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I

(Resolutions, recommendations and opinions)

RECOMMENDATIONS

COURT OF JUSTICE OF THE EUROPEAN UNION

This text updates the recommendations to national courts and tribunals adopted following the entry into force on 1 November 2012 of the new Rules of Procedure of the Court of Justice (OJ C 338, 6.11.2012, p. 1). Based on experience gained in implementing those rules ⁽¹⁾, and on the latest case-law, the present recommendations serve as a reminder of the essential characteristics of the preliminary ruling procedure and to provide courts and tribunals making references to the Court for a preliminary ruling with all the practical information required in order for the Court to be in a position to give a useful reply to the questions referred.

RECOMMENDATIONS

to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings

(2016/C 439/01)

Introduction

1. The reference for a preliminary ruling, provided for in Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), is a fundamental mechanism of EU law. It is designed to ensure the uniform interpretation and application of that law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union ('the Court') for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.
2. The preliminary ruling procedure is based on close cooperation between the Court and the courts and tribunals of the Member States. In order to ensure that that procedure is fully effective, it is necessary to recall its essential characteristics and to provide further information to clarify the provisions of the rules of procedure relating, in particular, to the originator and scope of a request for a preliminary ruling, as well as to the form and content of such a request. That information — which applies to all requests for a preliminary ruling ^(I) — is supplemented by the provisions that apply to requests for a preliminary ruling requiring particularly expeditious handling ^(II) and by an annex which summarises the essential elements of any request for a preliminary ruling.

I. Provisions which apply to all requests for a preliminary ruling**The originator of the request for a preliminary ruling**

3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought — and for that court or tribunal alone — to determine, in the light of the particular circumstances of each case,

⁽¹⁾ OJ L 265, 29.9.2012, p. 1.

both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

4. Status as a court or tribunal is interpreted by the Court as a self-standing concept of EU law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.
5. The courts and tribunals of the Member States may refer a question to the Court on the interpretation or validity of EU law where they consider that a decision of the Court on the question is necessary to enable them to give judgment (see second paragraph of Article 267 TFEU). A reference for a preliminary ruling may, *inter alia*, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.
6. Where a question is raised in the context of a case that is pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is nonetheless required to bring a request for a preliminary ruling before the Court (see third paragraph of Article 267 TFEU), unless there is already well-established case-law on the point or unless the correct interpretation of the rule of law in question admits of no reasonable doubt.
7. It follows, moreover, from settled case-law that although national courts and tribunals may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court has exclusive jurisdiction to declare such acts invalid. When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons for which it considers that the act is invalid.

The subject matter and scope of the request for a preliminary ruling

8. A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings.
9. The Court can give a preliminary ruling only if EU law applies to the case in the main proceedings. It is essential, in that respect, that the referring court or tribunal set out all the relevant matters of fact and of law that have prompted it to consider that any provisions of EU law may be applicable in the case.
10. With regard to references for a preliminary ruling concerning the interpretation of the Charter of Fundamental Rights of the European Union, it must be noted that, under Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. While the circumstances of such implementation can vary, it must nevertheless be clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings. Since the Court has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.
11. Lastly, although, in order to deliver its decision, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw case-specific conclusions, if necessary by disapplying the rule of national law held incompatible with EU law.

The appropriate stage at which to make a reference for a preliminary ruling

12. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

13. Since, however, that request will serve as the basis of the proceedings before the Court and the Court must therefore have available to it all the information that will enable it both to assess whether it has jurisdiction to give a reply to the questions raised and, if so, to give a useful reply to those questions, it is necessary that a decision to make a reference for a preliminary ruling be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

14. The request for a preliminary ruling may be in any form allowed by national law in respect of procedural issues, but it should be borne in mind that that request serves as the basis of the proceedings before the Court and is served on all the interested persons referred to in Article 23 of the Statute of the Court ('the Statute') and, in particular, on all the Member States, with a view to obtaining any observations they may wish to make. Owing to the consequential need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely by the referring court or tribunal, avoiding superfluous detail. As experience has shown, about 10 pages are often sufficient to set out adequately the legal and factual context of a request for a preliminary ruling.

15. The content of any request for a preliminary ruling is prescribed by Article 94 of the Rules of Procedure of the Court and is summarised in the annex hereto. In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling must contain:

- a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

In the absence of one or more of the above, the Court may have to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible.

