



Preliminary reference procedure – THE RIGHT, THE DUTY AND EXCEPTIONS

February 14th 2014, Maribor

Edita Turičnik, doctoral candidate (Faculty of Law, University of Maribor)

Content of presentation

- Short introduction
- Article 267 TFEU
- When referring a question is a right, and when a duty?
- Exceptions to the obligation
- Legal consequences
- Experiences from Slovenia

EU Courts: Article 19 TEU

- The Court of Justice of the EU (CJEU) 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.

The Court of Justice ... in 1974....

Case 166/73 – Rheinmühlen-Düsseldorf and Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

- *parag. 2: ARTICLE 177 IS ESSENTIAL FOR THE PRESERVATION OF THE COMMUNITY CHARACTER OF THE LAW ESTABLISHED BY THE TREATY AND HAS THE OBJECT OF ENSURING THAT IN ALL CIRCUMSTANCES THIS LAW IS THE SAME IN ALL STATES OF THE COMMUNITY .*
- After Treaty of Lisbon has come into force, the preliminary ruling procedure is set in Article 267 of the Treaty on the Functioning of the European Union (TFEU)

The significance of the procedure

Steiner, Woods & TwiggFlesner:

“Almost all the major principles established by the ECJ were decided in the context of a reference to that court for a preliminary ruling under Article 234. ... The procedure accounts for over 50% of all cases heard by the ECJ. [It thus] plays a central part in the development and enforcement of EC law.”

As a rule, the development of Union law by the CJEU is based on preliminary ruling procedures.

Article 267 TFEU (ex. Article 234 TEC)

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.

The role of the national judge

The national judge alone decides:

- whether or not a question needs to be referred (C-415/93 *Bosman*);
- at what point during the procedure the question should be referred; (14/86 *Pretore di Salo*);
- the substance and formulation of the question (247/86 *Alsatel*, 13/91 *Bosch*);
- to issue the order for a preliminary ruling to be submitted to the CJEU.
- If he finds that it is necessary to refer a question, national judge is bound by the CJEU's decision (C-206/01 *Arsenal FC v Reed*)
- “*relationship of cooperation*”

When?

- **WHEN:**»The judge must have got to the stage when he says to himself: »*This clause of the Treaty is capable of two or more meanings. If it means this, I give judgment for the plaintiff. If it means that, I give judgement for the defendant*«. **In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgement.**« *Lord Denning M.R.*

Control of admissibility

- The question does not provide the factual or legal context necessary to give an useful answer
- The question referred is general or of a hypothetical nature
- The interpretation of EU law bears no relation to the actual facts of the main action or its purpose
- The question does not fall within the scope of EU law
- Cases: 244/80 Foglia v. Novello, C-83/91 Meilicke, C-415/93 Bosman,...)
- It is NOT the task of the CJEU, to rule upon the compatibility of provisions of national law with EU law or to interpret national legislation or regulations (C-380/05 Centro Europa 7).

Consequences for the national proceeding

- National procedure is stayed until the CJEU has given its ruling
- The national court may however take protective measures or suspend the application of a national measure, particularly in a reference on determination of validity (interim relief).
- Rulings by the CJEU on questions of interpretation have a prejudicial effect, obliging all other courts either to follow established case law, or to make a new reference. Ruling on invalidity is effective erga omnes.

The right and the duty to make a reference

- Any court or tribunal against whose decisions there is a judicial remedy in national law → **may refer a question (RIGHT, OPTION) (Art. 267(2))**
- Courts or tribunals against whose decisions there is no judicial remedy in national law → **must refer such a question (DUTY, OBLIGATION; but with few EXCEPTIONS) (Art. 267(3))**
 - Highest national Courts
 - Lower Courts: only when court or tribunal's decision cannot be subject to appeal in this **particular** case
- References on **determination of validity** (314/85 Foto-Frost)
→ CJEU's exclusive power to reject illegal provisions of EU law

The exceptions (CILFIT)

The court or tribunal against whose decisions there is no remedy in national law **is not forced to make a reference when:**

1. The question of EU law that has been raised does not influence the case before the *national court (irrelevant questions)*
2. The question raised is materially identical with a question which has already been the subject of a preliminary ruling in similar case (doctrine of *acte éclairé*)
3. The correct application of EU law is so obvious as to leave no scope for any reasonable doubt (doctrine of *acte clair*) – *Risk of abuse!*

National courts and tribunals remain, in any event, entirely at liberty to bring a matter before the CJEU if they consider it appropriate to do so!

