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Judicial Coherence and the Preliminary Reference Procedure

Article 267 TFEU as a Private Party Remedy for ensuring Judicial Coherence
in Europe

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Abstract

This article examines how private parties may use the preliminary reference procedure in Article 267 TFEU to attain judicial coherence. Even though, in principle, the preliminary reference procedure is not a remedy available to private parties, in practice such parties have been able to draw on the procedure in order to further their own interests. To analyse this, the article first considers the preliminary rulings' erga omnes effect. Thereupon follows an examination of how a private party may go about actually using the preliminary reference procedure. This is followed by an account of how a private party may seek to influence the actual formulation of the national court's preliminary questions. Next, the article considers a private party's possibilities of influencing the preliminary reference procedure before the Court of Justice of the European Union as well as the fact that since the preliminary reference procedure is not conceived as an inter partes remedy it does not provide for the usual 'right of defence components'. Finally, a modest proposal for improving the procedure is presented.

I Judicial Coherence and the Erga Omnes Effect of Preliminary Rulings

From the very inception of the European Union, law has played a particularly important role. Not only is the Union founded on the rule of law,¹ but attaining legal cohesion – in a broad sense – figures amongst the Union's

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¹ Cf. Article 2 TEU.

key measures for realising its objectives. In general, EU legislation is intended to create legal cohesion, but legislation in itself cannot ensure full cohesion. Rather, coherent interpretation and application of EU law is equally important. In this regard the preliminary reference procedure, laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU), plays a particularly important role for the Union's judicial cohesion. This procedure enables national courts of the 28 Member States to request the Court of Justice of the European Union to provide a ruling on the interpretation or validity of an EU legal act in a situation where the referring court needs assistance to decide an actual case. Originally some legal observers took the view that a preliminary ruling only was binding on the referring court (as well as on other courts hearing the main proceedings case on appeal). Today there is no doubt that a preliminary ruling has general significance. When rendering a preliminary reference ruling, the Court of Justice provides an authoritative interpretation of EU law – and in practice this interpretation is binding *erga omnes*, i.e. on all and in all respects. The fact that in practice preliminary rulings have this *erga omnes* effect makes them very powerful when it comes to ensuring judicial coherence.

Moreover, the Court of Justice has ruled that following a preliminary ruling from which it is apparent that the national legislation is incompatible with EU law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that EU law is complied with. This particularly entails amending national law so as to comply with EU law as soon as possible and that the rights which individuals derive from EU law are given full effect.²

When it comes to judicial coherence it is important to observe that not only the Member States are bound by preliminary rulings. Rather, the Court of Justice's preliminary rulings are attributed general validity and binding force throughout the European Union.³ This fits well with the fact that preliminary rulings are declaratory in nature; i.e. they lay down the correct interpretation

² Joined Cases C-231/06 to C-233/06, *Emilienne Jonkman* [2007] ECR I-5149, ECLI:EU:C:2007:373, para. 41. By way of illustration, Italy, in 1999, amended its legislative decree regarding natural mineral water due to the Court of Justice's earlier ruling in Case C-17/96, *Badische Erfrischungsgetränke* [1997] ECR I-4617, ECLI:EU:C:1997:381, cf. *Reflets* 1/2000, p. 17.

³ Koen Lenaerts et al, *Procedural Law of the European Union* (2006) 195ff; and Alberto Trabucchi, 'L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes' (1974) *Revue trimestrielle du droit européen* Vol 10, 56, 78. See for example Case 66/80 ICC [1981] ECR 1191, ECLI:EU:C:1981:102, paras 9-18.

of existing EU law from the day of its entry into force.⁴ The Court of Justice itself also treats its own preliminary rulings as binding authority similar to its rulings in cases based on direct actions.⁵

Preliminary rulings' *erga omnes* effect means that when interpreting EU law, all national courts are obliged to apply not only the operative part of a preliminary ruling, but also its *ratio*. This obligation applies whether or not the national courts sit as courts of last instance.⁶ In reality there does not seem to be any difference between, on the one hand, the referring court which is directly bound by the preliminary ruling as such and, on the other hand, other actors such as EU institutions, Member States and private parties; in practice the preliminary rulings are equally binding on all these other actors. Indeed, this is the principal reason why the preliminary ruling procedure may constitute an efficient means of ensuring judicial coherence.

2 Private Parties' Use of the Preliminary Reference Procedure to attain Judicial Coherence

2.1 Introduction

Today it is far from uncommon that a private party uses the preliminary reference procedure as one of the central means for ensuring judicial coherence amongst the Member States.⁷ For example, the Sunday-trading case-

⁴ In special situations the Court of Justice may decide to attach a temporal limitation to the binding effect of a preliminary ruling. This, however, merely is the exception that proves the rule.

⁵ Compare Case C-445/05 *Werner Haderer* [2007] ECR I-4841, ECLI:EU:C:2007:344, para. 18; and Case C-465/93 *Atlanta* [1995] ECR I-3761, ECLI:EU:C:1995:369, para. 46, with Case C-422/05 *Commission v. Belgium* [2007] ECR I-4749, ECLI:EU:C:2007:342, para. 62. Note also that the so-called *acte éclairé* doctrine is based on the idea that, *inter alia*, preliminary rulings constitute binding authority.

⁶ Alberto Trabucchi, 'L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes' [1974/10] *Revue trimestrielle du droit européen* 56, 71ff; but compare A.G. Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' in Francis Jacobs (ed.), *Yearbook of European Law* 1984 (1986) 1, 61, and 66.

⁷ See Case 158/80, *Rewe Handelsgesellschaft* [1981] ECR 1805, ECLI:EU:C:1981:163, in particular paras 44 and 46. In the words of Karen Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' [1998] *International Organization* p. 122: 'legal scholars ... have shown how the Court turned the "preliminary ruling system" of the EU from a mechanism to allow individuals to challenge EC law in national courts into a mechanism to allow individuals to challenge national law in national courts'. In connection with this statement Alter refers to Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff Publishers 1986) and Joseph Weiler, 'The Transformation of Europe' [1991] *Yale Law Journal* pp. 2403-2483.

law, where British retailers fought to be able to trade on Sundays, to a considerable extent relied on the preliminary reference procedure.⁸ Below in this section we first consider how private parties may establish a case that can form the basis of a preliminary reference. Thereupon, we shall examine to what extent Member State laws, directly or indirectly, can preclude private parties from using the preliminary procedure. Finally, we will consider how a private party may induce a court of a Member State to make a preliminary reference.

2.2 'Construing' a Case to form the Basis for a Preliminary Reference

In order for a private party to use the preliminary reference procedure as a means to achieve judicial coherence of EU law amongst the Member States, it is necessary that there is a court case which can form the basis for such reference. Moreover, the Court of Justice only has jurisdiction to answer a preliminary reference if the question is relevant for deciding the dispute before the national court,⁹ and if the referring court itself can use the preliminary ruling to decide this dispute.¹⁰ Broadly speaking, there are three different ways of 'creating' these cases. The most obvious way is where the private party enters into a legal court fight against the public authorities; indeed, today approximately 70% of all preliminary references stem from proceedings between a private party, on the one side, and a public authority, on the other.¹¹ A second way of creating such case is where a (real) conflict arises between two private parties; for instance if one party invokes a Member State measure whereas the other party invokes a conflicting EU measure. The third – less straightforward – way of creating the case is where two parties have a joint interest in having a legal issue referred for a preliminary ruling and where the conflict arises between these two parties. Below, we will examine these three situations in turn.

Where the private party wishes to establish a conflict *vis-à-vis* the Member State in question, it is immaterial whether the private party is the plaintiff or the defendant.¹² Even if it is obvious that the private party deliberately has 'cre-

⁸ See Hans-W. Micklitz, *The Politics of Judicial Co-Operation in the EU – Sunday Trading, Equal Treatment and Good Faith* (Cambridge: Cambridge University Press 2005) p. 274, 462-463 and 466-467.

⁹ See for instance Case C-343/90, *Dias* [1992] ECR I-4673, ECLI:EU:C:1992:327.

¹⁰ See for instance Case C-428/93, *Monin Automobiles* [1994] ECR I-1707, ECLI:EU:C:1994:192.

¹¹ Of the 428 preliminary reference introduced before the Court of Justice in 2014 (cf. the 2014 Annual Report), 297 originated from main proceedings between a private and a public party.

¹² According to Weiler, '[t]he overwhelming number of preliminary references arise in the context of litigation before national courts in which individuals seek to enforce, to their benefit [Union] obligations against their own government or other national public authorities', cf. 'A Quiet Revolution – The European Court of Justice and Its Interlocutors' [1994/26:4] *Comparative Political Studies*, pp. 510-534 at p. 518.

ated' the actual conflict towards the public authority to be able to have the Court of Justice render a preliminary ruling in order for the referring court to be specifically required to ensure judicial coherence of EU law of the Member State in question *vis-à-vis* the other Member States, the Court of Justice will not consider the case to be contrived.

