

The preliminary ruling procedure pursuant to Article 267 TFEU¹

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The preliminary ruling procedure pursuant to Article 267 TFEU has a particular role among the procedures within the CJEU's jurisdiction. In 2015, the CJEU recorded a total of 713 new cases, 436 (approximately 61%) of which, were references for preliminary rulings³. This amount was only surpassed in 2013 with 450 such references⁴.

Expansion and transfers of competence were among the reasons giving rise to this increased need for judicial control of compliance with Union law. Furthermore, the preliminary ruling procedure fulfils the following functions:

- The preliminary ruling procedure secures legal unity within the European Union by guaranteeing that the law of the union is interpreted and applied uniformly, cf. Art. 19 (1) sentence 2 TEU. Correspondingly, the CJEU deems a reference useful when "*there is a new question of interpretation of general interest for the uniform application of European Union law*"⁵.
- The preliminary ruling procedure serves the further development of law. The CJEU recommends the initiation "*where the existing case-law does not appear to be applicable to a new set of facts*"⁶.
- References for preliminary rulings serve the protection of individual rights. Options for the individual to directly seek legal protection through the CJEU are subject to strict limitations. Despite the new introduction under the Treaty of Lisbon of the right for individual natural or legal persons to initiate proceedings pursuant to Article 263

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³ 2015 Annual Report of the CJEU, p. 9, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/en_ap_jur15_provisoire2.pdf

⁴ 2013 Annual Report of the CJEU, p. 9, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdaq14001enc.pdf>.

⁵ Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 6 November 2012, Official Journal of the European Union 2012, C 338/01 no. 13.

⁶ Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 6 November 2012, Official Journal of the European Union 2012, C 338/01 no. 13.

(4) TFEU, individuals cannot directly initiate proceedings at the CJEU against generally applicable legal acts within the meaning of Article 289 TFEU⁷. Thus, the preliminary ruling procedure provides for the option to initiate indirect proceedings.

1. Right to make a reference for preliminary ruling: The court or tribunal

Article 267 (2) TFEU says that it is a "*court or tribunal*" of a Member State that raises a question for the CJEU decide. The CJEU interprets these terms as independent terms of Union law, irrespective of how they are construed on the national level. Otherwise, it would be at the discretion of the Member States' legislatures to impose statutory limits on the right to make a reference for preliminary ruling. The CJEU has developed the following seven categories to define the terms:

They must be permanent bodies (1) which are established by law (2) and rule independently (i.e. they are not bound by instructions, and they are independent in applying the law and conducting the proceedings within the application scope of statutory provisions) (3) as the compulsory jurisdictions (4). The proceedings must be conducted before at least one independent trial court which takes evidence on disputed facts in order to investigate the circumstances of the case (5) where the proceedings must aim at a decision which has the same effects as a judgment handed down by an ordinary court in application of rules of law (6), and is definitive and enforceable (7)⁸.

2. Reference for a ruling on interpretation or validity

The general question arises whether a reference for preliminary ruling is to be considered for each case where Union law could potentially be applied - regardless of which rules of procedure are valid.

Pursuant to Article 267 (1) TFEU, the CJEU gives preliminary rulings concerning

- **the interpretation of the Treaties:** Article 267 (1) sentence 1 (a) TFEU

⁷ CJEU judgment of 3 October 2013, C-583/11, "Inuit".

⁸ For criteria cf. CJEU, judgment of 31 January 2013, C-394/11 marginal note 38 with further references (for determining whether arbitral tribunals have the right to make references) and judgment of 14 June 2011, C-196/09, marginal note 37 with additional references; summarised by Shirvani in ZfBR 2014, 31ff. - also on the issue of the right of arbitral tribunals; for the right of the federal procurement supervisory committees [Vergabekammern des Bundes] at the federal German antitrust office, Bundeskartellamt, cf. CJEU decision of 13 February 2014, C-555/13.

and

- **the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union**, Article 267 (1) sentence 1 (b) TFEU.

