not only to the supreme courts of Member States, but also to any other court of final instance⁴¹, which in Spain, for example, might be the Audiencia Nacional, a Tribunal Superior de Justicia or an Audiencia Provincial; the second is that the term “*judicial remedy*”

³⁹ ECJ Judgment of 19 October 1995, Job Centre, C-111/94, ECR p. I-3361.

⁴⁰ ECJ Judgment of 12 November 1969, Stauder, C-29/69, ECR p. 419; and of 24 May 1977, Hoffmann-La Roche, C-107/76, ECR p. 957.

⁴¹ ECJ Judgment of 15 July 1964, Costa-ENEL, C-6/64, ECR/EN p. 585.

encompasses appeals on points of law and fact, but not the special procedures such as review, legal protection or an appeal to a court of human rights.

The main problem which arises in this respect is whether, on an issue of interpretation, the reference is always obligatory. In other words, should a reference be withheld in the case of an *"acte clair"*. Although the Court of Justice has argued that the Treaty *"unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law [...] to refer to the court every question of interpretation raised before them"*⁴², a nuance was later introduced admitting the theory of *"acte clair"* under certain circumstances. The Court has accordingly reasoned that *"the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved"*. Nevertheless, *"before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice"*.⁴³ This theory has been subjected to well-founded criticism, even from within the Court itself.⁴⁴

Conversely, courts that do not constitute the final instance have a choice as to whether or not they wish to request a preliminary ruling. In this context, it is admissible for a national judge to pronounce a Community act valid without making a reference, but he may not pronounce it invalid, for that power rests exclusively with the Court of Justice.⁴⁵ Although there is no requirement to request a preliminary ruling in this instance, let us not forget that if any doubt arises the reference to the Court of Justice must be made.

2. Format

The Community rules do not provide for references to be made in any particular form⁴⁶, and hence any formats defined in national law will be respected, without the Court of Justice having competence to verify whether the reference *"was taken in accordance with the rules of national law governing the organisation of the courts and their procedure"*⁴⁷.

⁴² ECJ Judgment of 27 March 1963, *Da Costa*, Joined Cases 28-30/62, ECR/EN p. 31.

⁴³ ECJ Judgment of 6 October 1982, *CILFIT*, C-283/81, ECR p. 3415.

⁴⁴ Cf. Opinion of the Advocate General in the case which resulted in judgment on 6 December 2005, *Gaston Schul*, C-461/03, ECR p. I-10513.

⁴⁵ ECJ Judgment of 22 October 1987, *Foto-Frost*, C-314/85, ECR p. 4199.

⁴⁶ ECJ Judgment of 6 April 1962, *De Geus*, C-13/61, ECR/EN p. 45.

⁴⁷ ECJ Judgment of 14 January 1982, *Reina*, C-65/81, ECR p. 33

Under Spanish law there is no formal or procedural regulation for requesting a preliminary ruling. It is admissible, however, to make the reference in the form of a court order, much as a question would be referred on a matter of constitutionality, as defined in Article 245 of *Ley 6/1985 del Poder Judicial* (Judiciary Act) of 1 July 1985 and Article 206 of *Ley 1/2000 de Enjuiciamiento Civil* (Civil Procedure Act) of 7 January 2000.

Before the order is issued by the court, it is in the interests of the proper administration of justice that the parties to the main action are first heard with regard to the origin and content of the reference⁴⁸, whether or not they have actually asked for a preliminary ruling. As we know, while the request for a preliminary ruling often comes from one of the parties, the initiative may also be taken by the judge⁴⁹. Spanish legislation also requires that the Public Prosecutor's Office be heard in its capacity as guardian of lawful process.

Notwithstanding the following observations, the request must be worded in “*a simple and direct form, leaving it to the Court of Justice to rule on that request only within the limits of its jurisdiction*”⁵⁰.

Pursuant to Article 23 of the Statute of the Court of Justice, the order to refer shall be notified to the Court by the national court or tribunal concerned. It is usually sufficient for the registrar of the referring court to send a registered letter to the Registrar of the Community court, although it has been deemed sufficient for the file of the case to be transmitted⁵¹ or for the national judge to send a letter⁵². It is customary, although not essential, to forward the complete file of evidence from the proceedings pending before the national court⁵³. Under Spanish law, it is enough to send the court order containing the question together with a formal request and, as appropriate, a certified copy of the pertinent documents – either a full record of proceedings or else the suit, the reply, possibly the evidence, the findings of the court and any pleadings by the parties with regard to the questions referred, etc. – without any need for the Foreign Office or the Justice Ministry to intervene or for a letter of request as provided for in Article 276 of the Judiciary Act of 1 July 1985.

