



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 December 2012*

(Reference for a preliminary ruling — Concept of ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU — Proceedings intended to lead to a decision of a judicial nature — National court of auditors ruling on prior authorisation of public expenditure — Inadmissibility)

In Case C-363/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Elegktiko Sinedrio (Greece), made by decision of 1 July 2011, received at the Court on 7 July 2011, in the proceedings

Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou

v

Ipourgio Politismou kai Tourismou – Ipiresia Dimosionomikou Elenchou,

third party:

Konstantinos Antonopoulos,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász, G. Arestis, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

after considering the observations submitted on behalf of:

- Mr Antonopoulos, by D. Perpataris and K. E. Proiskos, dikigoroi,
- the Greek Government, by E.-M. Mamouna, A. Samoni-Rantou and S. Vodina, acting as Agents,
- the European Commission, by M. Patakia and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2012,

gives the following

* Language of the case: Greek.

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of:
 - Articles 12, 20, 21 and 28 of the Charter of Fundamental Rights of the European Union;
 - Article 153(1)(b) and (5) TFEU and
 - Clauses 3(2) and 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999 ('the framework agreement'), which is 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 (OJ 1999 L 175, p. 43).
- 2 The reference was made by the Elegktiko Sinedrio (Court of Auditors, Greece) in the context of a dispute between the Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou (the commissioner of the Elegktiko Sinedrio at the Ministry of Culture and Tourism, 'the commissioner of the Elegktiko Sinedrio') and the Ipourgio Politismou kai Tourismou – Ipiresia Dimosionomikou Elenchou (the audit service of the Ministry of Culture and Tourism, 'the audit service'), concerning that commissioner's refusal to approve the payment order issued by that service relating to the remuneration of a member of that ministry's staff, Mr Konstantinos Antonopoulos.

Legal context

Greek legislation

- 3 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.

...

- 4 The Statute of the Elegktiko Sinedrio is codified in Presidential Decree 774/1980 (the 'Presidential Decree').
- 5 Article 17(1) 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.
- 6 Article 19(1) of the Presidential Decree provides that an 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 offices of the ministry in question.
- 7 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 laid down in Article 17(1) of the Presidential Decree. 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.

The main proceedings and the questions referred for a preliminary ruling

- 8 The audit service of the Ministry of Culture and Tourism submitted, for approval, to the commissioner of the Elegktiko Sinedrio at that Ministry a payment order concerning the remuneration payable for the period from November 2008 to May 2009 to Mr Antonopoulos, an employee of that Ministry on a private-law fixed-term contract, assigned to the directorate of Prehistoric and Classical Antiquities, who was a member of the executive committee of a trade union.
- 9 The commissioner of the Elegktiko Sinedrio refused to approve that payment order, on the ground that, during the abovementioned period, although Mr Antonopoulos had been absent from his place of work for 34 days on leave for trade union business, his remuneration had not been reduced in proportion to the length of that leave.
- 10 In that regard, the opinion of the commissioner of the Elegktiko Sinedrio was that it was clear from the applicable provisions of Greek law that workers employed by the State on private-law fixed-term employment contracts are entitled to unpaid leave for trade union business, unlike workers who are employed by the State on private-law employment contracts of indefinite duration and who hold established posts, who are entitled to paid leave for trade union business.
- 11 However, the audit service then resubmitted to the commissioner for his approval the payment order at issue, arguing, more specifically, that, based on Article 4 of Decree 164/2004 of the President of the Republic which transposed Directive 1999/70 and which established the principle of the prohibition of discrimination between workers with a fixed-term employment contract and comparable workers with an employment contract of indefinite duration, the intended beneficiary, who was in paid employment on a fixed-term private law contract, was entitled to payment of his salary for the days when he had been absent on leave for trade union business.
- 12 However, since the commissioner of the Elegktiko Sinedrio maintained his refusal to approve the payment order concerned, there was a dispute which had to be resolved, by means of that commissioner's 'negative report' dated 3 November 2009 which brought the matter before the First Section of the Elegktiko Sinedrio, in accordance with the legislation.

13 Upon its examination, on 1 July 2010, of that ‘negative report’, questions were raised concerning the interpretation of European Union law. In those circumstances, the First Section of the Elegktiko Sinedrio decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

- ‘(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 European Union 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 European Union 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 legislation 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 hold an established post and who are officials of a second level trade union organisation receive 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 hold 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 fixed 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 hold an established post in the civil service and fixed-term workers with the same trade union status who do not hold 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?’

Admissibility of the reference for a preliminary ruling

14 Under Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

- 15 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. It is also stated in Article 267 TFEU that where such a question is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court.
- 16 It follows that if the body making the reference in question is to be entitled to bring the matter before the Court for a preliminary ruling, it must be capable of being classified as a ‘court or tribunal’ within the meaning of that provision.
- 17 Consequently, it is necessary to determine whether, in the circumstances which gave rise to this reference for a preliminary ruling, the Elegktiko Sinedrio constitutes a court or tribunal within the meaning of Article 267 TFEU and whether, accordingly, it is entitled to send a reference for a preliminary ruling to the Court.
- 18 According to settled case-law, in order to determine whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU, which is a question governed by European Union 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 (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; and the order of 14 May 2008 in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22).
- 19 In addition, a national court or tribunal 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 (see, inter alia, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 25, and *Syfait and Others*, paragraph 35).
- 20 Further, according to settled case-law, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 49).
- 21 Lastly, the question whether a body is entitled to refer a question to the Court, pursuant to Article 267 TFEU, falls to be determined on the basis of criteria relating both to the constitution of that body and to its function. In that regard, a national body may be classified as ‘a court or tribunal’ within the meaning of that article when it is performing judicial functions, whereas when it is exercising other functions, of an administrative nature, for example, it may not be so classified (see, as regards the Italian Court of Auditors, orders of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraph 22, and in Case C-440/98 *RAI* [1999] ECR I-8597, paragraph 13). The authority before which an appeal can be brought against a decision adopted by a department of an administrative authority cannot be regarded as a third party in relation to that department and, accordingly, as a court or tribunal within the meaning of Article 267 TFEU, where that authority has an organisational link with the administrative authority concerned (see, to that effect, *Corbiau*, paragraph 16, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 37).
- 22 In the present case, first, it is clear from the order for reference that the Elegktiko Sinedrio has been called upon to resolve a dispute which has arisen in relation to the *a priori* auditing of public expenditure, where the opposing parties are the commissioner of the Elegktiko Sinedrio at the Ministry of Culture and Tourism and the audit service of that same Ministry.

