Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 20 September 2012[1]

Case C-363/11

Commissioner of the Elegktiko Sinedrio with responsibility for the Ministry of Culture and Tourism
v
Audit Service of the Ministry of Culture and Tourism
and
Konstantinos Antonopoulos

(Reference for a preliminary ruling from the Elegktiko Sinedrio (Greece))

(Reference for a preliminary ruling — Concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU — Court of Auditors ruling on a priori authorisation of State expenditure — Social policy — Fixed-term work contract — Working or employment conditions — Leave of absence from work on trade union business)

1. In the context of proceedings before it, the Elegktiko Sinedrio (Court of Auditors) (Greece) seeks answers to four questions concerning the compatibility with European Union ('EU') law of national rules as a result of which, where public sector employees are entitled to leave for trade union business, that leave is paid or not paid according to the classification of the employment relationship, particularly with regard to whether it is of indefinite duration or for a fixed term.

2. In its order for reference, the Elegktiko Sinedrio is also concerned to establish that it is, in those proceedings, a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU as interpreted by the Court. That point must therefore be verified.

3. I shall accordingly divide my Opinion into two parts: first, the competence of the Elegktiko Sinedrio to request a ruling under Article 267 TFEU; second, the questions referred for a ruling.

4. Written observations have been submitted by Mr Antonopoulos, the payment of whose leave is in issue, by the Greek Government and by the Commission. At the hearing on 14 June 2012, the same parties presented oral submissions, in which they were asked to focus on the competence of the Elegktiko Sinedrio to request a preliminary ruling.

1 — Original language: English.

On the competence of the Elegktiko Sinedrio to request a preliminary ruling

Legal framework

EU law

5. In accordance with the first paragraph of Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of EU law. The second paragraph of the same article provides: 'Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.'

Greek law

6. The Elegktiko Sinedrio was established shortly after Greece gained independence from the Ottoman Empire, by Decree of 27 September 1833, as a body combining both administrative and judicial functions on the model of the French Cour des Comptes (Court of Auditors).

7. Part Three, Section I, of the Greek Constitution of 1975, as revised, concerns the structure of the State. In that section, Article 26 provides for the separation of legislative, executive and judicial powers. Section V (Articles 87 to 100A) concerns the judiciary.

8. Article 87 provides in particular that justice is to be administered by courts composed of professional judges who are to enjoy functional and personal independence and that, in the discharge of their duties, judges are to be subject only to the Constitution and the laws.

9. Article 93 of the Greek Constitution provides, in particular:

'2. Sittings of all courts shall be public, except when the court decides that publicity would be contrary to accepted standards of morality or that special reasons call for the protection of the private or family life of the litigants.

3. All court judgments must be specifically and fully reasoned and delivered in open court. ...'

10. Article 98 of the Constitution provides:

'1. The jurisdiction of the Elegktiko Sinedrio relates in particular to:

(a) auditing the expenditure of the State, together with that of local authorities or other public law bodies which are subject to its audit by virtue of specific legislation;

(b) verifying contracts of high economic value to which the State, or any other legal entity assimilated to the State for that purpose, is a party, as provided for by law;

(c) auditing the accounts of accounting officers and of the local authorities or other legal entities which are subject to the audit specified in subparagraph (a);

(d) giving advisory opinions on draft laws concerning pensions or the recognition of service for granting of the right to a pension, in accordance with Article 73(2), and on all other matters provided for by law;

(e) drawing up and presenting to Parliament a report on the financial statement and balance sheet of the State, in accordance with Article 79(7);

(f) determining legal disputes concerning the granting of pensions and the auditing of the accounts specified in subparagraph (c);

(g) determining cases concerning the liability of civil or military servants of the State, and of servants of local authorities or other public law bodies, for any loss caused, intentionally or negligently, to the State or to such local authorities or other public law bodies.

2. The powers of the Elegktiko Sinedrio shall be regulated and exercised as provided for by law.

The provisions of Article 93(2) and (3) shall not apply in the cases specified in subparagraphs (a) to (d) of the preceding paragraph.

3. Decisions of the Elegktiko Sinedrio in the cases specified in paragraph 1 shall not be subject to review by the Simvoulio tis Epikratias [Council of State].'

11. The Statute of the Elegktiko Sinedrio is codified in Presidential Decree 774/1980 (the 'Presidential Decree').

12. According to Article 3 of that decree, the Elegktiko Sinedrio comprises a President, a number of Vice-Presidents and a number of judges, of which there are two ranks. [2]

13. Article 4 provides that, in carrying out its work, the Elegktiko Sinedrio is to be assisted by judicial personnel. On its website, [3] that body adds: 'Auditing offices headed by commissioners of the Court (i.e. judicial employees with a university degree, with more than 15 years' experience and holding the rank of head of division) are situated in ministries, prefectures and larger municipalities, and have competence in both *a priori* and *a posteriori* audits. …'

14. Article 7 concerns the composition of the judicial formations of the Elegktiko Sinedrio. Under Article 7(1), it can sit in plenary formation, in sections or in 'klimakia' (which would appear to be *sui generis* formations having both judicial and administrative functions). In accordance with Article 7(3), each section is presided by a Vice-President (or by the President), sitting with four judges; two of the first rank ('symvouloi') and two of the second rank ('paredroi'); the latter are merely consulted and do not have a say in the final decision.

