Preliminary Reference Procedure Under Art. 267 TFEU: An Overview of European and National Case Law

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Abstract **The report provides an overview of the preliminary reference procedure and the European and national case law. The focus is on the preliminary reference procedure as stated in art. 267 TFEU. The report discusses the purpose of art. 267 TFEU, the effect of ruling, the obligation to refer and the doctrine of acte clair.**

Index terms: **art. 267, preliminary, reference, procedure, CJEU.**

JEL: **K33, K41**

I. Introduction

Article 267 TFEU and the formulation of questions Preliminary ruling procedures under Article 267 TFEU are designed to assist national courts applying EU law. When national courts are faced with a question of interpretation of the Treaties or the validity of a Union act, they may stay proceedings and ask the CJEU for help by submitting one or several questions to that court. The CJEU then answers the questions and the national court uses the CJEU's answers in their adjudication of the case. The procedure under Article 267 TFEU has thus been devised with a clear separation of assignments. The national court identifies the issues of EU law that it needs assistance with, formulates suitable questions and applies the answers from the CJEU to the facts in the case. The task for the CJEU is to interpret the Treaty and/or to assess the validity of Union acts. The development of EU law is thus partly dependent on the referral of questions by the national courts to the CJEU. The main mode of operation of the preliminary ruling procedure is by the CJEU itself emphasised as being cooperation between the CJEU and the national courts.Their ultimate goal must be a correct and uniform application of EU law throughout the Union. As regards the referral procedure, the CJEU is placed "above" national courts with regards to the supremacy of EU law, but equally at the same level as the national courts as it aims to assist them in their work.

The question to what extent the CJEU may change the question asked by the national court is highly relevant for the relationship between the national courts and the CJEU. In general a limited procedural scope gives more power to the national courts, hence they have the power to formulate the questions that will be subject to the interpretation by CJEU. A wider scope, logically, gives more power to the CJEU to reformulate a question it considers to be deficiently formulated. The basic problem that occurs in questions for preliminary ruling is the information asymmetry between the two courts involved. The national court, on the one hand, knows the circumstances of the case and the national law applying to the case. The CJEU, on the other hand, has a superior knowledge of EU law and the types of questions it can answer. For that reason, there is a guide for judges at national courts asking questions to the CJEU as regards the formulation of questions and the preliminary procedure as such. However, mistakes can occur in both courts and the purpose of this article is to illustrate the CJEU's practice when reformulating questions and discuss whether that practice creates any problems for the constitutional relationship between the CJEU and national courts as well as the correct application of EU law in the national courts.

The preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") plays an important role among the cases for which the Court of Justice of the European Union ("CJEU") has jurisdiction.

Purposes of the preliminary ruling procedure

The significance of the preliminary ruling procedure exceeds its statistic relevance.

1. It is an instrument to secure legal unity.
2. The preliminary ruling procedure is an instrument to further develop the law.
3. The preliminary ruling procedure is an instrument to protect individual rights.

Substantive conditions Under which conditions can a reference for a preliminary ruling be considered?

The general question arises whether a reference for preliminary ruling is to be considered for each case where Union law was potentially applicable - regardless of which rules of procedure are valid. The following substantive conditions must be satisfied: Pending proceedings.

The proceedings must (still) be pending. A referred question can no longer be posed if the proceedings before the national court have been completed.

It is at the national judge's discretion to decide at what stage of the proceedings such a request should be made.

Firstly, it is to be considered that the reference for a preliminary ruling must make all information available to the CJEU that enables it to assess the applicability of Union law to the initial legal dispute. The CJEU thus expressly deems it desirable that the national judge only decides to make a reference for a preliminary ruling when he/she is able to define, in sufficient detail, the legal and

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factual context of the case in the main proceedings, and the legal issues which it raises. Furthermore, both sides have to "have been heard".

