

Answers

to the questionnaire for the 18th colloquium of the Councils of State and Supreme Administrative Jurisdictions

"The Preliminary Reference to the Court of Justice of the European Communities"

Austria

1. General questions

1.1.

Does the internal legal system of your country provide for a procedure resembling the procedure for preliminary rulings established in Article 234 of the EC Treaty? Can a court of law refer a question relating to a pending case to another court of law (a special court, a court of a different branch of law, a court of higher instance), and receive an answer which is binding (or not binding)? What are the principal differences between such national arrangements and the procedure referred to in Article 234?

i) A procedure similar to the procedure concerning preliminary rulings established in Art. 234 EC¹ lies in the competence of the Austrian Constitutional

¹ Articles of the EC Treaty will be cited hereinafter in line with the new method of citation of the articles of the EU, EC, ECSC and Euratom Treaties, that pursuant to the renumbering of the articles of the Treaty on European Union (EU) and of the Treaty establishing the European Community (EC), brought about by the Treaty of Amsterdam, the Court of Justice and the Court of First Instance have introduced with effect from 1 May 1999 (cf. press release No. 57/99 of the Court of Justice of 30 July 1999 regarding a uniform system of citation or the "Note on the citation of the Treaties in the publications of the Court of Justice and the Court of First Instance" on the website of the Court of Justice (www.curia.eu.int) and n° 21/99 and 22/99 of the weekly report on the work of the Court).

Court to pronounce an ordinance to be contrary to law² and to pronounce a law to be unconstitutional³:

According to Art. 139 para. 1 of the Austrian Federal Constitution (B-VG) the Constitutional Court is competent to pronounce inter alia on application of a court or an independent administrative tribunal (Art. 129a of the Austrian Federal Constitution) whether ordinances issued by a federal authority or Land authority are contrary to law, but ex officio if the Court had to apply such an ordinance in a pending suit.

According to Art. 140 para. 1 of the Austrian Federal Constitution the Constitutional Court pronounces inter alia on application by the Administrative Court, the Supreme Court, a competent appellate court, an independent administrative tribunal or an independent administrative tribunal whether a Federal or Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit.

Thus the courts or independent tribunals are obliged to refer a question to the Constitutional Court and to submit to pronounce this ordinance/law to be contrary to law/unconstitutional whenever there are doubts on the legality (the situation is much the same as it is in Community law: the court must not decide the matter of conformity with the hierarchically higher norm on its own; it is obliged to refer this question to the Constitutional Court when there are doubts; contrary to the legal situation in other countries, the Austrian Constitutional Court does not only decide on the conformity of Acts of Parliament with the Constitution, but also on the conformity of provisions issued by administrative authorities with the law [even when there is no constitutional question at stake]; so the Administrative Court has not even the power, e.g., to set aside a town planning provision of a municipal authority; it has to refer the question of legality to the Constitutional Court). This procedure is similar to the reference procedure before the European Court of Justice (hereinafter ECJ), although different in subject.

According to para. 3 of Art. 139 of the Federal Constitution the Constitutional Court may rescind an ordinance as contrary to law only to the

² Art. 139 Austrian Federal Constitution.

³ Art. 140 Austrian Federal Constitution.

extent that its rescission was expressly submitted or the Court would have to apply it in the pending suit (with specific exceptions mentioned in para 3).

Similar to para. 3 of Art. 139 regarding ordinances, according to Art. 140 of the Federal Constitution the Constitutional Court may as well rescind a law as unconstitutional only to the extent that its rescission was expressly submitted or the Court would have to apply the law in the suit pending with it.

According to para. 5 of Art. 139 the judgment by the Constitutional Court which rescinds an ordinance as contrary to law imposes on the highest competent Federal or Land authority the obligation to publish the rescission without delay. The rescission enters into force on the day of publication if the Court does not set a deadline, which may not exceed six months, or if legal dispositions are necessary, 18 months for rescission.

According to para. 6 of Art. 139 of the Federal Constitution all courts and administrative authorities are bound by the Court's decision, if an ordinance has been rescinded on the score of illegality or if the Constitutional Court has pronounced an ordinance to be contrary to law pursuant to Art. 139 para. 4. However, the ordinance continues to apply to the circumstances effected before the rescission, the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has set a deadline pursuant to Art. 139 para. 5 in its rescissory judgment, the ordinance shall apply to all the circumstances effected, the case in point excepted, till the expiry of this deadline.

According to para. 5 of Art. 140 of the Federal Constitution the judgment of the Constitutional Court which rescinds a law as unconstitutional imposes on the Federal Chancellor or the competent Governor the obligation to publish the rescission without delay. The rescission enters into force on the day of publication if the Court does not set a deadline for the rescission. This deadline may not exceed eighteen months.

Unless the judgment pronounces otherwise the legal provisions rescinded by the law which the Court has pronounced unconstitutional become effective again on the day of entry into force of the rescission. All courts and administrative authorities are bound by the Court's decision. The law, however, continues to apply to the circumstances effected before the rescission, the case in point excepted, unless the Court in its rescissory judgment decides otherwise.

Otherwise, no procedure similar to the one of Art. 234 EC exists.

It has to be stressed, that the procedure described above only refers to the question of the conformity of ordinances and law with domestic law. The Austrian Constitutional Court has no competence to rescind norms because they are contrary to Community law. So, especially the question whether national law or directly effective provisions of Community law are applicable, has to be decided in each case by the competent authority or court, unless the legislator rescinds the law (or the author of an ordinance transposes the relevant provision of Community law correctly into national law).

ii) The main difference between these national proceedings explained above and the procedure according to Art. 234 EC lies in the different decision making power: whereas the Austrian Constitutional Court may not only decide a specific question of law arising in a pending case, but may declare a law or an ordinance invalid (with the consequence, that all the courts and administrative authorities are bound by the decision after its publication), the ECJ has only power to decide on the specific questions referred to it, having in general effects *inter partes* (if one leaves aside the effects that such a decision according to the case law of the ECJ may have on the necessity to refer further questions to the ECJ: cf. Case C-337/95, *Christian Dior* [1997] ECR I- § 28).

On the other hand, the Constitutional Court may also examine ordinances and laws *ex officio* in a pending suit, whereas the ECJ does not have such a power of review (cf. Art 241 EC; possibility of the *parties* to plead the grounds specified in the second paragraph of Article 230 in order to invoke before the ECJ the inapplicability of a regulation).

1.2

Is your country bound by other international arrangements outside the EU involving the possibility of referring questions for a preliminary ruling to an international court of law?

No⁴.

⁴ Except for the year of 1994, in which Austria was bound only by the EEA Agreement.

1.3.

Are there any supplementary provisions issued in your country concerning the procedure referred to in Article 234 of the EC Treaty or is the procedure solely and directly based on Community law? What is the level of such national norms and what questions do they involve?

There exist only two supplementary provisions concerning the procedure referred to in Article 234 EC.

Section 38a of the General Code on the Administrative Procedure (General Administrative Procedure Act⁵) and Section 38a of the Code on the Administrative Court provide for the stay of proceedings in case a question has been referred to the European Court of Justice.

Besides the Administrative Court there are also a number of independent bodies (cf. Art. 133 n° 4 of the Federal Constitution), so called "Kollegialbehörden mit richterlichem Einschlag" ("collegiate bodies with a judicial element"; tribunals that include at least one judge and that decide independently and are separated from the administration that is bound by instructions) and the Independent Administrative tribunals (Art. 129 and 129a - 129c of the Federal Constitution) that fulfil functions of an administrative judiciary⁶. Such bodies according to the case-law of the Court of Justice can

⁵ The General Administrative Procedure Act of 1925 as codified in 1950 and 1990, as amended by BGBl I N° 137/2001.

⁶ Articles 129a and 129b as amended by the 1988 Amendment of the Federal Constitution (BGBl n° 685/1988) provide for Independent Administrative Tribunals in the Länder, Art. 129c provides for an Independent Asylum Board (of the Bund);

Independent Administrative Tribunals in the Länder deal, inter alia, with appeals against penal orders issued by administrative authorities. Their members are lawyers, appointed by the Regional Government for a term of office of at least 6 years (in several Länder for lifetime; after renewal of the appointment the appointment lasts for lifetime in each Land). They are independent and not bound by instructions of administrative authorities. They can only be dismissed from office upon a decision of the Independent Administrative Tribunal itself.

fulfil the criteria for a court or tribunal according to Art. 234 EC.⁷ The rules of procedure for those independent bodies and the Independent Administrative Tribunals are contained in the General Code on the Administrative Procedure ("Allgemeines Verwaltungsverfahrensgesetz - AVG", BGBl. 1991/51). This Code was amended in a similar way as the Code on the Administrative Court; the relevant clause with respect to the reference procedure is also section 38a of the Code as amended by BGBl. n° 471/1995. An authority that has referred a question of Community law to the Court of Justice must take only such steps and decisions by which the decision of the Court of Justice is not prejudiced and which cannot be postponed.

Moreover, there has been issued an Act on the reference for preliminary ruling with a view to the competencies of the ECJ according to Art. 35 EC (BGBl. I Nr. 89/1999). This Act refers to the reference for preliminary rulings in matters falling under Art. 35 EC, in the areas of police and judicial cooperation (esp. preliminary rulings on the validity and interpretation of conventions established under Title VI EC).⁸

1.4.

If appeal to a court of higher instance has been restricted (e.g. leave to appeal required), has this been deemed to have the effect of treating courts of lower instance as being in the position of a court or tribunal of last instance referred to in Article 234 (3)? Which of the national courts in your country are, in general or in certain circumstances, courts or tribunals as referred to in Article 234 (3)?

i) As no administrative courts of lower instance exist, the access to the Administrative Court as court of last instance is generally not restricted. Thus

⁷ ECJ *Hospital-Ingenieure*, 4. 3. 1999, case C-258/97, ECR 1999, I-1405, with regard to the Independent Administrative Tribunal for Carinthia (in the judgment translated as "Independent Administrative Senate").

⁸ This Act is applicable in administrative procedures as well as in Court procedures (as the described bodies and the Independent Administrative Tribunals according to the Austrian Constitution are not courts but administrative authorities, the scope of application cannot be restricted to court procedures in the sense of the Austrian Constitution).

the Administrative Court is court of last instance and is obliged to refer a question for preliminary ruling to the ECJ if the conditions under Art. 234 EC are fulfilled.

