

Preliminary reference procedure

SUMMARY

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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Introduction

A specific feature of the EU's constitutional set-up is the role its Member States' national courts play in the day-to-day application, interpretation and enforcement of EU law. When interpreting and applying EU law, national courts may harbour doubts as to the correct interpretation of a given provision of EU law. In order to help national courts resolve such doubts, and in order to guarantee that the provisions of EU law are interpreted consistently across the Union, the TFEU provides for the preliminary reference procedure (Article 267 TFEU). Under this procedure, a national court may (and in some cases – must) refer the issue of interpretation of EU law to the [Court of Justice of the EU](#) (CJEU). The CJEU's ruling is binding on the court that submits the reference. Currently, references may be brought **only to the CJEU**. Article 256(3) TFEU provides for the [General Court](#) to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU in specific areas laid down by the Statute, but since no such provisions have been introduced into the Statute, the CJEU alone has jurisdiction in the preliminary reference procedure.

In [2015](#), the CJEU issued decisions on **404 preliminary references**. At the same time, 436 new preliminary references were submitted, the largest numbers originating from Germany (79), Italy (47), the Netherlands (40), Spain (36) and Belgium (32). The topics of preliminary references decided in 2015 were concerned mainly with free movement and internal market law (74 cases), taxation (55 cases), intellectual property (51 cases), competition and state aid (49 cases), and the area of freedom, security and justice (also 49 cases).

The preliminary reference procedure as a form of cooperation between courts has no equivalent in most Member States (with the notable exception of Poland).¹ The procedure is a non-contentious one, and serves as an instrument of cooperation between the CJEU and national courts, enabling the CJEU to provide a national court with guidance on the interpretation of EU law and the validity of legal acts of the EU institutions.²

Who may bring a preliminary reference?

The main criteria

Article 267 TFEU speaks simply of a 'court or tribunal of a Member State' as the organ entitled to submit a preliminary reference. However, it does not provide a definition of that notion. Assuming that the notion of a 'court or tribunal' is an EU-law concept, subject to autonomous interpretation, the CJEU has sometimes allowed questions from bodies not considered as courts under domestic law, and also rejected questions from bodies considered to be courts. In doing so, it has worked out a list of relevant criteria that need to be taken into account when determining whether a given national body is a 'court' under Article 267 TFEU or not. These were laid down in *Abrahamsson* ([C-407/98](#)) as follows: (1) whether the referring body is established by law, (2) whether the referring body is permanent, (3) whether the referring body's jurisdiction is compulsory, (4) whether the referring body follows an adversarial procedure,³ (5) whether the referring body applies rules of law (as opposed to mere *ex aequo et bono* adjudication), (6) whether the referring body is independent. Importantly, the CJEU does not analyse whether the referring court actually has jurisdiction to hear the case under national law (*WWF*, [C-435/97](#)).

The CJEU's approach to the definition of a 'court or tribunal' can, therefore, be described as combining **functional factors** (focusing on the judicial function of the referring body) and **institutional factors** (focusing on whether the referring body is established by law, permanent and independent). In contrast, the formal classification of a given body as a court under national law is irrelevant for the CJEU.

National courts performing merely administrative functions

In line with these criteria, the CJEU has refused preliminary references from courts performing **merely administrative functions**, such as an Italian *tribunale civile e penale* acting within a non-contentious procedure regarding the registration of a cooperative (*Job Centre*, [C-111/94](#)) or a German *Amtsgericht* (acting as a *Familiengericht*) deciding on the right of one of the parents to determine their common child's surname (*Standesamt Stadt Niebüll*, [C-96/04](#)). In the latter case the CJEU observed that the German *Amtsgericht* was exercising administrative authority, without being called on to decide a dispute and that, therefore, even if it satisfied the other conditions for being considered a 'court', it still could not be regarded as exercising a judicial function (para. 14). In contrast, a court hearing an appeal from a lower court that had merely performed an administrative function, is allowed to submit a preliminary reference precisely because it 'is hearing a dispute and is exercising a judicial function, regardless of the fact that the proceedings before that court are not *inter partes*' (*CARTESIO*, [C-210/06](#) para. 61).

