

“The Role of the National Judge in the Preliminary Ruling Procedure”

Nourishing the Judicial Dialogue
- points for a check-list

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« United in Diversity »

- Goes for the Member States
- Goes for the CJEU?
 - Check opinions of:
 - AG Juliane Kokott in Case C-157/15 Samira Achbita (pending)
 - AG Eleanor Sharpston in Case C-188/15 Asma Bougnani (pending)
- Still, the CJEU has to secure the uniform application of Union Law in the EU and in the Member States

“Preliminary Ruling Procedure”

- National Courts play a key role:
 - By resolving the big bulk of cases on EU Law themselves (perhaps without even reflecting on it)
 - By selecting the cases in which a preliminary reference should be made, a specific judicial dialogue initiated
- But judicial dialogues may be prepared, initiated and handled with more or less care
- The level of care exercised may affect the quality of the dialogue

Preliminary Ruling Procedure 1

- elements to a check-list: Role of the CJEU
- The competence of the CJEU
 - Art. 267 TFEU/Art. 19, 3 (b) TEU
 - Interpretation of Primary and Secondary Union Law
 - Validity of Secondary Union Law (Acts of the EU Institutions)
 - Some exceptions (i.e.: Art. 275 TFEU, CFSP, and Art. 276 TFEU, Police operations to uphold law and order)
- The out-put from the CJEU:
 - Interpretation or validity-check. NOT to apply that interpretation to the underlying facts of the case

Preliminary Ruling Procedure 2

- elements to a check-list: To refer or not?

Interpretation:

- A faculty for lower courts
- An obligation for courts of last instance
 - Exception: “Acte Claire” (no reasonable doubt about the right interpretation of EU-law, see Cilfit-judgment)
 - Exception: “Acte Eclairé” (existing jurisprudence, see Cilfit-judgment)

Validity:

- Only EU Courts may declare an EU act invalid
 - If in doubt of validity, then refer

Preliminary Ruling Procedure 3

- elements to a check-list: To refer or not

- Responsibility of the national judge, not the parties
- Who should refer: First instance/later instance?
- Several elements:
 - Degree of necessity?
 - Other ways to decide the case?
 - Reason to “push case upwards”?
 - Do NOT refrain from referring for fear you may not like the answer (Danes may think of Ladykid).

Preliminary Ruling Procedure 4

- elements to a check-list: Form

- Appr. 10 pages will often suffice
- Keep it clear, precise and simple
- The "DDP" (the request (not the annexes) will be translated into all the (23) other EU-languages)
- National judge is setting the scene
 - Concerning national law and case-law
 - Establishing the facts

Preliminary Ruling Procedure 5

- elements to a check-list: Explaining national law

- The aunt at the dinner party test
- You are NOT before your national Supreme Court
- EU-judges are NOT familiar with even key elements of your national legal order (examples from Danish Law) :
 - Like basic principles of Family Law: ("Særråden og særhæften")
 - Like rules on when the right of property passes ("aftale/levering/overgivelse")
 - Like rules on vindication/extinction ("DL 6-17-5, 5-7-4 & 5-8-12")
 - Like Danish rules on "skrotpræmie" (pending VAT-case, see AG Bot opinion)

Preliminary Ruling Procedure 6

- elements to a check-list: Consider formulating an answer
- Important to explain why you need an interpretation of EU Law
- Show how you see the interplay/conflict between national law and EU Law
- Consider proposing an answer to your question(s).
- French benefit: Helps you explain national law (a lot) better to bloody foreigners/aunts

Preliminary Ruling Procedure 7

- elements to a check-list: Additional reminders

- Special parties? (UNHCR?) Standing before the CJEU if standing nationally.
- Anonymisation? Timely request needed.
- Request for expedited or urgent procedures?:
 - Priority Treatment
 - Expedited Procedure
 - Urgent Procedure (“PPU” in AFSJ)

Preliminary Ruling Procedure 8

- elements to a check-list: Further reminders

- Costs? (“None”)
- Legal Aid?
- Do not forget to send the national file or a copy (as a life-west)
- For a perhaps more complete (and maybe less provocative) list of advice: Consult www.curia.europa.eu (available in all 24 official EU-languages).

Preliminary Ruling Procedure 9

- when things are imperfect

- Judicial dialogues may – in spite of all efforts deployed – and like other dialogues/conversations - be more or less fruitful, lead to new questions or simply go wrong.
 - Possible to seek clarification of a preliminary ruling
 - Possible to ask new questions

Preliminary Ruling Procedure

- elements to a check-list: Final comfort

Finally, remember the advice of Samuel Beckett:

- "Ever tried. Ever Failed. No matter. Try again. Fail again. Fail better."

