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Supreme Court of Spain

in cooperation with the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

**Convergence of the supreme administrative courts
of the European Union
in the application of Community law**

**THE CONTRIBUTION OF THE EU'S SUPREME
ADMINISTRATIVE COURTS TO IMPROVING THE
PRELIMINARY RULING PROCEDURE: CONCLUSIONS OF THE
HAGUE WORKING GROUP**

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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 13 and 14 May 2007, decided to establish a working group to consider the problem of the long duration of preliminary ruling procedures at the Court of Justice of the European Communities (ECJ).

The initiative for setting up the working group was taken by the Association of Councils of State, but representatives of the Network of the Presidents of the Supreme Judicial Courts of the European Union were also invited to participate in its work.

The working group was chaired by the Dutch Council of State. To prepare for the working group's meeting, the Group's secretariat sent a number of documents to the members relating to measures to speed up preliminary ruling procedures. In addition, a working document drawn up by the secretariat and containing possible points for discussion was sent to the members of the Group. These documents were placed on the Association's electronic internal discussion system "FORUM" on 31 October 2007. The working group held a single meeting in The Hague on 3 December 2007. All further discussions took place electronically. The meeting in The Hague took the form of a brainstorming session to elicit ideas, opinions and suggestions. On this basis the secretariat drew up a questionnaire on 23 January 2008 which was distributed among the members.

On the basis of members' answers and reactions to the questionnaire, the secretariat compiled a draft report on 21 April 2008 and sent it to the members for comments. Members' responses to the draft report were included in the working group's final report.

The final report was accepted at the colloquium held in Warsaw on 15 and 16 June 2008. (Annex 1) There it was decided to send the report to the Court of Justice of the European Communities, the European Commission, the Council of the European Union and the European Parliament. The General Assembly also recommended that the report should be drawn to the attention of national courts and training institutions. The report was published on the Association's website and discussed at a meeting of the Network of Supreme Court Presidents of the European Union. In a letter of 3 July 2008, the President of the Association asked the President of the Network to indicate that the Network concurs with the working group's final report.

The final report is divided into a number of parts. A number of top-down suggestions are made for the benefit of the Treaty drafters, the Community legislator or the ECJ itself. A number of bottom-up proposals relate to the scope which national courts have to make the preliminary ruling procedure more effective. This presentation will deal with the last proposals.

The working group paid considerable attention in its discussions to the question of what steps the national courts 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 as efficiently and effectively as possible. After all, they are no longer simply national courts but also European courts. Moreover, any delay in the preliminary rulings procedure means a longer stay of domestic proceedings.

II The working group's suggestions

I shall highlight a number of the suggestions made by the working group. The suggestions are illustrated here and there by cases, which I hope will encourage a lively discussion. In most of the examples the Dutch Administrative Jurisdiction Division (here after: the Dutch Council of State or the Dutch *Conseil d'État*) was involved, but I am sure that colleagues of other Member states can add comparable examples.

1. Information notes and practical guides

First of all, it should be noted in this context that the ECJ has provided clear information for national courts in its 'Information note on references by national courts for preliminary rulings'. (Annexes 2 and 2a)

The Association too has played a guiding role. On its website it has published a practical guide for use by the courts when considering a reference for a preliminary ruling. (Annex 3) The working group would also draw the attention of national courts to this useful tool.

The national courts should themselves flesh out the ECJ's note on references and the Association's practical guide. This detailing is dependent on the jurisdiction of the national courts, more specifically the different competences of the various chambers of these courts. Some chambers will be confronted with an extremely wide range of Community legislation, while others will have to deal with specific areas of Community law, such as environmental law. For some chambers the time factor is of less importance; others, such as an Aliens Affairs Chamber, will be confronted with an accelerated procedure.

The idea of the working group is that the Informal note of the ECJ and guide of the Association are worked out in detail at specific chamber level.

2. Knowledge of European law

In the working group's opinion 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 coordinating judge who may be consulted as an expert on EU law by his colleagues.