It thus follows that a distinction is to be made between references for rulings on interpretation (Article 267 (1) sentence 1 (a) TFEU) or validity (Article 267 (1) sentence 1 (b) TFEU).

- If the judge must decide how a rule of the Union law is to be interpreted which is applicable to the case at issue, a **reference for a ruling on interpretation** may be a viable option. A reference for a ruling on interpretation can be applied, for example, to a provision of the founding Treaties (TFEU, TEU), to the Charter of Fundamental Rights or the ECHR, and also to rules from protocols, annexes and accession treaties. This context also includes questions regarding the preferential application of Union law over national law⁹.

Example:¹⁰ *§ X of the W-Act of Member State AU determines that one of the conditions for granting business licences for certain arms trades is that a natural person is a citizen of the state AU. A business licence is not granted to K, who is not a citizen of the state AU. He initiated legal proceedings and contended that the national regulation violates Article 45 TFEU as, 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 and employment.*

- *Is Article 45 TFEU to be construed as stipulating that it precludes § X, pursuant to which the nationality of AU is a prerequisite for obtaining the business licence?*

- If the judge deems that a provision of Union law applicable to the case is unlawful, a request for ruling on the **validity** may be viable. The term "act" in Article 267 (2) TFEU must be subject to a broad interpretation. It mainly refers to all acts stipulated under Article 288 (1) TFEU, in particular directives and regulations. But it also

⁹ Latzel and Streinz in NJOZ 2013, p. 97 (97).

¹⁰ Example formed after CJEU, judgment of 4 September 2014, C-474/12.

includes CJEU judgments¹¹.

Example: ¹² *A legal act is imposed against citizen F on the basis of a European regulation. F challenges the legal act in court. The court rules that Article Y of the European regulation breaches Article X TFEU.*

➤ *Is Article Y of the regulation void?*

3. Subject of reference: Union law

It must be borne in mind that the CJEU only decides on the interpretation of *Union law*, cf. Article 19 (1) sentence 2 TEU, Article 267 (1) TFEU. Its decision solely concerns questions of European law and is detached from the main proceedings. The CJEU has no jurisdiction to decide on the validity or interpretation of national rules. Also, the CJEU does not apply the Union law on which it has been asked to rule to the national case at hand. Therefore, the reference for a preliminary ruling does not release the national court from deciding the present legal dispute with regard to the application or interpretation of the national norm, while taking into account the decision rendered by the CJEU.

Example: *In the case presented to her for decision, Judge R asks herself if § 312a (1) German Civil Code is compatible with the new EU-directive for consumer rights. The CJEU will not make the decision for her on a national level. However, it will explain if and in which way, for example, Article X of the directive precludes a national rule which prescribes that ... R must then consider this proviso in her decision with regard to § 312a (1) German Civil Code.*

Frequently, the judge of the main proceedings confronts him/herself with the question whether the national rule which is to be applied by him/her is compatible with the provisions of Union law (see above example). This question is precisely not suitable for submission to the CJEU, as it is not within its jurisdiction to rule on the validity or interpretation of the national rule¹³. However, it will decide how a specific rule of Union law is to be interpreted. It is then the task of the judge at the national level to apply the

11 See Latzel and Streinz in NJOZ 2013, p. 97 (99 ff.).

12 Example formed after CJEU, judgment of 22 October 1987, C-474/12, Circular 314/85 "Foto-Frost".

13 CJEU judgment of 1 December 1998, C-410/96 marginal note 19.

interpretation of Union law as rendered by the CJEU to the specific case and, if necessary, to "correctly" construe the national rule in accordance with the interpretation provided by the CJEU.

4. Relevance

The question raised in the reference must, from the perspective of the judge with jurisdiction on the national level, be relevant for the decision. A question is of no relevance if its answer, regardless of what it may be, can in no way affect the outcome of the case¹⁴. Whether the question is actually relevant for the outcome of the specific case is solely at the discretion of the national court and is not subject to CJEU assessment. For one, the jurisdiction of the Member State court to review this question follows from the wording of Article 267 (2) TFEU: "*if it considers that a decision on the question is necessary to enable it to give judgment*". Furthermore, it stems from the fact that the question of relevance is an issue of national law, for which - as discussed under point 3 - jurisdiction lies solely with the national court, which is ultimately responsible for the decision in the case at hand¹⁵.

