References for preliminary rulings

– Some dos and don’ts –

Richard Himmer,
Legal secretary,
General Court of the EU

Co-funded by the European Union’s Justice Programme (2014-2020).

Preliminary references

- A. Introduction
- B. Admissibility
- C. Practical indications

A. Introduction

- Actions against Member States for failure to fulfil obligations (Articles 258 - 260 TFEU)
- Actions for annulment of an act (Article 263-264 TFEU)
- Appeals (Article 257 TFUE)
- Reviews (Article 256(2)(2) TFUE)
- Opinion (Article 218(11) TFEU)
- Actions for failure to act (Article 265 TFEU)

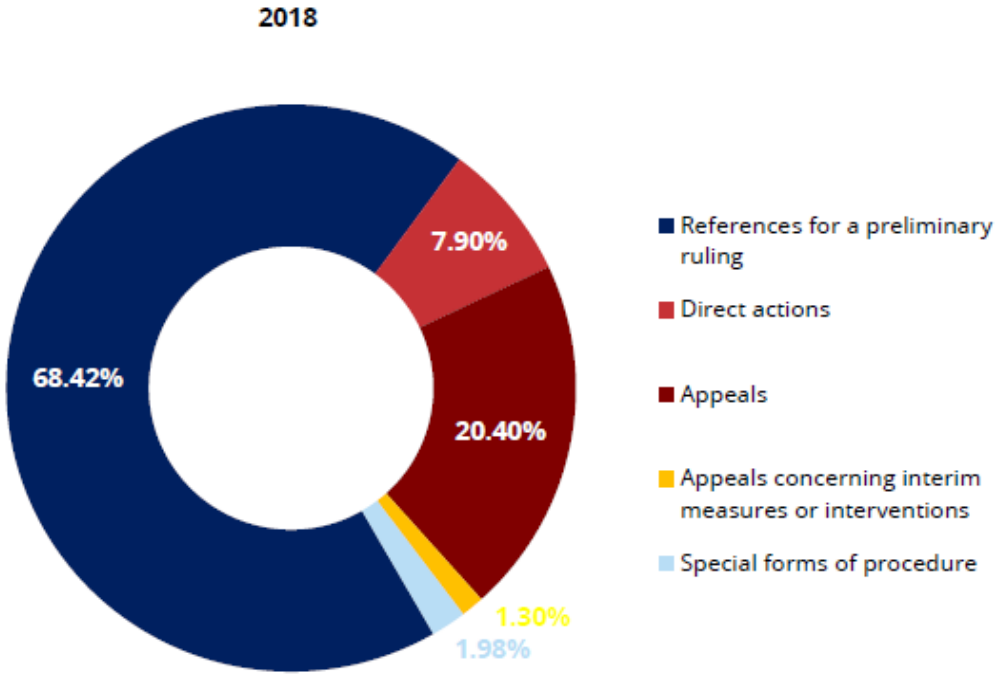
- **References for preliminary rulings (Article 267 TFEU, Article 19 TEU)**
  - "A **stroke of genius**" (Arnull)
  - "The **jewel in the Crown**" (Craig & De Burca)
  - "de **geniale troef** die prejudiciële procedure heet"/“the ingenious preliminary ruling procedure is our trump card’" (de Waele)
  - “**keystone** of the European Union judicial system” (ECJ)

A. Introduction

- **Purposes** of the preliminary rulings
  - uniform application and interpretation of EU law
  - compliance of secondary EU law with primary EU law
  - protection of individual rights
  - development of EU law