However, according to Art. 131 para. 3 Austrian Federal Constitution the Administrative Court can dismiss the hearing of a complaint against a ruling by an independent administrative tribunal under certain circumstances⁹. Thus it has been discussed whether the independent administrative tribunal can be regarded as a court of last instance in the sense of Art. 234 EC, because access to the Administrative Court might be restricted. The Administrative Court is not empowered to dismiss the hearing of any complaint against a ruling by an independent administrative tribunal, but first it has to examine and study the case. Only if it comes to the conclusion that the decision does not depend on a legal issue of basic importance, it may then dismiss the case. So far the Administrative Court and the Constitutional Court have both pronounced that the independent administrative tribunals are not obliged to refer a question for preliminary ruling¹⁰. Furthermore, the argument is brought forward that - as a consequence of Community law - the Administrative Court must not dismiss the hearing of a complaint against a ruling by an independent administrative tribunal¹¹ if a question of community law remains open for interpretation.¹²

⁹ Namely, if the decision does not depend on a legal issue of basic importance. "Basic importance" is given especially inasmuch as the independent administrative tribunal's adjudication deviates from that of the Administrative Court, such adjudication is lacking or the legal issue in question has in the Administrative Court's adjudication not as yet been uniformly settled. In administrative penal suits the Court can only dismiss the hearing of a complaint if a small monetary penalty was imposed. Section 33a of the Code on the Administrative Court defines the small monetary penalty with 10.000,-- ATS (app. 725 Euro).

¹⁰ See judgment of the Constitutional Court of 15 March 2000, B 2767/97, and judgment of the Administrative Court of 5 July 1996, 96/02/0094.

¹¹ As provided for by Art. 131 para. 3 Austrian Federal Constitution and Section 33a of the Code on the Administrative Court.

¹² See inter alia judgment of the Administrative Court of 22 March 2000, 2000/04/0033.

The situation thus is not quite the same as in the case of a leave of appeal; cf. the decision of the Court of Appeal at Turku (Turun hovioikeus) 26 May 1998, N° 1275/98 (cf. OJ 1999 C 354, p. 185).

ii) Concerning the question which of the national courts are courts or tribunals in the sense of Art. 234 para 3 EC, it has to be differentiated: generally, as noted above, it is the Administrative Court. However, the Administrative Court does not have jurisdiction in matters where the final decision rests with an independent tribunal according to Art. 133 n° 4 of the Federal Constitution and complaint to the Administrative Court is not expressly declared admissible by law (see answer to item 1.3.).

In these cases access to the Administrative Court is not only restricted, but generally excluded unless explicitly declared admissible by law.

Therefore in these matters a complaint against the decision of such a tribunal can only be lodged with the Constitutional Court. The Constitutional Court, however, in general, cannot be regarded as a Court of last instance, mainly due to its limited power of review (see item 1.5.). Thus in these matters also tribunals according to Art. 133 n° 4 are courts of last instance in the sense of Art. 234.

1.5.

If the legal order of your country provides for a particular judicial remedy before a constitutional court, how might this have affected the application of Art. 234?

Besides its competence described in item 1.1., the Constitutional Court according to Art. 144 para. 1 of the Austrian Federal Constitution pronounces on rulings by administrative authorities including the independent administrative tribunals in so far as the appellant alleges an infringement of a constitutionally guaranteed right by the ruling or the infringement of personal rights on the score of an illegal ordinance, an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted. According to Art. 144 para. 2 the Constitutional Court can decide to reject a hearing of a complaint if it has no reasonable prospect of success or if the decision cannot be expected to clarify a constitutional problem¹³.

¹³ Except if the case at hand according to Art. 133 is barred from the competence of the Administrative Court.

Hence the competence of the Constitutional Court in this respect is generally limited in so far as infringements of a constitutionally guaranteed right is alleged, the review is not a review in depth, as it is done by the Administrative Court, but focuses on alleged violations only of constitutionally guaranteed rights. Thus, in cases in which the Constitutional Court does not examine in depth, a tribunal judging in lower instance is a court in the sense of Art. 234 (3) EC, if there is no complaint to the Administrative Court; this applies especially to tribunals according to Art. 133 n° 4 of the Austrian Federal Constitution unless the law provides for a complaint to the Administrative Court.

Only in certain matters the Constitutional Court does examine the appealed decision in depth (e.g. law on the right to assemble and the law on associations; the reason for this is, that the right to assemble and the right to constitute associations are guaranteed by constitution and any breach of the law with respect to those rights at the same time is a breach of constitution; thus, there is no space for a decision of the Administrative Court on the legality of the act as opposed to the decision on the conformity with constitution; in such cases there is only a competence of the Constitutional Court). In these cases it is then court of last instance being obliged to refer a question for preliminary ruling should there arise one.

The Constitutional Court held that violations of Community law in general do not constitute infringements of constitutionally guaranteed rights¹⁴ and therefore generally spoken it is not obliged to decide on the question whether an administrative act is in line with Community law.

The Constitutional Court, therefore, in general does not rule on the conformity of a national law with Community law.¹⁵

The most important exception to this rule is the case, when an appealed decision or law is based on **qualified violations** of community law, which per se constitute violations of constitutionally guaranteed rights. The Constitutional Court in this case had to quash the administrative act because of the violation of the constitutional right following from the obvious breach of Community law. As

¹⁴ See judgment *Achtsnit*, VfSlg. 14.886/1997.

¹⁵ Cf. OJ 1999, C 354, p. 187, on the judgment of the Constitutional Court concerning the Burgenland provisions on the promotion of tourism. The Constitutional Court did not refer the question of compliance with Community law to the ECJ as had been done by the Administrative Court in the case *Pelzl* and others, case C-337/97, C-344/97 and C-390/97.

such an obvious breach of Community law per se can be stated without a reference for preliminary ruling - as otherwise it was not an obvious one! - normally there is no need for the Constitutional Court to go into such details of Community law that could require a reference for a preliminary ruling. So, the Constitutional Court held that having in view the principle of non-discrimination, being a constitutionally guaranteed right, it has to review whether there is a qualified violation of Community law equal to arbitrariness (see B 1625/98, 24 Feb 1999).¹⁶

This opinion is shared in Austrian literature on the whole; only in the year 2001 there was published a contribution in a journal ("Zeitschrift für Verwaltung" - Journal for Administration) that opposed this point of view (*Thienel, Anwendungsvorrang und Präjudizialität im amtswegigen Normenprüfungsverfahren - Primacy of Community Law and the applicability of the norm at stake as a requirement for norm control procedures*, Journal for Administration 2001, 342 [cf. the answer to 1.1. concerning the competence of the Constitutional Court to pronounce ex officio or on application by a court on the question whether a provision is unconstitutional or in conformity with the hierarchically higher norm; the competence depends on the question, whether the applying court has to apply the provision at stake; in cases with Community law impact one could argue, that the Constitutional Court had to check, whether the opinion of the applying court on the applicability of the national norm, was correct; otherwise - namely in the case, where there was a directly effective Community provision that excludes the application of the national norm - the Constitutional Court had to reject the application of the court; so far, the Constitutional Court did not follow these arguments, but ruled, that it is enough, when the court "arguably" came to the conclusion that there was no directly effective Community provision; the Constitutional Court, therefore, also in this context normally is not in the position to apply Community law "in detail" so that it would be necessary to refer a question of Community law to the ECJ]).

Thus, violations of Community law must be qualified and obvious to be relevant in a procedure before the Constitutional Court (this would be the case if there is a decision of the ECJ that leaves no space for any doubt [cf. the criteria for preliminary rulings according to the *CILFIT* and *Dior* judgments; thus the Constitutional Court normally is not obliged to refer a question for preliminary

¹⁶ And arbitrariness is generally judged to violate the principle of non-discrimination.

ruling, as the solution is either clear in the sense of the *CILFIT* judgment, or the question is not decisive for the judgment of the Court and can be left unsolved; it is up to the Administrative Court to go into the details of Community law and to decide, if the administrative act is in full compliance with community law]).

Only in exceptional cases there can be the necessity for the Constitutional Court to refer a question to the ECJ.

So far, the Constitutional Court has made only two references for preliminary rulings, one concerning specific levies on energy, the other a problem of data protection. The background of the first reference was that the Constitutional Court noticed, that the rescission of a provision could lead to a situation contrary to Community law¹⁷. It therefore asked, whether the situation that would be created by its judgment (the rescission of the provision at stake) was in conformity with Community law. From a theoretical point of view there are doubts on the necessity of this reference as it could be argued that the Constitutional Court must not take into consideration, whether the rescission of a provision would lead to a (national) legal situation contrary to Community law.

The second reference (12 December 2000, KR 1/00)¹⁸ pertains to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281 p. 31) ('the Directive'). The Constitutional Court wants to know, whether a national provision that requires the establishment (and publication) of a list of the income of certain public employees is in conformity with Community law, especially with 'the Directive'. The background of the case is, that the national audit institution ("Rechnungshof") is competent to collect the data and publish the list and the Constitutional Court also pronounces in litigations concerning the competencies of the Rechnungshof. The Rechnungshof had initiated the proceedings after several enterprises and institutions had refused to allow the organs of the Rechnungshof to have access to the relevant files.

1.6. i) Is it possible to lodge a separate appeal to a court of higher instance against a decision of a court of lower instance to refer a question

¹⁷ Judgment 8 November 2001, Rs C 143/99, *Adria-Wien Pipeline GmbH, Wiertersdorfer & Peggauer Zementwerke GmbH* [2001].

¹⁸ C-465/00, *Österreichischer Rundfunk* and others.

to the Court of Justice for a preliminary ruling? Do these kinds of appeal occur in practice, and what criteria does the court of higher instance use when judging the legality of the decision by the court of lower instance to make a reference to the Court of Justice?

No, it is not possible to lodge a separate appeal against a decision to refer a question to the ECJ (the question could only arise in a procedure before an independent tribunal according to Art. 133 n^o 4 of the Federal Constitution or an Independent Administrative Tribunal).

ii) Correspondingly, have there been appeals lodged against the fact that a court of lower instance has not referred for a preliminary ruling?

ii) Only in the case in which a tribunal according to Art. 133 n^o 4 of the Federal Constitution has decided and there is no appeal to the Administrative Court (and therefore the tribunal is a tribunal according Art. 234 (3) EC), it is possible to lodge an appeal with the Constitutional Court based on the ground that the right not to be deprived of the lawful judge has been violated. The Austrian Constitutional Court has ruled in this context that if the deciding authority is regarded as a court in the sense of Art. 234 para 3 EC and it has not referred a question for preliminary ruling, a complaint may be filed before the Constitutional Court on grounds of violation of the constitutional right not to be deprived of his lawful judge¹⁹.

