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Editorial

Where Is the Referring National Court at the CJEU's Oral Hearing?

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1 Introduction

The short answer to this question is: Not present! However, the subsequent question that comes up with the author is: Should the referring national court[1] be allowed to the Court of Justice of the European Union (CJEU)'s oral hearing in the context of the proceedings of a preliminary ruling?

The answer to this question will be given below, using a traditional legal methodology. This makes it possible to acquire a more complete understanding of the function of the referring national court in the proceedings of preliminary rulings and its possible position in the future in these proceedings as far as it concerns the CJEU's oral hearing. For the descriptions, analyses, and evaluations, the author has used sources of law, legislative history, technical explanations, case law, policy documents and academic literature.

Firstly, the author will discuss the aims of the oral hearing and address the current rules on what parties will be allowed to CJEU's oral hearing. Subsequently, the concept of judicial cooperation will be highlighted, because this concept may provide arguments for answering the research question of this editorial. At the end, the author will answer this question. The author will argue that the referring national court should also be allowed to the CJEU's oral hearing in the context of the proceedings of a preliminary ruling.

2 Aims of and persons currently allowed to CJEU's oral hearing

According to Article 20 of Statute of the Court of Justice of the European Union (Statute), the procedure before the CJEU consists of two parts: written and oral. The aim of the oral hearing after the written part is to give persons the opportunity to respond on the written documents produced in the written part in order to provide the CJEU with sufficient reliable information to give a ruling.[2] The oral procedure affords a full opportunity for explanations and counter arguments to be presented. This procedure is an expression of the underlying rationale of the preliminary procedure, which is effectively a debate before the CJEU requiring the largest possible participation in all parts of the procedure.[3] The oral hearing is the last opportunity to influence the answers to be given by the CJEU to the questions of the referring national court.[4] Article 76 of the Rules of Procedure stipulates that the Court may decide not to hold an oral hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling.

According to Article 20 of the Statute, the oral procedure consists of the hearing by the CJEU of agents, advisers and lawyers and of the submissions of the Advocate General, as well as the hearing, if any, of witnesses and experts.[5] The Advocate General may also ask questions (see Article 80 of the Rules of Procedure). On the basis of Article 23 of the Statue in conjunction with Article 96 of the Rules of Procedure the following are authorized to submit observations to the CJEU:

(1) the parties to the main proceedings
(2) the Member States
(3) the European Commission
(4) the institution which adopted the act the validity or interpretation of which is in dispute,

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1 Where the term 'referring national court' is used, a 'referring national tribunal' is assumed to be included.

2 *See also* Art. 83 of the Rules of Procedure of the Court of Justice (Rules of Procedure) in respect of the opening or reopening of the oral part of the procedure.

3 *See also* e.g. Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 Fordham Int'l L.J. 388 at 399 (1994), Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice* 389–91 (Oxford University Press 2014), and Koen Lenaerts, Ignace Maselis & Katheleen Gutman, *EU Procedural Law* 50–51 & 788 (Oxford University Press 2015).

4 Compare also, e.g. Lenz, *supra* n. 3, at 402; David Anderson, *References to the European Court*, Sweet & Maxwell 254 (1995), and Lenaerts, Maselis & Gutman, *supra* n. 3, at 242.

5 *See* for more details on representation, e.g. Broberg & Fenger, *supra* n. 3, at 371–72.

(5) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling
(6) non-Member States which are parties to an agreement relating to a specific subject matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

Anyone who is entitled to submit written observations has also the right to attend an oral hearing. If a listed person did not participate in the written part of the procedure, this person is, nevertheless, entitled to participate in the oral part of the procedure.[6] As it follows from the list, the referring national court is not listed. Of course, the referring court is not included in the category 'the parties to the main proceedings'.[7] According to Article 97 of the Rules of Procedure, 'the parties to the main proceedings' are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure. '[T]he parties' are solely the parties to the action pending before the national court.[8] Therefore, under the current rules, the referring national court is not entitled to attend the CJEU's oral hearing.