15. Article 17 of the Presidential Decree concerns the Elegktiko Sinedrio's jurisdiction to verify that public expenditure is correctly authorised and complies with all relevant legal provisions (Article 17(1)). In doing so, it may examine any incidental issue which arises, without prejudice to any provisions on *res judicata* (Article 17(3)), but is not competent to review the appropriateness of administrative acts (Article 17(5)).

16. Article 19(1) of the Presidential Decree provides that *a priori* audit of payment orders for the expenditure of ministries is to be carried out by second-rank judges or commissioners, as the case may be, of the Elegktiko Sinedrio, sitting in the head office of the ministry in question.

2 — It was confirmed by the Greek Government at the hearing that the judges are professional judges within the meaning of Article 87 of the Constitution.

3 — http://www.elsyn.gr/elsyn/files/Greece0012.pdf

17. In accordance with Article 21(1) of the Presidential Decree, the competent second-rank judge or commissioner must refuse to authorise any expenditure which does not comply with the conditions in Article 17(1). If the expenditure is then resubmitted to him and he considers that it still does not comply with those conditions, he must submit the issue to the competent section of the Elegktiko Sinedrio, which is to give a final decision.

18. The order for reference states that, in accordance with Article 141 of Presidential Decree 1225/1981 (and notwithstanding the second subparagraph of Article 98(2) of the Constitution), that decision must state the reasons on which it is based. At the hearing, however, it was stated that there was no requirement that proceedings should be public, and that the procedure did not involve any exchange of pleadings.

19. The order for reference also explains that the proceedings before the Elegktiko Sinedrio in cases such as the present concern not only the commissioner and the authority whose expenditure has not been authorised – as between whom its decision is binding – but also the third party claiming the benefit of that expenditure. That party's interests are represented by the authority concerned but, in the event of an unfavourable decision of the section concerned, he may, on certain grounds, apply to the same section to withdraw its decision. Except for those limited circumstances, that decision is final and unappealable.

20. At the hearing, however, both counsel for Mr Antonopoulos and the agent for the Greek Government agreed that the third party is not in fact a party to the proceedings before the Elegktiko Sinedrio, which concern only a divergence of views between the commissioner and the authority seeking to make the expenditure as to the legality of the expenditure envisaged and of the procedure followed.

21. The Elegktiko Sinedrio further explains – and this was agreed to at the hearing – that its decision does not constitute *res judicata* in the event of proceedings brought in the administrative courts by an individual seeking from an administrative authority payment of a sum which has not been authorised. In such cases, Article 17 of Law 2145/1993 requires that individual to produce the relevant decision of the section concerned (or a certificate that the decision refusing authorisation has not been submitted for review or that review by a section is pending), and such decision must be taken into account by the court seised of the dispute before it gives its own decision.

Procedure before the Elegktiko Sinedrio in the present case

22. The proceedings before the Elegktiko Sinedrio concern a payment order issued by the audit service of the Greek Ministry of Culture and Tourism ('the ministry'), for payment to Mr Antonopoulos of a sum representing salary for leave which he had taken on trade union business. It is common ground that those proceedings fall within the jurisdiction governed by Article 98(1)(a) of the Greek Constitution and Article 17 of the Presidential Decree. However, the Elegktiko Sinedrio states in its order for reference that, under national law, only the jurisdiction governed by Article 98(1)(f) and (g) of the Constitution is considered to be strictly judicial.[4]

23. The payment order in question was submitted to the commissioner of the Elegktiko Sinedrio with responsibility for the ministry ('the commissioner'), for *a priori* audit. The commissioner refused authorisation on the ground that, under national law, Mr Antonopoulos's employment status as a fixed-term public sector worker not occupying a permanent post did not entitle him to payment of leave on trade union business.[5]

4 — At the hearing, the Greek Government stated that the Simvoulio tis Epikratias had recently confirmed that position in judgment 22/2009.

5 — The details are set out more fully in the section below on the questions referred (see point 58 et seq.).

24. Since the order concerned a payment which he had already declined to authorise, the commissioner then referred the matter, pursuant to Article 21(1) of the Presidential Decree, to be decided by the First Section of the Elegktiko Sinedrio.

25. That section considers an interpretation of EU law necessary in order for it to decide whether the commissioner's position, and the national law on which it is based, are consistent with EU rules on equality of treatment, in particular as between fixed-term workers and permanent workers.

