



The Role of the National Judge and the Preliminary Ruling Procedure

Katherina Paraschas

District Court Judge

Seconded as Legal Secretary to the Cabinet of

Professor Dr. Dr. Thomas von Danwitz,

Judge at the European Court of Justice

... a hearing before the ECJ





Fundamental information about the preliminary ruling procedure and about the role of the national judge in the light of Union law

Importance of the preliminary ruling procedure



- Approx. 50 to 60 per cent of the 500 to 600 new cases brought each year are references for preliminary rulings.
- Traditionally, most references for preliminary rulings come from Germany, Italy, Spain, the United Kingdom, France, the Netherlands, Belgium and Austria.

Importance of the preliminary ruling procedure



- The importance of the preliminary ruling procedure is greater than its statistical relevance.
- As a rule, the development of Union law by the ECJ is based on preliminary ruling procedures.

Role of the ECJ as a genuine Union court



- The Court of Justice ensures that in the interpretation and application of the Treaties the law is observed (Art. 19 TEU).
- Binding interpretation of Union law by the ECJ is to ensure legal unity within the Union in everyday legal practice.

Role of the ECJ as a genuine Union court



- ECJ provides abstract interpretation of Union law.
- The ECJ has no power to rule on issues relating to breaches of national law.



Role of the national judge as a functional Union judge



- National judges apply Union law as an essential part of the Member States' national law.
- They have primary and standard jurisdiction for the application of Union law.

Role of the national judge as a functional Union judge



- Developments in Union law may be influenced by the participatory process between supranational and national judges under Art. 267 TFEU.

Role of the preliminary ruling procedure



- Indirect action (interlocutory proceedings) in which the national judge – not the individual – refers a question on Union law to the ECJ.
- ECJ gives judgment independently of the pending national case.
- Preliminary ruling procedure was needed because of decentralised application, interpretation and judicial review of Union law at national level.

Role of the preliminary ruling procedure



- Instrument of co-operation between the national judge and the genuine Union judge.
- Preservation of legal unity by ensuring the uniform interpretation and application of Community law.
- Safeguarding legal redress for the individual.
- Further development of law.

Purpose of a reference for a preliminary ruling



- Interpretation of the Treaty (Art. 267(1)(a) TFEU)

Refers to the interpretation of the founding treaties, annexes, protocols, supplements, accession treaties, unwritten primary law.

Purpose of a reference for a preliminary ruling



- The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (Art. 267(1)(b) TFEU)
- Broad interpretation of the term “acts”:

Includes the entire range of secondary law (all the legal instruments cited in Art. 288 TFEU such as regulations, directives, decisions, recommendations, opinions) as well as international conventions and judgments by the ECJ.
- Does not affect the validity of primary law.

Purpose of a reference for a preliminary ruling



- Questions concerning the validity or the interpretation of the national law of Member States do not qualify.
- Exception: National law applies Union law provisions to purely national matters unrelated to Union law (often in the field of antitrust law).

Courts entitled to refer a matter to the ECJ



- The term «court» is interpreted by the Court of Justice as an autonomous term of Union law.
- Hence, not every bench referred to as a «court» or «tribunal» in the national context is a «court» within the meaning of Art. 267 TFEU.
- Rationale: Otherwise, the national legislator could arbitrarily restrict or broaden the range of courts entitled to refer cases to the ECJ.

Courts entitled to refer a matter to the ECJ



- Permanent bench based on a legal foundation.
- Substantive and personal independence of the bench.
- Bench needs to have compulsory jurisdiction.

Courts entitled to refer a matter to the ECJ



- Litigation, i.e. proceedings aimed at a decision of a jurisprudential nature.
- Decision based on well-defined rules of law.
- At least one independent trial court required.
- Decision must be binding and enforceable.

Courts entitled to refer a matter to the ECJ



- Criteria cited above are not routinely checked by the ECJ.
- Criteria are modified and applied on a case-by-case basis.

Courts entitled to refer a matter to the ECJ



- Case-law examples of «courts» not entitled to refer cases to the ECJ:

Public prosecution authority, professional chambers, national competition authorities, registration courts in land register and commercial matters, family judge in the event of Section 1617(2) and (3) German Civil Code.

Courts entitled to refer a matter to the ECJ



- Each national court or tribunal (within the meaning outlined above) which considers a decision by the ECJ necessary to enable it to give judgment in the pending national case may request the ECJ to give a ruling thereon.

Courts entitled to refer a matter to the ECJ



- A national court's discretion and entitlement to refer cases to the ECJ cannot be restricted.
- As a matter of principle, it is also not possible to restrict the court's entitlement to refer cases to the ECJ by appealing the decision to refer a case to the ECJ if the case continues to be pending before the referring court.

Referral situation



- Pending national case.
- Case may be referred at any stage of the proceedings, including in legal aid proceedings and in separate proceedings for taking evidence.
- Referral is desirable at a point in time when the court is in a position to determine the factual and legal framework.