3 JUDICIAL COOPERATION BETWEEN NATIONAL COURTS AND THE CJEU

An essential task of the CJEU is to interpret European Union law.[9] In the process of preliminary rulings both the CJEU and national courts play their own role.[10] The interpretation of EU law is a task of the CJEU and the application of it is a task of the national courts.[11] However, this distinction has evolved under the concept of 'the special field of judicial cooperation'.[12] This concept requires that national courts and the CJEU both keeping within their respective roles and with the aim of ensuring that EU law is applied in a unified manner, 'making direct and complementary contributions to the working out of a decision'.[13] In the context of judicial cooperation, the aim of the CJEU is to give answers, which will be of use to the national courts so that it can determine the case before it. Although questions of the referring national court are primarily based on the interpretation of EU law, the answers given by the CJEU will also be determinative of the outcome of the question of whether domestic law is compatible with EU law.[14] The interpretation of EU law can be confined specifically to the facts and national law underlying the national proceeding. They may rise from documents before the CJEU.[15]

Under Article 101 of the Rules of Procedure, the CJEU may, after hearing the Advocate General, request clarification from the referring national court within a time limit prescribed by the Court. The reply shall be communicated with the interested persons. It is common practice that such information is obtained prior to the oral proceedings. The interested persons can comment on the information at the oral hearing.[16] However, the referring national court itself cannot participate in that debate, simply because it is not present at the CJEU's oral hearing. The author thinks that this is at odds with the underlying rationale of the preliminary procedure: a debate before the CJEU requiring the largest possible participation in all parts of the procedure in order to get sufficient reliable information to give a ruling. The absence of national referring court at the CJEU's oral hearing does not contribute to the judicial cooperation between the national referring court and the CJEU.

4 WHY SHOULD THE REFERRING NATIONAL COURT BE ALLOWED TO THE CJEU'S ORAL HEARING?

The author thinks that considering the aims of CJEU's oral hearing and the concept of judicial cooperation, that it is rather odd that maybe the most relevant stakeholder in the proceedings of the preliminary rulings, the referring national court, is not allowed to the oral hearing. It is this court, that is uncertain about the interpretation of EU law in a case that it has to decide.

[6] *See also* e.g. Broberg & Fenger, *supra* n. 3, at 387, and Koen Lenaerts & Piet van Nuffel, *Europees Recht*, Intersentia 650–52 (2017).
[7] It may even be doubted of whether any of the listed persons qualify at all as 'parties' in a preliminary procedure. *See* e.g. Broberg & Fenger, *supra* n. 3, at 359.
[8] *See also* e.g. CJEU 23 Jan. 1997, Case C-181/95, ECLI:EU:C:1997:32 (*Biogen*) and Morten Broberg & Niels Fenger, *supra* n. 3, at 351–53.
[9] *See* Art. 267 of the Treaty on the functioning of the European Union (TFEU).
[10] *See also* e.g. Lenz, *supra* n. 3, at 389–92 & 396–97, and Lenaerts, Maselis & Gutman, *supra* n. 3, at 82–86 & 231–49.
[11] *See* e.g. CJEU 5 Dec. 2017, Case C-42/17, ECLI:EU:C:2017:936 (*M.A.S.*), para. 26. *See also* e.g. Lenaerts, Maselis & Gutman, *supra* n. 3, at 237–43.
[12] *See* CJEU 1 Dec. 1965, Case 16/65, ECLI:EU:C:1965:117 (*Schwarze*), ECR 877, at 886. *See also* e.g. Takis Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, Common Mar L. Rev. 40 at 9–50 (2003), and Lenaerts, Maselis, & Gutman, *supra* n. 3, at 48–106 & 232.
[13] *See* CJEU 1 Dec. 1965, Case 16/65, ECLI:EU:C:1965:117 (*Schwarze*), ECR 877, at 886.
[14] *See also* e.g. Lenz, *supra* n. 3, at 399, and Lenaerts, Maselis, & Gutman, *supra* n. 3, at 234.
[15] *See* e.g. CJEU 11 Sept. 2008, Case C-279/06, ECLI:EU:C:2008:485 (*CEPSA*), paras 28–32. *See also* e.g. Morten Broberg & Niels Fenger, *supra* n. 3, at 374–75, & 387, and Lenaerts, Maselis & Gutman, *supra* n. 3, at 232.
[16] *See* e.g. Broberg & Fenger, *supra* n. 3, at 376, and Lenaerts, Maselis & Gutman, *supra* n. 3, at 237–38.

