

Better understanding the role of the CJEU in criminal matters

The preliminary ruling procedure in criminal cases

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The views expressed in this document are purely personal

The Preliminary Ruling Procedure (PRP) in national criminal cases

The role and the importance of EU law in criminal cases are strongly underestimated by lawyers and judges

Some key-figures:

- First ever questions in national criminal cases:
 - European Union : 1973 (131/73)
 - Spain (C-330/90 and C-331/90) / France (803/79) / Netherlands (185/78 to 204/78) / Portugal (C-60/91) / Romania (C-248/11) / UK (C-38/90 and C-151/90)
- Number of questions in national criminal cases :
 - European Union : 383
 - Spain: 12 / France : 58 / Netherlands : 50 / Portugal : 2 / Romania : 1 / UK : 8



The Preliminary Ruling Procedure (PRP) in national criminal cases

- The « **well perceived** » cases : cases in which implemented acts are adopted in the field of the « Area of Freedom, Security and Justice » (AFSJ) (Title V – art. 67 to 89 - of the TFEU (European Arrest Warrant, Asylum and Immigration, ...))
- The « **original but still current** » cases :
 - Prosecutions grounded on national incriminations, which could be considered as contrary to EU law
e.g. ECJ Guimont (C-448/98) (Emmenthal Without Crust vs Measures having equivalent effect to a quantitative restriction)
e.g. ECJ Keck and Mithouard (C-267/91 and C-268/91) (Legislation prohibiting resale at a loss vs. Measures having equivalent effect)
 - Prosecution for violation of EU law : e.g. CJEU Åkerberg Fransson, C-617/10 (VAT and double jeopardy)



The Preliminary Ruling Procedure (PRP) in national criminal cases

National cases essentially illustrate the use of the «interpretation» part of the PRP

- **PRP for interpretation of EU law:** interpretation of EU law to allow national courts to rule on the compliance of their national criminal law with EU law
CJEU Melki et Abdeli (C-188/10 et C-189/10) : National legislation authorising identity checks in the area between the land border of France with States party to the Convention Implementing the Schengen Agreement and a line drawn 20 kilometers inside that border (interpretation of Regulation 562/2006 “Schengen Borders Code”)
- **PRP to appreciate the validity of EU law:** (in)validity of EU acts serving as legal basis for a national incrimination on which a national criminal proceedings is grounded
CJEU Melloni (C-162/82) ((in)validity of art. 4 bis, para. 1, of the Framework-Decision 2002/584 «European Arrest Warrant» in relation to the Charter)



The PRP and the concept of criminal «jurisdiction»

The criteria of “jurisdiction” were established by case-law (ECJ Vaassen-Goebbels, 61/65):

- legal origin (established by law)
- permanence
- mandatory nature of its intervention
- adversarial nature of the proceedings
- application of legal rules / decide in law
- independence



PRP and criminal «court or tribunal»

Bodies taking part in criminal proceedings authorized to seize the Court of justice :

- **Sitting judges / members of the bench**
- **Judge in charge of preliminary enquiries in criminal proceedings** (ECJ Pupino, C-105/03, point 22 (Italie))
- **Indictment divisions of courts of appeal** (ECJ Santesteban Goicoechea, C-296/08 PPU, point 41 (France))



PRP and criminal «court or tribunal»

Entities submitting issues, if appropriate, for consideration by the competent judicial body, before which they act as **prosecutor** in the proceedings **CANNOT seize the Court**

ECJ Criminal proceedings against X (C-74/95 et C-129/95, points 18-19)

BUT prosecutors are valuable support **to the referring judge**, more than lawyers of the prosecuted parties

And as PARTY in the national case, prosecutors can make written and, eventually, oral observations to the Court



Using the PRP : a right or an obligation ?

Art. 267 TFEU, al. 2 et 3 :

«Where such a question is raised in the case pending before **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.