National administrative bodies performing judicial functions

At the opposite end of the spectrum are national bodies that are not considered to be courts under the domestic law, but nonetheless perform a judicial function and therefore are treated as a 'court or tribunal' for the purposes of Article 267 TFEU. For instance, the CJEU considered the Dutch Appeals Committee for General Practitioners (*Commissie van Beroep Huisartsgeneeskunde*) to be a 'court or tribunal', although it was not part of the Dutch judicial system (*Broekmeulen*, [246/80](#)). This was on account of the fact that its decisions, regarding the right to practice general medicine in the Netherlands, were final and given as part of an adversarial procedure (para. 18).

Arbitration bodies

The requirement that a national court's jurisdiction be compulsory means that, in principle, arbitration bodies may not submit questions to the CJEU (*Nordsee*, [102/81](#)). The fact that the parties to a contract have entered an arbitration clause in their agreement does not make the arbitrator's jurisdiction 'compulsory' as it follows from the will of the parties (*Denuit*, [C-125/04](#)). The CJEU's approach is justified by the fact that arbitration bodies, as opposed to state courts, have a "'private" character ... which forecloses their consideration as courts of a Member State'.⁴ Nonetheless, the laws of Member States usually provide for the possibility of judicial review of arbitration awards. If the arbitrators applied EU law, it is for the national court reviewing their award to submit, if need be, a reference to the CJEU (*Eco Swiss*, [C-126/97](#)). In fact, judicial review of arbitration awards based on EU law (e.g. on Article 101 TFEU) must be available to enable the involvement of the CJEU (*Eco Swiss* para. 40). In contrast, a permanent arbitration body, established by law, whose jurisdiction is obligatory, will be considered a court (*Vaasen-Göbbels*, [61/65](#)).

Prosecution service

In principle, a prosecutor is not a court and cannot submit a preliminary reference. However, the CJEU has accepted a preliminary reference from an Italian *pretore* – a judge performing both the functions of a public prosecutor and of an examining magistrate

(*Pretore di Salò*, [14/86](#)). The CJEU observed that it 'has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature' (para. 7). In a later case, the CJEU rejected questions from the Italian prosecution service (*Procura della Repubblica*) but admitted those from the *pretura* (X, [C-74/95 & C-129/95](#)).

Courts from overseas territories, foreign courts and international courts

Questions from Member States' courts established in their overseas territories are admitted by the CJEU, as long as EU law is applicable there, at least partially. For instance, a UK court on the Isle of Man (*Barr*, [C-355/89](#)) or a French court in French Polynesia (*Kaefer*, [C-100/89](#)) were allowed to submit references. Courts from non-EU countries may not submit preliminary references to the CJEU, even if they are candidate countries and even if they need to apply EU law (*Andersson*, [C-321/97](#)). The relevant point in time for analysing whether the court is a court of a Member State or not, is not the date on which the reference is submitted, but the time relevant from the point of view of the dispute (para. 30). By definition, international courts – established on the basis of an international treaty – cannot be treated as a 'court or tribunal of a Member State'.⁵ By way of exception, however, the CJEU has allowed questions from the Benelux Court (*Dior*, [C-337/95](#)).

When should a reference be submitted?

Situations where a reference may be submitted

In line with Article 267 TFEU, a preliminary reference may be submitted if two premises are met jointly: (1) a question of EU law is raised before a national court; and (2) a decision on that question is necessary for the national court to give judgment on the case at hand.

Answer to the question must be necessary to solve the dispute

The answer must be necessary for the referring court to decide on the dispute before it. Therefore, the CJEU will reject as inadmissible references that are too general or hypothetical, and therefore of no use in deciding the case (*Foglia*, [244/80](#) para. 18). Furthermore, the CJEU will not 'reply to questions of interpretation which are submitted to it within the framework of **procedural devices** arranged by the parties in order to induce the Court to give its views on certain problems of [EU] law which do not correspond to an objective requirement inherent in the resolution of a dispute' (*Foglia* para. 18). The CJEU will also reject a preliminary reference 'where it is quite obvious that the interpretation or the assessment of the validity of a provision of [EU] law ... bears **no relation to the actual facts** of the main action or its purpose, or 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' (*Bacardi-Martini*, [C-318/00](#) para. 43). Therefore, if the relevance of the questions does not 'emerge beyond any doubt from the file' of the case, the referring court must explain why it considers that the reply is necessary for it to give judgment (*Bacardi-Martini* para. 44). In particular, the national court should explain why it needs the specific provisions of EU law to be interpreted and how they are linked to national law (*Laguillaume*, [C-116/00](#) para. 16).

