Preliminary references and the right of courts of last resort not to refer (Consorzio Italian Management e Catania Multiservizi)

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EU Law analysis: This judgment by the Court of Justice, Grand Chamber, is about the preliminary reference procedure (Article 267 TFEU) and the power of courts of last instance in EU Member States not to refer, provided that certain conditions are met. It reaffirms existing case-law and provides further guidance about how domestic courts must decide whether the interpretation of EU law is so obvious as to render a reference unnecessary—on the one hand, they are not required to examine all language versions of EU law and may decide not to refer even in cases where different interpretations are possible but not sufficiently plausible; on the other hand, they must be particularly vigilant, given the objective of uniform interpretation of EU law, and must provide reasoning for their decision not to refer. The judgment confirms the significance of courts of EU Member States in the process of interpretation of EU law while it makes it clear that their power is neither unlimited nor unchecked. It is also helpful for practitioners, as it highlights the relevance of the information they may provide domestic courts in order to argue that a reference to the Court of Justice be made. Written by Professor Panos Koutrakos, barrister at Monckton Chambers and Professor of EU Law, and Jean Monnet Professor of EU Law at City, University of London.

Consorzio Italian Management e Catania Multiservizi Case C-561/19

What are the practical implications of this case?

The judgment reaffirms the power of courts of last instance in EU Member States not to refer a question about the interpretation of EU law to the Court of Justice, as an exception to the duty imposed under Article 267 TFEU third paragraph, and reiterates the conditions under which they may do so. It has the authority of the Court of Justice, Grand Chamber. It is noteworthy that the court did not endorse the proposal of Advocate General Bobek to revisit prior case-law.

The judgment also provides some guidance on how domestic courts should approach the above conditions, in particular regarding the principle of acte clair. This guidance is characterised by pragmatism (a case in point being the clarification that domestic courts are not required to engage with all language versions of EU law). In doing so, it reaffirms the role of domestic courts of EU Member States as EU law courts.

On the other hand, the judgment makes it clear that the power of domestic courts of last resort is neither unlimited nor uncontrolled. The duty to state reasons in order to explain a decision not to refer is important, as is its legal foundation, namely the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union. After all, a violation by a court of last resort of an EU Member State of the duty to refer may make the Member State liable in damages (*Köbler* Case C-224/01) and subject to enforcement proceedings under Article 258 TFEU (*Commission v France* Case C-416/17). It may also raise questions about proceedings under European Convention on Human Rights (ECHR) law in the context of the right to a fair hearing (the European Court of Human Rights has already ruled that a decision of a domestic court that does not explain why a reference to the Court of Justice has not been made is in breach of the right, enshrined in Article 6(1) ECHR) (for instance in *Bio Farmland Betriebs S.R.L. v. Romania* (application no 43639/17).

The judgment is also of interest to practitioners. In cases where they wish to argue for a reference to the Court of Justice, it is in their interest to provide as much information as possible about (the possibility of) divergences of interpretation between courts of an EU Member State or courts of

different EU Member States. Once such information is provided to a court of last resort, the latter is under a duty not only to consider whether to refer with particular vigilance but also, should it decide not to refer, to provide reasoning.

What was the background?

This is the second reference made by the Italian Council of State (the highest administrative court) in the context of the same dispute. The plaintiffs in the main action were the successful bidders for a public contract for cleaning services for national railway infrastructure in Italy. Their request for a review of the contract price had been rejected. They challenged domestic rules under which the decision had been taken as contrary to EU law. In its response to the first reference by the Council of State, the Court of Justice held in 2018 (*Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* Case C-152/17) that domestic rules were compatible with Directive 2004/17 but declined to rule on their compatibility with various primary EU rules as the question was hypothetical.

In the light of arguments made by the plaintiffs, the Council of State made a second reference not only about the compatibility of domestic rules with various primary EU law provisions but also about the scope of the duty of the domestic court to refer. The latter was about the role of the parties (the plaintiffs had insisted on challenging domestic law under EU rules), the timing of the reference in relation to the various stages of the national procedure, and the possibility of a second request for a preliminary ruling within the same proceedings.

What did the court decide?

The judgment reaffirmed the principle set out in earlier case-law (mainly in *CILFITt* Case 283/81) that, while domestic courts of last instance are under a duty to refer under Article 267 TFEU third paragraph where any question about the interpretation of EU law is raised before them, they may decide not to refer

- if the question is irrelevant, or
- the question has already been addressed by the ECJ (acte éclairé or principle of precedent), or
- the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, account being taken of the several language versions of EU law, the terminology that is peculiar to EU law, and the context of EU law as a whole and that of the specific provision raised before the domestic court (acte clair)

The judgment provides further guidance on how domestic courts of last resort may determine whether a question about the interpretation of EU law constitutes an acte clair:

- as regards the language requirement, they are not expected to examine each and every language version of the EU provision in question. However, they are required to bear in mind any divergences that may exist between the various language versions of which they are aware, in particular when those divergences are set out by the parties and are verified
- the mere possibility of divergent interpretations does not necessarily rule out the possibility of the relevant provision being an acte clair, if none of these interpretations seem sufficiently plausible
- where a domestic court becomes aware of divergent lines of case-law, within a Member State or between the courts of different Member States, it must be ‘particularly vigilant’ in their assessment of whether a reference is necessary in order to ensure uniform interpretation of EU law

The judgment imposes on domestic courts of last resort a duty of reasoning—if they decide not to refer, they must explain the reasons for their decision with reference to the criteria mentioned above.

This duty follows from Article 267 TFEU and second paragraph of Article 47 of the EU Charter of Fundamental Rights (right to a fair hearing).

The court declined (for a second time) to answer the substantive question about the compatibility of Italian legislation with primary EU law as the reference lacked precision, clarity and sufficient information.

Case details:

- Court: Court of Justice
- Judge: K Lenaerts, President, R Silva de Lapuerta, Vice-President, A Arabadjiev (Rapporteur), A Prechal, M Vilaras, M Ilešič, L Bay Larsen, N Piçarra, A Kumin, N Wahl, Presidents of Chambers, T von Danwitz, C Toader, LS Rossi, I Jarukaitis and N Jääskinen
- Date of judgment: 6 October 2021

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