Leaving aside the problems which may arise as to the independence of the court, the working group regards this as a second-best solution only. It is of the opinion that the knowledge of European law in a chamber dealing with cases involving European law should not rely too much on the views of coordinating judges since it is – and has to be – the chamber in question that is responsible for giving a decision based on intimate knowledge of the case.

The working group takes the view that national courts and institutions providing training, refresher courses and continuing education courses for judges should regard it as a priority to raise all judges' level of knowledge of EU law. An informal meeting of justice and home affairs ministers of the EU in Cannes recently decided (7 and 8 July 2008) to work towards a resolution on 'common criteria for training magistrates'.

Training in EU law that is adapted to the needs of judges should be widely available. In addition, there may be a need for arrangements to ensure access to a specific area of expertise, especially in cases posing complicated problems.

In the short term, it is probably not feasible to ensure that judges in general have a good knowledge of European law and are systematically kept abreast of developments in that field of law. 'Second-best solutions' are thus a necessity. If there are objections to external coordinating judges, efforts should be made to select the "law clerks" involved in drafting judgments on the basis of their knowledge of European law. Most of the current generation of lawyers had European law as a component part of their law degree, whereas many judges who graduated in the 1960s or 1970s did not.

Modern communication technology also offers an effective means of consulting colleagues, the Association's Forum being just one example. On this Forum questions can be asked about Community law.

3. Assessing the need for a reference

When deciding whether to refer a request for a preliminary ruling to the Court of Justice, the domestic court has to ask itself whether it is absolutely necessary (according to the criteria laid down in ECJ case law) to refer the question. An issue of EU law arising during proceedings may be an *acte clair* or

an *acte éclairé*, or the same question may already be pending before the Court. In such cases no reference should be made.

The working group argued that the *Cilfit* criteria should be assessed and applied 'in a rational and reasonable way, in other words with common sense', bearing in mind that it is in the interests of the parties, the national courts and the European Court of Justice to avoid burdening the preliminary rulings procedure with questions that are of minor importance to the unity, coherence and development of EU law.

In view of the need for *Cilfit* to be applied with common sense, the working group was of the opinion that the national court should consider whether the problem under consideration is worth the burden on the ECJ of a reference for a preliminary ruling. Interpretation using common sense means that the less serious a problem is, the more the national court may assume that it is capable, at first sight, of resolving the issue on the basis of its own knowledge and understanding of EU law. The Court should not be bothered with minor problems or problems national courts can themselves resolve in a satisfactory and acceptable way.

Greenpeace and genetically modified strains of maize: cooperation between the French Conseil d'État and the Dutch Conseil d'État

A good illustration is provided by a case currently pending before the Dutch *Conseil d'État* concerning genetically modified maize (200702756/1, 200702758/1, 200702759/1, order for reference 16 July 2008). The Minister of the Environment and Spatial Planning granted a permit for small-scale field trials using genetically modified strains of maize in three municipalities. The dispute centres on the question of whether it is sufficient when making a decision available for public inspection to give a general indication of the location where the maize was introduced, or whether the specific land registry code is required. Greenpeace argues that a general indication is in breach of Directive 2001/18/EC.

In hearing the dispute the Dutch *Conseil d'État* took cognizance of the order for reference made by the French *Conseil d'État* on 11 December 2007 (Commune de Sausheim, C-552/07) asking the ECJ for an interpretation of Directive 2001/18/EC. (Annex 4) The Dutch *Conseil d'État* obtained the full text of the reference from the French *Conseil d'État* through the Association's network.

After studying the order and the advisory opinion of the *commissaire du gouvernement*, the Dutch *Conseil d'État* decided to refer its own questions. (Annex 5) One of the reasons for doing so was the fact that the French *Conseil d'État* had put questions in its order for reference based on the administrative divisions of *département* and *canton*. An answer from the ECJ based on these territory descriptions would not be directly relevant to the Dutch situation.

