

Questionnaire Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union: The preliminary reference to the Court of Justice of the European Communities.

National report of the Dutch Raad van State

Before answering the questions of the Questionnaire the Dutch delegation wishes to clarify that in the Netherlands the highest jurisdiction in administrative law is divided between different courts. The Administrative Jurisdiction Division of the Council of State (*Raad van State*) has a general jurisdiction in administrative law. In some cases the *Raad van State* sits as a court of first and last instance, in other cases it hears appeals against decisions of the administrative sectors of the District Courts. In matters of social security the Central Appeal Court for the Public Service and for Social Security Matters (*Centrale Raad van Beroep*) is the appeal court, in matters on economic law and agricultural law the Regulatory Industrial Organisation Appeals Court (*College van Beroep voor het bedrijfsleven*) hears cases in first and last resort. However with regard to competition law, telecommunications law and decisions concerning supervision of trade in stocks the CBB hears cases in appeal, while in customs matters (until 1-12002) the *Tariefcommissie* and in fiscal matters (and from 1-1-2002 customs matters) the Supreme Court (*Hoge Raad*) acts as the final instance. The questions will be answered from the point of view of the *Raad van State*. However, the other courts have been consulted. Specific data concerning these courts have been inserted in this paper.

1.1 Dutch administrative law does not provide for a procedure, resembling that for reference for preliminary rulings established in article 234 EC.

1.2 Within the Benelux there is a comparable procedure for the reference for preliminary rulings in the field of trademarks and design. These preliminary rulings are given by the Benelux Court of Justice (*Benelux Gerechtshof*) upon request of the courts of the three Member States. The *Benelux Gerechtshof* has been established by the "Verdrag betreffende de instelling en het statuut van een Benelux-Gerechtshof"¹. The Court is composed of justices from the highest courts in the three Member States. The procedural rules are comparable to those, applicable in the EC-context. The *Benelux Gerechtshof* is a court as referred to in article 243-3 EC (Case C-337/95 *Christian Dior*, (1997) ECR I-6013).

1.3 No.

1.4 In some areas there are rules restricting the scope of appeal. The *Hoge Raad* can only rule on questions of law and not on questions of fact.

The appeal jurisdiction of the *Raad van State*, as well as the jurisdiction of the other supreme administrative jurisdictions, is not limited in scope. However, in immigration and asylum law, appeal is restricted in the way the *Raad van State* has to deal with the objections raised against the decision of the District Court.

Dutch administrative courts as referred to in article 234 (3) EC are:

¹See also: H.G. Schermers, N.M. Blokker: *International Institutional Law*, 3rd edition, 1999, p. 851 - 856.

- *Raad van State* (administrative law (general))
- *Centrale Raad van Beroep* (Civil Service law and social security law)
- *College van Beroep voor het bedrijfsleven* (economic and agricultural law)
- *Tariefcommissie* (customs law)
- *Hoge Raad* (taxation)

1.5 There is no constitutional court in the Netherlands.

1.6 As mentioned before under 1.4, there are in general no restrictions on the scope of appeal; however appeal lies only from a court judgment, while the decision to refer to the Court of Justice for a preliminary ruling is considered to be part of the proceedings and not a separate judgment. Therefore it is not possible to lodge an appeal against the decision of a lower administrative court to refer a question to the Court of Justice for a preliminary ruling. On appeal it can be argued that the lower court has wrongfully failed to refer for a preliminary ruling.

There is no appeal from the decision of a highest court not to refer for a preliminary ruling.

1.7 see 1.5.

1.8 About 5 % of the cases filed with the *Raad van State* and the *Centrale Raad van Beroep* involve the application of Community law. About 20% of the cases filed with the *College van Beroep voor het bedrijfsleven* involve the application of Community law.

1.9 The application of Community law *ex officio* happens sporadically. There are certain standard checks to review the challenged decision for its conformity with Community law. No mention is made of the *ex officio* review, if it does not lead to the conclusion that the challenged decision has to be annulled for not being in conformity with Community law.

1.10 Some specific measures have been taken within the *Raad van State* in view of the application of Community law. Within the *Raad van State*, a small group of members is charged with providing a general framework within which questions of Community law are dealt with by the competent Chamber. Within the Staff there are also specialised lawyers and documentalists. Furthermore, the *Raad van State* participates in an informal working group of judges of the various courts, who regularly debate questions of Community law (exchange of information). Two justices in the *College van Beroep voor het bedrijfsleven* coordinate the handling of EC questions within that court. Legislation and case law of other Member States are, if available, in a very limited number of cases taken into account in dealing with (complicated) questions of Community law.