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



A right or an obligation ? PRP for interpretation of EU Law

National courts whose decisions are **subject to appeal** have a **simple option** to ask the Court on a question of interpretation of EU law which has been raised before them

National courts whose decisions are **not subject to appeal** are **obliged** to ask the Court on any question of interpretation of EU law raised before them, **EXCEPT if**

- **irrelevant question**
- **identical or similar question to one already decided by the Court**
- **There is no doubt on the interpretation of the EU act (the theory of « acte clair ») (ECJ Cilfit, 283/81)**



A right or an obligation ? PRP on the validity of an EU act

ECJ Foto-Frost, 314/85 :

- A national court may declare an EU act valid (point 14)
- BUT a national court can NEVER declare an EU act invalid (point 15)

Consequently, if a national court - and especially one not adjudicating at last instance - is in doubt about the validity of an EU act, it is obliged to send a preliminary ruling question to the Court

Warning : the theory of « acte clair » is irrelevant regarding the PRP on the validity of an EU act (ECJ Gaston Schul, C-461/03)



A right or an obligation ? PRP on the validity of an EU act

Specific issues : TWD doctrine (ECJ *TWD*, C-188/92):

If an individual was «without any doubt» entitled to challenge the validity of an EU act before the CJEU, he cannot alleged the invalidity of this act before a national court while he challenges a national measure adopted on the basis of it.

However, a national court can invoke ex officio the invalidity of this EU act and consequently refer a preliminary ruling question to the Court (ECJ *Cassa di Risparmia di Firenze*, C-220/04, points 72-74)

TWD and incriminations by reference to an EU act (see C-550/09, E and F, points 43-52)



A right or an obligation ? PRP on the validity of an EU act

Specific issues - suspension of national acts implementing an EU act whose validity is challenged
ECJ *Zuckerfabrik* (C-143/88 et C-2/89) ; ECJ *Atlanta Fruchthandelsgesellschaft ea.. (I)* (C-465/93)

The suspension of enforcement of a national provision based on a EU act in proceedings pending before a national court is in all Member States subject to conditions which are uniform and analagous to the conditions for an application for interim relief brought before the CJEU



(Non)Use of the PRP by national courts Responsability / liability

The failure to comply with the obligation to refer to the Court can carry a national sanction and also European sanctions.

It can lead to

- **being mentioned in the Annual Report on monitoring the application of EU law**
- the finding of « **judicial misconduct/infringement** » (art. 258 TFEU) (ECJ Commission v. Italy, C-129/00)
- the engagement of the **liability** of the State due to its courts of last instance (ECJ Köbler, C-224/01; CJEU Ferreira Da Silva Brito e Cases C-160/14)
- **Sanction** by the ECHR (Dhahbi v. Italy, No. 17120/09 ; Schipani v. Italy, No. 38369/09)



Use of the PRP Timing and terms of the preliminary ruling question

- The **right time** for a preliminary ruling question: when the legal framework is sure vs. the urgency of the case

- **Adversarial hearing ?**

« Si l'article 267 TFUE ne subordonne pas la saisine de la Cour au caractère contradictoire de la procédure au cours de laquelle le juge national formule une question préjudicielle, il peut, le cas échéant, s'avérer de l'intérêt d'une bonne justice que la question préjudicielle ne soit posée qu'à la suite d'un débat contradictoire, mais il appartient à la seule juridiction nationale d'apprécier cette nécessité. » (ECJ Simmenthal, 70/77, point 10)



Use of the PRP Contents of the Preliminary Ruling Question (PQR)

National courts have **special responsibility**, because they are the masters of the preliminary ruling question, from the point of view of its relevance, its timing, its delimitation and the definition of its legal and factual framework.

The procedure is defined as **cooperation between courts**.

As parties cannot modify the question referred by the national court, the **referring judge** has to pay **special attention to**:

- the **factual framework** (facts, parties, procedure)
- the **legal framework** (relevant domestic and EU law)
- the **link between the case and EU law**
- (PRQ on validity: reasons to **doubt the validity** (CJEU, order, ADIAMIX, C-368/12)
- **Questions** (e.g. limit of the temporal effects of the judgment, ...)



Use of the PRP Contents of the Preliminary Ruling Question (PRQ)

Otherwise,

- At worst: **inadmissibility by an reasoned order** (art. 53 par. 2 of the Rules of Procedure)
- At the best: **request for clarification** (art. 101 of the Rules of Procedure), but a significant source of delays in the dealing of the case

Why?