Furthermore, the referring national court is an independent body. Therefore, it is the most reliable source to inform the CJEU about the relevant facts and the relevant domestic laws. Especially in tax cases, which are often perceived to be highly complex and technical,[17] the input of the referring national court can be highly relevant. All other parties allowed to the oral hearing do serve their own interests when informing the CJEU. This fits with the role they have to play. However, it also includes the risk that the CJEU is not informed completely or rightly. It may be expected from the referring national court that it can best explain what facts and what interpretation and application of national (tax) laws are relevant in respect of the questions raised on the interpretation of EU law. At the end, it is this court that has to apply the relevant EU law as interpreted by the CJEU in the case at hand.

As explained above, the aim of CJEU's oral hearing in the context of the proceedings of a preliminary ruling is to give persons the opportunity to respond on the written documents produced in the written part in order to provide the CJEU with sufficient reliable information to give a ruling. The oral procedure affords a full opportunity for explanations and counter arguments to be presented. It is the last opportunity to influence the answers to be given by the CJEU to the questions of the referring national court. However, the referring national court is not allowed to participate in this debate. Therefore, the CJEU might not get the necessary full or at least sufficient picture to give the ruling.

The author thinks that the judicial cooperation between the referring national courts and the CJEU could be improved by allowing the national referring court to the CJEU's oral hearing for several reasons. In addition to the arguments mentioned above, he gives three other main arguments:

(1) The referring national court could give an explanation of its questions. Questions of the CJEU in respect of these questions can directly be answered by the most relevant stakeholder in an efficient and effective way. Such a question-and-answer session at the oral hearing can avoid that the CJEU has to guess what the exact meaning of the questions of the referring national court is. It can also avoid needless paperwork and delay of the proceedings if the CJEU would ask further written explanation of the referring national court. Next to that, from the perspective of the referring national court, it can be avoided that it believes that CJEU has misunderstood its questions and that the CJEU's decision does not (completely) answer its question. Returning to the CJEU with a second set of questions is possible,[18] but it is not common practice, since the referring court might feel restraint to do so for several (courtesy) reasons. Such restraints will disappear if the referring national court has the opportunity to provide additional information to the CJEU in the less formal setting of a question-and-answer session at the CJEU's oral hearing.

(2) It may be expected from the referring national court that it can best explain what facts are relevant in respect of the questions raised in respect of the interpretation of EU law. At the end, it is this court that has to apply the relevant EU law as interpreted by the CJEU to the facts of the case at hand. More specifically addressing tax cases: it is not the Member State involved, other intervening Member States, the European Commission, the tax administration involved or the taxpayer involved that has to apply CJEU's decision in respect of the preliminary questions.

(3) It may also be expected from the referring national court that it can best explain what domestic laws are relevant in the case at hand and how these laws must interpreted and applied in respect of the questions raised on the interpretation of EU law. It is this court that has to interpret and apply the relevant domestic laws in the case at hand. If the referring court is the Member State's highest court, the CJEU receives the best information, i.e. it receives the information on what domestic laws are relevant in the case at hand and how these laws must ultimately be interpreted and applied. The quality of this information is essential in order to enable the CJEU to answer the questions on the interpretation of EU law in the best way possible. The quality of the information given by the independent referring judge may not be the same as the quality of the information given by, e.g. the Member Sate or the taxpayer involved if the case concerns a tax case. They have their own interests to be served. As a result, the risk arises that the CJEU is not informed completely or rightly or that domestic laws are misunderstood by the CJEU. And again, at the end, it is the referring court that has to apply the relevant EU law as interpreted by the CJEU in the case at hand; not the Member State involved, other intervening Member States, the European Commission, the tax administration involved or the taxpayer involved. Just to mention one example of misunderstanding domestic tax laws with (potential) huge consequences: the joint Cases 398/16 and C-399/16 (*XBV/X NV*).[19] It seems to be that the Advocate General and the

[17] *See* e.g. CJEU 26 Feb. 2019, joint Cases C-115/16, 118/16, 119/16, 299/16, ECLI:EU:C:2019:13 (*N Luxembourg 1*), paras 29, 133, & 143.

[18] *See also* e.g. Tridimas, *supra* n. 12, at 39–41, and Lenaerts, Maselis & Gutman, *supra* n. 3, at 243–44.