The Defrenne Cases

The origins of the *Defrenne* case are rather illustrative for how the preliminary ruling procedure may be used as an effective means for challenging national laws. Here a Belgian lawyer, Ms Elaine Vogel-Polsky, was eager to have Belgian practices, which conflicted with the Treaty-based equal pay requirements, to be rendered unlawful. To this end she contacted various Belgian trade unions to identify a case that could form the basis for bringing the issue before the courts. The trade unions were not ready to help her, however. Instead, via another lawyer, Ms Vogel-Polsky came in contact with an air hostess; Ms Gabrielle Defrenne. Ms Defrenne agreed to allow her name and her experience to form the basis of a court case based upon the Treaty-provision on equal pay. But simultaneously Ms Defrenne asked that she would not be otherwise involved in the case. Today any European law lawyer will be well aware of the two important preliminary rulings: *Defrenne I* and *Defrenne II*.¹³

The Dutch Coffee Shop Case

In the Netherlands drugs, including cannabis, are generally prohibited. However, the Dutch authorities apply a 'policy of tolerance' so that the sale and consumption of cannabis is accepted in practice. As part of this 'policy of tolerance' the Dutch authorities have laid down some strict conditions which must be observed by the coffee-shops that are authorised to sell cannabis. In order to reduce 'drug tourism' a (local) condition in Maastricht was that the coffee-shops could only admit people resident in the Netherlands into the shop. One coffee-shop, ran by Mr. Josemans, infringed the residence criterion and the shop was therefore temporarily closed by the authorities. Mr. Josemans lodged an objection against that decision. As that objection was dismissed by the authorities, he brought an action before the Dutch courts, arguing amongst other things that the Dutch practice constituted indirect discrimination against citizens of the European Union. When the case came before the Dutch Raad van State, this court decided to make a preliminary reference on the matter.¹⁴

¹³ The history has been explained at length by Catherine Hoskyns, *Integrating Gender – Women, Law and Politics in the European Union* (London: Verso 1996) pp. 68-75. The two Defrenne-rulings are Case C-80/70, *Defrenne I* [1971] ECR 445, ECLI:EU:C:1971:55 and Case 43/75, *Defrenne II* [1976] ECR 455, ECLI:EU:C:1976:56.

¹⁴ Case C-137/09, *Josemans v. Burgemeester van Maastricht* [2010] ECR I-13019, ECLI:EU:C:2010:774. For comments on the ruling, see Morten Broberg & Nina Holst-Christensen, *Free Movement in the European Union – Cases, Commentaries and Questions*, 4th edition (DJØF Publishing 2014) pp. 151-152.

Indeed, the *raison d'être* of the preliminary ruling procedure is to ensure the uniform application of EU law throughout the European Union so if anything, this type of cases should be encouraged, not discouraged. The Court of Justice therefore also accepts test cases under the preliminary ruling procedure where the actual subject of the case is so small that questions of principle are the only motivation for the litigation.

The Eurico Italia Case

In the *Eurico Italia* case the defendant Italian Rice Authority argued that the case was inadmissible because it concerned an amount of money that was so negligible that the main proceedings merely constituted 'test' cases that had been brought before the national courts for the sole purpose of obtaining a decision from the Court of Justice. The Court held that this would not render the preliminary reference inadmissible; and went on to answer the preliminary questions.¹⁵

Whilst instituting legal proceedings against public authorities may appear to be the most obvious way for private parties of using the preliminary reference procedure as a means of ensuring judicial coherence, the Member State in question is free to preclude a preliminary ruling by simply accepting the private party's claim in the main proceedings. Indeed, there is nothing preventing the Member State from 'closing the case' by accepting to honour the private party's actual claim whilst making it clear that it does not agree to the legal reasoning put forward in support of this claim. The Member State may even decide to honour the private party's claim after the national court has made a preliminary reference – which will under normal circumstances lead the Court of Justice to decline to answer the preliminary question(s).

The Imran Case

In the *Imran* case a Dutch court made a preliminary reference regarding the interpretation of Council Directive 2003/86 on the right to family reunification. The case concerned Ms Imran's application for a provisional residence permit in the Netherlands in order that she could be unified with her spouse and their eight children (of whom seven were minors). This application the Netherlands Minister for Foreign Affairs refused. The Minister also refused the subsequent objections raised by Ms Imran and the case therefore ended up

¹⁵ Joined Cases C-332/92, C-333/92, C-335/92, *Eurico Italia v. Ente Nazionale Risi* [1994] ECR I-711, ECLI:EU:C:1994:79, paras 16-17. See also Case C-189/95, *Criminal proceedings against Harry Franzén* [1997] ECR I-5909, ECLI:EU:C:1997:504, Case 71/85, *State of the Netherlands v. Federatie Nederlands Vakbeweging* [1986] ECR 3855, ECLI:EU:C:1986:465, and Case 6/64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585 (English special edition), ECLI:EU:C:1964:66.

before a Dutch court which decided to refer a number of preliminary questions to the Court of Justice.

Following the reference for a preliminary ruling the Dutch authorities decided to issue a provisional residence permit. The Court of Justice was informed about this: first directly by the Dutch authorities and thereupon by the referring court. The referring court took the view that the fact that the Dutch authorities had rendered inoperative the decision against which Ms Imran's appeal was directed meant that the preliminary reference was no longer urgent, but that it continued to be relevant to receive a preliminary ruling since Ms Imran's intended to bring a claim for damages. The Court of Justice however held that, following the Dutch authorities' decision to issue a provisional residence permit, the main proceedings no longer had any purpose. The preliminary reference was therefore rejected.¹⁶

In a number of situations it may prove difficult for a private party to create a conflict *vis-à-vis* the Member State. This is particularly so where the contested Member State laws regulate inter-private matters. If a private party unilaterally establishes a conflict against another private party in order to be able to create a case that can form the basis for a preliminary reference on the conformity with EU law of a Member State's administration/laws, the situation will be rather similar to the one where the conflict is between the private party and the Member State as such. The fact that the conflict appears to have been created primarily to provide a basis for a preliminary reference will not in itself lead the Court of Justice to consider this not to be a 'real dispute' that can form the basis for a preliminary reference.

The Costa/E.N.E.L. Case

Perhaps the most famous example of a private party instituting proceedings against another non-State party with a view to obtain a preliminary ruling is to be found in the case of *Costa/E.N.E.L.* Here Mr. Flaminio Costa, an Italian lawyer, alleged that the Italian State had infringed EU law in connection with a nationalisation in the Italian electricity sector. He therefore claimed that he was not under an obligation to pay an invoice amounting to only 1,925 Italian lire – a very small sum – demanded of him in respect of the supply of electricity by the electricity company E.N.E.L. The Italian court hearing the case followed Mr Costa's wishes of making a preliminary reference. And the rest is history!¹⁷

¹⁶ Case C-155/11 PPU, *Bibi Mohammad Imran v. Minister van Buitenlandse Zaken* [2011] ECR I-5095, ECLI:EU:C:2011:387.

¹⁷ Case 6/64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585 (English special edition), ECLI:EU:C:1964:66. For more recent examples of a private party invoking EU law against national law in a case between private parties, see Case C-555/07, *Küçükdeveci* [2010] ECR I-365, ECLI:EU:C:2010:21, and Case C-194/94, *CIA Security International* [1996] ECR I-2201, ECLI:EU:C:1996:172.

In this respect it does not matter that one of the parties tries to achieve a result that it has been unable to achieve by lobbying for legislative changes. For example, in *Badeck*, the Court of Justice had no objection to dealing with a reference for a preliminary ruling where the main proceedings were brought by 46 members of the *Landtag* – i.e. the regional assembly – of Hesse in Germany in proceedings for an abstract review of legality; so-called *Normenkontrollverfahren*.¹⁸

In principle, the situation becomes more delicate if two (or more) parties jointly create a conflict to provide a basis for a preliminary reference. Nevertheless, the Court of Justice will be ready to answer preliminary references also in cases where the parties in the main proceedings jointly agree that it will be useful for the resolution of their dispute that the national court makes a preliminary reference. Indeed, even if the parties were ready to settle their dispute without involving the courts, but decided to bring legal proceedings solely to (try to) obtain a preliminary ruling in order to have their inter-partes legal situation clarified, this will not in itself lead the Court of Justice to render the preliminary reference inadmissible. Even if the two conflicting parties agree on what, to their mind, should be the correct answer to the preliminary question, this does *not* (in itself) mean that the Court of Justice will consider the dispute to be artificial or collusive (contrived).¹⁹ In other words, also in the last-mentioned situation, the case may be capable of forming a sufficient legal basis for a preliminary reference.²⁰

Still, the Court of Justice has made it clear that the preliminary reference procedure is not intended as a means of the parties before the Member State courts to obtain answers to abstract or hypothetical questions from the judges on the Plateau Kirchberg in Luxembourg. This means that if it is obvious that the dispute before the referring court is contrived and consequently does not concern genuine disagreements between the parties to the main proceedings the Court has shown itself ready to render the reference inadmissible on the basis that it does not have jurisdiction to answer the preliminary questions in this situation.

The Foglia Cases

The leading cases are *Foglia v. Novello I* and *Foglia v. Novello II* which concerned the import of Italian wine into France. Both Mr Foglia, an Italian wine

¹⁸ Case C-158/97, *Badeck* [2000] ECR I-1987, ECLI:EU:C:2000:163. See also Case C-292/04, *Meillicke* [2007] ECR I-1835, ECLI:EU:C:2007:132.