The elements given by the national court are aimed at:

- allowing the Court to give a **useful answer** to the national court, who is called upon to decide the case
- allowing Member States and other interested parties to submit comments



Non(use) of PRP Appeal against the decision (not) to refer

- **Very differing approaches at the national level**
- **But an EU framework by the case-law of the Court:**
 - « it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it. [...] The decision to make a reference for a preliminary ruling [...] must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.. (ECJ *Cartesio*, C-210/06, points 96-97)



Urgent Preliminary Ruling Procedures

- Available procedures:
 - The **Urgent preliminary ruling procedure (PPU)** (art.107 of the Rules of Procedure)
 - 26 cases since the 1 March 2008
 - The **Expedited procedure** (art. 105 of the Rules of Procedure)
 - The **Treatment by priority** (art. 53, para. 3, of the Rules of Procedure)
- The nature of each procedure:
 - **PPU**: an adjusted procedure (reduced number of parties authorized to produce written observations, written procedure cancellable, ...)
 - **Expedited procedure** : faster than usual (time limits for written observations shortened , reduced scope of written observations ...)
 - **Treatment by priority** : « stacked on top »



PPU vs. Expedited procedure

Articles 107 to 114 of the Rules of Procedure
PPU is available in the field of the «Area of freedom, security and justice» (Title V of Part III of the TFEU), i.e.:

- **Border controls:** the Schengen Borders Code (Regulation 562/2006)
- **Visa and asylum:** Directive 2008/115 « Return », ...
- **Police and judicial co-operation in criminal matters:** European Arrest Warrant, ...
- **Judicial cooperation in civil matters :** EU International Private Law (e.g. Regulation n° 2201/2003 « Brussels II A » matrimonial matters and the matters of parental responsibility, ...)



PPU vs. Expedited procedure

CJEU, Order, Gielen (C-369/13, points 8 and 9):

8 [...] it should be recalled that, pursuant to Article 107 of the Rules of Procedure, the [PPU] is reserved only for preliminary rulings raising one or more questions in the areas covered by Title V of the third Part of the TFEU. However, Regulations No 273/2004 and 111/2005, whose interpretation is requested, were adopted on the basis of Article 95 EC, now Article 114 TFEU and under Title VII of the third Part of the TFEU. Therefore, the interpretation of these regulations cannot give rise to the initiation of the [PPU].

9 Accordingly, the request of the referring court must be understood as seeking to submit this preliminary ruling procedure to the expedited procedure provided for in Article 105, paragraph 1, of the Rules of Procedure.”

(own translation)



Urgent Preliminary Ruling Procedures The concept of « urgency »

Substantive requirement: urgency (mainly subjectively understood)

Uncertainty about the meaning of the concept of “urgency” following the entry into force of the new Rules of procedure (2012)

Art. 105 (PA) : « *where the nature of the case requires that it be dealt with within a short time, »*

Previously: article 104 a: « [...] *where the circumstances referred to establish that a ruling on the question put to the Court is a matter of **exceptional urgency** »*

Art. 107, para. 2 (PPU) : « *The referring court or tribunal shall set out the matters of fact and law which establish the urgency »*



Urgent Preliminary Ruling Procedures The concept of « urgency »

Facts taken into account:

- **Proceedings before the referring court:** the court is required to give a ruling within a prescribed period (CJEU Order, C-188/10 and C-189/10, point 16 ; CJEU Order, Z.Z., C-300/11, point 12)
- **Formal requirements:**
 - Reason for the urgency (EP : CJEU Order Cartiera dell’Adda SpA, C-42/13, point 11)
Own considerations and not reference to parties’ observations (CJUE Order Krizan, C-416/10)
 - Fast posting of the PRQ to the Court



Urgent Preliminary Ruling Procedures The concept of « urgency »

In criminal matters, a **decisive fact** : custody

Article 267, al. 4, TFEU : « **If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.** ».

Cf. CJEU order *Melki*, C-188/10 et C-189/10, point 16

Warning: no urgency despite custody, if the *décision* of the Court will have no effect on the release of the concerned person

Cf. CJEU Order *Kità*, C-264/10, pt. 9



Urgent Preliminary Ruling Procedures The concept of « urgency »

Urgency admitted:

- **Person in custody** : CJEU Order *Achughbabian*, C-329/11, point 10 (EP and not PPU because the concerned person was not in custody, but other persons was in) vs. CJEU Order *Arslan*, C-534/11, point 13
CJEU Order *E et F*, C-550/09
- Person under an **imminent threat of deportation** (CJEU Order *Metock*, C-127/08)
- Cases relating to the **custody of children** (CJEU Order *Purrucker*, C-296/10, points 7-8)
- **Risk of forfeiture of a right, especially a parental leave** (CJEU Order *Chatzi*, C-149/10, pt. 11)
- **Risk of loss of main dwelling** (CJEU Order *Sánchez Morcillo et Abril García*, C-169/14, points 11-12)

