



**EU Preliminary Ruling  
22 October 2020**

**Making a Reference and Formulating a  
Question to the CJEU**

**Judge Beatrice Ramascanu [AD/2020/08]**



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*The answers you get depend  
on **the questions** you ask.*

*(Thomas S. Kuhn)*

# Formulating the question

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- WHO?
- WHAT?
- WHY?
- WHEN?
- WHERE?
- **HOW?**

# Poll

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- Have you ever asked the Court of Justice a question in the preliminary ruling procedure?
- A. Yes
- B. No

# Poll

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If the answer is yes, the difficult part of the experience was...?

- A. Deciding to refer
- B. Formulating the question(s)
- C. Drafting the order
- D. Other reasons

# Structure

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- „*Semantics*”
- Types of PR
- Formal aspects

What makes a question a good question in the preliminary ruling procedure?

Apart from...*being admissible*



# ..from Costa ...up to date

- Flaminio Costa v. E.N.E.L., C 6/64
- “the allegation that *the Law of 6 December 1962 and the presidential decrees issued in pursuance of that Law infringe Articles 102, 93, 53 and 37 of the Treaty*”.
- The “*question*” was if the national provisions were valid under the EU law.

# Flaminio Costa v. E.N.E.L., C 6/64

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- the Court has power to extract from a **question imperfectly formulated** by the national court those questions which alone pertain to the interpretation of the treaty
- Consequently, a decision should be given by the court not upon the validity of an Italian law in relation to the treaty, **but only upon the interpretation** of the abovementioned articles in the context of the points of law stated by the giudice conciliatore.

# Good question

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- *...ends in a question mark= RELEVANT*
  - *....can be answered by ECJ*
    - Identifiable
    - Self explanatory
    - Clear/with short sentences
- Concise ....but not elliptical/limited number
  - Specific/not general
  - Open leading answers

# Shared responsibility

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- (...) it is solely for the national court before which a dispute has been brought, and which must assume **responsibility** for the subsequent judicial decision, 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 (judgment of 26 July 2017, Persidera, [C-112/16](#), [EU:C:2017:597](#), par. [23](#))

*...a decision on the question is necessary*

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- **necessary** for the effective resolution of a dispute concerning EU law

(judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, para. 50, 7 questions)

# Relevant

- Start with the end in mind



- a real need for a request for a preliminary ruling in order **to enable you to deliver a judgment**

(see Article 267 par. 2 TFEU)

# “a must”

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- ✓ statement of the reasons which prompted you 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 case before the referring court

# Presumption of relevance

- *However*, a reference for a preliminary ruling made by a national court is to be rejected where it is **quite obvious** that the interpretation of EU law that is sought is **unrelated** to the actual facts of the main action or its object, where the problem is **hypothetical**, or where the Court does not have before it **the factual and legal material** necessary to give a useful answer to the questions submitted to it
  - (order of 17 January 2019, *Cipollone*, C-600/17, EU:C:2019:29, para 21)

# Shared responsibility

- When ruling on the interpretation or validity of EU law, the Court **makes every effort to give a reply which will be of assistance** in resolving the dispute in the main proceedings,
- but it is for the referring court or tribunal **to draw case-specific conclusions**, if necessary by disapplying the rule of national law held incompatible with EU law.
- ( see *RECOMMENDATIONS to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*)



# Can be answered by ECJ

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## Subject matter

- **NOT** for interpretation of rules of national law
- **NOT** on issues of fact

# Identifiable

- must appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end, *“schedule”*.



# No standardized form

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- Do you have a national standardized form for the request for the preliminary ruling?
- A. Yes
- B. No
- C. not aware of such template
- D. no need to have such template

# Self explanatory/Self sufficient

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- It must be possible to understand them on their own terms
- without being necessary to refer to the statement of the grounds for the request.

# Let's practice 1

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- Refusal to pay certain social benefits
- Applicant pleads that denying those benefits would amount to a breach of the prohibition of discrimination laid down in 'European law'
- The national court send (three months later) an additional document entitled '*Summary of the facts relating to the order of 17 December 2013*' providing some information to enable a determination of, *inter alia*, the applicant's status as a worker

# Let's practice 2 – The questions

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1) *Is the second sentence of Paragraph 7(1) of Social Code compatible with [Union] law?*

(2) If not, must the legal situation be altered by the Federal Republic of Germany, or does a new legal situation immediately arise, and if so, what is it?

