



The competence of the CJEU in the area of freedom, security and justice

Presentation in the framework of a seminar at the Academy of European Law (ERA), 316DT01

*This project is co-financed by the European Union
Specific Programme "Criminal Justice"*

Trier, 29 February 2016

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All opinions expressed in this conference are strictly personal to the author.¹

Introduction



The judicial system of the European Union

- "Court of Justice of the European Union" (Luxembourg): 3 distinct jurisdictions
 - Court of Justice (in the narrow sense of the term)
 - General Court
 - Civil Service Tribunal (to be abolished Sept. 2016)
- National Courts in the 28 EU Member States
- Other "European Courts":
 - EFTA Court (Luxembourg)
 - European Court of Human Rights (Strasbourg)

Introduction



The Area of Freedom, Security and Justice (1)

- Part Three, Title V of the Treaty on the Functioning of the European Union (TFEU)
 - Border checks
 - Asylum and Immigration
 - Judicial cooperation in civil matters
 - Judicial cooperation in criminal matters
 - Police cooperation

3

Introduction



The Area of Freedom, Security and Justice (2)

- Origins:
 - Treaties of Maastricht (1992/93) and Amsterdam (1997/99)
 - Formerly: cooperation in the fields of justice and home affairs

4

Introduction



The Area of Freedom, Security and Justice (3)

- A very sensitive policy area
 - from the Member States' point of view (security, fight against crime, immigration)
 - from the individuals point of view (fundamental rights!)

5

Introduction



The Area of Freedom, Security and Justice (4)

- An area which was long characterised by a "derogatory regime"
 - At the beginning: simple intergovernmental cooperation, no application of the so-called "Community method"
 - Over the years: progressive abolition of derogations, evolution towards a supranational system

6

Introduction



The Area of Freedom, Security and Justice (5)

- For a long time, very limited jurisdiction of the EU courts:
 - In the field of criminal law: optional for Member States, need for a specific declaration (ex-art. 35 EU)
 - In other fields of the AFSJ: jurisdiction of the CJEU limited to preliminary references of last-instance national courts (ex-art. 68 EC)

7

Introduction



■ The Lisbon Treaty (in force since 1/12/2009)

- Abolition of the derogatory regime that had been provided for in articles 35 EU et 68 EC
 - Henceforth, application of the classical rules on jurisdiction of the European Courts
 - However, transitional period of five years until 30/11/2014 for acts adopted pre-Lisbon (in particular: framework decisions)
- Charter of Fundamental Rights: elevated to “Constitutional level”, legally binding, forms now part of the Treaties → see article 6(1) TEU

8



Direct actions

9



Direct actions

- Main types of direct actions
 - Actions for annulment (article 263 TFEU)
 - Actions for failure to act (article 265 TFEU)
 - Claims for damages (article 268 TFEU)
 - Infringement proceedings (articles 258, 259 TFEU)

N.B. Each type of proceeding can be combined with urgent claims for interim measures (articles 278, 279 TFEU)

10

Direct actions



- Actions for annulment (art. 263 TFEU)
 - Against all binding legal acts of the EU institutions, bodies, offices or agencies
 - Control of legality
 - Time limit: two months (article 263(6) TFEU)
 - *Locus standi*: certain restrictions apply to actions brought by natural and legal persons (article 263(4) TFEU)

11

Direct actions



- Actions for annulment (2)
 - *Locus standi* of natural and legal persons under article 263(4) TFEU:
 - acts which are addressed to them
 - acts which are of direct and individual concern to them
 - regulatory acts which are of direct concern to them and do not entail implementing measures

12

Direct actions



- Transitional restrictions of jurisdiction stemming from the derogatory regime for acts adopted pre-Lisbon
 - During the transitional period (until 30/11/2014), application of ex-article 35 EU
 - no right to bring any direct actions for natural and legal persons
 - no actions for failure to act or claims for damages
 - no infringement proceedings
 - only Commission and Member States may bring bring actions for annulment

13

Direct actions



- Permanent limits to the CJEU's jurisdiction (article 276 TFEU, ex-article 35(5) EU)
 - *Even after Lisbon*, the CJEU shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of the Member States ...
 - ... nor to review the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security
 - This concerns only judicial cooperation in criminal matters and police cooperation!