PPU vs. Expedited procedure

Expedited procedure

	2010		2011		2012		2013		2014	
	Admission	Rejet	Admission	Rejet	Admission	Rejet	Admission	Rejet	Admission	Rejet
Recours directs		1			1			1		
Renvois préjudiciels	4	8	2	7	1	5		16	2	10
Pourvois				5		1				
Total	4	9	2	12	2	6		17	2	10

PPU

	2010		2011		2012		2013		2014	
	Admission	Rejet								
Espace de liberté, de sécurité et de justice	5	4	2	5	4	1	2	3	4	1
Rapprochement des législations										1
Total	5	4	2	5	4	1	2	3	4	2

PPU vs. Expedited procedure

Duration of the proceedings

	2014	2013	2012	2011	2010	2009
P. Acc.	3,2	NC	3,8	5,5	5	NC
PPU	2,2	2,2	1,9	2,5	2,2	2,5
Proc. ordinaire	15	16,3	15,7	16,4	16	17,1



The content and the form of the PPU request

The nature of expedited procedures imposes specific obligations on referring courts:

- **Explicit request** (unambiguous) of urgent treatment indicating the desired procedure (PPU or EP)
- **Reason for the request of urgent treatment** (the legal and factual elements giving rise to urgency and the risk incurred in case of treatment by the ordinary procedure)
- **Brief indication of the point of view of the national court** on the PRQ
- **Brief but adequate presentation of legal and factual framework**
- **Electronic address and fax number of the referring court and involved parties**



The PRP in progress

- Send the national case file with the PRQ (translation only on request of the reporting judge)
Warning: avoid sending originals
- Following the signification of the written observations of the parties, avoid, except if necessary, new questions because these will entail reopening the written procedure
- Inform the Court of any changes in the dispute at national level (successful appeal against the PRQ, admission of new parties to the proceedings,...)
- Copy to the Court of the judgement delivered following that of the Court



The judgment of the Court

- Res judicata binding the referring court as well as all Member States' courts
- Retroactive effect of the interpretation of EU Law given by the Court, except if the Court limits the temporal effect of its judgment (exclusive competence of the Court in its judgment)
- Retroactive effect of a statement of invalidity of an EU act, except if the Court limits the temporal effect of its statement (exclusive competence of the Court in its judgment). The national judge has to consider the litigated national act (implementing the invalid EU act) as void for the purpose of its forthcoming decision
- The referring judge can always submit a new PRQ



Ancillary Questions Anonymity in the procedure

(Case C-563/10)

(2011/C 38/09)

Language of the case: German

Referring court

Oberverwaltungsgericht für das Land Nordrhein-Westfalen

Parties to the main proceedings

Applicant: Kashayar Khavand

Defendant: Federal Republic of Germany

Questions referred

1. Is homosexuality to be considered a sexual orientation within the meaning of the second sentence of Article 10(1)(d) of Directive 2004/83/EC (1) and can it be adequate reason for persecution?



Ancillary Questions Anonymity in the proceedings

- **The primary responsibility for the referring court**
Art.95, para. 1 the Rules of Procedure of the CJ: «Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceeding before it. »
In criminal matters: maltreatment, sexual crimes,
...
Request of the **partial or complete anonymity** : at the earliest stage of the proceedings
- **The safety-net** included in Art. 95, para. 2, of the Rules of Procedure of the CJ
« 2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.»



Ancillary Questions Costs of the Proceedings

- « Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. »*
- Right to **legal aid** (Art. 115 -118 of the Rules of Procedure)
 - **Subsidiary aid** (only if national legal aid does not – fully – cover costs incurred of the PRP)
 - By principle, legal aid is **paid ex post** and on receipt of invoices and supporting documents



Resources et documents

- CJEU, recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, November 2012 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:338:0001:0006:EN:PDF>)
- BARENTS R., *Guide de la jurisprudence sur l'article 234 CE*, Curia, 2009 (<http://sieg.unblog.fr/files/2009/05/jurisprudencedelacjce.pdf>)