

The role of national courts in the
application of EU law
and hearings for a preliminary ruling
before the CJEU

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The views expressed here represent only the personal opinions of the speaker



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Summary

- Introduction to the European justice system
- Overview of types of procedure
- Preliminary ruling procedure
 - Requirements
 - Procedure
 - Judgment and legal consequences of the decision
 - Significance of the preliminary ruling procedure
 - Problems
- On the role of the national judge
- Future developments

CJEU – structure

- The “Court of Justice of the European Union” (the CJEU as an institution is an organ of the Union alongside the EP, Council, Commission), founded 1952
- It comprises the following courts:
 - Court of Justice (the CJEU as a judicial body)
 - General Court (EGC, formerly the Court of First Instance)
 - Specialised courts (hitherto only the European Union Civil Service Tribunal, that only until 31/08/2016 - see reform of the CJEU)

CJEU - competence

- On the foundation of the CJEU in 1952, competent for all proceedings concerning
 - The validity of legislative acts
 - The lawfulness of administrative acts by the executive
 - Member States' compliance with European law
 - The interpretation of European law
- On discharge of CJEU, 1989 establishment of the Court of First Instance, now the General Court - EGC
 - Competence for direct appeals transferred to the EGC
- On discharge of the EGC: 2005 foundation of the Civil Service Tribunal
 - for disputes between officials and other staff of the EU institutions (from 01/09/2016 competence for this will be restored to the EGC – see reform of the CJEU)

CJEU and EGC - composition

- CJEU:

- 28 judges (1 judge per Member State)
- 9 advocates-general, from 7 October 2015: 11,
By agreement: “fixed” posts for the large Member States: DE, EN, ES, FR, IT, PL
Rotation between the other Member States for the remaining 3 (soon 5) places

- EGC:

- Formerly 28 judges, from 13/04/2016: 35; from 01/09/2016: 45 (including 7 judges from the civil service tribunal); from 01/09/2019 56 judges

- One registrar for each

CJEU and EGC - Appointment of judges and advocates-general

- On proposal of the relevant government and after consultation of the seven-member committee under Art. 255 TFEU (advisory panel), which issues an opinion on suitability, judges are
- “appointed by common accord of the governments of the Member States”, principle of unanimity
- period of appointment 6 years (or shorter for replacements)
- Reappointment is admissible, but not for advocates-general involved in the rotation
- Formerly special rules for civil service tribunal (selection panel after call for applications)

Types of procedure - overview I

CJEU:

- Preliminary ruling procedure
- Infringement procedure
- Disputes between EU institutions
- Opinions, e.g. opinion on the accession of the EU to the European Convention on Human Rights (ECHR)
- Appeal proceedings against EGC decisions
- Until 31/08/2016: Re-examination of EGC decisions in staff tribunal proceedings

Types of procedure - overview II

- EGC:
 - Direct actions
 - Indirect actions
 - But not: Disputes between EU Institutions (competent: CJEU)
 - Actions for failure to act
 - Actions for damages
 - Until 31/08/2016 appeals in civil service tribunal proceedings
- Civil Service Tribunal:
 - until 31.08.2016 actions brought by officials and other staff of the EU institutions

Preliminary ruling procedure I

Art. 267 TFEU, ex Art. 234 EC:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. [...]”

Preliminary ruling procedure II

- Conditions for the use of the preliminary ruling procedure
 - Proceedings before a national court (Dialogue)
 - All courts available in national system
 - Independently of its hierarchical position
 - Not arbitration or mediation services or internal bodies for administrative appeals

Preliminary ruling procedure III

– Subject of the application

- Interpretation of EU law
- Review of the validity of an EU legislative measure
- No competence,

to apply EU law to national circumstances, or to interpret national law, or to annul national legislation on the grounds of a breach of EU law. This is a matter for the national court.

