

Case studies: “To refer or not to refer”

I. Doubts about Union law?

Example 1:

Francois, a French citizen, lives in Vienna in Austria. He wants to open a shop there to sell arms. When he shows up at the authorities to get a license for his shop, the Austrian authority denies it. It invokes that according to § X of the Weapon-Act of Austria you must be an Austrian citizen to obtain a business license for arms trades. Non-Austrian citizens are not allowed to get such a license. Francois is disappointed that he is not allowed to open the shop as planned. He initiates legal proceedings against the public authority that denied the license. Before court, Francois claims that § X of the Austrian Weapon-Act violates Article 45 TFEU. Pursuant to Article 45 (2) TFEU, the freedom of movement for workers entails the abolition of any discrimination based on nationality as regards employment and other conditions of work.

Will the Austrian judge make a reference?

Example 2:

Franz has a photo shop near Hamburg. Inter alia, he buys and imports cameras to sell them to his customers. The German financial authority sends him a declaration and imposes a fee for his last import of cameras from Italy. The financial authority makes its decision on ground of Art. X of an EU regulation. Franz does not want to pay the fee and raises a claim against the decision.

Judge Julia must check if the decision of the financial authority is legal. She wonders if it's legal base, Art. X of the EU regulation, violates the principle of free movement of goods. Art. 28 TFEU eliminates customs duties within the EU.

Will she make a reference?

II. Relevance

Example:

Italian law foresees that – under certain circumstances – a judge can be held officially liable for damages caused by severe mistakes when executing official duties. Judge Giuseppe is irritated. He wants to take the chance to use whatever case to ask the CJEU whether he is independent within the meaning of Union law.

Can he raise this question using whatever current case as a framework?

III. Exceptions from the obligation to refer

Example:

You have to solve a case concerning the Anti-Discrimination Directive. The question is if an employer can prohibit Muslim employees to wear a headscarf at work. In your case [compare C-188/15] a Muslim employee rendered services as software designer. She was dismissed because of a complaint of a customer of the company, who was irritated about her wearing a headscarf during the meeting.

You know that a Belgian court had made a reference to the CJEU in a similar case [compare C-157/15]: A company rendered inter alia reception services for which the employees are currently in contact with customers presenting the company to the exterior. All employees of the Belgian company signed a code of conduct – applicable to all employees alike – that prohibited everybody to wear any visible religious signs in the workplace. A Muslim employee was dismissed because she did not want to take her headscarf off at work.

Should you refer despite the many similarities of the Belgian case with your case?