

17 January 2002

The preliminary reference to the Court of Justice of the European Communities

Denmark

The answers to the questionnaire have been elaborated in preparation of the 18th colloquium of the Councils of State and Supreme Administrative Jurisdictions of the European Union.

1. General questions

1.1. There are no procedures in Danish law resembling the procedure for preliminary rulings established in Article 234.

1.2. No.

1.3. In criminal cases involving issues of Community law which may require a preliminary reference to the Court of Justice the prosecution is obliged to submit the case to the Ministry of Justice to obtain advice on whether to make such a reference and, if so, how to phrase the questions, cf. the Prosecutor General's circular of 17. August 1978. The circular is binding on the prosecuting authorities. The case before the court will normally be adjourned pending the response from the Ministry.

1.4. In certain cases of a limited financial value appeal against judgments and decisions by the city courts requires leave to appeal from an independent board (*Procesbevillingsnævnet*). In such cases the city courts are regarded as court of last instance for the purpose of Article 234(3), see for an example C-67/97, Ditlev Bluhme, judgment of 3 December 1998.

Generally, the ordinary courts, the Special Court of Complaint (competent *inter alia* to re-open under certain conditions judgments in criminal cases), the Labour Court and certain permanently established and publicly authorised arbitration tribunals are considered "courts" for the purpose of Article 234(3). In addition, a number of quasi-judicial, specialised administrative bodies are in practice accepted as fora of reference, see C-275/98, Unitron, judgment of 18 November 1999.

1.5. No such remedy is provided for.

1.6. It is possible to lodge a separate appeal to a court of higher instance against a decision of a lower instance to refer - or not to refer - a question to the ECJ for a preliminary ruling. Such appeals do occur in practice. The court of higher instance will apply the same criteria as the lower court, *i.e.* the criteria derived from the case law of the ECJ. No specific remedy applies to such appeals.

1.7. No separate constitutional court exists in Denmark.

1.8. No statistics are available.

1.9. No. According to Section 338 of the Danish Administration of Justice Act the court may not in civil cases (administrative cases included) award to a party more than he has claimed. The court will, as a starting point, only consider arguments relied upon by that party or such arguments as cannot be waived. The background of this doctrine - derived from Roman law (*narra mihi factum, narro tibi jus*) - is that the parties know the case better than the court and are qualified to exercise a discretion as to the volume of claims and pleas appropriate to their case from the points of view of argumentation and costs.

In accordance with this principle the application of Community law normally depends on the parties. However, if it can be inferred from the facts of the case that it involves matters of Community law the national court may ask the parties to address the question, cf. Section 339 of the Administration of Justice Act. In case an important issue of Community law is at stake the national court is presumably under an obligation to apply Community law even in the

event that the parties refrain from invoking it. In such cases the court will ask the parties for their opinion on the relevant Community law, including if necessary their opinion on reference to the ECJ. There are no known examples of the Supreme Court applying Community law *ex officio*. In U 1989, p. 651 the city court decided to request for a preliminary ruling contrary to the parties' wishes.

1.10. No specific measures exist for the preparation and hearing of cases dealing with the application of Community law. Such issues are normally dealt with at the preparatory stage in the same way as preliminary procedural issues in general.

- The Supreme Court has no special unit within the court to assist judges and staff to procure information about Community law, nor is any organ assisting courts in general with such a service. Generally, the research and documentation unit of the ECJ is not consulted. The Supreme Court has extensive library facilities and librarian expertise, but no research and documentation department as such.

- Judges and staff in the Supreme Court have access to ECJ reports and all Danish literature on Community law. The staff frequently uses the internet site of the ECJ.

- There is at present no organised exchange of information on questions concerning Community law between the Danish courts.

- In general, no attempts are being made to ascertain the contents of the legislation and case law of other Member States in cases concerning Community law; nor does the Supreme Court normally request the Commission for information. Usually, such information will be provided by the parties for a particular case if and in so far as it is relevant for the determination of the case.

1.11. No cases have yet arisen in which the Supreme Court has applied the *Zuckerfabrik* or the *Atlanta Fruchthandelsgesellschaft* jurisprudence.

1.12. As far as can be inferred no such requests have ever been made, cf. the answer under 1.11.

1.13. Statistical data on the total number of references are not available in recent years. According to information from the ECJ the

number during 1995-2000 was 6.

- The questions referred relate to a broad variety of civil and administrative issues, such as equal treatment of men and women, taxation (free movement of services), repayment of Community aid, establishment of companies and products liability.

- The handling time in cases referred for a preliminary ruling may in average be 3-4 years, covering 1 year from the case is received by the Supreme Court until the request for a preliminary ruling is referred to the ECJ, 1½-2½ years handling time at the ECJ and up to 1 year from the moment when the preliminary ruling is given until the final judgment by the Supreme Court.

- The Danish Supreme Court hears administrative, civil and criminal judicial matters alike. The above facts relate to all types of cases.

2. The procedure of a decision to request a preliminary ruling

2.1. On the basis of the data available as regards the years 1997-2001 the annual number of requests from parties in pending cases for referral of questions to the ECJ may be estimated to approximately 10. In general, these requests relate to the same broad categories of issues as mentioned in 1.13. A certain proportion of requests from parties relate to the so-called AMBI-cases, *i.e.* sequels to C-200/90, *Dansk Denkavit*, ECR [1992] I-2227, in which the ECJ held that a Danish law on "labour market contributions" contravened Article 33 of 6th VAT Directive.