Earlier questions on the same topic

The question of EU law need not be fresh: a national court may wish to obtain the CJEU's interpretation in the light of the individual circumstances of the case at hand. However,

according to Article 99 of the CJEU's [Rules of Procedure](#) (RoP), where a question referred to the Court is **identical** to a question on which the Court has already ruled, where the reply to such a question may be **clearly deduced** from existing case-law or where the answer to the question referred for a preliminary ruling admits of **no reasonable doubt**, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by **reasoned order** instead of a judgment. This was the case, for instance, in *Rivas Quichimbo* ([C-537/12 & C-116/13](#)), where the answer to the question had already been given in the earlier case of *Aziz* ([C-415/11](#)).

Situations in which a reference must be submitted

'No judicial remedy'

If the factors calling for a voluntary preliminary reference, as described above, are present, and the court that is deciding the case is one 'against whose decisions there is no judicial remedy under national law' (Article 267 TFEU), such a court must bring the reference. Nonetheless, the existence of that duty is left to for the national court itself to evaluate – as the CJEU held, such courts 'remain **entirely at liberty** to bring a matter before the Court of Justice if they consider it appropriate to do so' (*CILFIT*, [283/81](#) para. 15). The Treaty does not specify whether the 'no judicial remedy' criterion must be applied *in abstracto* (i.e. whether no remedy is available against decisions from a given court at all) or *in concreto* (i.e. whether no remedy is available in a specific procedure). The CJEU interpreted the notion of 'no judicial remedy' in *Lyckeskog* ([C-99/00](#)), pointing out that even if the availability of a judicial remedy (appeal) depends on the higher court, it is that higher court that will have the duty to refer the case to the CJEU.

However, some authors⁶ argue that if reaching the highest court requires that the litigant prove, beyond raising an issue of EU law, the existence of special circumstances going beyond the dispute, such as the public interest in hearing the case by the supreme court, then it would be against the principle of effectiveness of EU law to treat that supreme court as the one against whose decision there is 'no judicial remedy'. Rather, the lower court, whose judgment is final and normally not subject to appeal, save for extraordinary situations, should be treated as the one that has a duty to refer to the CJEU.

There are two **exceptions from the duty to refer** for courts against whose decisions there is no judicial remedy. These are known as the *acte clair* and the *acte éclairé* doctrines.

The acte clair doctrine

It is a generally accepted principle that obvious legal provisions do not need to be interpreted ([clara non sunt interpretanda](#) – 'clear [rules] are not subject to interpretation'). This principle, known as the *acte clair* doctrine, has been applied by the CJEU in the context of the preliminary reference procedure. In *CILFIT* the Court held that 'the correct application of Community law may be so obvious as to leave **no scope for any reasonable doubt** as to the manner in which the question raised is to be resolved' (para. 16). The CJEU indicated, however, that in order to assume that a rule of EU law is clear and does not require interpretation the national court must take into account 'the characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise' (para. 17), paying particular attention to the fact that all language versions are authentic and need to be compared (para. 18), that even if 'the different language versions are entirely in accord with one another, that [EU] law uses terminology which is peculiar to it', and as a result EU 'legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various member states' (para. 19) and that 'every provision of [EU] law must be placed in its context and interpreted in the light of the

provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution' (para. 20). The requirements for invoking the *acte clair* doctrine are, therefore 'so strict that ... that their fulfilment in practice is difficult'.⁷

The acte éclairé doctrine

A court that would normally be under a duty to submit the preliminary reference may refrain from doing so if 'the question raised [by the referring court] is materially identical with a question which has already been the subject of a preliminary ruling in a similar case' (*Da Costa*, [28-30/62](#)). The *acte éclairé* doctrine means that the court is not under an obligation to submit a question, but may do so and the CJEU will provide an answer.

