

preliminary ruling

why (not)
and
how

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Preliminary procedure

Article 267 VWEU:

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 institutions, bodies 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.

Preliminary procedure

- Nature of the procedure:
 - A dialogue between one court and the other
 - Cooperation
 - within their respective jurisdiction



Division of competences

- Principle of conferral (article 5, lid 1 TEU)
- Competences not conferred on the Union remain with the Member States (article 4 TFEU)
- Competence of the Court of Justice according to article 267 TFEU:
 - To give rulings concerning
 - Validity
 - Interpretationof EU law
 - On request of a court of a Member State
 - In view of to give judgment in the pending before the referring court



Division of competences

- Function of national court

- To give a ruling in the dispute before it
 - Establishment of facts and assessment of facts
 - Interpretation and application of national law
 - Application of EU law

(principle of procedural autonomy → national rules govern actions for safeguarding rights that individuals derive from EU law)

- Assessment of need for a preliminary question

(exclusively governed by EU law, e.g HvJ 5 October 2011, Elchinov, C-173/09, ECLI:EU:C:2011:581)

Article 267 TFEU does not constitute a means of redress available to parties to a case pending before a national court

- Selection of relevant questions
- Decision of case



Procedure for a preliminary ruling

- Function
 - Securing uniform interpretation of EU law
 - Consistency
 - Full effect
 - Autonomy
 - Ensuring particular nature of EU
- Success:
 - National procedures for a preliminary ruling
 - Protocol 16 ECHR









Discretion or obligation

- Power to seek a preliminary ruling
 - National court considers a preliminary ruling necessary to enable it to give judgment (not when the procedure had already been terminated 😊 HvJ 13 april 2000, Lehtonen en Castors Braine, C-176/96, ECLI:EU:C:2000:201, punt 19).
- Obligation
 - Necessary to give judgment
 - Validity
 - When a question is raised in a case pending before a court against whose decision there is no legal remedy under national law.

Exceptions on obligation to refer

- Question is materially identical with a question that has already been subject of a preliminary ruling in a similar case (acte éclairé)
- Point of law has already been dealt with by ECJ, irrespective of the nature of the proceedings which led to those decisions, even if the questions at issue are not strictly identical (acte éclairé – bis)
- Correct application is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be solved (acte clair)
- Exceptions do not limit liberty of NC to bring a matter to the ECJ
- **No exception** apply when NC considers a provision of EU law invalid, even if ECJ has already declared invalid analogous provisions of another comparable act.

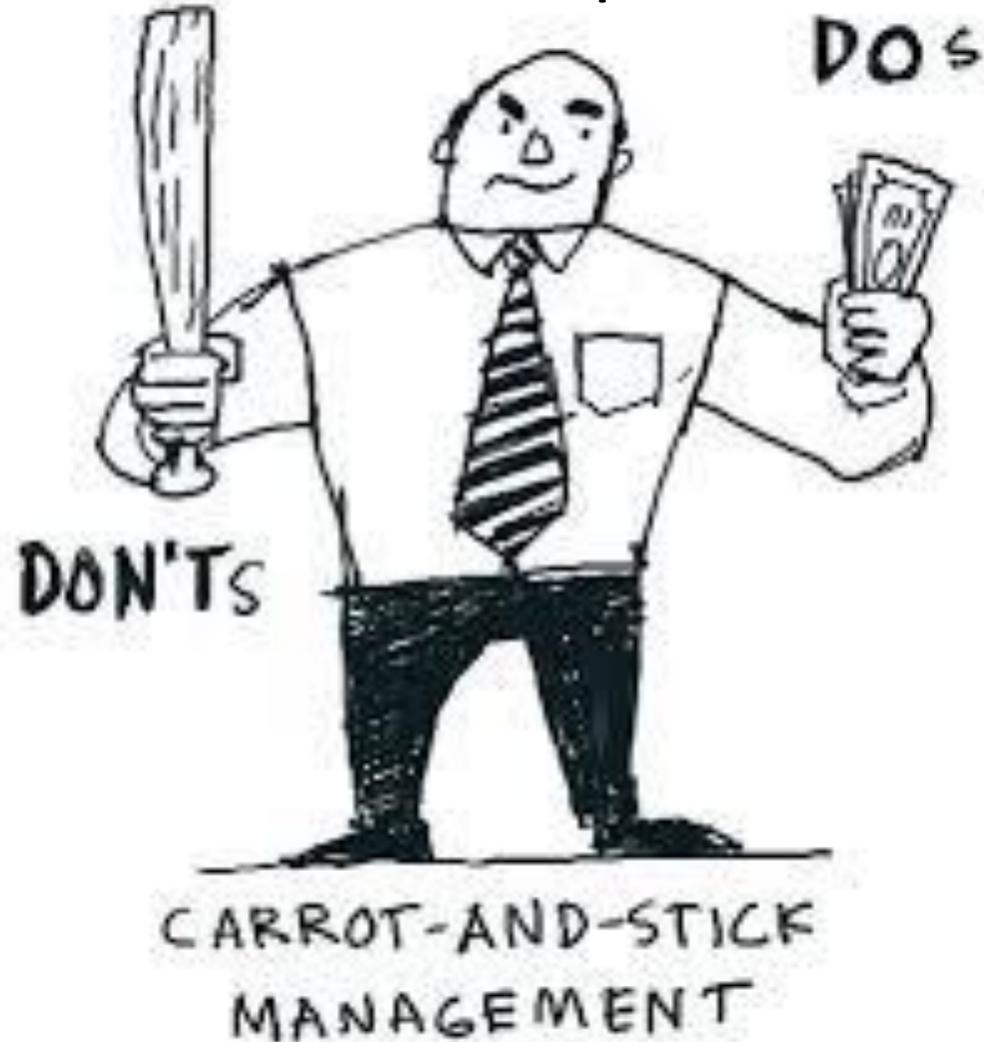
General conditions for an exception to the obligation to refer