¹⁹ Cf. Case C-144/04, *Mangold* [2005] ECR I-9981, ECLI:EU:C:2005:709, para. 38.

²⁰ See, for example, Case C-97/98, *Jägerskiöld* [1999] ECR I-7319, ECLI:EU:C:1999:515.

dealer, Mrs Novello a French wine-importer, and Danzas, the transport company, had an interest in the French authorities not imposing a tax on the wine upon Mrs Novello's importation of Mr Foglia's wine. They therefore drew up a contract whereby a conflict between the parties would arise if any such tax were imposed contrary to EU law. When the French authorities imposed such tax the dispute was brought before the domestic courts, and since the contract referred to the legality under EU law it was only natural to refer the matter to the Court of Justice. The Court, however, found that there were strong indications that in reality the contract had primarily been drafted so as to provide a basis for a preliminary reference and that the case itself did not concern a real conflict between the parties. Rather, the Court of Justice found that if it were to give a ruling in the case, this would jeopardise the whole system of legal remedies which EU law makes available to private individuals to protect them against national legal provisions that are contrary to EU law. In this regard the Court observed that its jurisdiction is limited to giving national courts the elements for interpreting EU law that are necessary for deciding genuine disputes. Moreover, the duty of the Court of Justice is to assist in the administration of justice in the Member States; it is not to deliver advisory opinions on general or hypothetical questions. Therefore, according to the Court, if it had admitted the preliminary reference it would have meant that the parties had been allowed to create a procedural situation in which the French State, whose situation would be affected by the judgment, would not have the possibility of presenting an appropriate defence of its interests. Accordingly, the Court of Justice rejected the preliminary reference.²¹

Even though the two *Foglia v. Novello* rulings are important, we should not exaggerate the importance of the principle on contrived cases. Thus, while the Court of Justice has been consistent in maintaining that the principle as such shall be upheld, it has simultaneously shown a considerable restraint when it comes to the actual application thereof. Firstly, the Court will only apply the *Foglia* principle where both parties to the main proceedings are party to the contrivance of the dispute. Secondly, if the referring court has accepted to hear the case, the Court of Justice will not render a preliminary reference inadmissible on the basis that the dispute in the main proceedings is contrived unless it is manifestly apparent from the facts set out in the order for reference that the dispute is in fact fictitious.²²

²¹ Case 104/79, *Foglia I* [1980] ECR 745, ECLI:EU:C:1980:73, and Case 244/80, *Foglia II* [1981] ECR 3045, ECLI:EU:C:1981:302. The Court of Justice's rulings in *Foglia I* and *Foglia II* have been subject to extensive criticism. See in this regards, Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 203-206.

²² See for example Case C-451/99, *Cura Anlagen* [2002] ECR I-3193, ECLI:EU:C:2002:195 and Case C-47/90, *Delhaize* [1992] ECR I-3699, ECLI:EU:C:1992:250.

The Delhaize Case

One of the most striking examples of the Court of Justice's restraint when it comes to the application of the *Foglia* principle is the *Delhaize* ruling. The dispute concerned the importation of 3,000 hectolitres of wine from Rioja in Spain to Belgium. However, not only did both parties in the main proceedings argue that the national legislation was incompatible with EU law, the actual claim for compensation amounted to only one Belgian Franc (significantly less than one Euro). The Court of Justice nonetheless did not touch on the question of whether the dispute was contrived but simply answered the questions referred.²³

The Cura Anlagen Case

In *Cura Anlagen*, the Court of Justice observed that there were indications that the situation underlying the main proceedings was contrived with a view to obtaining a decision from the Court on a question of EU law of general interest. However, the Court of Justice also observed that the main proceedings concerned a genuine contract and that the performance or annulment of this contract depended on the interpretation of EU law. It therefore rendered the question referred to be admissible.²⁴

The Court of Justice's restraint in applying the *Foglia* principle is also reflected in the fact that if a case is between a parent company and a subsidiary this in itself does not mean that the Court will consider the dispute to be contrived.²⁵ Similarly, arguments that the plaintiff in the main proceedings lacks a legal interest in challenging a national provision, or arguments that a national practice is not a matter for the Court of Justice to decide on but instead is a matter for the national court, are also unlikely to render the reference inadmissible.²⁶

From the above it follows that it is highly unlikely that the Court of Justice will hold a dispute to be contrived and thereby render a reference for a preliminary ruling to be inadmissible under the *Foglia* jurisprudence. Nonetheless, we should not completely discard the importance of the *Foglia* judgments since they have established the basis upon which the Court of Justice may examine its own jurisdiction to determine whether or not to accept a preliminary refer-

²³ Case C-47/90, *Delhaize* [1992] ECR I-3699, ECLI:EU:C:1992:250. For comments on this case, see Catherine Barnard & Eleanor Sharpston, 'The Changing Face of Article 177 References' [1997] *CML Rev.* pp. 1113-1171 at pp. 1124-1125.

²⁴ Case C-451/99, *Cura Anlagen* [2002] ECR I-3193, ECLI:EU:C:2002:195.

²⁵ See for instance Case C-379/98, *PreussenElektra* [2001] ECR I-2099, ECLI:EU:C:2001:160.

²⁶ See for instance Case C-309/02, *Radlberger Getränkegesellschaft* [2004] ECR I-11763, ECLI:EU:C:2004:799, para. 26, with further references.

ence, depending on whether the case in the main action concerns a real or a contrived case.

2.3 National Law precludes the Preliminary Reference

In order for a private party to create the basis for a preliminary ruling, this party must be able to institute legal proceedings before a national court. In this regard, as a clear main rule, the private party must comply with national procedural rules. Thus, if the party does not have *locus standi*, if the case is time-barred, or if for other procedural reasons a case cannot be brought before the national court, this will normally preclude the possibility of creating the basis for a preliminary ruling. It may also be that the most obvious way of having a question brought before a Member State court is by infringing a national rule and thereby provoke administrative or criminal proceedings to be instituted.²⁷ Obviously, the risk of facing this type of proceedings may deter many private parties from pursuing this route.²⁸

The Franzén Case

In Sweden the State operates a monopoly system responsible for the sale of (most) alcoholic beverages. Mr Franzén, the owner of a food retail shop in Southern Sweden, wanted to challenge this monopoly system under EU law. So when Sweden acceded to the European Union on 1 January 1995, Mr Franzén intentionally infringed the Swedish prohibition against sales of alcoholic beverages. Indeed, the first sale took place only hours after the Swedish accession, i.e. during the night between 31 December 1994 and 1 January 1995. Apparently the sale was intended to cause the Swedish police to institute proceedings against Mr Franzén in order that a preliminary reference could be made to the Court of Justice of the European Union. This also happened.²⁹

²⁷ In Case C-432/05, *Unibet* [2007] ECR I-2271, ECLI:EU:C:2007:163, the Court of Justice at para. 64 held that 'If... [Unibet] was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it [effective judicial protection of its rights under Community law]' (emphasis added).

²⁸ See Advocate General Francis Jacobs in Case C-263/02 P, *Commission of the European Communities v. Jégo-Quéré & Cie SA* [2004] ECR I-3425, ECLI:EU:C:2003:410, para. 43, and compare with para. 34 of the Court's ruling in the same case as well as with the Court's subsequent ruling in Case C-432/05, *Unibet* [2007] ECR I-2271, ECLI:EU:C:2007:163, para. 64.

²⁹ Case C-189/95, *Criminal proceedings against Harry Franzén* [1997] ECR I-5909, ECLI:EU:C:1997:504. According to Nina Edgren-Henrichson, 'Rättsprocessen kring fallet Franzén', *Nordisk Alkohol- & Narkotikatidskrift* vol. 14, 1997, 2, pp. 122-124, p. 123, Mr. Franzén intentionally breached the Swedish laws in order to test them against the EU rules. And, according to Ole Rothenborg, 'Svenskt brott mot EU-rätten ger vinimportörer miljoner', DN.se (published 2 January 2003), Mr. Franzén's lawyers were paid by The Federation of Swedish Food Traders. Moreover, according to Justice Mats Melin, President of the Swedish Supreme Administrative Court, when talking at the Swedish Network for European Legal Studies 2015 conference on 16 February in Stockholm, the Franzén case was an (early) wake-up call to Sweden that the EU-rules could also be enforced through the preliminary reference procedure.

Along the same lines, where a private party has instituted proceedings before a Member State court, EU-law does not preclude national procedural rules which prevent the private party from invoking certain arguments – even if the coincidental consequence is that it will not be possible to have the national court make a preliminary reference. On the other hand, if the national procedural rules effectively prevent a national court from making a reference for a preliminary ruling the Court of Justice will set aside these procedural rules.³⁰

Similarly, where a lower national court is to consider the constitutionality of a national provision several Member States obligate such lower court to refer this question to the country's constitutional court. If, however, the case also involves aspects of EU law, the obligation to refer to the constitutional court cannot preclude the lower court from making a reference for a preliminary ruling, the Court of Justice has ruled.³¹ This is so since only the national court before which a case is brought has jurisdiction to determine whether there should be a reference to the Court of Justice.³²

Even though lower national courts are generally bound by the rulings (and interpretations) rendered by superior national courts, this cannot preclude the lower court from making a preliminary reference.³³ Even where a superior national court has ruled on the necessity of making a reference for a preliminary ruling in another case concerning the same problem, and has held that a refer-

For a rather similar example, see Case C-438/02, *Criminal proceedings against Krister Hanner* [2005] ECR I-4551, ECLI:EU:C:2005:332.

