

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

and

Network of the Presidents of the Supreme Judicial Courts of the European Union

Report of the working group on the preliminary rulings procedure.

I Introduction

The General Assembly of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, meeting in Warsaw on 14 May 2007, on the proposal of the Netherlands Council of State, decided to set up a working group to formulate practical suggestions on ways of reducing the delays involved in the preliminary rulings procedure.

It was also decided that representatives of the Network of the Supreme Judicial Courts of the European Union would join the working group if the Network agreed.

In the context of these activities, all members of the Association would be invited to put forward ideas and suggestions for consideration by the working group. These could either be their own or could come from other sources in the country concerned, for example the courts or academic circles.

The composition of the working group was as follows:

Chair:

Pieter VAN DIJK Netherlands

Observer for the Court of Justice of the European Communities

Christiaan TIMMERMANS

Members

For the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

Pascal GILLIAUX Belgium

Ms Tuula PYNNÄ Finland

Julien BOUCHER France

Michael GROEPPER Germany

Henri CAMPILL Luxembourg

Ms Hanna SEVENSTER Netherlands

Stanislaw BIERNAT Poland

Manuel CAMPOS Spain

For the Network of the Presidents of the Supreme Judicial Courts of the European Union

Ivan VEROUGSTRAETE Belgium

Ms Pauliine KOSKELO Finland

Manuel CAMPOS Spain

Secretariat

Albert HEIJMANS Netherlands

Method of working

The working group held a meeting in The Hague on December 3rd 2007. Discussions were conducted on the basis of a working document prepared by the Presidency. In the working document a structured survey was given of the various proposals that had been made in the past with regard to the preliminary rulings procedure. The working document had been submitted in advance to the members of the working group for their reaction.

It was also submitted for reactions to the members of the Association and it was put on the Forum network as well. Apart from reactions from members of the working group and the observer for the Court, reactions were received from M. JABLONER, President of the Administrative Court of Austria, mr FOTIOU, president of the Supreme Court of Cyprus and mr M. BOBEK, adviser at the Supreme Administrative Court of the Czech Republic. All reactions received were distributed among the members of the working group.

The meeting of the working group of December 3rd had the character of a brainstorming session, enabling all participants to bring forward opinions, ideas and suggestions. Of these discussions a summary report was made and on its basis a questionnaire was prepared which was sent to the members of the working group. All answers received on the questionnaire were also distributed among the members of the working group. The final report is drawn up on the basis of the discussions in the working group and the answers received from its members on the questionnaire.

As additional treaty amendments will be out of the question for the near future, given the burdensome experiences with the ratification of the Constitutional Treaty and the Treaty of Lisbon, the working group only briefly discussed such amendments, but focussed mainly on amendments of the Statute and the Rules of Procedure, and on measures the Court of Justice and especially the domestic courts could take to accelerate procedures and to limit the number of references. There was full agreement that the domestic courts should do everything necessary to ensure that the preliminary rulings procedure operates as efficiently and effectively as possible. After all as stated at the 19th Colloquium of the Association in The Hague in 2004 domestic courts are also *European* courts and as such '*co-actors in the development of European law making*'¹.

Acknowledgement

The chair and members of the working group would like to express their great appreciation for the active role played in their deliberations by Mr Timmermans, member of the Court of Justice, who acted as observer for the Court. They wish to thank him for his contribution as adviser to the working group. By providing the group with information about the inner workings of the Court, he had a marked impact on the content of the report.

They also owe gratitude to mr Heijmans who acted as secretary to the working group and meticulously prepared the working document as well as the present report and the conclusions.

The preliminary rulings procedure; developments and problems

Legal basis of the preliminary rulings procedure

The preliminary rulings procedure, which provides for a form of dialogue between national courts and the Court of Justice, serves an essential function, particularly in ensuring the uniform interpretation of Community law and promoting its harmonious development throughout the European Union.

¹ E. HIRSCH BALLIN and L.SENDEN "Co-actorship in the development of European law making. The quality of European legislation and its implementation and application in the national legal order", T.M.C. Asser press, The Hague 2005

The basis for the preliminary rulings procedure is article 234 of the Treaty establishing the European Community (hereafter "the Treaty"), which provides that the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty, the validity and interpretation of acts of the Institutions of the Community and of the European Central Bank, and the interpretation of the statutes of bodies established by an act of Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member state, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal *must* bring the matter before the Court of Justice by means of a reference for a preliminary ruling.

Development of delays and measures taken to control them

The workload of the Court of Justice, which consists mainly of references for preliminary rulings, direct actions and appeals, has been a cause for concern for some years in view of the resulting delays. This is particularly true of the preliminary rulings procedure, about which Koopmans remarked as long ago as 1987 that it was in danger of becoming a victim of its own success.² In 2007, the average time needed by the Court of Justice to handle questions referred for preliminary rulings was 19.3 months.³

The Due Report of 19 January 2000⁴ noted that the average duration of preliminary ruling proceedings had risen from 12.6 to 21.4 months between 1983 and 1998. It stated as follows,

'As these cases have to be fitted into proceedings in the national courts, it is essential that the 1983 situation, when preliminary rulings were generally given within the year, be restored. Preserving a genuine dialogue between the Court of Justice and the national courts depends on this.'