⁴⁸ ECJ Judgment of 28 June 1978, Simmenthal, C-70/77, ECR p. 1453.

⁴⁹ ECJ Judgment of 16 June 1981, Salonia, C-126/80, ECR p. 1563.

⁵⁰ ECJ Judgment of 12 May 1964, Wagner, C-101/63, ECR/EN p. 195.

⁵¹ ECJ Judgment of 12 May 1964, Wagner, C-101/63, ECR/EN p. 195.

⁵² ECJ Judgment of 19 March 1964, Unger, C-75/63, ECR/EN 177.

⁵³ ECJ Judgment of 19 June 1973, Capolongo, C-77/72, ECR p. 611.

3. *Timing*

It is left entirely to the discretion of the national court to determine at what stage in the proceedings the reference should be made⁵⁴, although it is normally done when the time comes to rule on the principal matter or to resolve an incidental matter such as interim relief. Whatever the choice, the Court of Justice has expressed a preference that it should be consulted once the facts have been ascertained and the parameters of national law have been defined, in order to avoid hypothetical debates and alternative scenarios⁵⁵. Under Spanish law, again by analogy with the procedure for referring questions of constitutionality, the reference order must be issued when judgment is pending. A reference is unfounded once the action in the national court has been concluded, as the preliminary ruling has lost its purpose⁵⁶.

A problem arises when an appeal is lodged against the reference order. In theory, it is legitimate for one of the parties to the action in the national court to object to the reference for a preliminary ruling on the grounds that it is intended to delay the process or that it lacks content⁵⁷; in Spain, the order for the reference is considered absolute, and no appeal against it may be lodged. Nevertheless, it should be borne in mind that, as we have seen, the Court of Justice will not contest any right of appeal provided for under national law against a reference for a preliminary ruling, but it will continue to appraise the matter before it until such time as it receives notice of the appeal explaining its judicial effects under national law⁵⁸; the Court will discontinue its deliberations when the national court concerned sends notification that the reference has been stayed by an appeal granted against its decision⁵⁹. It is, nevertheless, advisable not to submit a reference until the order to make it is absolute.

It remains only to observe that a request for a preliminary ruling need not necessarily be presented during the proceedings in the first instance. Indeed, it may be raised and rejected and raised again during an appeal on a point of fact or law⁶⁰.

⁵⁴ ECJ Judgment of 10 March 1981, *Irish Creamery Milk*, Joined Cases 36 and 71/80, ECR p. 735; and of 11 June 1987, *Pretore di Salò*, C-14/86, ECR p. 2545.

⁵⁵ ECJ Judgment of 10 March 1981, *Irish Creamery Milk*, Joined Cases 36 and 71/80, ECR p. 735.

⁵⁶ ECJ Judgment of 21 April 1988, *Fratelli Pardini*, C-338/85, ECR 2041; of 4 October 1991, *Society for the Protection of Unborn Children*, C-159/90, ECR I-4685.

⁵⁷ ECJ Judgment of 12 February 1974, *Rheinmühlen*, C-146/73, ECR p. 139.

⁵⁸ ECJ Judgment of 16 June 1970, *Chanel*, C-31/68, ECR p. 404; and of 27 March 1974, *SABAM*, C-127/73, ECR p. 313.

⁵⁹ ECJ Judgment of 6 October 1983, *Delhaize*, Joined Cases 2, 3 and 4/82, ECR p. 2973.

⁶⁰ ECJ Judgment of 6 April 1962, *Bosch*, C-13/61, ECR/EN p. 45; and of 12 July 1984, *Les Rapides Savoyards*, C-218/83, ECR p. 3105.

4. Contents

Apart from taking into consideration all the specific requirements to be met by the procedure for a preliminary ruling, especially on a matter of interpretation, the decision to submit a reference must observe the format dictated by national rules, without ignoring the practices in use at the Court of Justice.

Regardless of the heading, emphasis must be given to the significance of the facts, and these should be described in as much detail as possible, thereby providing the Court of Justice with all the factual elements that will facilitate its work, especially if they are not strictly speaking "*proven facts*" or if some modifications might be made when drawing up the definitive judgment. The more exhaustive the description of the facts, the greater the chance that the reply from the Community court will match the circumstances in which the problem of Community law has arisen, and the less likely it will be that the reply fails to meet the needs of the national judge. At the same time, this is the section where the provisions of Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC on the burden of proof will in particular be brought to bear.