³⁰ Cf. Case C-312/93 *Peterbroeck* [1995] ECR I-4599, ECLI:EU:C:1995:437, paras 11–21. See also Case C-599/10 *SAG ELV Slovensko and others*, judgment of 29 March 2012, ECLI:EU:C:2012:191, para. 19 together with Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, ECLI:EU:C:2010:659, paras 26–35.

³¹ Case C-348/89 *Mecanarte* [1991] ECR I-3277, ECLI:EU:C:1991:278, paras 41–46, and Case 106/77 *Simmenthal* [1978] ECR 629, ECLI:EU:C:1978:49, para. 24.

³² Case C-555/07 *Küçükdeveci* [2010] ECR I-365, ECLI:EU:C:2010:21, paras 52–56, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, ECLI:EU:C:2010:363, paras 31–57 and, with regard to the main proceedings in this case, decisions by the Conseil constitutionnel (décision du 12 mai 2010, n° 2010-605 DC) and by the Conseil d'État (arrêt du 14 mai 2010, n° 312305).

³³ Case 166/73 *Rheinmühlen* [1974] ECR 33, ECLI:EU:C:1974:3, paras 3–11 and Case 146/73 *Rheinmühlen* [1974] ECR 139, ECLI:EU:C:1974:12 as well as Sacha Prechal, 'Community law in national courts: the lessons from van Schijndel' [1998] 35 *CML Rev.* 681, 694. See also Case C-378/08 *Raffinerie Mediterranée (ERG) SpA* [2010] ECR I-1919, ECLI:EU:C:2010:126, para. 32, and Case C-210/06 *Cartesio* [2008] ECR I-9641, ECLI:EU:C:2008:723, paras 88–89. In Joined Cases C-201/10 and C-202/10 *Ze Fu Fleischhandel et Vion Trading* [2011] ECR I-3545, ECLI:EU:C:2010:323, a superior national court in an appeal case made a preliminary reference and thereafter referred the main case back to the lower national court from where the appeal was made. This lower national court did not agree with the superior court and therefore made a new preliminary reference to the Court of Justice (see paras 12–20).

ence was not necessary, a lower national court will not be bound by this.³⁴ The preliminary ruling by the Court of Justice, in a case before a lower national court, will be binding on the national courts even if it were to conflict with an earlier ruling of a superior national court.³⁵ In other words, the lower national court making the preliminary reference will be obligated to set aside the earlier ruling of the superior national court if this is necessary to comply with the ruling by the Court of Justice.

2.4 Inducing a Domestic Court to refer

Even though only the Member State court hearing the actual dispute is competent to decide whether or not to make a preliminary reference,³⁶ this does not mean that private parties have no possibility of inducing the national courts to make a reference.³⁷ There are (at least) three ways whereby a private party may do this:

1. By putting forward convincing arguments that a reference will be useful or perhaps even necessary to decide the case.
2. By designing the case in such a way that the EU law element becomes decisive for deciding the case.
3. By designing the case so that under EU-law the national court is obligated to refer.

Where a private party invokes EU law against the laws or practices of a Member State the primary objective often simply is to have these laws or practices overturned and thereby win the actual dispute. In these situations, the

³⁴ Regarding appeals against a national court's decision to make a preliminary reference, see Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 327-336.

³⁵ Case C-396/09 *Interedil* [2011] ECR I-9915, ECLI:EU:C:2011:671, paras 34-40; and Case C-173/09 *Elchinov* [2010] ECR I-8889, ECLI:EU:C:2010:581, paras 21-32. The Court of Justice's ruling may be contrasted with the view set out by Advocate General Cruz Villalón in paras 18-40 of his Opinion in the *Elchinov* Case, ECLI:EU:C:2010:336. The Advocate General essentially proposed that the Court of Justice overturned most of its previous case law on the matter. As is apparent, the Court of Justice did not follow its Advocate General in this respect.

³⁶ This has been clearly reflected in the Court of Justice's *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* [2012] OJ C338/1, para. 10. See, for example, Case C-251/11, *Huet*, judgment of 8 March 2012, ECLI:EU:C:2012:133, paras 22-26.

³⁷ In Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415, ECLI:EU:C:1991:65, para. 16, the Court of Justice held that '... the legal protection guaranteed by [EU] law includes the right of individuals to challenge ... the legality of [EU regulations] before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling.' (emphasis added). It would seem peculiar if the same approach were not taken where the case concerned the legality of Member State measures under EU law.

actual case is unlikely to have been ‘designed’ to generate a preliminary reference. In order to induce the national court to make a preliminary reference, the parties will therefore have to put forward convincing arguments in support of the need for a preliminary ruling. If the national court finds that the case does not fall within one of the situations where EU law requires a preliminary reference to be made and if the national court takes the view that there is no need to make such reference, it is free not to refer to the Court of Justice. This is so even if both parties to the case agree that a reference should be made.³⁸

Under Article 6 of the European Convention on Human Rights, national courts, whose decisions are not open to appeal under domestic law, may (to some extent) be required to give reasons, based on the applicable law and the exceptions to make a preliminary reference laid down in the case-law of the Court of Justice of the European Union, for their refusal to refer a preliminary question on the interpretation of EU law. The national court of last instance may have to set out its reasons for considering that the question is not relevant, that the provision has already been interpreted by the Court of Justice (*acte éclairé*), or that the correct application of EU law is so obvious as to leave no scope for reasonable doubt (*acte clair*). If a national court fails to give reasons when refusing to refer, this refusal may be considered to be arbitrary in contravention of Article 6(1) of the European Convention of Human Rights.³⁹

Sometimes the lawyers representing a private party, more or less explicitly, ‘design’ the dispute in such a way that, in itself, this induces the national court to make a preliminary reference. The most obvious way of doing this is by making it immediately apparent that the case concerns the interpretation of EU law. Thus, two private parties may agree to design the dispute so that it turns upon the correct interpretation of EU law.

The PreussenElektra Case

In *PreussenElektra*, the German Government argued that the case was contrived precisely because the two private parties to the case apparently had designed the dispute so that it turned on a specific EU law issue. According to the German Government the one party’s claim against the other party merely

³⁸ See for example judgment of 16 April 1999 (1 O 186, *Zeitschrift für Wirtschaftsrecht* 1999, p. 959 summarised in *Reflète* 2/1999 at p. 3) and the decision of 17 July 2009 by the Spanish Supreme Court as summarised in *National Courts and EU Environmental Law* (Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina, eds) (Groningen: Europa Law Publishing 2013) pp. 134, 366 and 375.

³⁹ European Court of Human Rights, judgment of 8 April 2014, *Dhahbi c. Italie*, Application no 17120/09, available at <http://hudoc.echr.coe.int/eng?i=001-142504> and judgment of 21 July 2015, *Schipani et autres c. Italie*, Application no 38369/09, available at <http://hudoc.echr.coe.int/eng?i=001-156258>.

was a pretext designed to obtain a particular answer from the Court of Justice. Nevertheless, the Court of Justice admitted the reference, not least since parts of the dispute concerned payments between the two parties which were imposed directly by the contested German Act.⁴⁰

Similarly, in the Court of Justice's case-law there are examples of preliminary references where the only objective was to obtain a ruling on whether a Member State's laws or practices were in conformity with EU law.

The FNV Case

In *State of the Netherlands v. Federatie Nederlands Vakbeweging* the Court of Justice accepted a preliminary reference relating to an action brought by the Netherlands Trade Union Federation against the State of the Netherlands and where the purpose of that action was 'to obtain a finding that the State of the Netherlands acted unlawfully' under EU-law.⁴¹

The Humanplasma Case

In the *Humanplasma* case, following a procurement procedure, the company Humanplasma submitted a bid for providing certain blood products to Wiener Krankenanstaltenverbund (Vienna Hospital Association). Austrian law however laid down certain requirements which made it difficult for Humanplasma to comply with the conditions for winning the contract. Humanplasma claimed that the Austrian legal requirements were in contravention of the EU rules on free movement of goods. The dispute was brought before the Austrian Landesgericht für Zivilrechtssachen which decided to make a preliminary reference on this question.⁴²

A party (or parties) may also design the case in such a way that, under EU law, the national court is obligated to make a preliminary reference. Three situations may be distinguished. Firstly, where a national court of last instance is required to rule on the interpretation of EU law to decide the dispute and where this interpretation is not obvious (*acte clair* or *acte éclairé*). Secondly, where the ruling of a national court presupposes that an EU legal measure is

⁴⁰ Case C-379/98, *PreussenElektra* [2001] ECR I-2099, ECLI:EU:C:2001:160, para. 44. The ruling has been commented upon by Morten Broberg & Nina Holst-Christensen, *Free Movement in the European Union – Cases, Commentaries and Questions*, 4th edition (DJØF Publishing 2014) pp. 331-332.