The Dutch *Conseil d'État* referred its questions for a preliminary ruling to the ECJ. It informed the French *Conseil d'État* and placed the questions on the FORUM on the Association's website. In an early stage before the reference, the Dutch *Conseil d'État*, had informal contact with the registry of the ECJ, so that the ECJ has the opportunity to consider to deal with both cases at the same time.

This example illustrates cooperation through contact persons between the highest courts of two countries, and between one highest court and the ECJ, in order to facilitate the preliminary ruling procedure.

In this case the Dutch *Conseil d'État* was of the opinion that there was no *acte clair* or *acte éclairé*.

Association Agreement with Turkey: cooperation between the Dutch Conseil d'État and the European Court of Justice

On 2 May 2004, the House of Lords referred questions for a preliminary ruling to the ECJ in the case of *Tum and Dari* (C-16/05) concerning the Additional Protocol to the Association Agreement between Turkey and the EEC. A similar question arose in a dispute between Günes and the Dutch Minister of Justice that came before the Dutch *Conseil d'État*.

The Dutch *Conseil d'État* was aware of the questions put by the House of Lords.

In this situation there are three options for the Dutch *Conseil d'État*:

First, that the Dutch *Conseil d'État* ignores the reference in the UK case (*Tum and Dari*).

Second, it decides to stay proceedings until the ECJ has given judgment in the UK case.

And third, that the Dutch *Conseil d'État* makes an order for reference in the case before it.

The Dutch *Conseil d'État* ultimately chose the third option. In its order for reference it referred to the UK case, stating that it was possible that the outcome of the UK case would be partly relevant to the questions put in the Dutch case. (Günes, C-296/05, 200409217/1, order for reference 19 July 2005) This choice gives the parties in the Dutch case the opportunity to submit written observations to the ECJ.

Consequently, the ECJ has different options:

- It could decide to join both cases,
- It could deliver two judgments on the same day,
- It could decide to ask the second referring court, in this case, the Dutch *Conseil d'État*, if it wishes to pursue its questions once judgment has been given in the UK case.

On 20 September 2007, the ECJ gave judgment in the UK case. By letter of 28 September 2007, the Court registry sent the judgment to Dutch *Conseil d'État* with the request to inform the Court whether in view of the judgment, it wished to pursue its reference for a preliminary ruling. The Dutch *Conseil d'État* put this request to the parties so that their views on the matter could be heard. By letter of 8 November 2007, the Dutch *Conseil d'État* informed the ECJ that it did not wish to pursue its reference in view of the judgment in the Tum and Dari UK case.

This example illustrates cooperation between the highest national administrative court and the ECJ. The former withdrew the reference for a preliminary ruling since it was made redundant by a new judgment from the ECJ.

Doing so, the Dutch *Conseil d'État* applied the Cilfit criteria in a rational and reasonable way.

4. Quick 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 ECJ have a role to play here.

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

- a) the courts should publish immediately the full text of all references for preliminary rulings at national level; and
- b) the courts should work together in order to publish all references for preliminary rulings at international level as soon as possible.

4.1. Publication at national level

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

A brief inquiry into practice revealed that although publication of references for a preliminary ruling is not prescribed by law, all the highest courts of the members of the working group that were consulted, publish their preliminary references on their websites and/or on a separate database accessible to the national judiciary. The working group recommended that all highest courts follow this practice.

Quick information on references can result in coordinated references or in decisions not to refer to the ECJ.

Betting and gambling: cooperation between the Dutch Conseil d'État and the Dutch Supreme Court

In the Netherlands Lotto has an exclusive licence relating to games of chance.

In a case involving an administrative law dispute focusing on the refusal of the Minister of Justice to issue a licence to Betfair, comparable to the licence granted to Lotto, the *Dutch Conseil d'État* made a reference for a preliminary ruling on 14 May 2008 (case of Betfair, C-203/08, 200700622/1, order for reference 14 May 2008). (Annex 6)

The Dutch *Conseil d'État* had knowledge of the fact that a similar case was pending before the Dutch Supreme Court (Hoge Raad) and it e-mailed its referral decision to the Dutch Supreme Court the day it was made public.