(3) Does the second sentence of Paragraph 7(1) of Social Code remain in force until (any) necessary change to the law has been effected by the institutions of the Federal Republic of Germany?'

(C-19/14, Order of 3 July 2017, Ana – Maria Talasca)

# Poll- The questions lack one or more of the features

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- A. Admissible
- B. Relevant
- C. Self explanatory
- D. Are in conformity with the requirements of ECJ' s caselaw

# Lexical semantics

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- simply
- clearly
- precisely
- avoiding superfluous detail

*( see RECOMMENDATIONS to national courts and tribunals  
in relation to the initiation of preliminary ruling proceedings)*

# Concise

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Concise ...but not deficient

Simply .... short sentences,  
phrase, topic, number of  
questions

Wording– n.b. *national concepts*

# How many?

- no more than two to five questions
- avoid too many internal sub-questions
- asking too many intricate questions or sub-questions normally leads EXJ to reformulate



# Perfection...

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- *Overly detailed questions... serve no purpose and are likely to prove a waste of time”*

(Carsten Zatschler)

# *Simply...* superfluous details

- "Must Article 2(b) of Directive 93/13, as regards the definition of "consumer", be interpreted as including in or, conversely, as excluding from, that definition natural persons who have, as guarantors/sureties, concluded additional acts and contracts (guarantee contracts, contracts providing immovable property as security) ancillary to the credit agreement entered into by a commercial company for the purposes of its business, where those natural persons have no connection with the activities of the commercial company and have acted for purposes unconnected with their trade, business or profession, in the light of the fact that, initially, the applicants were natural persons acting as guarantors of the principal debtor — a legal person of which one of the applicants was director — in connection with a loan agreement concluded with the defendant creditor, but subsequently the agreement in question was amended and the original debtor, of which the applicant referred to above was director, entered into a novation of the loan, with the agreement of the defendant creditor, with another legal person, neither of the applicants holding the position of director of that legal person but having undertaken, as sureties, for the benefit of the new debtor (a legal person), the obligation under the novation vis-à-vis the new debtor?"

- (Case C-534/15, Pavel Dumitras, Order of 14 September 2016)

# If you were the Court ...

- 1) Must Article 1(3) of Directive 2003/88/EC, in conjunction with Article 2 of Directive 89/391/EEC be interpreted as excluding from the ambit of the directive activity such as that of parental assistants, performed by the applicants?
- 2) If the answer to the first question is in the negative, must Article 17 of Directive 2003/88/EC be interpreted to the effect that an activity such as that of parental assistants, performed by the applicants, may be the object of a derogation from the provisions of Article 5 of the directive in accordance with paragraphs 1, 3(b) and (c) or 4(b) of Article 17?
- 3) If the answer to the preceding question is in the affirmative, is Article 17(1) or, if applicable, Article 17(3) or (4) of Directive 2003/88/EC to be interpreted to the effect that such a derogation must be explicit, or may it also be implicit as a result of the adoption of special legislation laying down other rules for organising working hours for a particular professional activity? If such a derogation need not be explicit, what are the minimum conditions for it to be considered that national legislation introduces a derogation and may such a derogation be expressed in the terms deriving from Law No 272/2004?

# And so on...

- 4) If the answer to questions 1, 2 or 3 is in the negative, must Article 2(1) of Directive 2003/88/EC be interpreted to the effect meaning that the period spent by a parental assistant with the assisted minor, in his own home or in another place of his choice, constitutes working time even if none of the activities described in the individual employment contract is performed?
- 5) If the answer to questions 1, 2 or 3 is in the negative, is Article 5 of Directive 2003/88/EC to be interpreted as precluding national provisions such as those in Article 122 of Law No 272/2004? And if the answer should confirm that paragraph (3)(b) and (c) or paragraph 4(b) of Article 17 of the directive is applicable, must that article be interpreted as precluding that national legislation?

# ...and finally

- 6) If the answer to question 1 is in the negative and the answer to question 4 is in the affirmative, may Article 7(2) of Directive 2003/88/EC be interpreted to the effect that it does not, however, preclude the award of compensation equal to the allowance that the worker would have received during annual leave, because the nature of the activity performed by parental assistants prevents them taking such leave or, even though leave is formally granted, the worker continues in practice to perform that activity if, in the period in question, he is not permitted to leave the assisted minor? If the answer is in the affirmative, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?
- 7) If the answer to question 1 is in the negative, the answer to question 4 is in the affirmative and the answer to question 6 is in the negative, does Article 7(1) of Directive 2003/88 preclude a provision such as that contained in Article 122(3)(d) of Law No 272/2004 in a situation in which that law gives the employer discretion to decide whether to authorise separation from the minor during leave and, if so, is the inability de facto to take leave as a result of the application of that provision of the law an infringement of EU law that meets the conditions for the worker to be entitled to compensation? If so, must such compensation be paid by the State for infringement of Article 7 of that directive or by the public body, as employer, which has not provided for separation from the assisted minor during the period of leave? In that situation, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?