See also answer to 1.6.i. It is not possible to lodge a separate appeal against a decision of an administrative authority to another administrative authority of higher instance or an independent administrative tribunal or the Administrative Court, either. However, in the course of a possible appeal against the final decision of an administrative authority as well as - after

¹⁹ This is guaranteed by Art. 83 para. 2 of the Austrian Federal Constitution and Art. 6 ECHR; see inter alia VfSlg. 14.390/1995; see also 1.6 iii.

exhaustion of administrative remedies - in a complaint before the Administrative Court it is possible to allege also violations of community law²⁰.

iii) Can an appeal be lodged on some specific grounds (for instance on the grounds of a violation against the Constitution) against a decision not to refer for a preliminary ruling made by a court or tribunal referred to in Art. 234 (3)?

iii) Yes, if the deciding authority is regarded as a court in the sense of Art. 234 para 3 EC and it has not referred a question for preliminary ruling, a complaint may be filed before the Constitutional Court on grounds of violation of the constitutional right not to be deprived of his lawful judge.

1.7. If your country has a Constitutional Court, has it made a reference to the Court of Justice? If, on principle, it does not make references for preliminary rulings, what are the reasons for that refusal?

See answer to item 1.5.

So far the Constitutional Court has made two references.²¹

1.8.

What is the proportion of cases brought before your court, where it is essential to apply or take into account Community law?

This question is difficult to answer, as the number of cases concerning Community law differs notably between the 21 chambers of the Administrative Court, which are competent to decide on different administrative matters.

Generally spoken it may be necessary to apply Community law in every administrative matter in specific fields of administration, such as tax law or in the field of customs. Also in social security matters or in matters of Common

²⁰ And if a court of last instance does not refer a question for preliminary ruling, although it would be necessary to do so, this could lead to state responsibility.

²¹ See ECJ 8 November 2001, Rs C-143/99, *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH* [2001] and Constitutional Court 12 December 2000, KR 1/00 (ECJ C-465/00, *Österreichischer Rundfunk* and others).

Market the number of cases where community law is relevant is relatively high. In other matters there is only the need to apply Community law, when there is a relevant factual connection to Community matters. There might, moreover, be the need to apply Community law in environmental law matters in a broad sense of meaning²², in cases concerning regulations of road traffic, market regulations in a broad sense of meaning, freedom of movement of workers (a predominant place is taken by questions with respect to the EEC-Turkey Association Agreement) and freedom of service and finally also the law on foodstuffs. In this context it has also to be mentioned, that issues concerning transitional questions have been subject to intensive deliberations of the Administrative Court because Austria has become member of the European Union only in 1995²³.

Practically no community law is applicable e.g. in building law (although here questions related to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204, p.

²² Including matters concerning shipment of waste, provisions with respect to plant-protective agents, law on conservation of nature and regulations concerning the effects of certain public and private projects on the environment.

²³ See for instance the order of the Administrative Court of 29 June 1999, 97/08/0003, referring several questions to the Court of Justice for preliminary ruling. Therein inter alia it is requested whether the existing "Rönfeldt"- case law of the Court of Justice is also applicable within the scope of applicability of the Council Regulation 1408/71 under circumstances which have arisen before this Council Regulation 1408/71 has come into force and before the EC treaty has come into force in the respective member state in question. So far, the opinion of the Advocate General has been delivered (case *Kaske*, C-277/99, opinion of the Advocate General of 18 October 2001). There have also been other cases concerning transitional problems, dealing with national market regulations as well as issues with respect to the statutory monopoly of the cultivation, import and sale of tobacco dealt with such transitional questions (see e.g. judgment of the Administrative Court of 15 May 2000, 95/17/0047, in which transitional questions with respect to possible forfeitures of goods in the area of market regulations provided by national law have arisen, namely if these provisions would still prevail although Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products had already generally become applicable after Austria's accession to the EU on 1 January 1995).

37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ 1998 L 217 could arise; cf. also judgment of the Administrative Court of 23 December 1999, 98/06/0218, in which the Court dealt with the argument, that the authority had not paid attention to a directive concerning environmental pollution, namely with respect to the emissions of the cars using the parking area of the house the building permission of which was at stake in the case) or in staff cases²⁴.

1.9.

Does application of Community law often come up in the work of your court ex officio?

Generally spoken, the answer to this question must be negative. In its deliberations the Court sometimes argues by mentioning some fundamental community principles, e.g. the principle of proportionality, even when the parties have not referred to Community law (in the sense, that the Court firstly points out the national legal situation and then, in addition, checks, whether the solution found would contravene Community law). However, if the decision under review was illegal because it does not comply with obligatory community law, the Administrative Court had to declare the act void and thus apply Community law ex officio; but - as far as can be seen - there have not occurred such cases, so far.

In this context special mention must be given to decisions to grant a stay of execution. The granting of provisional effects might contravene Community law; this aspect has been dealt with by the Administrative Court in various cases²⁵.

²⁴ Unless e.g. issues regarding Art. 45 EC, non-discrimination with respect to various areas, e.g. the reference date, which is the relevant date for advancement and elections to the staff association.

²⁵ See judgment of the Administrative Court of 25 June 1996, 96/17/0232, 0233, 0235. A main issue at stake was the question whether a stay of execution, granted on a national legal basis, with respect to the imposition of taxes prescribed by Community law would contravene Community law and remain thus not applicable due to supremacy of Community law. The Administrative Court denied so, generally. In this context cf. also the decision of the Administrative Court of 28 April 1999, AW 99/17/0006, where the Court deals with the opinion

It is important to stress, that the conditions established by the ECJ in the cases *Zuckerfabrik* and others have been defined in cases where a regulation or directive was subject of a reference for a preliminary ruling on its validity. It is therefore not possible to assume that the Court would strictly apply the same rules in any case where national authorities are responsible for administrative implementation of Community regulations²⁶. The said case law has been developed for situations in which the national court had referred a question of the validity of a regulation for a preliminary ruling to the Court. The Court therefore only had to establish the conditions for relief measures under those circumstances. It can, however, be assumed, that the granting of provisional court protection according to the national law²⁷ is subject to specific conditions under Community law. One of the criteria that have to be fulfilled can be seen in the case law concerning the obligation of member states to implement Community law and to refrain from measures that would deprive Community law of all effectiveness (or the obligation to take appropriate measures to enact Community law)²⁸. Suspension of the effects of an contested administrative act can only be granted if these conditions are fulfilled. The national court has to take into account, whether Community law would be deprived of its effects if the provisional measure was granted²⁹.

in (Austrian) literature (cf. note 26), that Community law requires that there are severe doubts on the validity of a norm to grant a stay (the case was one in tax matters). Similar: Administrative Court 19. 4. 2000, AW 2000/17/0005, or 4. 5. 2000, AW 2000/17/0013, and 19. 6. 2000, AW 2000/17/0019.

²⁶ Cf. in this sense *Vcelouch*, *Gerichtsbarkeit und EU*, Vienna, 1995, 181.

²⁷ Cf. section 30 paragraph 2 of the Act on the Administrative Court, BGBl 1985/10 as amended.

²⁸ *Zuckerfabrik*, C-143/88 and C-92/89, § 31, *Atlanta Fruchthandels-gesmbH*, C-465/93, § 43, *Commission v Federal Republic of Germany*, C-217/88, ECR I-2899 ("*table wine*").

²⁹ Cf. the ruling of the Austrian Administrative Court 25 June 1996, 96/17/0232, 0233 and 0235 ("*Überschussbestand an Reis*"; levy on stocks of rice at the time of the accession); the court held that it is not possible to draw the conclusion of the case law of the ECJ, that a court (or authority), that is not entitled to refer to the ECJ a question on the validity of a regulation was not entitled to grant provisional (court) protection. The court resumed that there might be situations where the granting of provisional protection would produce a conflict with Community law and under certain circumstances like in the *table wine*-case, C-217/88, it might

1.10

Does the internal work of your court involve specific measures for the preparation and hearing of cases dealing with the application of Community law?

Generally not.

However, for a certain period of time, additional support used to be provided by several members of the legal staff having special expertise in Community law who assisted all judges with respect to the research in the area of Community law (e.g. by gathering information and proposing drafts). Meantime it is no longer differentiated between cases dealing with the application of national law and Community law. Thus no specific measures are applied any more.

The measures taken immediately after the Austrian accession of EU with respect to enable the judges to cope with the new tasks were the following:

Firstly, a series of lectures was arranged, in which experts in Community law dealt with important aspects of Community law. Those lectures were arranged by the court; the experts came either from Austrian or German universities, but there was also a meeting with the Austrian judge at the Court of Justice.

Secondly the judges (partly at their own expenses, there was a subsidy by the state that covered only the greatest part of the flight expenses) took part in a visit to the Court of Justice where there was the possibility to take part in a hearing at the Court of Justice (with a short briefing on the case beforehand).

be necessary, not to apply the national law on the provisional measure; in the case the court had to decide the authority, though, had not established such facts that would allow to say that Community law would be deprived of its effects entirely. The court therefore quashed the act of the administrative authority that denied to the applicant the suspension of a tax order.

Thirdly, to some extent it is possible to take part in the seminars at the European Law Academy in Trier (Europäische Rechtsakademie - ERA) or of similar institutions (like in Maastricht), although the budget for those seminars is limited and therefore there are (at most) only three or four judges every year that can attend such courses, for which the court has to pay seminar fees.

See also the answer to the next question.

What means do you have, on the whole, to seek necessary information about Community law?

- Can the judges deciding the matter and the staff assisting them procure information (e.g. about the pertinent case law of the Court of Justice) from a particular unit within the internal organisation of your court, from a service assisting courts in general or from a similar service? Do you consult the research and documentation unit of the Court of Justice? Does your court have a research and documentation department?

A special unit, "documentation for the Community law", was set up within the Administrative Court as early as 1994. The documentation comprises the literature with respect to Community law (contributions in journals, books ...). A list of relevant papers is published and distributed by this unit every third or fourth month.

Furthermore, a list containing the court decisions on matters of Community law is published and distributed as well at regular intervals. Therein all relevant Community provisions being touched by the decision referred to are listed including a short reference to the procedural problem with respect to this specific provision in this case (e.g. "direct application of ...").

Moreover, in the (complete) documentation of the case-law of the court in the so called "RIS", the electronic legal documentation, provided for by the Federal Chancellery, there are used specific indices for decisions dealing with Community law (the decisions are delivered by the Administrative Court electronically; the indices are added by the Administrative Court, as well). So, it is possible, to trace the decisions that in some or the other way had to deal with issues of Community law (according to a search carried out in the course of the work for the drafting of this report it showed, that under the index "Community

law in general" 423 decisions are registered; many of them deal with observations of the parties relying on Community law, arguing, why the Court does not think it necessary to refer a question to the ECJ; if a case does not pertain to "Community law in general", but deals with specific questions of substantive law, it will be registered under a specific index; so, a quantitative analysis, how many decisions since 1995 have dealt with community law, would be rather complicated, as one has to bear in mind, that there are also used more indices for the same decision).

