

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

- the Swedish national report to the 18th colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union in Helsinki, 20 and 21 May, 2002\*

The following answers may be given to the questions in the questionnaire prepared by the general reporter of the colloquium.

### 1. General questions

1.1 Within the general courts system, a court of first instance has the possibility, in civil law cases where the parties may settle their dispute, to refer a question of precedent to the Supreme Court. - The principal difference between that system and the Article 234-procedure is that a reference may only be made with the consent of the parties and that the Supreme Court may refuse to answer the question if it is considered not to be of importance for the future application of the law. - There is no corresponding arrangement within the administrative courts system.

1.2 Sweden is not bound by other international arrangements outside the Union involving the possibility to refer questions for a preliminary ruling to an international court of law.

1.3 The Article 234-procedure is solely and directly based on Community law.

1.4 The right to have a case tried by the Supreme Court and by the Supreme Administrative Court is restricted in the sense that a leave to appeal is required. Whether or not this system would have the effect that appeal courts should be regarded as courts of last instances for the purposes of Article 234(3) is a question subject to debate among scholars and judges. It may be mentioned that the Court of Appeal in Gothenburg has posed a question on that very issue to the Court of Justice (case C-99/00). It remains to be seen if the Court of Justice will consider it necessary to give an answer to that specific question.

1.5 There is no constitutional court in Sweden.

1.6 Since Swedish procedural law does not contain any provisions specific to the Article 234-procedure, a decision by a general court of first instance to refer a question to the Court of Justice may only be appealed against on the ground, common to all types of cases, that the procedure due to that measure is unnecessarily prolonged. There is no corresponding provision within the administrative court system. It may be assumed that an appeal based on that provision has not been used in connection with an Article 234-reference by a general court of first instance (so far, only four references have been made by such courts).

A decision not to refer a question to the Court of Justice may be appealed against only when an appeal is lodged against the final judgment.

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\* by Justice Mats Melin, the Supreme Administrative Court of Sweden

1.7 See under 1.5.

1.8 - 1.9 The parties will normally, when appropriate, base their pleadings before the Supreme Administrative Court on points of Community law. However, the question of an *ex officio* application of Community law is rather often raised in the work of the Court, especially in cases concerning VAT, direct taxation, public procurement and the possible application of regulation 1408/71. Since approximately 25 per cent of the cases brought before this Court concerns VAT and direct taxation issues, the proportion of cases where it is essential to take Community law into account is quite substantial. It is not, however, possible to give a precise estimate of the proportion of cases involving Community law.

1.10 There are no specific arrangements within the Supreme Administrative Court for the preparation of cases dealing with the application of Community law. The Court does not have a research and documentation department.

This means that information on Community law has to be procured - by the judges as well as by the legal staff - in the same manner as information on national law, that is to say through the use of our extensive library and various national and international data bases. Concerning, more specifically, information as to the work of the Court of Justice, the weekly bulletin on the proceedings of the Court of Justice (which contains brief notes on new cases brought before the Court, the opinions of the advocate generals and the judgments of the Court of Justice and the Court of First Instance) are circulated among the judges and their staff.

This Court subscribes to the Swedish and English versions of the European Court Reports. The French version is also available to the members of the Court. Of course, the delay in its publication makes the possibility to consult the Internet site of the Court of Justice especially valuable.

There is an exchange of information between judges at seminars and conferences dealing with different aspects of Community law. Such events are quite frequent but must, however, be said to be organized on a more or less *ad hoc* basis.

This Court does not attempt to study legislation or case-law of other Member States when interpreting Community law, nor has it contacted the Commission for information or asked for its opinion.

1.11 - 1.12 This Court has never been presented with a plea of illegality against a Community Act and, consequently, has never had to apply the Zuckerfabrik/Atlanta case-law.