- NC must assume responsibility to determine whether:
 - A question is necessary (relevant to case)
 - The case involves one of the situations in which they may refrain from referring
- With all requisite attention
- The statement of reasons must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of EU law is based on the Court's case-law or, in absence of such case-law, that the interpretation of EU law was so obvious to the NC of last instance as to leave no room for reasonable doubt (ECJ 6 October 2021, *Consorzio Italian Management*, C-561/19, ECLI:EU:C:2021:799)
 - See also: ECtHR 20 September 2011, *Ullens de Schooten/Belgium*, ECtHR 8 April 2014, *Dhabi/Italy*; ECtHR 13 February 2020, *Sanofi Pasteur/France*.
 - See also ECtHR 24 April 2018 *Baydar/the Netherlands*
→ extent of obligation to state reasons?

Specific conditions for application of acte clair exception

- Interpretation equally obvious to other Courts of last instance of the MS and to the Court of Justice
- No reasonable doubt should take into account the characteristic features of EU law (risk of divergencies)
- Particular difficulties with regard to
 - All language versions are equally authentic
 - Terminology is peculiar to EU law and corresponding concepts in national law might have a different meaning
 - Every provision should be placed in its context (objectives, state of evolution at date at the date the provision has to be applied)

To refer or not to refer
that's the question



When do I bring a matter before the ECJ

- Facts and legal issues should be clear
- It is appropriate to hear parties, but only NC decides on relevant questions
- To be discussed: do I suspend national proceedings when similar questions are submitted to ECJ or ECtHR ?
- How much scope for discretion?



How do I request a preliminary ruling

Article 267 TFEU and article 94 Rules of Procedure

- Mandatory requirements:
 - Question with regard to interpretation of specific rule of EU-law
 - Clear
 - Detailed questions could lead to complications and misunderstandings
 - Object of dispute
 - Relevant findings of fact,
 - tenor of national provisions and national case-law
 - Concise but clear
 - Why doubt on the interpretation (or validity) of EU-law
 - Reasons why the interpretation is needed by the NC (relationship between the provisions to be interpreted and national provisions applicable to main proceedings)

