

## **ACA QUESTIONNAIRE**

### **The preliminary ruling procedure**

During the Netherlands' forthcoming two-year presidency of ACA-Europe (mid 2016 - mid 2018) a number of seminars will be held focusing on the preliminary ruling procedure provided for by article 267 of the Treaty on the Functioning of the European Union (TFEU). This main theme encompasses three sub-topics, the third of which concerns an alternative manner of clarifying European Union law and is relevant both to advisory and judicial functions.

These sub-topics are:

1. cooperation between courts prior to a reference being made for a preliminary ruling (at national and European level);
2. communication between the court making the reference and the Court of Justice of the European Union; and
3. cooperation with the European Commission (both with respect to judicial and advisory functions).

The first seminar, chaired by the Dutch Council of State, will take place in The Hague on 7 November 2016. The aim will be to take stock, looking particularly at members' experience with the preliminary ruling procedure and how cooperation with the Commission works in practice. This questionnaire is intended to identify particular problems and the sub-topics that will need special attention at a follow-up seminar. It can therefore serve as an initial step towards a more detailed questionnaire for the 2018 colloquium.

The questions that we would like to put to your institution are set out below, arranged by sub-topic. Not all questions are relevant to your institution. Some are specifically intended for the European Commission or the Court of Justice. Others are relevant only if yours is a judicial institution that also issues advisory opinions on legislative proposals. This is clearly stated in each heading. When you fill in the questionnaire, we would be grateful if you would also address the issue of whether you draw on the opinions and experience of other judicial institutions in your country. We hope to receive your completed questionnaire by 15 May 2016 at the latest.

## Sub-topic 1

### Cooperation between courts prior to a reference being made for a preliminary ruling (at national and European level)

The questions in this part are intended to obtain an insight into the differing views on the desirability of cooperation between courts prior to a reference being made for a preliminary ruling. To clarify, these questions do not concern cooperation between judges who make up the particular bench or chamber that hears a case, but with other judges, whether they belong to the same court or not. At national level these questions may therefore concern cooperation between the highest courts in the different court systems (i.e. civil, criminal, administrative and possibly constitutional courts) or cooperation between the higher courts and lower judges within one system (e.g. the administrative court system). At European level they concern cooperation between the highest courts of the different member states.

The extent to which such cooperation currently takes place varies for a number of reasons. Some of these reasons are cultural and others are matters of principle, for instance the strict application of certain principles, such as *le juge légal*. Opinions and practice vary not only between member states but in some cases within the judiciaries of individual member states. The questions aim to establish the extent to which judicial cooperation in this area currently takes place in the member states. They are also intended to identify the reasons for the differences.

1. Does any contact on the subject of developments in national and/or European law take place within your institution or with other judicial institutions in your member state? This may concern developments in general or a particular case. If so, what form does this contact take and what purpose does it serve? Are there objections to such contact on points of principle or otherwise? Do you think such contact is/would be a good idea?
2. Is there any contact/consultation between the highest administrative courts and lower courts, for instance when the highest court is intending to make a reference for a preliminary ruling? If so, what form does this contact/consultation take? Does it for example include the exchange of draft questions for referral, and if so, for what purpose? Are there objections to such contact/consultation on points of principle or otherwise? Do you think such contact/consultation is/would be a good idea?
3. Is there any contact/consultation between the highest civil, criminal administrative or constitutional courts when they are intending to make a reference for a preliminary ruling? If so, what form does this contact/consultation take? Does it for example include the exchange of draft questions for referral, and if so, for what purpose? Are there objections to such contact/consultation on points of principle or otherwise? Do you think such contact/consultation is/would be a good idea?
4. Is there any contact/consultation with courts in other member states when preparing to make references for preliminary rulings, for instance through the ACA Forum? If so, what is your opinion of this contact? Does the ACA Forum offer sufficient scope for the provision of information? Are there objections to such contact/consultation on points of principle or otherwise? Do you think such contact/consultation is/would be a good idea?
5. In judgments concerning matters of European law, regardless of whether or not a reference for a preliminary ruling is made, do you refer to judgments in other member states interpreting European Union law or take account of such judgments in any other way? If so, do you do so only at the request of either or both parties or do you actively search for case law? And in which situations do you do so? Do you receive any technical assistance from inside or outside your judicial institution? Are there objections to doing so on points of principle or otherwise? If there are no objections, do you think it would be a good idea to do so?

#### Questions to the Court of Justice

6. Do you think it would be a good idea for consultation or coordination to take place at national level between judicial institutions concerning EU law prior to a reference being made for a

preliminary ruling? Are there objections to any such prior consultation or coordination on points of principle or otherwise?

