

A judge's recommendation on a preliminary reference

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11 oktober 2021

Today's main topic: the preliminary ruling procedure

Central aim and purpose:

10.00-10.30: Reflect on preliminary references and some of the latest CJEU case law

10.30-10.45: Discussion

11.00-13:00: Workshop: exchange our views as court coordinators in EU law on working with the preliminary ruling procedure in practical terms from 11.10-12.10 in subgroups and from 12.10 onwards plenary & closing discussion

The power of questions: Socrates



Jacques-Louis David, The death of Socrates, oil on canvas, Metropolitan Museum of Art, New York

Article 19 (1) TEU and Article 47 Charter

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Article 47

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [...]

Judicial independence

Judgment of 27 February 2018, *Associação Sindical dos Juizes*

Portugueses (Case 64/16, EU:C:2018:117)

42 **The guarantee of independence, which is inherent in the task of adjudication** (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49; of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 60; and of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 40), **is required not only at EU level** as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, **but also at the level of the Member States as regards national courts.**

43 **The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU**, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

44 **The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions** (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37 and the case-law cited).

Article 267 TFEU

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;

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.

Judgment of 24 May 1977, Hoffmann-Laroche (107/76, EU:C:1977:89)

“5. In the context of Article [267 TFEU], whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State.”

The 2021 clarification of *Cilfit*

Judgment of 6 October 1982, CILFIT (283/81, EU:C:1982:335)



Press and Information

Court of Justice of the European Union

PRESS RELEASE No 175/21

Luxembourg, 6 October 2021

Judgment in Case C-561/19

Consorzio Italian Management and Catania Multiservizi

The Court clarifies its case-law in *Cilfit* concerning the situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling

Where such a court or tribunal considers that it may refrain from complying with that obligation, the statement of reasons for its decision must show that the matter involves one of the three situations that allows it to do so

The exceptions to the obligation to refer:
Judgment of 6 October 1982, CILFIT (283/81, EU:C:1982:335)

Three situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling:

- (i) the question is irrelevant for the resolution of the dispute;**
- (ii) the provision of EU law in question has already been interpreted by the CJEU (*acte éclairé*);**
- (iii) the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).**

A shift in responsibilities: the lessons from the *CIM* judgment (I) Judgment of 6 October 2021, Consorzio Italian Management e Catania Multiservizi (Case C-561/19, ECLI:EU:C:2021:799)

- National courts or tribunals of last instance must take upon themselves, independently and with all the requisite attention, the responsibility for determining whether the case before them involves one of the situations in which they may refrain from submitting to the Court a question concerning the interpretation of EU law which has been raised before them. (= judicial independence & autonomy of national courts in EU law)
- If such a court or tribunal takes the view that it is relieved of its obligation to make a reference to the Court, the statement of reasons for its decision must show that the matter involves one of those three situations.
(= new EU law obligation to reason your decision as national court of last instance, Cf. ECHR Judgment of 13 July 2021, Bio Farmland Betriebs S.R.L. v. Romania (application no. 43639/17))

A shift in responsibilities: the lessons from the *CIM* judgment (II) Judgment of 6 October 2021, Consorzio Italian Management e Catania Multiservizi (Case C-561/19, ECLI:EU:C:2021:799

- The **absence of reasonable doubt** must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union. **Before concluding that there is no reasonable doubt as to the correct interpretation of EU law, the national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance** of the Member States and to the Court of Justice.
- In that regard, the **mere fact that a provision of EU law may be interpreted in several ways is not sufficient for the view to be taken that there is a reasonable doubt** as to the correct interpretation of that provision. (=new nuanced approach)
- Nonetheless, where the national court or tribunal of last instance is made aware of **the existence of diverging lines of case-law** – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of that provision.
- a court or tribunal of last instance cannot be relieved of its obligation to make a reference for a preliminary ruling merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings;

Did the Court follow its Advocate General? Opinion of AG Bobek of 15 april 2021 (C-561/19, ECLI:EU:C:2021:291) ('Consortio Italian Management e Catania Multiservizi')

Conclusion AG Bobek:

Under the third paragraph of Article 267 TFEU, a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law is to refer the case to the Court of Justice, provided that, first, that case raises a general issue of interpretation of EU law, which may, second, be reasonably interpreted in more than one possible way and, third, the way in which the EU law at issue is to be interpreted cannot be inferred from the existing case-law of the Court of Justice. Should such a national court or tribunal, before which an issue of interpretation of EU law has been raised, decide not to submit a request for a preliminary ruling pursuant to that provision, it is obliged to state adequate reasons to explain which of the three conditions is not met and why.

Topic for debate in the workshop?

Relevant questions on the validity of an EU legal act? Always refer!

“The national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid.” Judgment of 22 October 1987, Foto-Frost (C-314/85, ECLI:EU:C:1987:452)

“The third paragraph of Article [267 TFEU] requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation” Judgment of 6 December 2005, Gaston Schul Douane-expediteur (C-461/03, ECLI:EU:C:2005:742)

Each preliminary reference is an opportunity for the development of EU law

If you have any serious doubt on the interpretation of a relevant question of EU law and/or the validity of secondary EU law for deciding a dispute:

JUST DO IT.

