Making a Reference and Formulating a Question to the CJEU

Beatrice Ramascanu, 19 September 2016, Trier
Structure

- Background
- Drafting an order for reference
- Content and form
- Formulating the questions
- Good practices
Legal framework – Art. 267 TFUE

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;
Preliminary ruling

- fundamental mechanism of EU law aimed at enabling the courts and tribunals of the Member States to **ensure uniform interpretation and application** of that law within the EU.

- cooperation between the Court of Justice and the courts and tribunals of the MS.

- “dialogue“ between judges.

- domestic courts - ‘ordinary courts of the EU legal order’ (Opinion 1/09, para. 80).
Key elements

Who?
- Art. 267 TFUE

When?
- In cases where EU law is applicable

Why?
- Because is relevant/necessary for a MS court in order to decide the case

How?
- Carefully!
Actors – a play in three acts

- **National court:**

  - the initiative
  - remains the master of the case (can withdraw the question – Article 100 Rules)
  - is absent in the procedure before the ECJ but remains the partner in dialogue

- **Court of Justice**

  - Rules of procedure – Title III

- **National court:**

  - Will apply the ruling of the ECJ to the facts of the case
Steps

- Are you a “court” within the meaning of Article 267 par. 2, 3?
- Is EU law applicable in your case?
- Is this interpretation of EU law necessary for solving the case?
- Make your homework before!!! - research of ECJ’s case-law – CILFIT!!!

Request for a preliminary ruling
Are you a “court”?

A. the court
- Established by law/not by the parties
- independent of other branches of government
- Permanent/not temporary

B. the procedure
- compulsory jurisdiction
- whose procedure is *inter partes*
- adversarial procedure
- applying rules of law
- Binding decision (res judicata)
When?

- Case may be referred at any stage of the proceedings (including in legal aid proceedings and in separate proceedings for taking evidence)

- After both sides have been heard on the issue (proper administration of justice, defence rights)

- At a point in time when you are in a position to determine the factual and legal framework.
Why?

- A question of Union law is raised in the case.
- No matter if the court ex officio identifies the incidence of EU law in the case or the parties raise the issue.
- Only if the judge believes that the interpretation to be given by ECJ is necessary for adjudicating the case.
Tools

- See:

  Rules of the Court
  Article 94
RECOMMENDATIONS to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01)

Content

- 1. Subject-matter of the dispute. Relevant facts
- 2. Domestic law. Relevant case law
- 3. European Union law
- 4. Reasons which prompted the court to inquire about the interpretation of European law
- 5. View of the referring court (optional)
- 6. Reasons which prompted the court to ask for the application of the expedited procedure/urgent preliminary ruling procedure (if applicable)
The requirements concerning the content of a request for a preliminary ruling are explicitly set out in Article 94 of the Rules of Procedure of which the referring court is supposed, in the context of the cooperation instituted by Article 267 TFEU, to be aware and which it is bound scrupulously to observe

- order of 3 July 2014 in Talasca, C-19/14, EU:C:2014:2049, parag 21
- C-692/15, C-694/15, Security Service Srl, 12 May 2016
Facts

- the order should set out in concise form the given facts of the main proceedings (not only the subject matter of the case)

- So, wait until the facts of the case have been established (C-36 and 71/80, Irish Creamery Milk Suppliers Association, 10 March 1981, para. 9)

- “it is for the national court to establish the facts” (Case C-31/09, Bolbol, 17 June 2010, para 40)
ECJ is not a fact-finding body - the facts presented by the national court are essential for the interpretation to be given in a particular case.

ECJ relies entirely on the facts presented by you the – separation of functions.

NO domestic files attached in order to “offer” the possibility for the Court to establishes itself the facts.

( C-181/09, Canon Kabushiki Kaisha, 17 sept 2009)
Facts (3)

- C-454/08, C-454/08, Seaport Investments Limited, Order of 20 May 2009, para 12
- “the order for reference does not contain any information setting out the legislative and factual context of the main proceedings, since the Court of Appeal in Northern Ireland merely appended to the letter accompanying the order for reference documents relating to the proceedings before the national courts.”
- C-141/16, Stanleybet Malta Ltd, 20 July 2016, para.11
“whilst, according to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of the law involved in the main action, is a matter for the national court it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court.”