Assessment

26. According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. [6]

27. The question whether a body may refer a question to the Court thus falls to be determined on the basis of criteria relating both to its constitution and to its function. A body may be a 'court or tribunal' when performing judicial functions but not when exercising functions of an administrative nature. It is therefore necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling. For that purpose it is irrelevant that, when otherwise configured or when exercising other powers, the body concerned is to be classed as a court or tribunal for the purposes of Article 267 TFEU. The Court has thus found that the Italian Corte dei Conti (Court of Auditors) does not exercise a judicial function when carrying out *a posteriori* review of expenditure of State agencies – an administrative role consisting in the evaluation and verification of the results of administrative action. [7]

28. This is the second occasion on which the Elegktiko Sinedrio has sought a preliminary ruling from the Court. On the first occasion, [8] its competence to do so was not questioned. In the main proceedings in that case, the Elegktiko Sinedrio had to determine a legal dispute concerning the granting of a pension to a person treated for that purpose as a civil servant. Its jurisdiction thus fell within Article 98(1)(f) of the Greek Constitution, concerning the determination of legal disputes, whereas, in the present case, its jurisdiction falls within Article 98(1)(a) of the Constitution and concerns the auditing of State expenditure. It appears that the former competence is considered to be strictly judicial under national law, whereas the latter is not. [9]

29. The doubts which may arise, therefore, as regards the Elegktiko Sinedrio's competence to seek a preliminary ruling in the present case, do not concern its inherent nature. Most importantly, it is undisputedly a permanent body established by law, composed of judges whose independence is unquestioned, whose jurisdiction is (in cases such as the present) compulsory and who apply rules of law, including (in cases such as the present) rules of EU law. Such doubts concern, rather, aspects of

6 — See, most recently, Case C-443/09 *Grillo Star* [2012] ECR, paragraphs 20 and 21 and case-law cited.

7 — See orders in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraphs 22 to 25, and Case C-440/98 *RAI* [1999] ECR I-8597, paragraphs 13 to 16. Later, in Case C-482/10 *Cicala* [2011] ECR I-14139, the Court held that it did not have jurisdiction to respond to questions posed by the Corte dei Conti, sezione giurisdizionale per la Regione Siciliana, but that was on the ground that the order for reference did not contain sufficient information to link the questions referred to the rules of EU law whose interpretation was requested; the Court expressly did not examine whether the referring body was, in the context of the dispute in the main proceedings, a court within the meaning of Article 267 TFEU (paragraph 31 of the judgment).

8 — Case C-443/93 *Vougioukas* [1995] ECR I-4033.

9 — See point 22 above.

its function in the main proceedings. In particular, it seems important to consider whether the Elegktiko Sinedrio is called upon judicially to determine a dispute between parties at arm's length or administratively to reconsider a decision taken by a member of its own staff, and whether its decision will have the same status and effects as those of a decision of an ordinary court of law.

30. Before considering those points, it may be useful to reflect briefly on the history of the Court's case-law in this area. The qualification of a referring body as a court or tribunal of a Member State was not an issue which arose frequently in the early years of the Court's existence [10] but in the last three decades or so there have been some 50 decisions in cases of doubt. [11]

31. Most instructive are the 11 cases in which the Court has reached a view opposed to that of its Advocate General. They are roughly evenly balanced between those in which the Advocate General has taken the view that the referring body should not be considered a court or tribunal of a Member State but the Court has ruled that it should (six cases [12]) and those in which the opposite has occurred (five cases [13]). What is striking is that, in the first group of cases, three Advocates General all from a Roman civil law background [14] have advocated, essentially, the approach that only courts of law *stricto sensu* are competent to refer questions for a preliminary ruling, whereas, in the second group, four Advocates General from a non-Roman, mainly common law, background [15] have argued broadly that, in the interests of procedural economy and uniform application of EU law, the Court should in general answer relevant questions from bodies which have features of a court or tribunal and which must apply the law in resolving a genuine issue.

32. It might be thought that, in eschewing both those approaches, the Court has steered a judicious middle course between Mediterranean formalism and Anglo-Scandinavian informality – although it might also be simply that, as Advocate General Ruiz-Jarabo Colomer suggested in *De Coster*, [16] the approach overall has been casuistic rather than scientific. I feel that it would be appropriate for the Court to indicate, in the present case or on another suitable occasion in the not too distant future, whether, having regard to the now considerable body of case-law which it has amassed, it adheres to either of the approaches proposed by its Advocates General in the above cases, whether it follows any guiding principle which is different from either or whether, simply, each case must be examined afresh and on its own merits.

33. I shall not seek here to set out yet again a full account of the development of the Court's case-law; that has been done a number of times in the Opinions in the cases already decided, in particular those cited in footnotes 12 and 13 above. I would simply stress three points which the Court should, in my view, take into consideration.

10 — The only occasion before 1980 appears to have been in Case 61/65 *Vaassen-Göbbels* [1966] ECR 261, although the issue was touched upon in Case 43/71 *Politi* [1971] ECR 1039 and may have been referred to in passing in other cases.

11 — There is a slight overall bias in favour of accepting rather than refusing an order for reference from a body whose status is disputed. In roughly four-fifths of those cases, the outcome appears to have been relatively clear: either the Court's ruling was in agreement with the Advocate General's recommendation or the issue was decided without a formal Opinion, which in general suggests an absence of difficulty or controversy.

