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EDITORIAL COMMENTS

Use of the preliminary procedure

The many applications brought before the human rights institutions in Strasbourg show that one of the grave judicial problems of present day Western Europe is the great length of proceedings before courts. More than ever our modern economy requires speed. Each month of delay in obtaining a final court decision may mean a loss for the party concerned. In view of this the increased time for obtaining preliminary rulings merits careful consideration. Can this time be brought back to the six months orginally considered necessary or can other quick solutions be found?

Preliminary rulings are authentic interpretation of Community law and therefore, in principle, important for all Member States. They must be decided by the (full) Court of Justice. When the Court of First Instance was created, it was especially charged with the cases which require fact finding. Preliminary rulings may not be delegated to the Court of First Instance (Article 168A EEC). Possibilities for speeding up matters by delegating preliminary rulings to a chamber of the Court are limited, as any such delegation may be vetoed by any Member State. An effort to shorten the period of time needed will have to be made by the Court of Justice itself. We may just hope that the establishment of the Court of First Instance and a more extensive reference to chambers by the Court of Justice will provide for the time needed to decide preliminary rulings faster. But even if maximum attention is given to them, preliminary rulings necessarily take a considerable amount of

time. Because of their importance, the Member States, the Commission and the parties must have an opportunity to send in their comments in writing and – in order to be able to comment each other – also orally. Often, written comments need to be translated. In addition, preliminary rulings are costly for the parties concerned. It is true that the parties are not obliged to make use of their right to submit statements of case or written observations under Article 20 of the Statute of the Court or to plead during the oral hearing, but in practice they always do. Lawyers probably fear that if ever they were to renounce this right and subsequently lose their case they might also lose their client.

One may dispute whether a preliminary ruling on any question of Community law is always necessary. Some questions are so unique or so unimportant that one might submit that even a court against whose decisions there is no judicial remedy under national law should not necessarily request a preliminary ruling. This holds in particular for some issues concerning the interpretation of the common external tariff. The classification of a product under the external tariff is a question of interpretation of the tariff-regulations and therefore subject to the preliminary procedure. But, sometimes the differences between the possible solutions is minimal, sometimes the product is so specialized that further imports of the same product are unlikely. In a conference in the Hague, organized by the Asser Instituut in 1985, Professor Weiler proposed what he called a "green light procedure". This would allow the national courts to state their own view of the correct interpretation and to forward that to the Court of Justice. If the Advocate General and the Judge Rapporteur agree with that interpretation and neither the Commission, nor any Member State raises objection then this interpretation would stand. To some extent one could compare this with the opposition procedure in competition law. When exemption is asked for an agreement and no reply received in six months the agreement may be considered exempted.

The "green light procedure" would mean a kind of controlled application of the theory of *acte clair* in the broad sense of the expression – as often used in French law – viz. under the circumstances of the case, the act is clear enough for the domestic court to be able to decide by itself. Perhaps, one could go even further by accepting a more frequent

use of *acte clair* with only *post facto* control. So far, the Commission has been reluctant to use Article 169 with respect to decisions of the national judiciary. On a few occasions where they should have requested preliminary rulings, supreme courts have failed to do so. In reply to parliamentary questions the Commission indicated that it will not act under Article 169 as long as such failures can be seen as incidents. To a question posed in the European Parliament in 1983 the Commission replied:

> "As already stated in the answers to Written Questions Nos 100/67[1] and 349/69[2] by Mr. Westerterp and to written Question No. 28/68[3] by Mr. Deringer, the Commission does not in principle exclude the possibility of initiating an infringement procedure where a national court has ignored the scope and conditions of Article 177 of the EEC Treaty. However, in the Commission's view this procedure does not provide the most effective basis for co-operation between national courts and the European Court of Justice.
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> The procedure laid down in Article 169 of the EEC Treaty was not conceived as a means of reviewing judgments of national supreme courts. For this reason the Commission has repeatedly stated that infringement proceedings in respect of such judgments can only be considered when a judgment by a court of last instance shows clearly that that court is systematically and deliberately unprepared to comply with Article 177 of the EEC Treaty."[4]

An action under Article 169 EEC may lead to the undesirable result that a Member State will be required under Article 171 to take measures against its judiciary. The independence of the judiciary being of essential importance also for the application of Community law, it seems justified that the Commission will take this chance only in extreme cases.

1. O.J. 1967, 270/2.
2. O.J. 1970, C 20/3.
3. O.J. 1968, C 71/1.
4. Answer given to Written question No. 526/83 by Mr. Alan Tyrell of 9.6.1983, O.J. 1983, C 268/25. See also answer to Written Question No. 608/78 by Mr. Krieg, O.J. 1979, C 28/8.

Should one permit a wider use of *acte clair* by national courts without the Commission applying Article 169 if mistakes are made, then the risk will grow of divergent interpretations of particular rules of Community law. To prevent this one could perhaps attribute a further task to the Advocates General of the Court. In 1975 a Dutch committee, charged with writing a report on European Union suggested that an Advocate General of the Court of Justice should be empowered to raise preliminary questions before the Court of Justice whenever a national court of last instance has failed to do so. Even if it is impossible to apply the ruling then given to the case in which the question arose, the authentic interpretation would then be available to future cases. A follow-up of this suggestion was not considered necessary as refusals to request preliminary rulings are rare. Should one, however, drastically expand the possibility for specialized courts to apply the theory of *acte clair*, then the suggestion of allowing one or more Advocates General to raise the question before the Court of Justice for the sake of future cases could be useful.

Any development as suggested above requires loyal cooperation of the national judiciaries. When the Communities were established one was not at all sure of such cooperation. That is why many authors were afraid of any application of *acte clair*. Now, especially since the *Nicolo* Case of the French *Conseil d'Etat*, developments have shown that the national judiciaries loyally cooperate in the development of Community law. In many respects it is no longer a strange or foreign legal system for them. Most supreme courts, and especially those which are frequently faced with questions of Community law, are perfectly able to identify the important legal questions which they should subject to the preliminary procedure notwithstanding delay and costs. There would be little harm in allowing them to interpret the unimportant questions themselves, thus obtaining the greater benefit for the litigants of saving time and costs.

Seen from the point of view of Community law none of the abovementioned suggestions would be an improvement. The question rather is whether the mature Community legal order can make sacrifices for the sake of the litigating citizens.