Various measures have been taken since the Due Report and the document of the Court of Justice and the Court of First Instance of May 10th 1999⁵ to reduce the length of preliminary ruling proceedings. These include:

- the amendment of article 104 (3) of the Rules of Procedure to expand the scope for use of the *simplified procedure* to cover cases in which the answer to the question can be clearly deduced from existing case law or admits of no reasonable doubt;⁶
- the introduction of an *accelerated procedure* (Article 104a of the Rules of Procedure);⁷
- the introduction of the possibility for questions referred for preliminary ruling in specific areas to be heard by the Court of First Instance (Article 225 (3) EC Treaty);⁸
- the amendment of article 20 of the Statute of the Court of Justice allowing the Court, where it considers that a case raises no new point of law and after hearing the Advocate General, to decide that the case will be determined without a submission from the Advocate General⁹;
- the introduction of an urgent preliminary ruling procedure to ensure the expeditious handling of references for preliminary rulings concerning the area of freedom, security

² Koopmans 'La procédure préjudicielle, victime de son succès ?' in Capotorti, Ehlermann et al. *Du droit international au droit de l'intégration*, Liber amicorum Pierre Pescatore.

³ 2007 Annual Report of the Court of Justice, annex 12.

⁴ Report by the working party on the future of the European Communities Court system, January 2000.

⁵ The Future of the Judicial system of the European Union (proposals and reflections). Hereafter: Reflection document

⁶ 21 cases in total were dealt with by this procedure in 2006 (Annual Report of the Court of Justice, Part A, 2).

⁷ This procedure is seldom applied. Hitherto it has been used just once in a reference for a preliminary ruling. The reason for this is that as a consequence of its application other cases which have no such claim to priority will be delayed even more.

⁸ No use has yet been made of this possibility owing to the fact that the Court of First Instance is overloaded itself.

⁹ The Court makes an abundant use of this possibility: 35% of the cases in 2005 and 33% in 2006.

and justice¹⁰. This procedure provides for the expeditious handling of the references concerned, for instance in cases involving deprivation of liberty. The aim is to ensure that the procedures are completed in about three months. The Council has requested the Court of Justice to report on the application of this urgent preliminary ruling procedure after a period of three years.

The 2007 Annual Report of the Court of Justice pointed out that the statistics concerning the Court's judicial activity in 2007 revealed a distinct improvement compared with the preceding year. In particular the reduction, for the fourth year in a row, of the duration of proceedings before the Court should be noted, as should the increase of approximately 10% in the number of cases completed compared with 2006. The Report noted that the average time taken to deal with references for a preliminary ruling (19.3 months, as already noted) was at its shortest since 1995.

Expectations for the near future

All things considered, it has to be said that, although definite progress has been made as a result of the measures taken in recent years, and the Court of Justice should be given full credit for the progress as it constantly has done its utmost to improve the situation, the situation is still not satisfactory at present.

The Annual Report shows that the number of references for a preliminary ruling is rising steadily. At the same time, the number of direct actions and appeals is rising or *at least* remains steady.

Indeed, the flow of cases to the Court of Justice is expected to rise still further, given the still strong propensity to litigate in virtually all member states of the European Union, which is due in part to society's growing complexity and people's greater awareness of their rights, combined with the enlargement of the Union and the expansion of the areas in which it operates. The working group notes in this connection that the integration of the third pillar will entail that lower courts will refer cases for preliminary rulings in the relevant field too, and as experience shows that substantially more references for a preliminary ruling can be expected from the lower courts, a sharp increase of cases should be anticipated.

Although the number of cases decided by the Court has exceeded the number of new cases in the past three years, the positive gap narrowed from 134 in 2004 to only 9 in 2006, while in 2007 statistics show a negative effect, with an inflow of 580 cases – the highest number in the history of the Court - and a production of 570. If this trend continues this will in all probability extend the average length of proceedings in the near future, including that of preliminary ruling proceedings.

The working group further does not exclude the possibility that the reduction in the average handling period recently noted is connected with the increase in the capacity of the Court of Justice following the recent enlargement of the European Union and that this beneficial effect will dissipate in due course, as a result of an increase in the number of references for preliminary rulings from the new member states, the integration of the third pillar, and the introduction of the new urgent procedure in this connection.

On the whole, preliminary rulings proceedings still take rather long, in any event compared with the goal set by the Due Report. It should also be remembered that the period of 19.3 months is no more than an average: while some judgments may be delivered reasonably quickly, other cases take much longer. Simple cases help to pull down the average, but more complex cases (many of which concern matters of principle that have far-reaching repercussions) often involve much longer delays.

Cases that are or should be disposed of as a matter of priority, for example part of the cases concerning the area of freedom, security and justice, as indicated above, delay the hearing of cases that have no claim to priority.

¹⁰ Decision of the Council of January 15th 2008, Official journal EU 29.1.2008, L 24/44, entered into force as from 1.3.2008.