Intent to consider an EU measure as illegal

A national court, even if it not one of last instance, must still refer to the CJEU if it intends to consider an act of the institutions as illegal and to refuse its application (*Foto-Frost*, [314/85](#)). This is because national courts may not, by themselves, decide on the legality of EU measures, which is an exclusive competence of the CJEU (*Foto-Frost*, paras 15-19; *Gaston Schul*, [C-461/03](#) paras 17-19). This does not preclude the possibility of granting the parties interim relief, on the assumption that an EU measure is illegal, provided that a reference is submitted to the CJEU (*Zuckerfabrik Süderdithmarschen*, [C-143/88 & C-92/89](#)). On the contrary, if the national court considers that an EU act is legal, it does not have to submit its doubts to the CJEU (*Foto-Frost*, para. 14).

Liability for not submitting a reference that was obligatory

Failure to submit a preliminary reference, when the court was under a duty to do so, constitutes a violation of EU law and may lead to proceedings on the basis of Article 258 TFEU against the Member State.⁸ An individual who suffered a loss as a result of the failure to submit an obligatory preliminary reference – and was therefore denied access to justice – may claim damages from the Member State (*Köbler*, [C-224/01](#); *Traghetti*, [C-173/03](#)).

Stage of national proceedings when a reference is brought

EU law does not specify the stage in proceedings at which a preliminary reference may be brought. It can therefore be brought at any moment from the time a case is launched, until the very moment before a judgment is given. Also, a court of any instance may bring a reference. It can also be submitted at the stage of a preliminary consideration before allowing an extraordinary appeal to the supreme court (*Lyckeskog*). Nonetheless, the CJEU encourages national courts to bring a reference only once 'the national proceedings have reached a stage at which the national court is able to **define the factual and legal context** of the question, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that [the EU] law applies to the main proceedings' (Information note on references from national courts for a preliminary ruling ([IN](#)), para. 19).

Who decides to refer?

The referring court

The decision to bring a preliminary reference rests with the national court. As the CJEU indicated in *Bacardi-Martini* (para. 41) 'it is solely for the national court ... to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of [EU] law, the Court of Justice is, in principle, bound to give a ruling ...'.

However, in exceptional situations – if the reference is clearly unnecessary to solve the case – the CJEU will refuse to give judgment on it, as was mentioned above.

Higher courts

EU law does not prevent national law from providing, in its domestic procedural law, for a decision to refer to the CJEU be subject to an appeal. Nevertheless, the CJEU will still consider a preliminary reference unless it is withdrawn by the national court that made it (*Rheinmühlen-Düsseldorf*, [146/73](#) para. 4). Therefore, in principle, the fact that a decision to refer has been appealed does not block the CJEU from hearing the case.⁹ Article 100(1) RoP provides explicitly that the CJEU remains 'seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request'. The lower court may withdraw its preliminary reference by its own decision, the higher court's decision is only non-binding guidance on the court that submitted the reference.¹⁰

The parties: only an advisory role

The role of the parties before the national court is limited. The court may refer on its own motion (*CILFIT*) and it may decide not to refer even if the parties request it. Although hearing the parties is not obligatory, the CJEU encourages the national court to do so before submitting the question (*IN*, para. 19). In practice, in the United Kingdom, Ireland and Denmark courts submit references mainly upon the request of the parties.¹¹

What can the CJEU be asked about?

Interpretation of EU law

The question of EU law can relate either to interpretation of the Treaties, or interpretation of an act of the institutions, bodies, offices or agencies of the EU. This also covers the interpretation of (unwritten) general principles of EU law that are considered to be part of EU primary law. International treaties concluded by the EU are considered as acts of the institutions (*Andersson; Haegeman*, [181/73](#)) and may be subject to interpretation by the CJEU (which was the case with the TRIPS agreement, interpreted in *Hermès*, [C-53/96](#)).

Legality (validity) of an act of the institutions

The question may otherwise concern the validity (legality) of an act of the institutions, bodies, offices or agencies, i.e. its conformity with the Treaties (including the Charter of Fundamental Rights), with general principles of EU law, with directly applicable international treaties binding on the EU, as well as with superior acts of secondary EU law (e.g. conformity of a decision with the regulation on which it was based).¹² The CJEU may also verify the legality of non-binding acts (*Deutsche Shell*, [C-188/91](#) para. 18).