As a general rule, the CJEU is bound to the assessment of the Member State court. Thus, the questions submitted enjoy a presumption of relevance¹⁶.

The CJEU may only reject a reference for a preliminary ruling for a lack of relevance if it is obvious that there is no relation between the examination of the validity of a rule of Community law sought by this court and the main action¹⁷.

*Example:*¹⁸ *Judge R is irritated by the fact that under certain circumstances national rules may impose official liability on him. In reference to some legal dispute, he raises the question to the CJEU whether he is independent within the meaning of Union law despite his statutory liability pursuant to national law.*

The CJEU rejects the request due to the fact that it bears no relation to the subject-matter of the main action. Equally, the submission of hypothetical questions constitutes misuse of

14 CJEU judgment of 06 October 1982, C-283/81 marginal note 10.

15 CJEU judgment of 14 December 1996, C-283/95 marginal note 11.

16 CJEU judgment of 15 May 2003, C-300/01 marginal note 31 with further references; CJEU judgment of 19 July 2012, C-470/11, marginal note 17 with additional citations.

17 CJEU judgment of 26 January 1990, C-283/88 marginal note 8.

18 CJEU judgment of 26 January 1990, C-283/88 "Falicola".

the procedure¹⁹, as there is no specific need for legal protection.

5. Discretion or duty to make a reference for a preliminary ruling

Article 267 (2) and (3) TFEU stipulate whether raising a question before the CJEU is at the court's discretion or whether it is obliged to bring the matter before the CJEU.

a. Courts of non-final instance

The sense and purpose of the preliminary ruling procedure is to prevent national case-law and judicial practice that are not in accordance with the rules of Union law from being established in a Member State. Therefore, Article 267 (2) TFEU only grants discretionary rights to those courts against whose decisions there is a specific judicial remedy facilitating a review of the decision by a higher court ("**specific perspective**"), (also) contesting the infringement **of Union law**²⁰. In addition to appeals, the possibility of lodging a complaint against denial of leave to appeal [Nichtzulassungsbeschwerde]²¹ would be sufficient and would have to be granted if submission to the CJEU merited consideration.

The discretion awarded to the courts of first instance is not only solidified into an obligation to submit because one party to a legal dispute contends the invalidity of the applicable Union law and demands the submission. The presumption of validity is embedded in Union law²². The purpose of the preliminary ruling procedure to prevent diverging court rulings on

19 CJEU judgment of 14 December 1996, C-104/95 marginal note 11; CJEU judgment of 17 July 1997, C-130/95 marginal note 60; for further details see Wägenbaur in EuZW 2000, p. 37 (39f.).

20 CJEU, judgment of 22 February 2001, C-393/98 marginal note 16f.; CJEU judgment of 15 September 2005, C-495-03 marginal note 29f. with further references; the "abstract perspective" according to which in Germany only the highest federal courts, the state constitutional courts and the Federal Constitutional Court are under the obligation to submit, cannot comprehensively secure the purpose of the preliminary ruling procedure; cf. Wißmann in Erfurter Kommentar zum Arbeitsrecht, 15. Auflage, Article 267 marginal note 27f.

21 It constitutes a distinct feature of German procedural law, cf. § 133 of the Administrative Court Proceedings Act (VwGO), § 544 Code of Civil Procedure (ZPO): The complaint against denial of leave to appeal is lodged with the *Revisionsgericht* [court hearing appeal on points of law] (Federal Administrative Court [Bundesverwaltungsgericht], Federal Court of Justice [Bundesgerichtshof]). It is an option when leave for appeal has been denied by the *Berufungsgericht* [court hearing the appeal] (Regional Court [Landgericht] or the Higher Regional Court [Oberlandesgericht]). A complaint against denial of leave to appeal requests from the *Revisionsgericht* that it grants leave for the *Revision*. This procedure should entail a review of the last-instance decision concerning legal errors by the *Revisionsgericht*, and ultimately the quashing or correction of the last-instance ruling. If the *Revisionsgericht* grants leave for the complaint against denial of leave to appeal, this enables the review of the last instance decision by an additional court.