[19] *See* CJEU 28 Feb. 2018, joint Cases 398/16 and 399/16, ECLI:EU:C:2018:110 (*XBV/X NV*). *See* for a detailed discussion of the cases, e.g. Daniël Smit, *The Netherlands II: X BV*, Case C-398/16, in *CJEU - Recent Developments in Direct Taxation 2016*, Series on International

CJEU misunderstood the Dutch corporate income tax fiscal unity system.[20] It triggered (potentially) unnecessary emergency legislation which affects unnecessarily fully domestic fiscal unities.[21] It also endangers unnecessarily the continuation the Dutch concept of fiscal unity, since it is discussed of whether this concept is EU sustainable because of these decisions of the CJEU.[22] In an internet consultation by the Dutch Ministry of Finance on the future of the Dutch fiscal unity system, it considers four options: to keep the fiscal unity system as it is after the implementation of the emergency legislation, even to repeal completely the fiscal unity system without introducing a substitute, to switch over to a kind of group relief or to introduce a cross-border fiscal unity including a foreign permanent establishment whose profits will be exempted based on the territoriality principle.[23] The misunderstanding of Dutch domestic corporate income tax law could (potentially) have been avoided if the Dutch Supreme Court would have had the opportunity to participate in the oral hearing, since a question-and-answer session at the hearing allows much more interaction between the national referring court and the CJEU than an exchange of written documents as is possible under Article 101 of the Rules of Procedure. The current uncertainty in respect of and adverse consequences for the Dutch fiscal unity system might have been avoided.

By allowing the referring national court to the CJEU's oral hearing, the CJEU will be better informed. The risk of misunderstandings can be decreased and, consequently, the relevance and, therefore, the quality of CJEU's rulings can be improved. The CJEU can also better attune its answers to the needs of the referring national court. As a result, not only the quality of the CJEU decisions can be improved, but also the quality of the end decision of the referring national court can be improved, because the answer of the CJEU will be better attuned to its needs to decide the case at hand. The judicial dialogue between the CJEU and the national courts could really come to life. Therefore, the author believes that allowing the referring national court to CJEU's oral hearing will strengthen the judicial cooperation between the referring national court and the CJEU in the benefit of strengthening the development the internal market.

5 Conclusions

Under the current rules, the referring national court is not entitled to participate in the CJEU's oral hearing which is part of the proceedings of a preliminary ruling. The research question of this editorial has been: Should the referring national court be allowed to the CJEU's oral hearing in the context of the proceedings of a preliminary ruling? Based on the aims of the oral hearing and the concept of judicial cooperation, the author's answer to this question is in the affirmative. It is more likely than not that not only the quality of the CJEU rulings will increase, but also the end decision of the referring national court if the referring national court participates in the oral hearing.

[20] *See also* e.g. Daniël Smit, *The Court of Justice EU Pulls Down Dutch Interest Limitation Rule (Case X BV, C-398/16)*, EC Tax Rev. 303–08 (2018), and Hans-Peter Peeters, *De EU-rechtelijke onbestaanbare 'per-element-fiscale eenheidsbenadering'*, Maandblad Belasting Beschouwingen 505–20 (2018).

[21] *See Wet spoedreparatie fiscale eenheid* (in English: Law emergency repair fiscal unity). *See also* e.g. Peeters, *supra* n. 20, at 1388–400, and Jan Bouwman, *Geen afschaffing van de consolidatie in de fiscale eenheid (VPB)*, 19(41) Nederlands tijdschrift voor Fiscaal Recht 1–3 (2018).

[22] *See also* e.g. Lex Bekkers & Arthur Hofman, *Dutch Fiscal Unity Regime Under EU-Fire, Will the Regime Survive?*, Intertax 113–20 (2019).

[23] *See* https://www.internetconsultatie.nl/groepsregeling for the policy paper: 'Eerste internetconsultatie nieuwe groepsregeling in de vennootschapsbelasting'. (Consulted on 10 July 2019).

Tax Law, vol. 103, 163–80 (Michael Lang, a.o. eds, Linde Publishers Vienna 2017), and Eric Kemmeren, *The Netherlands I: Fiscal Unity, Groupe Steria's Per-Element Approach and Currency Losses Relating to a Non-Resident Subsidiary (C-399/16[X NV]); Starbucks and State Aid (T-760/15 and T-636/16)*, in Michael Lang, a.o. (eds), *supra*, at 117–44 and 160–61.