The national court may not seek from the CJEU a decision on the **validity of primary EU law**,¹³ for instance regarding its conformity with general public international law.

Conformity of national law with EU law

The only procedure in which the CJEU may analyse the conformity of national law with EU law is infringement proceedings (Article 258-259 TFEU) where the Commission or another Member State alleges that the defendant Member State has violated its obligations under EU law. The preliminary reference procedure, however, does not give the CJEU a comparable power – it does not have jurisdiction to do so (*Inter-Huiles*, [172/82](#), para. 8). It is therefore exclusively for the national court to decide whether a given national legal provision or administrative decision complies with EU law or not (*Gebhardt*, [C-55/94](#) para. 19). Nonetheless, the CJEU 'is competent to provide the

national court with all criteria for the interpretation of [EU] law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it' (*Gebhardt*, para. 19). If the national court formulates its question incorrectly, the CJEU will reformulate it in order to make it clear that it does not decide on the compatibility of specific national legal provisions with EU law. The CJEU may, however, interpret national law which implements an EU directive (*Salahadin Abdulla*, [C-175-179/08](#) para. 48).

The CJEU cannot be asked to rule on **questions of fact** that are exclusively for the national court to decide (*Traghetti* paras 22 and 24). The CJEU has underlined that only the national court has direct knowledge of the facts of the case (*Hemig*, [C-399/92](#) para. 8) and it must provide the CJEU with a sufficient description of those facts in the submission (*Keller*, [C-145/03](#) para. 29).

Exclusions and limitations regarding criminal law and foreign policy

Criminal law and criminal procedure (former 'Third Pillar')

Until the entry into force of the Lisbon Treaty, the possibility of submitting references regarding EU criminal law was subject to an opt-in by the Member State concerned (former Article 35 of the Treaty on European Union (TEU)). Since the expiry of the transitional period on 1 December 2014, EU criminal law has been fully covered by Article 267 TFEU. This article does however provide for an exception: the CJEU has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Common foreign and security policy (former 'Second Pillar')

Another pre-Lisbon Treaty exception to have been maintained concerns acts of the institutions in the area of common foreign and security policy. Under Article 24(1) TEU, the CJEU does not, in principle, have jurisdiction in this area, save for monitoring compliance with Article 40 TEU and reviewing the legality of certain decisions as provided for by Article 275 TFEU. However, preliminary references are not permitted.

How should the reference be written?

According to Article 94 RoP, a preliminary reference must contain: (1) the **questions** referred to the CJEU; (2) 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; (3) the tenor of any **national provisions** applicable in the case and, where appropriate, the relevant national case-law; (4) a **statement of the reasons** that prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

An information note, published by the CJEU in 2009 ([IN](#)), gives national courts detailed guidelines on formulating a preliminary reference. Although the information note is a non-binding act (IN, para. 6), the duty to adhere to it when reasonable could, in principle, be derived from the principle of loyal cooperation between EU institutions and Member States (Article 4(3) TEU). The note (paras 21-24) lays down more detailed guidance on the content of a preliminary reference, requiring that references be drafted simply, clearly and precisely, avoiding superfluous detail, and succinct (if possible, no longer than 10 pages). They should include, if need be, a summary of the main arguments of the parties to the main proceedings, be divided into numbered points or paragraphs for ease of reading and reference, and contain, if appropriate, a brief statement of the referring court's view. The questions should appear in a separate, clearly identified section, generally at the beginning or the end, and must be capable of being understood on their own.

How is the procedure organised?

National procedure

EU law does not prescribe any specific procedural rules for the preliminary reference, leaving the matter to national law. In its information note, the CJEU points out that the reference 'may be in any form allowed by national law as regards procedural steps' ([IN](#), para. 20). Neither EU nor national law regulates the national procedure following the CJEU's preliminary ruling.¹⁴

Procedure before the CJEU

Submission of preliminary reference

A preliminary reference must be submitted in writing by post to the CJEU's Registry ([IN](#), para. 29). In the case of the urgent preliminary ruling procedure, the reference may first be sent electronically (email or fax), but a paper version is also obligatory ([IN](#), para. 42).