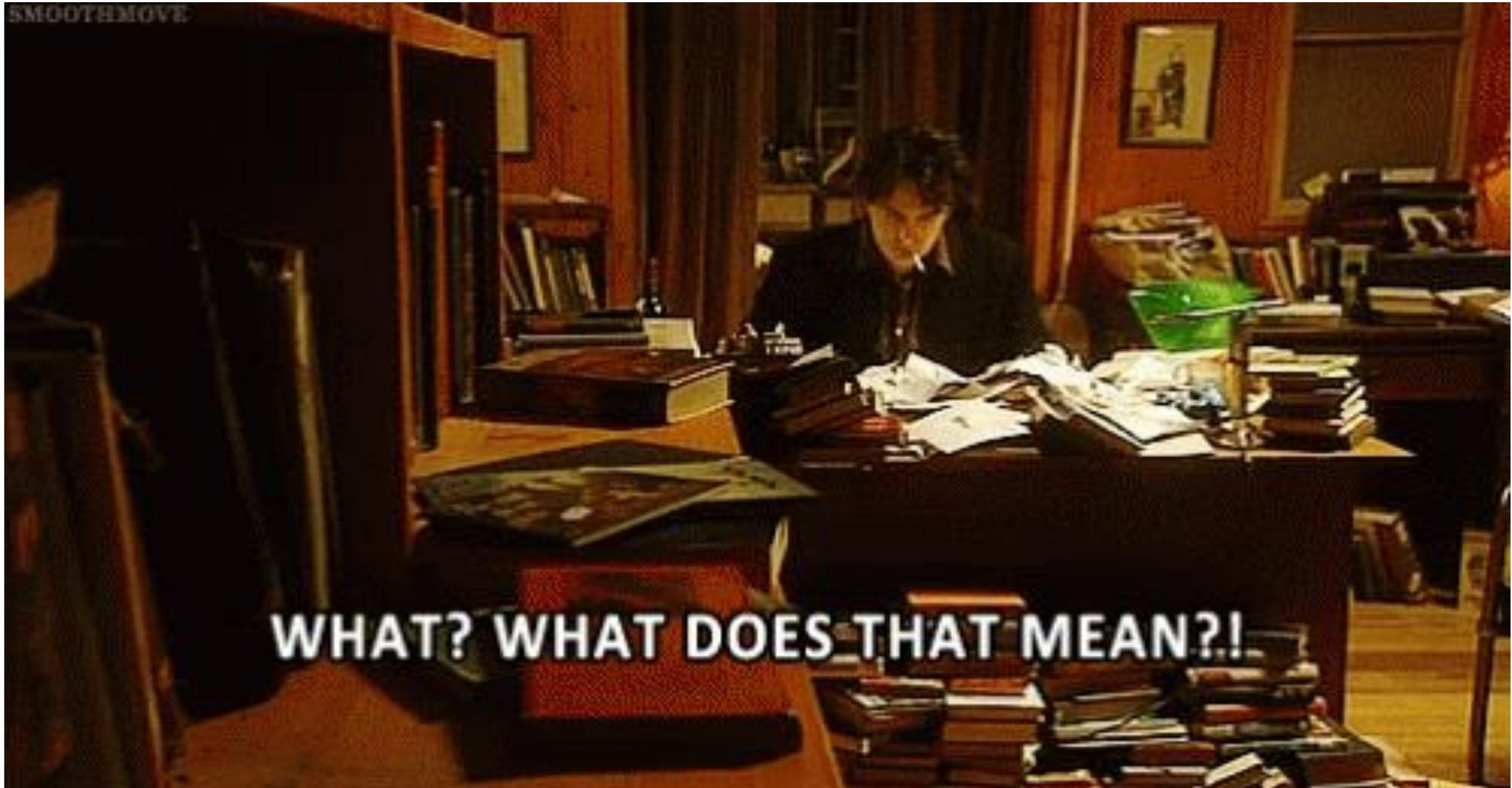
How do I request a preliminary ruling

- Communications is the crux of a successful request for a preliminary ruling - art. 267 TFEU establishes a form of direct cooperation, a dialogue
- What type of question suits my problem:
 - Open question
 - Closed question
 - Choice of alternative answers
 - Leading question
 - Questions to check

How do I request a preliminary ruling

- Enter in the way of thinking of another
 - Without specific knowledge on your legal system or the dispute
 - Subject matter of the dispute should be understood from the request
 - Everything has to be translated (maximum 15 pages of 1500 characters = 22.500 characters)
 - **clear, plain language is crucial**
 - Cilfit works the other way round: is your request for a preliminary ruling crystal-clear to the European Court of Justice and any other party involved
 - Check if your question is not caused by one specific language version
- Explain explicitly why you don't decide on the interpretation yourself and explain what might be the impact of the alternative interpretations for the decision in the main proceedings
- What are the views of the parties with regard to the answer on the question you refer to the ECJ

How do I handle a preliminary judgment by the ECJ



Any questions about asking a question to the
European Court of Justice