1.13 This Court has referred ten cases for a preliminary ruling by the Court of Justice (1995: 0, 1996: 0, 1997: 2, 1998: 1, 1999:3, 2000:2 and during 2001: 2 cases). The cases referred have concerned company law, agricultural law, direct taxation (5 cases), VAT, regulation 1408/71, parallel import and freedom to provide services.

It should be noted that two of the cases referred in 1999, which concerned direct taxation, were withdrawn only a few months after the reference was made (cf the answer to question 3.1).

Concerning the duration of the procedure in the cases referred, it may be mentioned that, in the four cases in which the Court of Justice so far has given a ruling, the length of the

procedure in Luxembourg in three of them varied between 18 and 21 months. In one of the four cases, however, it was as long as 32 months. The length of the procedure in this Court after having received the preliminary ruling has varied between 4 and 11 months.

With regard to the duration of the procedure within the national court system before the reference was made, it may be mentioned that certain tax cases follow a special kind of procedure according to which there is only one single instance dealing with the matter before it may reach the Supreme Administrative Court (for a more detailed description of that procedure, see cases C-134/97, *Victoria Film*, [1998] ECR I-7023 and C-200/98, *X and Y*, [1999] ECR I-8261). Another special kind of procedure is the one where a plea of illegality may be brought before the Supreme Administrative Court against certain decisions by the Swedish cabinet (such a procedure had been followed in case C-241/97, *Försäkringsaktiebolaget Skandia*, [1999] ECR I-1879). It may be noted, however, that regardless of the procedure followed, the duration within the national court system before the reference was made, seems to have been between 15 and 27 months.

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

2.1 - 2.2 It is not possible to estimate how often the parties have asked this Court to request a preliminary ruling. Such demands by a party are particularly frequent, though, in cases on direct taxation, VAT and public procurement (cf the answer given to questions 1.8-1.9).

A negative answer to a demand by a party is normally given in the final judgment. It may however be necessary to give the parties the possibility to further argue their case in the light of the fact that a reference will not be made. In those cases, the decision not to refer will be given in a separate decision.

When turning down a request for a preliminary ruling, this Court will sometimes simply state that it has not found reason to refer a question to the Court of Justice. In some cases, however, a more detailed reasoning needs to be included in the judgment on the question whether or not an issue of Community law is indeed pertinent to the solution of the problem at hand as well as concerning the question whether or not to refer.

2.3 The necessity to request a preliminary ruling will have to be evaluated in the light of the particularities of each case with due regard to the criteria established by the Court of Justice in the *CILFIT* case. This Court has not developed any general criteria of its own on the question whether or not to make a reference.

2.4 When a matter concerning the same question of law is pending before this Court and the Court of Justice, this Court will, as a general rule, await the ruling of the Court of Justice before passing its own judgment. It is conceivable that the matter exceptionally could be settled immediately if it seems sufficiently clear what the answer to be given by the Court of Justice must be (cf the *acte clair* doctrine).

2.5 If there are several cases pending involving the same question of Community law requiring interpretation by the Court of Justice, only one typical case will be referred while the others will be, informally, stayed, awaiting the ruling by the Court of Justice. This Court will draw the attention of the Court of Justice to the fact that other cases on the same issue are pending, before this Court or before courts of lower instances. (This was, for example, done in the order for reference in case C-292/97, *Karlsson a.o.* [2000] ECR I-2737).

Where cases are pending before courts of lower instances, similar to a case to be adjudicated by this Court, those courts would normally await the final judgment by this Court before deciding on the matter. Consequently, when this Court has found it necessary to refer a question to the Court of Justice in order to be able to pass a judgment, the lower courts will not rule on the matter before the question has been answered by the Court of Justice.

2.6 - 2.7 This Court has not requested a preliminary ruling in connection with a procedure concerning precautionary, or similar, measures, nor in application of the Leur-Bloem/Giloy case-law.