⁴¹ Case 71/85, *State of the Netherlands v. Federatie Nederlands Vakbeweging* [1986] ECR 3855, ECLI:EU:C:1986:465, para. 2.

⁴² Case C-421/09, *Humanplasma v. Austria* [2010] ECR I-12869, ECLI:EU:C:2010:760. For comments on this case, Morten Broberg & Nina Holst-Christensen, *Free Movement in the European Union – Cases, Commentaries and Questions*, 4th edition (DJØF Publishing 2014) pp. 162-163.

invalid. And thirdly, where the national court's intended ruling will deviate from the Court of Justice's established interpretation.

The first situation may often be created by structuring the dispute in such a way that there will be no right of appeal from the national court whilst it is necessary to have a question of EU law clarified in order to adjudicate on the dispute. If the losing party does not have a right to a legal review of the decision allowing for a possibility of a reference for a preliminary ruling by the reviewing national court, this court is under an obligation to make a preliminary reference (presupposing the case is not one of *acte clair* or *acte éclairé*). It may be possible to attain this objective, for instance, by simply filing a small (rather than a large) claim against the other party since in some Member States the losing party will be precluded from appealing the judgment if the dispute merely concerns a claim below a given value.

The Costa/E.N.E.L. Case

Above we have seen that in the case of *Costa/E.N.E.L.* Mr. Costa instituted legal proceedings on the basis of an invoice amounting to only 1,925 Italian lire. Due to the negligible sum the case could only be heard by the *Giudice Conciliatore* – which made a preliminary reference in accordance with (today) Article 267(3) TFEU.⁴³

The second situation is more difficult to design since it is not enough to argue that an EU legal measure is invalid. Only if, moreover, the national court is inclined to agree that the EU legal measure suffers from invalidity and will base its ruling on this view is the national court under a duty to make a preliminary reference.⁴⁴

The Lucchini Case

In *Lucchini* the question arose as to whether a national court could declare invalid a Commission decision rendering State aid given to the Italian company Lucchini SpA incompatible with the common market (and thus illegal). In its ruling, the Court of Justice clearly held that while national courts may, in principle, consider whether an EU act is valid, they nonetheless have no juris-

⁴³ Case 6/64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585 (English special edition), ECLI:EU:C:1964:66.

⁴⁴ Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [2007] ECR I-6199, ECLI:EU:C:2007:434, para. 53.

diction themselves to declare acts of EU institutions invalid. Only the Court of Justice has jurisdiction to determine that a Union act is invalid.⁴⁵

The third situation is based on the fact that it is for the Court of Justice to establish authoritatively the correct interpretation of EU law. This means that if the Court has given a decision on the validity or correct interpretation of an EU act, the national courts are obliged to follow this existing practice. As a consequence, a national court may not depart from a clear ruling or a clearly established practice of the Court of Justice without first making a preliminary reference to ask the Court whether it is possible to make such derogation in a situation like the one that the referring court is faced with.⁴⁶ Failure to ask the Court of Justice before departing from a clear ruling or a clearly established practice would imply a breach of the principle of loyalty. It follows that in order for a private party to induce a national court to make a preliminary reference in this way, the private party will need to design the case so that it is possible to argue that it is necessary to divert from a clear ruling or an established practice by the Court of Justice. Even though there may be situations where this is possible, it nevertheless is a rather uncertain strategy.⁴⁷ Indeed, this author would expect that in the majority of situations the national courts would simply accept the Court of Justice's established practice; and only exceptionally would the national courts be ready to accept an argument that it is necessary to divert from that practice.⁴⁸ Still, there may be situations where one (or both) parties can persuade the national court that a reference should be made to the Court of Justice to have an earlier ruling by the latter clarified (or corrected).

The International Stem Cell Corporation Case

In *International Stem Cell Corporation* the High Court of Justice (England and Wales) put a preliminary question on the correct interpretation of the concept of human embryos laid down in Directive on the legal protection of biotechnological inventions. It appears that the High Court found an earlier preliminary ruling by the Court of Justice on the same issue to be incorrect.⁴⁹

⁴⁵ Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [2007] ECR I-6199, ECLI:EU:C:2007:434, para. 53. For a more recent ruling, see Case C-112/13, *A v. B and Others*, judgment of 11 September 2014, ECLI:EU:C:2014:2195.

⁴⁶ For an illustration of this, see Tribunal Constitucional. Sala Segunda. Sentencia 58/2004, de 19.04.04, *Recurso de amparo* 4979/1999, summarised in *Reflets* 2/2004, pp. 8-10.

⁴⁷ See for example Case C-400/95, *Larsson* [1997] ECR I-2757, ECLI:EU:C:1997:259 – and compare with the subsequent ruling in Case C-394/96, *Brown* [1998] ECR I-4185, ECLI:EU:C:1998:331.

⁴⁸ Nevertheless, exceptionally a private party may be able to persuade a national court that it is necessary to divert from the practice of the Court of Justice. Indeed, this was the situation in Case 69/85 *Wünsche II* [1986] ECR 947, ECLI:EU:C:1986:104, where a private party persuaded the national court that it was necessary to ask the Court of Justice whether an earlier preliminary ruling in the very same case was flawed.

⁴⁹ See Case C-34/10, *Oliver Brüstle v. Greenpeace eV* [2011] ECR I-9821, ECLI:EU:C:2011:669.

This left the High Court with a choice of either applying that earlier (arguably incorrect) ruling or making a new preliminary reference and ask the Court of Justice to develop (or rather 'distinguish') its former ruling in such a way that it would not apply to the case before the High Court. The High Court chose the latter avenue.⁵⁰

In some situations, it may be particularly difficult to induce a national court to submit a preliminary reference. For instance, a national court contemplating making a preliminary reference may find out that a reference very similar to the one contemplated has already been submitted by another Member State court. In this situation the national court may decide to stay proceedings and await the outcome of the already pending preliminary reference case.⁵¹ Or it may be that a national court contemplating making a reference on a given issue finds out that the European Commission has instituted infringement proceedings against a Member State on the same issue leading the national court to merely await the Court of Justice's ruling in this case.⁵² Equally, there have been situations where several parallel cases bringing up one and the same EU law issue are brought before one (or more) national courts in one of the Member State. This may lead the national court (or courts) to single out one of the cases

⁵⁰ Case C-364/13, *International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks*, judgment of 18 December 2014, ECLI:EU:C:2014:2451. Contrast with the UK Supreme Court's approach in *R (on the application of HS2 Action Alliance Limited) (Appellant) v. The Secretary of State for Transport and another (Respondents)*, judgment of 22 January 2014 [2014] UKSC 3, available at www.supremecourt.uk/decided-cases/docs/UKSC_2013_0172_Judgment.pdf. For examples of German courts having asked the Court of Justice to reconsider its earlier case law, see for example Case C-555/07, *Küçükdeveci* [2010] ECR I-365, ECLI:EU:C:2010:21 and Case C-67/14, *Alimanovic*, pending.

⁵¹ See Conseil d'État, 29.10.03, *Société Techna* (ordonnance) Juris-Data n° 2003-066077 Droit administratif, janvier 2004, p. 32, summarized in *Reflets* 2/2004, pp. 13-15. In this case the Conseil d'État decided (*ad interim*) to disapply a French legal measure which implemented a directive provision on the basis that, presumably, the directive was invalid. At the same time the Conseil d'État decided not to make a preliminary reference on the validity of the directive since the UK High Court of Justice had already made a reference to this effect. See also Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) p. 285.

⁵² Referring to procedural economics and to the fact that infringement proceedings had been instituted regarding a similar question, the German Bundesverwaltungsgericht expressly chose not to make a preliminary reference but instead to await the outcome of the infringement proceedings in Order of 10.11.00, 3 C 3/00, in *Die Öffentliche Verwaltung* 2001 pp. 380-381, *Entscheidungen des Bundesverwaltungsgerichts* Bd.112 pp.166-170 (the ruling has been summarized in *Reflets* 1/2003, p. 5). See also *Vrhovno sodišče Republike Slovenije, gospodarski oddelek*, judgment of 13.03.12, Sodba G 8/2009, www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113042929/, summarized in *Reflets* 2/2012, p. 26-27. See also decision by the Irish High Court, 15 April 2005, *Friends of the Irish Environment Limited, Tony Lowes v. Minister for the Environment, Heritage and Local Government, Ireland, Attorney General, Galway County Council* [2005] IEHC 123. Note that the Irish High Court decided to stay the proceedings and await a ruling by the Court of Justice merely on the basis that the Commission had issued a reasoned opinion regarding the same provision as the one at issue before the High Court.

– a pilot case – to form the basis for a preliminary ruling.⁵³ The reluctance with regards to submitting a preliminary reference in all of these situations may make very good sense from a procedural economy point of view. However, there is an important side-effect since only parties and interveners to the main proceedings forming the basis for the preliminary reference are entitled to submit observations (in writing and orally) to the Court of Justice. In other words, parties and interveners, in those national cases that are stayed without the national court making a preliminary reference whilst this court awaits a ruling from the Court of Justice, are precluded from taking part in the proceedings before the Court of Justice.⁵⁴

If a national court fails to make a preliminary reference where it was obligated to do so, there are only few and ineffective remedies available to the private party or parties.⁵⁵ However, it cannot be excluded that the judgments by the European Court of Human Rights in the *Dhahbi* and the *Schipani* cases,⁵⁶ mentioned above, may turn out to be a useful remedy. At the time of writing this ruling is still so new that it is difficult to say whether that will be the case.

