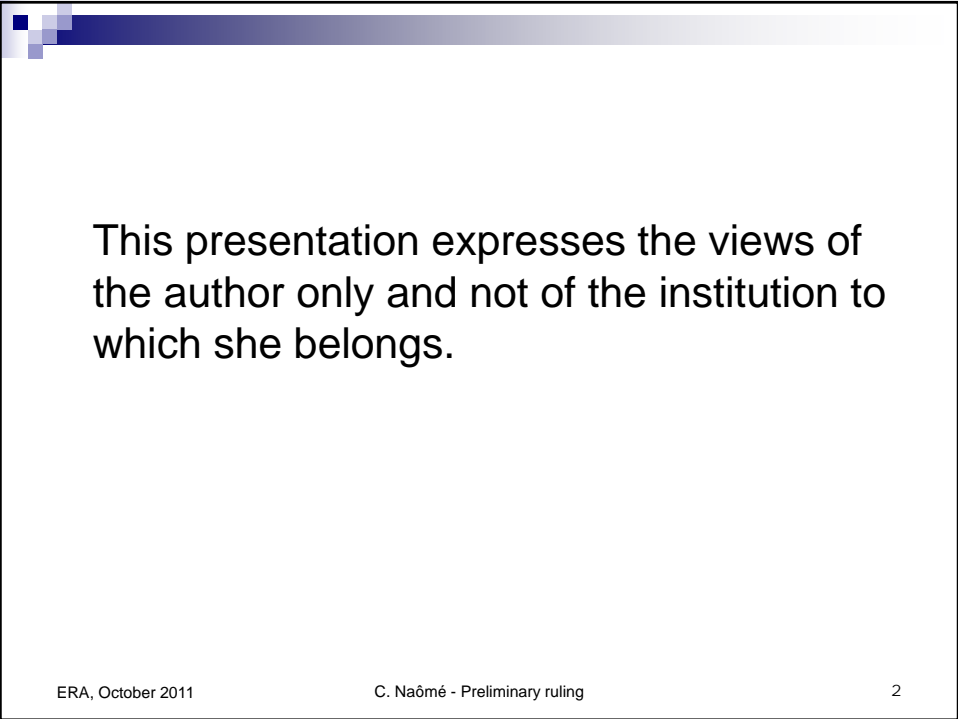




Preliminary reference proceedings

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This presentation expresses the views of the author only and not of the institution to which she belongs.

Definition of the Preliminary ruling procedure

- Mechanism of cooperation between national courts and the ECJ
- « dialogue » between national court and the ECJ

Objective of the Preliminary ruling procedure

- Interpretation of EU law: in order to have only one uniform interpretation in the EU
- Assessment of the validity of a EU act:
 - Centralized decision
 - Provide a possibility for an individual to contest a EU act

Texts

- Art 234 EC (general provision)
- Art 150 EAEC (very rare)
- Art 68 EC (civil procedure + immigration)
- Art 35 EU (criminal procedure)
- Brussels convention (now quite rare)
- Rome convention (used only twice)

Texts: **Article 267 TFUE**

- ~~■ Art 234 EC (general provision)~~
- ~~■ Art 150 EAEC (very rare)~~
- ~~■ Art 68 EC (civil procedure + immigration)~~
- ~~■ Art 35 EU (criminal procedure)~~
- Brussels convention (now quite rare)
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Article 35 EU

- preliminary rulings on the validity and interpretation of **framework decisions** and **decisions**, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

Art 35 EU

- The Member state must accept the jurisdiction of the Court of justice
- It must specify which Court may/must put a question

Article 267 TFEU

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;

Article 267, al. 2, TFEU

- 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 of Justice to give a ruling thereon.

Possibility to ask a question

- May = has the right to, must be allowed to
- Ex: Cartesio, Melki & Abdeli (question prioritaire de constitutionnalité in French law), Chartry (same in Belgian law)

Foto-Frost (22.10.1987, 314/85)

- A national court may consider the validity of a Community act
- But it does not have the power to declare an act invalid
- Is obliged to ask a question (exception to « may«»)

WHY? Coherence with Art. 263 TFUE (the Court has exclusive jurisdiction to declare an act void)

Article 267, al. 3, TFEU

- Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal **shall bring** the matter before the Court of Justice.

The duty to request preliminary ruling

- Highest courts
- Courts of last instance (there is no remedy available against their decision, except wholly exceptional judicial remedies)

Exceptions to the duty (CILFIT)

- Irrelevant questions
 - Identical or similar questions
 - The correct application of EU law is obvious, leaving no scope for any reasonable doubt (« acte clair »)
- However, attention must be paid to the characteristic features of EU law.