7. Is there any contact/consultation between individual judges or benches of judges within your Court of Justice or with the General Court, beside the CJEU's general meeting? If so, what form does this take and what purpose does it serve? Are there objections to such contact/consultation on points of principle or otherwise? Do you think such contact/consultation is/would be a good idea?
8. Is there any contact/consultation between the Court of Justice and other national or international courts, such as the European Court of Human Rights, the US Supreme Court or the Benelux Court of Justice? If so, what form does this take and what purpose does it serve? Are there objections to such contact/consultation on points of principle or otherwise? Do you think such contact/consultation is/would be a good idea?
9. What role do you think the Court of Justice could play to further encourage horizontal dialogue between courts in different member states, for instance through the ACA Forum?

## **Sub-topic 2**

### **Communication between the court making the reference and the Court of Justice**

This part concerns communication between the Court of Justice and the court that makes the reference for a preliminary ruling. The aim is to establish a clear picture of ACA members' views concerning this communication. The questions are not restricted to the period between the reference and the judgment. They also cover the period before (for instance when the court is considering making a reference for a preliminary ruling) and afterwards (concerning the interpretation and application of the Court of Justice's judgment).

10. Communication between the Court of Justice and the court that makes the reference is largely confined to the order for reference. Do you feel the need for any other form of communication with the Court of Justice, for instance an exchange of letters? If so, what do you think this communication could address, in what manner and in which situations? How should the parties be involved? Are there objections to other forms of communication on points of principle or otherwise? Do you think it would be a good idea?
11. What steps does your judicial institution take when a reference for a preliminary ruling is made from another member state concerning a subject that is also being addressed by your judicial institution? For instance, do you stay the proceedings or urge that a reference be made in your case too?
12. Has the Court of Justice ever submitted a request for clarification under article 101 of the Court of Justice Rules of Procedure to your judicial institution concerning a pending reference for a preliminary ruling?<sup>1</sup> Do your national rules of procedure make any provision for the procedure to be followed when the Court of Justice makes use of its power under article 101 of its Rules of Procedure?
13. Do you take any steps in response to the documents that you receive from the Court of Justice during a preliminary ruling procedure? For instance by attending a hearing or taking any other steps? Are there objections to doing so on points of principle or otherwise? If there are no objections, do you think it would be a good idea to do so?
14. What is your view of the involvement of your judicial institution in the procedure in the period after the reference has been made and before the Court of Justice has handed down its ruling? Would you like to play a more active role, for instance by responding to written questions or speaking during the Court of Justice's hearing of your order for reference? Does your national law make provision for any similar procedure? Are there objections to such

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<sup>1</sup> See for instance judgment of the Court of Justice of 17 December 2015, C-239/14 (*Tall*), paragraph 31.

involvement following the submission of an order for reference on points of principle or otherwise?

15. Have you ever seen a pilot case withdrawn while proceedings had been stayed in a number of other pending cases before your judicial institution awaiting the Court of Justice's ruling in the pilot case? What does your judicial institution do to prevent a pilot case becoming meaningless in such instances?
16. Do you think that the Court of Justice's rulings on your references generally provide sufficient clarity for you to be able to resolve disputes? Does the Court of Justice's reformulation of questions play any role in this respect? Does it make a difference if you have attempted to answer the question yourself in the order for reference? Have you ever contacted the Court of Justice following a judgment? If so, in what way and for what purpose? Are there objections to such contact on points of principle or otherwise? Do you think such contact is a good idea when the circumstances arise?

#### Questions to the Court of Justice

17. Does the Court of Justice wish to be informed about any pending cases in the member states that are connected with a reference for a preliminary ruling that is pending before the Court of Justice itself? If so, does the Court of Justice have a procedure in place for this purpose and in what way do you wish to be informed? Are there objections to the receipt of such information on points of principle or otherwise?
18. Can the Court of Justice envisage any other forms of communication with national courts? If so, what subjects would they cover and what form would they take? One example might be correspondence that does not relate to one of a particular judicial institution's own cases.
19. What is the Court of Justice's experience with requests for clarification made concerning a preliminary ruling procedure under article 101 of its Rules of Procedure? How often have you made such requests? Do you have any suggestions for improving the instructions for courts on the content of their orders for reference?
20. In situations such as those described in question 15, do you see any scope for making an exception to the rule that the Court of Justice does not give judgment on hypothetical questions by giving a ruling in order to resolve the other cases that have been stayed?

### Sub-topic 3

#### Cooperation with the European Commission (with respect to judicial and advisory functions)

This part does not relate solely to the preliminary ruling procedure; it is mainly concerned with other forms of contact that may be used to obtain clarification on points of EU law. The focus is on formal and informal contacts between members of the ACA and the European Commission, both with respect to judicial and advisory functions. Formal rules governing contact between the national courts and European Commission exist in only two areas, namely procedural regulations relating to state aid and competition.<sup>2</sup> Furthermore, the principle of sincere cooperation also offers national courts a basis for contacting the European Commission.<sup>3</sup> Less is known about informal contacts in this area and others, both with respect to judicial and advisory functions, and opinions on the desirability of such contact may vary greatly. The following questions are aimed at obtaining an insight into the extent of formal and informal contacts with the European Commission. They are also intended to take stock of the different views that are held regarding the desirability of such contacts and to identify any objections.