- 23 In that regard, it is clear from the file that the commissioner of the Elegktiko Sinedrio is a member of the Elegktiko Sinedrio who is attached, as is clear from Article 19(1) of the Presidential Decree, to each Ministry to carry out *a priori* auditing of orders for expenditure made by the Ministry concerned. The dispute in question arises from the refusal of the commissioner of the Elegktiko Sinedrio at the Ministry of Culture and Tourism to approve expenditure corresponding to the remuneration payable to a worker on a fixed-term contract for the time occupied on leave on trade union business. That refusal was contrary to the wishes of the authority which had made the initial request for payment, which is, in this case, the audit service of that same Ministry. However, that service submitted a further request for payment, on the same basis as the first. In those circumstances, pursuant to Article 21(1) of the Presidential Decree, the commissioner concerned, who maintained his refusal, sent his 'negative report' to the Elegktiko Sinedrio, with the result that the Elegktiko Sinedrio was required to give a decision on that report.
- 24 It follows from the foregoing that there is between the Elegktiko Sinedrio and its commissioner attached to the Ministry of Culture and Tourism, who is the author of the 'negative report' at issue before it, a clear organisational and functional link, which means that it is impossible to regard the Elegktiko Sinedrio as a third party in relation to that commissioner (see, by analogy, *Corbiau*, paragraph 16, and *Schmid*, paragraph 38).
- 25 Consequently, when it gives a decision on the 'negative report' produced by its commissioner, the Elegktiko Sinedrio is not acting as a third party in relation to the interests at stake and, accordingly, does not possess the necessary impartiality vis-à-vis the beneficiary of the expenditure at issue, namely Mr Antonopoulos in this case (see, by analogy, Case C-517/09 *RTL Belgium* [2010] ECR I-14093, paragraph 47).
- 26 Next, it is clear that, as distinct from its jurisdiction relating to 'determining legal disputes' concerning the granting of pensions as described in Article 98(1)(f) of the Constitution and relating to 'determining' cases concerning the liability of civil or military servants of the State as provided for in Article 98(1)(g) of the Constitution, the jurisdiction of the Elegktiko Sinedrio which encompasses this reference for a preliminary ruling relates to the *a priori* 'auditing' of the expenditure of the State, on the basis of Article 98(1)(a) of the Constitution, and is not, therefore, supposed to give rise to a determination as such.
- 27 In that regards, it is clear from the order for reference that, on the basis of that latter jurisdiction, the Elegktiko Sinedrio is called upon to assess whether public expenditure complies with the law relating to the budget and to adopt a decision which does not acquire the force of *res judicata*.
- 28 Accordingly, such a decision is not part of proceedings intended to lead to a decision of a judicial nature, contrary to the requirements of the case-law set out in paragraph 19 of this judgment.
- 29 Lastly, it was established at the hearing that Mr Antonopoulos, as the beneficiary of the expenditure at issue in the main proceedings, is not a party to the proceedings before the Elegktiko Sinedrio, which relate exclusively to a dispute between the commissioner of the Elegktiko Sinedrio and the administrative authority which wishes to effect the expenditure, concerning the lawfulness of that expenditure and the procedure followed.
- 30 Within this administrative process, the position occupied by Mr Antonopoulos, as the beneficiary of the expenditure at issue, is that of a mere spectator who supports the position of the Ministry audit service which seeks to pay him his remuneration.
- 31 Only at a later stage, when a case is brought before the administrative court, will there be delivered a judgment on a dispute concerning the payment of that remuneration where the opposing parties will be Mr Antonopoulos and the administrative authority. It will fall to the administrative court to decide

whether the individual concerned is entitled to remuneration and, in that context, if necessary, to stay proceedings and send a reference for a preliminary ruling to the Court (see, by analogy, *Victoria Film*, paragraph 18).

- 32 In those circumstances, the body making the reference cannot, in this case, be regarded as acting in a judicial capacity (see, by analogy, the order of 12 January 2010 in Case C-497/08 *Amiraike Berlin* [2010] ECR I-101, paragraph 21, and of 24 March 2011 in Case C-344/09 *Bengtsson* [2011] ECR I-1999, paragraph 19 and case-law cited).
- 33 It follows from the foregoing, taking into account the whole context, that, in the circumstances which gave rise to this reference for a preliminary ruling, the Elegktiko Sinedrio does not constitute a court or tribunal within the meaning of Article 267 TFEU and, consequently, is not entitled to send a reference for a preliminary ruling to the Court.
- 34 Consequently, the reference for a preliminary ruling from the Elegktiko Sinedrio must be declared to be inadmissible.

Costs

- 35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the Elegktiko Sinedrio, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The reference for a preliminary ruling from the Elegktiko Sinedrio (Greece) made by decision of 1 July 2011 is inadmissible.

[Signatures]