The recent case law of the Court of Justice can be best traced by searching in its data base³⁰. Every judge, as well as the staff assisting the judges, has access to it via his/her own computer. The advantage of this data base is, that the judgments are also available in other languages. It is also possible to access CELEX, the data-base on Community law and the case-law of the ECJ (only German).

- How do you undertake to guarantee that you will have access to up to date information on the case law of the Court of Justice (court reports, legal literature, data bases, etc.)?

As noted above, via the data base of the Court of Justice. For the most recent decisions the press releases of the Court of Justice are helpful, too.

For those, who do not make use of the data base, the weekly report on the work of the Court is a useful means of information.

Literature normally is used in written form (copies of the relevant journals are circulated in the court).

- What means do you have to keep informed about the kind of cases pending before the Court of Justice and their stage of proceedings?

Unfortunately, in general there is no detailed information available, which cases are pending before the Court of Justice and the stage of proceedings yet. Information is available about references made by the various chambers of the Administrative Court itself as the order for reference of each chamber is

³⁰ Under the heading "recent case law" at the web site of the Court of Justice, which is: <http://www.curia.eu.int>.

distributed within the court. Furthermore, a short information on new cases is provided by the weekly reports of the Court of Justice, which are available at the Administrative Court. However, these reports do not give detailed information on the specific issue of Community law at stake (and in practice, there will not be made use very often of this opportunity to get information on new cases). Finally, information is also available from the legal literature sometimes in certain areas of Community law which attract more people (e.g. taxation or state aid; this also applies to German literature, especially with respect to tax and customs matters; this, in practice, should be the main source of information for the judges).

At the internet site of the ECJ there is a list of the pending cases now and obviously there is a new page under construction, on which there will be (further) information on the pending cases. This might prove to be a more practical way to obtain information on pending cases.

- Your experience of using the Internet site of the Court of Justice

A very useful tool; especially with respect to the possibility to have access to texts in English and French (or other languages).

No specific experience needs to be mentioned, except slight practical difficulties (there occur errors when switching back; sometimes the language chosen changes [switch to another official language unintentionally]).

Is there an exchange of information on questions concerning Community law between the courts in your Member State?

In general, there is no institutionalised exchange of information between Austrian courts. The Austrian Court of Justice, however, as well as the German Supreme Administrative Court have their judgments dealing with Community law issues delivered to the Administrative Court. The Administrative Court has its above mentioned compilation "Documentation for the Community law" delivered to the German Supreme Administrative Court, in response. Furthermore, based on a mutual informal agreement the respective orders of reference are exchanged between the Administrative Court and the Regional Tax Authorities; also judgments dealing with issues of Community law are

subject of exchange between the Administrative Court and the German Supreme Financial Court.

In this respect the data base that is to be established by the Association will be very useful.

In complicated questions of Community law, do you attempt to ascertain the contents of the legislation and case law of other Member States?

Yes, depending on the case and similarity of the regulation in question³¹. For obvious reasons, especially the German legal literature and case law are used.

Have you heard or otherwise asked the Commission, for example, for information on points of fact, for acts preparatory to Community legislation or for its opinion? Has your court contacted the Commission in matters related to competition or state aid?

Generally not. Sometimes indications of the Commission's opinion or even papers of the competent Directorate General can be found in the files. However, the Commission has not yet been contacted by the Administrative Court in the course of preparation of a case, although sometimes it has been thought of addressing the Commission for some information. There might be cases where it could be appropriate to invite the Commission to give its opinion on a certain point.

1.11

i) In situations where the legality of a Community act is contested, has your court decided to prohibit the enforcement of a national administrative decision based on the contested Community act (see judgement of 21 Feb 1991 in joined cases C-143/88 and C-92/89 *Zuckerfabrik*)?

³¹ E.g. concerning the organization of the market, as with respect to reference quantities, or concerning tax law.

Not so far (there has not been a case, in which the legality of a Community act was at stake). However, in this context special mention must be given to issues of provisional court protection in general. This difficult area, especially (from the reverse angle) to decide, when the granting of provisional measures might contravene Community law, has been dealt with by the Administrative Court in various cases³².

ii) Has your court applied any of the principles (so-called positive interim measures) arising from the judgement in the *Atlanta* case (9 Nov 1995, case C-465/93 *Atlanta Fruchthandelsgesellschaft*)?

So far the Administrative Court has considered the principles arising from the law on provisional Court protection mainly with respect to grant a stay of execution. The Administrative Court has, however, not ordered positive provisional measures yet. In one case referring to the case *Zuckerfabrik*, it finally denied that the obligatory elements, elaborated by the ECJ in the case *Zuckerfabrik*, could be affirmed in this specific case (see order of 29 Sept 1999, 99/11/0257). In other cases it concluded that the grant of stay of execution already includes as well possible effects of a grant of provisional measures in this special case and thus needs not be granted in addition (see order of 9 April 1999, AW 99/21/0061; the decision is enclosed; in this order the court stated, that it might be necessary according to Community law to issue provisional positive measures). In one case, regarding the freedom of movement of workers, the Administrative Court referred several questions to the ECJ (97/09/0331). In this order of reference the Administrative Court also requested whether Community law requires that the (directly effective) rights deriving from Articles 6 and 7 of Decision No 1/80 in a Member State for the group of people designated therein be safeguarded by providing provisional legal protection in

³² See judgment of the Administrative Court of 25 June 1996, 96/17/0232, 0233, 0235. A main issue at stake was the question whether a stay of execution, granted on a national legal basis, with respect to the imposition of taxes prescribed by Community law would contravene Community law and remain thus not applicable due to supremacy of Community law. The Administrative Court denied so generally. In this context see also decision of the Administrative Court of 28 April 1999, AW 99/17/0006.

certain cases in the form of positive (prescriptive) interim measures. However, in its judgment of 22 June 2000, C-65/98 *Eyüp*, ECR I-4747, the ECJ noted in para. 49 that "there is no longer any need to reply to the other questions, which essentially concern the point whether, if national law does not allow provisional legal protection to be granted, the courts of a Member State are required under Community law to order provisional measures capable of preserving the right of access to employment of Turkish nationals in the host Member State for as long as no final ruling has been given on the legality of the refusal by the competent national authorities to authorise such access." Hence no decision has made the above mentioned issues clear yet.

Finally, there has to be mentioned a decision of the Administrative Court referring to a complaint in which the applicant complained that he was denied to participate in a course offered in line with Art. 19b of the Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services³³. Besides the complaint lodged against this decision before the Administrative Court the applicant claimed as well interim measures to be taken by the Administrative Court in line with Community law so that he could participate in the course. Referring to the case law of the Court of Justice, the Administrative Court held, that there was no "threat of serious and irreparable damage to the applicant"³⁴.

Although no positive interim measures have been ordered yet by the Administrative Court, the Court draws a clear distinction between positive interim measures and other interim measures as the grant of stay of execution: the single reporting judge is only competent to grant a stay of execution; for positive interim measures the competence lies with the (whole) chamber³⁵.

³³ See Administrative Court 2001/10/0030, an order of reference was made on 25 April 2001 (the reference was made under the EU 2001/0012).

³⁴ See 21 March 2001, AW 2001/10/0017.

³⁵ According to Article 14 para. 2 of the Code on the Administrative Court the reporting judge of the specific case has among others also the power to decide on a stay of execution. However, as no power to grant positive interim measures is enumerated in Article 14, decisions with respect to such applications - as for instance the above mentioned decision of 21 March 2001 - are made by the competent chamber consisting of five judges according to Article 11

1.12

When dealing with questions concerning the illegality of a Community act (and especially as regards suspension of a national act adopted on the basis of a Community act), has your court heard the Commission (or other representatives of the Union)?

Not yet; so far no such questions have arisen concerning the illegality of a Community act.

1.13

Statistical data concerning references for a preliminary ruling made by your court

- total number of references for a preliminary ruling made by your court

From 1 January 1995 to 31 December 2001 38 requests for a preliminary ruling were made by the Administrative Court³⁶.

- Development of the annual number of references for a preliminary ruling made by your court, and particularly the numbers during the period 1995-2000.

para. 1 Code on the Administrative Court (cf. the above mentioned decision of 21 March 2001, AW 2001/10/0017).

³⁶ As noted hereinafter in further detail, the most prominent place is taken by requests for preliminary ruling with respect to taxation matters in the broad sense of meaning, followed by issues with respect to free movement of workers and social security matters. The number of files concerned by the 39 requests is higher than 39, as in several cases (especially in 1997) the court combined several cases in which the relevant question was at stake and therefore settled a number of cases with one and the same request. For the purpose of the statistics given here such requests are counted only once (the numbers thus correspond to those in the Annual Reports of the Commission on Monitoring the Application of Community Law with two exceptions, concerning the years 1997 and 2000, in which there is a difference of one request in each of the mentioned years; the reason of this difference could not be clarified).

As Austria has been member of the European Union only since 1 January 1995, also no numbers of references for a preliminary ruling exist for previous years.

Year	Number of requests
1995	0
1996	2
1997	10
1998	3
1999	7
2000	5
2001	12

- Are the questions referred by your court for a preliminary ruling related mainly to a certain domain or to certain domains of cases?

Quite a number of cases submitted to the ECJ for a preliminary ruling contained issues regarding tax law in general (e.g. various duties or value added tax - Sixth Council Directive 77/388/EEC), social security law matters, law on the transport of animals, telecommunication matters and questions of the exercise of fundamental freedoms guaranteed by the EC Treaty.

- How long has the handling time been in recent years as regards the cases referred by your court for a preliminary ruling? If possible please present facts or an estimate of how the total handling time has been distributed: the handling time from the moment the proceedings were started until the reference for a preliminary ruling was sent to the Court of Justice; the handling time at the Court of Justice; the handling time after the preliminary ruling was given.

It has to be mentioned that cases which are referred to the ECJ for a preliminary ruling might not only contain problematic issues with respect to Community law, but also other difficult issues (of domestic law) to be solved.

Thus the handling time after the preliminary ruling was given, might differ to a great extent³⁷.

In general one can say:

- 1/2 year to 1 year for the reference (exceptions in the field of social security, taxation and the law on foodstuffs, where the reference was made after a longer time);
- approximately 2 years proceedings before ECJ,
- 1/2 year to 1 year for the remaining procedure before the Administrative Court, in some cases only one or two months

In detail the figures are as follows:

References made in 1996:

- one case concerning a levy towards the functioning of chambers of commerce (Kammerumlage)³⁸, the proceedings before the Administrative Court were officially instituted on 30 April 1996³⁹, whereas the order for reference was made on 18 September 1996, the judgment of the ECJ was issued on 6 February 1998⁴⁰ and the final decision was pronounced on 19 March 1998⁴¹.

