Advanced training in EU Law for Courts Coordinators

References for preliminary rulings

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Judge Valeria Piccone

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PRINCIPLES OF PRIMACY AND DIRECT EFFECT AND PRELIMINARY RULINGS

- ECJ, 5 February 1962, case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos:* reference for a preliminary ruling as *ubi consistam* of primacy and direct effect principles

"*… the states have acknowledged that* ***community law has an authority which can be invoked by their nationals before those courts and tribunals****.*

….the community constitutes a ***new legal order of international law*** *for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.*

…. ***community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage****. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community".*

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- ECJ, 5 July 2016, C- 614/16, *Ognyanov*

*"…the **preliminary ruling procedure** provided for in Article 267 TFEU constitutes the **keystone of the European Union judicial system**, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of **securing uniform interpretation of EU law**, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see Opinion 2/13 of 18 December 2014, paragraph176)*

SCOPE

- uniform application and interpretation of EU law
- compliance of secondary EU law with primary EU law
- protection of individual rights
- development of EU law

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THE "TRIANGLE MAGIQUE" OF THE COMMUNITY JUDICIAL SYSTEM:

- Direct effect
- Primacy
- Preliminary reference

Art. 267 TFEU paragraph 1

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

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FIELD OF APPLICATION

✕ The provisions of the Treaties, due to their constitutional role, cannot be subject to preliminary rulings.

✕ Preliminary ruling can never concern the validity and interpretation of national rules.

✓ The Court can establish the existence of a conflict between national law and EU law, without, however, being able to draw the consequences, which must be drawn from the national courts.

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➢ ECJ, 7 November 2018, C-380/17, *K and B*

... it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, ***provisions taken from EU law should be interpreted uniformly*** *(see, to that effect, judgments of 18 October 2012, Nolan, C-583/10, EU:C:2012:638, paragraph 46, and of 22 March 2018, Jacob and Lassus, C-327/16 and C-421/16, EU:C:2018:210, paragraph 34).*

Thus, an interpretation by the Court of provisions of EU law in situations not falling within the scope of EU law is warranted where such provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those situations and situations falling within the scope of EU law are ***treated in the same way*** *(see, to that effect, judgments of 21 December 2011, Cicala, C-482/10, EU:C:2011:868, paragraph 19; of 18 October 2012, Nolan, C-583/10, EU:C:2012:638, paragraph 47; and of 7 November 2013, Romeo, C-313/12, EU:C:2013:718, paragraph 33)".*

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LOYAL COOPERATION

Article 4 TEU: Member States are obliged

- to ensure, in their respective territories, the application of and respect for EU law;
- to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU

(see Opinion 2/13 paragraph 173; Opinion 1/09, paragraph 68 and the case-law cited).

"In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 2/13, para 174 – 175; Opinion 1/09, paragraph 68 and the case-law cited).

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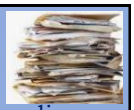
ADMISSIBILITY. Pending proceedings



- a national court is empowered to make a reference for a preliminary only if a dispute is pending before it in the context of which it is called on to give a decision which could take into account the preliminary ruling (Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988], paragraph 11:Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan* [1991], paragraph 12);
- the Court has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been concluded (see also case C-176/96, Jyri Lehtonen, para 19);
- the national court decides at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Case C-470/03, A.G.M.-COS.MET; Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981], paragraph 5; Case C-236/98 *JämO* [2000], paragraph 30; *Schmidberger*, paragraph 39)

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- national courts have the **widest discretion** in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (*Mecanarte*, C-348/89, paragraph 44; *Cartesio*, C-210/06, paragraph 88; *Melki and Abdeli*, C-188/10 and C-189/10, paragraph 41; and *A*, C-112/13, C-5/14, Kernkraftwerke Lippe-Ems, para 31);
- not necessarily parties have to be heard before (Case C-430/15, *Tolley*, paragraphs 32 and 33);
- the national court assesses the need to hear the defendant before making an order for reference: the existence of an inter partes hearing does not appear among the conditions required to implement the procedure under Article 177 (Case C-10/92 *Balocchi* [1993], paragraphs 13 and 14 ; C-332/92, *Eurico*, para 11)

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BODIES ENABLED TO MAKE A REFERENCE FOR A PRELIMINARY RULING

only Courts and Tribunal of the Member States (Article 267 TFEU)

- (1) be established by law and permanent
- (2) the jurisdiction must be compulsory
- (3) the procedure before the court must be contradictory (or "inter partes")
- (4) the court must apply rules of law
- (5) the court must be independent
- (6) the functions performed have to be judicial

(see Case C-54/96 *Dorsch Consult*, paragraph 23, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Other* , paragraph 33, Case C-195/98 *Österreichischer Gewerkschaftsbund*, paragraph 24, Case C-516/99 *Schmid*, paragraph 34; Case 53/03, *Syfait,* paragraph 29).

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A SUBSTANTIAL NOTION: not a formal classification, but competence of bodies which actually exercise a judicial function.

- Bodies which have such a qualification under national law may be excluded; on the other hand, bodies may also be included which, according to national law, do not possess it.

- Arbitral tribunals ✕ (ECJ, 23 March 1982, Case 102/81, *Nordsee*, for arbitrators)

✓ "An arbitral tribunal, established on a legislative basis, which has permanent compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs on the basis of national industrial property law, which observes the principle of equal treatment and the adversarial principle in the treatment of parties, which applies national legislation which defines and frames the procedural rules, whose decisions have the same effects as judgments handed down by the ordinary courts and, lastly, whose arbitrators are subject to the same obligations of independence and impartiality as judges belonging to the ordinary courts, must be considered to be a court or tribunal for the purposes of Article 267 TFEU (ECJ, 13 February 2014, Case C-555/13, *Merck Canada*).

