

ERA Seminar
26-27 March 2012

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The role of national courts in
procedures for preliminary rulings
under Article 267 TFEU

Guiding principles

The legal framework

- Article 267 TFEU
- Articles 23 and 23a of the CJEU Statute (TFEU Protocol No. 3)
- Articles 103 to 104b of the CJEU Rules of Procedure
- Information Note on references from national courts for a preliminary ruling

Guiding principles

A procedure founded on cooperation

Division of competence between the referring court and the CJEU:

- Power to refer a case to the CJEU
- Respect for the competence of the CJEU

Guiding principles

National court references to the CJEU

- Request for interpretation/ review of validity of Union law

Acts that can be interpreted/ reviewed

Article 267 TFEU: the Treaties and acts issued by the institutions, bodies or agencies of the Union

- Treaties (apart from validity)
- Regulations, directives, decisions, opinions, recommendations
- International conventions to which the Union is a party

Guiding principles

National court references to the CJEU

- National law derived from Union law

[W]here, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in [Union] law with a view, in particular, to preventing national citizens from experiencing discriminatory conditions or [...] possible distortions of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from [Union] law should be interpreted uniformly, irrespective of the circumstances in which they are to apply»

Judgment of 17 July 1997, *Leur-Bloem*, C-28/95, ECR p. I-4161 (32)

Guiding principles

National court references to the CJEU

Obligation or option for the national court?

The national court must refer a question on the interpretation of Union law that arises during proceedings before it if there is no judicial remedy against its decisions under national law.

- Functional criterion
- Court is ruling on the merits of the case
- Effects of national law on references to the CJEU

Guiding principles

Exceptions:

“[Article 267, 3rd paragraph, TFEU] must, following settled case-law, be interpreted as meaning that such courts or tribunals are required, where a question of [Union] law is raised before them, to comply with their obligation to make a reference, unless they have established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of [Union] law is so obvious as to leave no scope for any reasonable doubt.”

Judgment of 15 September 2005, Intermodal Transports BV, C-495/03, ECR p. I-8151, (33)

- Irrelevant
- Identical to a question already submitted
- Acte clair

Guiding principles

Option/entitlement: When a question of interpretation or of assessment of the validity of Union law is raised before a national court against whose decision there is a judicial remedy, this court may, if it considers that a decision on this point is essential to its resolution of the dispute, request the Court for a ruling on this question.

Exception: declaration of invalidity of a provision of Union law

- “[National] courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. On the other hand, those courts do not have the power to declare acts of the [Union] institutions invalid.”

Judgment of 22 October 1987, Foto-Frost, C-314/85, ECR p. I-4199, (14-15)

Guiding principles

The jurisdiction of the CJEU

- Conditions relating to the nature of the referring court
 - Absolute criteria
 - Obligatory jurisdiction
 - Legal origin
 - Permanent status
 - Adversary procedure
 - Application of rules of law
 - Independence
 - Other indicators

Guiding principles

The jurisdiction of the CJEU

- Substantive conditions relating to the national dispute
 - The need for a linking element

“It is settled case-law that the Treaty rules governing freedom of movement [...] cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State”
Judgment of 27 July 2008, Metock, C-127/08, ECR p. I-6241, (77)
 - Relevance test for the question submitted for a preliminary ruling

Guiding principles

The jurisdiction of the CJEU

■ Substantive conditions relating to the reference order

➢ Material elements required

“The need to arrive at an interprétation of [Union] law of use to the national court requires the latter to define the factual and regulatory framework in which its questions are embedded or at least to explain the factual hypotheses on which those questions are founded [...] The information supplied in the reference orders must not merely permit the Court to provide useful answers, but must also offer the governments of Member States and interested parties a chance to submit observations [...]”

Order of 7 December 2010, Dra Speed, C-439/10, (10)

Practical advice

Reference to the CJEU

■ Choosing the right procedure

➢ The ordinary reference procedure

Articles 23 of the Statute and 104 of the Rules of Procedure

➢ The accelerated reference procedure

Articles 23a of the Statute and 104a of the Rules

➢ The urgent reference procedure

Articles 23a of the Statute and 104b of the Rules

Practical advice

Reference to the CJEU

- What the reference order should contain
 - Essential information
 - The factual framework
 - The national legal framework
 - Provisions of Union law held to be relevant
 - The links between provisions of Union law, the national legal framework and the facts of the case
 - The question referred for a preliminary ruling
 - Optional information
 - Arguments put forward by the parties
 - Replies proposed by the parties to the question

Practical advice

During proceedings at the CJEU

- Consequences of the pending procedure for the national court

“The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference is appropriate and necessary.”

Judgment of 12 February 2008, *Kempter*, C-2/06, ECR p. I-411, (42)
- Technical hitches in the procedure before the CJEU
 - Request for clarification (Article 104 § 5 RoP)
 - Request to uphold the question for preliminary ruling
 - Stay of proceedings pending another case / joining of cases

Practical advice

The effects of the preliminary ruling

- Binding nature of the Court's reply
 - On the referring court and on other courts
 - Recognition of the referring court's freedom to interpret
- Effects of the Court's judgment over time
 - Interpretation ex tunc
 - Limitation of the effects of the judgment over time