3 Influencing the Formulation of the Preliminary Questions

Since a preliminary reference is a remedy which is exclusively available to the Member State courts, the national court can choose to make a

⁵³ See for example Case C-408/92, *Constance Christina Ellen Smith and others v. Avdel Systems Ltd.* [1994] ECR I-4435, ECLI:EU:C:1994:349 (see the Opinion of Advocate General Van Gerven at para. 3).

⁵⁴ See for example Case C-453/03 ABNA unpublished Order of 30 March 2004. See also Case C-305/05, *Ordre des barreaux francophones and germanophone and others*, Order of 9 June 2006 (unpublished), ECLI:EU:C:2006:389. See further Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 284-289 and Caroline Naômé, *Le renvoi préjudiciel en droit européen* (Brussels: Larcier 2010) pp. 155-156. It may be added that if, instead of singling out a pilot case to form the basis for a preliminary reference, a national court, prior to making the preliminary reference, decides to join the different cases pending before it and involving the same legal issue, all the parties to the joined cases will be entitled to submit observations and take part in the hearing before the Court of Justice. Perhaps another way of allowing the parties to the cases that are not singled out as a pilot case to take part in the preliminary reference proceedings would be to admit these other parties as interveners (in the main proceedings of the pilot case).

⁵⁵ See further Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 266-273.

⁵⁶ European Court of Human Rights, judgment of 8 April 2014, *Dhahbi c. Italie*, Application no 17120/09, available at <http://hudoc.echr.coe.int/eng?i=001-142504> and judgment of 21 July 2015, *Schipani et autres c. Italie*, Application no 38369/09, available at <http://hudoc.echr.coe.int/eng?i=001-156258>.

reference without involving the parties.⁵⁷ Indeed, the national court is free to make a preliminary reference even if both parties object to this.

The Garland v. British Rail Engineering Ltd Case

In the *Garland v. British Rail Engineering Ltd* case neither the appellant nor the respondent wanted the House of Lords to make a preliminary reference to the Court of Justice. The appellant explained that she was ‘anxious to avoid the risk of what might turn out to be an empty reference’ and she thus argued that the case ‘should be treated as an ordinary case of construction of an English act’. Similarly, the respondents made it clear that they did not want the matter to go to the European Court. Still, the House of Lords decided to make a preliminary reference.⁵⁸

The Rosenbladt Case

In the *Rosenbladt* case the parties to the main proceedings as well as the German Government disputed the admissibility of the first of the referring court’s four preliminary questions. Nevertheless, the Court of Justice rendered all four questions admissible.⁵⁹

On the other hand, the national court may involve the parties in the preparations of the preliminary reference if it so wishes. Indeed, the Court of Justice supports that the parties are heard before the reference is completed.⁶⁰

The Kelly Case

In the *Kelly* case the Court of Justice observed that the referring court ‘is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred’, but it added that ‘the fact remains that it is for

⁵⁷ Cf. Case C-561/11, *Fédération Cynologique Internationale (FCI)*, judgment of 21 February 2013, ECLI:EU:C:2013:91, paras 23-31, Case C-251/11, *Huet*, judgment of 8 March 2012, ECLI:EU:C:2012:133, paras 23-25 and Case 126/80, *Salonia* [1981] ECR 1563, ECLI:EU:C:1981:136, para. 7. See also Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C338/1, para. 10. This may be contrasted with the judgment by the UK Supreme Court in *The Office of Fair Trading (Respondents) v. Abbey National plc & Others (Appellants)* [2009] UKSC 6 (available at www.supremecourt.uk/decided-cases/docs/UKSC_2009_0070_Judgment.pdf) where the UK Supreme Court, somewhat surprisingly, chose not to refer – apparently thereby following the wishes of both parties.

⁵⁸ *Garland v. British Rail Engineering Ltd* [1983] 2 A.C. 751 at 754 together with Case 12/81, *Eileen Garland v. British Rail Engineering Limited* [1982] ECR 359, ECLI:EU:C:1982:44.

⁵⁹ Case C-45/09, *Rosenbladt* [2010] ECR I-9391, ECLI:EU:C:2010:601.

⁶⁰ Cf. Court of Justice, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C338/1, para. 19. See also Notes for the Guidance of Counsel [available at the Court of Justice’s website: curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf], Section 7 in fine, where the Court of Justice clearly (albeit implicitly) acknowledges that the text of the order for reference may be proposed by counsel to the parties to the main proceedings.

[the referring court] alone ultimately to decide both [the preliminary reference's] form and content.'⁶¹

In some Member States the courts allow the parties to play important roles in the procedure leading up to the submission of the preliminary reference – sometimes going as far as allowing the parties to jointly draft the preliminary reference (presentation of both facts and law as well as the actual questions to be asked) whilst the national court itself may limit its own involvement to verifying and submitting the reference.

Thus, in *Garland v. British Rail Engineering Ltd* Lord Diplock observed as follows:

'You should draft the questions you want to ask, bearing in mind that the reference is our reference, not yours or the parties'. Put in your draft; we will either adopt it or alter it as we think fit.' And he continued: 'We will stand over this appeal until you have conferred and refer it to the European Court to get their answer. Perhaps counsel on both sides will endeavour to agree draft questions for us to approve and, if you will send them to the Judicial Office, we will consider them'.⁶²

Allowing the parties to play important roles in the drafting of the preliminary reference questions is for instance the situation in Denmark, Ireland and the UK. In contrast, in other Member States the courts may follow a practice where they themselves draft the preliminary reference without allowing the parties any real influence.⁶³

It follows that the possibility of influencing the preliminary reference in general and the formulation of the preliminary questions in particular depend on the actual court hearing the case.

4 Influencing the Reference during the Procedure before the Court of Justice

Parties to the main proceedings as well as interveners in these proceedings are entitled to submit observations to the Court of Justice with re-

⁶¹ Case C-104/10 *Kelly* [2011] ECR I-6813, ECLI:EU:C:2011:506, para. 65.

⁶² *Garland v. British Rail Engineering Ltd* [1983] 2 A.C. 751 at 755. See also H Kanninen, 'General Report on the Colloquium subject: The Preliminary Reference to the Court of Justice of the European Communities' [2002] *Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union*, 18th Colloquium, 29.

⁶³ Examples of this approach we find at the Austrian Administrative Court, the Belgian Council of State, the German Federal Administrative Courts, the French Council of State, and the Supreme Court of Spain.

gards to a preliminary reference from the national court.⁶⁴ This applies to the submission of written observations as well as to the oral pleadings of the preliminary reference proceedings before the Court of Justice. Whilst the parties are under no obligation to take part in the proceedings, the submission of observations offers a (limited) possibility of influencing the Court.

The starting point is that those entitled to submit observations during the preliminary procedure before the Court of Justice cannot amend or expand, or for that matter narrow, the content of the question;⁶⁵ they can only submit suggestions with regard to the interpretation of the content of the reference and with regard to the answers to the questions referred.⁶⁶ For the parties to the main proceedings this is likely to be an advantage since it means that they may influence the formulation of the questions *put by the referring court* – typically without the interference from others – whereupon they may reasonably expect the Court of Justice to turn down subsequent attempts at rephrasing the questions. This restrictive approach to rephrasing is first of all clear where the national court has delimited its preliminary reference to a legal problem that is derived from a *specific rule under national law*.⁶⁷ In contrast, when it comes to identifying the applicable *EU rules* the Court has shown itself more willing to (partly or fully) rephrase the preliminary questions.⁶⁸ Hereby the Court

⁶⁴ Article 23(2) of the Court's Statute as well as Articles 96(1)(a) and 97 of its Rules of Procedure. See for example Case C-108/96, *Dennis Mac Quen* [2001] ECR I-837, ECLI:EU:C:2001:67. In contrast, private entities that are neither parties nor interveners in the main proceedings are not entitled to intervene before the Court of Justice as part of the preliminary reference procedure, cf. Case C-181/95, *Biogen* [1996] ECR I-717, paras 3-4 and 6 as well as Bertrand Wägenbaur, *Court of Justice of the European Union – Commentary on Statute and Rules of Procedure* (Munich: C.H. Beck-Hart-NOMOS 2013) p. 109. See also above Sections 2.2 and 3. According to the British Justice Turner, the fact that a person has been given permission to be heard in the judicial review proceedings pursuant UK law does not mean that that person is automatically categorised as a party for the purposes of the Court of Justice's Rules of Procedure, cf. *Philip Morris Brands v. Secretary of State for Health* [2014] EWHC 3669 (Admin), available at <http://www.bailii.org/uk/ew/cases/ewhc/2014/Philip-Morris-Brands-v-Secretary-of-State-for-Health.pdf> together with *British American Tobacco v. Secretary of State for Health* [2014] EWHC 3515 (Admin), available at <http://www.bailii.org/uk/ew/cases/ewhc/2014/British-American-Tobacco-v-Secretary-of-State-for-Health.pdf>.