³⁷ Also if several similar cases are referred for a preliminary ruling at the same time, the overall handling time for all of these cases will increase: see e.g. the above mentioned joined cases C-338/97, C-344/97 and C-390/97, *Erna Pelzl and Others*, [1999] ECR I-3319, concerning contributions to tourism associations and to a tourism development fund in which references were made with respect to different laws of different Land authorities with a lot of similar cases in each Land.

³⁸ In which the Administrative Court sought for interpretation of Articles 17 and 33 of the Sixth Council Directive (77/388/EEC).

³⁹ 96/15/0065.

⁴⁰ Case C-318/96, *Spar* [1998] ECR I-785.

⁴¹ 96/15/0065.

- the second request made in 1995 dealt with issues of freedom of movement for workers⁴². The proceedings before the Administrative Court were officially instituted on 22 March 1996⁴³, whereas the order for reference was made on 8 October 1996 and the judgment of the ECJ was issued on 7 May 1998⁴⁴ and the final judgment of the Administrative Court was issued on 24 June 1998⁴⁵.

[2 cases, 1/2 year for the reference; 1 1/2 years proceedings before ECJ, 2 months for the remaining procedure before the Administrative Court]

References made in 1997:

- one reference concerned the free movement of services, namely restriction for boat-owners resident in another Member State, and issues of primacy of Community law the proceedings before the Administrative Court were officially initiated on 4 September 1996⁴⁶, the order for reference was issued on 26 May 1997, whereas the judgment of the ECJ was made on 29 April 1999⁴⁷ and the final judgment by the Administrative Court was issued on 20 September 1999⁴⁸.

- various other references were made regarding several joined cases. These cases concerned taxation, namely contributions to tourism associations and to a tourism development fund. The proceedings in one of the first cases⁴⁹ were officially initiated on 17 October 1996⁵⁰, the order for reference was made on 12 August 1997. The judgment of the ECJ was issued on 8 June 1999⁵¹ and the final judgment of the Administrative Court was issued on 30 August 1999⁵².

⁴² Namely the national legislation requiring legal persons to appoint as manager a person residing in the country.

⁴³ 95/04/0253.

⁴⁴ Case C-350/96, *Clean Car* [1998] ECR I-2521.

⁴⁵ 98/04/0112.

⁴⁶ 96/10/0159.

⁴⁷ Case C-224/97 *Ciola* [1999] ECR I- I-2517.

⁴⁸ 99/10/0069,0070.

⁴⁹ Namely in case 96/17/0409.

⁵⁰ 96/17/0409, 0410, 0420, 97/17/0072, 0077 to 0080, 0120, 0122, 0176, 0177, 0208.

⁵¹ Joined Cases C-338/97, C-344/97 and C-390/97 *Pelzl and Others* [1999] ECR I-3319.

⁵² 99/17/0226.

- another reference concerning the free movement of goods, namely dealing with the law on the transport of animals. The proceedings before the Administrative Court were officially initiated on 27 August 1996⁵³, the order of reference was made on 27 September 1997, the judgment of the ECJ was issued on 11 May 1999⁵⁴, and the final judgment of the Administrative Court was issued on 30 June 1999⁵⁵.
- a further reference dealt with the EEC-Turkey Association Agreement, namely free movement of workers. Officially proceedings before the Administrative Court were initiated on 21 November 1997⁵⁶, the order of reference was made on 18 December 1997 and the final judgment of the ECJ was issued on 22 June 2000⁵⁷ and the final judgment of the Administrative Court was made on 28 September 2000⁵⁸.
- still various other references were made concerning the Sixth VAT Directive - Directive 92/12/EEC, namely indirect taxation by a municipal beverage duty. Proceedings of one of these cases were initiated on 6 August 1996⁵⁹, the order of reference was made on 18 December 1997, the judgment of the ECJ was issued on 9 March 2000⁶⁰ and the final judgment of the Administrative Court was made on 30 March 2000⁶¹.
- finally another reference of the year 1997 dealt with discrimination, namely whether Stamp duties on loan agreements contravene Community law. Proceedings before the Administrative Court were initiated on 26 November 1996⁶², the order of reference was made on 18 December 1997, the final

⁵³ 96/03/0254.

⁵⁴ Case C-350/97, *Monsees* [1999] ECR I-2921.

⁵⁵ 99/03/0191.

⁵⁶ 97/09/0331.

⁵⁷ Case C-65/98, *Eyüp* [2000] ECR I-4747.

⁵⁸ 2000/09/0116.

⁵⁹ 96/16/0163.

⁶⁰ Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157.

⁶¹ 2000/16/0117.

⁶² 96/16/0256.

judgment of the ECJ was issued on 14 October 1999⁶³ and the final judgment of the Administrative Court was made on 25 November 1999⁶⁴.

[1/2 year to 1 year for the reference; 2 years proceedings before ECJ, 1/2 year to 1 year for the remaining procedure before the Administrative Court, in some cases only one or two months]

References made in 1998:

- one reference made in 1998⁶⁵ dealt with issues similar with the above mentioned preliminary ruling, C-350/97, *Monsees* [1999] ECR I-2921, and this reference was withdrawn as the referred question was made clear by the above mentioned judgment.
- in this year a number of cases, in which questions concerning the Sixth VAT Council Directive - Directive 92/12/EEC, namely indirect taxation by a municipal beverage duty⁶⁶, were relevant, had to be dealt with. The proceedings of these cases were stayed until the final judgment of the ECJ was issued.
- one reference with respect to the free movement of workers; app. one year to the reference two years proceeding before ECJ

[like in the previous years].

References made in 1999:

- one reference dealt with the directive 69/335/EEC (indirect taxes on the raising of capital), namely minimum tax on capital companies. The proceedings were

⁶³ Case C-439/97 *Sandoz v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-7041.

⁶⁴ 99/16/0365.

⁶⁵ 97/03/0152 et al.

⁶⁶ See e.g. 98/16/0033; proceedings in this case were stayed by order of 19 February 1998.

initiated before the Administrative Court on 2 September 1998⁶⁷, the order of reference was issued on 17 March 1999, the final judgment of the ECJ was issued on 18 January 2001⁶⁸ and the final judgment of the Administrative Court was issued on 27 February 2001⁶⁹.

- another reference concerned social security matters, namely unemployment insurance issues⁷⁰. The proceedings were initiated by the Administrative Court on 21 January 1997, the order of reference was issued on 29 June 1999, the proceedings before the ECJ are still pending.

- another reference dealt with indirect taxation, namely taxes on raising of capital⁷¹. The proceedings before the Administrative Court were initiated on 30 November 1998, the order of reference was made on 1 September 1999, the proceedings before the ECJ are still pending⁷².

- furthermore a reference regarding various cases was made with respect to issues of taxation and the Sixth Council Directive (77/388/EEC). Proceedings in one of these cases were initiated by the Administrative Court on 25 November 1998⁷³, the order of reference was issued on 22 September 1999, the judgment has recently been delivered⁷⁴.

- another reference was made with respect to issues of telecommunication and questions of relation of national procedural provisions with respect to provisions foreseen by Community law. Proceedings were initiated by the Administrative Court on 1 April 1999, the order of reference was made on 24 November 1999 and for the time being the reference is still pending before the ECJ⁷⁵.

- furthermore another reference was made with respect to issues of indirect taxation, namely taxes on raising of capital⁷⁶. Proceedings before the

⁶⁷ 98/13/0088.

⁶⁸ Case C-113/99, *Herta Schmid*.

⁶⁹ 2001/13/0030.

⁷⁰ 97/08/0003, so far the opinion of the Advocate General has been delivered (case *Kaske*, C-277/99, opinion of the Advocate General of 18 October 2001).

⁷¹ 98/16/0324.

⁷² Case C-339/99, *Energie Steiermark Holding*.

⁷³ 98/15/0136.

⁷⁴ 8 January 2002, Case C-409/99, *Metropol Treuhand and Stadler*.

⁷⁵ Case C-462/99, *Connect Austria*.

⁷⁶ 97/16/0419.

Administrative Court were initiated on 30 October 1997, the order of reference was made on 16 December 1999 and at the time being the case is still pending before the ECJ⁷⁷.

- finally another reference in 1999 deals with waste and supervision and control of shipments of waste⁷⁸. Proceedings before the Administrative Court were initiated on 15 September 1999, order of reference was issued on 16 December 1999 and the case is still pending before the ECJ⁷⁹.

[again 1/2 year to 1 year for the reference; 2 years proceedings before ECJ in one case, final judgment within two months;
but most of the cases are still pending before ECJ, now for more than 2 years; with respect to the time from the beginning of the proceedings to the reference one exception in the field of social security: two years until the reference of the Administrative Court, proceedings before ECJ so far more than 2 1/2 years]

References in the year 2000:

- one reference dealt with taxation again, namely taxes on raising of capital⁸⁰. Proceedings before the Administrative Court were initiated on 10 September 1997, the order of reference was made on 17 February 2000 and the case is still pending before the ECJ⁸¹.

- furthermore, another request for preliminary ruling was made in a case dealing with taxation again, namely taxes on raising of capital⁸². The proceedings before the Administrative Court were initiated on 7 July 1999, the order of reference was issued on 30 March 2000 and for the time being the case is still pending before the ECJ⁸³.

⁷⁷ Case C-508/99, *Palais am Stadtpark Hotelbetrieb*.

⁷⁸ 99/07/0116, EU 99/0001.

⁷⁹ Case C-6/00, *ASA Abfall Service*.

⁸⁰ 1997/16/0358, EU 2000/0021.

⁸¹ Case C-71/00, *DEVELOP*.

⁸² 99/16/0192, EU 2000/0036.

⁸³ Case C-138/00, *Solida Raiffeisen Immobilien Leasing and Tech Gate Vienna*

Wissenschaft- und Technologiepark.

- another request for preliminary ruling submitted in the year 2000 deals with the levy on stocks of agricultural products⁸⁴. Proceedings before the Administrative Court were initiated on 21 October 1998, the order of reference was made on 17 April 2000 and for the time being the case is still pending before the ECJ⁸⁵.
- furthermore, a request for preliminary ruling was made with respect to free movements of goods and the law on foodstuffs, namely affixing suitable labels concerning the nature and characteristics of the product for sale. Proceedings before the Administrative Court were initiated on 1 December 1999⁸⁶, the order of reference was issued on 18 December 2000 and for the time being the case is still pending before the ECJ⁸⁷.