As long delays frustrate the purpose of the instrument of the preliminary rulings procedure, every effort must be made to reduce the duration of the procedure still further. A handling period of a maximum of 12 months for normal cases, as formulated by the Due Report, should serve as a target to be pursued.

During its work the working group was however well aware of the fact that although expeditiousness of handling is an aspect of quality of the judicial process in general, the substantive quality of preliminary rulings should never be compromised, and that an equilibrium must be found between these two aspects.

At the working group's meeting on 3 December 2007 the participants welcomed the communication by Mr Timmermans that the Court of Justice had decided to restart an internal discussion on this issue within the framework of a more general discussion on a possible reform of the judicial architecture of the EU. In this context the working group wants to pay tribute to the persistent endeavours of the Court of Justice, its successive presidents and its members, to improve both the duration and the substantive quality of the procedures before the Court of Justice. Not only by the dedication of all its members to the handling of the constant flow of individual cases, but also by its contributions to provide solutions for the fundamental problems which arise in the system as a consequence of the developments of the European Union. The creative and decisive role the Court of Justice has played *inter alia* in the development of the urgent preliminary rulings procedure regarding questions relating to the area of freedom, security and justice is an outstanding recent example of this.

The working group expresses the hope that the present report may make a useful contribution to the discussion in the future. The members of the working group are convinced that the national courts too should do everything possible to ensure that the preliminary rulings procedure operates efficiently and effectively with a uniform application and interpretation of Community law. A substantial part of this report is therefore devoted to this subject.

They, therefore, hope that their recommendations will also percolate through to the national courts at all levels, not just those of final instance. Only by a widespread, concerted effort will it be possible to achieve the goal of substantially reducing the delays: "*Point n'est besoin d'espérer pour entreprendre, ni de réussir pour persévérer*"¹¹.

II Amending the formal framework of the preliminary rulings procedure

The formal framework of the preliminary rulings procedure consists of the EU and EC Treaty, the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice. These subjects are dealt with in this paragraph.

II. A Amending the EC Treaty

In the working document of the working group several amendments to the Treaty were suggested. At its meeting, the representative of the French Conseil d'État also put forward a possible amendment creating the possibility that the Court could, at the request of a national court, give an opinion, couched in general terms, on the interpretation of a legal rule if that rule is of a recent date and occasions many questions. This subject had also been raised during the Association's 18th Colloquium in Helsinki in 2002.

As indicated above, the working group has decided *not* to put forward proposals for treaty amendments, because it is unlikely that they could be realised in the near future. Instead, it will simply draw attention to the following topics, which could, in the opinion of the majority of the working group, be worth studying in the future if the occasion arises.

Introduction of a filtering system

¹¹ Statement attributed to Prince William of Orange.

The legal systems of several member states (Germany, Finland, Sweden, France, England, Wales, Denmark and Poland ¹²) have some system of "leave to appeal" which enables their supreme court(s) and/or their constitutional court to choose the cases which merit examination and to decline minor cases or clearly ill-founded appeals, often without having to give any reasons for their decision at all. Sometimes as a matter of efficiency a special chamber of limited composition ¹³ within the domestic court sifts the appeals.

The advantage of this system is that the court of final instance can focus on the really important cases and thus influence the development of the law and the uniformity of its application probably more effectively than if it is required to spend much of its time on trifling cases. The working group has also noted that in Germany and Finland, whose courts of final instance were represented on the working group, this system has proved effective in keeping the workload of the courts of final instance within reasonable bounds. On the other hand, the working group is also aware of the fact that there is resistance to the introduction of such a system in some EU countries and that the Court of Justice itself was critical of certain aspects of the system in its Reflection Document ¹⁴.

The introduction of a filtering system with regard to appeals to the Court of Justice from judgements given by the Court of First Instance only, as a limited variant of a general system, could be less problematic, however.

The majority of the working group recommends that the possibility of introducing general or limited filtering of references for preliminary rulings be examined in case the situation would worsen in the future.

Enabling the Court to adopt its own Rules of Procedure

The **majority of the** working group would have been in favour of the inclusion in the Treaty of Lisbon of a provision enabling the Court of Justice from now on to determine its own Rules of Procedure, without the approval of the Council. It points out that the European Court of Human Rights is already in this position.

The working group welcomes the dropping of the requirement of a qualified majority in the Council for amending the Rules of Procedure of the Court in the Treaty of Lisbon as a step in the right direction. The majority of the working group nonetheless still believes that the introduction of a provision enabling the Court of Justice to adopt its own Rules of Procedure would be a worthwhile goal in the future and would be beneficial for finding solutions for suppressing the delays. The majority of the working group does not pass over the eventual necessity to amend the Statute of the Court in this connexion. This majority recommends this subject for study as well.

Advisory preliminary opinion of a general nature by the Court

In France an administrative court of first instance or an administrative court of appeal can request from the Council of State an opinion (*avis contentieux*) on a legal question in connection with a main cause of action if this legal question is new, particularly difficult and comes up in a considerable number of cases. The question is submitted to the Council of State which must reply within three months. On the basis of the indication given by the Council of State, it is left entirely to the lower court to take its decision. The right of appeal against the decision on the merits of each case remains untouched.