*Questions concerning the judicial functions of the Councils of State:*

21. Do you make use of the possibility recognised by the Court of Justice in case C-2/88 IMM (*Zwartveld*)<sup>4</sup> of formally requesting information from the European Commission on the basis of the principle of sincere cooperation (article 4(3) of the Treaty on European Union)? If so, what is your opinion of such contacts? Are there objections on points of principle or otherwise? If there are no objections, do you think it would be a good idea? What practical problems do you experience with requesting information or in dealing with such requests? How are the parties involved with regard to these requests?
22. Are there rules in force in your member state (under the law of procedure or otherwise) based on European competition or state aid legislation that make provision for judicial institutions to request information from the European Commission or to allow the European Commission to intervene in national proceedings? If so, how are the parties involved and what safeguards are in place to allow the parties to respond?
23. Do you make use of the possibility of formally requesting information from the European Commission in cases concerning competition and state aid? If so, what is your opinion of such contacts? Are there objections on points of principle or otherwise? If there are no objections, do you think it would be a good idea? What practical problems do you experience with regard to requesting information or the manner in which such requests are dealt with? How are the parties involved with regard to these requests?
24. To what extent is the European Commission's answer decisive for your ruling on the case with respect to which such contact took place? Is this contact and the European Commission's answer mentioned in the judgment or disclosed in any other way?
25. If you have answered the first question under 23 in the affirmative, what is your view of the relationship between the possibility of submitting questions to the European Commission and the obligation to refer questions to the Court of Justice for a preliminary ruling?

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<sup>2</sup> Article 29 of Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ EU, L 248/9) and article 15 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 001/1).

<sup>3</sup> Article 4(3) of the Treaty on European Union.

<sup>4</sup> Order of the Court of Justice of 13 July 1990, C-2/88-IMM (*Zwartveld*).

26. Do you ever have contact with the European Commission regarding a complaint by an individual of an alleged violation of EU law following a judgment by your court?<sup>5</sup> If so, what form does this contact take and is it disclosed in any way? If not, are there objections to such forms of contact on points of principle or otherwise? Do you think such contact would be a good idea?
27. Do you ever contact the European Commission if a case is pending before you on a subject that is also being addressed by a complaint procedure or infringement proceedings under article 258 of the Treaty on the Functioning of the European Union? If so, do you also receive information on the European Commission's views and, if so, from whom? Is this contact mentioned in the judgment in the case or disclosed in any other way?
28. Has the European Commission ever attended a hearing at your court to provide an explanation of: 1) the validity or suspension of an EU decision;<sup>6</sup> 2) the interpretation of the rules on state aid or competition;<sup>7</sup> or 3) in other cases,<sup>8</sup> whether at your request or otherwise?

#### Question to the European Commission

29. Other than in state aid and competition cases, what internal rules does the European Commission follow when it receives formal or informal requests from national courts for information concerning complaints or infringement proceedings? Who can the national courts contact in such cases? Does the European Commission attach any conditions to the provision of information? Does the European Commission wish to be kept informed of further progress in the proceedings before the national court?

#### *Questions concerning advisory functions*

30. Do you have any formal or informal contact with the European Commission prior to issuing an advisory opinion on legislative proposals? If so, in which cases does this occur? Which European Commission departments have you been in contact with, and with whom at those departments? Are there objections to such contact on points of principle or otherwise? Do you think such contact is/would be a good idea?
31. Prior to issuing your advisory opinion on legislative proposals, do you have any formal or informal contact with the government authorities that sought your advice? If so, do you ask those authorities to make contact formally or informally with the European Commission? Are there objections to such contact on points of principle or otherwise? Do you think such contact is/would be a good idea?

#### Question to the European Commission

32. What internal rules does the European Commission follow in cases where questions are posed prior to an advisory opinion being given on legislative proposals? If there are no such mechanisms in place, are there any objections to such contact on points of principle or otherwise?

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<sup>5</sup> This is the administrative procedure for lodging a complaint with the European Commission concerning an alleged violation of EU law and asking for article 258 of the Treaty on the Functioning of the European Union to be applied.

<sup>6</sup> See for instance the judgment of the Court of Justice of 17 July 1997, C-183/95 (*Affish*).

<sup>7</sup> See for instance the judgment of the Court of Justice of 11 July 2009, C-429/07 (*X*).

<sup>8</sup> See for instance the order of the Court of Justice of 13 July 1990, C-2/88-IMM (*Zwartveld*).