The Dutch Supreme court had to decide in a case concerning a civil law dispute in which Lotto demanded that Ladbrokes be ordered to prevent Dutch residents taking part in games of chance as long as Ladbrokes was offering these services without a licence. (case of Ladbrokes, C-258/08 C07/035 HR, order for reference 13 June 2008) (Annex 7)

On 13 June 2008 the Supreme Court made a request for a preliminary ruling to the ECJ. The Supreme Court explicitly noted that its third question had already been put as the first question posed in another context by the Dutch *Conseil d'État* in its order for reference of 14 May 2008 in the Betfair case. In the original Dutch references and in both French translations both questions are identical. In the English versions of both questions the translations differ.

4.2 Publication at international level

The Association has two channels of communication: JURIFAST and FORUM.

JURIFAST is an open communication channel of the Association, where members of the Association are expected to publish all decisions on European issues which may be relevant to other members and the general public.

The working group recommended all members of the Association to publish on JURIFAST the full 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 if the questions are in a less widely known language.

The working group invited the Association to make it possible for member institutions of the Network of Supreme Court Presidents to put the same information on JURIFAST, which as an open channel is accessible to the members of the Network too. It recommended member institutions of the Network to publish their texts on JURIFAST.

FORUM is an electronic platform for discussion between members of the Association. It is thus only open to members.

An advantage of the fact that FORUM is for registered users only is that it permits the exchange of confidential information.

In some situations it may be useful to inform or to contact judicial bodies in another member state dealing with comparable cases before publishing the order for reference. Quite often 'floods of cases' are submitted that can all be reduced to one central legal issue, for example whether national legislation on games of chance is compatible with the provisions on freedom of establishment and services.

It is not absolutely necessary to provide a translation of the questions; key words in English or French to indicate the subject of the question are sufficient.

The case of Betfair on JURIFAST and on FORUM

The questions in the Betfair case were placed on FORUM under the heading 'administrative action'.

On the same day, an English summary of the case, together with a translation into English of the questions to be referred, was posted on JURIFAST.

By publishing on FORUM and on JURIFAST, the Dutch *Conseil d'État* notified the highest courts in other member states on the day of referral that it had referred questions for a preliminary ruling in a case concerned with games of chance. These other courts may subsequently ask the Dutch *Conseil d'État* for further information.

The Dutch *Conseil d'État* explicitly referred in its order for reference to a pending reference from a German court. The Dutch Supreme Court also referred explicitly to these questions of the German Court and stated that the pending cases concerning violations of the EC Treaty (against the Netherlands, amongst others) might also be a reason to ask for a preliminary ruling.

5. 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, as well as the relevant facts and circumstances of the case provided by the domestic court are of the greatest importance, as they determine whether the Court can give a clear-cut and conclusive answer. It is of vital importance for the quality of the references for the domestic court to make a good analysis of the case, addressing in addition European law and relevant case law.

The working group recommended the following as good practice for domestic courts:

- The referring court should deal with the case as exhaustively as possible before formulating the preliminary questions.

Such an exhaustive handling of the factual and legal aspects of the case is a good guarantee both of the correct determination of its necessity and of the quality of the reference itself.

- The referring court should try to solve all the issues of fact and law in such a way that the only aspect left is the decision of the ECJ on the preliminary question. In this way the domestic court will have prepared the case to such a degree that its reopening after receipt of the ECJ's answer will not, as a rule, lead to unnecessary delays.

- The referring court can send all relevant information about the case to the ECJ and will forestall the need for additional preliminary questions which might otherwise arise at a later stage of proceedings.