Within the so called "Eurogroup", in which Dutch courts are represented, EC-law is also being discussed.

The *Raad van State* has so far not asked the Commission for information, especially because matters relating to competition or state aid are only very rarely before the *Raad van State*. The *College van Beroep voor het bedrijfsleven* has on several occasions invited the Commission to present its view when the legality of applicable Commission decisions was questioned by one of the parties.

The *Raad van State* and the *College van Beroep voor het bedrijfsleven* use to a large extent the Courts website as well as those of the other institutions. Especially the part containing recent judgments is very useful, although not all decisions are being put on the web. Moreover the website contains serious lacunae with regard to pending cases. It is not possible to get useful information with regard to the questions currently pending (referring judgments, report for the hearing). Information with regard to the state of the procedure of cases is also not available. Moreover the information concerning the library is not adapted to internet.

1.11 *Raad van State* and *Centrale Raad van Beroep*: no.

College van Beroep voor het bedrijfsleven: Yes, see case C-183/95, Affish, ECR (1997) I-4315.

1.12 Yes (*College van Beroep voor het bedrijfsleven*).

1.13. The total number of references made by the *Raad van State* is 38; in the period from 1995 -2000: 20). For more details see the annex. *College van Beroep voor het bedrijfsleven*: 100). There is no separate administration of cases in which preliminary questions are referred to the Court of Justice.

The references from the *Raad van State* mainly deal with environmental law, but also with media law, competition, free movement of goods and free movement of persons.

2.1 The amount of cases in which parties have requested the *Raad van State* to refer the case for a preliminary ruling is approx. 10-15 times a year. *College van Beroep voor het bedrijfsleven*: about 10 times a year parties suggest to ask for a preliminary ruling. In most cases however parties just raise an issue of EC law.

The reasons for the decision not to refer for a preliminary ruling are rarely given and only when a party has explicitly asked for such reference. If the case-law of the Court of Justice already offers an answer (*acte éclairé*), the *Raad van State* will refer to that case-law. There will be no separate interim rulings.

In only one case a reference has taken place without it having been requested by one of the parties to the case (case C-72/95, Kraaijeveld, 1996 ECR I-5403). This also has happened once or twice within the *Centrale Raad van Beroep*.

In VAT-cases before the *Hoge Raad* EC-Law is often applied and interpreted. In these cases it frequently happens that a reference for a preliminary ruling is given without it having been requested by one of the parties.

2.2 The annual number of cases in which a reference for a preliminary ruling has been considered and declined amounts to about 15 - 20 for the *Raad van State*. *College van Beroep voor het bedrijfsleven*: no statistics available, the number is estimated to be about 5-10 times a year.

2.3 The *Raad van State* follows the criteria set by the Court in the CILFIT Case. The *College van Beroep voor het bedrijfsleven* does not apply a separate set of rulings detailing the CILFIT-criteria.

2.4 If a matter that is pending before the Court of Justice comes up in a case before the *Raad van State*, the procedure in that case will be stayed, until the ruling by the Court of Justice has been given. Thereupon the case will be decided, taking that ruling into account. The information with regard to pending cases is provided by the Court of Justice is not very helpful. The summaries published in the OJ contain in most cases too little information to be of great use. Moreover no adequate search method is being provided for. This holds good for preliminary procedures as well as for direct actions (also CFI !) which might also be of importance within the range of jurisdiction of the *College van Beroep voor het bedrijfsleven*. Given these practical problems no clear criteria have been developed. If one is aware of a related or identical question pending before the Court of Justice usually the Registrar is being contacted to get informed of the State of the procedure. Once the Conclusion of the Advocate-General is available it is usually possible to determine whether the question pending before the Court of Justice is relevant to the case pending at the domestic level.

2.5 In a situation where a question requiring a preliminary ruling has been raised in several cases, the *Raad van State* will refer in one or two cases (and not in all those cases), if these cases permit to submit all relevant questions to the Court (see pending cases C-430-431/99 Sea-Land Service en Nedlloyd). As the Court will not answer academic questions, there has to be a proper case to refer a question and it is not possible to add one or more questions to a reference which has already taken place. Concerning the export of waste materials (removal or useful application) the *Raad van State* puts more or less the same questions in five different cases in order to present the Court with a clear picture of the different situations in which these questions arose (C-307-311/00 Oliehandel Koeweit B.V. e.a.).

The possible staying effect on the proceedings in other cases (or on the administration, which may be very harmful in the case of large projects) is taken into account.

Sometimes the *Raad van State* will decide not to refer in order to prevent that a large number of urgent cases cannot be settled for a long time.

