

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

**Diagram 4**

**The preliminary ruling proceedings (art. 267 FEU Treaty<sup>1</sup>)**

**I. Admissibility of the reference for a preliminary ruling**

1) *Jurisdiction of the European Court of Justice*

- the courts of the Union have jurisdiction to give preliminary rulings in all matters of Union law, however
  - except in matters of the Common Foreign and Security Policy (art. 275 FEU Treaty)
  - a restricted jurisdiction in matters of the Judicial Cooperation in Criminal Matters and Police Cooperation (art. 276 FEU Treaty; it is not yet settled, to what extent this will affect preliminary ruling proceedings)
- within the Union until now the Court of Justice has exclusive jurisdiction; the option to attribute jurisdiction to the General under art. 256(3) FEU Treaty<sup>2</sup> has not (yet) been used

2) *Right to refer*

a) Court (judicial authority)

- despite the heterogeneous wording in the various language versions ("jurisdiction" / "rechterlijke instantie" / "Gericht" / "court or tribunal" / "tiesā") there is only *one, specific concept of "court" in Union law*
- also the constitutional courts
- also the "tribunals" existing in some member states
- also the "Councils of State" existing in some member states (Conseil d'Etat, Raad van State, Consiglio di Stato etc.)

aa) Permanent institution for the compulsory and binding resolution of legal disputes

- dispute resolution based on legal norms, not on equity
- dispute resolution with legal force (no register courts or prosecuting authorities)
- the "court" does not need to be integrated into the traditional court system (→ also administrative "tribunals")
- arbitrators only if they are part of the system of legal protection
- problems regarding panels of professional associations with quasi-judicial functions

bb) Instituted by the law or on the basis of the law

cc) Decision-making in an organized procedure based on the rule of law

dd) Judicial independence

b) Of a member state

3) *Suitable subject-matter for a reference*

- note: the ECJ does not examine the compatibility of national law with Union law!
- a) Question of the interpretation of primary Union law (art. 267 sub-sect. 1 lit. a)
  - of all Treaties (EU Treaty, FEU Treaty, EURATOM Treaty<sup>3</sup>, Amending Treaties, Accession Treaties)
  - also of the Charter of Fundamental Rights of the European Union (cf. art. 6(1) EU Treaty)
  - also of the general principles of law
  - also of the protocols and with this of the statutes of institutions established by the FEU Treaty (cf. art. 51 EU Treaty)
  - however, *not of the provisions relating to the Common Foreign and Security Policy* (cf. art. 275 FEU Treaty); see also the restrictions concerning the Judicial Cooperation in Criminal Matters and Police Cooperation under art. 276 FEU Treaty
- b) Question of the validity of secondary Union law (art. 267 sub-sect. 1 lit. b)
  - of all acts of all institutions, bodies, offices and agencies of the Union
  - also of the international treaties concluded by the Union (formerly by the Community), including mixed agreements as far as the obligations of the Union are concerned
  - however, not of any measures of the Common Foreign and Security Policy (see art. 276 FEU Treaty)
- c) Question of the interpretation of secondary Union law (art. 267 sub-sect. 1 lit. b)
  - of all acts of all institutions, bodies, offices and agencies of the Union
  - also of the statutes of institutions established by secondary law (formerly expressly mentioned in sub-sect. 1 lit. c)
  - also of the non-binding recommendations and opinions under art. 288 sub-sect. 5 FEU Treaty<sup>4</sup>
  - also of the international treaties concluded by the Union (formerly by the Community), including mixed agreements as far as the obligations of the Union are concerned
  - however, not of any measures of the Common Foreign and Security Policy (see art. 276 FEU Treaty)

<sup>1</sup> Formerly (until the Treaty of Lisbon came into force) art. 234 EC Treaty.

<sup>2</sup> Formerly to the Court of First Instance under art. 225(3) EC Treaty.

<sup>3</sup> Cf. art. 106a(1, 2) EURATOM Treaty.

<sup>4</sup> Formerly art. 249 sub-sect. 5 EC Treaty.

- 4) *Relevance of the referred question to the case before the referring court (art. 267 sub-sect. 2)*
  - the outcome of the proceedings before the referring court must depend on the answer to the referred question
  - however, the assessment of the referring court is binding (exception: artificially constructed "relevance", obviously hypothetical questions)
- 5) *Question demanding clarification*
  - a) Doubts of the referring court about the interpretation or validity of Union law
  - b) No failure of the parties at the referring court to take possible action for annulment before the ECJ
    - no circumventing of art. 263 sub-sect. 6 FEU Treaty<sup>5</sup> by taking action at the national courts...
- 6) *Suitable formulation of the referred question*
  - note that the ECJ will, as far as necessary and possible, extract ["herausschälen"] from a question imperfectly formulated those questions, which are admissible in a reference (cf. ECJ, case 6/64, *Costa/ENEL*)
  - a) In case of a question of interpretation: abstract question about the interpretation of Union law
    - no question about the compatibility of national provisions with Union law!
  - b) In case of a question of validity: precise and accurate specification of the concerned legal norm

► *Special case: the obligation to refer*

- any non-compliance will violate the right to a lawful judge and may cause state liability according to Union law
- a) Cases
  - aa) Relevance of the question to a case pending before a court of last instance (art. 267 sub-sect. 3)
    - ECJ, case 283/81, *CILFIT*: court must (only) be the last instance in the individual case
  - bb) Necessity of the reference to ensure the uniform application of Union law
    - α) The referring court wants to depart from the jurisprudence of the ECJ (ECJ, case 283/81, *CILFIT*)
    - β) The referring court does not want to apply a legal act considered as invalid (ECJ, case 314/85, *Foto Frost*)
    - γ) The referring court grants interim relief against the application of secondary law (ECJ, case C-143/88, *Zuckerfabrik Süderdithmarschen*)
- b) Exceptions:
  - aa) The ECJ has already answered to an identical question in another case (ECJ, joint cases 28-30/62, *da Costa*)  
(*caution: irrelevant in exercises of practical case-solving at university, because most practical cases are modelled on important decisions of the ECJ! Do not draw on this exception in a case solution at university!*)
  - bb) The ECJ has answered this question otherwise in his well-established jurisprudence (ECJ, *CILFIT*)
  - cc) The correct interpretation of Union law is evident to such a degree that there is no scope for any reasonable doubt (ECJ, *CILFIT*, *acte clair doctrine*)

## II. The answer of the European Court of Justice to the referred question

- 1) *In case of a question of interpretation: abstract interpretation of the concerned legal norms*
  - detailed explanation in the grounds of the judgement
  - it is the task of the referring court to apply the criteria developed by the ECJ on the individual case and, if necessary, to decide about the compatibility of national law with Union law
- 2) *In case of a question of validity: declaratory ruling about the validity or invalidity of the concerned legal act or the concerned individual legal norms*
  - criteria for the examination: 1. lack of competence; 2. infringement of essential (formal and) procedural requirements; 3. infringement of substantive law; 4. misuse of powers (cf. art. 263 sub-sect. 2 FEU Treaty)<sup>6</sup>

(Datei: Diagram4 (Cases-EULaw))

<sup>5</sup> Formerly art. 230(5) EC Treaty.

<sup>6</sup> See for details diagram 1 (from this course).