The high quality of the reference also means that clear and accurate information is provided to other courts which are considering putting questions on the same issue and it is a precondition for the quality of the observations of member states during proceedings before the ECJ.

- The referring court should pose an abstract question calling for an abstract answer, which is all the more useful for other courts in the EU.

The working group wanted to make it clear that the desirability of an exhaustive handling of the case should not lead national courts to succumb to the temptation to ask the ECJ to more or less resolve their case, rather than to request an interpretation of EU law.

The working group is aware of the fact that there may be situations where the answers given by the ECJ to the questions of interpretation raised in a reference have an impact on the issue of which facts are relevant to 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 ECJ has clarified what the law is, which facts are pertinent and which evidence is needed to assess them. These situations are, however, exceptional and should not deter national courts from preparing the case as exhaustively as possible.

6. Involvement of the parties in the preliminary reference

The working group considers it advisable that - if possible and fitting in national proceedings - the domestic courts consult with the parties on the texts to be submitted in order to forestall complications after the ECJ has handed down its judgment.

If the parties are consulted, however, their influence should never be preponderant: the domestic court should always remain exclusively responsible for the questions to be posed and the information to be sent to the ECJ. In this respect the working group would recall that the preliminary ruling procedure envisages direct cooperation between the ECJ and the national courts by means of a procedure which is completely independent of any initiative by the parties.

The national courts follow a different practice:

- If the Dutch *Conseil d'État* intends to make a request for a preliminary ruling, it sends the draft questions to the parties. They may then respond to the questions. The Dutch *Conseil d'État* retains sole responsibility for the questions and the information to be sent to the ECJ.

- The Supreme Court of Belgium does not consult with the parties on the formulation of the questions, as the procedure is mainly in writing and pressure of time is intense.

- The Supreme Court of Spain consults the parties only on the necessity of putting a preliminary question, but not on the text.

- Another option would be to instruct the parties to formulate the draft questions. This does however have a number of disadvantages. The parties may formulate a great number of questions, they take a subjective view (which may affect the formulation of the questions) and the initiative then no longer lies with the court.

There is also a risk that the parties may make use of the opportunity to bring the case into the public domain. This was what happened in *Betfair*: the Dutch press reported that the Dutch *Conseil d'État* was intending to ask for a preliminary ruling, information which probably came from *Betfair*. Knowing this, *Ladbrokes* (one of the parties in the *Ladbrokes/Lotto* case then before the Supreme Court) asked the Dutch *Conseil d'État* if it could join the proceedings as a third interested party. *Lotto* was already a third interested party in the *Betfair* case, which entitles it to submit observations to the ECJ. Because it was not clear at that moment whether the Supreme Court would make a reference in its case, *Ladbrokes* thus wished to gain access to the ECJ through the *Betfair* case.

This example illustrates the fact that if parties to proceedings confer, which *Betfair* and *Ladbrokes* presumably did, national courts too should, if possible and if fitting in national proceedings, consult each other both within and between countries.

7. The contents of the reference and the information presented to the Court: clarity and brevity

First of all, the questions to be put to the ECJ must be clearly and concisely formulated and avoid superfluous detail, as recommended in paragraph 22 of the Information Note on references from national courts for an preliminary ruling. The number of pages presented to the Court should be kept to a minimum.

7.1. Relevant additional information to be sent in the reference

If a substantial number of cases pending before national courts depend for their resolution on the answer to be given by the ECJ, national courts should inform the ECJ of this fact, as it may well prompt the Court to give priority to the case, where possible.

The Elgafaji case

In this case a dispute between Mr *Elgafaji* and the Dutch State Secretary for Justice concerned the refusal to grant an asylum residence permit. The dispute focuses on the interpretation of Directive 2004/83/EC on minimum standards for refugees.