As the *Raad van State* acts as a court of first and final instance in many cases (approx. 50 %), the question concerning the courts of lower instance has only limited relevance. In appeal the *Raad van State* is usually not aware of cases pending in lower courts similar to the one has come up in its own proceedings which has given rise to a referral to the Court of Justice.

2.6 No. However, if proceeding concerning a request for a stay of execution of an order questions of Community law arise that may require a reference for a preliminary ruling, the examination of the merits of the case will be expedited, so that the reference can be made at a not too distant moment.

The *College van Beroep voor het bedrijfsleven* has requested for a preliminary ruling in connection with a procedure concerning precautionary measures.

2.7 No.

2.8 The reference for a preliminary ruling is often combined with a decision on all questions of fact and law on which the reference has no bearing. In most cases parties will be heard about the intention to refer a question to the Court of Justice. In some cases they will be given the opportunity to comment in writing on the intention, sometimes draft questions will be submitted for their comments. Usually the matter will be discussed during the hearing.

2.9 For the *Raad van State* and the *College van Beroep voor het bedrijfsleven* the reference for a preliminary ruling has the format of an interim ruling, which has not the legal status of a judgment. The procedure is stayed only with respect to the aspect of Community law.

The rulings are given by a normally constituted chamber.

For the *Centrale Raad van Beroep* it is practice that the reference for a preliminary ruling has the form of a request ex article 234 EC.

For the *Hoge Raad* the reference for a preliminary ruling has the form of a normal judgment.

2.10 References for a preliminary ruling usually follow this format:

- 1°. The facts;
- 2°. The applicable law;
- 3°. Arguments of the parties;
- 4°. Preliminary opinion of the *Raad van State*;
- 5°. The questions referred.

The *Raad van State* suggests - if possible - an answer to the questions raised. Sometimes various such answers are suggested.

The references are in general approx. 20 pages long. In their wording the need for translation is taken into account. Therefore, the questions are formulated as clearly as possible (short sentences; logical structure). The case law of the Court of Justice is sometimes quoted in French (working language of the Court). The *College van Beroep voor het bedrijfsleven* uses the format which is also being used for its judgments. However, the description of applicable law is more elaborated to take into account that national law is not necessarily easily accessible to the Court of Justice or other parties mentioned in art. 20 of the Statute of the Court of Justice and that for a full comprehension of those rules it may be necessary to also provide some information on the legal context of those rules.

2.11 A copy of the file will be forwarded to the Court of Justice together with the referring judgment. Confidentiality of documents has so far not been an issue in cases before the *Raad van State* and the *College van Beroep voor het bedrijfsleven*.

2.12 In case C-81/96 (Ruigoord) (1998) ECR I-3923, in the letter sending the request to the Court of Justice the Court was requested to proceed urgently. It is unknown whether or not this request has expedited the proceedings. In its reference leading to the judgment of the Court of Justice of July 12 2001, case C-189/01, Jippes, nyr., the *College van Beroep voor het bedrijfsleven* asked the Court of Justice to proceed urgently.

The expected time for the ruling of the Court of Justice to come down may be of influence for the decision to refer a matter, especially in cases where a staying effect on the case under review and perhaps many other pending cases is expected and is considered to be undesirable in view of their urgency.

2.13 See pt 2.9.

2.14 Although no legal obligation to this effect exists, in all cases the entire file has been submitted to the Court of Justice.

3.1 The *Raad van State* has never withdrawn a reference for a preliminary ruling. After the judgment of the Court of Justice in case C-179/98, *Mesbah*, 1999 ECR I-7955, the Court asked the *Centrale Raad van Beroep* whether or not it wanted to withdraw the reference for a preliminary ruling in case C-255/99, *Moughit*, after which that reference was withdrawn.

In case C-181/97, *Van der Kooij*, ECR (1999) I-483, the *Hoge Raad* did not withdraw the reference upon the suggestion made by the Court of Justice to do so. In case C-102/00, *Welthgrove*, of July 12 2001, the *Hoge Raad withdrew* one of the three questions asked upon the suggestion made by the Court of Justice to withdraw the reference. Afterwards the questions referred became *éclairé* by another judgment of the Court of Justice.

3.2 In case C-311/94, *IJssel-Vliet Combinatie*, (1996) ECR I-5023, the *Raad van State* has slightly rephrased one of the questions submitted to the Court of Justice. After the judgment of the Court of Justice of 12 July 2001 in case C-157/99, *Smits-Peerbooms, nyr*, the Court asked the *Centrale Raad van Beroep* whether or not it wanted to withdraw the reference for a preliminary ruling in case C-385/99, *Müller-Fauré en Van Riet*, after which a question has been added to the reference. This has also happened in case C-156101, *Van der Duin en Van Wegberg-Van Brederode*. The *College van Beroep voor het bedrijfsleven* has never corrected, supplemented or otherwise amended a request for a preliminary ruling.