22 CJEU judgment of 10 January 2006, C-344/04 marginal note 28f.; CJEU already in judgment of 6 October 1982, C-283/81 marginal note 9.

issues of Union law is precisely not at risk if a court of first instance has no doubts in the validity of Union law.

Example: The authorised counsel of the claimant challenges the validity of the rule of regulation X governing relevance. Judge J does not share the doubts.

If the judge hearing the main action has no doubts concerning the validity of the applicable law, he is under no obligation to raise the question of relevance²³.

However, the discretion of the courts of first instance is reduced to an obligation to make a reference for a preliminary ruling if the judge deems that Union law is invalid in the specific case and he thus does not want to apply it.

Example: Judge J deems Article X of the European regulation invalid and intends to decide the legal dispute without consideration of this provision.

The CJEU claims for itself an exclusive right to dismiss Union law. The requirement of uniform application of Union law by national courts, legal certainty of the Union, would be placed in jeopardy if courts in the Member States had the power to declare Union law invalid. The exclusive jurisdiction of the CJEU to declare Union law invalid follows from the wording of Article 267 (1) TFEU as well as from the supervisory function with regard to the review of acts by Union institutions²⁴.

b. Courts of final instance

Pursuant to Article 267 (3) TFEU courts against whose decisions there is no judicial remedy under national law must make a reference for a preliminary ruling if the present case gives rise to a question of relevance with regard to the interpretation or validity of Union law.

With regard to the duty to make a reference for a preliminary ruling, an initial differentiation must be made whether it arises in the main proceedings or in proceedings for interim

23 CJEU judgment of 22 October 1985, C-314/85 marginal note 14; CJEU judgment of 19 January 2010, C-555/07 marginal note 51 - 53.

24 CJEU judgment of 22 October 1987, C-314/85 marginal note 15ff.

orders aimed at securing the provisional protection of legal rights:

- Decisions in **proceedings for interim orders** are also not considered to be "without judicial remedy" when they can no longer be challenged. There is no duty to make a reference for a preliminary ruling, as a party can seek a decision in the main proceedings and can obtain a ruling on the question pertaining to Union law²⁵.

In the **main proceedings**, the final decision against which there is no judicial remedy lies not only with the federal courts or the Federal Constitutional Court of Germany. A civil judge at a Municipal Court [Amtsgericht] can also be a court of final instance if no appeal can be lodged against its judgment. Article 267 (3) TFEU makes no distinction regarding the duty to refer the case for preliminary ruling on the grounds of whether first instance proceedings seem to be of legal significance or on the grounds of the dispute value²⁶. If national law permits that an exception can be made, and leave can be granted for the appeal, e.g. due to the fact that the question of Union law is a significant matter of legal principle, the judge can thus release himself from his duty to refer the case.

At an early date, the CJEU started developing **exceptions for the duty of last-instance courts to make a reference** for a preliminary ruling. On the one hand, this prevents unnecessary delays of the proceedings before the national court and, on the other hand, the exceptions may also protect the CJEU against congestion. In any case, the wording of Article 267 (3) TFEU, providing for the "all-encompassing" duty to make a reference for a preliminary ruling, seems inappropriate if

- the CJEU has already ruled on a point of law in question in a previous case (so-called **acte éclairé**)²⁷.

or:

- if the question has not yet been answered by the CJEU, but the answer is "without doubt and obvious" (**acte clair**).

