Common Market Law Review **44:** 1–7, 2007.

EDITORIAL COMMENTS

Preliminary rulings and the area of freedom, security and justice

The preliminary ruling procedure (Art. 234 EC), a characteristic feature of the relationship between national courts and the ECJ, has been enormously successful. It has the merit of contributing to the settlement of disputes while avoiding the dramatization of a condemnation by the European Court of Justice; it is a remarkable tool for harmonizing EC law. However this success has a price. The procedure has become dangerously long: around 20 months despite the efforts of successive presidents of the Court to make the institution improve its efficiency.[1] The situation has become even more difficult due to the successive enlargements to new Member States and to the growing variety of procedures providing for the possibility of some sort of preliminary ruling. Among them special mention must be made of the provisions of Article 35 TEU and Article 68 EC. A possibility of a preliminary ruling is provided for, under some restrictive conditions, in the Third pillar, concerning "Provisions on police and judicial cooperation in criminal matters", and in Title IV added to the EC Treaty by the Amsterdam revision, concerning "Visas, asylum, immigration and other policies related to free movement of persons". These restrictive conditions attract criticism for limiting the possibility to refer preliminary rulings in such open and flexible conditions as in Community law in general. On the other hand, any relaxation of the restrictive conditions may have the effect of multiplying the number of preliminary rulings with the consequence that the delay for judgment by the Court will increase, whereas Article 6 of the European Convention of Human Rights requires that judicial decisions be adopted within a reasonable time. It is worth mentioning that although a modification introduced by the Nice Treaty would allow the Court of First Instance to become competent for preliminary rulings concerning some specific matters, the Court of Justice is not willing to accept this – even at a time when the Court of First Instance has been relieved of the burden of the cases concerning EU civil servants.

1. According to the President of the Court, the figures fell from 25.5 months in 2003 to 20.6 in 2005, 19.8 in 2006. It is expected that in time references from the new Member States will increase.

In that context, two recent initiatives by EC institutions are worth mentioning: a communication from the Commission of 28 June 2006,[2] proposing an adaptation of Article 68 EC in view of enlarging the possibilities of preliminary rulings in the area of Title IV of the Treaty, and a letter dated 25 September 2006 of the President of ECJ to the President of the Council proposing a more expeditious procedure for the treatment of questions referred for a preliminary ruling concerning the whole area of freedom, security and justice. These two proposals at first seem to be complementary; in fact they both raise a number of questions, some of them we will try to address keeping in mind the contradictory requirements of minimum delay and maximum openness.

Adaptation of the provisions of Title IV EC in order to ensure more effective judicial protection

Article 67(2) EC requires the Council, at the end of the transitional period of five years following the entry into force of the Treaty of Amsterdam, to take decisions to make codecision applicable in the fields covered by Title IV and to adapt the jurisdiction of the Court. The first has been done, not the second. Taking into account the importance of respect for fundamental rights in that area, and in particular effective judicial protection for everybody, the Commission proposes that the jurisdiction of the Court, namely as regards preliminary ruling, be aligned with the general scheme of the Treaty. Incidentally, if the Council were to adopt this proposal by unanimity after consultation of the European Parliament, it would contribute to the adoption – without ratification – of features of the Constitutional Treaty, since that Treaty does not make distinctions as to the jurisdiction of the Court in the area of freedom, security and justice.[3]

According to the present drafting of Article 68(1) EC, preliminary ruling can be requested only in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. Further, Article 68(2) excludes preliminary ruling on matters related to the crossing of external borders which raise questions of public order and security, a situation which is most likely to occur. The Commission in its com-

2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the Court of Justice of the European Communities, Brussels, 28 June 2006 COM(2006)346 final.

3. Apart from Art. III-377 which maintains the exclusion concerning public order and security of Art. 35(5)TEU.

munication pleads for an alignment with the general regime of Article 234 EC: generalization to all courts and tribunals and no public order exception. There are good reasons for that. The first is to ensure uniform application and interpretation of Community law. In the framework of the major legislative programme launched by the Tampere European Council (1999), an impressive body of Community law is emerging in civil matters, asylum, immigration, visas and free movement of persons. There is a vital need to ensure that this body of legislation is applied in the same way throughout the Union. The ideal procedure to enable the Court to guarantee the unity of Community law is the preliminary ruling procedure of Article 234 EC; an essential element of that procedure – which is missing in the Article 68(1) system – is that *all* national courts[4] can dialogue with the European Court. The Commission stresses that consistency is an essential element of the area of freedom, security and justice.