14



Preliminary references

15

Preliminary references



- A dialogue between judges
- A procedure applicable to cases brought before national courts
- Institutional background:
 - De-centralised application of EU law
 - Decisive role of national authorities (including national judges) and individuals
- Two-fold objective:
 - *Integration*: uniform interpretation and application of EU law in all 28 Member States
 - *Protection* of individual rights

16

Preliminary references



- Subject-matter of the reference
 - Interpretation of primary law ("the Treaties") and of secondary law
article 267, first paragraph, lit. a) and b), TFEU
 - validity of secondary law ("the acts")
article 267, first paragraph, lit. b), TFEU

- By contrast, no jurisdiction of the CJEU regarding:
 - interpretation and validity of national law
 - application of the law (European or national) to the facts of the case

17

Preliminary references



- Author of the preliminary reference
 - "court or tribunal" of a Member State: an autonomous concept of EU Law
 - established by law
 - independent and impartial
 - compulsory jurisdiction
 - permanent jurisdiction
 - *inter partes* procedure
 - application of rules of law (≠ equity)

18

Preliminary references



■ Faculty vs. obligation to refer the case:

- All national courts and tribunals *may* refer cases to the CJEU (article 267, second paragraph, TFEU).
- Last-instance national courts are *obliged* to refer cases (article 267, third paragraph, TFEU).
- In principle, no obligation to refer cases incumbent on lower national courts and tribunals (exception: « *Foto Frost* », case 314/85, ECR 1987, p. 4199).

19

Preliminary references



■ Exceptions to the obligation to refer cases to the CJEU

CJEU, case 283/81 (*CILFIT*), ECR 1982, p. 3415

- ***question not necessary to give judgment*** in the case pending before the national court
- ***acte éclairé*** (relevant case-law already exists)
- ***acte clair*** (no room for reasonable doubt as to the correct construction of the provision of EU law at issue)

20

Preliminary references



■ „Cooperation“ between the CJEU and the national tribunal

It is up to the national tribunal to decide ...

- whether or not to refer the case
- at what point in time to refer the case
- which questions to put to the CJEU

By contrast, it is up to the CJEU ...

- to verify the admissibility of the reference
- to provide the national judge with a useful answer

21

Preliminary references



■ Content of the preliminary reference

→ See also: “Recommendations to national courts”

- Description of the legal framework of the case
- Presentation of the facts of the case
- Evaluation of the need for a ruling of the CJEU to give judgment in the case
- Questions to the CJEU

22

Preliminary references



- The effects of a preliminary ruling:
 - Answer of the CJEU is compulsory for the referring judge and for all other courts and tribunals that may be seized with the matter
 - CJEU may be seized a second time in the same case
 - Precedent for all other cases (*erga omnes* effect)
 - Construction of provision of EU law as interpreted by the CJEU is "retroactive" (i.e. shows how that provision should have been applied in the past)

23

Special procedural elements



- **Expedited procedure** (since 01/07/2000)
 - Applicable to all areas of European law and to all types of proceedings
 - Similar to regular proceedings, but much more condensed
 - Average duration: 4-6 months (instead of 15)
- **Urgent preliminary ruling procedure** (« **PPU** ») (since 01/03/2008)
 - A "super expedited" procedure
 - Only for matters belonging to the area of freedom, security and justice
 - Restricted number of participants in written proc.
 - Average duration: 6-8 weeks (max. 3 months)

24

For further guidance ...



- Website of the Court of Justice
 - <http://curia.europa.eu>
 - Case Law
(with search engine)
 - Texts governing procedure
 - Statute and Rules of Procedure
 - Recommendations and practice directions
- EUR-lex database
 - <http://eur-lex.europa.eu>