If a court of last instance wishes to desist from submitting a reference for a preliminary ruling on the grounds of an "**acte éclairé**", it must be certain that the CJEU had previously

25 CJEU judgment of 24 May 1977, C-107/76 marginal note 5f.;

26 Cf. Broberg und Fenger in EuR 2010, p. 835 (850).

27 CJEU, judgment of 27 March 1963, C-28/62 "Costa"; CJEU judgment of 6 October 1982, C-283-81 "CILFIT", marginal note 14.

ruled on the question and that it does not want to derogate from the answer. The CJEU deems that an "acte éclairé" has occurred where "*the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case*"²⁸. At a later date, the CJEU extensively clarified that the question at issue need not be strictly identical and that it is irrespective what the nature of the proceedings were in which the CJEU had previously answered the question²⁹. If a court is uncertain whether there is existing CJEU case law on the question submitted for preliminary ruling, or if it is uncertain whether the case at issue is indeed materially identical, it must make a reference for a preliminary ruling. A reference for preliminary ruling is not precluded if it turns out that the CJEU has already answered the question. If the national court concludes that it is appropriate, it may also once again submit identical questions of interpretation to the CJEU³⁰. In such cases the CJEU may "only" decide to rule by reasoned order³¹.

The exception of obviousness (**acte clair**) seems to be more venturesome than the exception of "acte éclairé", as the CJEU does claim an exclusive right to interpretation and dismissal. Thus, a national court could avoid a disagreeable reference for a preliminary ruling by invoking that there were no reasonable doubts concerning the correct interpretation of the applicable Union law. The CJEU recognised this risk and imposed strict criteria defining when a court of last instance may invoke "obviousness":

- not only must the national court itself be convinced that the "correct" interpretation is obvious, it must also be convinced that is equally obvious to the courts of the other Member States and to the CJEU;
- the court must also be convinced of the obviousness in all language versions of the applicable Union law;
- the court must be convinced that the particular terminology of Union law is equally unambiguous in all national legal systems of the Member States;
- the court must also be convinced that any other interpretation than its own is impossible also when "*interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at*

28 CJEU, judgment of 27 March 1963, C-28/62 "Costa".

29 CJEU judgment of 6 October 1982, C-283-81 "CILFIT", marginal note 14.

30 Article 104 (2) of the consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.

31 Article 99 of the consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.

*the date on which the provision in question is to be applied*³².

One could presume that under these circumstances no national court would decide against a submission invoking obviousness as it is barely possible to reach this degree of certainty³³. However, the acte clair-doctrine has assumed great significance in practice. Member State courts often exercise a certain "functional flexibility" in its application³⁴, which the CJEU has also countered³⁵.

6. Consequences of failing to make a reference

A distinction must be made between the national and European level with regard to the consequences arising from failing to make a reference for a preliminary ruling:

If a court fails to make a reference despite being under the obligation to do so, it is in breach of the **principle of sincere cooperation** (Article 4 TEU), according to which the Member States are to take any appropriate measure to fulfil their obligations arising from Union law. The European Commission would have the opportunity to initiate infringement proceedings pursuant to Article 258 TFEU, whereas it is unlikely that these proceedings would provide appropriate sanctions (cf. Article 269 TFEU). To this date, it was possible to avert proceedings before the claim was filed.

7. Stage of the proceedings

It is at the discretion of the Member State court at which stage in the proceedings it is appropriate to refer a question to the CJEU for a preliminary ruling³⁶. However, the following must be borne in mind: For one, the national court must have sufficient knowledge of the facts of the case in order to assess the relevance of the question referred and to formulate it with sufficient clarity³⁷. Also, aspects concerning the efficiency of the proceedings play a role and may be linked to national law. For example, if a

32 CJEU judgment of 6 October 1982, C-283-81 "CILFIT", marginal note 16-20.

33 Currently, there are 24 official EU languages; even checking the French and English language version is likely to pose regular problems to the national courts.

34 Cf. in more detail Broberg und Fenger in EuR 2010, p. 825 (839ff); cf. also von Danwitz in NwZ-Beilage 2013, p. 44 (45f) and Latzel and Streinz in NJOZ 2013, p. 97 (99).

35 CJEU judgment of 13 January 2004, C-453/00 marginal note 28.

36 CJEU judgment of 17 April 2007, C-470/03 with further references; Recommendations of the CJEU to national courts and tribunals, cf. footnote 48, no. 18 and 19.