On 12 October 2007 the Dutch *Conseil d'État* made a reference for a preliminary ruling asking for an interpretation of the provision (C-465/07), 200702174/1, order for reference 12 October 2007)

The order for reference was accompanied by a request that the case be given priority, for the following reasons:

- sixty-five cases were pending in which the Directive is a key issue and the Dutch *Conseil d'État* expected this number to increase substantially, partly because a request for a preliminary ruling has been made
- the Dutch *Conseil d'État* pointed to the uncertainty in which the alien in question remains until the issue is resolved.

On 19 November 2007, the Dutch *Conseil d'État* was informed by the ECJ that it would give the case priority. A large number of member states have made written observations in this case. On 9 September 2008 Advocate General *Poiares Maduro* will give his opinion.

7.2. Provision of possible solutions

In line with the ECJ Information Note, the working group recommended that courts give (if legally and practically possible and convenient) a reasoned provisional answer to the questions referred, as additional information for the benefit of the ECJ. Such provisional answers may enable the Court to

acquire a good understanding of the specifics of the case and provide clarification as to its context. In this respect there should be room for discretion on the part of the domestic court.

Provisional answers: the Servatius case

In the Servatius case the Dutch *Conseil d'État* made express use of this option. The case involves a housing association and, politically speaking, housing policy is a sensitive issue in the Netherlands.

Both parties, Servatius and the Minister for Housing submitted expert evidence drawn up by a professor, which discussed in great detail ECJ case law and its implications for the Servatius case. (case C-567/07, 200604981/1, order for reference of 27 December 2007). In the order for reference the Dutch *Conseil d'État* therefore gave a preliminary opinion on the answers to the questions. It made use of different formula:

- the closing sentence of question 2a was: 'To exclude all possible doubt on this issue, the Dutch *Conseil d'État* nevertheless sees grounds for asking the Court of Justice the following question.'
- the closing sentence of question 2b was: 'Since this issue remains unresolved, the Dutch *Conseil d'État* sees grounds for asking the Court of Justice the following question.'

7.3. Clarifications and indications

As an alternative to providing the ECJ with provisional answers, the domestic court may consider giving 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 the judge enjoys more leeway.

In cases in which a *commissaire du gouvernement* (as is the case in procedures before the French *Conseil d'État*) or Advocate General (as is the case in procedures before many Supreme Courts) offers an advisory opinion to the national court as part of national proceedings, the referring court may consider sending the opinion, either in whole or in part, to the ECJ.

In the *Ladbroke* case, the Advocate General at the Dutch Supreme Court provided a considerable amount of practical information, to which the Supreme Court explicitly referred in its reference. During the *Betfair* proceedings, the Dutch *Conseil d'État* also had access to this information on the infraction procedure against the Netherlands, but it did not include it in its referring judgment.

7.4. Pooling cases

From the point of view of efficiency, both for the domestic court and the ECJ, the working group recommended that questions which arise in several cases be pooled as much as possible by the referring court.

Pooling in the Belgian Mrax case

An example of such pooling provides a reference made by the Belgian *Conseil d'État* in which four questions of a fairly general nature were formulated on the basis of a large number of individual immigration cases. The ECJ gave judgment in this case (*Mrax*, C-459/99) on 25 July 2002.

It is not clear from the ECJ judgment that there were a number of cases. This fact emerged from information provided by a Belgian colleague during the working group's meeting on 3 December 2007 in The Hague.

7.5. Pilot case

Depending on the issue at stake, however, it may sometimes be preferable for the domestic court to make one reference only and await the ECJ's ruling in that case before giving a decision in the other comparable cases.

Romkes

In the *Romkes* case (46/86) questions were put to the ECJ regarding the validity of Community Regulations on fishing quotas.

In the Netherlands the common conservation measures were enforced under criminal law. After much unrest and strict enforcement involving the arrest of fishing vessels, a lower court made a reference for a preliminary ruling.

Pending answers from the ECJ, proceedings were stayed not only in the Romkes case, but in all cases relating to fishing quotas in 1985 and 1986.

In this instance it was unnecessary to make requests for a preliminary ruling in the other cases as the Romkes case embodied the interests of all Dutch fishermen.