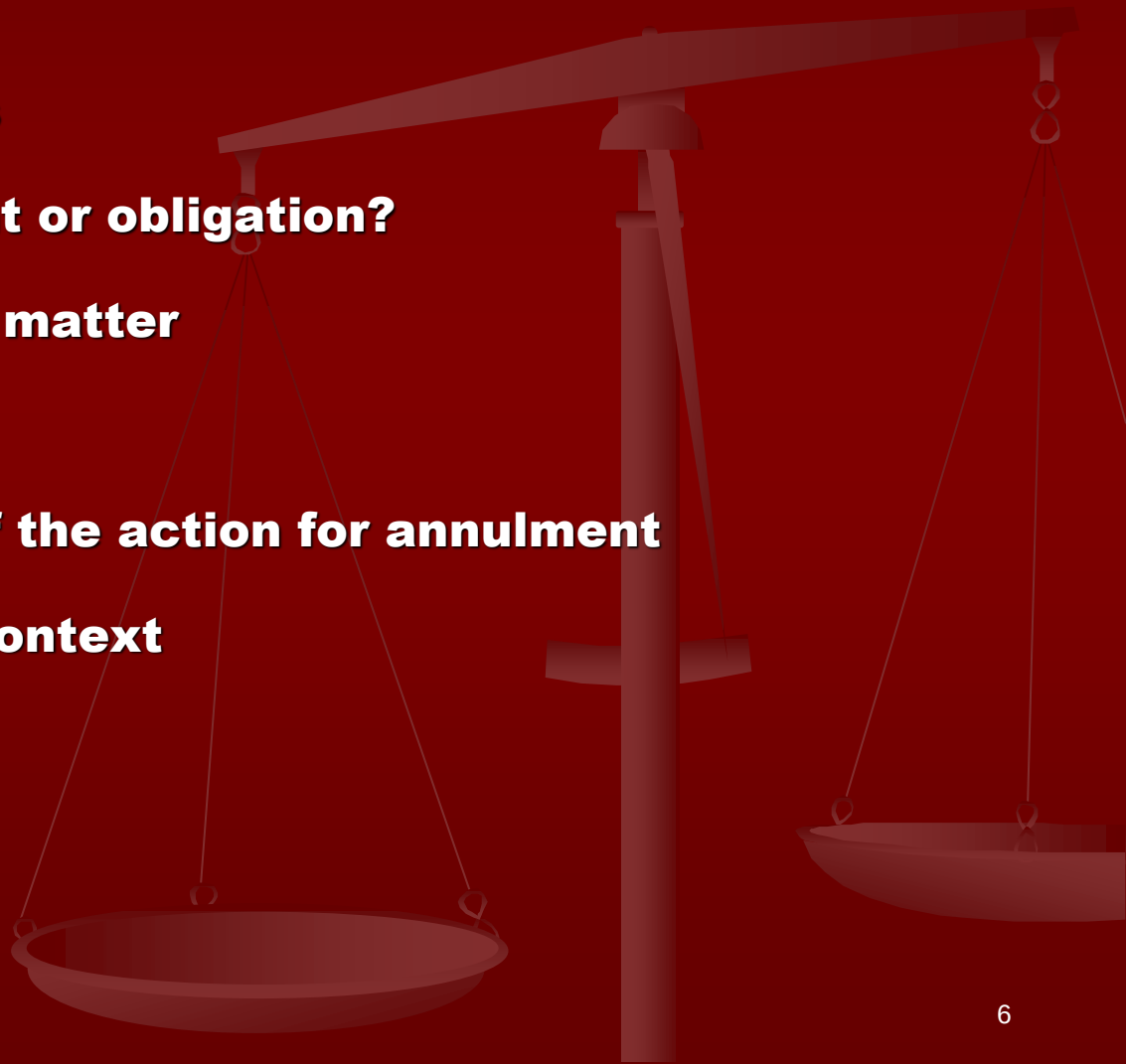
- **"Spirit of cooperation"** – "the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in van Gend & Loos, EU:C:1963:1, p. 12), 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(Opinion 2/13, para 176)

Completed cases — Nature of proceedings (2014-2018)



	2014	2015	2016	2017	2018
References for a preliminary ruling	476	404	453	447	520
Direct actions	76	70	49	37	60
Appeals	157	127	182	194	155
Appeals concerning interim measures or interventions	1	7	7	4	10
Requests for an opinion	2	1		3	
Special forms of procedure [2]	7	7	13	14	15
Total	**719**	**616**	**704**	**699**	**760**

