

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

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THE PRELIMINARY REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Questionnaire (16 August 2001)

Introduction

Article 234 of the Treaty establishing the European Community (hereinafter “the EC Treaty”) lays down the possibility and in certain cases even the obligation of courts of law of the Member States to request a preliminary ruling from the Court of Justice of the European Communities (hereinafter “the Court of Justice”).¹ Moreover, a corresponding procedure for preliminary rulings is provided for in the Treaty establishing the European Coal and Steel Community (Article 150) and in the Treaty establishing the European Atomic Energy Community (Article 41).

Certain international agreements concluded by the Member States also contain procedures for preliminary rulings. In practice, the most important of these agreements is the so-called Brussels Convention of 1968 (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters).

The present questionnaire concentrates on the procedure for preliminary rulings referred to in Article 234 of the EC Treaty.

This questionnaire has been drawn up in view of the legal situation prevailing in the spring of 2001. Accordingly, no account is taken here of the Treaty of Nice, providing for the Court of First Instance to have jurisdiction in questions referred for a preliminary ruling in specific areas laid down by the Statute of the Court of Justice (Paragraph 3 of Article 225 of the EC Treaty as modified by the Treaty of Nice).

The Rules of Procedure of the Court of Justice were recently amended, among others for the purpose of a more expeditious and effective procedure for preliminary rulings. The amendment, which entered into force in early July 2000, established the possibility of handling requests for a preliminary ruling under a so-called accelerated procedure in cases where the national court in question has requested an urgent ruling (Article 104 a of the Rules of Procedure). At the same time, a scheme was introduced enabling the Court of Justice to request clarifications from the national courts (Paragraph 5 of Article 104). Moreover, the procedure has been simplified in situations where

¹Article 68 of the EC Treaty contains certain provisions for derogation from the reference procedure in cases concerning policies related to visas, asylum and immigration, as provided for in Title IV of the Treaty. Article 35 of the Treaty on European Union authorises the Court of Justice, subject to the conditions laid down in that article, to give preliminary rulings within the framework of the so-called third pillar (police and judicial cooperation in criminal matters); a Member State can, by making a declaration when signing the Treaty of Amsterdam or later, acknowledge the jurisdiction of the Court of Justice to give preliminary rulings as specified above.

the answer to a question referred for a preliminary ruling is manifestly clear (Paragraph 3 of Article 104).

This questionnaire has been drawn up particularly with a view to compiling information and experience from the national courts of last instance. The procedure for preliminary rulings is a form of cooperation between the Court of Justice and the national courts. It is therefore of vital importance to acquire a more intimate acquaintance with its practices within the courts of the Member States as well as the Court of Justice. The Court of Justice will be asked to give, as far as possible, its considerations on the elements arising from this questionnaire from the point of view of its own activities.²

Answers to this questionnaire are requested to be drawn up using the same subdivision, where possible.

The questionnaire consists of four principal parts. The first part contains questions of a general character, followed by questions grouped into three parts, basically according to the temporal course of the procedure.

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?

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?

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?

1.4. If appeal to a court of higher instance has been restricted (e.g. leave to appeal is 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)?

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 Article 234?

1.6. 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 to the Court of Justice for a preliminary ruling? Do these kinds of appeals 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?

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

² A copy of the national reports will be forwarded to the Court of Justice to enable it to take account of the information contained in them before giving its own report.

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 Article 234(3)?

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?

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

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

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?

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?
- 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.)?
- What means do you have to keep informed about the kind of cases pending before the Court of Justice and their stage of proceedings?
- Your experience of using the Internet site of the Court of Justice.

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

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

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?

1.11. 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 judgment of 21 February 1991 in joined cases C_143/88 and C_92/89 Zuckerfabrik)? Has your court applied any of the principles (so-called positive interim measures) arising from the judgment in the Atlanta case (9 November 1995, case C-465/93 Atlanta Fruchthandelsgesellschaft)?

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)?

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.

- Development of the annual number of references for a preliminary ruling made by your court, and particularly the numbers during the period 1995-2000.
- Are the questions referred by your court for a preliminary ruling related mainly to a certain domain or to certain domains of cases?
- 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.

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.

2. THE PROCEDURE OF A DECISION TO REQUEST A PRELIMINARY RULING

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

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

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

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?

2.3. In its practices, has your court developed criteria to be taken into account when applying the obligation to request a preliminary ruling under Article 234(3) in the light of the case law of the Court of Justice (in particular, the CILFIT case)?

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?

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 for other cases, for example the paralysing effect suspension of the case referred may have on the handling of other cases?

If there are several cases pending before courts of lower instance, similar to the one subject to a request for a preliminary ruling made by your court, do the courts of lower instance wait until the Court of Justice has ruled on the question referred?

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

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?

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 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?

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

Are the decisions concerning requests for preliminary ruling and their formulations made by a normally constituted court?

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

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?

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?

Is it possible that the foreseeable handling time of the preliminary reference procedure could constitute, in fact and in practice, a reason not to refer a matter?

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?

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)?

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?

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?

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 questions)?

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?

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)?

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?

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

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)?

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 judgment of the Court of Justice?

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 judgments relevant to Community law to be forwarded for information to the Court of Justice?