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*“The role of national courts and the preliminary-ruling
procedure”*

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The system of references for a preliminary ruling

1. Introduction (I)

The principal instrument of judicial protection in the EU's legal order

7428 references for a preliminary ruling
out of a total of **17507** cases judged (1953-2011)

849 cases pending at the end of 2011 /
423 references for a preliminary ruling

Mechanism of judicial protection inspired by national models for verifying the constitutionality of domestic laws, the ultimate purpose of which is to give national courts and tribunals the instrument for ensuring uniform interpretation and application of EU law

It is a non-contentious and incidental procedure.

The Court's ruling is preliminary in both the temporal sense (it precedes the judgment of the national court or tribunal) and the functional sense (it is instrumental in the formulation of the judgment of the national court or tribunal) .

1. Introduction (II)

MULTIPLICITY OF OBJECTIVES

The mechanism of references for a preliminary ruling:

- ensures the **correct and uniform interpretation of EU law** through a system of cooperation between the Court and national courts and tribunals;
- guarantees **uniformity in the application** of EU law **through the courts**;
- contributes to **rounding off the direct means for scrutinising the legitimacy of EU acts** (providing protection through the courts to applicants whose own active legal standing is limited);
- ensures a **form**, albeit only an indirect one, of **scrutinising the compatibility of domestic acts with EU law**.

2. Object of the reference for a preliminary ruling (I)

Articles 19 (3)(b) TEU and 267 TFEU:

The Court of Justice of the EU (a triune institution) holds jurisdiction to judge through preliminary rulings on the **interpretation of EU law** and on the **validity** of the **acts** adopted by the **institutions, bodies, offices and entities of the EU (but not national acts!)**

1. So-called preliminary questions concerning interpretation

Preliminary *questions* concerning interpretation of the provisions of the Treaty, the acts listed in Art. 288 TFEU, excluding the direct applicability of the provisions contained in them, as well as any acts, including atypical ones, of institutions, bodies, offices and entities of the EU (so-called derived law) – general principles of EU law

2. So-called preliminary questions concerning validity

Preliminary questions concerning the validity and efficacy of acts of derived law (*and only them – i.e. not the provisions of the TFEU, which constitute the main parameter in the legality of derived law; nor preliminary rulings*) = all the acts that could be refuted through recourse to Art. 263 TFEU (identical imperfections in the act)

2. Object of the reference for a preliminary ruling (II)

A *sine qua non* for the reference for a preliminary ruling is the existence of a genuine, non-contrived difference of opinion regarding interpretation (or validity) that is relevant for the referring court or tribunal in making up its mind.

**It is thus a “court-to-court” procedure
(in which the parties play only a “secondary” role)**

(The Court provides the national court or tribunal with the hermeneutical principle for resolving the question referred for a preliminary ruling, putting it in a position to give a definitive ruling on the dispute before it.)

3. The concept of “court or tribunal”

An autonomous concept > “courts and tribunals” within the meaning of Art. 267 TFEU are characterised by:

- their statutory origin
- their permanent nature
- the obligatory nature of their jurisdiction
- the *inter partes* nature of their procedure
- the fact that they apply rules of law rather than ruling in equity
- their independence

4. Option and duty to make a reference

**National court or tribunal
against whose decisions there
is a judicial remedy in national
law**

OPTION of making a reference

**National court or tribunal
against whose decisions there
is no judicial remedy in
national law**

DUTY to make a reference
(but with a few exceptions)

5. The exceptions to the duty for a court or tribunal against whose decisions there is no remedy in national law to make a reference

The court or tribunal against whose decisions there is no remedy in national law **is not forced** to make a reference when:

- ✓ the question of EU law that has been raised does not influence the case before the *national court*
- ✓ the answer is clear from settled case-law independently of the nature of the proceedings in which it arose (*theory of acte éclairé*)
- ✓ there is no doubt as regards the correct interpretation of the provision of EU law concerned (*theory of acte clair*)
 - Risk of abuse

6. Failure of a court or tribunal against whose decisions there is no remedy in national law to refer a question for a preliminary ruling – what are the consequences?