16. In its request for a preliminary ruling, the referring court or tribunal must provide precise references for the national provisions applicable to the facts of the dispute in the main proceedings, and accurately identify the provisions of EU law whose interpretation is sought or whose validity is challenged. The request should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings. It is helpful to bear in mind in that context that it is only the request for a preliminary ruling that will be translated, not any annexes to that request.

17. The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

18. Lastly, the questions referred to the Court for a preliminary ruling must appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without it being necessary to refer to the statement of the grounds for the request.

19. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form and that the pages and paragraphs of the order for reference be numbered.

20. The request for a preliminary ruling must be dated and signed, then sent, by registered post, to the Court Registry at the following address: Rue du Fort Niedergrünwald, 2925 Luxembourg, LUXEMBOURG. The request must be

accompanied by any relevant documents and, in particular, precise contact details for the parties to the main proceedings and their representatives, if any, as well as the file of the case in the main proceedings or a copy of it. The file (or copy file) will be retained at the Registry throughout the proceedings where, unless otherwise indicated by the referring court or tribunal, it may be consulted by the interested persons referred to in Article 23 of the Statute.

21. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to redact certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.
22. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute, which generally takes place about one month after the request for a preliminary ruling has been lodged. Given the increasing use of new information and communication technologies, any anonymisation after such publication and service would be devoid of practical purpose.

Interaction between the reference for a preliminary ruling and the national proceedings

23. Although the referring court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity, the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court has given its ruling.
24. While the Court, in principle, remains seised of a request for a preliminary ruling for so long as that request is not withdrawn, it must nevertheless be borne in mind that the Court's role in the preliminary ruling procedure is to contribute to the effective administration of justice in the Member States and not to give opinions on general or hypothetical questions. Since the preliminary ruling procedure is predicated on there being proceedings actually pending before the referring court or tribunal, it is incumbent on that court or tribunal to inform the Court of any procedural step that may affect the referral and, in particular, of any discontinuance or withdrawal, amicable settlement or other event leading to the termination of the proceedings. The referring court or tribunal must also inform the Court of any decision delivered in the context of an appeal against the order for reference and of the consequences of that decision for the request for a preliminary ruling.
25. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is important, however, that such information is communicated to the Court with the minimum of delay. The national courts and tribunals should also note that the withdrawal of a request for a preliminary ruling may have an impact on the management of similar cases (or of a series of cases) by the referring court or tribunal. Where the outcome of a number of cases pending before the referring court or tribunal depends on the reply to be given by the Court to the questions submitted by that court or tribunal, it may be appropriate for that court or tribunal to join those cases in the request for a preliminary ruling in order to enable the Court to reply to the questions referred notwithstanding any withdrawal of one or more cases.

Costs and legal aid

26. Preliminary ruling proceedings before the Court are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.
27. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the Court and the national court or tribunal

28. The Court Registry will remain in contact with the referring court or tribunal throughout the proceedings, and will send it copies of all procedural documents and any requests for information or clarification deemed necessary in order for a useful reply to be given to the questions referred by that court or tribunal.
29. At the end of the proceedings, the Registry will send the Court's decision to the referring court or tribunal, which is invited to inform the Court of the action taken upon that decision in the case in the main proceedings and to communicate to the Court its final decision in that case.

II. Provisions applicable to requests for a preliminary ruling requiring particularly expeditious handling

30. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure. The Court will decide whether these procedures are to be applied, either on submission by the referring court or tribunal of a duly reasoned request setting out the matters of fact or of law which justify the application of such procedure(s), or, exceptionally, of its own motion, where that appears to be required by the nature or the particular circumstances of the case.

Conditions for the application of the expedited and urgent procedures

31. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may thus be determined pursuant to an expedited procedure derogating from the provisions of those rules where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge observations, whether written or oral, within much shorter time limits than would ordinarily apply, its application must be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. According to settled case-law, the large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing the matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure.
32. The same applies *a fortiori* to the urgent preliminary ruling procedure, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure must therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.
33. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of EU law governing the area of freedom, security and justice, a national court or tribunal may, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of young children, where the identity of the court having jurisdiction under EU law depends on the answer to the question referred for a preliminary ruling.

The request for application of the expedited procedure or the urgent procedure

34. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure. In so far as it is possible to do so, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions, and therefore contributes to the rapidity of the procedure.