It is not a prerequisite in Danish law that rulings on procedural issues, considered at a preparatory stage of a case, are always accompanied by explicit reasons. However, the issue often merits an explicit statement of reasons and then such statement is given. Usually, this will be the case if a request for a referral to the ECJ for a preliminary ruling is turned down. It is customary to refer to the case law of the ECJ where appropriate. Normally, the decision to refuse a request for a reference to the ECJ is handed down as a separate interim decision.

Requests for preliminary rulings are usually dependent on the initiative of the parties. However, such requests have been made *ex*

officio, cf. 1.9.

2.2. See 2.1 above. The average annual number of cases a year in which a request for a preliminary ruling is considered *ex officio* may be estimated to 3-5.

2.3. The Supreme Court, when assessing whether to request a preliminary ruling, is relying on the criteria set out in the CILFIT case and subsequent ECJ case law. When refusing a request for reference to the ECJ the Supreme Court will state that there is no reasonable doubt as to the interpretation of the Community law in question.

In one criminal case on violation of national provisions of indirect taxation (U 1994, p. 86) the Supreme Court decided not to refer a case to the ECJ - in order to avoid prolongation of proceedings - despite the fact that the case at hand involved questions of Community law (Article 95 EC) which would necessitate a preliminary ruling by the ECJ. Instead the defendant was - in accordance with the Prosecutor General's final submissions - acquitted.

2.4. The Supreme Court has not developed any fixed set of criteria to be applied in the situation referred to in the question. The solution in a given case will primarily depend on the relevance of the issue, dealt with by the ECJ, to the case pending before the Supreme Court, on the one hand, and the urgency of the matter, on the other hand. The opinion of the parties will also be taken into consideration. At the lower courts there is a tendency to adjourn the case pending the ECJ's ruling if the ECJ case appears to have a bearing on the issue dealt with by the domestic courts and there is no specific need for a speedy procedure.

2.5. Cases pending before the Supreme Court which each give rise to a particular Community law issue that warrant a preliminary ruling by the ECJ will normally be joined and a single request will be made. Some attention may be paid to the consequences of the reference for other cases. However, such consequences will rarely have the effect of the Supreme Court abstaining from requesting a ruling when it is considered necessary.

The lower courts may stay the action pending a reference to the ECJ by the Supreme Court. In practice this will normally depend on a request of the parties to the case before the lower court.

2.6. No.

2.7. No.

2.8. As indicated in 1.9. a reference to the ECJ for a preliminary ruling is usually dependent on a request by one of the parties. This is particularly so at the preparatory stage of the proceedings. If, on the other hand, a request is made by one or both parties at the preparatory stage and the Supreme Court finds such reference to the ECJ required, a reference will be made at that stage. Normally, it is a precondition for reference to the ECJ for a preliminary ruling that the facts of the case are established.

The parties also exert important influence on the formulation of the questions. They are usually asked to submit a draft of the order for reference, including the questions to be referred. However, it is only a draft and it is closely examined by the Supreme Court, and the Court reserves the right whether or not to finally endorse the formulation of the questions.

2.9. The reference for a preliminary ruling is made in the form of a decision. Normally, the decision is taken by a committee of three judges charged with the preparation of cases before the Court in general. However, if the reference is made in continuation of a hearing on the merits of the case the decision will normally be made by the chamber constituted for that hearing.

2.10. The order for reference contains - apart from the questions to be referred - an account of the facts and relevant national law, arguments of the parties regarding Community law and - in case of reversal of a decision of a lower court - the Court's reasoning. Usually no advance opinion is made as to the nature of the answer to be given to the question referred. The length of the orders varies according to the nature of the case. The length is usually between 10 and 20 pages. Generally, the order is formulated in plain language in order to facilitate its translation into the other

official languages of the Union. As an example the decision of 21 May 1999 in case C-203/99 is attached.

2.11. No issues with regard to confidential information have yet arisen in relation to questions referred to the ECJ.

2.12. No such request has been made to the ECJ. In U 1994, p. 86 (see 2.3.) the Supreme Court abstained from referring the matter to the ECJ on grounds of expediency.

Also in the future, it cannot be excluded that the handling time of a preliminary reference could be taken into consideration as a reason not to refer the matter. In this respect the opinion of the parties will be of importance.

2.13. In case of a reference to the ECJ the main proceedings normally will be stayed pending the ruling by the ECJ. However, nothing in Danish law prevents part of the case from being continued if such continuation on the basis of an overall assessment is justified.

2.14. We have no information on different lines of action.

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

3.1. No.

3.2. No.

3.3. No.

3.4. If the answer to the question referred to the ECJ can have a bearing on the new case pending before the Supreme Court it will normally be stayed pending the ECJ's ruling. The parties will always be heard prior to the decision.

3.5. No amendment of the rules has been considered to that effect. Such situation is adequately covered by general rules.

4. Proceedings after the preliminary ruling is obtained

4.1. The parties will always be invited to submit their legal arguments in the subsequent domestic proceedings on the legal basis established by the preliminary ruling.

4.2. None of the situations referred to seems to have appeared before the Supreme Court.

4.3. No.

4.4. The conclusion of the preliminary ruling is quoted in the Supreme Court judgment, and the Supreme Court's reasoning will be based on the ruling obtained from the ECJ.

4.5. The ECJ is not automatically informed by the national court of the final result.

No systematic distribution to the ECJ of national judgments relevant to Community law exists.