[1 1/2 to 2 1/2 years until the reference, cases still pending]

References in the year 2001:

- a request for preliminary ruling was submitted in a case dealing again with free movement of goods and the law on foodstuffs⁸⁸. Proceedings were initiated on 4 May 1999, the order of reference was issued on 29 January 2001 and the case is still pending before the ECJ⁸⁹.
- another request for preliminary ruling was necessary to be made in consequence of a former decision, namely concerning Municipal beverage duty again⁹⁰ in various cases (dealing with the effects of the decision and the question, whether specific regulations issued by the Länder after the judgment of the ECJ are in conformity with Community law; those regulations restrict the possibility of refunding the tax paid, when the tax has been borne by a third person, in the cases pending by the consumer that paid a higher price for the beverages as the seller of the beverages sold at a higher price because of the

⁸⁴ 98/17/0260, EU 2000/0037.

⁸⁵ Case C-179/00, *Weidacher*. Advocate General Mischo has presented his opinion on 20 November 2001.

⁸⁶ 99/10/0260, EU 2001/0001.

⁸⁷ Case C-16/01, *Haug*.

⁸⁸ 99/10/0064 et al.

⁸⁹ Case C-99/01, *Linhart*.

⁹⁰ 2000/16/0640 et al: proceedings in the other cases were stayed.

tax). Proceedings in one of these cases were initiated on 2 November 2000, the order of reference was made on 23 March 2001 and at the time being the case is still pending before the ECJ⁹¹.

- a request for preliminary ruling was also made with respect to issues of taxation, namely turnover tax and refund of the tax⁹². Proceedings were initiated on 5 October 2000, the order of reference was issued on 29 March 2001 and at the time being the case is still pending before the ECJ⁹³.

- a request for preliminary ruling was also made with respect to freedom of movement for workers⁹⁴. Proceedings were initiated on 29 February 2001, the order of reference was made on 25 April 2001 and the case is still pending before the ECJ⁹⁵.

- a request for preliminary ruling was made also with respect to issues of non-discrimination and public service employment law matters⁹⁶. Proceedings were

⁹¹ Case C-147/01, *Weber's Wine World*.

⁹² 2000/14/0155, EU 2001/0011.

⁹³ Case C-155/01, *Cookies World*.

⁹⁴ 2001/10/0030, EU 2001/0012.

⁹⁵ Case C-204/01, *Klett*.

⁹⁶ 99/12/0198, EU 2001/0013. This request is of special interest because it concerns doubts on the conformity of the Austrian legal situation with respect to the administrative jurisdiction with Community law. The Administrative Courts raises the question, whether the fact, that the Administrative Court decides on the basis of the facts established by the authority the decision of which is at stake, is in conformity with the directive at stake. Although this is a question pertaining in particular to Art 6 of directive 76/207/EC, the answer to it could have severe impact on the administrative jurisdiction in Austria on the whole. Art. 6 of the Directive requires legal protection and could be seen as a clause that is just repeating what can be found in Community law, in general (necessity of effective court protection). The particulars of the case at stake might be seen in the topic (claim for damages; see below). The administrative court in the request does not deal with legal literature on the issue and does not take into consideration the case-law of the ECJ on the whole and in specific cases, e.g. in the judgment case C-120/97, *Upjohn*, ECR 1999, I-223, which seems to demonstrate, that according to the ECJ "effective court protection" in Community law does not mean a decision in full compliance with all the requirements of Art. 6 of the Convention on Human Rights and Freedoms. It did not seem to be necessary to change the structure of the Austrian judiciary with respect to the court control in administrative matters (although there are some issues of procedural law that might to

initiated before the Administrative Court on 4 August 1999, the order of reference was made on 20 September 2001.

- another request for preliminary ruling concerned again taxation⁹⁷. Proceedings were initiated on 10 December 1998, the order of reference was made on 20 September 2001.

- one request concerned subsidies for students and the question, whether a person is a worker within the meaning of Community law (Case C-357/89

be changed; cf. on this topic *Potacs*, Die Europäische Union und die Gerichtsbarkeit öffentlichen Rechts, Verhandlungen des 14. Österreichischen Juristentages, Vienna, 2000, I/1 [The European Union and the Judiciary concerning public law, Deliberations at the 14th Conference of Austrian Lawyers, Vienna, 2000, vol. I/1], especially thesis 14, p.138: "According to the present state of the case-law of the ECJ the system of ex-post-control of the administration by the Administrative Court seems to be generally in compliance with Community law". Given, this interpretation of the case-law is right, the ECJ should be able to accept the competence of the Administrative Court as sufficient, also with respect to Art 6 of directive 76/207/EC, which obviously is not meant to institute a higher standard of legal protection than in other fields of administration; it has to be mentioned, though, that the case could raise the question, whether there should be drawn a distinction between civil cases and administrative cases, as the case pertains to claims for damages caused by alleged discrimination; it might be, that the ECJ comes to the conclusion, that in certain matters the competence of the Administrative Court does not fulfil the requirements of Community law (which would lead to the necessity of a "substantive division of powers"; it would not be up to the legislator any longer to distribute competencies between the ordinary courts and the administrative authorities - with the possibility to appeal to the Administrative Court after the exhaustion of the administrative remedies - at will any longer, but certain matters had to be decided upon by courts meeting the requirements of Art. 6 ECHR [moreover, there still is the question, if or under which circumstances the control procedure before the Administrative Court fulfills the requirements of Art. 6 ECHR]; as far as can be seen, the ECJ has not addressed this problem explicitly so far; cf. the judgments 14.12.1995, case C-312/93, *Peterbroeck*, ECR 1995, I-4599, on the one hand, and 14.12.1995, joint cases C-430/93 and C-431/93, *van Schijndel* and *van Veen*, ECR 1995, I-4705, on the other hand, which seem to lead to the question of a possible concept of substantial division of powers, too; the ECJ might have seen the difference between the cases in the fact, that the case in *van Schijndel* was of civil character; cf. on the distinction between public law and private law *Skouris*, EuR 1998, 111).

⁹⁷ 98/15/0116, EU 2001/0014.

- Raulin* [1992] ECR I-1027, paragraph 10)⁹⁸; proceedings were initiated in August 1999, the reference was issued in September 2001;
- another request concerned land transactions.⁹⁹ Proceedings were initiated in October 2000, the order for reference was issued on 19 October 2001.

[in three cases 1 1/2 year and 2 years until the reference, in the other cases like in previous years, less time to the reference]

It has to be added, that there are a number of cases pending before the court concerning the common organisation of the market in meat; there have to be paid contributions to an organisation responsible for the marketing of meat; the parties to the cases claim that those compulsory contributions (together with the way they are used for marketing activities) are contrary to Community law. There has been no decision of the Court in any of the cases so far (and consequently no decision, whether the question of Community law can be decided on without making a reference to the ECJ). Cf. on the topic in general ECJ, judgment in *Case 222/82 Apple and Pear Development Council* [1983] ECR 4083.

- If your court hears also cases other than administrative judicial matters, please specify the above facts, if possible, according to whether or not they concerned administrative judicial matters

The Administrative Court only hears administrative judicial matters.

2.1.

i) Please estimate how often and particularly in which categories of cases the parties have asked your court to request a preliminary ruling

Similar to question 1.8. it is difficult to answer this question exactly, it can only be estimated roughly:

⁹⁸ 99/12/0212, EU 2001/0016.

⁹⁹ 2000/02/0288, EU 2001/0017.

Generally spoken, the number of such cases differs widely, depending on the matter of law; in some areas of administrative law there are hardly any requests for preliminary ruling, in other matters almost every single file contains requests for preliminary ruling (e.g. in cases concerning the marketing of meat cf. the closing remark to 1.13, fourth question).

Areas in which questions for preliminary ruling are posed more often than in others are the following:

Provisions on banking and market regulations, commercial law in general and tax law, issues of regulation of road traffic and social security matters as well as freedom of movement of workers¹⁰⁰ and law on acquisition of immovable properties.

Moreover, there are some fields of administration, where in the case that a EU-citizen is involved, Community law is applicable in each case (when the freedoms guaranteed by the Treaty are involved). But so far, those cases (compared with all the other cases brought before the court) do not play a dominant role (e.g. with respect to diplomas and profession; so far, there have only been some cases).

Areas in which there is seldom referred to Community law are building law or the law on the use of forests as well as the law on the civil service. In environmental law there have been more suggestions, but not as much as one could expect. In the field of the protection of nature most of the cases do not concern areas that have been nominated as a specific area according to a specific provision of Community law and therefore in this field of administration, too, suggestions with a view to Community law are rather seldom.

An area in which the number of cases with Community law impact is increasing is the law on foodstuffs.

ii) If the request is turned down, are the reasons always stated in the ruling? Does the statement of reasons contain a reference, where

¹⁰⁰ Especially with respect to the EEC-Turkey Association Agreement.

necessary, to the case law of the Court of Justice? Do you make a separate interim decision in case of a negative decision, or is the answer generally given only in the final decision?

Generally, if the request is turned down, also the reasons for turning it down are stated in the final judgment. Where necessary, it is also referred to the case law of the Court of Justice in the reasoning. No separate decision is made, if the request is turned down, but the answer is given in the final judgment.

iii) Have you requested a preliminary ruling although it had not been demanded by the parties?

If necessary, preliminary rulings are requested, no matter whether there has been a request by the parties or not (cf. the cases of levy on stocks of agricultural products; another area, where a reference is seriously thought of, even when the parties did not rely on Community law, is banking law).

2.2. As the annual number of requests for a preliminary ruling, even made by courts of last instance, for obvious reasons, is not very high, is it possible for you to make a general estimate of the annual number of cases where a request for a preliminary ruling has been seriously considered (on a party's initiative or ex officio) although the request was finally never sent to Luxembourg?

Again, it is difficult to give exact numbers, however, the number is definitely not high. Maximum, the number of cases where a request for a preliminary ruling has been seriously considered and the request was then never sent to Luxembourg will lie somewhere between 50 % to 100 % of the number of cases where a request was finally sent to Luxembourg in fact¹⁰¹.

2.3. In its practices, has your court developed criteria to be taken into account when applying the obligation to request a preliminary ruling

¹⁰¹ Mainly in matters of taxation, regulations of road traffic and social security matters; once in a case concerning building matters, once in a case concerning gambling and in another one concerning the level of fees charged in respect of health inspections and controls of meat.

under Art. 234 (3) in the light of the case law of the Court of Justice (in particular the *CILFIT* case)?

In line with the case law of the ECJ the Administrative Court applies directly the criteria laid down by the ECJ therein: thus it does not refer a question to the ECJ if the respective question is "substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings"¹⁰² or when "the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in a similar case"¹⁰³. E.g. see the decision of the Administrative Court to refer a case to the ECJ for preliminary ruling concerning the interpretation of Art. 19b of the directive 78/686/EWG¹⁰⁴.