– Need for the requested ruling to resolve the case before the national court: no hypothetical cases

Preliminary ruling procedure IV

- Obligation to start proceedings for a preliminary ruling,
 - if a court of the last instance, i.e. if decision can no longer be contested
 - exception: “acte clair” doctrine (CJEC: *CILFIT*, 1982)

Preliminary ruling procedure V

- CJEC: *CILFIT* 1982 - “acte clair” doctrine
 - CJEC ruled that it was the responsibility of the national court to obtain a preliminary ruling,
“unless it has 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 Community law is so obvious as to leave no scope for any reasonable doubt.”*

Preliminary ruling procedure VI

- Further, from the recommendations of the CJEU to national courts on the initiation of preliminary ruling proceedings (OJ 338/1 of 06/11/2012):

“Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it.”

Preliminary ruling procedure VII

- Always an obligation to seek a preliminary ruling if the validity of an EU legal provision would be brought into question
- In Germany, a breach of the constitutional law principle of the competent judge, if no preliminary ruling (BVerfG, ruling of 10/12/2014 -2 BvR 1549/07: *Junk* decision, Federal Labour Court granted protection of confidence without a preliminary ruling!)

Preliminary ruling procedure VIII

- Option of preliminary ruling
 - If not a court of last instance
 - Whether the decision to submit can be contested depends on the procedural law of the Member State
- Decision to submit by national court

National court decides on submission independently of whether the parties to the main proceedings propose such submission

Preliminary ruling procedure IX

- Time for submission

When the factual and legal context of the case has become sufficiently clear

- Form and content of submission

Form complies with national law

Following content is obligatory:

- Presentation of the facts
- Wording of the national provisions (not in annex, as annexes are not translated!)
- Relevant provisions of EU law
- Statement of the pertinence of the application and the question
- Any proposal by the national court for a appropriate response to the application

Preliminary ruling procedure X

- For questions on the validity of an EU legal provision:
 - National court can dismiss the grounds proposed for invalidity
 - But: The CJEU has sole authority to declare an EU legal provision invalid
 - National court can however provisionally set aside application of the law and take temporary measures

Preliminary ruling procedure XI

- Size of the application: Max. 10 pages, typescript, simple language for translation
- CJEU may reformulate application in order to give an appropriate response
- Rejection for invalidity occurs only rarely

Application XII

- Written procedure:
 - Submission of application by national court to CJEU Registry, L-2925 Luxemburg
 - Translation of application into all 24 official languages (without annexes!)
 - Service to all parties, all member states and all EU institutions via the court registry
 - Publication in Official Journal (anonymity problem)
 - Written submissions by the parties, particularly the European Commission as *amicus curiae*
- Time limit: 2 months, exception: PPU

Preliminary ruling procedure XIII

Designation of the Judge-Rapporteur

- by general meeting on the proposal of the president of the CJEU and
- Establishing the formation and whether the Advocate General will be involved by General Assembly on proposal of the rapporteur and after consultation of the Advocate General

Preliminary ruling procedure XIV

- Oral proceedings:
 - Rapporteur's preliminary report
 - Oral hearing (unless renounced by the parties or so ruled by the Court)
 - Advocate General's opinion, if any

Preliminary ruling procedure XV

- Majority decision of the formation
(often after protracted discussions: differing legal cultures and language issues, often most basic consensus on grounds)
- Announced in open session
- Published on the internet
(www.curia.europa.eu)
- No longer in collection

Preliminary ruling procedure XVI

- Legal consequences of the decision
 - Binding on the national judge in the main proceedings
 - Serves as a precedent for courts and public administrations (contentious)
 - Effective “ex tunc”, unless CJEU limits the effects of its decision to the date of the judgment or even later (e.g. granting a period of grace)

Preliminary ruling procedure XVII

- The preliminary ruling procedure is the most important mechanism for
 - Development of EU law
 - Ensuring the consistency of EU law
 - Total number of cases referred to the CJEU:
just 19,429 (1953-2014), of which 8,710 via the preliminary ruling procedure

Preliminary ruling procedure XVIII

– Distribution by Member State:

DE: 2,137=25%, IT: 1,279, NL: 909, FR: 906
UK: 573, AU: 447, ES: 354; PT:124,
SE: 114, FI: 91=1,2%, PL 74=0,8%

– Distribution by court:

FR: Total 906, highest courts 204,
lower courts 702 =77%

DE: Total 2,137, highest courts 716,
lower courts 1,421=66%

FI: Total 91, highest courts 64,
lower courts 27=30%

Preliminary ruling procedure XIX

- Problems

- No direct access by the parties to national proceedings to the CJEU, except via national judge (Filter)
- After submitting the application for a ruling no further involvement of national court (exception: rare request by the CJEU)
- Duration of proceedings (2009-2014)
 - Average preliminary ruling procedure: 15 months
 - Accelerated and summary proceedings: Average for PPU 2.2 months
- Costs of proceedings
- Still no sufficient clarification for conflicts where national law is not interpreted in accordance with European law

A digression: EU legislation

Hierarchy of laws and their binding effect:

- General principles of EU law
 - (e.g. precedence of EU law, guarantees of fundamental rights, proportionality principle, principle of protection of expression, right to a fair hearing, principle of the liability of Member States for violations of EU law)
- Primary law
 - EU treaties
(e.g. Lisbon Treaty and charter of fundamental rights)
- Secondary law
 - (regulations, directives, etc.)
- All cited measures are immediately binding if sufficiently precise and unconditional, except for directives (need transposition into national law)

Digression: General principles via CJEU case-law

- Primacy of EU law
 - *Costa/ENEL* (1964), *Simmenthal* (1978),
– *Factortame I* (1990)
- Direct application of EU law
 - *Van Gend en Loos* (1963)
- Accountability of Member States for breaches of EU law
 - *Francovich* (1991), *Brasserie du Pêcheur* and *Factortame III* (1996), *Köbler* (2003)
- No adequate response for private law cases

On the role of the national judge as an EU judge I

- If national law conflicts with EU law, obligation on national judge to interpret in compliance with EU law

Von Colson (1984) Simmenthal,

Pfeiffer (2004)

- Rather than an EU law interpretation method, see *Marleasing*, the CJEU later referred to national interpretation methods, *Pfeiffer*
- Recourse to national legal methods does not promote integration, since interpretation produces different results!

Digression:

What national interpretation methods are there?

The benchmark is an examination of the compatibility of the national law with higher-ranking law, so taking Germany as an example:

- » Practical consistency
- » Teleological reduction
- » Interpretation in accordance with the constitution
- » Interpretation in accordance with international law

(see BVerfG, ruling of 14/10/2004 -
2 BvR 148/04)

On the role of the national judge as an EU judge II

- If the national judge can reconcile national law with EU law by interpreting it in accordance with EU law, the primacy of EU law has been respected
- What happens where no interpretation in compliance with EU law is possible (e.g. *contra legem*), then could we ask whether the national judge is justified in disapplying the national law which conflicts with European law? The issue arises in particular for interpretation problems relating to measures which transpose directives, which under existing CJEU case law have no horizontal application in private law relationships

On the role of the national judge as an EU judge III

- CJEU has raised this in a series of judgments: *Mangold* (2005), *Kücükdeveci* (2010), *Dominguez* (2012), *AMS* (2014), *AKT* (2015)
- From *Mangold* (age discrimination case):
“It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, ...”
- From *Kücükdeveci* (likewise an age discrimination case):
“It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age ... is complied with, disapplying if need be any contrary provision of national legislation ...”

On the role of the national judge as an EU judge IV

- I feel that this issue has been clarified for Germany: the BVerfG has conceded the right to the judge hearing a case to disapply national law that conflicts with international law in line with the international law interpretation. Consequently this method also applies to national law which contradicts EU law (although this is controversial in case law and literature).

Conclusions and prospects I

- EU law is increasingly influencing national law in almost all areas of the law
- The CJEU has a considerable impact on the consistency of EU law
- In the early stages case law was emphatically integration-friendly
- Now in a consolidation phase, hardly any developments in EU legislation covering labour and social law

Conclusions and prospects II

- In the past predominantly applications from a workers' perspective against previously dominant conservative ideas
- Now also applications from the neoliberal camp
- Advance of Anglo-Saxon anti-discrimination law at the expense of continental European protective measures
- Politicisation of the infringement procedure

Conclusions and prospects III

- Threat to the consistency of CJEU case law through enlargement, issue of selection of judges
- Impact of the charter of fundamental rights and of the potential accession of the EU to European Convention on Human Rights
- Consideration of reforms to the Cifit formula and to the structure of European jurisdiction

End

Thank you
for your
attention