



REPUBLIC OF SLOVENIA
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CONSEJO GENERAL



IN COOPERATION WITH



FACULTY OF LAW,
ECONOMICS
AND FINANCE

Submodule 3:

The mandate to submit a preliminary reference



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A. When courts shall or may submit a preliminary reference?

- According to Article 267 Treaty on the Functioning of the European Union ('TFEU'), courts that encounter an issue on the interpretation or the validity of EU may submit a preliminary reference to the CJEU
- Nonetheless, it clarifies that courts 'against whose decisions there is no judicial remedy under national law' shall bring a preliminary reference before the CJEU
- From this provision it can be inferred that while for courts of last instance it is mandatory to make a preliminary reference, for other courts submitting a preliminary reference is just a possibility
- Last instance courts are required to submit a preliminary reference because they are the last opportunity to submit a preliminary reference before the CJEU in the context of the proceedings in which the issue on the interpretation or validity of EU law arises

B. Courts against whose decisions there is no judicial remedy under national law

- Which courts are those ‘against whose decisions there is no judicial remedy?’
 - This expression includes the hierarchical superior courts and tribunals of any judicial system (e.g. Supreme courts; Constitutional courts...)
 - Besides the highest courts of a judicial system, it also includes lower courts against whose decisions, in a specific proceeding, there are no judicial remedies
- The term ‘judicial remedy’ include those cases where the availability of the judicial remedy/appeal depends on the higher court declaring the remedy admissible before deciding on it ([C-99/00, Lyckeskog](#))
- Nonetheless, the CJEU has clarified that when a last instance court receives an application for leave to appeal on a point of law that includes request to submit a preliminary reference to the CJEU, the last instance court needs to take into consideration whether it is necessary to submit the preliminary reference when assessing if leave to appeal is admissible or not ([C-144/23, Kubera](#))

B. Courts against whose decisions there is no judicial remedy under national law

Do courts of last instance have any discretion to decide if they submit a preliminary reference?

- Courts 'against whose decisions there is no judicial remedy' can refrain from submitting a preliminary reference when one of the following conditions is met (the so-called *CILFIT* test):
 - The question is irrelevant
 - The question on the interpretation of EU law has been already clarified by the CJEU (*acte éclairé*). The CJEU has stated that when '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', the court is not obliged to submit a preliminary reference
 - The other possibility for a court not to submit a preliminary reference is that 'the correct application of Community ('EU') law is so obvious as to leave no scope for any reasonable doubt' (*acte clair*)

B. Courts against whose decisions there is no judicial remedy under national law

- In [C-283/81, Cilfit](#), the CJEU established certain criteria that national courts must observe in order to determine that there is an *acte clair*:
 - First, ‘the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice’ (para. 16)
 - To determine whether the ‘matter is equally obvious to the courts of other Member States’, the national court needs take into consideration ‘the characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise’
 - Furthermore, courts must take into consideration the different official language versions of the EU legal text to be interpreted

B. Courts against whose decisions there is no judicial remedy under national law

- Over the decades, the CJEU has made some small nuances on the *acte clair* doctrine:
 - In [Joined cases C-72/14 and C-197/14, X and van Dijk](#), the CJEU clarified that the fact that a court of last instance can determine that there is an *acte clair* even when a court of lower instance has submitted a preliminary reference to the CJEU on the same legal issue
 - In [C-160/14, Ferreira da Silva](#) the CJEU determined that the existence of conflicting case law at the national level on the same EU law issue as well as frequent difficulties of interpretation in various Member States on that legal issue shows that there is no *acte clair*
 - In [C-561/19, Consorzio](#), the CJEU clarified ‘a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question’ (para. 44)

B. Courts against whose decisions there is no judicial remedy under national law

- The prerequisites that courts have to satisfy to determine if there is an *acte clair* are very difficult to implement by courts
- A [research note](#) elaborated by the CJEU's Directorate-General for Library, Research and Documentation on the *acte clair* doctrine exposed that courts across the EU rarely conduct the test established by the CJEU to determine if there is an *acte clair*
- As Advocate General Wahl stated in its [Opinion](#) in *X and van Dijk*, 'coming across a 'true' *acte clair* situation would, at best, seem just as likely as encountering a unicorn' (para. 62)
- A case before the Dutch Supreme Court offers a rare example of a court relying on the Cifit test to establish an *acte clair* regarding an issue on the interpretation of a provision of the European Account Preservation Order Regulation ('EAPO Regulation'):
 - It consulted other Supreme Courts of the EU through the Network of the Presidents of the Supreme Judicial Courts of the European Union
 - It also conveyed a linguistic comparison of the EAPO Regulation's provision at issue

C. Consequences of failing to submit a preliminary reference

- What could it happen if a court which is required to submit a preliminary reference fails to do so?
- EU law foresees two potential consequences:
 - The European Commission could launch a procedure of infringement against that Member State of the court that failed to make the preliminary reference
 - The Member State of the court that failed to submit the preliminary reference can be found liable and respond for the damages caused to the individual resulting from the failure to submit the preliminary reference

I. Procedure of infringement

- According to Article 258 of the TFEU, ‘if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations’
- If the Member State ‘does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union’
- In the event the CJEU determines that the Member State has breached EU law, and the Member State does not correct such infringement of EU law, then the Commission can bring again the Member State before the CJEU. At this state, the CJEU will impose on fine on the Member State
- In the case [C-416/17, Commission v France](#), the CJEU found that the French Council of State failed to submit a preliminary reference to the CJEU, and thus the France had breached EU law

II. Liability of a Member State

- The CJEU has established that ‘Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible’ ([Joined cases C-6/90 and C-9/90, Francovich](#), para. 37)
- This is the so-called EU Principle of State Liability
- Member States can be also found liable for the damages suffered by an individual resulting from the failure to submit a preliminary reference to the CJEU
- This is something that the CJEU determined in the case the [C-224/01, Köbler](#)
- Nonetheless, the threshold to establish the liability is rather high:
 - There has to be causal link between the failure to submit the preliminary reference and the damages suffered by the individual
 - There has to be a manifest and serious infringement of that obligation to make a preliminary reference

D. A violation of Article 6 of the ECHR

- Article 6(1) of the European Convention on Human Rights ('ECHR') requires that domestic courts give reasons for their decisions
- The European Court of Human Rights ('ECtHR') has reiterated on several occasions that when a court which is required to submit a preliminary reference, decides not to do so without providing any reasons, that amounts to a violation of Article 6(1) of the ECHR:
 - [*Ullens de Schooten and Rezabek v. Belgium*](#)
 - [*Dhahbi v. Italy*](#)
 - [*Vergauwen and Others v. Belgium*](#)
 - [*Georgiou v. Greece*](#)
- Therefore, if one of the parties of a dispute asks a court of last instance to submit a preliminary reference to the CJEU, this court is not required to submit the preliminary reference, but it has to provide the party with reasons on why it does not submit the preliminary reference

E. The protection of the preliminary reference under national constitutional law

- In some Member States, Constitutional Courts have established that the preliminary reference procedure enjoys certain protection under the national constitutional systems:
 - **Germany:** Failure to submit a request for a preliminary ruling when required by a last instance court can amount to a violation of the right to a legitimate court protected by Article 101 of the German Constitution
 - **Austria:** Failure to submit a request for a preliminary ruling when required by a last instance court can amount to a violation of the right to a legitimate court or tribunal protected by Article 83(2) of the Austrian Constitution
 - **Spain:** Failure to submit a request for a preliminary ruling when required by a court of last instance amount to a violation of the right to effective judicial protection enshrined in Article 24 of the Spanish Constitution



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