Possible sanctions/consequences

- To be mentioned in the Report of the Commission about application of EU law; critics of legal doctrine
- Infringement procedure (Art. 258 TFUE)
- Claim for damages
- Sanction in national law (violation of « legal judge » principle)
- Violation of article 6 of ECHR (Bosphorus)
- Question from another Court

TWD Textilwerke Deggendorf

- If the natural or legal person may act in annulment before the Community judge,
- but does not do so in due time
- the definitive Community act binds the national court by virtue of the principle of legal certainty

Effective judicial protection of the individuals

The Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the institutions:

- 1) there must be a remedy
- 2) there is only one

Effective judicial protection of the individuals

- When natural or legal persons cannot challenge a EU act before the EU Court, they can go before the national court and ask it to refer a question
- It is for the Member states to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (case-law; now article 19 § 1 of the TEU)

Interaction with action for annulment

EU judge	National judge
No standing to bring an action against a general measure (Unión de Pequeños Agricultores)	Litigation against a national measure implementing a EU measure of general application (e.g. regulation, directive). The judge may/must request a preliminary ruling about the validity of the EU act. Obligation of Member States to establish a system of legal remedies and procedure which ensure respect for the right to effective judicial protection (Unión de Pequeños Agricultores, Unibet)

Interaction with action for annulment

Community judge	National judge
Action for annulment against individual decision (if of direct and individual concern to the applicant) (Art. 230, al. 4, TEC)	Litigation against a national measure implementing a Community individual decision. The judge may/must request a preliminary ruling about the validity of the Community decision. However, a definitive decision (not challenged in due time) binds the national judge (TWS Textilwerke Deggendorf)

Since the Treaty of Lisbon

- Now, standing for persons to contest a regulatory act which is of direct concern to them and does not entail implementing measures (article 263, al. 4 of TFUE)
- How will the TWD rule evolve ?

In case of accession to the ECHR

- Is the preliminary ruling procedure part of the remedies that have to be exhausted before going in front of ECourtHR? (No, because it is the national court that refers a question, not the individual)
- What if the EU Court never had the possibility to control the validity of an EU act? (possibility to create a mechanism that would allow the ECJ to take position while the case is pending before the ECourtHR)

Role of the actors

- National Court
- Parties in the main action
- Member states
- European institutions
- Others

National Court

- Has the initiative (If there is no question, there is no answer)
- Remains the master of the case (can withdraw the question)
- Is absent in the procedure before the ECJ but remains the partner in dialogue
- Will apply the ruling of the ECJ to the facts of the case

National Court

- Decides who is a party in the main proceedings; can admit a litigant after it has referred a question (nb. a “real” litigant, cf. Foglia/Novello)
- Has jurisdiction for interim measures (Dory)
- Decides on the costs

ECJ <> National court

ECJ

- Interprets EU law
- Decides on the validity of a EU act

National court:

- Decides which national law is applicable; interprets national law (ASM Brescia)
- Establishes the relevant facts
- Applies EU law to the specific situation

Parties in the main action

- Are invited to present observations before the Court
- They cannot change the frame of reference (the facts, the national legislation as described by the national court, the question...).

Member states

- May be one of the parties in the main action
- Are invited to present observations (Article 23 Statute of the Court)

Member States

- Which Member states ? All, as soon as they are Member states, even in pending proceedings (immediate application of procedural law)
- Also Denmark, UK or Ireland, even if the EC legislation does not apply (opting out/in)

Institutions

- Commission: always there
- Council, Parliament or ECB: if the act the validity or interpretation of which is in dispute originates from one of them (in practice, they present observations only when the validity of an act is in dispute)
- Bodies, offices or agencies of EU: same as institutions

Others

- Member states and institutions of the Agreement on the European Economic Area
- Non-member States concerned by an agreement with the EU (e.g.. Switzerland and Schengen Agreement in C-411/10 NS)

Jurisdiction of the Court according to 267 TFUE

- The question must be raised by a Court or Tribunal of a Member State
- It must concern the interpretation or validity of EU law
- The national judge must consider that the question is necessary to enable it to give its judgment
- There must be a real litigation

Criteria to recognize a Court or Tribunal of a Member state according to 267 TFUE

The ECJ takes account of a number of factors:

- Whether the body is established by law
- Whether it is permanent
- Whether its jurisdiction is compulsory
- Whether its procedure is inter partes
- Whether it applies rules of law
- Whether it is independent

National Court according to 267

Were not recognized as such:

- director of Taxation
- Competition authorities
- Arbitration
- Court acting in an administrative matter (e.g. registration of companies)

Interpretation of applicable EU law

- The ECJ has no jurisdiction to interpret national law (but it has to be able to understand it)
- Fundamental rights are part of EU law, but the Court has jurisdiction to interpret them only in the context of application or implementation of EU law (Kremzov, Annibaldi, Vajnai + art. 52 § 5 of the Charter of fundamental rights of the EU)

Interpretation of applicable EU law

If EU law is not applicable *ratione temporis* (e.g. because of accession, because a directive was not in force at the time a contract was agreed upon), the ECJ has no jurisdiction (Andersson, Ynos)

