

EJTN ADMINISTRATIVE LAW PROJECT

Judicial training - The EU Preliminary Ruling Procedure

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A View from Luxembourg : Drafting a Reference

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1. The Reference for a Preliminary Ruling Procedure: A Dialogue between Judges

Grand chamber judgment of 5 July 2016 in Case C-614/14, Ognyanov

15 First, it must be recalled that the preliminary ruling procedure provided for in Article 267 TFEU constitutes the keystone of the European Union judicial system, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.

16 In accordance with settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate.

2. The Presumption of Relevance

Grand Chamber judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10, Melki and Abdeli:

27 In that regard, suffice it to point out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy **a presumption of relevance**. The Court may refuse to rule on a question referred by a national court **only** where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

3. Subject Matter and Scope of the Reference

Quoting *Ognyanov* again:

17 In accordance with... settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises

questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them.

Grand Chamber judgment of 15 November 2016 in Case C-268/15, Ullens de Schooten:

48 As may be seen from the order for reference ... the dispute in the main proceedings is characterised by factors all confined within Belgium. Mr Ullens de Schooten, a Belgian national who operated a clinical biology laboratory in Belgian territory, is asking the Belgian State to compensate him for the damage allegedly suffered as a result of the alleged incompatibility with EU law of the Belgian legislation mentioned in paragraph 3 above.

49 ... While the bringing of an action for failure to fulfil obligations means that the Court ascertains whether the national measure challenged by the Commission is, in general, capable of deterring operators from other Member States from making use of the freedom in question, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court, which presupposes that that freedom is shown to be applicable to that dispute.

1) Nationals from other Member States may be affected

50 The Court has indeed regarded requests for preliminary rulings concerning the interpretation of provisions of the Treaties relating to the fundamental freedoms as admissible even though the disputes in the main proceedings were confined in all respect within a single Member State, on the ground that it was not inconceivable that nationals established in other Member States had been or were interested in making use of those freedoms for carrying on activities in the territory of the Member State that had enacted the national legislation in question, and, consequently, that the legislation, applicable without distinction to nationals of that State and those of other Member States, was capable of producing effects which were not confined to that Member State...

2) National provisions at issue in judicial review-type proceedings

51 Similarly, the Court has found that, where the referring court makes a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States, the decision of the referring court that will be adopted following the Court's preliminary ruling will also have effects on the nationals of other Member States, which justifies the Court giving an answer to the questions put to it in relation to the provisions of the Treaty on the fundamental freedoms, even though the dispute in the main proceedings is confined in all respects within a single Member State...

3) National law applies in order to avoid reverse discrimination

52 It should, moreover, be recalled that the interpretation of the fundamental freedoms provided for in Article 49, 56 or 63 TFEU may prove to be relevant in a case confined in all respects within a single Member State where national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law...

4) National law explicitly applies same rule to internal situations– so substantive content of rule needs to be known in order to rule on situation of own nationals

53 The same applies in cases in which, although the facts of the main proceedings are outside the direct scope of EU law, the provisions of EU law have been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follows the same approach as that provided for by EU law...

Finally, the Court stressed that it is for the national court to make clear in it is reference the facts and/or national law on the basis on which one of those exceptions may apply.

54 While that is so, in the cases referred to in paragraphs 50 to 53 above, the Court, on a question being referred by a national court in connection with a situation confined in all respects within a single Member State, cannot, where the referring court does not indicate something other than that the national legislation in question applies without distinction to nationals of the Member State concerned and those of other Member States, consider that the request for a preliminary ruling on the interpretation of the provisions of the FEU Treaty on the fundamental freedoms is necessary to enable that court to give judgment in the case pending before it. The specific factors that allow a link to be established between the subject or circumstances of a dispute, confined in all respects within a single Member State, and Article 49, 56 or 63 TFEU must be apparent from the order for reference.

Article 51(1) of the Charter of Fundamental Rights:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

4. Timing of the Reference

Quoting *Ognyanov* again:

17... National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (...). The choice of the most appropriate time to refer a question for a preliminary ruling lies within their exclusive jurisdiction.

5. Form and Content of the Reference

Ognyanov once again:

18 The need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based.

19 The requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure, of which the national court should, in the context of

the cooperation instituted by Article 267 TFEU, be aware and which it is bound to observe scrupulously.

Article 94 of the Rules of Procedure of the Court of Justice:

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) 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 least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings

These requirements are not just about giving the Court of Justice the information it needs in order to rule on the case, but also about giving the parties an, EU Member States and Institutions the chance to participate in the proceedings in a meaningful way.

For example, the Order of the sixth chamber of 3 July 2014 in Case C-19/14, Talasca:

23 It must also be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that it is possible for the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that that possibility is safeguarded, in the light of the fact that, under that provision, only the orders for reference are notified to the interested parties.

6. A few practical issues:

- About 10 pages should usually be enough (Recommendations, paragraph 14).
- Only the reference itself is translated NOT any annexes and NOT the national case file.
- Questions referred must appear in a separate section of the reference (Recommendations, paragraph 19).
- Typewritten – pages and paragraphs to be numbered (Recommendations, paragraph 20).
- Anonymity – bear this in mind when drafting a reference (Recommendations, paragraph 21).

7. Communication between the Court of Justice and National Courts

See Article 101 of the Rules of Procedure of the Court of Justice on Requests for Clarification.

8. Urgency and Expedited procedures

The Urgency Procedure – Article 107 *et seq.* of the Rules of Procedure: Area of Freedom, Security and Justice cases only.

The Expedited Procedure – Article 105 of the Rules of Procedure