Under Article 95 RoP, where anonymity has been granted by the referring court or tribunal, the CJEU will also respect that anonymity in the proceedings pending before it. Furthermore, at the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the CJEU may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Service of the preliminary reference

Article 23(1) of the CJEU Statute provides that the decision to refer a preliminary ruling is notified, by the CJEU Registrar, to the parties of the original proceedings, to the Member States, to the Commission, and to the EU institution, body, office or agency that adopted the act whose validity is being questioned. Article 98 RoP provides that preliminary references are served on the Member States in the original version, accompanied by a translation into the official language of the state to which they are being addressed. If a reference is particularly lengthy, the translation may be replaced by a translation of the summary, which will contain the full text of the question, information on the subject-matter of the main proceedings, the essential arguments of the parties to those proceedings, a succinct presentation of the reasons for the reference for a preliminary ruling and the case-law and the provisions of national law and EU law relied on. Furthermore, if a case is concerned with the EEA agreement, the reference is also notified to EEA states and the EFTA Surveillance Authority (Article 23(3) CJEU Statute).

Submission of observations and clarifications from the referring court

Article 23(2) of the CJEU Statute provides that within two months of the notification, the entities to which the preliminary reference was notified may submit written observations. No other entities, e.g. NGOs or branches of national administration other than the government may submit observations. Article 101 RoP provides that the CJEU may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court.

Costs and legal aid

Preliminary ruling proceedings before the CJEU are free of charge ([IN](#), para. 27). The CJEU does not rule on the costs of the parties to the main proceedings, leaving it to the national court (Article 102 RoP). There is a possibility of obtaining legal aid from the national court ([IN](#), para. 28) or the CJEU (Article 115-118 RoP).

There are two types of **special preliminary reference procedure**: expedited or urgent. According to Article 105 RoP, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an **expedited procedure**. The date of the hearing is fixed immediately and the deadlines for submitting observations are shortened. Article 107 RoP provides that a reference for a preliminary ruling raising one or more questions regarding judicial cooperation in criminal matters may, at the request of the referring court or, exceptionally, of the CJEU itself, be dealt with under an **urgent procedure**. This decision is taken by the designated chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General (Article 108 RoP). The decision to deal with the reference under the urgent procedure prescribes the time-limit for lodging statements of case or written observations and may also specify the matters of law to which such statements or observations must relate and the maximum length of those documents (Article 109(2) RoP). In exceptional situations the submission of statements and observations may be omitted altogether (Article 111 RoP).

The CJEU's decision

Three possible decisions

The CJEU's decision on a preliminary reference can take three possible forms: (1) an order of the President rejecting the reference as inadmissible; (2) a reasoned order of the Court answering the questions, if they have already been addressed earlier or are trivial (Article 99 RoP); (3) a judgment of the Court answering the questions.

Aspects excluded from the judgment

In the preliminary reference procedure the CJEU acts exclusively as a **court of law**, not of facts, and therefore has no jurisdiction to determine the factual circumstances of the case or to apply the law to the facts ([IN](#), para. 7). These aspects are the duty of the national court. Likewise, the CJEU does not decide in any way on national law – neither on its interpretation, nor on its conformity with EU law ([IN](#), paras 7-8).

Legal effects of the CJEU's decision

No explicit legal rules

Neither Article 267 TFEU, nor the CJEU's statute nor RoP indicate who exactly is bound by the CJEU's preliminary judgment.¹⁵ The only provision of EU law to mention explicitly the binding force of the CJEU preliminary ruling is Article 65 RoP, which states that the judgment is binding from the day of its publication.¹⁶ Therefore, the issue as to which addressees (courts) are bound by the judgment and to what extent remains to be clarified by legal scholarship and case-law. Judgments of the CJEU are binding from the moment of their publication and, in principle, *ex tunc* (with retroactive force), unless the Court explicitly provides otherwise.¹⁷