Interpretation of applicable EU law

- If EU law is not applicable *ratione materiae* (purely internal situation), the ECJ has no jurisdiction (Salzmann, §32)
- Exception: the domestic law of a Member State refers to a EU provision in order to determine the rules applicable to a situation which is purely internal to that State (Dzodzi, Autorità Garante della Concorrenza)

The answer must be necessary for the national Court

- It is for the national court to determine the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions
- However, the ECJ can refuse to answer when it is obvious that the ruling sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical

Question non related (Nour)

- Main action: between a doctor of medicine and an Insurance fund about his medical fees
- Questions: about the method of calculating the remuneration of the President of the Appeals Board

Hypothetical question (Meilicke I)

“Mr Meilicke is the author of numerous publications in which he asserts that the doctrine of disguised contributions in kind is unfounded, particularly with reference to the Second Directive, and so it might be concluded (without fear of being accused of calumny) that the claimed right to information is being used merely as an instrument to secure confirmation of his theoretical view.” (Opinion AG, pt 4)

The answer must be necessary

- There is a presumption of relevance of the questions
- The presumption can be rebutted in exceptional circumstances

There must be a litigation

« A national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give a judgment in proceedings intended to lead to a decision of a judicial nature. »

Litigation: consequences

- If the case is settled by the parties outside of courts, the national Court will (has to) withdraw the questions (Zabala Erasun)
- The dispute should be genuine, not a procedural device arranged by the parties in order to get a judgment from the ECJ (Foglia/Novello)

Admissibility

- The ECJ must know enough about the facts and the national legislation in order to give a useful ruling (Telemarsicabruzzo)
- The ECJ must know enough in order to control its own jurisdiction
- The Member States must be able to present observations

Admissibility

The national court must define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Laguillaumie)

Admissibility

The national court must state the precise reasons which cause it to question itself as to the interpretation of Community law. It should give some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute. (Laguillaumie)

How to write the judgment?

It is important to take into consideration what the Court will do with the judgment.

The procedure before the Court

The different types of procedure:

- Ordinary procedure
- Simplified procedure (order)
- Accelerated procedure
- Urgent procedure

The content of the order for reference

- Parties
- Procedure
- Facts
- National law
- EU law
- Why the question?
- The proposed answer
- Special wishes

The parties

- Who is who?
- Who is asking what?
- Why are they parties to the litigation? (intervention...)
- Give a summary of their arguments (it helps the Member states and institutions)

The procedure

- What type of procedure is it? If you know it is specific to your national system, explain it
- If it is an administrative procedure, give the dates of administrative decisions, explain the procedure before the administration

The facts

- Describe the facts
- Do not refer to an earlier judgment

The facts are necessary:

- To check that EU law applies
- To check which regulation applies

The legislation

- Where do you place yourself in time to apply the law ? (when a fact happened? When a claim was introduced? When the judge decides?)
- Do specific rules about application in time apply? (e.g. new softer criminal law)
- Do certain rules of interpretation apply? (e.g. criminal law)

The national law

- Select the pertinent articles and quote it
- Give references of publication (Internet?)
- Avoid abbreviations

EU law

- Indicate which regulation, you think, is pertinent for the case
- Quote it (e.g. in one case, the national judge did not take a rectification into consideration)

Why the questions?

- Explain why you think the questions are necessary
- It must show the link between the litigation (the facts) and the EU litigation that should be interpreted

The question

- Not: Does the national law infringe EU law?
- Yes: Must EU law be interpreted in such a way that it does not allow...

Specific wishes of the judge

- Accelerated/urgent procedure; priority
- Protection of the names of the parties (children, fiscal matters...)
- Limitation in time of the effects of the judgment (to avoid the retroactive effect of an interpretation of EU law)

Procedure

- Appeal against the decision of the national court asking for a preliminary ruling: the appeal should not be only on the decision to refer (Cartesio)
 - The ECJ should be informed !!
 - The registry will write to the national court
 - Has the appeal a suspensive effect ?

Procedure

- Languages
- Priority (55 § 2 RP), accelerated procedure (104 a RP), urgent procedure (104 b RP)
- Stay of proceedings (82a RP, informal stay)
- Intervention (national judge)

Procedure

- Costs (national judge)
- Interim measures (national judge)
- Legal aid
- Assignment to the Grand chamber (44 § 3 RP for direct actions)
- Composition of a chamber

Procedure

- Junction of cases (43 RP), common oral procedure, oral procedure on the same day
- Information/documents asked to the national court (« clarification », 104, §5 RP) or to the parties (54 a RP)

Procedure

- **Reopening of the oral procedure (61 RP):**
 - Lack of quorum
 - Reassignment of the case to a different formation composed of a greater number of judges (44 § 4 RP)
 - Necessity of opinion of AG
 - New elements (documents, opinion...)

Procedure

- Protection of names of parties in the main proceedings (children, ...): should be asked for by the national court
- rectification (66 RP for direct actions), revision (98 RP for direct actions) and interpretation (102 RP for direct action): the national court may ask new questions

Thank you for your attention !