12 — Case C-54/96 *Dorsch Consult* [1997] ECR I-4961; Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577; Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539; Case C-17/00 *De Coster* [2001] ECR I-9445; and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817.

13 — Case C-111/94 *Job Centre* [1995] ECR I-3361; Case C-134/97 *Victoria Film* [1998] ECR I-7023; Case C-53/03 *Syfait* [2005] ECR I-4609; Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561; and Case C-196/09 *Miles and Others* [2011] ECR I-5105.

14 — Advocates General Tesauro (*Dorsch Consult*), Saggio (*Köllensperger and Atzwanger*, *Gabalfrisa* and *Abrahamsson and Anderson*) and Ruiz-Jarabo Colomer (*De Coster* and *Österreichischer Rundfunk*).

15 — Advocates General Elmer (*Job Centre*), Fennelly (*Victoria Film*) and Jacobs (*Syfait* and *Standesamt Stadt Niebüll*), and myself (*Miles* – although it must be pointed out that what was at issue in that case was the body's status as a court or tribunal *of a Member State* rather than as a court or tribunal as such).

16 — Cited in footnote 12 above, point 14 of the Opinion.

34. First, although the decision as to whether a body is a 'court or tribunal of a Member State' is a matter for EU law (and this Court) alone, it can be taken only on the basis of the rules which govern the body in question and the specific proceedings before it. Those are matters of national law. The Court must therefore base its decision on the rules governing the functioning of the body in question, although it has no competence to interpret those rules. Even if the likelihood of a misapprehension or misunderstanding on that score is small, it cannot be ruled out. It seems to me therefore, that the Court should seek to err, if it errs at all, on the side of the lesser rather than the greater risk. The lesser risk is that of replying to a body whose competence to seek a preliminary ruling is not clearly established, whereas the greater risk is that of leaving a question of EU law unresolved with a possible disparity of application at national level.

35. Second, I have cited five cases in which the Advocate General considered that the reference was admissible but the Court decided otherwise. Following three of those cases, the questions which had not been answered were referred again to the Court in different but related proceedings, and had to be answered. In all three cases, a second Opinion was necessary (in two of them from a different Advocate General), so that the substantive questions were in each case analysed twice by an Advocate General and were answered by the Court some two or three years after its first judgment.[17] Such circumstances are not representative of the greatest procedural economy.

36. Third, I recall the words of Advocate General Ruiz-Jarabo Colomer in his Opinion in *Österreichischer Rundfunk*:[18] '… it is appropriate to allow non-judicial bodies to take part in the dialogue … where their decisions are not subject to subsequent review by a court, providing the last word under national law, a context offering access to the preliminary-ruling procedure in order to ward off the danger of leaving patches of [EU] law outside the scope of the unifying intervention of the Court of Justice'.

37. Having regard to those considerations against the background of the Court's case-law in this area, I prefer a liberal approach in cases where an application of the criteria which the Court has developed[19] still leaves scope for doubt.

38. Returning to the present case, I note four factors which might lead the Court to consider that the Elegktiko Sinedrio is not competent to request a preliminary ruling in the present proceedings. First, those proceedings are not considered to be strictly judicial under national law. Second, the *a priori* review of State expenditure carried out by the Elegktiko Sinedrio might be compared to the *a posteriori* review which was considered by the Court to be an administrative rather than a judicial role in *ANAS* and *RAI*.[20] Third, one of the parties to the main proceedings – the commissioner – is an official of the Elegktiko Sinedrio itself. Fourth, although the decision to be taken by the section concerned is final as to the *a priori* authorisation of the expenditure in question, and subject to review by no higher authority, it is not final as regards Mr Antonopoulos's entitlement to be paid; in the event of an unfavourable decision, he can still, it seems, take his claim to the administrative courts and seek an order that the ministry should pay him, in which case, if the order were granted, the expenditure would have to be authorised.

17 — Substantially the same questions as in Case C-111/94 *Job Centre* were referred again, by the court hearing the appeal against the decision of the court whose reference was held inadmissible, in Case C-55/96 *Job Centre* [1997] ECR I-7119; questions identical to those in *Syfait* were referred by a different court in Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia and Others* [2008] ECR I-7139; and essentially the same question as in *Standesamt Stadt Niebüll* was referred in different proceedings arising out of the same facts in Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639. In the latter two cases, Advocate General Jacobs, who had delivered the first Opinion, had left the Court and was replaced by a different Advocate General (respectively, Advocate General Ruiz-Jarabo Colomer and myself).

18 — Cited in footnote 12 above, point 37.

19 — See points 26 and 27 above.

20 — Cited in footnote 7 above.

39. The first point, I think, is in no way decisive. The Court has consistently held that it is the classification of a body, or of proceedings, in EU law, not in national law, which determines whether a reference has been competently made.[21]

40. Nor does it seem to me that the Court's decisions in *ANAS* and *RAI* can be effectively transposed to the present case. It is true that review of State expenditure will always have many of the same features, whether it is *a priori* or *a posteriori*. However, it is clear from the orders in those earlier cases that the Court relied specifically on the submissions of the Italian Government and the Commission, which stressed the differences between *a priori* and *a posteriori* review as carried out by the Corte dei Conti. In particular, while the former was in many respects comparable to a judicial function, the latter was not only a subsequent evaluation of measures which had already been implemented but was guided by criteria other than rules of law alone.[22] In the present case, the role of the Elegktiko Sinedrio is to determine whether planned expenditure must be authorised or not, in accordance with rules of law alone.