Secondly, aspects of procedural economy are to be considered. For example, if a question of European law is at the fore of a legal dispute, it may seem advisable to make a reference for a preliminary ruling at an early stage in order to shorten lengthy proceedings. Even if the referring court derogates from the legal opinion expressed by the CJEU (so far), a reference at the earliest stage possible seems to stand to reason. Depending on whether the assessment by a national judge concerning the stage at which the reference for a preliminary ruling is made makes sense, a reference can, for example, already be considered in preliminary proceedings, e.g. relating to an application for legal aid. It is also to be taken into consideration in proceedings for interim orders. Neither the urgency, nor the provisional nature of summary proceedings, questions the powers of national courts to call upon the CJEU.

II. The Court or Tribunal

Pursuant to Article 267 (2) TFEU, only a "court or tribunal" of a Member State has the right to make a reference for preliminary ruling. The CJEU interprets the terms "court or tribunal" as independent terms of Union law, irrespective of how they are construed on a national level. Otherwise, it would be at the discretion of the Member States' legislatures to impose statutory limits on the right to make a reference for a preliminary ruling.

The CJEU has developed the following categories to define the terms "court or tribunal": It must be a permanent body of a Member State (1) which is established by law (2) and rules independently (3) as the compulsory jurisdiction (4). The proceedings must be conducted in at least one independent trial court (5) where the proceedings must aim at a decision which has the same effects as a judgment handed down by an ordinary court in application of rules of law (6) and is definitive and enforceable (7).

III. Usefulness For Referring National Courts

A preliminary ruling has a dual function. First, it answers the questions put by the referring court. Second, it provides an interpretation of EU law that is valid in all 28 Member States. Against this background, two things are crucial to an ideal ruling. It must state the grounds on which it is based in a clear and consistent manner, so that courts across the EU can make use of it. At the same time, the answer given must be useful for the referring court. In other words, the answer must be of practical value to the referring court in order to solve the domestic dispute. In practice, this is not an easy task for the Court of Justice.

The Court of Justice's habit of reformulating or rephrasing the referring court's question plays an important role in this respect. Sometimes it does this because it is more practical to group certain questions together. But sometimes it does this in order to make its response suitable for application in all 28 Member States. This makes for a more effective dialogue.

There are several examples in the case law, such as McCarthy. McCarthy was a British national who also had Irish nationality. Although she had not made use of her right to free movement, she reclaimed a dependent right for the Jamaican husband to reside in the UK on the basis of the Citizens Right Directive. The UK Supreme Court wished to know the extent to which a person in Ms McCarthy's situation was covered by the Directive. The Court of Justice added that the referring court's question must also be understood as asking in essence whether Article 21 of the TFEU and the Directive could be invoked in light of the Zambrano discussion. A welcome addition, in that the ruling thus provided another piece in the Zambrano jigsaw.

Nevertheless, the question is whether a generous use of reformulations is always appropriate. It can lead to the referring court being saddled with an answer that is not particularly helpful.

IV. Proceedings Before The Court Of Justice

The parties to the national proceedings, the EU institutions and the Member States can participate in the proceedings by presenting their views on the questions both in writing and orally.

In these proceedings, the Member States have a special position. They usually present their views as amici curiae. They are there to facilitate the dialogue between the referring national courts and the Court of Justice. However, at the same time, they have an interest in the ruling taking a particular direction or producing a particular outcome. Don't be mistaken: that is the most important – if not the only – reason why they participate in the proceedings.

Often, the Member State where the reference originates from in fact even has a direct interest in the national case. This Member State sometimes files a defence claiming inadmissibility or argues that the referring court has misinterpreted national law. Yet, the referring court cannot respond to these arguments. This can be frustrating for the referring court. In particular, though the Court has frequently held that the reference order is leading and has easily dismissed such claims, it has not always been consistent in this regard. It may not come as a surprise, but these instances of inconsistency may arguably make it more attractive for the Member States to make these arguments. For instance, in Audace, the Court declared some of the questions posted by the referring French court inadmissible. It seems that the Court did so in reaction to the French Government's claim that the referring court did not explain why the provisions of French law it described in the order applied to the dispute at hand.