In the legal submissions, it is most expedient to distinguish between the Community and national framework, following the pattern adopted by the Court of Justice. With regard to Community law, concrete reference must be made to the rule for which interpretation is sought. As for the national framework, in addition to indicating whatever provisions may be applicable (or lacking), it may be appropriate to reproduce the wording of legislative texts.

When it comes to the reasoning, it is not sufficient to identify the provision which has given rise to the question of interpretation. The Court of Justice should be informed about any different positions that may have been argued by the parties, in addition to the position of the referring judge, along with the various alternatives that have been considered. The line of argument should include the consequences for the proceedings of the interpretation (or validity ruling) that has been requested.

In addition to enabling the Court of Justice to reformulate or complete the questions, "*the information furnished in the decisions making references does not serve only to enable the Court to give helpful answers but also to enable the governments of the Member States and other interested parties to submit observations*"⁶¹.

⁶¹ ECJ Judgment of 1 April 1982, Gerrit Holdijk, Joined Cases 141 to 143/81, ECR p. 1299.

Finally, it is essential to present the question in abstract terms and to confine it to the interpretation of Community texts or the validity of acts by the institutions of the Community.

b) In the Community court

The proceedings before the Community court will not be of particular concern to the national judge making the reference, whose interest lies with the final outcome, in other words the Judgment. It will be sufficient, therefore, to highlight some distinctive features of the two stages in these proceedings.

The first point to note is that at present all preliminary rulings have been adopted by the Court of Justice in the narrow sense, for although the Treaties provide for this competence to be ceded in full or in part to the Court of First Instance, this provision has so far never taken effect.

1. The written procedure

Once the decision making the reference has been received, the Registrar to the Court of Justice will notify the parties, the Member States and the Commission, and also the Council or the European Central Bank if the act the validity or interpretation of which is in dispute originates from one of them, and the European Parliament and the Council if the act the validity or interpretation of which is in dispute was adopted jointly by those two institutions, giving them two months to submit statements of case or written observations. A judge will be designated as Rapporteur to draw up the “*preliminary report*” and, as appropriate, the “*report for the hearing*”, and an Advocate General will be nominated to present an “*opinion*” if the action proceeds.

The referring judge will be kept informed of each stage in the proceedings so that he knows how the preliminary ruling is progressing.

2. The oral procedure

Following the written stage, there may be an oral stage, with a public hearing at which all those invited to submit written input may do so in oral form, even if they did not take up the option to submit in writing. However, this stage is not mandatory.

Decisions will be taken at a general meeting of the Court of Justice, on the Judge-Rapporteur's proposal and after hearing the Advocate General assigned to the case, about whether and when to conduct a hearing and, if appropriate, the contents of that hearing, and whether the case is to be resolved with or without an opinion from the Advocate General. It is also the task of the general meeting, as and when necessary, to declare the inadmissibility of a reference or to request clarification from the national court.

The opinion of the Advocate General will be read out on a subsequent date, but it may not be debated by the parties to the action. This, too, will be forwarded to the referring judge.

D. THE JUDGMENT

The judgment passed by the Court of Justice will be sent to the referring judge, who shall confirm receipt, and it is also advisable to forward the ruling to the parties to enable them to make any pleas, notably on its impact on the case pending before the national court. One should not forget, after all, that quite possibly the parties to the main action did not present their views to the Court of Justice.

The manner in which the reply from the Community court shall be applied in the main action depends on the judge in question, for it falls within the responsibility of his jurisdiction. It should be noted, however, that the Court of Justice should be informed, for its own records, of the final decision in the national proceedings.

The particular force of judgments from the Court of Justice is threefold: they are binding, general and retroactive in effect.

On the first point, the ruling by the Court of Justice constitutes a definitive and mandatory response to the question that was raised and it binds the referring judge and any other courts hearing a remedy, without prejudice to the option or making a further reference to the Court if the matter is not deemed to have been sufficiently clarified⁶². As the Community court itself has stated, the preliminary ruling “*conclusively determines a question [...] of Community law*” and “*is binding on the national court for the purposes of the decision to be given by it in the main proceedings*”, although this does not preclude a further reference “*when the national court encounters difficulties in*

⁶² ECJ Judgment of 4 April 1968, *Milch-, Fett- und Eierkontor*, C-25/67, ECR/EN p. 207.

understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier”⁶³.