An interesting point that remains open for discussion with respect to the case law of the ECJ is the following:

According to the ECJ¹⁰⁵ a national court is not obliged to refer the question of the validity of a Community act for a preliminary ruling under Article 234 EC if it has checked the arguments of the parties against the validity and has found that they are not sufficient. When the national court came to the conclusion that the Community act is valid, it was not obliged to refer the question to the ECJ. Strictly speaking in this way the national court is deciding a question of Community law, that should be decided upon by the ECJ, on its own. According to Art 234 lit. b EC the Court of Justice decides on the validity (and the interpretation) of acts of the institutions of the Community (and of the

¹⁰² Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV vs Evora BV* [1997] ECR I-6227, para 29.

¹⁰³ Case 283/81, *CILFIT and Lanificio di Gavardo v Italian Ministry of Health* [1982] ECR 3415, para 13. Similar deliberations can be found sometimes in decisions of the Independent Administrative Tribunals of the Länder (although those cannot be seen as courts according to Art. 234 para 3 EC), e.g. in Independent Administrative Tribunal for Vorarlberg, 28 November 2001, 3-14-03/01, or Independent Administrative Tribunal for Upper Austria, VwSen-103133/15/Weg/Ri.

¹⁰⁴ 2001/10/0030, decision of 25 April 2001, EU 2001/0012.

¹⁰⁵ April 1997, case C-27/95, *Bakers of Nailsea Ltd.*, ECR 1997, I-1847. Cf. in the same sense the decision of the Dijon Administrative Tribunal, premiere chambre, 5 January 1999, *Société BSAD*, n° 97-125 (quoted in COM (2000) 92 final, p. 21).

ECB). There is no reason, why a national authority or court should be able to decide on its own if only it decides in favour of the validity of the act of the institution of the Community. The reason given in the judgment quoted above, that in accepting the validity the court did not question the existence of the Community act, is no sufficient explanation for the opinion of the ECJ, as Art 234 lit. b EC does not distinguish in that way. Art. 234 lit. b EC seems to require, that the national court, on the contrary, is only entitled not to refer the question to the ECJ, when the reasons that are in favour of the validity of the norm are sufficiently clear so that there is no doubt on the solution in the sense of the CILFIT-formula.

2.4. Given the fact that a matter is pending before your own court and a matter concerning the same question of law is pending before the Court of Justice, which factors then determine whether

- a) the matter will be settled immediately without considering the fact that the same question of law remains to be answered by the Court of Justice in a pending reference procedure**
- b) the matter will be settled after the ruling of the Court of Justice, or**
- c) a preliminary ruling should be requested on the same question?**

In general, the matter will be settled after the ruling of the Court of Justice (b), if the question is really substantially the same question of law¹⁰⁶. If the question of law is not the same, but only similar or comparable to the one pending before the Court of Justice, a new preliminary ruling would probably be requested.

However, it is difficult to answer this issue on the whole, as it might differ according to the specific circumstances of the pending case and also the workload resting with the reporting judge¹⁰⁷.

¹⁰⁶ Either there is a formal order of stay of proceedings or the decision-making is informally postponed until the judgment of the ECJ has been delivered.

¹⁰⁷ E.g. see joined cases C-338/97, C-344/97 and C-390/97 *Erna Pelzl and Others*, [1999] ECR I-3319, concerning contributions to tourism associations and to a tourism development fund (the laws were issued by different Land authorities and provided for different solutions): There was made one reference with respect to each of these laws (for it could not be

2.5. What is the procedure in a situation where a question requiring preliminary ruling appears in several cases pending at the same time?

Generally speaking, does your court in its decision to request a preliminary ruling pay attention to the consequences of that reference to other cases, for example the paralysing effect suspension of the case referred may have on the handling of other cases?

If a question requiring preliminary ruling appears in several cases at the same time, the other cases remain pending at the Administrative Court and are not decided until the question referred to the ECJ is decided¹⁰⁸. Cf. the joined cases C-338/97, C-344/97 and C-390/97 *Erna Pelzl and Others* [1999] ECR I-3319, concerning contributions to tourism associations and to a tourism development fund: in these joined cases the Administrative Court referred questions for preliminary ruling to the ECJ in cases of the laws issued by the Carinthian, the Styrian and Tyrolian Land authorities and in the meantime it did not decide on other pending cases regarding laws of other Land authorities.

The consequences of a reference for other cases cannot be a criterion for referring the question or not. It is, as a consequence, paid no attention in the decision.

foreseen, what might be the reason for the ECJ to state, that the contribution was not contrary to the 6th VAT-Directive), whereas the decision-making with respect to the other cases concerning the same laws was informally postponed. In this way it should be avoided to refer another question, if the answer of the ECJ would not solve the question also with respect to the law of other Länder. But there might be cases in which the decision whether another request is posed is postponed until the ECJ has answered the first one - depending on the answer of the ECJ it could be unnecessary to refer another question as the first answer clarifies also the further question (or makes another question superfluous).

¹⁰⁸ However, there is no uniform practice whether to issue an order of stay of proceedings formally according to Section 38a of the Code on the Administrative Court or whether to wait informally for the "leading case" to be decided by the ECJ.

2.6. Has your court requested a preliminary ruling in connection with a procedure concerning precautionary measures or other similar summary proceedings?

Yes, once, as noted above:

in one case, regarding the freedom of movement of workers, the Administrative Court referred several questions to the ECJ¹⁰⁹. In this order of reference the Administrative Court also requested whether Community law requires that the (directly effective) rights derived from Articles 6 and 7 of Decision No 1/80 in a Member State for the group of people designated therein be safeguarded by providing provisional legal protection in certain cases in the form of positive (prescriptive) interim measures. However, in its judgment of 22 June 2000, C-65/98 *Eyüp*, ECR I-4747, para. 49 the ECJ noted that "there is no longer any need to reply to the other questions, which essentially concern the point whether, if national law does not allow provisional legal protection to be granted, the courts of a Member State are required under Community law to order provisional measures capable of preserving the right of access to employment of Turkish nationals in the host Member State for as long as no final ruling has been given on the legality of the refusal by the competent national authorities to authorise such access." Hence no decision has made the above mentioned issues clear.

2.7. Has your court referred for a preliminary ruling on the grounds of the cases C-28/95, *Leur-Bloem*, and C-130/95, *Giloy*, i.e. regarding the interpretation of a concept of Community law or of Community origin which has been transposed into national law where the situation in question is not governed directly by Community law?

There has not been such a reference so far.

2.8. At which stage of the proceedings is the request for a preliminary ruling normally made?

Will the parties be heard before making the request for a preliminary ruling? Will they be submitted a draft of the order for reference for

¹⁰⁹ 97/09/0331.

comments? What, all things considered, is the role of the parties in practice, when a request for a preliminary ruling is considered and the questions are formulated?

Generally speaking, the reporting judge of the case will formally institute the proceedings before the Administrative Court ¹¹⁰. Afterwards, the reporting judge, who is in charge of drafting a decision, will try to deal with complaints concerning questions of Community law and therefore could lead to requests for preliminary ruling more urgently than other complaints lodged at the same time. However, no institutionalised code of conduct exists in this respect, and the exact stage of proceedings when the request will be made depends mostly on the reporting judge's deliberations and therefore also on the workload that is resting on the relevant judge as well¹¹¹. Moreover, there are chambers that seldom have to deal with Community law and others, that face Community law questions recurrently (according to the above mentioned list on the decisions of the Court in Community matters two fifth of the decisions dealing with Community Regulations applicable in the case have been taken by one and the same chamber; in addition, one fifth of the decisions listed under the heading "implementation of Community law in general" have been taken by the same chamber; there is also a large number of decisions dealing with Community law that have been taken by the Chamber competent for custom matters). It will not be possible to give preference to Community matters, if there are a lot of cases concerning Community law pending in the same chamber, especially considering, that all the other applicants also have a right to obtain court protection within a reasonable time.

What concerns the second part of the question, it can be noted that in general the parties do not have much influence during the proceedings before the Administrative Court. They are neither obligatory heard before the

¹¹⁰ According to section 35 of the Code on the Administrative Court the respective chamber has to quash a decision/dismiss the complaint immediately without further proceedings if it is clear that the alleged violation of law ha occurred/has not occurred. In all the other cases (and those are approximately 80 to 90 %) the proceedings are instituted formally.

¹¹¹ See answers to item 1.13 for illustration.

reference, nor are drafts sent for comments or other activities requested from the parties in this respect.

However, generally spoken, the Administrative Court has the possibility to request the parties to submit additional written statements as well as the parties themselves may at any stage of the proceedings submit written statements on their own¹¹². It might be made use of these possibilities also in cases with Community law impact.

2.9. What form does your court follow when referring a case for preliminary ruling? Is it possible to give an interim judgement or do you have to apply another kind of judgement?

The form of decision to refer a question for preliminary ruling to the ECJ is an order of the competent chamber (which is competent to take also the final decision of the case in question). This order must be served on the parties of the case.

No interim judgment of any kind is made, but the proceedings are stayed for the time the reference is pending before the ECJ. As noted above, section 38a of the Code on the Administrative Court provides for the stay of proceedings in case a question has been referred to the European Court of Justice¹¹³. Then it is only allowed to take such interim decisions in the case which do not depend on the decision of the ECJ in this reference procedure. Only if the legal basis invalidates and is no longer the basis of the decision to be taken, the request must be withdrawn by the Administrative Court if the referred question is not yet decided¹¹⁴.

2.10 Has your court developed any established practices as regards the manner of drafting the order for reference (description of the facts, the

¹¹² According to section 36 para 8 of the Code on the Administrative Court.

¹¹³ In this respective case or other cases, where "the question is substantially the same".

¹¹⁴ Which was done once when the authority, the decision of which had been appealed against before the Administrative Court, quashed the appealed decision (97/02/0081).

national law, arguments of the parties and the justification of the questions in the light of Community law)?

Does the order for reference contain an advance opinion of the national court as to the nature of the answer to be given to the question referred?

How long are the orders for reference in general? When drafting the decision, do you endeavour to keep in mind that it will be translated into the other official languages of the Union? Please attach to your report one or more typical decisions made by your court requesting a preliminary ruling.

Firstly, the Court tries to stick to the directives issued by the ECJ on the manner to draft the order for reference.

Although differing from case to case, in general the Administrative Court at first deliberates on the circumstances of the specific case in the reasons of the order, then turns to the national legal basis relevant in the specific case and to the allegations of the appellant and finally deliberates on the contentious issues of the case. Generally, no advanced opinion of the Administrative Court is enclosed in the order, but only deliberations on specific points of law, which are regarded to be the most relevant ones in order to decide the case.

In general, orders of reference are of a length of approximately 5 to 10 pages, please find attached copies of orders for reference of 17 April 2000, ZI. 98/17/0260 (EU 2000/0037), and of 25 April 2001, ZI. 2001/10/0030 (EU 2001/0012).