The French and the Belgian Courts de Cassation know a comparable system. It seems that in Greece and Portugal the introduction of similar systems was under consideration in 2002.

¹² As recorded in the general report of the 18th Colloquium of the Association held in Helsinki in 2002, page 16. As at that time the countries of Middle and Eastern Europe were not yet member states, no information was available as whether these countries also have filtering systems. It is however known that the Supreme Court of Poland has a filtering system, the Supreme administrative Court of Poland does not have such a system. The Belgian Council of State has an admissibility procedure in administrative cassation which is not a certiorari procedure properly speaking, but which nevertheless has elements of a "leave to appeal" system.

¹³ These questions are f.i. within the Bundesverwaltungsgericht as well as within the Supreme Administrative Court of Finland decided by a chamber of three judges only, instead of by five.

¹⁴ Reflection document , Chapter IV, 3

The introduction of the French system (or elements thereof) into the preliminary rulings procedure could prevent a substantial number of references for preliminary rulings. Although the members of the working group recognise the difficulties involved in giving an opinion of a general nature, as the answer to the question submitted will often depend on the particularities of the individual case, the majority of the working group recommends to study this idea in the future also in the light of the experiences of the French Conseil d'État and the French and Belgian Cours de Cassation and any other national jurisdictions in which it may have been introduced.

II.B Amending the Statute of the Court of Justice

Amending the Statute of the Court of Justice is expected to become somewhat easier after the Treaty of Lisbon will have entered into force, since under article 281 of the consolidated text of the Treaty on the functioning of the European Union the ordinary legislative procedure is applicable and, with the exception of amendments to Title 1 and article 64, unanimity is no longer required within the Council.

In the working document the following suggestions were formulated involving amendments of the Statute.

Implementation of Article 225 (3) of the EC Treaty so that some classes of questions referred for preliminary rulings, would be dealt with by the Court of First Instance¹⁵

Article 225 as it stands today results from the Due report. In its "Reflection document" the Court of Justice warned for overloading the Court of First Instance, indicating that the Court of First Instance already had to face an influx of direct actions far exceeding the limits of its current capacity.

Such a transfer would need, in the opinion of the Court, to be accompanied by a corresponding increase in the number of judges. The Court also indicated that it would be necessary to ensure by appropriate procedural mechanisms, that the most important questions will always be referred to the Court of Justice in the end¹⁶.

The working group agrees with the Court of Justice that implementing article 225 would overburden the Court of First Instance still further. The working group also considers that it is by no means certain that such a transfer of cases would substantially lighten the workload of the Court of Justice, because the possibility cannot be excluded that in a number of cases the first Advocate-General of the Court of Justice will propose that the Court reviews the decision of the Court of First Instance. In such cases the aim of shortening the stay of proceedings before the national courts would be frustrated. The working group is also of the opinion that it would be difficult to find any group of cases that could be transferred to the Court of First Instance without compromising the need for uniform interpretation.

The working group for these reasons does not consider this option to be opportune for the moment.

Empowering the Court to reduce the prescribed time limits in particular cases (article 23 of the Statute)¹⁷

Article 23 (2) of the Statute of the Court of Justice provides that within two months of notification of the reference, the parties, the member states, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank may submit statements of case or written observations to the Court. The decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice with regard to the procedure governing urgent references for a preliminary ruling concerning the area of freedom, security and justice provides for the possibility to include in the Rules of Procedure

¹⁵ Working document item 5.1 f

¹⁶ Reflection document Chapter IV, 3 (iii)

¹⁷ Working document item 5.3 a

shorter periods in respect of the submission of statements of case or written observations in derogation from article 23.

With a view to this modality of shortening the duration of proceedings (for which provision was already made in the proposals that were circulated before 3 December 2007) the working group discussed the desirability of introducing such a provision for all or certain categories of preliminary rulings procedures.

The majority of the members of the working group agreed with the observer of the Court of Justice that the present time limits for the intervening parties are already tight. The proposal might therefore jeopardise the support of the member states for the preliminary rulings given¹⁸. The majority of the working group therefore dismissed this option.

Empowering the Court of Justice to adjust the procedure to take account of the complexity and importance of the case (article 20 of the Statute of the Court)¹⁹

In virtue of the Treaty of Nice the Court of Justice already has the power to decide cases without submission of an opinion of the Advocate General if they do not involve a new point of law. It is evident from the 2006 Annual Report of the Court of Justice that this possibility is already being put to good use.

This power could be extended to include the criterion of the importance of the points of law raised by a preliminary question for the development of Community law.

The working party was in favour of an amendment of the Statute to this end.

II.C Amending the Rules of Procedure

The introduction of a 'green light' procedure

Under a "green light"- procedure the national courts would be encouraged, though in no way obliged, when referring a case for a preliminary ruling, to include their proposal for the answers to be given. The Court could then dispose of the case by giving the "green light" to this proposal.