Legal effects for the court that submitted the preliminary reference

Both CJEU case-law ([Wünsche](#), [69/85](#) para. 13) and legal scholars agree that the court that submitted the reference is bound by the CJEU's answer (*inter partes* effects).¹⁸ This extends also to other courts deciding the same case (in the same proceedings), whether in higher or lower instance.¹⁹ Whilst the CJEU's decision is final (not subject to appeal), the national court (or a different court in the same proceedings) may submit a new question to clarify the previous answer ([Pretore di Salò; Milch- Fett- und Eierkontor](#), [29/68](#)) or to indicate new perspectives on the issue ([Wünsche](#) para. 15).²⁰

Legal effects vis-à-vis third parties of a judgment declaring an EU act invalid

Most EU law scholars agree that if, in a judgment rendered in the preliminary reference procedure, the CJEU declares an act of the institutions invalid, such a decision has effects not only *inter partes*, but also *erga omnes* (i.e. outside the litigation in which the question arose).²¹ This view has been also adopted by the CJEU, which has ruled that 'a national court may not apply the act declared to be void [in the preliminary reference procedure] without once more creating serious uncertainty as to the EU law applicable', adding that although the judgment 'is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give' (*International Chemical Corporation*, [66/80](#) paras 12-13). Other scholars are more reserved, merely pointing out that 'Union institutions and governmental entities are *entitled to rely on the invalidity*' and that the institution 'which adopted the act in question is obliged to take the necessary measures'²² or noting that such a decision comes close to *erga omnes* effects.²³

National courts may not apply such a ruling by analogy, e.g. by extending it to the provisions of other EU law acts, even if they are similar (*Gaston Schul*, para. 25).

Legal effects vis-à-vis third parties of a judgment declaring an EU act valid

In a situation where the CJEU declares an EU act valid, most scholars argue that such a judgment does not produce *erga omnes* effects. This is because the Court could analyse only some, specific arguments regarding the validity of the legal act which does not preclude that other arguments would persuade it to declare the act's invalidity in the future²⁴ or pleading illegality on a different basis (*Milac*, [8/78](#) paras 4-9). Importantly, the CJEU formulates its answer in a way that does not confirm validity in general, but merely states that the 'Examination of the question referred has disclosed no factor of such a kind as to affect the validity of' the act in question (*cp-Pharma*, [C-448/06](#)), therefore not precluding that another preliminary reference might contain a question which would persuade the CJEU to change its view.

Legal effects vis-à-vis third parties of a judgment interpreting EU law

Scholarly opinion is most divided on the question of *erga omnes* effects of a judgment interpreting EU law. Some firmly declare that the CJEU decision 'does not have *erga omnes* effects. It is not a formal precedent whose effects would extend beyond the case in connection with which it was issued or towards third parties'²⁵, stressing that EU law 'has not adopted the Anglo-Saxon concept of precedent as a binding proclamation of the law.'²⁶ Under this view, CJEU cases are non-binding guidelines for other courts on how to interpret EU law.²⁷ Others claim that EU law does know a doctrine of binding precedent, introduced already either in *Da Costa* or in *Kühne & Heitz* ([C-453/00](#)).²⁸ It is argued that national courts must follow CJEU precedent under the duty of harmonious interpretation of EU law.²⁹ Finally a third group of authors takes the middle ground, arguing for *de facto* or *sui generis* precedent in EU law, whereby a national court may always request that the CJEU reconsider its legal opinion, but may not depart from such an opinion without submitting a fresh reference.³⁰ In this vein CJEU's interpretation of EU law, 'although not binding directly, enjoys, due to its "leading function in the application of Community law" ... a "*de facto* law-making power" ...'.³¹

Although the CJEU has never openly declared its case-law to constitute precedent, in *Kühne & Heitz* it held that following an interpretation of EU law given in a different case national authorities should review their earlier decisions based on a different interpretation and possibly reopen proceedings (para. 27).

Main reference

Wägenbaur, B., *Court of Justice of the European Union: Commentary on Statute and Rules of Procedure*, C.H. Beck, 2013.