V. The Nature Of Questions Referred To Luxembourg

As briefly mentioned before, Art. 267(1) TFEU entitles the EU Member States to request preliminary rulings from the CJEU in two categories of cases; firstly, concerning the interpretation of the Treaties, and secondly, concerning the validity and interpretation of secondary EU law. In contrast to the proposed advisory opinion procedure, there is an abundance of case law on the matter which kind of questions the Member State courts should (or even must) refer and in which situations they should rather abstain from consulting the Luxembourg Court. More concretely, there are two criteria which must be satisfied before a reference to the CJEU may be made: The first being that a question involving EU law has been raised before a Member State court, and the second that a decision on this question is necessary to enable it to give judgment. The reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain EU acts may not always be wellfounded, as Luxembourg's case law shows, for example, if the CJEU has already ruled on a matter, either on national law in breach of EU law or on the validity of Union legislation and has thus clarified an issue to the extent that no further reference to Luxembourg is required. Of course, in this case we must take into account that a Member State court is only deprived from its obligation to refer a question on the alleged invalidity of an EU act, if the specific legal measure has previously been held invalid by the CJEU and the question raised is materially identical with said question (acte éclairé). If, however, the CJEU has only held a similar legal measure to be invalid, this fact will not suffice for the domestic court to render another measure invalid, since strict conditions need to be satisfied before the domestic court could legitimately conclude that a case was in fact acte clair. Accordingly a national court must not assume rashly that the interpretation of a Union provision is undisputable and clear.

VI. Interpretation And Application In The Preliminary Reference Procedure

Certain types of legal action are reserved to the European Court of Justice, and national courts play no role. Here there is little to discuss concerning division of functions. That issue becomes important only in the context of preliminary references, which avoid a simple hierarchical relationship between courts, such as between deciding court and court of appeal, in favour of a co-operative sharing out of the various activities necessary to decide a case.

Article 234 EC provides that national courts may refer a question concerning the interpretation of the Treaty to the Court of Justice. The Court of Justice has limited this right to circumstances in which the answer to that question is necessary to decide a case currently before the national court. This idea of sending a question to another court has its origins in continental legal systems. A number of these have courts which are empowered to answer questions, often on the constitutionality of lower laws, but do not formally decide the case. There is also a similarity with courts of cassation. These are appeal courts, but once again they do not decide the case, but merely consider whether the lower court has correctly used the law. If they find it has not, they refer the case to be re-decided by the lower court, or another court of that level. They do not provide a replacement judgment.

In both these cases there is a distinction made between interpreting and applying, or between law and fact. The higher body considers and interprets legal matters, but does not determine matters of fact, nor does it apply the law to the facts, which functions it leaves to the referring court, which decides the case and issues the operative judgment. This distinction also operates in Community law and has been expressed and repeated by the Court of Justice. It has jurisdiction to interpret the Treaties, it often emphasises, but not to apply that interpretation to the facts in case, which task is the exclusive competence of the national referring court. Nevertheless, it remains far from obvious what this formula means, and what the difference between interpretation and application is.

Interpretation could be understood in an abstract sense. Then interpretations of Article 28 would include the famous proposition in Dassonville as well as the finding in Cassis de Dijon that the application of formally equal national standards can be contrary to that article if disproportionate, and the suggestion in Keck that rules having no difference in their effect on imports and national goods are outside of Article 28 altogether. Application, the task of the national court, would then consist in applying these principles to the case – asking whether on the facts before them the national measure is proportionate, or whether it has an unequal effect on national and imported goods.