1. Irrelevant question

- if the answer to that question can in no way affect the outcome of the main proceeding
- *Art 267. TFEU - if national court considers that a decision on the question is necessary to enable it to give judgment*
- protects the CJEU from overwhelming flood of unnecessary cases
- inhibits unreasonable lengthening of the proceeding before the national court.

2. Acte éclairé

- Previous decisions of the CJEU have already dealt with the point of law in question, even though the questions at issue are not strictly identical.
- *'settled case law'*
- The decision of the national court is based on the effect of precedent.
- Risk: national court may err in its interpretation of settled case law.

3. Acte Clair

Very strict conditions: subjective conviction is not sufficient.

- Matter is equally obvious to the courts of MS (in all languages of the EU);
- Matter is equally obvious to the CJEU (objective, evolution of EU law to date):
 1. compare different language versions of EU legal acts;
 2. possible divergences in the meaning of legal concepts and used terminology in EU law and in the law of the various MS;
 3. the context and the objectives of EU law.

- The answer is not based on precedent by the CJEU, but rather on the inexorable logic of EU law.
- Courts are still allowed to refer the case to CJEU.
- Strict conditions → for circumscribing the scope of the doctrine and to avoid abuses → in practice → widespread application → breach of EU law.

Open questions of acte claire doctrine

Strict conditions - unusually difficult to satisfy in practice.

1. The matter is equally clear to all the other MS courts and CJEU (close to impossible to fulfil)
 - the judges at lower stages supported a diverging interpretation?
 - disagreement in a Chamber of more judges?
 - the arguments of the parties?
 - Would also the MS found a certain EU law provision as clear?
2. All courts must consider the outcome to be 'obvious'
 - AG Stix-Hackl (national judge cannot realistically engage in imagining the workings of the minds of other judges whom he has never met)
 - national court cannot use the same methodology as is used by the CJEU
3. Attention must be paid to the characteristic features of EU law.

4. CJEU has not ruled on the issue at question yet (risk of mutually conflicting conclusions).
5. CJEU has a tendency to develop its case-law in a dynamic fashion (makes it close to impossible to be absolutely certain about the correct interpretation).
6. The relationship between acte claire doctrine and temporal effect of the final judgment.

Failure to refer a question – the consequences

A failure by a court or tribunal of last instance to make a reference constitutes a breach of Art. 267 TFEU .

Four types of possible consequences - on three different levels, i.e. national, Union and international :

1. Invalidity of the national ruling or duty to reopen a case at a national level (violation of « legal judge » principle);
2. Claims for damages at the national level (State liability claim under EU law);
3. Infringement proceedings at the Union level (Art. 258 TFEU);
4. Breach of Article 6 of the European Convention of Human Rights (?)

Additionally:

- To be mentioned in the Report of the Commission about application of EU law; critics of legal doctrine
- Question from another Court

Experiences from Slovenia

- Entrance into EU integration - 1. May 2004
- Only four questions referred for a preliminary ruling
- The first one in case Detiček (C-403/09) was sent only in 2009
- Others: C-536/09 Omejc; C-603/10 Pelati; C-541/11 Grilc
- Constitutional Court of RS (Decision Up-1056/11-15) on the 21.st of November 2013 set aside the judgement of Supreme Court and returned the case to the same court for reconsideration. Reasoning: “If there is an obligation of the CJEU to participate in certain proceedings and the national court concerned omits this obligation by failure to bring the case before the CJEU, a violation of the right to lawful judge is present.”

- The right of all MS to intervene in preliminary ruling procedure and thus importantly influence on the development of EU law.
- Approximately 400 proposals for a preliminary ruling all together each year.
- Slovenia (nine years of membership) intervened in approximately 27 preliminary ruling procedures.
- Intervention - an opportunity for MS influence on the development of EU law, which is not created only in the EU's legislative bodies, but with the case law of the CJEU as well.

Thank you for your attention.

edita.turicnik@gmail.com