Referral situation



- A question of Union law is raised in the case.
- A decision on the question is necessary to enable the national court to give judgment.
- The question does not have to be raised by the parties to the proceedings.
- Art. 267 TFEU does not create any claim for the parties to the pending national case.

Referral situation



- The national court must believe that the referral is necessary.
- In this respect, the national court has its own margin of discretion which is generally not subject to review.

Referral situation



- The ECJ usually does not scrutinise the need for referring questions to the ECJ or for a ruling by the ECJ to enable the national court to give judgment.
- Exceptions: no identifiable relationship with Union law, questions of a hypothetical nature.

Obligation of national courts to refer a matter to the ECJ



- All national courts or tribunals against whose decisions there is no judicial remedy shall bring the matter before the Court (Art. 267(3) TFEU).
- Functional approach.

Obligation of national courts to refer a matter to the ECJ



- Appeal on points of law requiring leave to appeal:

If the denial of leave to appeal by the first-instance court can be challenged by filing an appeal against denial of leave to appeal, only the court that will rule on the appeal against denial of leave to appeal will be obliged to refer the case to the ECJ.

Obligation of national courts to refer a matter to the ECJ



- In addition, any national court which believes that a legal instrument adopted by the European Union is invalid and does not want to apply this legal instrument is obliged to refer the case to the ECJ.

Reason: ECJ's exclusive power to reject illegal provisions of Union law.

Obligation of national courts to refer a matter to the ECJ



- This also applies if the Court of Justice has already declared that corresponding provisions of another, comparable legal instrument are null and void.

Obligation of national courts to refer a matter to the ECJ



- The obligation to refer cases to the ECJ also applies to interim relief proceedings.
- If a case is referred to the ECJ, the execution of a national Act of State based on Union law may be suspended.

Exemptions from the obligation to refer a matter to the ECJ



- The question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.
- Previous decisions of the ECJ have already dealt with the point of law in question, even though the questions at issue are not strictly identical.

Exemptions from the obligation to refer a matter to the ECJ



The correct application of Union law is so obvious as to “leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.

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.”

(ECJ 1982, C-283/81, C.I.L.F.I.T., p. 3415, para. 16, so-called “acte-claire doctrine”).

Consequences of an infringement of the obligation to refer a matter to the Court



- Infringement proceedings will be initiated against the Member State of the court concerned (has remained without any practical significance to date)
- State liability claim under Union law for judicial wrongs

Consequences of an infringement of the obligation to refer a matter to the Court



State liability may be claimed under Union law for judicial wrongs if:

- the infringement in question is a decision handed down by a court against whose decision there is no judicial remedy,
- the purpose of the infringed provision of Union law is to grant rights to individuals,
- the infringement has been sufficiently qualified (is obvious), and
- there is a direct cause-and-effect relationship between this infringement and the damage sustained by the individual.

Consequences of an infringement of the obligation to refer a matter to the Court



- In addition, instruments of national law
- In Germany: constitutional complaint



Consequences of an infringement in Germany



- If Germany's Federal Constitutional Court finds that basic rights have been violated, the decision will be set aside and the case will be remitted to the court concerned.
- This will be the case if the manner in which the court dealt with its obligation to refer a matter to the ECJ was unacceptable.

Consequences of an infringement in Germany



- These are cases “in which a court against whose decision there is no judicial remedy has generally failed to comply with its obligation to refer a matter to the ECJ”.
- The same applies “if a question of Community law for which a decision is necessary to enable the court to give judgment has not yet been the subject of a preliminary ruling by the ECJ or if a preliminary ruling has not yet exhaustively answered the question for which a decision by the ECJ is necessary”.

Consequences of an infringement in Germany



- If a further development of the ECJ's case law is more than just a remote possibility, the German Constitutional Court takes the view that Art. 101(1) sentence 2 of the German Constitution has been violated if "the court against whose decisions there is no judicial remedy has transgressed in an unacceptable manner the margin of discretion that it necessarily has in such cases".

(cf. decision of 9 January 2001 – 1 BvR 1036/99
"Rinke Decision")

Consequences of an infringement in Germany



The basic right to effective legal redress is violated:

- if a court denies that there are major doubts with regard to the compatibility of a provision in a directive with primary Union law and if this court does not grant interim relief,
- *“without substantively addressing the fact that”* various courts of other Member States *“have confirmed [such] doubts and have therefore temporarily suspended the execution of the national implementation act for their jurisdiction”* to refer the matter to the ECJ for a preliminary ruling.

Form of the referral decision



- The form of the referral decision depends on national procedural law.
- In Germany, the decision to refer a matter to the ECJ is taken in the form of a unappealable court order.