This procedure would very probably ensure that, depending on the way in which the cases are presented, a considerable number of them could be easily disposed of by the Court of Justice. This option would seem to be in keeping with the design of the preliminary ruling procedure as a dialogue between courts. The national courts, on their part, would be inspired to play a greater role.

This modality was suggested in the Reflection document of the Court²⁰ as well as in the Due report²¹.

Article 104b, para.1, of the Rules of Procedure of the Court of Justice prescribes in this respect that the national court or tribunal indicates in so far as possible the answer it proposes to the questions referred. In the supplement to the "Information note on references from national courts for a preliminary ruling", following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice of March 3 2008, the Court suggests under point 9:

" In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred. Such a statement makes it easier for the parties and

¹⁸ In this respect the statement of the Council attached to the decision of December 20th 2007 in which it notes "the Court's intention of ensuring... that member states are allowed the time and translations necessary for drafting written observations and preparing oral statements in order to guarantee effective and useful participation in the procedure", is noteworthy.

¹⁹ Working document item 6.2(b). This option was in the working document mistakenly indicated as an amendment to the Treaty.

²⁰ Reflection document Chapter IV, 3 (ii) (p 24)

²¹ Due report part II A, 2c

other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure".

The working group was of the opinion that it should remain at the discretion of the national courts to provide provisional answers to the questions referred to the Court. In its opinion, the proposed course of action should be promoted as much as possible in not too complicated or controversial cases, but it should not become compulsory. Moreover, even if the Court of Justice agrees with the proposed answers, the Court should nevertheless include these answers in its own ruling, giving the ruling thus the authority required under article 234 of the EC-Treaty.

The working group considers that the attention of the national courts could be **more** expressly drawn, either in the Rules of Procedure or in a further addition to the Information Note, to the desirability of proposing an answer in all appropriate cases, with reference expressly to the reasons given in the note of 3 March 2008²².

The working group has included such a course of action in its recommendations for best practices by domestic courts, which are dealt with below.

Empowering the Court of Justice to issue instructions to parties concerning the points of law to be dealt with in their pleadings and the length of the documents to be submitted²³.

Article 104a, third paragraph, of the Rules of Procedure for the accelerated procedure and article 104b, second paragraph, of those same Rules, which entered into force on 1 March 2008, provides for the accelerated procedure and for the urgent procedure for references for a preliminary ruling relating to the area of freedom, security and justice, that instructions may be given to parties concerning the points of law to be dealt with in their pleadings and the length of the documents to be submitted.

The majority of the working group recommends that elements of this provision be incorporated also in article 104 of the Rules of Procedure for the ordinary procedure. A decision to this effect could eventually be taken after the use of the provision has been evaluated by the Court of Justice in accordance with the wish of the Council at the end of a period of three years²⁴.

Enlargement of the scope of article 104, paragraph 3, of the Rules of Procedure to cases which are of minor importance for the unity, the coherence and the development of community law²⁵

An enlargement of the scope of the simplified procedure under article 104(3) to questions "*which are of minor importance to the unity, the coherence and the development of community law*" seems indicated.

Such an amendment would leave it to the domestic courts to solve the issues which do not pose a real problem of community law themselves and would stress the idea that minor problems should be eliminated from the workload of higher courts such as the Court of Justice.

Empowering the Court of Justice to decide whether a case needs to be dealt with orally²⁶

Articles 44 bis and 104 paragraph 4, of the Rules of Procedure could be amended in the sense that the Court would have full discretion to decide on the need for a hearing.

²² Although a suggestion concerning this procedure figures in the Information note on references from national courts for a preliminary ruling van 2005 (para.23) the working group is of the opinion that the suggestion is formulated in a rather noncommittal way.

²³ Working document item 5.3 (d)

²⁴ See above p 4

²⁵ Working document item 5.3 (e)

²⁶ Working document item 6.2. (c)

The majority of the working group considered that such a possibility should *not* be created because the member states must have a real opportunity to submit observations. This proposal could also entail that the member states would be less inclined to recognise the authority of the decisions (cf. above page 8 with regard to article 23 of the Statute), which is something that must be prevented at all costs.

III What can national courts do?

The working group has paid much attention in its discussions to the question of what steps the national courts of final instance themselves can take in order to solve or at least mitigate the problems connected with the delays caused by the preliminary rulings procedure. The national courts play a crucial role in interpreting and applying European law and have a major responsibility for ensuring that the preliminary rulings procedure works smoothly. After all, they are no longer simply national courts but also *European* courts and as such they should do everything necessary to ensure that the preliminary rulings procedure operates as efficiently and effectively as possible. Moreover, any delay in the preliminary rulings procedure means a longer stay of the domestic proceedings.

First of all, it should be noted in relation to the present subject that the Court has provided clear information for the national courts in its 'Information note on references by national courts for preliminary rulings'²⁷. Needless to say, the working group strongly recommends that the national courts follow this advice to the letter when considering to refer a case for a preliminary ruling.

The Association too has played a guiding role. On its website it has published a useful and practical guide for use by the courts when considering a reference for a preliminary ruling. The working group draws the attention of national courts to this useful tool too.