41. As regards the third point, the case might be compared with *Corbiau*,[23] in which a question was referred by the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of the Grand Duchy of Luxembourg in an administrative appeal brought by a taxpayer against a decision of a department under the director's authority. The Court held that the director, although considered by both the Luxembourg Government and the Commission to be exercising a sufficiently judicial role in those proceedings, was not acting as a third party in relation to the department which adopted the decision forming the subject-matter of the proceedings because he had a clear organisational link with the departments which made the tax assessment against which the complaint submitted to him was directed. Similarly, in *Syfait*,[24] the Court stressed the operational link between the Epitropi Antagonismou (Competition Commission), a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposals it adopted decisions.

42. In the present case, the Greek Government questions in its written observations whether the Elegktiko Sinedrio acts as a third party in relation to the commissioner. The Elegktiko Sinedrio itself, in its order for reference, stresses the complete functional separation between the section concerned and the commissioner, whose role is confined to (i) giving and confirming his initial assessment, (ii) referring the dispute to the section and (iii) presenting only the facts and his reasons for not approving the expenditure. The section then, in the light of all the submissions made, decides what is presented in the order for reference as a triangular dispute between the commissioner, the State agency whose expenditure has not been approved and the putative recipient of the expenditure.

43. From what was said at the hearing, while the functional separation between the section concerned and the commissioner was not called in question, it seems open to doubt whether the dispute can truly be said to be triangular. Procedurally, it seems rather that the section is called upon to adjudicate between the opposing views of the ministry and the commissioner.[25] While Mr Antonopoulos's interest in the outcome is undeniable he is, so to speak, merely a spectator of the proceedings. The Greek Government and the Commission therefore consider that the section's role is of an internal, administrative nature. The Commission compared it to that of the Skatterättsnämnden in the main proceedings in *Victoria Film*,[26] which the Court (as opposed to the Advocate General) held to be acting in an administrative capacity when giving a preliminary binding decision.

21 — See point 26 above.

22 — See in particular paragraph 16 et seq. of the order in *ANAS*, cited in footnote 7 above.

23 — Case C-24/92 [1993] ECR I-1277, paragraphs 15 to 17; see also the Opinion of Advocate General Darmon, points 3 to 55.

24 — Cited in footnote 13 above, paragraph 33.

25 — Thus, if the proceedings are not *inter partes* as regards Mr Antonopoulos, they appear to be so as far as the ministry and the commissioner are concerned.

26 — Cited in footnote 13 above.

44. Whilst I understand the considerations which lead the Greek Government and the Commission to that view, it seems to me that the situation is not clear-cut, and that due weight should be given also to the fact that the relevant section of the Elegktiko Sinedrio is functionally independent of both the ministry and the commissioner and that its role is to adjudicate between them, with binding effect, on the basis of rules of law. To the extent that there is none the less scope for doubt, I would therefore recommend that the doubt be resolved in favour of allowing, rather than refusing, the reference for a preliminary ruling. [27]

45. Finally, as regards the fourth aspect – whether, essentially, the decision which the Elegktiko Sinedrio will give in the main proceedings has the same status as that of a decision of an ordinary court – it seems helpful to consider both of the possible outcomes.

46. If the decision is that the payment should not be authorised, that will not, it seems, preclude Mr Antonopoulos from seeking – and possibly obtaining – redress from the administrative courts, which will not be bound by the decision. [28] Any entitlement to remuneration which Mr Antonopoulos may have thus appears to be unaffected in any binding way by an adverse decision of the Elegktiko Sinedrio. In those circumstances, it might seem reasonable to consider that it would be for the administrative courts alone, whose decision would be final and binding vis-à-vis all parties, to refer a question to the Court of Justice. However, the same is not true in the opposite event – that is to say, the commissioner cannot also apply to the administrative courts for an order prohibiting the expenditure despite a contrary decision of the section. [29] If the section decides that the expenditure must be authorised, its decision cannot be challenged by the commissioner and the very nature of the dispute means that neither the ministry nor Mr Antonopoulos will seek to challenge it. In that event, a final and binding decision will have been made as a matter of law, and there will be no possibility of recourse to any other judicial authority, whether by way of appeal or by way of any other kind of proceeding – and thus, if the Elegktiko Sinedrio is not considered a court or tribunal of a Member State, no possibility of a reference to the Court of Justice. [30]

47. It does not seem possible to make a body's competence to seek a preliminary ruling from the Court of Justice – and thus its status as a court or tribunal of a Member State within the meaning of Article 267 TFEU – dependent on whether the decision it takes to determine the proceedings before it will be positive or negative, when it needs such a ruling in order to reach its decision. Since one of the possible decisions the Elegktiko Sinedrio can take clearly has a status equivalent to that of a judgment of an ordinary court, I do not think it should be precluded from seeking a preliminary ruling on the ground that the other possible decision would not have such a status.