35. The request for the application of the expedited procedure or the urgent procedure must in any event be submitted in an unambiguous form that enables the Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is requested to specify which of the two procedures is required in the particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, it may be helpful for a covering letter from the referring court or tribunal to refer to that request.
36. As regards the order for reference itself, it is particularly important that it should be concise where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court, the referring court or tribunal and the parties to the main proceedings

37. In order to expedite and facilitate communication with the referring court or tribunal and the parties to the main proceedings, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is requested to state the email address and any fax number which may be used by the Court, together with the email addresses and any fax numbers of the representatives of the parties to the proceedings.
 38. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by email (ECJ-Registry@curia.europa.eu) or by fax (+352 433766). Processing of the reference and of the request can then begin upon receipt of the emailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.
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ANNEX

The essential elements of a request for a preliminary ruling*1. The referring court or tribunal*

A request for a preliminary ruling must specify the referring court or tribunal and, where appropriate, the chamber or formation of the court or tribunal making the reference, and must include full contact details for that court or tribunal, in order to facilitate subsequent contact between that court or tribunal and the Court of Justice.

2. The parties to the main proceedings and their representatives

After specifying the referring court or tribunal, the request for a preliminary ruling should state the names of the parties to the main proceedings and anyone representing them before that court or tribunal. Those particulars must be as comprehensive as possible and must notably include, in the order for reference or in the covering letter, the exact postal address of the persons concerned, their telephone or fax number and, in so far as they have one, their email address.

The attention of the national courts and tribunals is here drawn to Article 95 of the Rules of Procedure of the Court, and to points 21 and 22 of these recommendations. If the referring court or tribunal considers it necessary, it must itself redact certain names or details in its request for a preliminary ruling, or send an anonymised version of that request in addition to the full request for a preliminary ruling, which will serve as the basis of the proceedings before the Court.

3. The subject matter of the dispute in the main proceedings and the relevant facts

The referring court or tribunal must briefly describe the subject matter of the dispute in the main proceedings and the relevant findings of fact, as determined by that court or tribunal.

4. The relevant legal provisions

The request for a preliminary ruling must contain precise references to the national provisions applicable to the facts of the dispute in the main proceedings, including any relevant case-law, and the provisions of EU law whose interpretation is sought or whose validity is challenged. Those references must be comprehensive and must include the precise title of and citations for the provisions concerned, as well as their publication references. As far as possible, case-law citations, whether national or European, should also include the ECLI number ('European Case Law Identifier') of the decision concerned.

5. The grounds for the reference

The Court can rule on the request for a preliminary ruling only if EU law is applicable to the case in the main proceedings. The referring court or tribunal must therefore set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings. If it considers it helpful for the purposes of understanding the case, the referring court or tribunal may set out here the arguments of the parties in that regard.

6. The questions referred for a preliminary ruling

The referring court or tribunal should set out, clearly and distinctly, the questions it is submitting to the Court for a preliminary ruling. It must be possible to understand those questions on their own terms, without the need to refer to the statement of the grounds for the request for a preliminary ruling.

In so far as it is able to do so, the referring court or tribunal should also briefly state its view on the answer to be given to the questions referred for a preliminary ruling.

7. Possible need for specific treatment

Lastly, where the referring court or tribunal considers that the request it is submitting to the Court has to be dealt with in a particular way, both as regards the need to preserve the anonymity of the persons concerned by the dispute in the main proceedings and as regards the rapidity with which the request may have to be dealt with by the Court, the reasons for such treatment must be set out in detail in the request for a preliminary ruling and in any covering letter.

Formal aspects of the request for a preliminary ruling

Requests for a preliminary ruling must be submitted in a form that facilitates electronic processing by the Court and, in particular, that enables them to be scanned and optical character recognition to be applied. To that end:

- the request should be typed on white, unlined, A4-size paper,
- the text should be in a commonly used font (such as Times New Roman, Courier or Arial), in at least 12 point in the body of the text and at least 10 point in any footnotes, with 1,5 line spacing and horizontal and vertical margins of at least 2,5 cm (above, below, at the left and at the right of the page), and
- all the pages of the request, and the paragraphs they contain, should be numbered consecutively.

The request for a preliminary ruling must be dated and signed. It should be sent by registered post, together with the file of the case in the main proceedings, to the Registry of the Court of Justice, Rue du Fort Niedergrünwald, 2925 Luxembourg, LUXEMBOURG.

In the event of a request for the expedited procedure or the urgent procedure to be applied, it is recommended that a signed copy of the request for a preliminary ruling is first sent by email (ECJ-Registry@curia.europa.eu) or by fax (+352 433766), and that the original of that request is then sent by post.

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