As regards the role of the national courts, the working group recommends specifically the following 'good practices' relating to assessing the need to submit a reference for a preliminary ruling (III.A) and the measures to be taken by national courts to expedite the handling of cases both at national level and at the level of the Court (III.B).

III.A Assessing the need for the reference for a preliminary ruling

The working group considers that in order to make an informed decision on whether a case should be referred to the Court for a preliminary ruling, a judge should:

- have a thorough knowledge of European law;
- be able to conduct a proper assessment of the need for a reference, taking into account the relevant case-law, including but not limited to a reasonable reading of the CILFIT criteria;
- have the latest information about matters referred by other courts within the EU at his disposal.

In order to ensure that necessary references are made while unnecessary ones are avoided, the working group is of the opinion that the following "good practices" should be observed.

Knowledge of European law

In the opinion of the working group it is necessary that judges in general have a good knowledge of European law and are systematically kept abreast of developments in that field of law.

In some national courts provision is made for a *EU law - coordinating judge* who may be consulted as an expert by his colleagues. Apart from problems which may rise as to the independence of the court, the working group regards this as a second best solution only, as it is of the opinion that the knowledge of European law in a chamber dealing with cases

²⁷ Official Journal of the EU 11.6.12005 C 143/1; see also the information note on references from national courts for a preliminary ruling. Supplement following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice, OJ 8.3.2008, C-64/1.

involving European law, should not lean too much on outside judges or "coordinating judges" as it is – and has to be - the chamber in question that knows the case well enough and is responsible for the decision.

The working group is of the opinion that national courts and institutions providing training, refresher courses and continuing education courses for judges should regard it as a priority to raise the level of knowledge of EU law of all the judges. A sufficient availability of EU law training that is well adapted to the needs of judges should be ensured. In addition, there may be a need for arrangements to ensure the presence of particular EU law expertise especially in cases posing complicated problems.

Assessing the need for a reference – CILFIT

The domestic court, when considering to refer prejudicial questions to the Court of Justice, has to ask itself, whether it is necessary to pose (according to the criteria of the case law of the Court of Justice) the questions at all. An issue of EU law arising before a judge may be an *acte clair* or an *acte éclairé*, or the same question may already be pending before the Court. In such cases reference should not take place²⁸.

The question whether a reference for a preliminary ruling should be made to the Court of Justice, can be properly decided only if the judge has a thorough knowledge of European law, including the relevant case law of the Court. In this context, national judges deciding in last instance need to consider, inter alia, the criteria laid down in the CILFIT judgment.

The working group submits that the criteria must be assessed and applied "in a rational and reasonable way, in other words "with common sense", bearing in mind that it is in the interest of the parties, the national courts as well as the Court of Justice to avoid burdening the preliminary rulings procedure with questions that are of minor importance with a view to the unity, the coherence and development of EU law. As a particular point, given the increase in the number of languages within the EU since the CILFIT judgment, the original requirement to compare the text of all language versions is no longer realistic or feasible.

In view of the need that CILFIT be applied with common sense it follows in the opinion of the working group, that the national court should consider whether the problem under consideration is worth the burden of a reference for a preliminary ruling. Interpretation with common sense entails that the lesser the problem the more the national court can convince itself that he is capable, at first sight, to solve itself the question on the basis of its own knowledge and understanding of EU law, as the Court should not be bothered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way.

Publication of all references for a preliminary ruling

In the opinion of the working group all references for a preliminary ruling should be published as quickly as possible in order that courts have the necessary information to make an informed decision on the need for references.

The working group considers that both the national courts and the Court of Justice have a role to play here. As long as the Court of Justice has not introduced an adequate system for rapid publication (the working group will return to this subject in point IV A below), the national courts of final instance should make their own arrangements.

The working group advises the following good practices to the courts:

- a) national supreme courts should publish immediately the full text of all references for preliminary rulings on the national level; and
- b) national supreme courts should cooperate to publish, as soon as possible, all references for preliminary rulings on the international level.

²⁸ Comp. point 13 of the Courts information note.

ad a) Publication on the national level

The working group is of the opinion that the whole text of the reference for a preliminary ruling (*not the text of the questions only!*) should be published on the national level or communicated within the national judiciary, immediately after the reference is made, in order to prevent the same questions unnecessarily being submitted to the Court of Justice by courts of the same member state.

A brief inquiry as to the practice in the countries of the members of the working group revealed that, although publication of references for a preliminary ruling is not prescribed by law, yet all supreme courts of the members of the working group publish their preliminary references on their websites and/or on a separate database accessible for the national judiciary.

The working groups recommends all supreme courts to follow this practice.

ad b) Publication on international level

JURIFAST is the – open - communication channel of the Association on which the members of the Association should publish all decisions on European issues which may be relevant for the other members - and the general public - to know.

The working group recommends all members of the Association to publish on JURIFAST the whole text of every reference for a preliminary ruling (*not the text of the questions only!*) immediately after the reference is made, together with a brief indication of its contents in English or French in case the questions are in a less widely known language.