A failure by a court or tribunal against whose decisions there is no remedy in national law to make a reference constitutes a breach of Art. 267 TFEU

- Possible infringement by the member state (infringement proceedings ex Art. 258 TFEU)
- Infringement likely to give rise to the extra-contractual liability of the member state on account of an action by one of its courts (infringement of EU law)

7. The specificity of the so-called preliminary reference regarding validity (i)

Fotofrost judgment

The national court or tribunal has no power to declare an act of an institution, body, office or entity of the EU invalid, except perhaps incidentally, and to proceed to disapply it.

→ It follows that the national court or tribunal against whose decisions there is a remedy in national law:

✓ **is obliged** to make the reference if it has any doubts as regards the validity of an EU act.

✓ *In exceptional cases, it may temporarily suspend the application of the domestic act based on an EU act suspected of invalidity, but must at the same time refer it to the Court for a preliminary ruling.*

✓ **is not obliged** to make the reference if it has sound reasons for believing the EU act to be valid.

7. The specificity of the so-called preliminary reference regarding validity (II)

The reference for a preliminary ruling regarding validity:

- rounds off the system of judicial review of the legality of the acts of the EU and fills the “gap” left by precluding individuals from initiating actions for the annulment of acts having a general impact
- ...**however**, a decision not brought before a court or tribunal within the time limits set down in Art. 263 TFEU becomes final vis-à-vis those to whom it is addressed, who cannot then object to its legality before the national court or tribunal (*idem* in the case of a subject objecting to the legality before the national court or tribunal of an act not addressed to them but who “without doubt” would have been able to bring the matter before the court or tribunal – for instance in matters of state aid)

8. Sharing of functions and cooperation between the national court or tribunal and the Court (I)

The Court does not rule on the compatibility of the disputed national law with EU law but provides the national court or tribunal with elements of interpretation that can be obtained from EU law that are suitable for putting it in a position to be able to give its ruling on such compatibility in order to give its judgment in the main proceedings.



Example “(..) *EU law and, in particular Art. X of Directive 2000/78 must be interpreted in the sense that they preclude national legislation such as that in dispute in the main proceedings, which envisages/authorised/fixes an age limit...*”

Reference for a preliminary ruling = Indirect judgment on the compatibility of the domestic provision with EU law (effects similar to those arising out of a judgment given ex Art. 258 TFEU)

8. Sharing of functions and cooperation between the national court or tribunal and the Court (II)

The Court does not check the need for or opportuneness of the reference for a preliminary ruling nor its relevance. (cf. Art. 94 of the Rules of Procedure in the new, revised form: “*Content of the request for a preliminary ruling*”)

It has, however, declared the following to be inadmissible:

- references for a preliminary ruling that are manifestly irrelevant for the solution before the national court
- references for a preliminary ruling on purely hypothetical matters
- references for a preliminary ruling contained in orders for a reference devoid of an (adequate) summary of the legal issues and facts of the case
- references for a preliminary ruling brought up in the context of fictitious litigation
- Declaration of inadmissibility = *extrema ratio*

9. The effects of preliminary rulings

INTERPRETATIVE PRELIMINARY RULING

- **Binding on the referring court or tribunal** (*including any higher courts or tribunals called on to rule on the same case in later phases and at subsequent levels : i.e. effects within that case – it is, however possible to make a new reference*)
- **Effects beyond the particular case:** *also binding on other courts and national administrations (abstract character; uniform application of EU law)*

VALIDITY PRELIMINARY RULING

- Effects limited to the case in point – ***erga omnes*** effectiveness **in the event of ascertainment of invalidity**, with the duty for the institution to adopt the necessary provisions to remedy the illegality (= annulment judgment ex Art. 263 TFEU)

10. The temporal effectiveness of preliminary rulings

- Preliminary rulings have a retroactive or *ex tunc* effect, with no exception for the effects within the case
- Exceptionally (but only as regards the effects beyond the particular case), the Court, considering the serious economic repercussions and in the light of the large number of legal relationships entered into in good faith that might be affected by its ruling, may limit the possibility for the parties concerned to invoke the operational part of its judgment for the purpose of challenging situations already defined (which is, however, not applicable to subjects who have already initiated legal proceedings at the time of the judgement). Example: Test-Achats.