On the second point, the effects of the ruling are not relative in that they do not apply merely to the set of facts which gave rise to the question but are binding on future actions. The interpretation given by the Court of Justice must be taken into account by all courts in the Community, who must apply it scrupulously to every case in which the text concerned is invoked, thereby guaranteeing its uniform application⁶⁴, which does not prevent the Court of Justice from modifying, complementing or specifying further detail with regard to its case law on the occasion of a new reference⁶⁵ or from refuting any fresh arguments submitted against its earlier interpretation⁶⁶.

On the third point, the Court of Justice has affirmed the validity *ex tunc* of its rulings on interpretation, stating that “*the interpretation which [...] the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation*”⁶⁷. It does concede that there is one exception to this, however; namely when retroactive application of an interpretation would incur serious economic and social consequences⁶⁸.

IV. PRELIMINARY RULINGS ON DIRECTIVES 2000/43 and 2000/78

National judges have not hitherto made many references for preliminary rulings on the Community’s interpretation of Directives 2000/43/EC and 2000/78/EC, although some rulings have been issued. Our focus here is on the procedural aspects of the references, and the substantive matters will be dealt with elsewhere.

⁶³ ECJ Order of 5 March 1986, Wunsche, C-69/85, ECR p. 947.

⁶⁴ ECJ Judgment of 27 March 1963, Da Costa, C-28-30/62, ECR/EN p. 31.

⁶⁵ ECJ Judgment of 9 July 1969, Portelange, C-10/69, ECR p. 309.

⁶⁶ ECJ Judgment of 3 April 1968, Molkerei-Zentrale, C-28/67, ECR/EN p. 143.

⁶⁷ ECJ Judgment of 27 March 1980, Denkavit, C-61/79, ECR p. 1205.

⁶⁸ ECJ Judgment of 8 April 1976, Defrenne, C-43/75, ECR p. 455.

A. DIRECTIVE 2000/43/EC

Apart from a mention of this Directive – and also Directive 2000/78 – in the *Impact* ruling of 15 April 2008⁶⁹, it is the *Feryn* ruling of 10 July 2008⁷⁰ which responds to the only request so far posed with regard to the legal instrument in question.

The director of Feryn, a company specialising in the sale and installation of up-and-over and sectional doors, stated publicly that his company was looking for fitters, but that he could not employ “immigrants” because his customers were reluctant to grant them access to their private residences while the work was in progress. In the light of these statements, the Belgian institution designated under Article 13 of Directive 2000/43 to promote equal treatment applied to the courts for a ruling that the company was maintaining a discriminatory recruitment policy.

The application was dismissed in the lower court on the basis that there was no proof nor was there a presumption that a person had applied for a job and had not been employed as a result of his ethnic origin.

When an appeal was lodged, the court of appeal stayed the proceedings and drew up six questions for a preliminary ruling, some of them consisting of several parts, all of which related to the interpretation of terms in the aforementioned Directive 2000/43.

However – and this was the first measure taken by the Court of Justice – the Community judges decided not to consider these questions in sequence, nor to follow the literal tenor of the wording formulated by the referring court. Instead, without rewording the questions, they chose to simplify them, arguing that “*the national court has requested the Court to interpret the provisions of Directive 2000/43 for the purpose, essentially, of assessing the scope of the concept of direct discrimination in the light of the public statements made by an employer in the course of a recruitment procedure (first and second questions), the conditions in which the rule of the reversal of the burden of proof laid down in that directive can be applied (third to fifth questions) and what penalties may be considered appropriate in a case such as that in the main proceedings (sixth question)*” (paragraph 20).

⁶⁹ C-268/06, as yet unpublished in the European Court reports.

⁷⁰ C-54/07, likewise unpublished as yet in the ECR.

This ruling contains a second feature of interest with regard to the formulation of a reference and the competence of the Court of Justice, for in response to various questions about how to apply the provision on inversion of proof in Article 8 of the Directive, the Court states: *“It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment”* (paragraph 3).

B. DIRECTIVE 2000/78/EC

The judgments from the Court of Justice on this Directive have been slightly more numerous: *Mangold* on 22 November 2005⁷¹; *Chacón Navas* on 11 July 2006⁷²; *Palacios de la Villa* on 16 October 2007⁷³; *Tadao Maruko* on 1 April 2008⁷⁴; *Coleman* on 17 July 2008⁷⁵; and most recently *Bartsch* on 23 September 2008⁷⁶.