48. All the foregoing considerations – in particular those set out in points 34 to 37 above – lead me to the view that, in the context of the proceedings before it, the Elegktiko Sinedrio should be regarded in the present case as a court or tribunal of a Member State competent to seek a preliminary ruling from the Court under Article 267 TFEU.

27 — See also point 37 above.

28 — Indeed, it seems that he could bring proceedings before such courts without waiting for the Elegktiko Sinedrio's decision – see point 21 above.

29 — See point 19 above.

30 — See point 36 above.

On the questions referred

Legal framework

EU law

49. The main proceedings concern an employment relationship which ended before the entry into force of the Lisbon Treaty. At that time, the first paragraph of Article 136 EC[31] provided:

'The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

50. Article 137 EC[32] provided, in particular:

'1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:

…

(b) working conditions;

…

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.'

51. Article 139 EC[33] provided, in particular:

'1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

…'

52. Article 12(1) of the Charter of Fundamental Rights of the European Union ('the Charter') guarantees 'the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests'.

31 — Now, with minor verbal changes, Article 151 TFEU.

32 — Now, with minor verbal changes, Article 153 TFEU.

33 — Now, with minor verbal changes, Article 155 TFEU.

53. Article 20 of the Charter guarantees equality before the law, and Article 21(1) prohibits any discrimination 'based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation', while Article 21(2) prohibits discrimination on grounds of nationality.

54. Article 28 of the Charter provides:

'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'

55. On 18 March 1999, three European cross-industry organisations [34] concluded a framework agreement on fixed-term work ('the framework agreement'). The framework agreement formed the annex to Directive 1999/70 ('the directive'), [35] which was adopted on the basis of Article 139(2) EC. Article 2 of the directive in effect required the Member States to ensure that the measures necessary to put the framework agreement into effect were in place by 10 July 2001 (or, at the latest, 1 July 2002).

56. Clause 3(2) of the framework agreement defines 'comparable permanent worker' as 'a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills'.

57. Clause 4(1) of the framework agreement provides:

'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'

Greek law

58. According to the order for reference, Article 103 of the Constitution, regulating the status of State and other public employees, distinguishes three categories according to the nature of the employment relationship. Essentially:

(a) permanent civil servants occupy permanent posts provided for by law; the terms of their employment are governed by specific legislation;

(b) public sector workers with a private law contract for a fixed or indefinite term occupy certain types of permanent post provided for by law but cannot be established in those posts, nor can they have a fixed-term contract converted to one of indefinite duration; certain terms of their employment are governed by specific legislation;

(c) public sector workers with a fixed-term private law contract, recruited in order to meet unforeseen and urgent needs, do not occupy a permanent post and cannot have their contract converted to one of indefinite duration; certain terms of their employment are governed by specific legislation.

34 — The European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP).

35 — Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

59. Law 1264/1982 laid down a system of leave for trade union business of graduated duration – up to 15 days' leave a month in certain cases – depending on the importance of the trade union and the position in it held by the trade union member. Such leave was to be treated as working time for all purposes other than the right to remuneration, with the trade union being liable for payment of the relevant social security contributions.[36] That law did not distinguish, for such purposes, between workers with different kinds of employment relationship.

60. Law 1400/1983 later provided that, for civil servants and public sector workers occupying a permanent post under a private-law relationship (categories (a) and (b) in point 58 above), the trade union leave in question was to be remunerated. There was, however, at the material time in the main proceedings, no such right to remuneration for public sector workers with a fixed-term private law contract, recruited in order to meet unforeseen and urgent needs and not occupying a permanent post (category (c) in point 58 above).

Facts, procedure and questions referred

61. Mr Antonopoulos was employed by the ministry under a fixed-term private law contract (falling within category (c) above) from November 2008 to October 2009. He was a member of a trade union and, during that period, was authorised to take 34 days' leave on trade union business. The ministry sought to pay his salary in respect of those 34 days, but the commissioner refused to authorise the payment, on the ground that Mr Antonopoulos's employment status did not entitle him to such payment.

62. The First Section of the Elegktiko Sinedrio has to determine whether the less favourable treatment accorded to those in Mr Antonopoulos's position is consistent with the requirements of EU law. It seeks a ruling on the following questions:

'(1) Does payment or non-payment of remuneration to a worker during leave of absence from work on trade union business constitute a working condition or employment condition under EU law and, in particular, do provisions of law allowing unpaid leave for union business to be granted to workers with a fixed-term employment relationship in the public sector who do not occupy an established post and who are officials of a trade union organisation introduce a "working condition" within the meaning of Article 137(1)(b) EC and an "employment condition" in accordance with Clause 4(1) of the framework agreement or does this question come within the areas of pay and the right of association to which EU law does not apply?