⁶⁵ See for example Case C-605/12, *Welmory sp. z o.o. v. Dyrektor Izby Skarbowej w Gdańsku*, judgment of 16 October 2014, ECLI:EU:C:2014:2298, para. 33, Case C-602/10, *SC Volksbank România SA*, judgment of 12 July 2012, ECLI:EU:C:2012:443, paras 46-51, and Case C-316/10, *Danske Svineproducenter II* [2011] ECR I-13721, ECLI:EU:C:2011:863, paras 29-34.

⁶⁶ This is, in particular, the case when the party concerned has not been able to persuade the referring court to expand, amend or limit the scope of the questions referred, cf. Case C-373/08, *Hoesch Metals and Alloys GmbH* [2010] ECR I-951, ECLI:EU:C:2010:68, paras 57-60 and Case C-305/05 *Ordre des Barreaux francophones et germanophones* [2007] ECR I-5305, ECLI:EU:C:2007:383, paras 17-19.

⁶⁷ For an exception, see for example Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, ECLI:EU:C:2010:311, paras 27-30.

⁶⁸ See Case C-657/11, *Belgian Electronic Sorting Technology NV v. Bert Peelaers and Visys NV*, judgment of 11 July 2013, ECLI:EU:C:2013:516, para. 29, Case C-437/09, *AG2R Prévoyance v. Beaudout Père et Fils SARL* [2011] ECR I-973, ECLI:EU:C:2011:112, para. 26, and Case C-70/09, *Alexander*

sometimes answers questions that differ from those originally put by the referring court.⁶⁹ Such rephrasing primarily takes place at the Court's own initiative and less frequently due to observations made by the parties to the main action.⁷⁰ In addition, it normally only takes place at the stage where the preliminary ruling is being drafted; i.e. after the presentation of written and oral observations.⁷¹ In other words, if the parties to the main proceedings want the Court of Justice to consider certain additional arguments, as a rule they must persuade the referring national court to make a fresh preliminary reference.⁷²

Under Article 267, it is for the referring court to present the facts of the case including the relevant national rules. Only exceptionally will the Court of Justice be willing to take account of supplementary information presented to it during the preliminary procedure – and in even more exceptional situations it may base itself on an understanding of the facts (including national law) that conflicts with the one presented by the referring court.⁷³ Nevertheless, to some extent, the Court of Justice allows the parties to supplement the facts provided in the national court's order for reference.⁷⁴ Normally, the Court of Justice is particularly open to including contextual information that can clarify the general background to a problem before it, as long as this new information does not cast doubt on the facts that are given in the order for reference in relation to

Hengartner and Rudolf Gasser v. Landesregierung Vorarlberg [2010] ECR I-7233, ECLI:EU:C:2010:430, para. 27.

⁶⁹ See for example Case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, ECLI:EU:C:2010:215, and Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, ECLI:EU:C:1993:905, in particular para. 10.

⁷⁰ Case C-321/03, *Dyson* [2007] ECR I-687, ECLI:EU:C:2007:51, paras 22-26. See also Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 359-362.

⁷¹ It may be observed that in Joined Cases C-320/90, C-321/90 and C-322/90, *Telemarsicabruzzo* [1993] ECR I-393, ECLI:EU:C:1993:26 the Court of Justice held that a preliminary reference is inadmissible if the question is not sufficiently clear. In this regard the Court merely observed that in the absence of adequate knowledge of the facts underlying the main proceedings, it would not be able to interpret the relevant EU rules in the light of the situation at issue. In other words, the Court made no reference to the right of defence of those entitled to provide observations.

⁷² Case C-236/02 *J. Slob v. Productschap Zuivel* [2004] ECR I-1861, ECLI:EU:C:2004:94, para. 29.

⁷³ See Case C-135/10, *Società Consortile Fonografici (SCF)*, judgment of 15 March 2012, ECLI:EU:C:2012:140, paras 65-69, and Case C-232/09, *Danosa* [2010] ECR I-11405, ECLI:EU:C:2010:674, paras 31-37, and contrast with Case C-182/08, *Glaxo Wellcome GmbH & Co* [2009] ECR I-8591, ECLI:EU:C:2009:559, paras 32-33, and Case C-88/99, *Roquette Frères* [2000] ECR I-10465, ECLI:EU:C:2000:652, paras 16-19.

⁷⁴ See Article 23 of the Court's Statute as well as *Notes for the Guidance of Counsel*, February 2009, section 9 (available at curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf). For an example, see Case 251/83 *Haug-Adrion* [1984] ECR 4277, ECLI:EU:C:1984:397, paras 8-10.

the actual dispute.⁷⁵ In contrast, the Court of Justice only very rarely admits corrections of a national court's interpretation of national law. This is so even where the referring court's interpretation is being disputed by the Member State government that has issued the national rules in question.⁷⁶

5 Problems regarding Private Parties' Use of the Preliminary Reference Procedure

The fact that, strictly speaking, the preliminary reference procedure is not a measure created for private parties to ensure judicial coherence is reflected in various ways. First of all, a preliminary reference presupposes that proceedings are brought before the Member State courts so that the national court can refer a preliminary question. It is far from any lawyer (not to mention any European citizen) who will be aware of the possibility of using the preliminary reference procedure in support of a claim. In addition, it may demand rather considerable resources to pursue this avenue. Perhaps this is why several of the preliminary references spring from cases brought by pressure groups wishing to force a Member State to comply with EU law.⁷⁷ Thus, Dr. Fahey has pointed out that '[i]n Ireland, agricultural organisations and farm related bodies have single-handedly comprised the most litigious bodies employing the preliminary reference mechanism to challenge national and [Union] legislation'.⁷⁸ Similarly, Professor Kristiansen has pointed out that in Denmark trade unions have consciously used the preliminary reference procedure as an efficient means of enforcing labour rights; and that this is an important reason why a large part of preliminary references from Danish courts are concerned with labour issues.⁷⁹ Presumably, pressure groups equally play important roles for the use of the preliminary reference procedure in several other Member States.

A consequence of the seemingly important role played by pressure groups towards employing the preliminary reference procedure as a means for attaining judicial coherence also is that areas where no strong pressure groups are active

⁷⁵ Cf. Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) p. 365 with further references.

⁷⁶ See for example Joined Cases C-128/10 and C-129/10 *Nafiliaki Etaireia Thasou* [2011] ECR I-1885, ECLI:EU:C:2011:163, paras 35-41.

⁷⁷ See for example the ruling by the High Court of Ireland in *Digital Rights Ireland Ltd v. Minister for Communication & Ors* [2010] IEHC 221 (05 May 2010), available at www.bailii.org/ie/cases/IEHC/2010/H221.html.

⁷⁸ Elaine Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (Dublin: First Law 2007) p. 108.

⁷⁹ Jens Kristiansen *Aftalemodellen og dens europæiske udfordringer – Om rollefordelingen mellem overenskomstparterne, Folketinget og domstolene* (Copenhagen: Jurist- og Økonomforbundets Forlag 2013) pp. 195-197.

may be neglected. For example, this may partly explain why Danish courts submit surprisingly few preliminary references in the social policy field. Similarly, even though there are several, strong pressure groups in the field of environmental protection they appear to be faced with considerable obstacles when trying to challenge Member State actions – which may explain the lower than expected number of preliminary rulings in this field.⁸⁰

Whereas private parties may reasonably view the preliminary reference as an important, albeit peculiar, remedy towards ensuring judicial coherence of EU law, the Court of Justice has, as we have seen above, explicitly ruled that the preliminary reference does not constitute a remedy available to private parties; the preliminary reference procedure is a remedy which is exclusively available to the Member State courts. Nevertheless, the Court of Justice has not been completely unequivocal in this regard. Thus, in *Jégo-Quéré*⁸¹ with particular regards to private parties' access to judicial review of the legality of acts of the EU institutions, the Court observed that by what are now Articles 263 TFEU and 277 TFEU, on the one hand, and by what is now Article 267 TFEU, on the other, 'the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the [Union] Courts.'⁸² And it went on to lay down that '... [it is] for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection [i.e. that individuals have access to the national courts].'⁸³ Indeed, not only the Member States but also the Member State courts are under an obligation of allowing individuals access to the national courts in order to enforce their rights under EU law.⁸⁴ That the preliminary reference procedure constitutes a means for protecting the European citizens was reiterated by the Court of Justice in its *Opinion 1/09 (European and Community Patents Court)*.⁸⁵

Perhaps the above may be condensed into that whilst the Court of Justice maintains that the preliminary reference procedure is a remedy that is only available to Member State courts, it simultaneously acknowledges that this

⁸⁰ See *National Courts and EU Environmental Law* (Jan H. Jans, Richard Macrory & Angel-Manuel Moreno Molina, eds) (Groningen: Europa Law Publishing 2013) pp. 176-183. See also p. 59.

⁸¹ Case C-263/02 P, *Commission of the European Communities v. Jégo-Quéré & Cie SA* [2004] ECR I-3425, ECLI:EU:C:2004:210.

⁸² Para. 30.

⁸³ Para. 31.

⁸⁴ Para. 32.

