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RECOMMENDATIONS

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(Resolutions, recommendations and opinions)

RECOMMENDATIONS

COURT OF JUSTICE OF THE EUROPEAN UNION

These recommendations follow on from the adoption on 25 September 2012 in Luxembourg of the new Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1). They replace the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011, p. 1) and reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling to the Court of Justice and the procedure for making such a reference.

RECOMMENDATIONS

to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2012/C 338/01)

I — GENERAL PROVISIONS

The Court's jurisdiction in preliminary rulings

1. The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.

2. Under Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute. However, since no provisions have been introduced into the Statute in that regard, the Court of Justice alone currently has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction in that regard, a number of primary law provisions exist which lay down exceptions to or temporary restrictions on that jurisdiction. This is true, in particular, of Articles 275 TFEU and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2010 C 83, p. 1) ([1]).

([1]) Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts of the Union adopted in the field of police cooperation and judicial cooperation in criminal matters before the entry into force of the Treaty of Lisbon, and which have not since been amended, are to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court or tribunal of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each of those States to determine whether the right to refer a question to the Court is to be available to all of its national courts and tribunals or is to be reserved to the courts or tribunals of last instance.

5. Since the preliminary ruling procedure is based on cooperation between the Court of Justice and the courts and tribunals of the Member States, it may be helpful, in order to ensure that that procedure is fully effective, to provide those courts and tribunals with the following recommendations.

6. While in no way binding, these recommendations are intended to supplement Title III of the Rules of Procedure of the Court of Justice (Articles 93 to 118) and to provide guidance to the courts and tribunals of the Member States as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference.

The role of the Court of Justice in the preliminary ruling procedure

7. As stated above, under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.

8. When ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw specific conclusions from that reply, if necessary by disapplying the rule of national law in question.

The decision to make a reference for a preliminary ruling

The originator of the request for a preliminary ruling

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference 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.

10. Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

References on interpretation

11. Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment.

References on determination of validity

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals **must** therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The appropriate stage at which to make a reference for a preliminary ruling

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19. It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

20. The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.

21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.

22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

— a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;

— the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ([1]);

([1]) The referring court or tribunal is requested to provide precise references for those texts and their publication, such as a page of an official journal or a specific law report, or a reference to an internet site.

— a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.

24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.

26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.

27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

28. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

The effects of the reference for a preliminary ruling on the national proceedings

29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.

Costs and legal aid

31. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

32. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the Court of Justice and the national courts and tribunals

33. The request for a preliminary ruling and the relevant documents (including, where applicable, the case file or a copy of it) are to be sent by the national court or tribunal making the reference directly to the Court of Justice. They must be sent by registered post to the Registry of the Court of Justice (Rue du Fort Niedergrünewald, L-2925 Luxembourg).

34. Until the decision containing the Court's ruling on the referring court's or tribunal's request for a preliminary ruling is served on that court or tribunal, the Court Registry will stay in contact with the referring court or tribunal, and will send it copies of the procedural documents.

35. The Court of Justice will send its ruling to the referring court or tribunal. It would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision.

II — **SPECIAL PROVISIONS IN RELATION TO URGENT REFERENCES FOR A PRELIMINARY RULING**

36. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure.

Conditions for the application of the expedited and urgent procedures

37. The Court of Justice decides whether these procedures are to be applied. Such a decision is generally taken only on a reasoned request from the referring court or tribunal. Exceptionally, the Court may, however, decide of its own motion to determine a reference for a preliminary ruling under an expedited procedure or an urgent procedure where that appears to be required by the nature or the particular circumstances of the case.

38. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an **expedited procedure** derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure ([1]).

39. The same applies *a fortiori* to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

40. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

([1]) For an insight into circumstances that have resulted in the approval or refusal of requests for the application of the accelerated procedure, made on the basis of Article 104a of the Rules of Procedure of the Court of Justice of 19 June 1991, as amended, see the orders made by the President of the Court of Justice, available at www.curia.europa.eu (the orders can be found under 'Case-law', by selecting each of the following in turn in the search form: Documents – Documents not published in the ECR – Orders – Expedited procedure).

The request for application of the expedited procedure or the urgent procedure

41. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

42. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

43. The request for the application of the expedited procedure or the urgent procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is asked to specify which of the two procedures is required in that particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court or tribunal can usefully refer to that request.

44. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court of Justice, the referring court or tribunal and the parties to the main proceedings

45. In order to expedite and facilitate communication with the referring court or tribunal and the parties before it, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is asked to state the e-mail address and any fax number which may be used by the Court of Justice, together with the e-mail addresses and any fax numbers of the representatives of the parties to the proceedings.

46. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

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