....and guess what

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In view of the answer given to the first question, there is no need to answer Questions 2 to 7

(C-147/17, Sindicatul Familia Constanta, 20 November 2018,  
ECLI:EU:C:2018:926)

# Too general/too specific

- it is not the Court's task to deliver advisory opinions on **general** or hypothetical questions
- if the question is insufficiently specific to your particular case
- being too specific risks to be perceived as *fact-bound*



# Neither ...nor

- A good statement of the question has to include some **specific** of the material facts at an appropriate **level of generality**

- ***in circumstances as those in the present case***



# Let's practice (2)

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- Article 8 Regulation 2201/2003 -jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is **habitually resident** in that Member State at the time the court is seised.

# Background (1)

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- According to that case-law, the ‘habitual residence’ of a child corresponds to the place which reflects **some degree of integration** by the child in a social and family environment.
- That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case.
  - (judgments of 2 April 2009, *A*, C-523/07, EU:C:2009:225, and of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829,).

## Background (2)

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- Such factors include the duration, regularity, conditions and reasons for the child's stay on the territory of a Member State and the child's nationality.
- In addition, the relevant factors vary according to the age of the child concerned.

# Facts

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- A+B (Spanish/French unmarried couple) live together in Spain
- Child C born on 11 August 2010 in Spain
- In the week following the birth of C, couple separated
- C **-two months old-** and B left Spain and moved to France
- C's habitual residence, before her departure, was in Spain and B was the only person with 'rights of custody' / Article 2(9) of the Regulation.

# Legal proceedings

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Spain – A for parental responsibility, shared residence and rights of access and return of C

France – B for exclusive parental responsibility and to establish C's domicile at her address in France

Spanish court - jurisdiction – Article 8 and 10 Regulation 2201/2003

# Request for PR

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- Please clarify the appropriate test for determining the habitual residence of a child for the purpose of:
  - Article 8 of Regulation no. 2201/2003;
  - Article 10 (*child abduction*) Regulation no. 2201/2003.

# Let's rephrase

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- Specific/not general

# C-497/10 PPU, *Mercredi*

- where the situation concerned is that of **an infant** who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and, second, with particular reference to the child's age, the **mother's** geographic and family origins and the family and social connections which the mother and child have with that Member State.

# Let's practice...further

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- Antonio + Ariadne (Italian/Greek married couple living in Italy)
- They decide that the couple's baby should be delivered in Athens (Greece) and after that Ariadne would return to the marital home in Italy with the child.
- The couple travelled to Athens, Ariadne gave birth on 3 February 2016.
- No return to Italy

# Legal proceedings

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- Italy – Antonio asks for divorce, exclusive custody, return of the child to Italy
- Greece – Antonio (in parallel) application for the return of the child

# Case A, Mercredi....or PR?

- *‘What is the appropriate interpretation of the concept of “habitual residence”, within the meaning of Article 11(1) of [Regulation No 2201/2003], in the case of an infant who **fortuitously or due to force majeure** has been born in a place other than that which her parents with joint parental responsibility for the child intended to be the place of her habitual residence, and was then unlawfully retained by one parent in the State where she was born, or removed to a third State. More specifically, is physical presence a necessary and self-evident prerequisite, in all circumstances, for establishing the habitual residence of a person, and in particular a newborn child?’*

(see Judgment of 8 June 2017, C-111/17 PPU – OL, ECLI:EU:C:2017:436)

# Wording...what' s in a name

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1. Article X of (*Treaty, Regulation, Directive....*) **precludes** a domestic provisions/an interpretation such as...?

2. Is Article X of (*Treaty, Regulation, Directive....*) to be interpreted as/to be construed as opposing to a national legislation imposing....?

# Wording...what' s in a name

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- Article X of.... means that, in the circumstances as those in the main proceedings....a national provision/legal practice is contrary to....
- If the answer is YES/No...