(Case C- 244/80, Foglia II, 16 December 1981, para. 21)
Legal context

- relevant national law provisions - with publication references to official journals - it must be the relevant provision that apply *ratione temporis*)

- relevant case law of national courts (Constitutional Court, Supreme Courts, and the source – case-law data base, compendium, if possible internet references)
Legal context (2)

- relevant EU law – as accurate as possible

- “The Court has a duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts.”

- (Case C42/96 Immobiliare SIF[1997] ECR I-7089, para. 28)
Legal context (3)

- relevant EU law – *as accurate as possible*

- Order, C-325/15, Z. Ś. And others, 18 February 2016, lack of identification of the specific paragraph of Article 8 of Regulation No 561/2006 on the harmonisation of certain social legislation relating to road transport
Parties’ claims and arguments

☐ **Summary of claims and arguments of parties** (not *in extenso* – *limit of 10 pages totally*)

☐ A reference can be made even if the parties in the case do not invoke EU law in support of their claims (C-222/05-225/05 Van der Weerd and others, 7 June 2007)
Necessity of PR

- **Explanation** of the reasons which prompted the court to inquire about the interpretation of EU law

- **Why** PR enables the national court “to give a judgment” and to solve the dispute

- Indication of the **relationship** between the EU law applicable to the case/domestic legislation or the particular case
Necessity of PR

“The Court has also stressed that it is important for the national court to set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling.”

(see, inter alia, the orders in Case C-9/98 Agostini, para. 6, of 13 July 2006, C-166/06)
Rebuttal – presumption of relevance

- The interpretation requested by the national court has no connection with the reality and subject-matter of the case (C-322/98, Kachelmann, 26 September 2000)

- Hypothetical (C-83/91, Meilicke, 16 July 1992, Order in C-82/13, Società cooperativa Madonna dei miracoli, 7 October 2013, para. 12, 14)

- No factual or legal material before it in order to give a useful answer (C-648/11, MA, BT, DA, 6 June 2013, C-119/05, Lucchini SpA 18 July 2007, paras 43-44.)
Question(s) – What to ask?

- NO interpretation of domestic law (revise Article 267 TFUE)
- Order, C-23/15, Andre, 19 March 2015

  «Is the Belgian law of 15 April 1958 and (...) in conformity with Article 43 CE et 49 CE?»

- Order, C-483/11, Boncea, 14 December 2011
- Law on compensation payable to persons sentenced in political trials under the Communist regime, admissibility of national legislation reducing the right to compensation for non-material harm suffered, Article 5 of ECHR, of Article 8 of the Universal Declaration of Human Rights
Order, C-462/11, Cozman, 14 December 2011

First Additional Protocol to ECHR/ national legislation establishing reductions in the salaries of several categories of public-sector employee is lawful

Order, C-305/14 Babasan, 10 February 2015

National legislation according to which prior authorisation is required for the organisation of a public meeting — Failure to implement EU law

Pure internal situation even if the question refers to EU Charter of fundamental rights and Article 6 of TUE
Outside the scope of EU law…*but*

- domestic law renders applicable the provisions of EU law due to a reference made by that law to the content of those provisions
- reference has to be in a direct and unconditional way, in order to ensure that internal situations and situations governed by EU law are treated in the same way
- It in the interest of the EU legal order to give a uniform interpretation of EU provisions irrespective of the circumstances in which it is to be applied.

(see, inter alia, judgment of 18 October 2012 in Nolan, C-583/10, para 45)
Formulating the question(s)

- the questions should be self-contained and self-explanatory

- open - leading questions

- it should be understandable without the need to refer to other documents/ no appendices will be notified or translated
The question(s)

- “Should Article X of EU Directive Y be interpreted in a way so as to **preclude** national legislation according to which....?”

- Be **SPECIFIC**

- Relate to your **PARTICULAR** situation

- **GENERAL** answers to generic questions might clarify some aspects of EU provisions but it might not be so useful for the circumstances of your **specific case**.
General or specific?

