



REPUBLIC OF SLOVENIA
GOV.SI



IN COOPERATION WITH



FACULTY OF LAW,
ECONOMICS
AND FINANCE

Submodule 4:

The context and the content of the preliminary reference



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A. The context of the preliminary reference

- In which context a preliminary reference could be formulated?
 - The preliminary reference has to be formulated in the context of an ongoing procedure before a court and the answer to the preliminary reference must be necessary to solve the dispute
 - In other words, a court could not submit a preliminary outside of a real procedure/dispute. For instance, a judge that come across an issue on the interpretation of a regulation while randomly reading the text of this instrument cannot submit a preliminary reference
 - The dispute must be pending: once the dispute has terminated, the CJEU has no longer jurisdiction to answer the preliminary reference ([C-338/85, Pardini](#))
 - The preliminary reference may arise in all sorts of proceedings: civil, criminal, constitutional, administrative, social law...

B. A preliminary ruling relevant to solve a dispute before a national court

- Furthermore, the answer to the preliminary reference must be fundamental for the national court to give judgment on the case at hand. Without the solution on the interpretation or validity of EU law, the
- The CJEU has rejected preliminary references because they were not relevant to solve the case
- For instance, in [C-318/00, *Bacardi-Martini*](#), the CJEU found that ‘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’ (para. 43)

B. A preliminary ruling relevant to solve a dispute before a national court

- It corresponds to the court which submits the preliminary reference to self-assess ‘the necessity for a preliminary ruling so as to enable it to give judgment’ ([C-83/78, Pigs Marketing Board](#), para. 25)
- In the preliminary reference submitted by the national court to the CJEU, it should appear manifestly reflected the relevance of the preliminary ruling for the national court to render a judgment
- As the CJEU stated in [C-244/80, Foglia v Novello](#), ‘it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment’ (para. 17)

C. A question on the interpretation or validity of EU law

- According Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), a preliminary reference could be about:
 - **The interpretation of EU law:** Courts can ask questions on the interpretation of provision or any source of EU law
 - **The validity of EU law:** Courts can also ask about the validity of EU law except EU primary law

I. A question on the interpretation of EU law

- The most common preliminary references are those concerning the interpretation of EU law
- All the CJEU case law examined in the UpJudCoop project concerns questions on the interpretation EU law
- **Questions on the interpretation of EU law cover all sources of EU law:**
 - EU primary law (e.g. the Treaty, the Charter of Fundamental Rights; general principles of EU law)
 - Acts of the EU institutions, bodies, offices, or agencies
 - Judgments of the CJEU judgments
 - International agreements concluded by the EU and acts of bodies established by such agreements

I. A question on the interpretation of EU law

- Could a national court ask the CJEU about the conformity of EU law with national law?
 - The answer is no. The only procedure in which the CJEU can assess the conformity of national law with EU law is the infringement proceeding launched by the European Commission (Articles 258 – 259 Treaty on the Functioning of the European Union ('TFEU'))
 - As the CJEU stated in [C-172/82, *Inter-Huiles*](#), 'Although in the context of proceedings under Article 177 of the Treaty (now Article 267 of the TFEU) the Court may not rule on the compatibility of the provisions of a national law with the Treaty, it has jurisdiction to provide the national court with all the criteria of interpretation relating to Community law which may enable it to assess such compatibility' (para. 8)

I. A question on the interpretation of EU law

- Example of preliminary references on the interpretation of EU law:

- In the field of criminal judicial cooperation

Question on the interpretation European Arrest Warrant Framework Decision

‘Must Articles 3(2) and 4(3) EAW Framework Decision be interpreted as meaning that a decision of a public prosecutor’s office which terminated an investigation opened against an unknown person, during which the person who is the subject of the EAW was interviewed as a witness only, may be relied on for the purpose of refusing to execute that EAW?’ ([C-268/17, AY](#))

- In the field of civil judicial cooperation

Question on the interpretation of the 2001 Evidence Regulation

‘Under [Regulation No 1206/2001], does the requested court have the right to demand from the requesting court an advance for witness expenses or reimbursement of the expenses paid to the witness heard, or must it cover them out of its own financial resources?’ ([C-283/09, Weryński](#))

II. A question on the validity of EU law

- Preliminary references on the validity of EU law can concern all sources of EU law except those sources of primary law such as the Treaties or the Charter of Fundamental Rights
- Preliminary references could not submitted on the validity on CJEU judgments
- It is not entirely clear to which extent a preliminary reference can be formulated on the validity of international agreements concluded by the EU or the acts of bodies established by international agreements concluded by the EU
- The CJEU could also examine the validity of EU non-binding acts: 'It is settled case-law that the fact that a measure of Community law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling' ([C-188/91, Deutsche Shell](#), para. 18)

II. A question on the validity of EU law

- Example of a preliminary reference on the validity of EU law:

C-61/22, RL v Landeshauptstadt Wiesbaden

‘Does the obligation to take fingerprints and store them in identity cards in accordance with Article 3(5) of Regulation [2019/1157] infringe higher-ranking EU law, in particular

(a) Article 77(3) TFEU;

(b) Articles 7 and 8 of the [Charter],

(c) Article 35(10) of the [GDPR];

and is it therefore invalid on one of those grounds?’



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