# Wording...what's in a name

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- Is Article 1 of ...**to be understood that**...in circumstances as those in the main proceedings...
- Should Article X of EU Directive Y be interpreted in a way **so as to preclude national legislation** according to which....?”

# FYI

- Even though formally the referring court or tribunal limits its questions to the interpretation of **particular provisions of EU law**, such a situation does not prevent the CJ from providing it with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions.

(C-444/09 McCarthy, 5 May 2011, par 24)

# Validity of secondary EU law

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- Is Article X of the Directive Z void?
- Is Article 7 of the Regulation void or invalid on grounds that...?

# Interpretation of national law?

- *Caixa d'Estalvis i Pensions de Barcelona v. Generalidad de Catalunya*, Case C-139/12, ECLI:EU:C:2014:174
- Paragraph 34: *It should nevertheless be recalled that, under certain very specific conditions, the purely internal nature of the situation concerned will not prevent the Court from answering a question referred pursuant to Article 267 TFEU. That may be the case, in particular, if national law requires the referring court to grant the same rights to a national of the Member State of that court as those which a national of another Member State in the same situation would derive from EU law or where the request for a preliminary ruling concerns provisions of EU law to which the national law of a Member State refers in order to determine the rules applicable to a situation which is purely internal to that Member State.*
- *Ullens de Schooten*, C-268/2015, EU:C:2016:874
- *K and B*, C- 380/17, ECLI:EU:C:2018:877

# Charter, the good/the bad

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- EU Charter but without any other link/legal base in EU law (Article 51 par. 1)
- any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction

# Charter, the good/the bad

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- Article X of the Regulation, Directive ....in the light of Article Y of the Charter/ and the Article Y of the Charter precludes a national provision....
- **NOT**
- Article X of the Charter.....means that?

.....*a shadow cannot*.....

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# How? Formal perspective

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- there is no standard imposed by the Court
- According to national tradition but main points in the Annex to the Recommendations (2019 update)
- Romanian template

# Formal perspective - template

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## Interim judgement:

- introducing part:
  - the Court's structure
  - the object of the case and the parties
- the discussion on the question to be referred, the necessity of submitting - issue dealt with in the last panel
- the reasoning of the Court upon the necessity
- the disposal of submitting the question to the ECJ and of staying the procedure

# Content – formal perspective 1

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- A4 size paper
- Typewritten on white
- Unlined
- Times New Roman, Courier or Arial
- In at least 12 point in the body of the text
- At least 10 point in the footnotes
- With 1,5 line spacing and horizontal and vertical margins of at least 2,5 cm
- All the pages of the request and the paragraphs they contain should be numbered consecutively
- The request for the preliminary ruling must be dated and signed.

# Formal perspective 2

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- stick to 10 pages
- reserve a separate and clearly identified section for the question/s
- render anonymous one/more persons involved in the proceedings

# Expedited and urgent procedures

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- set out precisely the matters of the fact and law which establish the urgency and, in particular, the risks involved in following the standard procedure
  - parental authority, custody of young children, person in custody or deprived of his liberty
- the referring court/tribunal shall briefly state its view on the answer to be given to the questions referred

# From Costa....to SHARED RESPONSIBILITY

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- **Flaminio Costa v. E.N.E.L., C 6/64** ....to extract from a question *imperfectly formulated* by the national court those questions which alone pertain to the interpretation of the treaty
- to a more rigorous approach?

But keeping in mind

KEYSTONE of EU judicial system

DIALOGUE between courts

INSTRUMENT OF COOPERATION.....?

# Cooperation

- Nonetheless, in the procedure laid down by Article 267 TFEU providing **for cooperation** between national courts and the Court of Justice, it is for the latter to provide the national court with an answer **which will be of use** to it and enable it **to determine** the case before it.
- With this in mind, the Court may, where necessary, **have to reformulate the questions referred to it.**

(judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 16).

# Shared responsibility

- a Member State is obliged to make good damage caused to individuals as a result of breaches of European Union law for which it is responsible applies to any case in which a Member State infringes European Union law, whichever is the authority of the Member State whose act or omission was responsible for the breach, and that principle **also applies, under specific conditions, to judicial bodies**
  - (C-224/01 *Köbler* par. 31 and 33 to 36; C-173/03 *Traghetti del Mediterraneo*, par. 30 and 31, Case C-154/08 *Commission v Spain*, par. 125).



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Judge *a court* by its questions  
rather than by his answers.

*(Voltaire)*

# Thank you!

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