The working group invites the Association to arrange that member institutions of the Network of Presidents of Supreme Judicial Courts may put the same information on JURIFAST, which as an open channel is accessible for the members of the Network too. It recommends member institutions of the Network to publish their texts on JURIFAST.

Other subjects

The majority of the working group also considers that no references for preliminary rulings should, in principle, be made to the Court in provisional proceedings before the national courts, as the decisions in such proceedings may be binding *de facto*, but are not *legally* binding on the domestic court when deciding on the merits of the case.

If a reference is made for a preliminary ruling and this decision is contested on appeal (this possibility is in fact excluded in many countries), the referring court should, in the view of the working group, always inform the Court of Justice that an appeal has been lodged and request as a rule, unless the appeal is clearly lodged for purposes of delay or is reckless and provocative, that consideration of the case be deferred. This may prevent a situation in which the Court of Justice is saddled with work that later proves to have been unnecessary for the case to be decided.

III B Measures to be taken by national courts to expedite handling of cases both at a national level and at the Court of Justice level

The decision of a national court to refer preliminary questions is just an incident – be it a time-consuming one – in the national procedure(s) in which the case has to be determined. The quality of the question posed and the information added to it, are however of the greatest relevance for the ability of the Court to give a clear-cut and conclusive answer, which in its turn will enable the domestic court to give a quick final decision, thus shortening the complete duration of the case on the national level²⁹.

²⁹ Comp. point 20 ff. of the Information note.

Regarding this subject the working group recommends good practices with regard to the following subjects:

- the preparation by the domestic court of the case prior to making the reference for a preliminary ruling; and
- the contents of the reference and the information presented to the Court.

Preparation of the case by the national court prior to making the reference for a preliminary ruling

The quality of the questions posed and of the information on national law and the relevant facts and circumstances of the case provided by the domestic court are of the greatest importance, as it determines the possibility of the Court to give a clear-cut and conclusive answer. Of vital importance for the quality of the references is that the domestic court makes a good analysis of the case, involving also European law and relevant case law.

The working group recommends the following as a good practice for domestic courts: the domestic court should deal with the case as exhaustively as possible before formulating the preliminary questions. It should try to solve all the issues of fact and law involved in the case in such a way that the only aspect left is the decision of the Court of Justice on the preliminary question.

This way the domestic court will have prepared the case to such a degree that its reopening after the reception of the answer given by the Court of Justice, as a rule, will not give rise to unnecessary delays.

Such an exhaustive handling of the factual and legal aspects of the case is also a good guarantee both for the right determination of its necessity and for the optimal quality of the reference itself. It will also enable the domestic court to send all relevant information about the case to the Court of Justice and will forestall the need for additional preliminary questions which might otherwise arise in a later stage of the procedure.

The high quality of the reference will also provide proper information to other courts which are considering putting questions on the same issue and is a precondition for quality of the observations of member states during the procedure before the Court of Justice as well.

The working group wants to make clear that the desirability of an exhaustive handling of the case should not lead the national courts, as they sometimes are tempted to, to ask the Court of Justice, more or less, to solve their case, rather than to request an interpretation of EU law: an abstract question calling for an abstract answer, which is all the more useful for other courts in the EU.

The working group is aware of the fact that there may be situations where the answers given by the Court of Justice to the questions of interpretation raised in a reference, have an impact on the issue of which facts are relevant for a final adjudication of the case. In other words an *exhaustive* determination of the relevant factual basis of the case may not be possible until the Court of Justice has clarified what the law is and which facts are pertinent and which evidence is needed to assess them. These situations are, however, exceptional and should not detract a priori from the approach to prepare the case as exhaustively as possible.

Involvement of the parties in the preliminary reference

The working group considers it advisable that - if possible and fitting in the national procedure³⁰ - the domestic court consult with the parties on the texts to be submitted in order to forestall complications after the Court has handed down its decision. The influence of the parties in case they are consulted, should however never be preponderant as the domestic court should always remain exclusively responsible for the questions to be posed and the information to be sent to the Court of Justice.

³⁰ The Supreme Judicial Court of Belgium does not consult with the parties on the formulation of the questions, as the procedure is mainly in writing and time pressure is tense. The Supreme Court of Spain consults the parties only on the necessity of putting a preliminary question, but not on its text.

In this respect the working group calls to mind that the preliminary rulings procedure envisages a direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties³¹.

The contents of the reference and the information presented to the Court

Clarity and brevity

The first thing domestic courts should take care of, is that the questions are – in conformity with paragraph 22 of the Information note on references from national courts for an preliminary ruling - clearly and concisely formulated and do not enter too much into detail. The number of pages presented to the Court of Justice should be as limited as possible.

Relevant additional information to be sent with the reference

In case a substantial number of cases pending before national courts depend for their solution on the answer to be given by the Court of Justice, it is recommended to provide the Court with that information, as this may well incite it – if possible - to give priority to the case.

Provision of possible solutions

The working group recommends courts to communicate, in conformity with the information note of the Court of Justice³², (if legally and practically possible and convenient), a reasoned provisional answer to the questions referred, as additional information for the benefit of the Court of Justice, as such provisional answers may enable the Court to get a good understanding of the specifics of the case as well as clarification on its context. In this respect there should be room for discretion on the part of the domestic court³³.