2.8 - 2.10 The procedure before the Supreme Administrative Court is generally written. A request for a preliminary ruling may be made when, on the basis of the observations made by the parties, the points of fact and law are clarified and the need for a reference thus may be ascertained. It is standard practice in this Court to send a draft order for reference to the parties and to give them the opportunity to submit their comments. They may comment on the presentation of the facts of the case as well as on how the questions are drafted.

A case where a reference may be made is, like all cases, attributed to a formation of the Court following the Courts normal procedure. It is for those members of the Court to take all the necessary decisions during the proceedings, such as the decision to send a draft order to the parties and, having evaluated the relevance of the observations made by the parties, to decide the final content of the order for reference.

The order for reference will, without exceptions, contain a description of the facts and of national law, a justification as to the need for a judgment by the Court of Justice and the questions referred. Sometimes, a special presentation of the arguments by the parties have been included. So far, this Court has not, however, presented its own opinion as to how the questions referred should be answered.

Many of the orders have been some eight pages long - a few somewhat shorter and one a few pages longer. It may be said that this Court endeavours to keep the orders as short as possible, even without paying particular attention to the fact that they need to be translated.

A typical example of an order for reference is attached to this report.

2.11 When the case referred involves documents containing confidential information, the request for a preliminary ruling will have to be drafted in such a manner that such details of the case are not divulged. This is normally possible without excluding relevant information necessary for the reference. In certain tax cases referred to the Court of Justice, the demand for confidentiality has been met by identifying the parties to the main proceedings as companies X and Y (see, as an example, the case mentioned above, C-200/98, X AB and Y AB, [1999] ECR I-8261). The Court of Justice is informed of the fact that the case contains documents which are confidential under Swedish law.

2.12 This Court has not referred any case which, according to a provision of national law, should be treated urgently or within a prescribed period of time. However, the type of tax cases mentioned in the preceding paragraph should be treated with priority since they concern issues of how taxation should be carried out in the future. The need for priority was

explained to the Court of Justice in the abovementioned case. The duration of the procedure in Luxembourg was in that case 19 months.

Unfortunately, it cannot be avoided that the foreseeable length of the preliminary ruling procedure is one of the elements which need to be taken into consideration when deciding whether or not to refer a matter to the Court of Justice.

2.13 When this Court has decided to request a preliminary ruling, the main proceedings will automatically be stayed. Within the administrative courts system it is not considered possible to give a ruling on a separate part of the case only (this is, however, possible within the general courts system).

2.14 This Court has so far found it possible to submit a copy of the entire file to the Court of Justice.

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

3.1 Yes, this has unfortunately occurred in two cases. The reason was that the appeal before this Court was withdrawn.

3.2 - 3.3 This Court has not found it necessary neither to amend an order for a preliminary ruling already submitted to the Court of Justice, nor to clarify a certain point after having received the report for the hearing or the opinion of the advocate general.

3.4 It may be assumed that the proceedings will be stayed until the case is decided by the Court of Justice without a formal decision to that effect.

3.5 There are no supplementary provisions in Swedish procedural law concerning the Article 234-procedure (see the answer to question 1.3). Nor does it seem to be any need to modify procedural rules in order to be able to comply with a request for clarification according to Article 104(5) of the Rules of Procedure of the Court of Justice.

### **4 Proceedings after the preliminary ruling is obtained**

4.1 Having received the preliminary ruling and having given the parties the opportunity to submit their observations on the judgment of the Court of Justice, the Supreme Administrative Court will proceed with its deliberations.

4.2 - 4.3 This Court has not found it impossible to apply Community law as interpreted by the Court of Justice in a requested preliminary ruling, nor has it found it necessary to request a second preliminary ruling.

4.4 The answers given to the question or questions referred are always cited in the final judgment of this Court.

4.5 The Court of Justice receives a copy of each final judgment passed by a Swedish court that has made a reference for a preliminary ruling. Other judgments by national courts relevant to Community law are not, however, forwarded to the Court of Justice in an organized manner.