However, interpretation can also be understood to go a great deal further. It could be understood to include assessment of the facts in the light of the law. Thus the concrete finding that the rule on alcohol levels under consideration in Cassis (or a rule of that form) is in fact disproportionate, or the finding in Keck that selling arrangements are in fact generally rules of equal effect, can also be seen as an interpretation of the Treaty in the particular case. On this reading, the application task left over to the national court is a mechanical, residual one. It is reduced to a primary fact-finder but with even that function limited, since certain factual questions – such as whether consumers may be confused – may be essentially redefined as questions of Community law, for the Court of Justice. Under such a view of interpretation, it could be said that Community law includes a degree of a priori fact finding.

VII. The Court Of Justice's Approach

The Court of Justice is quite consistent in its doctrine; application is for the national court, the only one competent to assess the facts, and the legality or proportionality of the

particular national measure; "the court has no jurisdiction either to apply the Treaty to a specific case, or to decide upon the validity of a provision of domestic law in relation to the Treaty"; "it is for national courts alone to apply the provisions of Community law so interpreted, taking into account the circumstances of fact and law in the case which has come before it. No such application is possible without a comprehensive appraisal of the facts of the case"; "Article 177 ... does not give the Court jurisdiction to take cognizance of the facts of the case"; Yet at the same time, the Court will reject questions that do not provide sufficient factual information, and emphasizes that it can only deal with references where the context is made very clear. Moreover, it is well-known that it often delivers judgments so specific that the case is effectively decided, in which it rules unambiguously on matters of fact.

This does seem to disclose some flexibility of approach, which is deserving of analysis in itself. However the examples below show what perhaps does not need to be shown – that when it wants to the Court considers itself quite competent to engage with the facts and take a very broad view of interpretation indeed.

VIII. Conclusion

The preliminary ruling procedure is the mechanism by which national court may seek definitive "rulings" from the CJEU on the interpretation of the Treaties and EU Secondary Legislation. Is is important to appreciate that the relationship between CJEU and the national courts is cooperative, not hierarchal. The preliminary ruling procedure is not an appeals procedure.

To achieve uniformity in application, EU law must be consistently interpreted first. The CJEU is well placed to give this authoritative interpretation of EU law given its "panoramic view" of the union and of its institutions and its detailed knowledge of EU law.

The procedure has provided a platform for the Court of Justice of the European Union (CJEU) to deliver seminal constitutional decisions that define the relationship between the EU and member states. On the other hand, it has been argued that the use of Article 267 has been overextended in a number of ways, for example, by pushing the boundaries of the type of bodies which can refer. This can lead to low quality rulings due to an overwhelming of the Court.

The preliminary reference procedure, provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU), is an institutionalised mechanism of dialogue between the Court of Justice of the European Union (CJEU) and national courts. This dialogue serves three principal purposes.

First of all, to provide national courts with assistance on questions regarding the interpretation of EU law.

Secondly, to contribute to a uniform application of EU law across the Union.

Thirdly, to create an additional mechanism – on top of the action for annulment of an EU act (set out in Article 263 TFEU) – for an ex post verification of the conformity of acts of the EU institutions with primary EU law (the Treaties and general principles of EU law). The scope of the preliminary reference procedure covers the entire body of EU law with the exclusion of acts under common foreign and security policy and certain limitations in the area of judicial and police cooperation in criminal matters. EU law does not have a doctrine of binding precedent such as that entertained in common law countries. Therefore, a judgment of the CJEU in a preliminary reference procedure is, strictly speaking, binding only on the national court that submitted the question, as well as on other courts in the same domestic procedure. Nonetheless, CJEU judgments interpreting EU law enjoy an authority similar to those of national supreme courts in civil law countries – national courts interpreting EU law should take them into account. Furthermore, if the CJEU decides that an act of the EU institutions is illegal, no national court may find to the contrary and consider that act legal. The decision whether to submit a preliminary reference to the CJEU rests with the national court concerned. However, if it is a court of last instance and a question of interpretation of EU law or the validity of an act of the EU institutions is necessary to decide a question before it, that court must submit a question. If it refrains from doing so, the Member State concerned may be held liable for a breach of EU law. This briefing is one in a series aimed at explaining the activities of the CJEU.

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