Once again, without dwelling on the substantive replies that the Court of Justice has given to the referring courts, these raise a number of issues about the format and timing of the references themselves.

Let us consider, for example, the *Mangold* case, where the national judge raised concerns about the compatibility of a national provision with Community law, in this instance the admissibility of fixed-term contracts for older workers. In the oral proceedings, Germany expressed reservations about the admissibility of the request for a preliminary ruling, claiming that the main action was fictitious or contrived, having been instigated to endorse a contention upheld publicly by Mr Mangold’s employer. The Court of Justice, after recalling its own case law regarding its basic obligation to issue a ruling on such matters and any exceptions to that obligation, held it to be incontrovertible^[kv2] *“that the interpretation of Community law sought by the national court does actually respond to an objective need inherent in the outcome of a case pending before it. In fact, it is common ground that the contract has actually been performed and that its application raises a question of interpretation of Community law”*, going on to argue that the *“reality of that dispute”* was not affected by the circumstance that the parties were in agreement on the matter of the interpretation of

 144/04, ECR p. I-9981.

⁷² C-13/05, ECR p. I-6467.

⁷³ C-411/05, ECR p. I-8531.

⁷⁴ C-267-06, as yet unpublished in the ECR.

⁷⁵ C-303/06, as yet unpublished in the ECR.

⁷⁶ C-427/06, likewise as yet unpublished in the ECR.

national law (paragraphs 32 to 39). This did not imply that the Court must reply to every question raised, as the first of them was “*obviously irrelevant to the outcome of the dispute before the national court*” and it was therefore left unanswered (paragraph 43). With regard to the merits of the case, the Court accepted the national court’s assumption that the Directive should be interpreted as precluding a national provision such as the one disputed in the initial proceedings, concluding significantly that “*it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law*”⁷⁷ (paragraph 77).

The Chacón Navas ruling also addresses issues relating to the admissibility of questions referred to the Court of Justice, in this event by a Spanish judge, following the dismissal of a worker while she was on sick leave, in connection with the prohibition of discrimination on grounds of disability. The Commission cast doubt on the admissibility of the questions, claiming that “*the facts described in the order for reference lack precision*”, in particular because of “*the absence of any indication of the nature and possible course of Ms Chacón Navas’ sickness*”. Correct as these points were, the Court of Justice took the view that it had “*enough information to enable it to give a useful answer to the questions referred*” (paragraphs 26 to 30). The second allegation of inadmissibility came from the company, arguing that Spain’s Supreme Court had already ruled that the dismissal of a worker under such circumstances did not constitute discrimination. Nonetheless, the Court of Justice felt that this did not render the reference invalid (paragraphs 31 to 33).

In the case which led to the Palacios de la Villa judgment, attention should be drawn to the manner in which the Court of Justice took up the arguments underlying the questions from the referring judge and proceeded to analyse and complement them.

Again, in the Tadao Maruko judgment, we see how the first, second and fourth questions formulated by the national court were analysed and answered as a cluster, whereas the third and fifth questions were accorded individual treatment. The response to the third question, we should note, passed the ball back into the court of the national judge, whose assessment would subsequently be required in order to apply the Court’s ruling: “*If the referring court decides that surviving spouses and surviving life partners*

⁷⁷ With reference to the judgments of 9 March 1978, Simmenthal, 106/77, ECR p. 629, and 5 March 1998, Solred, C-347/96, ECR p. I-937.

are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.” (paragraph 72).

A further obstacle to the admissibility of references for a preliminary ruling was examined in the Coleman judgment, as the decision to make the reference was taken during preliminary proceedings, when not all the circumstances of the case had been established and the national judge was assuming hypothetically that the facts were as described by the plaintiff. The Court of Justice nevertheless ruled that the reference was admissible, as the merits of the case could not be considered without an interpretation of Community law, the purpose of the preliminary hearing having been to ascertain whether the Directive was applicable to a worker in a situation such as that of Ms Coleman. In the event of an affirmative answer, the proceedings would continue in order to establish whether there had been unfavourable treatment or harassment (paragraphs 28 to 32); a negative response – non-application of the Directive – would have led to the main action being terminated forthwith.

The Bartsch judgment followed a case in which three questions for a preliminary ruling had been interlaced in such a manner that each conclusion depended on whether another had been answered in the affirmative or negative. Hence, in the light of the reply to the first, it was impossible to proceed to the others, as the first question concerned whether the disputed situation in the main proceedings fell within the scope of Community law, and the Court of Justice ruled that it did not.