Another concern is that of effective judicial protection. Restrictions on the right to refer to the Court under Article 68 EC apply in policy areas which are particularly sensitive in terms of fundamental rights and concern the protection of especially vulnerable people: asylum-seekers, applicants for family reunification, third-country nationals challenging expulsion orders or discriminatory treatment, minors affected by disputes covering maintenance responsibilities, parental responsibilities, etc. In national disputes concerning personal rights generated by legislation adopted under Title IV, the national courts of first instance and appeal cannot ask the Court to interpret the applicable Community law; the litigants have to exhaust national redress procedures right up to the supreme court level before having the possibility to refer a question for preliminary ruling to clarify their rights.[5] Moreover, a national court of first instance or of appeal, even if it is convinced that an instrument adopted on the basis of Title IV violates fundamental rights, is still obliged under Article 68(1) to apply it without being able to refer the question to the Court of Justice; only the Court of justice can rule on the invalidity of a Community instrument.[6] More seriously still – according to the Commission[7] – it seems that such a court cannot even grant any kind of provisional judicial protection, since it is possible to provisionally disapply a Community instrument only if there is also a reference for preliminary ruling on the validity of

4. Communication of the Commission p. 4
5. Communication of the Commission p. 5.
6. Case 314/85, *Foto-Frost*, [1987] ECR 4199.
7. Communication of the Commission p. 5.

the instrument.[8] In all circumstances the need to take a case all the way up to the highest level simply in order to refer to the Court after months or years of procedure is an unnecessary waste of resources for national courts and for litigants.

The Commission elaborates further on the provisions of Article 68(2) which exclude the jurisdiction of the Court of Justice "to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security". This in practice concerns Community rules for the abolition of controls on persons at the Union's internal borders, including the exceptional possibilities of reintroducing such controls temporarily. As the Commission observes:[9] "Since, by definition, the national courts cannot rule either on the validity of such Community rules, the result is to exclude any possibility of judicial review, which is difficult to justify in an area of freedom, security and justice". This exclusion of the Court's jurisdiction on public policy measures is also inconsistent with the rest of the EC Treaty. Since the origins of the Community one of the functions of the Court has been to circumscribe the exercise of the powers of the Member States to restrict the freedom of movement of goods, persons or capitals in connection with public-policy issues (on the basis of Arts. 30, 39(3) and 46 EC), trying to find the right balance between proportionality and the discretion of Member States.

Last, the Commission wonders about the possible consequences of the special restrictions to the jurisdiction of the Court under Title IV EC in relation to the European Convention of Human Rights. Will the European Court of Human Rights consider the limited judicial protection of fundamental rights offered under Title IV EC to be "equivalent" to that ensured by the mechanism of the Convention? It is known that the European Court of Human Rights has held that Member States are collectively liable for any violation of the Convention resulting directly from Community primary law.[10]

There are therefore a number of good reasons to consider the adaptation of Art. 68 and its alignment with ordinary Community law (Art. 234) regarding the jurisdiction of the Court.[11] The procedure to introduce the modification

8. Joined cases C-143/88 & C-92/89, *Zuckerfabrik Süderdithmarschen*, [1991] ECR I-415; C-465/93, *Atlanta*, [1995] ECR I-3761.

9. Communication of the Commission p. 6.

10. Judgment of 18 Feb. 1999 *Matthews* v. *United Kingdom* (Application N° 24833/94).

11. One may add another reason. Between 1971 and 2002, when Regulation (EC) N° 44/2001 entered into force, the ECJ had jurisdiction to give preliminary rulings on the interpretation of the "Brussels I" Convention of 27 Sept. 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, requested not only by the courts of final instance in the Member States but also by courts of appeal. It is therefore paradoxical that the Amsterdam Treaty which

is relatively simple: the unanimity of the Council is required and perhaps not unobtainable. However, such alignment would undoubtedly have the effect of overloading the Court of Justice with a mass of references for preliminary rulings in matters covered by Title IV EC. They will come in addition to preliminary rulings in criminal matters under Title VI of the EU Treaty, where judicial protection is insufficient but nevertheless superior to that existing under Title IV EC. Article 35(2) TEU provides for an opt-in by the Member States which retain the freedom to choose to allow all the courts to refer questions for preliminary ruling to the Court of Justice or only the courts of last resort; thirteen member States, including Hungary and the Czech Republic, have opted for the former solution and one, Spain, for the later; Ireland, UK and Denmark remain outside.[12] The Commission concludes, and we share that view, that at the present stage of development of the area of freedom, security and justice, considerations related to the Court's workload do not suffice to justify the maintenance of provisions which can undermine effective judicial protection and the unity of Community law. In that context, it is especially relevant to examine the practical proposals made by the President of the Court to the President of the Council of the European Union in order to make possible an accelerated treatment of preliminary rulings proceedings in that field.