11. New Rules of Procedure and Recommendations to national courts or tribunals concerning the presentation of questions referred for a preliminary ruling

- ✓ The Court's new Rules of Procedure (applicable as of 1 November 2012), OJ L 265 of 29 Sept. 2012, *(now containing 210 rules compared with 127 in the previous version)*
 - ✓ ***Title III (references for a preliminary ruling) : four headings and 25 articles (from 93 to 118)***
- ✓ Recommendations to the national courts or tribunals concerning the presentation of questions referred for a preliminary ruling (OJ C 338 of 6 November 2012)
 - ✓ These replace the information note (the latest version of which was dated 2011) and aim to reflect the innovations introduced with the new Rules of Procedure (cf., in particular, points 20-28; form and content of the request for a preliminary ruling)
- ✓ Role of the national court or tribunal in questions referred as a matter of urgency for a preliminary ruling (accelerated procedure and urgent procedure)

12. Practical issues and guidance (I)

Premise

- The national court or tribunal should, wherever possible, try to resolve the question using its own resources, studying the Court's case law (making sure there are no precedents already there, which is fairly likely in many areas).
- It must be aware of the importance that references for a preliminary ruling have for the evolution of EU law (and, as a consequence, for its own national law).
- It must abandon the trimmings and stylistic conventions of its own national legal system (it is going to be difficult for the order for reference to be read in the original language!) and must accept the discipline of simplification in both its reasoning and its language.

12. Practical issues and guidance (II)

It must be borne in mind:

- that there may be problems of translation of the documents (or only parts of them may be translated): judges and advocates general (and legal secretaries) are not always familiar with the language of the case;
- that judge-rapporteurs and advocates general (and legal secretaries) are not always familiar with the legal order (let alone the style of case documents) of the source country of the reference for a preliminary ruling;
- that the subjects to be notified of the order for reference *ex Art. 23* of the Statute receive it only in translation;
- that the parties present their observations separately without knowing the contents of those of the other parties (to which they may, depending to the case, only reply in the oral hearing).

12. Practical issues and guidance (III)

The order for reference ought to :

- be properly **structured**, if possible with subheadings (especially when it contains elements of no interest to the Court) and with **numbered paragraphs** (just the Court's own judgments) (point 25 of the Recommendations)
- be **short** (ideally, **10-15 pages**), simple, linear and as complete as possible (points 21-22 of the Recommendations)
- **provide a clear description of the facts** (the Court sticks to this even in the event of a challenge on behalf of one of the parties to the main proceedings)
- specify the applicable **national legislation**, which ought also to be comprehensible (avoiding abbreviations; stating the legal provisions concerned, even if such a listing is not necessary in the proceedings of the national court or tribunal); also indicate the references to their publication (points 22-23 of the Recommendations).

12. Practical issues and guidance (IV)

....in addition, it ought to:

- **identify**, if possible, **the provisions of EU law** that are pertinent for resolving the dispute
- contain a brief **description to the parties' arguments**
- explain briefly the **logical thread** that has led the court or tribunal to make the reference for a preliminary ruling (*i.e.* of its own motion, following a motion from one or several parties; assuming a certain thesis of the doctrine or the case-law, etc.)
- **formulate the reference for a preliminary ruling as precisely as possible** (the Court does not perform a check on the compatibility of the national provision with EU law...), highlighting this in a separate part of the order (point 26 of the Recommendations)
- **indicate** succinctly where possible, the point of view of the national court or tribunal as regards the solution to be given to the question referred for a preliminary ruling (in particular, if a request is made for the accelerated or urgent procedure) (point 24 of the Recommendations).

12. Practical issues and guidance (V)

A what point in its proceedings should the national court or tribunal refer its request for a preliminary ruling?

- It is the national court or tribunal that is in the best position to assess at what phase in its procedure it must make the reference for a preliminary ruling. Therefore it must decide.
- Nonetheless, it is desirable for the question to be referred in a phase in which the national court or tribunal is in a position to define the *de facto* and *de jure* scope of the problem. That might possibly be after opening the *inter partes* hearing in the national court or tribunal (points 18 and 19 of the Recommendations).

Thank you for your kind attention!