

**Symposium of the Presidents of the Member States' Constitutional and Supreme Courts on the Preliminary Ruling Procedure  
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Pekka Hallberg, Finland**

## **How to improve cooperation with national judges?**

The goal of the preliminary ruling procedure is to ensure uniformity in the interpretation of Community law. The judgments of the Court of Justice of the European Communities (ECJ) and its character as a developer of the law play an essential role. However, the ECJ may only give preliminary rulings on questions submitted to it by national courts. In a way national courts thus decide in which matters, issues and connections the ECJ interprets the contents of Community law. Therefore, dialogue between courts is fundamental.

The preliminary ruling procedure (Article 234 of the EC Treaty) is based on a sophisticated division of competence. The ECJ has the final word in the abstract interpretation or validity of Community law, whereas the national supreme courts have the final say in the concrete application of Community law.

About 200 new references for a preliminary ruling are yearly submitted to the ECJ – from Finland four each year. However, every year national courts apply Community law in a great number of cases. This issue has been discussed in the colloquium organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. My presentation here is based on these discussions and on personal experiences.

The preliminary ruling procedure is often described as a dialogue. During its EU membership Finland has submitted approximately 50 references for a preliminary ruling. Next I will look at the development of the dialogue from the perspective of the Finnish Supreme Administrative Court. National courts may promote the preliminary ruling procedure in several ways:

1) First of all it has to be carefully considered in which matters a reference for a preliminary ruling is submitted. The ECJ judgment in the CILFIT case (1982) contains more precise criteria based on the theories of *acte clair* and *acte éclairé*. There has to be a clear basis for the application of Community law so that there is no scope for any reasonable doubt about the application of a provision.

At the conference in Helsinki it was jointly noted that there is certain latitude in the obligation to request a preliminary ruling. This could be called functional flexibility. In this connection the demands made upon the practicality and clarity of the procedure have to be emphasised. There are several matters in which a reference was never submitted although the possibility was considered. Examples of this and information about the procedure are found on the web pages of supreme courts.

2) The references submitted by the Supreme Administrative Court have touched upon several fields: the freedoms of the internal market, the rights of EU citizens, the regulation concerning public service obligation in transport as well as several directives having to do with *e.g.* package travel, public procurement, value added tax, waste, and with the taxation of removal goods. Some references have also taken up general legal principles such as the administrative procedure when applying for export subsidies.

This diversity stresses the need to draw up clear and brief references. The average length of the references of the Supreme Administrative Court has been 16 pages – the shortest ten and the longest 26. Lately we have also numbered paragraphs, put forward reasoned proposals for replies, and specified the questions in detail.

3) An important issue is the form of a reference for a preliminary ruling. Considering the diversity of matters it would not be easy to use standardised forms – it would however not be impossible either. Nevertheless, a reference always has to include

- the facts of the case, the legal rules applicable to the issues and a summary of the positions of the parties;
- the reason why questions about certain Community law provisions are submitted;
- the connection between these and national legislation; and
- a possible suggestion for a position on the question of interpretation (ECJ memorandum in 2005).

In certain matters it is also important to *e.g.* add a description of the area of the country, the service structure or environmental conditions. Circumstances simply differ.

4) It would be helpful to gain all the information on pending references for a preliminary ruling. At present the web pages of the ECJ only contain the questions, which is not enough for assessing a reference. Access to the entire material would be beneficial.

Sometimes several courts have submitted a reference on the same question. Then the ECJ may consider the references together, at least during the oral procedure. This was the case *inter alia* when the Finnish and Swedish Supreme Administrative Courts inquired about the possibility to revoke a parallel import licence for medicine (Paranova, judgments in 2003). An exchange of information between the two national courts helped formulate the questions.

5) According to Article 104 of its Rules of Procedure the ECJ may request clarification from a national court in a pending matter. This possibility is hardly ever used although it would promote dialogue and the clarification of issues. A too high threshold should not be set for requesting clarification. It is in the interest of the national court to get an answer to the right question.

The procedure should guarantee a satisfactory reply so that it will not be necessary to submit a new reference for a preliminary ruling.

6) According to the instructions of the ECJ a new reference for a preliminary ruling is justified if the court that submitted the reference has difficulties in understanding or applying a judgment. Another ground could be new factors in the matter.

In some cases the Supreme Administrative Court too has been forced to ask supplementary questions after a reference has been submitted, *e.g.* in connection with mining and the quarrying of dimension stone (C-114/01 and C-9/00), and with the application of the Brussels II a regulation to taking a child into care (C-435/06 and C-523/07). The judgments of the ECJ only seldom prove to be too narrow because of changes in the circumstances of the matter.

This has happened in connection with the interpretation of the Waste Incineration Directive. A gasification plant planned to purify waste gas for incineration in a power plant (C-317/07, judgment in 2008). After the preliminary ruling the company changed its application abandoning the thought of purifying the gas. As the ECJ had not taken a stand on unrefined gas, the Supreme Administrative Court has submitted a new reference for a preliminary ruling on this issue. At

national level it was not possible to take a great interpretation risk in connection with emissions from unrefined gases.

7) A party or a national court takes the initiative to submit a reference for a preliminary ruling. Parties are heard regarding the intention to submit a reference and afforded the opportunity to comment on necessary questions. The contents of the hearings have varied somewhat. Sometimes the Supreme Administrative Court sends a draft of the reference including the questions to the parties (C-73/07 and C-464/06). An active conduct of the proceedings and the responsibility for formulating clear questions are core issues.

If the ECJ feels that it needs clarification after the remarks of the Member States but before the oral procedure, it would be natural to send the questions to the court that submitted the reference for a preliminary ruling. This would ensure a realistic procedure.

8) Training at national level is the key. This should be combined with an exchange of best practices between courts (the BAT system of Community law). In this connection I would also like to mention the databases DEC.NET and JURIFAST of the supreme administrative courts. These make it easier to familiarise oneself with the case law of the ECJ and of national courts.

9) Lastly, I would like to stress the importance of close contacts between the ECJ and national judges. The yearly meetings between judges here in Luxemburg have greatly benefited the situation.

This symposium is extremely significant. On national level I am certain that we are prepared to strengthen our informal contacts and increase our interaction. Ensuring uniformity in the interpretation of Community law, promoting a functional procedure and developing the legal safeguards in Europe are in everyone's interest.