⁸⁵ *Opinion 1/09 (European and Community Patents Court)* [2011] ECR I-1137, ECLI:EU:C:2011:123, see in particular paras 84 and 86.

procedure is of utmost importance for the EU citizens' possibility of effectively defending their rights under EU law.⁸⁶

In the opinion of the present author, there can be no doubt that the preliminary reference procedure has been – and continues to be – crucial for the development of Union law as well as for the European citizens' possibilities of defending their rights under EU law. Still, the preliminary reference procedure should not be immune to criticism. Thus, the preliminary reference procedure carries an important drawback when it comes to its suitability as a measure for ensuring judicial coherence: The fact that it has been created to cater for the Member State courts' possibility of obtaining advice with regards to the interpretation or validity of EU law means that it has not been designed so as to also vest in private parties and Member States adequate procedural rights to establish a fully suitable defence.⁸⁷

Thus, in order for an individual to persuade a national court to make a preliminary reference, this individual necessarily must ensure that a case is brought before such court. Sometimes, however, the only real possibility of achieving this is by infringing a Member State rule, thereby inducing the Member State authorities to institute proceedings against the person in breach – possibly criminal proceedings.⁸⁸ Moreover, even if an individual manages to ensure that a case is heard by a national court, it does not necessarily mean that the national court will make a preliminary reference. This may be because the national court considers that a ruling by the Court of Justice is not necessary for the national court to decide the matter. It may also be that the national court considers a ruling by the Court of Justice necessary; but that it takes the view that such ruling may be obtained without it making a preliminary reference in the actual case – for instance because it decides to make a preliminary reference in another, but similar, case before it, or because the question has also been brought up in a direct action that is pending before the Court of Justice.⁸⁹ In this situation the problem is that only the parties to the main proceedings have the right to

⁸⁶ Already René Joliet made this clear in his article 'La protection juridictionnelle des particuliers contre les manquements étatiques' [1994/4] *Revue française de droit administrative* pp. 647-662.

⁸⁷ See in this respect Case C-362/12, *Test Claimants*, judgment of 12 December 2013, ECLI:EU:C:2013:834, para. 44.

⁸⁸ As noted in section 2.3 above, the Court of Justice has held that where a private party disputes the compatibility of a national provision with Union law this shall not constitute the only form of legal remedy available to the party if such disputing may mean that the party becomes subject to administrative or criminal proceedings.

⁸⁹ See Henry G. Schermers & Denis Waelbroeck, *Judicial Protection in the European Communities*, 5th edition (Deventer: Kluwer 1992) pp. 318-319 regarding the *Danish Just Case*. Compare with the approach taken by the French Conseil d'État, Section du contentieux, avis of 4 February 2000, M. Mouflin, req. n° 213321, reported in *Revue française de droit administratif* 2000, p. 468.

plead before the Court of Justice. Other parties, who may also become affected by the preliminary ruling, are precluded from taking part in the procedure before the Court.⁹⁰

Not only private parties may find the preliminary reference procedure wanting when used as a means to ensure judicial coherence of EU law amongst the Member States. The same is true with regards to the Member States.⁹¹ Thus, if the Commission considers that a Member State infringes EU law, the Commission may initiate an infringement procedure. Normally, the Commission will first make an enquiry with the Member State on the matter. If this does not lead to a solution, the Commission may send a so-called reasoned opinion to the Member State – enabling the latter to address the points of criticism raised by the Commission. Only thereafter may the Commission bring the dispute before the Court of Justice. This pre-litigation stage is an important means for ascertaining the Member State's right to defend itself.⁹² Or, as the Court of Justice has explained:

‘... the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, *to avail itself of its right to defend itself properly* against the objections formulated by the Commission. The subject-matter of proceedings under Article 258 TFEU is therefore delimited by the pre-litigation procedure prescribed by that provision. The proper conduct of that procedure constitutes *an essential guarantee required by the FEU Treaty* not only in order to protect the rights of the Member State concerned, but also in order to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter’.⁹³

Moreover, when the infringement action arrives at the Court of Justice, it follows the classical rules for contentious proceedings, where – sequentially – there will be an application and a defence, possibly followed by a reply and a rejoinder. Only thereafter will there normally be an oral hearing.

⁹⁰ Moreover, where the main proceedings take place between two private parties, a party relying on national law may also find that a preliminary ruling which in practice sets aside the national law infringes the principle of legal certainty. See in this regard Case C-441/14, *Ajos* (pending).

⁹¹ In the 1963-ruling of *Van Gend & Loos* the Dutch Government's observed ‘... that if a failure by a state to fulfil its [Union] obligations could be brought before the Court by a procedure other than those under [Articles 258 and 259 TFEU] the legal protection of that state would be considerably diminished’ cf. Case 26/62, *Van Gend & Loos* [1963] ECR 1 (English special edition), ECLI:EU:C:1963:1, p. 9.

⁹² Indeed, the Member States' right of defense was attributed considerable weight in the *Foglia* rulings when the Court of Justice declined to answer preliminary questions stemming from a contrived case. See further above section 2.2.

⁹³ Case C-525/12, *Commission v. Germany*, judgment of 11 September 2014, ECLI:EU:C:2014:2202, para. 21 (emphasis added). See also para. 22 of the ruling.

In contrast, in preliminary references the Member State may not even be aware of the case until it is notified of it by the Court of Justice; this may be particularly problematic in those situations where the national laws of one Member State are being challenged before a national court of another Member State. Moreover, before the Court of Justice all written pleadings are exchanged only once and simultaneously – thereby precluding the Member State in question from replying in writing to new aspects (accusations) brought up as part of the written procedure. In those cases where the Court of Justice decides to rephrase one or more of the preliminary questions, this effectively undermines the possibility of submitting observations – as has been recognised by the Court itself.⁹⁴ To make the matter worse, there is no guarantee that an oral hearing will be held. In particular, if the Court of Justice finds that the written pleadings and observations provide it with sufficient information to rule on the preliminary reference, it may decide not to hold such hearing.⁹⁵

6 A Modest Proposal for improving the Procedure

Above we have seen that whilst Article 267 is not a remedy available to the parties to a case before a national court,⁹⁶ in practice the preliminary reference procedure has become a highly important means for private parties to ensure a coherent interpretation and application of EU-law throughout the Member States; perhaps even *the* most important means to this effect.

Indeed, today the preliminary reference procedure has attained such importance as a measure to ensure judicial coherence that the prospect of a reference to the Court of Justice may in itself induce a Member State, that is party to proceedings before a national court, to settle the dispute. Whilst from a rule of law point of view the importance of the preliminary ruling procedure may widely

⁹⁴ Case C-605/12, *Welmory*, judgment of 16 October 2014, ECLI:EU:C:2014:2298, para. 34. For an example of re-phrasing, see Case C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, ECLI:EU:C:2010:215. In *Conseil d'État*, Sect. Contentieux, 3ème et 8ème Sous-sections réunies, 11.12.06, n° 234560, *Société DE GROOT EN SLOT ALLIUM B.V. Société BEJO ZADEN B.V.* www.conseiletat.fr/ce/jurisprud/index_ac_id0650.shtml, summarised in *Reflets* 1/2007, pp. 13-15, the French *Conseil d'État* ruled that a referring national court is bound by the *interpretation* provided by the Court of Justice even if this interpretation goes beyond the question(s) put by the referring national court. The *Conseil d'État* simultaneously recalled that it is for the national court to *apply* the interpretation.

⁹⁵ Cf. Article 76(2) of the Court's Rules of Procedure. See also Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 2nd edition (Oxford University Press 2014) pp. 386-387.

⁹⁶ Case C-344/04, *IATA* [2006] ECR I-403, ECLI:EU:C:2006:10, para. 28 and Case 496/04, *Slob* [2006] ECR I-8257, para. 34.

be seen as positive, it is equally clear that the preliminary reference procedure has not been designed in a way that duly reflects that it is often used by private parties towards ensuring judicial coherence.

Perhaps the best way of addressing the challenges identified in this article with regards to the right of defence would be to introduce two rounds of written proceedings in non-urgent preliminary reference cases: A first round where the admissibility as well as the facts and the specific legal questions are clearly established. During this first round the parties to the main proceedings, the Member State of the referring court and the European Commission should be entitled to provide observations. The first round should be followed by a joint statement by the reporting judge and the Advocate General whereby these two unequivocally (if necessary: after having heard the referring court) lay down the facts and, in particular, the legal question(s) to be answered. Following the first round there should be a second round where all those entitled to make observations should be invited to provide written observations on the facts and legal questions that have been unambiguously established. This round should be followed by an oral hearing unless the Court of Justice considers this to be superfluous. Moreover, when the reporting judge and the Advocate General jointly lay down the facts and the legal questions to be answered, they may also be given the power to decide whether the case justifies an opinion by the Advocate General; to the mind of the present author it is rather rare that the preliminary reference cases benefit appreciably from such opinions; thus by excluding the opinion by the Advocate General in the vast majority of the preliminary reference cases, the proposed 'additional round' is unlikely to materially extend the total time spent on answering a preliminary reference.

Arguably, this modest proposal for amending the procedures before the Court of Justice will improve the safeguarding of the legitimate interests of both Member States and private parties.

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