37 CJEU judgment of 30 March 2000, C-236/98; cf. also Latzel und Streinz in NJOZ 2013, 97 (100).

question of European law is at the fore of a legal dispute, it may seem advisable to make a reference for a preliminary ruling at an early stage in order to shorten lengthy proceedings. Even if the court of first instance derogates from the legal opinion expressed by the CJEU (so far), a reference at the earliest stage possible seems to stand to reason.

8. Formulating the reference for preliminary ruling

National procedural law stipulates which procedural steps must be followed before the reference for a preliminary ruling is formulated. As a general rule, for example, the right to be heard by the court and due process are to be granted to the parties of the legal dispute.

The fate of the ongoing proceedings is also governed by national law. In Germany, the national court suspends its own proceedings for the duration of the preliminary ruling procedure³⁸.

The reference for a preliminary ruling is to be formulated as an order.

The Consolidated Version of the Rules of Procedure of the Court of Justice of 25 September 2012 (in the following Rules of Procedure)³⁹, the Protocol on the Statute of the Court of Justice of the European Union of 26 February 2001 (in the following Statute-CJEU)⁴⁰ and Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 6 November 2012 (in the following Recommendations-CJEU)⁴¹ stipulate which points are to be considered. The CJEU has not compiled a standardised form or a similar comprehensive overview⁴².

a. The contents

The operative part of the order includes - separately and clearly indicated, cf. Recommendations-CJEU no. 26 - the questions submitted to the CJEU. In the event that

38In analogy with § 148 German Code of Civil Procedure (ZPO), in analogy with § 94 German Administrative Court Proceedings Act (VwGO), in analogy with § 114 German Social Courts Act or in analogy with the German Financial Court Proceedings Act. For examples from case law see Foerster in EuZW 2011, p. 901 (902).

39 Official Journal no. L 265 p. 1.

40 Official Journal no. C 80 p. 53.

41 Official Journal 20120/C 388/01

42 Sample forms for German reference orders are retrievable from legal databases, e.g. Prieß in Johlen, MPF Verwaltungsrecht, 4. Auflage 2014 „Vorlagebeschluss“ mit Erläuterungen, retrievable at beck-online.

questions are formulated imprecisely, the CJEU reserves the right to extract from all the information provided by the national court and from the documents concerning the main proceedings the elements that need to be interpreted⁴³. The CJEU also changes the sequence of the referred questions if it seems appropriate.

The contents of the request for a preliminary ruling are governed by Article 94 of the Rules of Procedure and the Recommendations-CJEU no. 22⁴⁴. The request must include:

- a summary of the subject-matter of the dispute and the relevant findings of fact
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law
- a statement of the relationship between the Union law to which the question pertains and of the applicable national legislation.

b. The form

The request can be formulated in the language of the referring court, cf. Article 37 (3) of the Rules of Procedure. The CJEU wishes - not least owing to the need to translate the reference for a preliminary ruling into all the official languages of the European Union - that it is "*drafted simply, clearly and precisely*", it avoids "*superfluous detail*" and, if possible, it does not exceed 10 pages, cf. no. 21 and 22 Recommendations-CJEU. The request is to be paginated, the individual pages are to be signed and dated, and the individual paragraphs are to be numbered, cf. no. 25 Recommendations-CJEU.

The order for the reference, to which a copy of the (most important contents of) the case files is to be enclosed, is to be sent as a single copy to the CJEU by registered post, cf. Recommendations-CJEU no. 33. Thereafter, the production of copies, translations and the notification are tasks which are fulfilled by the Registrar of the Court of Justice, cf. Article 23 (1) sentence 2 CJEU-Statute, Article 4 (1), 98 CJEU-Rules of Procedure.

43 CJEU judgment of 13 December 1984, C-251/83 marginal note 9; CJEU judgment of 26 September 1996, C-168/95 marginal note 20f, for further examples see Wägenbaur in EuZW 2000, p. 37 (40).