Clarifications and indications

As an alternative to provide the Court of Justice with provisional answers, the domestic court may consider to give the Court "*clarifications*" or "*indications*". With respect to the first option the rights and interests of the parties may be at stake, with respect to the second one the judge enjoys more leeway.

In cases in which an Auditor or Advocate General offers conclusions to the national court as part of the national procedure, it may be considered to send this conclusion in whole or in part to the Court of Justice³⁴.

Efficiency (pooling cases)

From a point of view of efficiency, both for the domestic court and the Court, the working group recommends that questions which arise in more cases be pooled as much as possible by the referring court. As an example of such pooling of questions it mentions the reference of the Council of State of Belgium in which four questions of a more or less general nature were formulated on the basis of a large number of individual aliens cases.

Depending on the issue at stake however, it may as an alternative sometimes be preferable for the domestic court to make one reference only and await the ruling by the Court of Justice in that case, before taking a decision in the other more or less similar cases.

IV What can the Court of Justice do?

IV A Publication of preliminary references by the Court of Justice

The Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, after its General Assembly in Helsinki in May 2002, proposed to the Court

³¹ See C-2/06 Kempter.

³² Point 23

³³ For references in the Area of freedom etc. article 104, paragraph 3 of the Rules of Procedure of the Court of Justice is of course applicable

³⁴ This is regularly done by the Belgian Council of State. In some cases the conclusion of the Auditor General - in which a solution for the case was proposed - was sent to the Court of Justice in its entirety.

of Justice, if possible, to publish the references made by national courts on its website. The Court of Justice welcomed the proposition and by a letter dated on 25th March 2003 asked the Governments of the Member States whether there were any obstacles concerning this proposal. After this inquiry, the Court of Justice started to publish the references, limited however to the publication of the questions only, on its website. The working groups regrets that the full text of a reference is still not accessible³⁵.

After the enlargement of the European Union, the need for information about and transparency of the references has increased. Access to the full text of a reference made by a domestic court would help other national courts to decide whether there is a real need for a reference to the Court of Justice.

The working group recommends that the Court provides the full text of the references for a preliminary ruling in all EU languages on its website as early as possible, and facilitates links with national electronic information systems that are in existence for the judiciary of the member states and with JURIFAST.

IV B CILFIT

During the discussions in the working group it became clear that sometimes national courts give too narrow (and erroneous) an interpretation of the CILFIT criteria. The conclusion of the discussions within the working group was – as stated before - that a literal interpretation of CILFIT, especially as far as concerns the comparison of 24 language versions nowadays is *obsolete* and that CILFIT should be interpreted *in a reasonable way*. The working group is, however, aware of the fact that the KÖBLER decision has sharpened the dilemma for the domestic judge, as the leeway which in all probability is implied by the Court of Justice in this decision, is not always well understood in practice.

The majority of the working group recommends that the Court of Justice should seize a suiting opportunity to clarify its position in a judgement, taking into account that since CILFIT the number of member states and languages has increased.

IV C Measures to be taken by the Court itself

In most national jurisdictions it is not possible to lodge an appeal against the decision to refer. In some jurisdictions, for instance in Belgium, appeals are allowed, which means that the reference may become moot by the later decision of the superior court. At present it is up to the referring judge to take the initiative to communicate the appeal to the Court of Justice and to suggest the Court to stay the case. If the referring judge does not act, the Court of Justice continues its work on the case.

The working group recommends that the possibility be considered that the Court of Justice takes the decision to stay the case itself as soon as it has become aware of the appeal, for instance by having the Registrar of the Court sent a communication to the referring judge that the Court will suspend its work on the case³⁶.

The working group recommends also that contact between the national courts and the Court of Justice should be encouraged, even by non-classical methods like the telephone, in order to know if a preliminary question on a certain subject is already pending before the Court.

V Language regime

³⁵ From information obtained by the working group it seems that the Spanish Government (for unknown reasons) was not in agreement with publication of the full text of the references.

³⁶ Comp. above under III.A Other questions

The working group has examined the issue of the language regime in relation to the preliminary rulings procedure from various perspectives on the basis of the suggestions made in the working document.

In that context the working group has expressly addressed the question whether it should recommend that the decision of the Court of Justice be handed down to the referring court immediately after it is taken, in the working language of the Court and that the Court should not wait till it is translated in other languages as is the practice of the Court now.

The observer of the Court of Justice, however, provided the working Group with the following information.

As the judgment of the Court can only be delivered in the language of the case the translation into that language is most thoroughly prepared and revised. The translation into the other languages does not in practice cause any additional delays. The language versions other than that in the language of the case are produced within the time limit set for the production of the authentic version. If, exceptionally, a language version would not be available at the date fixed for the delivery of the judgment, the judgement will nevertheless be delivered at that date, the missing version being published later.

On the basis of this information the working group concludes that it had started from a wrong impression of the practice of the Court of Justice.

Since the working group assumes that this wrong impression is shared by others, it hopes to have clarified the issue.