More expeditious treatment of questions referred for a preliminary ruling in the area of freedom, security and justice

The proposal of the President of the Court concerns preliminary ruling procedure in the entire field of freedom, security and justice, that is to say Article 35 TEU and Article 68 EC. Presently, although under these articles – as explained above – the jurisdiction of the Court is limited, the procedure is parallel to that of ordinary Community law (Art. 234). On several occasions in the past the Court has considered the possibility to reduce the time taken for the treatment of questions referred for preliminary ruling. The Rules of Procedure were amended twice, in 2000, so as to permit in some cases the recourse to an accelerated procedure.[13] To date, the accelerated procedure has

communitarized this matter and enables the legislature to convert the previous conventions into regulations, at the same time by way of Art. 68(1) EC sharply restricts the jurisdiction of the Court of Justice to interpret these regulations, by precluding appeal courts and allowing only courts of final instance to apply for preliminary rulings.

12. For a first example of preliminary ruling under Art. 35(1) TEU, C-105/03, *Pupino*, [2005] I-5285.

13. Art. 104a of the Rules of Procedure provides for shorter limits of time for the deposit of briefs; the Advocate General is only heard.

been used only in three occasions, and only one involving a reference for a preliminary ruling.[14] In that circumstance, the time between the case being brought and the Court's delivering judgment was 76 days; according to the President of the Court, only one week was taken up by the Court's decision and the drafting of the judgment. The remainder was taken up by procedural time-limits and translation.

The Presidency Conclusions of the Brussels European Council of 4 and 5 November 2004 contain a sub-chapter on the Court of Justice in connection with the area of freedom, security and justice (point 3.1). Reference is made to Article III-369 of the Constitutional Treaty which requires the Court to "act with the minimum of delay" in preliminary ruling when a person is detained. More generally, with or without the Constitutional Treaty in prospect, it would be appropriate to introduce speedy handling of requests for preliminary rulings concerning the area of freedom, security and justice where individual rights are so directly in question. It is an area where cases before national courts must often be dealt with within strict time-limits. Legislations of Member States have introduced procedural mechanisms which involve the elimination of certain stages of the procedure, recourse to courts having fewer judges, mandatory time-limits, and priority treatment to certain cases.

The President of the Court of Justice is contemplating the creation in that field of a new type of procedure which might be called the *emergency preliminary ruling procedure.* One possibility would be to designate a Chamber which would handle all cases in the area of freedom, security and justice in which the emergency preliminary ruling procedure is requested by national courts; this Chamber would proceed to the filtering of cases and either give a ruling itself or send the case to another Chamber. The Advocate General would continue to be involved in the treatment of cases falling under emergency procedure. Further, two options are envisaged. In a first option, the first stage of the new emergency procedure would not involve the participation of all Member States and institutions. The only parties having the right to participate in the procedure would be the parties to the dispute before the national court, the Member State of the court which made the reference for preliminary ruling, the Commission and the institutions responsible for the measure whose validity is challenged or the interpretation of which is sought. The Court would make an order, which would then be notified to all Member States and institutions, opening an opportunity for re-examination; but failing a request for re-examination, the order adopted following the emergency procedure would become final.

14. Case C-189/01, *Jippes and others,* [2001] ECR I-5689.

The second option would involve a procedure in which all the parties referred to in Article 23 of the Statute of the Court of Justice would participate, but with stricter practical rules. The translation into all languages would be limited to the questions referred for preliminary ruling; the time-limit for replying would be shorter than under the accelerated procedure of Article 104a of the Rules of Procedure; length of written observations would be limited or no written observations allowed. The Advocate General would still be heard but would not submit an Opinion. In that second option the Court would deliver a judgment without an opportunity for re-examination.

The practical proposals made by the President of the Court, either Option I or II, are perfectly sensible. They could have the effect, if adopted, to allow a more expeditious handling of the cases without renunciation of essential procedural safeguards. However, it is the essential character of the reference for a preliminary ruling as instrument of harmonization of Community law which would be altered if there were not involvement of either all Member States or all institutions (Option I); this is the reason why we would prefer Option II (translation limited to the question referred). The participation of all Member States is a unique guarantee that the interpretation or appreciation of validity of EC/EU rules will take place in a context where due consideration is given to all legal systems; the participation of the institutions is not less important. The smooth acceptation of an unparalleled level of legal integration put into effect in the European Community/Union during the last fifty years is for a significant part due to the dialogue based on mutual confidence between national courts and the European Court of Justice which developed through preliminary rulings. The extension of competences of the Community and the Union in the area of freedom, security and justice creates situations where individuals are involved in such a way that old procedures thought up for building progressive integration between Member States are no longer adapted; respect for fundamental rights of individuals requires that requests for preliminary rulings be handled with the minimum delay. It is unavoidable to have to suffer some losses; that of limiting translation in all languages to the question referred seems acceptable. Will it be sufficient to restore reasonable delay?

As to the question of languages, the problem is neither limited to the efficiency of the preliminary ruling procedure, nor to that of the Court itself. With the latest enlargements and those to come, it has become an impossible challenge for all the institutions and procedures in the Union.