44 For practical information on the formulation see Latzel and Streinz in NJOZ 2013, p. 97 (101ff.); see also Karpenstein in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 54. Supplements 2014, Article 267 TFEU, marginal note 28 - 46.

9. Urgent procedure

The average time taken to deal with references for a preliminary ruling in the main proceedings was 15.3 months⁴⁵. This may be too long in urgent cases.

If the request refers to the regulations under Article 67 - 89 TFEU or corresponding secondary law, and if there is particular urgency attached to the case, e.g. because the duration of custody depends on the CJEU's answer (cf. Article 267 (4) TFEU) or there is a risk of irreparable deterioration of a parent-child-relationship, Article 107 ff of the Rules of Procedure provide for the option of initiating the **urgent preliminary ruling procedure**. Such cases are shortened to an average duration of approximately 2 months⁴⁶.

If the reference concerns other regulations than those under Article 67 - 89 TFEU, and where the nature of the case requires that it be dealt with within a short time, Article 105 f of the Rules of Procedure additionally offers the **expedited procedure**. Finally, other cases can at least be given priority pursuant to Article 53 (3) of the Rules of Procedure, if warranted by special circumstances of the particular case, such as the fact that it affects a particularly large group of people.

10. Effects on the main proceedings

The preliminary ruling procedure at the CJEU ends with an order⁴⁷ or with a judgment provided that it is not, upon proposal of the CJEU, withdrawn by the court or tribunal which made that request⁴⁸. The interim proceedings end on the national level with the judgment by the CJEU or the withdrawal of the reference for a preliminary ruling.

Due to the principle of sincere cooperation enshrined in Article 4 (3) TEU, the referring court is under the obligation to consider the CJEU's decision in its deliberations on the

45 2015 Annual Report of the CJEU, p. 9, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/en_ap_jur15_provisoire2.pdf

46 2015 Annual Report of the CJEU, p. 9, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/en_ap_jur15_provisoire2.pdf

47 Article 99 CJEU-Rules of Procedure: for acte clair or acte éclairé.

48 If the CJEU has already made a decision in another case which sufficiently answers the referred question, it is at the referring court's discretion to withdraw its reference per order and declaratory reversal of the suspension order, cf. Article 100 (1) Rules of Procedure; withdrawal is proposed by the CJEU.

legal dispute.⁴⁹ It is welcomed by the CJEU if the referring court or tribunal communicates its final decision and thus gives information on the action taken upon the CJEU's decision, cf. Recommendations-CJEU no. 35.

It shall be for the referring court or tribunal to decide as to the costs, cf. Article 102 Rules of Procedure. The preliminary ruling procedure is free of charge, cf. Article 143 Rules of Procedure. However, costs are incurred for representation before the CJEU. These costs of the interim proceedings are subject to the same fate as the costs for the decision to be made on the national level⁵⁰.

If the referred question has not been sufficiently answered for the referring court so that it can accordingly decide the legal dispute on the national level, a further reference is possible, Article 104 (2) Rules of Procedure.

11. Conclusion

In Europe, courts make moderate use of the preliminary ruling procedure. Of all EU Member States, Germany has referred the most cases. From 1952 to 2013 a total of 2,216 references were submitted from Germany. In 2015, 79 references were made. Germany is followed by Italy (1952 - 2013: a total of 1,326 references, 47 in 2015), the Netherlands (949 references, 40 in 2015) and France (931, 25 in 2015)⁵¹. It may be surprising that a large amount of references were made by courts which decided to do so at their own discretion.

Even though the unknown procedure may still stop many courts from referring questions for preliminary ruling, the figures do indicate that the dialogue with the CJEU is slowly gaining intensity.

49 For a more detailed account of the binding effect see Marsch in Schoch/Schneider/Bier, VwGO, 26. Supplements 2014, Article 267 TFEU, marginal note 60 - 66.

50 For a more detailed account see Latzel and Streinz in NJOZ 2013, p. 97 (109).

51 2015 Annual Report of the CJEU, p. 100, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/rapport_annuel_2015_activite_judiciaire_de.pdf