Considering possible misunderstandings resulting from the necessity to translate the order, it is kept in mind to explain the facts and law very clearly.

2.11. If the case referred involves documents containing information which is confidential under national law, how is this taken into account when drafting the request for a preliminary ruling? Is the Court of Justice informed of the fact that the case contains documents which are confidential under national law?

So far, neither an order of reference has been drafted which would refer to documents of the case containing confidential material nor were such documents sent to Luxembourg in the course of a reference procedure.

2.12. Has your court in any of its references for preliminary rulings requested the Court of Justice to proceed urgently for specific reasons? To what extent has such a request speeded up the proceedings? Have there been situations where a request for a preliminary ruling has come up in a case which, according to a provision of national law, should be treated urgently or within a determined time limit?

Neither has the Administrative Court requested the ECJ to proceed urgently nor has arisen a situation in which urgent proceeding within a determined time limit according to national law had been necessary.

2.13. When you have decided to request a preliminary ruling, will the main proceedings be automatically stayed pending the preliminary ruling or can the proceedings exceptionally be continued (e.g. a certain part of the case) while the matter is pending in Luxembourg?

Yes, the main proceedings are automatically stayed pending the preliminary ruling according to section 38a of the Code on the Administrative Court¹¹⁵. Although in this case interim decisions which cannot be influenced by the future decision of the ECJ could be made by law, generally there is no necessity to do so. Thus the proceedings are totally suspended.

The situation is only different in cases where the applicant does not appeal against an administrative decision but complains because of the failure of the authority to take a decision (so called "Säumnisbeschwerde"). In such a case it could be possible to carry on the establishing of facts to be able to take the decision immediately after the judgment of the ECJ (the Administrative Court in these cases has to decide in the administrative matter instead of the

¹¹⁵ Section 38a of the Code on the Administrative Court provides for the stay of proceedings in case a question has been referred to the ECJ. Then it is only allowed to issue such interim decisions which cannot be influenced by the decision of the ECJ in this reference procedure.

administrative authority that failed to issue the administrative act; therefore it is necessary to establish the relevant facts before the decision is taken; so far, there has not been made a reference in such a case).

2.14. The national courts are required to place the documents of the main proceedings at the disposal of the Court of Justice. Has practice led to different lines of action in this respect (for instance: has the entire material been submitted in cases involving an exceptionally large number of documents)?

So far no specific problems have come up, as generally the entire material is delivered to the ECJ.

3. Measures taken by the national court or tribunal during the proceedings before the Court of Justice

3.1. Has your court withdrawn a request for preliminary ruling already referred? In the affirmative, why did it happen?

Yes, the Administrative Court has withdrawn the request in several cases:

this has happened after the Registrar had sent judgments of the ECJ, making the referred question (seemingly) clear¹¹⁶ or because the administrative authority had quashed the decision upon which a complaint had been filed with the Administrative Court¹¹⁷.

3.2. Have you, in practice, faced situations where a request for a preliminary ruling already referred has had to be corrected, supplemented or otherwise amended?

¹¹⁶ See 98/12/0167 concerning public service employment law matters and on this case OJ 1999 C 354, page 184; 97/03/0152, 0153, 0154, 0216, 0351 concerning transportation of animals.

¹¹⁷ See 97/02/0081 concerning land transactions.

So far, requests for preliminary ruling have not been amended or corrected after they had been sent to the ECJ. The Administrative Court has only withdrawn requests, as mentioned in 3.1.

3.3. Have you met with any particular situations where a need to clarify a particular detail to the Court of Justice has occurred after the report of the Judge-Rapporteur and the opinion of the Advocate General (for instance the description of the facts of the main proceedings, the national provisions or the question)?

No, it has not been done so far; however, it could be reasonable to do so under specific circumstances¹¹⁸.

3.4. Should a similar case become pending before your court after the request for preliminary ruling has been submitted, will there be an official decision to stay the proceedings? Will the parties be heard before the decision for postponement is made?

There does not exist a uniform practice within the Administrative Court itself. In several similar cases the proceedings are officially stayed¹¹⁹, whereas in other cases no official stay of the proceedings is pronounced¹²⁰.

¹¹⁸ See e.g. judgment of ECJ, C-437/97, *Evangelischer Krankenhausverein Wien*, concerning municipal beverage duty and the decision of the Administrative Court hereinafter, 2000/16/0116 of 30 March 2000; in this case the specific legal situation with respect to the levy on beverages in Austria played a dominant role; the ECJ also decided on the consequences of its ruling (whether the communities had to pay back the duties levied before the judgment); the ECJ ruled, that only "claimants who have, before that date [i.e. the date of the judgment], initiated legal proceedings or raised an equivalent administrative claim" could rely on the rights derived from Community law; but as there need not be a formal decision that prescribes the duty, it was not clear after the judgment what has to be understood by an "administrative claim". This situation could have been avoided by a hint to the described fact that there need not necessarily be an administrative decision that could be appealed against after the publication of the opinion of the Advocate General.

3.5. By virtue of Article 104 (5) of the Rules of Procedure of the Court of Justice, the Court may now request clarification from the national court. Has there been a need to modify the national procedural rules in order to be able to answer to such a request for clarification (e.g. hearing of the parties)?

There has not been such a need to adapt national procedural rules in this respect. As noted above, the Administrative Court has the power to request the parties to submit additional written statements as well as the parties themselves may at any stage of the pending proceedings submit written statements on their own¹²¹. So even the necessity to hear the parties does not require a change in national law.

The ECJ, on the other hand, so far has not requested for clarification in line with Art. 104 (5) of the Rules of Procedure of the Court of Justice.

4. Proceedings after the preliminary ruling is obtained

4.1. In what way is the national procedure continued when the preliminary ruling has been given? Are the parties always heard on the preliminary ruling?

The national procedure before the Administrative Court is continued without any specific additional (procedural) rules to be observed.

The parties to the case are generally not heard on the preliminary ruling.

¹¹⁹ See e.g. order of the Administrative Court of 4 October 2000, 2000/11/0108 concerning the law on the education of non-medical practitioners; order of the Administrative Court of 9 November 2000, 99/16/0193.

¹²⁰ See e.g. judgment of the Administrative Court of 11 July 2000, 2000/16/0326, which was decided in line with the above mentioned judgment of the Administrative Court of 30 March 2000, 2000/16/0116, in the case of which the request for preliminary ruling had resulted in the above mentioned judgment of the ECJ, *Evangelischer Krankenhausverein*, C-437/97.

¹²¹ According to section 36 para 8 of the Code on the Administrative Court.

4.2. Have there been situations where it has finally been impossible to make use of the preliminary ruling, because of the following:

- The formulation of the preliminary question has finally proven not to be expedient?

No.

- The question referred to the Court of Justice for preliminary ruling has to be formulated in a general way and thus the preliminary ruling provided for the national court will also be of a general nature?

No.

- The Court of Justice has not answered the question referred (the Court of Justice has for instance misinterpreted the question)? Have there been other kinds of problems due to the fact that the answer of the Court of Justice has not been sufficiently precise for the purpose of settling the main proceedings?

As noted above (see the case regarding the freedom of movement of workers, in which the Administrative Court referred several questions to the ECJ¹²²) with respect to the EEC-Turkey Association Agreement the ECJ did not answer the question concerning the issuing of interim measures.

Furthermore, the judgment of the ECJ delivered in response to a request for preliminary ruling regarding a levy towards the functioning of chambers of commerce (Kammerumlage)¹²³, was subject to further interpretation.

Furthermore, as noted already above, a second request for preliminary ruling¹²⁴ in another case was made by the Administrative Court¹²⁵, concerning

¹²² 97/09/0331; resulting in the judgment of the ECJ of 22 June 2000, C-65/98 Eyüp, ECR I-4747.

¹²³ In which the Administrative Court sought for interpretation of Articles 17 and 33 of the Sixth Council Directive (77/388/EEC).

¹²⁴ The first request for a preliminary ruling resulted in the above mentioned judgment of ECJ, C-437/97, *Evangelischer Krankenhausverein Wien*, concerning municipal beverage duty and the decision of the Administrative Court hereinafter, 2000/16/0116, of 30 March 2000.

the question whether the temporal limitation of the effects of the Court's interpretation in the first judgment, C-437/97, would be contrary to a retroactive application of such legislation adding an additional restriction to that imposed by the Court of Justice.¹²⁶

- The question referred has later been found unnecessary for the purpose of settling the main proceedings?

No.

4.3. Have you had to request a second preliminary ruling in the same case (for instance due to the fact that the answer to the first preliminary ruling was not satisfactory)?

Not so far.

However, as noted above there have been made two subsequent references for preliminary ruling, inter alia concerning the effects of the first judgment of the ECJ, as there were issued provisions excluding the paying back of the levied taxes under certain circumstances¹²⁷.

¹²⁵ 2000/16/0640 (EU 2001/0007) and others, of 23 March 2001, case C-147/01.

¹²⁶ A specific problem that is to be mentioned here arose as a consequence of one of the cases in which the Registrar after the reference sent some judgments of the ECJ and the Administrative Court withdrew the reference (98/12/0167): a party to another case, in which the same question arose and in which the Administrative Court with a view of the transmitting of judgments by the Registrar in the other case did not refer the question to the ECJ, claimed to be damaged by the fact that the Court had decided in the case without a reference for preliminary ruling and brought in an action against the state (the withdrawal in the other case had been done premature and without necessity, as the judgments transmitted by the Registrar did not solve the question at stake).

¹²⁷ Namely the judgment of ECJ, C-437/97, *Evangelischer Krankenhausverein Wien* concerning Municipal beverage duty; however, a second request for preliminary ruling was made by the Administrative Court, 2000/16/0640 (EU 2001/0007) and others, of 23 March 2001, C-147/01, concerning the question whether Community law would be contrary to a retroactive application of such legislation adding an additional restriction to that imposed by the Court of Justice (cf. the ruling of the ECJ with respect to the temporal limitation of the effects of the Court's interpretation in the first judgment, C-437/97).

4.4. In what way and to what extent does the decision of your court, for which a preliminary ruling was requested, give an account of and otherwise refer to the judgement of the Court of Justice?

The final decision of the Administrative Court does indeed refer to the judgment of the ECJ, namely in so far, as in the course of describing the facts it also repeats the most relevant items of the judgment of the ECJ and refers to them in its deliberations on the points of law, insofar it is necessary.

4.5. Is the Court of Justice informed of the final decision by the national court having made the reference?

How has your country organised the other judgements relevant to Community law to be forwarded for information to the Court of Justice?

The ECJ, so far, is not informed of the final decision in question nor are other judgments relevant to Community law forwarded for information to the ECJ.