B. Admissibility



- I. Pending proceedings
- II. Referring court: right or obligation?
- III. Admissible subject matter
- IV. Relevance
- V. No circumvention of the action for annulment
- VI. Legal and factual context

B. Admissibility
I. Pending proceedings

- A national court is empowered to make a reference to the Court for a preliminary ruling under Article 267 TFUE 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. Conversely, **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 Case C-176/96, Jyri Lehtonen, para 19
- It is for the national court to decide **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, para 45
  - The earliest stage possible? Before or after the taking of evidence? ➔ when the national court is able to define the factual and legal context of the question, see case C-5/14, Kernkraftwerke Lippe-Ems, para31
  - Parties heard? Not a condition, Case C-430/15, Tolley, para 32, 33
  - Before/ after a real hearing? Not a condition, Case C-332/92, Eurico, para 11
  - During proceedings for interim orders?

B. Admissibility
II. Referring court – Who is who?

- What is a **national court** or tribunal? In principle, no difficulties. In case of doubts, the ECJ verifies whether the referring body fulfils some basic conditions. The body in question must :
  - (1) be established by law
  - (2) and permanent
  - (3) its jurisdiction must be compulsory
  - (4) the procedure before it must be contradictory (or "inter partes")
  - (5) it must apply rules of law
  - (6) it must be independent
  - (7) and it must perform judicial functions

  (see inter alia order of 14 May 2008 in case C-109/07, Pilato; judgment of 16 December 2008 in case C-210/06, Cartesio or judgment of 22 December 2010 in case C-517/09, RTL Belgium)

- No for arbitral tribunals (Case 102/81, Nordsee, for arbitrators); but yes for arbitral tribunals „established by law"(Case C-555/13, Merck Canada)
  No for (competition) authorities (Cases C-53/03, Syfait; C-222/13, TDC)
  No for register courts (Cases C-96/04, Niebüll; C-210/06, Cartesio)

B. Admissibility
II. Referring court – Right or obligation?

- **Right to request preliminary ruling:** All national courts and tribunals, the parties to the main proceedings may make suggestions to the national court or tribunal, but they are not entitled to send questions to the ECJ on their own motion
- **Obligation to seek a preliminary ruling**
  - 'on all **courts of last resort** against whose decisions there is no judicial remedy under national law'; '**case specific approach**': Case C-99/00 *Lyckeskog*, para 15: lower courts whose decisions in the particular proceedings cannot be challenged also constitute courts of last resort
  - on **all courts** when validity of EU law at issue
- **Restraining the right of the national courts:** "a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union law concerned by such legal rulings. […] [A] court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which concern", Case C-173/09, Elchinov

B. Admissibility
III. Right or obligation – Interim relief (1)

- 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, Port

B. Admissibility
III. Right or obligation – Interim relief (4)

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).

B. Admissibility
III. Admissible subject matter – the law (1)

- **Interpretation of primary and secondary EU law:**
  - Any provision of the Treaties, Protocols
  - EU Fundamental Rights - „implementation of EU law“ (article 51 ChFR)
  - How about (General) Court’s judgments?
  - Question: „Is article 1 TEU to be understood that?...“
  - Cf., however, C-129/14, Spasic

- **Validity of secondary EU law**
  - EU regulations, directives; decisions, recommendations, opinions of EU institutions, bodies…
  - Presumption of validity of secondary EU law…
  - Question: „Is article 3 of the Directive/Regulation Z **void**?“

B. Admissibility
III. Admissible subject matter – the law (2)

- **How about?...**
  - Validity and interpretation of national law?
  - "[34] [...] the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall within the field of application of EU law directly, provisions of EU law have been rendered applicable by domestic law due to a **renvoi** made by that law to the content of those provisions. [35] In such circumstances, 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. [36] 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." Case C-380/17, K and B, para 34 to 35
  - Validity and interpretation of international law? – international agreements, Article 218 TFEU, see Case C-83/17, CP, para 24

B. Admissibility
III. Admissible subject matter – the law (3)

Case 283/81 CILFIT, para 21:

„In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its 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."

