

THE PRELIMINARY RULING PROCEDURE

AND

THE ROLE OF THE NATIONAL JUDGE

Prof. Dr. V. A. CHRISTIANOS

Faculty of Law

University of Athens

Introduction

Article 267 TFEU establishes a procedure characterised by the Court of Justice as a cooperation procedure between itself and the national judge¹.

The ECJ and the national judge are the active agents in the preliminary ruling procedure.

The ECJ plays a triple role in the preliminary ruling procedure:

- a) It provides *an interpretation* and thereby ensures the uniform application of Union law in Member States.
- b) It *indirectly monitors* the compliance of national rules with the law of the European Union. Whether or not a national law or other domestic

¹ Cf. for example: judgment of 1/12/1995, *Schwarze*, 16/65, ECR p. 1081; order of 18/10/1979, *Sirena*, 40/70, p. 3169; judgment of 25/6/1992, *Ferrer Laderer*, C-147/91, ECR p. I-4097, para. 6; judgment of 16/7/1992, *Lourenço Dias*, C-343/90, ECR p. I-4703, para. 14; judgment of 16/7/1992, *Meilicke*, C-83/91, ECR p. I-4871, para. 22.

provision complies with a rule of Union law is indirectly derived from the interpretation given to that rule by the Court. Consequently the national judge is verifying whether a national rule is compliant with the law of the European Union.

- c) Finally, it reviews the *validity of provisions of the Union's secondary law*. National governments apply the law of the European Union either directly or else through implementing acts of domestic law. In this way, directly applicable provisions of EU law, but also the basis in EU law for a national act or practice, can be challenged before a national judge by means of a plea of illegality.

The role of the national judge is equally important.

The national judge alone decides:

- whether or not a question needs to be referred²;
- at what point during the proceedings before it the question should be referred³;
- the substance⁴ and formulation of the question⁵;
- to issue the order for a preliminary ruling to be submitted to the ECJ.

² Cf. for example judgment of 29/11/1978, Pigs Marketing, 83/78, ECR p. 2347, para. 25; judgment of 28/11/1991, Duringhello, C-186/90, ECR p. I-5773, para. 8; judgment of 15/12/1995, Bosman, C-415/93, ECR p. I-4921, para. 59; judgment of 13/3/2001, Preussen Electra, C-379/98, ECR p. I-2099, para. 38; judgment of 12/4/2005, Keller, C-145/03, ECR p. I-2529, para. 33. Nevertheless, evolving case-law from the Court has extended review of the need to refer the question; in this context see judgment of 16/7/1992; Lourenço Dias; C-343/90, ECR p. I-4673; judgment of 16/5/1994, Monin Automobiles, C-428/93, ECR p. I-1707; order of 9/8/1994, La Pyramide, C-378/93, ECR p. I-3999 and the Bosman and Preussen Electra judgments cited above.

³ Cf. for example judgment of 11/6/1987, Pretore di Salò, 14/86, ECR p. 2545, para. 11; judgment of 15/12/1993, Ligur Carni and others, C-277/91, ECR p. I-6621, para. 16.

⁴ Cf. judgment of 5/10/1988, Alsatel, 247/86, ECR. p. 5987, paras. 7 et 8; judgment of 12/12/1992, Kerafina and others, joined cases C-134/91 and C-135/91, ECR p. I-5699, para. 16; judgment of 6/3/2003, Kaba, C-466/00, ECR p. I-2219, para. 40.

⁵ Cf. for example judgment of 6/4/1992, Bosch, 13/61, ECR p. 89, esp. p. 102.

The preliminary ruling procedure breaks down into three stages:

- the first, before the national court, ends if and when this court decides to submit a question to the European Court of Justice for a preliminary ruling;
- the second, before the European Court, ends when the ECJ issues its judgment or order ruling on the interpretation or validity of a provision of Union law;
- the third, again before the national court, ends with the *application* of this provision of Union law (or in the event that it has been declared invalid its *deapplication*) to the case pending before this court in order to resolve the dispute.

I shall not dwell upon the procedural details, but I do wish to highlight the role of the national judge, particularly during the first stage.

To this end I shall briefly outline three questions at the heart of the reference procedure which illustrate the paramount importance of the national judge.

First question: Who can submit a reference for a preliminary ruling to the Court? (I)

Second question: Under what conditions can the reference be made? (II)

Third question: What form should the reference take? (III)

I

The originator

The answer to the first question is usually simple: *any court or tribunal in a Member State* can submit a reference for a preliminary ruling to the Court (which excludes courts in third countries and international courts). It is

sufficient to consult the Constitution of the Member States or its judicial legislation which designates national courts (administrative, civil, criminal).

However, the Treaty has its own definition of what constitutes a court. The ECJ has supplied a number of criteria:

- a) establishment in law (no arbitrators);
- b) permanence (no *ad hoc* tribunals);
- c) compulsory jurisdiction (no mediators);
- d) *inter partes* procedure (*audiatur et altera pars*);
- e) application of rules of law (no *ex aequo et bono* decisions);
- f) independence (no administrative bodies);
- g) binding decisions (no consultative opinions).

II

The conditions

Five conditions have to be met.

- a) The national court must be uncertain about the interpretation or validity of a provision of Union law; the court may raise the question *ex officio* or at the request of one of the parties.
- b) The question must arise in the course of proceedings pending before the referring court. It follows that a reference may not be submitted with regard to a case pending before a different court or when the case is no longer pending before the referring court.
- c) The pending case must concern the settlement of a dispute.
- d) The national judge must believe that the ECJ's ruling is necessary to enable it to give judgment.
- e) At what point can the national court refer its question to the ECJ?

III

The formal requirements

In other words, what powers does the national judge exercise in submitting a reference?

I shall examine three issues: the *form the reference should take*, the *formulation of the question* and the *substance of that question*.

- a) The form it takes (order, ruling, judgment) will depend on the national rules.
- b) The formulation of the question lies within the competence of the national judge. Deficiencies in formulation would result in non-application of Article 267 TFEU. The questions must be simple and direct, not vague and over-general. Alternative questions should be avoided. The questions must concern the interpretation or validity, not the application, of a rule of Union law. The ECJ may proceed to reformulate the questions.
- c) The substance of the question for a preliminary ruling must concern the interpretation or validity of a rule of Union law (social security, right to establish, free movement of capital, competition, public procurement, consumer protection). The substance really refers here to the *entire content* of the reference order rather than the content of the question itself. The entire content will include:
 - i) the reasons for the reference from the national judge;
 - ii) a description of the facts;
 - iii) a description of the national legal context.

By way of a Conclusion: the ECJ's competence to give preliminary rulings after Lisbon.

Wider competence but also limitations for the Court.

A. The wider competence results from:

- a) the elimination of the pillars (former Articles 35 TEU and 68 TEC),
- b) the Charter of Fundamental Rights.

B. Limitations on its competence remain in relation to:

- a) CFSP, Article 24 TEU,
- b) the validity and proportionality of police operations.