Contents of the referral decision



- Matter in dispute and the facts of the pending national case
- Relevant provisions of national law, if possible exact wording
- Relevant provisions of Union law
- Question(s) referred to the ECJ



- Grounds for referral:

In cases where the ECJ is requested to interpret Union law, the requesting court has to state why the requested interpretation is necessary to enable it to give judgment.

In cases where the ECJ is requested to review the validity of Union law, the requesting court has to state the reasons why the legal instrument in question might be invalid.

Contents of the referral decision



- In addition, the court may state, from its own perspective, how the questions referred to the ECJ for a preliminary ruling should be answered.

Contents of the referral decision



- If the referral decision does not provide sufficient information on the legal background and the facts of the pending national case, the request for a preliminary ruling may be rejected as inadmissible.
- The Court of must be able to understand the legal consequences of its ruling.

Wording of the question(s) referred to the ECJ



- Only questions concerning the interpretation and the validity of Union law
- The ECJ has no power to rule on issues relating to breaches of the national law of Member States

Wording of the question(s) referred to the ECJ



- The question should therefore be worded in an abstract form and exclusively related to Union law.
- However, the question may refer precisely to the problem underlying the pending national case.
- The ECJ reserves the right to rephrase the question.

Effects of a reference for a preliminary ruling



- A reference for a preliminary ruling always leads to the stay of the national proceedings.
- However, the national court will continue to have jurisdiction for granting interim relief.
- A reference for a preliminary ruling may be withdrawn at any time (e.g. if appeal is filed, if action is withdrawn or if parties reach a settlement).

Effects of the ruling by the ECJ



- As a matter of principle, rulings by the ECJ on questions of interpretation are only effective *inter partes*; however, they also have a prejudicial effect, obliging diverging courts against whose decision there is no judicial remedy to refer the matter to the ECJ.
- If the ECJ rules that a provision of Union law provision is invalid, such a decision will be effective *erga omnes*.



Role of the national judge in the light of national law



Role of the national judge

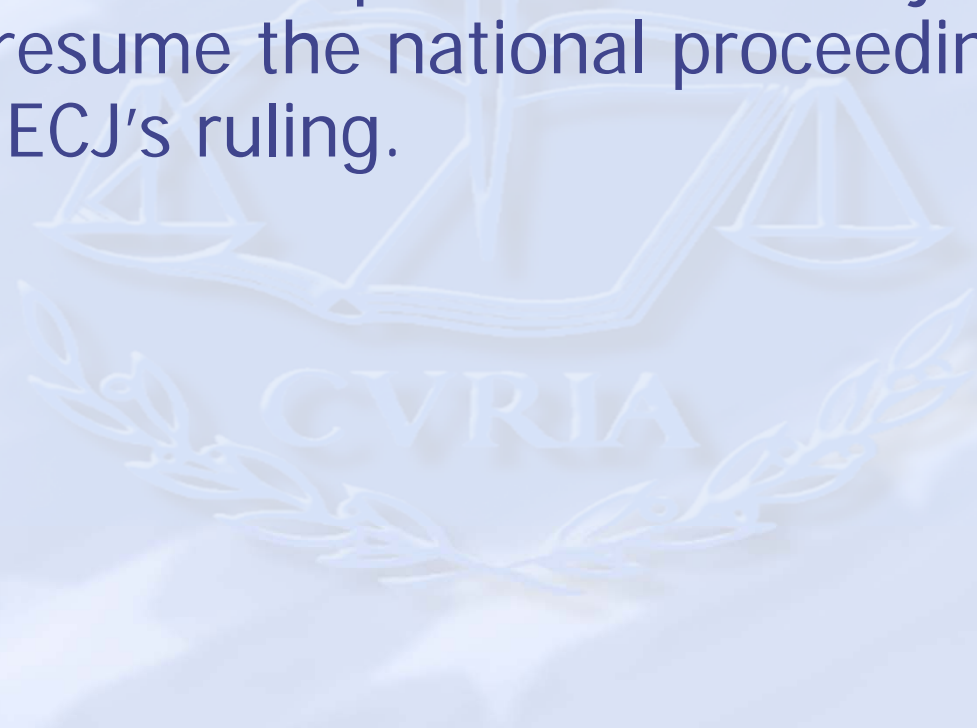


- The national judge is the «guardian of specialised national law».
- In the context of references for preliminary rulings, the particular task of the national judge is therefore to draw attention to the specific requirements of specialised law in a comprehensible manner.

Role of the national judge



- The application of the interpreted Union law provision to the facts of the pending national case is incumbent upon the national judge who will resume the national proceedings after the ECJ's ruling.



Role of the national judge



- The interpretation and application of national law in conformity with Union law ensures full effectiveness of Union law.
- The entirety of national law is taken into consideration, and it is applied in accordance with recognised methods of interpretation.

Role of the national judge



- National law is not applied if it cannot be interpreted in conformity with Union law.



Role of the national judge



Particularities in the field of
anti-discrimination law?

... outside a court room