B. Admissibility
III. Admissible subject matter – the doubts (1)

- "**Doubts**" - question as to the extent to which the courts of MS may apply a margin of discretion in the interpretation of EU law – Case 283/81 CILFIT
  - "**acte clair** " - correct application of EU law 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 the ECJ
    - Similar case
    - No matter what proceedings

B. Admissibility
III. Admissible subject matter – the doubts (2)

- "Doubts" because of **contradictory decisions of national courts**?
  Case C-160/14, Ferreira da Silva e Brito, para 41-45:
  - As a matter of principal: the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU
  - however,
    - "[when] conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a '[xxx]' within the meaning of Article [1111] of Directive [yyyy/zz] and
    - [because] that concept frequently gives rise to difficulties of interpretation in the various Member States,

    the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept"

B. Admissibility
IV. Relevance

- Question **not relevant** to the proceedings – many varieties – for example, application in time (cf., however, case C-534/13, Fipa, para 43 to 47)
- **Presumption of relevance** – Joined Cases C-188/10 and C-189/10, Melki and Abdeli, para 27: "questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a 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";

  (cf., however, case C-239/19, Eli Lilly, para 15, for hypothetical question and manifestedly inadmissible request for preliminary ruling)

  - **Construed cases –** 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"

B. Admissibility
V. No circumvention of the action for annulment

- Request for preliminary ruling aiming at establishing **invalidity of a decision** inadmissible
  - when that the private party concerned could have brought an action under Article 263(4) TFEU and
  - when such action would have *evidently* been admissible

  (Cases C-188/92, TWD Textilwerke Deggendorf GmbH; C-241/01, National Farmers' Union)

- **Interpretation** remains, however, admissible

B. Admissibility
VI. Legal and factual context (1)

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.

B. Admissibility
VI. Legal and factual context (2)

- Article 94(a) RoP ECJ – Content of the request for a preliminary ruling
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2018/C 257/01, OJ, C 257, 1), para 11: "the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, **as defined by the referring court or tribunal** in its request for a preliminary ruling"
- Case C-325/15, Z.Ś.,Z.M.,M.P.v.X: the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that it is possible for the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that that possibility is safeguarded, in the light of the fact that, under that provision, only the orders for reference are notified to the interested parties
- Unclear factual background ➔ manifestly inadmissible referrence – see Cases C-441/10, Ioan Anghel; C440/10, SEMTEX; C-23/15, Sébastien Andre

C. Practical indications (1)

- 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
  (2018/C 257/01, OJ 2018, C 257, p.1)

C. Practical indications (2)

- The request should be typed on white, unlined, A4-size paper
- The text should be in a commonly used font (such as Times New Roman, Courier or Arial), in at least 12 point in the body of the text and at least 10 point in any footnotes, with 1,5 line spacing and horizontal and vertical margins of at least 2,5 cm (above, below, at the left and at the right of the page)
- All the pages of the request, and the paragraphs they contain, should be numbered consecutively

- The request must be dated and signed
- To be sent to the Court Registry, with the file of the case in the main proceedings, either by email (DDP-GreffeCour@curia.europa.eu) or by registered post addressed to the Registry of the Court of Justice (Rue du Fort Niedergrünewald, L-2925 Luxembourg, Luxembourg)

C. Practical indications (3)

- Three main things to think about - Article 94 RoP ECJ:
  - Summary of the subject matter and the relevant facts; short summary of arguments of the parties (Article 94(a) RoP ECJ)
  - National legal issues; case-law of the highest courts of the MS (Article 94(b) RoP ECJ)
  - Statement of the reasons underlying the reference; explain the link between the EU law provision and the national legislation; deliver your own interpretation (Article 94(c) RoP ECJ)

- Other things to think about:
  - Accurate indication of the EU law provision…
  - Don't hide the question somewhere within the text of the request; consider to put it in the operative part of your request or – at least – formulate it as a conclusion…
  - Summarize, avoidance of repetitions, use of short sentences; 10 pages as ideal limit (think of the translation!)…

Thank you for your attention !