(2) If the answer to Question 1 is in the affirmative, is a worker with a private-law employment relationship of indefinite duration with the civil service who occupies an established post and is employed on the same work as a worker with a private-law fixed-term employment relationship who does not occupy an established post "comparable" to that worker within the meaning of Clauses 3(2) and 4(1) of the framework agreement or does the fact that the national Constitution (Article 103) and its implementing laws provide for a special employment regime for such workers (terms of employment and specific safeguards in accordance with Article 103(3) of the Constitution) suffice to classify them as not "comparable" to workers with a private-law fixed-term employment relationship who do not occupy an established post?

(3) If the answers to Questions 1 and 2 are in the affirmative:

(a) If the effect of a combination of national legislative provisions is that public sector employees with an employment relationship of indefinite duration who occupy an established post and who are officials of a second-level trade union organisation receive

36 — And, under other provisions, for payment of remuneration.

paid leave (up to nine days a month) for trade union business, while workers in the same service with a fixed-term employment relationship who do not occupy an established post but who do have the same trade union status receive unpaid leave of the same duration for trade union business, does the distinction in question constitute less favourable treatment of the second category of workers within the meaning of Clause 4(1) of the framework agreement and

(b) Do the limited term of the employment relationship of the second category of workers and the fact that that category is distinct in terms of the employment regime in general (terms of recruitment, promotion and termination of the employment relationship) constitute objective grounds that might justify that discrimination?

(4) Does the distinction at issue between trade union officials who are workers with a contract of indefinite duration and who occupy an established position in the civil service and fixed-term workers with the same trade union status who do not occupy an established post in the same service infringe the principle of non-discrimination in the pursuit of trade union rights in accordance with Articles 12, 20, 21 and 28 of the Charter of Fundamental Rights of the European Union or can that distinction be justified on the grounds that the two categories of workers have a different employment status?'

Assessment

63. Mr Antonopoulos, the Greek Government and the Commission agree in substance on the answers to the first three questions. Essentially, they consider that: (1) payment or non-payment of remuneration during leave on trade union business is a 'working condition' or 'employment condition' within the meaning of the relevant EU provisions; (2) the two categories of worker in question are 'comparable' within the meaning of the framework agreement; and (3) the difference in treatment between them is 'less favourable' treatment of the second category, which is not justified on objective grounds.

64. On the fourth question, the proposed answers differ slightly in form but not in underlying substance. Mr Antonopoulos considers that the difference in treatment also infringes the principle of non-discrimination in the pursuit of trade union rights under the Charter; the Greek Government simply that the Charter confirms its conclusion that there is unjustified discrimination; and the Commission that, prohibited discrimination being established in the context of the framework agreement, there is no need to examine it in the light of the Charter but that, in any event, the national provisions in issue do not appear to regulate trade union rights directly.

65. Those submissions – which coincide broadly with the view which the Elegktiko Sinedrio itself appears inclined to take – accord with the Court's consistent case-law, and may be dealt with briefly.

66. It must be borne in mind that the framework agreement applies to all fixed-term workers, without distinction as between the public and private sectors.[37]

37 — See Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 56.

Question 1

67. A rule that remuneration is, or is not, to be paid in respect of leave which is accorded by law to employees who are trade union officials for absence from work on trade union business is, *prima facie* and on a straightforward interpretation of the terms, an employment or working condition for such employees. The question is whether such an interpretation could be affected by the provisions of Clause 4(1) of the framework agreement or of Article 137(5) EC (Article 153(5) TFEU) which, indirectly, circumscribes the legal basis on which the directive incorporating the framework agreement into EU law was adopted.

68. Nothing in Clause 4(1) of the framework agreement gives any cause to diverge from that interpretation.

69. On the other hand, Articles 136, 137 and 139 EC, read together, did not authorise the Community (and Articles 153, 155 and 159 TFEU, read together, do not authorise the Union) to take action in the fields of, inter alia, pay or the right of association.

70. However, as those submitting observations all agree, that limitation concerns only direct intervention in those matters. It does not preclude measures which affect them only indirectly. Clause 4(1) of the framework agreement does not purport to regulate pay or the right of association in any substantive way. It merely requires that whatever rules govern employment conditions in the Member States must be applied without discrimination as between fixed-term and permanent workers. The Court has made it clear that Article 137(5) EC, which must be interpreted strictly, cannot prevent a fixed-term worker from relying on the requirement of non-discrimination in Clause 4(1) of the framework agreement in order to seek the benefit of an employment condition reserved for permanent workers, even where it concerns pay.[38] The same conclusion must apply by analogy in so far as the disputed difference in treatment relates to the exercise of the right of association.

71. Consequently, the treatment at issue in the proceedings before the Elegktiko Sinedrio must be regarded as falling within the concept of 'employment conditions' in Clause 4(1) of the framework agreement, and as not being concerned by the limitation in Article 137(5) EC.

Question 2

72. In those circumstances, the Elegktiko Sinedrio must consider whether the two categories of worker who are treated differently are comparable within the meaning of the framework agreement. That is a question of fact which only it can decide, but the Court can offer guidance as to the correct interpretation of the framework agreement, having regard to the elements which the Elegktiko Sinedrio suggests might render the categories not comparable: the fact that workers in one category occupy permanent posts, while the others do not; and that a specific employment regime is laid down for the former but not for the latter.