Endnotes

- ¹ The procedure was introduced in 1949 for criminal, and in 1953 for civil cases. The current rules are Article 441 of the Code of Criminal Procedure and Article 391 of the Code of Civil Procedure.
- ² B. Wägenbaur, *Court of Justice of the European Union: Commentary on Statute and Rules of Procedure*, C.H. Beck, 2013, pp. 67-68.
- ³ However, this factor is not an obligatory one (see Case C-54/96 *Dorsch Consult*, para. 31).
- ⁴ R. Ostrihansky, in: M. Kenig-Witkowska (ed.), *Prawo instytucjonalne UE*, C.H. Beck 2015, p. 422.
- ⁵ R. Ostrihansky, *op.cit.*, p. 419.
- ⁶ M. Ahlt, M. Szpunar and M. Nowacki, *Prawo europejskie*, C.H. Beck 2011, p. 160.
- ⁷ R. Ostrihansky, *op.cit.*, p. 434.
- ⁸ M. Szpunar, in: *Traktat o funkcjonowaniu Unii Europejskiej*, ed. A. Wróbel, Wolters Kluwer 2012, Vol. II, p. 399.
- ⁹ Ahlt, Szpunar and Nowacki, *op.cit.*, p. 158.
- ¹⁰ Szpunar, *op.cit.*, p. 426.
- ¹¹ *Ibid.*, p. 417.
- ¹² Ahlt, Szpunar and Nowacki, *op.cit.*, p. 153; Wägenbaur, *op.cit.*, p. 69.
- ¹³ Ahlt, Szpunar, Nowacki, *op.cit.*, p. 154; Wägenbaur, *op.cit.*, p. 69.
- ¹⁴ Szpunar, *op.cit.*, p. 419.
- ¹⁵ M. Kotzur, in: *European Union Treaties: A Commentary*, C.H. Beck 2015, p. 901.
- ¹⁶ P. Dąbrowska, 'Skutki wyroków prejudycjalnych TS w postępowaniu przed sądami krajowymi w świetle orzecznictwa i Traktatu z Lizbony', *Europejski Przegląd Sądowy* 12 (2010): 4-15, p. 5.
- ¹⁷ Szpunar, *op.cit.*, p. 397.
- ¹⁸ R. Ostrihansky, *op.cit.*, p. 465; J. Schwarze, in: *EU-Kommentar*, ed. J. Schwarze, 3rd ed., Nomos 2012, p. 2247.
- ¹⁹ Szpunar, *op.cit.*, p. 396; Kotzur, *op.cit.*, p. 901.
- ²⁰ Szpunar, *op.cit.*, p. 429, 396; Schwarze, *op.cit.*, p. 2247.
- ²¹ P. Dąbrowska, *Skutki orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości* [Effects of the ECJ's Preliminary Ruling], ABC 2004, pp. 75-90; P. Dąbrowska, 'Skutki...', p. 8-9; Schwarze, *op.cit.*, p. 2247-2248; Szpunar, *op.cit.*, p. 396; C.D. Classen, in T. Oppermann et al., *Europarecht*, 4th ed., C.H. Beck 2009, p. 274.
- ²² Kotzur, *op.cit.*, p. 901.
- ²³ U. Everling, *Das Vorabentscheidungsverfahren vor dem EuGH*, Nomos 1986, p. 65, cit. after Schwarze, *op.cit.*, p. 2247.
- ²⁴ Schwarze, *op.cit.*, p. 2248.
- ²⁵ Szpunar, *op.cit.*, p. 396.
- ²⁶ Ostrihansky, *op.cit.*, p. 465.
- ²⁷ J. Barcik, in: J. Barcik and A. Wentkowska, *Prawo Unii Europejskiej*, C.H. Beck 2014, p. 333; Ahlt, Szpunar and Nowacki, *op.cit.*, p. 164.
- ²⁸ P. Craig, G. de Búrca, *EU Law*, 5th ed., OUP, 2011, p. 475-476; D. Chalmers et al., *EU Law*, CUP 2008, pp. 295-296.
- ²⁹ Craig, de Búrca, *ibid.*; A. Wróbel, in: *Stosowanie prawa Unii Europejskiej przez sądy* [Judicial Application of EU Law], Zakamycze, 2005, p. 811-812; K. Schmidt, 'Stosowanie prawa Unii Europejskiej przez sędzię polskiego' [Application of EU Law by Polish Judges] in *Profesjonalna kultura prawnicza*, Scholar, 2012, pp. 178-179.
- ³⁰ P. Dąbrowska, 'Skutki...', pp. 11-12.
- ³¹ J. Schwarze, *op.cit.*, p. 2248.

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