8. Consultation of the European Commission in national proceedings

This subject was not dealt with in the working group's report. Cooperation between the European Commission and national courts may in some cases serve as a kind of preliminary ruling procedure and lighten the burden resting on the ECJ.

The Commission has issued two Communications on cooperation with domestic courts:

- State aid measures: Notice of 23 November 1995, OJ C 312 (Annex 8)
- Competition: Notice of 27 April 2004, OJ C101.

The Notices offer national courts the opportunity, within the limits of national procedural law, to put questions to the European Commission. They also indicate how the Commission will deal with such questions, i.e. it will not go into the substance of the individual case or the compatibility of the measure with the common market, and the answer given by the Commission will not be binding on the requesting court. In both Notices the Commission makes it clear that its view is not definitive and that the court's right to request a preliminary ruling is unaffected.

8.1 Competition law

Mussel fishing

The Dutch Minister of Agriculture pursued a policy based on the Mussel Fishery Regulations drawn up by a producers' association established under private law.

The matter at issue was heard by both the Dutch *Conseil d'État* and by The Hague Court of Appeal. In both cases the question of whether the Regulations were incompatible with article 81 of the EC Treaty played a role.

Incompatibility with the Treaty was directly at issue in the civil law dispute before The Hague Court of Appeal. The Appeal Court put questions on this issue to the European Commission. On 24 April 2008 the Appeal Court gave judgment in the civil law dispute. In this judgment the Commission's answers are reproduced.

The Commission's advice was submitted before the Dutch *Conseil d'État*. The Dutch *Conseil d'État* came to the conclusion that the decisions in question were not prepared with sufficient care, and it did not therefore deal with the issue of competition law. (200507831/1 and 200509427/1), judgments 24 January 2007).

This example illustrates cooperation on the one end between the European Commission and a national court and on the other hand between the national administrative court and the national civil court on the same question of EC law.

8.2 State aid

Dutch case law provides two examples of the application of the state aid Notice on cooperation with the national courts.

Environmental subsidies

In a case before the Administrative Court for Trade and Industry (College van Beroep voor het bedrijfsleven) concerning subsidies within the limits of the environmental support framework the following points are worthy of note.

On 14 December 2006 the Administrative Court for Trade and Industry put questions to the European Commission. On 6 March 2007 the European Commission sent its reply to the Administrative Court for Trade and Industry. It thus took less than three months in total for the Commission to give its answers in this case. These were reproduced in their entirety in the Administrative Court for Trade and Industry judgment. (AWB/05/59), judgment 10 July 2007)

Airport of Eelde

The Dutch *Conseil d'État* put questions concerning State aid to the European Commission in the Eelde case on 30 July 2007. On 23 November 2007 the Commission sent its reply to the Dutch *Conseil d'État*. It thus took less than four months in total for the Commission to give its answers in this case.

In the Eelde case the parties were given the opportunity to comment on the draft questions, and on the Commission's answers. These answers were appended to the judgment.

With a view to obtaining information on comparable cases, one of the parties in the Eelde case had submitted a request to the Dutch *Conseil d'État* for access to the original English versions of the answers. After consultation of the European Commission, The Dutch *Conseil d'État* submitted the English versions to the requesting party.

The judgment of the Dutch *Conseil d'État* was published on the website of the Council of State, with a link to the questions put to the Commission and its answers. The European law issue was only one of the grounds in the Eelde case but a decisive one. The Dutch *Conseil d'État* incorporated a shorter version of the extremely detailed answers in its judgment, but in the end came to its own decision. (case (200603116/1) judgment 11 June 2008)

9. Introduction of a informal filter system via pooling or coordination

According to the working group's report this topic belongs under the heading 'Amending the EC Treaty'. Nevertheless, it is useful to examine this issue because informal filters can be introduced bottom-up (i.e. by the national courts) and not top-down (by the Treaty drafters), even in the states which have no filter system.