3.3 No.

3.4 In cases where comparable questions arise the proceedings are stayed for the duration of the time it takes for the preliminary ruling to be given. Written notice is given. There will usually be no hearing on this decision.

3.5 No. Any such requests will be dealt with by the Chamber which has referred for the preliminary ruling.

4.1 After the preliminary ruling has been given, there will be a hearing, unless the parties have agreed, as the Chamber has decided, that no hearing is necessary. Next, the judgment will be given unless there are other outstanding questions.

4.2 In case C-57/96, *Meints*, (1997) ECR I-6689, the Court of Justice added a new element to the reference, i.e. the mandatory repayment of certain social security benefits as a condition for the inapplicability of Reg Nr. 1408/71 /EEC.

After the judgment of the Court of Justice in case 102/88, *Ruzius-Wilbrink*, 1989 ECR 4311, upon the reference of the *Raad van Beroep* of Groningen, the *Centrale Raad van Beroep* has declared the ruling of the Court of Justice in that case not to be of use because the Court of Justice had not dealt with all relevant aspects of the case.

In case C-106/97, *DADI*, ECJ (1999) I-5983, the Court of Justice ruled that Directive 92/46/EC was also applicable to imports from the OCT. In the same judgment the Court ruled that decision 94/70 was invalid. The Court did however not indicate whether this had as a consequence that no imports from third countries were allowed of that imports from all countries were allowed.

4.3 The *Centrale Raad van Beroep* twice requested for a preliminary ruling a second time in the same case because the ruling of the Court of Justice did not help to solve the case (cases 98/77 *Schaap I*, 1978 ECR 707; 176/78, *Schaap II*, 1979 ECR 1673; 117/77, *Pierik I*, 1978 ECR 825; 182/78, *Pierik II*, 1979 ECR 1977).

The *Raad van State* has never twice requested for a preliminary ruling a second time in the same case.

4.4 Reference is always made *expressis verbis* to the ruling of the Court of Justice.

4.5 The Court of Justice will always be informed of the final ruling given by the *Raad van State* or the *College van Beroep voor het bedrijfsleven*. The *College van Beroep voor het bedrijfsleven* in addition informs the Court of Justice of other judgments rendered by the *College van Beroep voor het bedrijfsleven* relevant to Community law.

Annex

Statistical data concerning references for a preliminary ruling by the *Raad van State*

36/73	NV Nederlandse Spoorwegen	(1973) ECR 1299
145/78	Augustijn	(1979) ECR 1025
146/78	Wattenberg	(1979) ECR 1041
53/81	Levin	(1982) ECR 1035
126/82	Smit	(1983) ECR 73
139/85	Kempf	(1986) ECR 741
196/87	Steymann	(1988) ECR 6159
344/87	Betray	(1989) ECR 1621
9/88	Mario Lopez da Vega	(1989) ECR 2989
C-192/89	Sevince	(1990) ECR I-3461
C-288/89	Stichting Collectieve Antennevoorziening Gouda	(1991) ECR I-4007
C-148/91	Veronica	(1993) ECR I-487
C-66/92	Acciardi	(1993) ECR I-4567
C-23/93	TV 10	(1994) ECR I-4795
C-434/93	Bozkurt	(1995) ECR I-1475
C-8/94	Laperre	(1996) ECR I-273
C-311/94	IJssel-Vliet Combinatie	(1996) ECR I-5023
C-72/95	Kraaijeveld	(1996) ECR I-5403
C-131/95	Huijbregts	(1997) ECR I-1409
C-57/96	Meints	(1997) ECR I-6689
C-81/96	Ruigoord	(1998) ECR I-3923
C-192/96	Beside BV	(1998) ECR I-4029
C-203/96	Dusseldorp	(1998) ECR I-4075
C-231/97	Van Rooij	(1999) ECR I-6355
C-232/97	Nederhoff	(1999) ECR I-6385
C-418-419/97	Arco Chemie en EPON	(2000) ECR I-4475
C-314/98	Snellers	(2000) ECR I-8633
C-420/98	W.N	(2000) ECR I-2847

Pending cases:

C-309/99	Wouters
C-430-431/99	Sea-Land Service en Nedlloyd
307-311/00	Oliehandel Koeweit B.V. e.a.
C-116/01	Verol Recycling Limburg

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