How will I know if the answer to my question is beyond reasonable doubt and the question is relevant?

- Parties differ on a fundamental level on the interpretation of the EU law involved, and the answer to the question is really necessary for your decision;
- You are (made) aware of the existence of diverging lines of case-law in your Member State or between the courts of different Member States;
- Deciding without a reference does not feel as a just and proper decision;
- A search on InfoCuria Case-Law does not provide an affirmative answer;
- Parties and colleagues support referral (*not decisive*).
- CJEU: questions “enjoy a presumption of relevance”

Posing a question: keep it short and simple, keep the necessity of translation in mind

RECOMMENDATIONS

- Make good use of the Recommendations, which concern relevant advise on e.g.:

- The subject matter and scope of the request for a preliminary ruling
- The appropriate stage at which to make a reference for a preliminary ruling
- The form and content of the request for a preliminary ruling
- Transmission to the Court of the request for a preliminary ruling and of the case file in the national proceedings
- Interaction between the reference for a preliminary ruling and the national proceedings
- Conduct of the proceedings before the Court and the action taken by the referring court or tribunal upon the Court's decision
- The conditions for the application of the expedited procedure and the urgent procedure

COURT OF JUSTICE OF THE EUROPEAN UNION

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2019/C 380/01)

These recommendations have been drawn up for the attention of the courts and tribunals of the Member States of the European Union and echo the provisions of Title III of the Rules of Procedure of the Court of Justice⁽¹⁾. They serve as a reminder of the essential characteristics of the preliminary ruling procedure and the matters to be taken into account by the national courts and tribunals before a reference for a preliminary ruling is made to the Court of Justice, while providing practical guidance as to the form and content of requests for a preliminary ruling. Since such requests will be served, after having been translated, on all interested persons referred to in Article 23 of the Protocol on the Statute of the Court of Justice of the European Union and the decisions of the Court closing the proceedings will in principle be published in all the official languages of the European Union, close attention must be paid to the presentation of requests for a preliminary ruling and, in particular, to the protection of personal data which they contain.

With great power comes great responsibility (Voltaire)

- Judgment of 30 September 2003, Köbler (C-224/01, ECLI:EU:C:2003:513)
- Judgment of 4 October 2018, Commission v France (Advance payment) (C-416/17, EU:C:2018:811)
- Judgment of 13 July 2021, Bio Farmland Betriebs S.R.L. v. Romania (application no. 43639/17)

Use the wisdom of the other contributions at the project website: [Court Coordinators in European Law](#)



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Speakers' contributions

Preliminary Ruling procedure

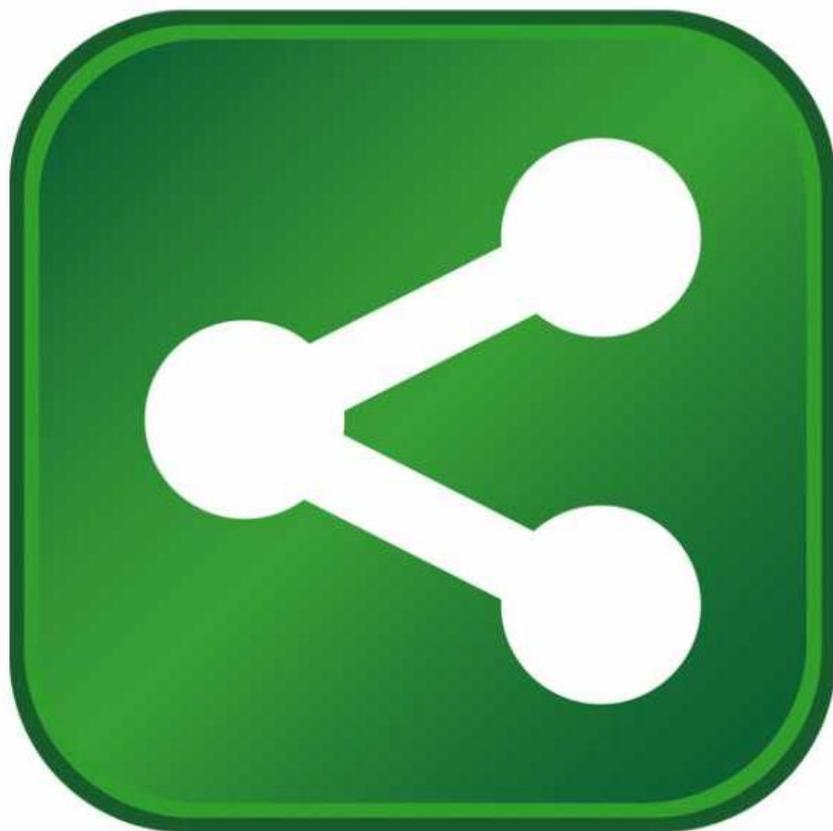
Fundamental/Human Rights

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Recommendations on a preliminary reference ▾

Our insight, ambassadorship, and judicial role in EU law is what we share



And undoubtedly much more!

Thank you very much for your attention

simplified Socrates - Junior / Middles

1. Can you tell me more about that?
2. What makes you say that?
3. What did you mean by..?
4. Can you give me an example?
5. Are you saying ... or ... ?
6. Can you say that a different way?
7. Please explain why/how...?
8. Have you thought about...?