- “Habitual residence” – Article 8 Regulation 2201/2003
- C-523/07, A, 2 April 2009
- “corresponds to the place which reflects some degree of integration by the child in a social and family” + criteria for the referring court
- C-497/10 PPU Mercredi [2010], 22 December 2010 but specific – INFANT- the integration of their primary carer in her social and family environment
Formulating the questions – how many?

- It is prudent to aim to ask no more than **two to five** questions and to avoid too many internal sub-questions.
- Asking too many intricate questions or sub-questions normally leads to the Court reformulating them.

- C-115 and 116/81, Adouï and Cornuaille, 18 May 1982, **29 questions**
- C-343/90, Manuel Jose Lourenco Dias, -8 questions but 6 were inadmissible as there were irrelevant to the particular facts of the case (not too enthusiastic even if you have interesting questions in your mind)
- C-83/91, Wienand Meilicke, 16 July 1992, -8 questions and sub-questions with sub-points and sub-letters
Check list!

- Questions about the question – Socratic method
  - What was the point of asking that question?
  - Why do you think I asked this question?
  - Am I making sense? Why not?
  - What else might I ask?
  - What does that mean?
Court’s opinion – optional element

- too much to ask for a referring court that is not a specialist or higher-level court to attempt to furnish its own suggested answers (Craig and De Burca)

- it is an ‘optional’ element which adds value but will “depend on the time and resources available to the referring court whether they are included in the reference”

- Contributes to the idea of dialogue between judges and nourish the essence of this cooperation mechanism.
Reasons for special procedure

- Expedited procedure – Article 105 Rules of the Court
- Urgent procedure - Article 107
  - an unambiguous form
  - Clear indication of the form of procedure and Article
  - at the head of the page/or in a separate judicial document/ a covering letter from the referring court
Form – how to draft?

No standard form imposed/any form allowed by national legislation

- the name/title of the document – order, ordinanza, incheiere
- This document will serve as the basis for the proceedings before the Court
- **Style** – simple, clear, short sentences
- 10 pages – succinct but complete
- Paragraphs and pages – numbered
- Typewritten form
Where to send?

- Registry of the Court of Justice, Rue du Fort Niedergrünewald, L-2925 Luxembourg

- ASP
Question/s regarding the interpretation of Article … of the TFEU and/or article … of Regulation …/Directive … , considering that a decision on the question is necessary to enable the present court to give judgment in the present case

Subject-matter of the dispute. Relevant facts

- Claim
- Defence /counter claim
- Facts established by the court
Romanian template

- Romanian law. Relevant case law
- European Union law
- Reasons which prompted the court to inquire about the interpretation of European law
  - identification of the matter of law, for example: the way an EU provision should be interpreted OR the existence of an apparent conflict between national provisions and EU provisions OR the manner in which EU law should be applied etc.)
9. precisely why a decision on this particular matter is (also) necessary to enable the court to give judgment in the case

10. … (succinct analysis of the CJEU jurisprudence on the issue OR a statement to the effect that the court did not identify any relevant CJEU case law on the matter; succinct analysis of the way in which Romanian courts interpret(ed) and/or applied the EU law provision/s and/or case law and, if applicable, the existence of national divergent case law and summary of the main arguments)
11. … (identification of circumstances that are different in the present case which make the court doubt the answer to the question, in light of the CJEU case law previously summarised)

12. … (if applicable, the existence of previous preliminary references from Romania on the same matter, already closed or still pending, identification of differences).

(brief summary of the arguments of the parties or the statement that the parties chose not to express their views may be included at points 9-12 above)
Romania template

- View of the court (optional)
- Reasons which prompted the court to ask for the application of the expedited procedure/urgent preliminary ruling procedure (if applicable)

- No documents/files attached (C-441/10, Anghel)
AUTO PLANTEANDO CUESTIONES PREJUDICIALES AL TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA

1. OBJETO DEL LITIGIO

2. HECHOS

3. DERECHO NACIONAL

4. DISPOSICIONES COMUNITARIAS

5. ARGUMENTOS DE LAS PARTES

6. FUNDAMENTOS

7. PARTE DISPOSITIVA: CUESTIÓN O CUESTIONES QUE SE FORMulan AL TRIBUNAL DE JUSTICIA
Thank you!

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