73. It is clear from the very terms of Clause 3(2) of the framework agreement that such aspects are not relevant to the determination of whether workers are comparable or not. The definition in that provision confines the comparison to the identity of the establishment in which the workers are employed and the identical or similar nature of the work in which they are engaged, due regard being had to their qualifications and skills. It is thus, as the Commission points out, a functional approach, in which questions of status are not relevant.

38 — See Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 33 et seq.

74. Consequently, if, as seems to be the case, the Elegktiko Sinedrio considers that Mr Antonopoulos was engaged in the ministry in work which was the same as, or similar to, that carried out by employees with a private-law employment relationship of indefinite duration occupying a permanent post, due regard being had to the qualifications and skills of each, then it must conclude that, with regard to Mr Antonopoulos, the latter were comparable permanent workers within the meaning of Clause 4(1) of the framework agreement.

Question 3

75. The Elegktiko Sinedrio asks essentially (a) whether the difference of treatment at issue constitutes less favourable treatment of those in Mr Antonopoulos's position and (b) whether differences between employment relationships entered into for a limited period (to meet needs of a limited duration) and those of unlimited duration, and differences between employment regimes in general, can be objective grounds justifying that difference in treatment.

76. As regards the first aspect, there can be no doubt that, where two categories of employees are entitled to leave on trade union business but one category is entitled to remuneration in respect of that leave while the other is not, the latter category is treated in a less favourable manner.

77. As regards the second aspect, it is clear from settled case-law that a difference in treatment cannot be justified on objective grounds for the purposes of Clause 4(1) of the framework agreement on the basis that it is provided for by a general, abstract norm such as a law or collective agreement. There must, rather, be precise and specific factors characterising the employment condition concerned in its particular context, together with objective and transparent criteria, from which it can be ascertained that the unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Such factors may include the specific nature or inherent characteristics of the tasks performed, or pursuit of a legitimate social-policy objective. The temporary nature of the employment is not, of itself, capable of constituting an objective ground for those purposes – if it were, the objectives of the directive and the framework agreement would be rendered meaningless and it would be tantamount to perpetuating a situation that is disadvantageous to fixed-term workers.[39] The same must be true of the limited duration of the employment, which is another feature usually found in fixed-term contracts.

78. As the Greek Government and the Commission have pointed out, the fact that staff are recruited for a limited period in order to meet unforeseen and urgent needs – and that maximum use must therefore be made of their services during that period – might be capable of justifying a rule which allowed them less leave on trade union business than permanent staff. Where, however, they are allowed the same leave as permanent staff on the same grounds, such a fact does not justify withdrawing their remuneration in respect of such leave, when permanent staff are paid.

Question 4

79. The Elegktiko Sinedrio asks whether the disputed difference in treatment infringes the principle of non-discrimination in the pursuit of trade union rights in accordance with Articles 12, 20, 21 and 28 of the Charter or whether it can be justified on the ground that the two categories of workers have a different employment status.

39 — See Case C-177/10 *Rosado Santana* [2011] ECR I-7907, paragraphs 72 to 74, and case-law cited.

80. In so far as the disputed difference in treatment clearly constitutes less favourable treatment of fixed-term employees, contrary to the principle of non-discrimination laid down in Clause 4(1) of the framework agreement, it is unnecessary to consider whether, in the absence of that provision, it would fall foul of the same principle as set out in the Charter. As the Commission points out in substance, there is no need to refer to the Charter where EU law is already explicit on the matter. Nor, a fortiori, can the Charter provide grounds for justification of unequal treatment where such grounds would otherwise be absent.

Conclusion

81. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Elegktiko Sinedrio to the following effect:

(1) The (non-)payment of remuneration during a worker's leave of absence on trade union business is a working condition within the meaning of Article 137(1)(b) EC (now Article 153(1)(b) TFEU) and an employment condition within the meaning of Clause 4(1) of the framework agreement annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; it is not concerned by the exclusion relating to pay and/or the right of association in Article 137(5) EC (now Article 153(5) TFEU).

(2) A worker with a private-law employment relationship of indefinite duration with the civil service who occupies a permanent post and a worker with a fixed-term private-law employment relationship, employed on the same work but who does not occupy a permanent post, are in principle comparable within the meaning of Clauses 3(2) and 4(1) of that framework agreement.

(3) Where workers in the first category who are trade union officials receive paid leave for trade union business, while those in the second category who have the same trade union status receive unpaid leave for the same purpose, there is less favourable treatment of the second category within the meaning of Clause 4(1) of the framework agreement; the facts that the employment relationship is of limited duration for the second category of workers and that it is distinct in terms of the employment regime in general (terms of recruitment, promotion and termination of the employment relationship) do not constitute objective grounds that might justify such discrimination.

(4) In the light of the answers to the first three questions, it is unnecessary to consider whether the treatment in question is prohibited by, or could be justified under, the provisions of the Charter of Fundamental Rights of the European Union.