

# Prejudicial questions to the Hoge Raad – and the answers



# Prejudicial questions to the Hoge Raad

## Background

2008: Report '**Strengthening the jurisdiction in cassation**':

- Problem: in civil cases not all important legal questions reach the Hoge Raad. This hinders legal unity and legal development.
- Recommendation: explore the option of posing prejudicial questions
- Legislative proposal 2011: “a speedy answer by the Hoge Raad can prevent the start or prolongation of possibly many individual legal procedures and can contribute to a better fulfillment of the task of legal development in cases with great social need for an answer.”

# Prejudicial questions

## Law

- 1 July 2012: judges in civil cases can put prejudicial questions to the civil chamber of the Hoge Raad.
- 1 January 2012: also in tax law cases
- 1 October 2022 (?) : also in criminal cases
- Conditions:
  1. the question has to be of a purely legal nature
  2. the judge needs the answer to be able to decide the case before him
  3. the answer must be of direct importance for the solving of other (possible) cases
  4. there has to be an interest that extends beyond a single case
- The judge can decide to pose the question on his own initiative, but also on request of one of the parties involved
- The parties must be given the opportunity to **reflect on the intention** to pose a prejudicial question and on the **content** of the question

# Prejudicial questions

## Procedure 1

The Hoge Raad can immediately decide that:

- the question does not meet the criteria, or is a
- ‘acte éclairé’ (the answer to the question follows from the already existing jurisprudence of the Hoge Raad or a
- ‘acte clair’: there can be no reasonable doubt as to the answer to the question

If not:

- Parties can make comments in writing about what the answer should be in their opinion
- The Hoge raad can decide that also others (‘amici curiae’) can comment on the issue to get a broad view:
  1. by **directly inviting** a third person or a legal entity to comment on the question
  2. by placing an **open invitation** on the Hoge Raads’ website; remarks have to be filed by an attorney-at-law practising at the Hoge Raad (this opportunity is often used by sector-organisations, but also by people involved in the same kind of procedure)

# Prejudicial questions

## Procedure 2

Next steps:

- Advice ('conclusie') by the advocate-general at the Hoge Raad
- The parties can react ('amici curiae' cannot)
- The Hoge Raad decides: 1. the question (or some of more questions) don't meet the criteria or are not of enough importance  
2. the Hoge Raad answers the question (the Hoge Raad can reformulate)

# Prejudicial questions

## Legal status

The answer the Hoge Raad gives binds the judge who put the question (if he still needs the answer to decide the case).

If in other cases the same legal question arises, the judge is not formally bound, but will practically always follow the answer the Hoge Raad gave.

# Prejudicial questions

## Experiences in civil cases

- About 13 questions per year (on average)
- Asked by both judges of the first instance and appeal courts
- The main goal of bringing important legal questions to the Hoge Raad in an early stage has been reached
- Examples of important questions that were answered:
  - Is supplying a 'free' telephone with a phone contract legally permissible?
  - Questions about costs of extrajudicial collection
- In some cases it was decided that it is up to the legislator to decide the issue, so the question was not answered
  
- The legal practice is generally satisfied with this new instrument
  
- -Bottleneck: capacity

# Prejudicial questions

## Experiences in tax law cases

- Since 2016 an average of 4 questions a year