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✕ Competition authorities (Cases C-53/03, *Syfait*; C-222/13, *TDC*)

✕ Register courts (Case C-96/04, *Niebüll*; C-210/06, *Cartesio*)

✕ Prosecutors in criminal proceedings (ECJ, 12 December 1996, in cases C-74/95 and C-129/95)

✕ a judge in voluntary jurisdiction (ECJ 19 October 1995, in case C- 111/94, *Job Centre*, concerning the approval of a company's instrument of incorporation)

✓ a notary in a case in which the law conferred him the power to define it effectively as a judgment on the parties (ECJ, 30 June 2005, in case C- 165/03, *Langst*) .

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REFERRING COURT: RIGHT OR OBLIGATION?

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.

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.

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.

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- ECJ 6 October 1982, case 283/81 *CILFIT*: *In claris non fit interpretatio*

"…obligation to bring the matter before the Court of Justice, 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. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

"acte clair" – correct application of EU laws is so obvious as to leave no scope for any reasonable doubt

- to all courts of the other Member States
- in all language versions
- in all different legal terminologies
- in the light of Union law as a whole

"acte éclairé" – question has been already interpreted by ECJ

- similar case
- no matter what proceedings

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DISCRETIONAL POWER OF FIRST INSTANCE JUDGE.

A CENTRALIZED ASSESSMENT OF LEGITIMACY?

- ECJ 22 October 1987, case 314/85 *Foto - Frost*

"Those 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. By taking that action they are not calling into question the existence of the Community measure. On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 International Chemical Corporation v Amministrazione delle Finanze [1981], ***the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts****. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty"*

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CONSEQUENCES OF THE VIOLATION

- ECJ, 30 September 2003, case C- 224/01, *Köbler*

"*In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pêcheur and Factortame, cited above, paragraph 34).*

According to the principles stated in Köbler case, in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

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- ECJ, 13 June 2006, case C- 173/03, *Traghetti del Mediterraneo*

"*Basing its reasoning in that respect, inter alia, on the* ***essential role played by the judiciary in the protection of the rights derived by individuals from Community rules*** *and on the fact that a court adjudicating at last instance is by definition* ***the last judicial body*** *before which individuals may assert the rights conferred on them by Community law, the Court infers that the protection of those rights would be weakened – and the full effectiveness of the Community rules conferring such rights would be brought into question – if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance (see Köbler, paragraphs 33 to 36)".*

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RELEVANCE

- ECJ 24 June 2019, Case C-573/17, *Poplawski:* **presumption of relevance**

"*The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears* ***no relation to the actual facts of the main action*** *or its purpose, where the* ***problem is hypothetical****, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it"* (see also, Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, para 27; judgment of 10 December 2018, *Wightman and Others*, C-621/18,, paragraph 27 and the case-law cited; however, case C-239/19, Eli Lilly, para 15, for hypothetical question and manifestly inadmissible request for preliminary ruling);

- ECJ 11 March 1980, Case 104/79 *Foglia v Novello*, para 11: the dispute was **not a genuine dispute**, but *"arranged by the parties in order to induce the Court to give its views on certain problems of [EU] law which does not correspond to an objective requirement inherent in the resolution of a dispute".*

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INTERIM RELIEF

- ✓ Suspension of enforcement of national legal provisions incompatible with EU law (Case C-213/89, *R. v. Secretary of State for Transport,* ex parte *Factortame);*
- ✓ Suspension of enforcement of national measures implementing EU Regulations and positive interim orders disapplying such regulations (Cases C-143/88 and C-92/89*, Zuckerfabrik Soest*; C-465/93, *Atlanta Fruchthandelsgesellschaft*; C-68/95);
- ✓ Suspension of enforcement of a national measure adopted in implementation of a EU regulation may be granted by a national court only:
  *if that court entertains serious doubts as to the validity of the EU measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court, if there is urgency and a threat of serious and irreparable damage to the applicant, and if the national court takes due account of the Union's interests (Cases C-143/88 and C-92/89, *Zuckerfabrik Soest,* para 33).

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LEGAL AND FACTUAL CONTEXT

Article 94 RoP ECJ – Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

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PRACTICAL ISSUES

- Protocol (No 3) on the Statute of the Court of Justice of the European Union, as amended
- Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012), as amended (title III – References for a preliminary ruling; Article 94 RoP ECJ)
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

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THE NATIONAL JUDGE'S APPROACH

- ECJ 24 January 2012, Case C- 282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique*

"*…when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This* ***obligation to interpret national law in conformity with European Union law*** *is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them* "(see, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* , paragraph 114; Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* , paragraphs 197 and 198; and Case C-555/07 *Kücükdeveci* , paragraph 48).

It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (see Case C-268/06 *Impact*, paragraph 100, and *Angelidaki and Others*, paragraph 199).

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- ECJ, 24 June 2019, Case C-573/17 *Popławski*

"The principle of the primacy of EU law must be interpreted as meaning that it does not require a national court to disapply a provision of national law which is incompatible with the provisions of a framework decision, such as the framework decisions at issue in the main proceedings, the legal effects of which are preserved in accordance with Article 9 of Protocol (No. 36) on transitional provisions, annexed to the treaties, since those provisions do not have direct effect. The authorities of the Member States, including the courts, are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned"

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Thank you for your attention!

Valeria Piccone

Judge

Supreme Court of Italy

valeria.piccone@giustizia.it

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