This requires alertness during the preparatory stage of proceedings before the national courts. There are two variants: coordination or pooling.

9.1. Coordination

Betfair (Dutch Conseil d'État) and Ladbroke (Dutch Supreme Court)

Similar cases may be pending before different courts in the same member state (e.g Betfair and Ladbrokes, before the Dutch *Conseil d'État* and the Supreme Court respectively). Pooling is technically impossible in this instance, but coordinated adjudication is. This coordination led - as explained above - to the coordinated questions at the Dutch level and, partly, the identical translations at the Luxembourg level.

9.2. Pooling

European Structural Funds grants and the Dutch Conseil d'État

Cases may be pending before a single national court which have the same European law issue at their heart.

An example would be the ESF (European Structural Funds) cases. Many cases that came before the Dutch *Conseil d'État* were disputes concerning the recovery of subsidies granted under the European Structural Funds Order.

In some cases a judgment could be rendered on national grounds. In other cases the key question was whether the member state can derive the power to recover subsidies unduly paid directly - that is to say without a basis in national law - from a EC regulation.

Once it had been decided (in a coordination meeting attended by the various trial chambers) that a reference for a preliminary ruling would be made, the question arose of whether the reference should relate to one or several cases. The three cases were partly identical, but each had its own specific elements. The parties were also different in each case.

The Dutch *Conseil d'État* made requests for a preliminary ruling in all three cases on 30 August 2006. In doing so it explicitly indicated which questions were identical, and formulated specific questions per case.

It was decided that questions should be put in all cases where the same questions were partly at issue. In other words, there was no informal filtering. The main reason for this was to ensure that all parties could submit written observations to the ECJ. (C-383/06, C-384/06, C-385/06 (20050295/1, 200502898/1, 200505580/1), orders for referral 30 August 2006)

By order of the President of the Court of 22 November 2006, cases C-383/06 to C-385/06 were joined for the purposes of the oral and written part of the procedure.

On 13 March 2008 the ECJ gave judgment in the joined cases C-383/06 to C-385/06.

The above constitutes a form of pooling of cases by the national court in putting questions to the Court, with a view to greater efficiency. In fact what happens is that the national court makes simultaneous orders for reference.

Metock case

The parties in this case were third-country nationals married to non-Irish Union citizens. The Irish order for reference of 25 March 2008 pooled all cases and stated the origins of each couple and how long they had been married.

This is an efficient method of operation (pooling). The Irish court distilled three questions from the various immigration cases before it and incorporated them in a single order for reference. Furthermore, the Irish court made a request, furnished with reasons, for application of the accelerated procedure.

This request was granted by the President of the Court by order of 17 April 2008, giving grounds for the decision. (C-127/08 (Ireland), order for reference 25 March 2008, judgment 25 July 2008).

III Conclusion

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 as efficiently and effectively as possible.

After all, they are no longer simply national courts but also European courts.

The suggestions made by the working group may contribute to improve the preliminary rulings procedure.

ANNEXES

- Annex 1 The Hague working group's final report
- Annex 2 Information note of the ECJ on references by national courts for preliminary rulings
- Annex 2a` Information note of the ECJ, supplement (AFSJ)
- Annex 3 Practical guide of the Association for use by the courts when considering a reference for a preliminary ruling
- Annex 4 Reference made by the French *Conseil d'État* on 11 December 2007, case C-552/07 (Commune de Sausheim)
- Annex 5 Reference made by the Dutch *Conseil d'État* on 16 Juli 2008, cases C-359/08 and C-361/08 (Greenpeace): Information on FORUM
- Annex 6 Reference made by the *Dutch Conseil d'État* on 14 May 2008, case C-203/08 (Betfair)
- Annex 7 Reference made by the Dutch Supreme Court (Hoge Raad) on 13 june 2008, case C-258/08 (Ladbroke)
- Annex 8 Notice of the European Commission on cooperation with domestic courts on state aids