

CEEMC -Behind the Scenes: Preparing the Moot Court Question

This document is intended to provide students with an idea of what goes on “in the minds” of the CEEMC Organising Committee when they are preparing the moot question and bundle. Hopefully it will provide you with a better understanding of our aims and methodology.

1. The Moot Question

EU law offers a rich variety of cases from which to draw inspiration for any moot. Following the creation of the Court of First Instance (now known post-Lisbon as the ‘General Court’) to assist with the backlog of ECJ cases during the 1980’s, the CEEMC Organising Committee has approximately 500 cases per year from that court and a further 550 cases per year from the ECJ to choose from. Furthermore, the fact that recent years have witnessed the entry into force of the *Maastricht Treaty*, *Amsterdam Treaty*, *Treaty of Nice* and *Lisbon Treaty* means that there are plenty of problems to choose from within EU primary law. If we add to that the fact that the EU institutions are adopting record amounts of secondary legislation and the number of Member States has increased by more than four times since its inception, the European legal system is a dream for finding debatable moot issues (and a potential nightmare for those who seek to find an overarching sense of order in the European integration process!)

So, how do we choose amongst such a wide array of potential issues? Well... that’s the difficult part!

Our aim is to ensure that the students participating in our competition gain a general overview of how the European system functions and cooperates with the Member States’ national systems. In order to achieve that, it is necessary for the moot questions to be a combination of EU “constitutional” issues and more “everyday” issues, such as interpretation of Directives.

Although much of the EU’s “constitution” (if one dares to use that word post-Lisbon!) has already been the subject of ECJ case law, the rapid pace of the EU’s development means that there is always something left to be decided. It seems that with the ECJ “the story is never quite finished”. Even as regards doctrines of EU law which have existed since the 1960’s, the possibility cannot be excluded that the ECJ will decide to extend their application into new areas. Take direct effect as an example. Who would have thought that the ECJ would extend the application of this doctrine from Treaty articles to Regulations and then to Decisions and, ultimately, Directives? Who could foresee the extension of liability under Directives from the State to emanations of the State? Who would have imagined that, in some circumstances, the ECJ would be willing to give direct effect to a Directive *before the date of implementation* has expired? Such “constitutional” judgments show the ECJ at its most powerful and provide students with an understanding of EU law which is not possible to gain from merely reading the Treaties themselves. Accordingly, our moot problems try to find new areas of “constitutional” interest and to discuss what might be the next chapter in the ECJ’s constitutionalism of the EU system. This is particularly important for students from across central and eastern Europe, whose countries have only recently joined the Union and where the full force of the ECJ’s jurisprudential creativity might not yet have been felt.

With this aim in mind, past moots have required students to consider a range of “constitutional” questions, such as the following:

- Might a Member State incur liability for the early implementation of a Directive where this was done in bad faith and with the aim of protecting the home market?
- Does Community law require a national court to review the compatibility of a national statute which will not enter into force until some future date if this statute is challenged as being contrary to Community law?
- What are the limits, if any, which EC law imposes on Member States as regards the imposition of criminal sanctions?
- Is a Member State entitled to create a national body with the power to re-word preliminary references sought by a national court before they are sent to the ECJ?
- Is a new Member State bound by the provisions of EU law which has neither been translated nor transposed into in its own language?
- To what extent, if at all, was a Member State required to respect the *Charter on Human Rights* prior to its incorporation into the Lisbon Treaty?

- What are the outer limits of the concept “court or tribunal” which may refer a preliminary reference to the ECJ?
- Are 3rd country nationals entitled to rely upon the doctrines of EU law which would give rise to State liability?
- When should a Member State be liable for the behaviour of its national courts?

Of course, the other very important aspect of the ECJ's role within the EU system is to interpret EU legislation. In this sense the ECJ acts as an “everyday” court, focusing on specific provisions in secondary legislation, rather than on larger “constitutional” issues. Since the majority of preliminary references are of this kind, it would be unrealistic for our moot to ignore them and focus solely upon “constitutional” issues, interesting as they may be. Accordingly, we try to identify a particular piece of secondary legislation and ask students to take an in-depth look at various provisions which are causing problems to the national court in terms of their application. Past moots have looked at questions such as the following in relation to particular pieces of secondary legislation:

- What is the meaning of particular provisions?
- Are those provisions capable of having direct effect?
- Is the body mentioned in the moot question to be treated as an “emanation of the State”?
- Does the piece of EU law respect the principles of subsidiarity and proportionality?
- Was the proper Treaty basis used for the adoption of the EU law in question?

The most difficult task is to construct a moot question which combines both “constitutional” and “everyday” issues but the CEEMC Organisers are extremely lucky to have a very reliable drafting team comprised inter alia of who work in the various EU institutions (predominantly the ECJ, Commission and Parliament) and academic experts. They provide initial inspiration as to “what’s hot and what’s not” in EU law in any given year and help to write the moot question itself. In some years, the moot question has been so “hot” that an Advocate-General’s opinion was delivered on a very similar issue shortly before the competition and an ECJ judgment shortly afterwards! Having competed in the competition, students were therefore able to compare their own thoughts on the moot issues with those of the ECJ itself.

2. The Moot “Bundle”

Having written the question, we then need to decide which materials to include in the bundle provided to students. Our thinking behind the creation of a bundle (and limiting students’ submissions to those materials contained in the bundle) is that we want to ensure a “level playing field” between teams. Some teams come from countries or Universities where EU law is a major part of their law studies and their University libraries are packed with EU law materials, whilst others come from Universities where EU is only just beginning to be taught and where EU research materials are in short supply. By limiting teams to the materials contained in the bundle, we aim to take away any inherent advantages which would be gained by some teams and ensure that each team must show how well it can perform with identical materials.

The bundle contains a few chapters of “background” reading on some of the ECJ's most fundamental judgments, such as supremacy of EU law, direct effect, Member State liability etc. These chapters are reproduced with the kind permission of their authors, who are great supporters of the moot. The remainder of the bundle contains any relevant EU primary and secondary legislation and a selection of judgments from the ECJ or General Court. Of course, we could always insert more into the bundle but aim to keep the length of the materials to a minimum so as to give the contestants an opportunity to have some sleep as well as study prior to the competition!

Occasionally, when new materials have become available (such as a new Advocate-General's opinion which could impact on the moot issues) we need to produce a supplementary bundle which is sent to contestants separately.

We hope that this brief explanation helps you to understand the thinking that goes on behind the construction of the moot problem you will face this year. We also hope that the combination of “constitutional” and “everyday” issues which are looked at during our moots will provide you with a flavour of two types of cases which are both extremely important for the EU and which may become increasingly relevant within your own country’s legal system. One thing is for sure - when the time comes, the experience you gain from our moot means that you’ll be ready to play a role in assisting national courts as well as government bodies and so-called ‘emanations of the state’ in both understanding and resolving the problems that face them!