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**« EC Law on Equal Treatment »**

**"The role of the national judge and the preliminary ruling procedure"**

by

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**I. Introduction**

**II. Main features of the preliminary ruling procedure**

- The preliminary ruling procedure is a *cooperation mechanism* between the European Court of Justice (ECJ) and national courts. It is a non contentious procedure.
- The preliminary ruling procedure still falls within the *exclusive competence of the ECJ* (notwithstanding Article 225, § 3, EC Treaty)

**III. Who may initiate a preliminary ruling procedure?**

- *A national court or tribunal of a Member State*. In principle, no difficulties arise. In case of doubts, the ECJ verifies whether the referring body fulfils some basic conditions. Thus according to the Court case-law, the body in question must be established by law (1) and permanent (2), its jurisdiction must be compulsory (3), the procedure before it must be contradictory (or inter partes) (4), it must apply the rules of law (5), it must be independent (6) and it must perform judicial functions (7) (e.g.: Order of 14 May 2008 in case C-109/07, *Pilato* or Judgment of 16 December 2008 in case C-210/06, *Cartesio*).
- *Only a national court or tribunal*. The parties themselves are not entitled to address questions to the ECJ on their own motion.
- *But the discretionary power of the national court is not an absolute one*. In two situations, the national court or tribunal is obliged to make a reference to the ECJ:

1) when the problem of Community law arises before *a court or tribunal against whose decisions there is no judicial remedy available under national law* (Art. 234, § 3, EC Treaty) (see however the three exceptions listed in the CILFIT Judgment);

2) when the national court has *doubts concerning the validity of a Community law provision*. In such a case, the national court must refer to the ECJ. This was made clear in the Foto-Frost case (1987) and reaffirmed, very clearly, in the Gaston Schul case (2005).

#### **IV. When and how should a reference to the ECJ be made?**

- *Basic principle*: the national judge is in the best position to decide on such questions.

- However, in order for him to get a useful answer from the ECJ, he has to take some elements into account. Thus, the Court has adopted, in 1996, an *information note* on references by national courts for preliminary rulings. That note has been updated in 2005 and published in the OJ of the EU (C 143, 11 June 2005). According to par. 4 of such a note, "it is in no way binding"; it is intended "to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court".

- *At what stage of the national procedure should a question be submitted to the ECJ?* The answer is to be found in *par. 18 of the information note* "as soon as the national court or tribunal finds that a ruling on the point(s) of interpretation or validity of Community law is necessary to enable it to give judgment". *In paragraph 19* of the same note, the Court adds however that "it is desirable that the decision to seek a preliminary ruling should be taken when the proceedings have reached the stage at which the national court is able to define the factual and legal context of the question, so that the Court has available to it all the information necessary to check, where appropriate, that Community law applies to the main proceedings". Moreover, "it may be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard".

- *How should a reference to the ECJ be made?* Some indications are given in par. 20 to 24 of the information note. A reference can be made in any form allowed by national law as regards procedural steps, provided that such a document explains clearly the problem at stake before the national court and the questions of Community law that call upon the intervention of the Court [Comments concerning the form, the length and the contents of such a document/order for reference].

#### **V. What are the consequences of a reference to the ECJ?**

##### **A. Consequences on the national proceedings:**

These proceedings are stayed as long as the case is pending before the ECJ and until the Court has given its ruling (par. 25 of the information note). The national court may however take protective measures or suspend the application of a national measure,

particularly in a reference on determination of validity (see par. 17 and 26 of the information note).

## **B. Consequences on the procedure before the ECJ:**

These consequences are much more numerous as it is the registration of the order for reference in Luxemburg that will constitute the starting point of the whole procedure before the Court.

### *1) Registration & Treatment of the case by the registry*

- Formal registration of the case (case number & language of procedure)
- Acknowledgment of receipt for the national court
- Transmission of the order for reference to the Court's translation services
- Transmission of the order for reference to the research & documentation service
- Transmission of the order for reference to the President of the Court and the 1<sup>st</sup> AG
- Drafting (by the administrator of the registry) of a notice on that new case that will be published in the OJ of the EU and drafting of an internal information note on that case (la "fiche-objet")

### *2) Translation of the order for reference*

### *3) Notification of the order for reference to all the parties entitled to submit observations*

- List of these parties provided for in Article 23 of the Statute
- There is *no possibility for additional interveners before the ECJ*. The Court only admits as interveners the parties who have been admitted as interveners by the national court.

### *4) Lodging of written observations*

- The contents of these observations.
- The author/drafter of these observations (see Art. 19 of the Statute and Article 104, paragraph 2, of the rules of procedure of the ECJ)
- The language of the written observations (depends on the party concerned).
- The time-limit for lodging written observations: 2 months + 10 days.

### *5) The consecutive stages of the procedure before the ECJ*

- Translation of the written observations in the language of procedure as well as in the working language of the Court (French)
- Notification of these observations and their translations to all the parties entitled to submit written observations (see Article 23 of the Statute), with a request to inform the Court about their desire (or not) to participate to the oral phase of the procedure (Article 104, § 4 of the rules of procedure)
- Drafting by the reporting judge of a report for the hearing as well as a preliminary report in which the judge makes proposals concerning the further procedural treatment of the case by the Court (composition of the Court, opinion of the AG, hearing, questions to the parties...)

- Examination of these proposals by the Court during a general meeting
- Oral phase of the procedure: Hearing and Opinion of the AG [may be omitted in some circumstances, since the entry into force of the Treaty of Nice]
- Deliberation on the case
- Delivery of the Judgment, which is then communicated to the national court. The latter is compelled to take the answers given by the Court to its questions into account in order to solve the case pending before it.

## **VI. Three specific forms of preliminary ruling procedure**

1) *The simplified preliminary ruling procedure (Article 104, paragraph 3)*. It enables the ECJ to answer questions referred to it in a simplified way – by means of a reasoned order – when the question referred to it for a preliminary ruling is identical to a question on which the Court has already ruled, or when the answer to such a question may be clearly deduced from existing case-law or admits of no reasonable doubt. In such a case, there will be no oral phase and, in some circumstances, also no written phase (adoption of a reasoned order by the Court as soon as the order for reference is translated in French).

2) *The accelerated procedure (Article 104 a)*. It is an ordinary preliminary ruling procedure, with all the classical stages of such a procedure (written, oral, deliberation stages), but all the time-limits are shortened in order to give an absolute priority to that case. Interesting for the national judge, who gets an answer to its questions in a short delay, but presupposes that the national court is able to demonstrate that a ruling on its questions is "a matter of exceptional urgency" and presupposes also that all the cases submitted to the Court are not submitted to such a procedure...

3) *The urgent preliminary ruling procedure (Article 104 b)*. It is a specific form of preliminary ruling procedure, which is only applicable to cases falling within the scope of Title IV of the EC Treaty (Visas, asylum and immigration, judicial cooperation in civil matters) or Title VI of the EU Treaty (Police and judicial cooperation in criminal matters). Here, the number of parties entitled to submit written observations is limited. But it allows the Court to adopt a decision in a very short delay after the oral phase of the procedure (during which all the parties may be heard).

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