XXV MEETING OF EUROPEAN LABOUR COURT JUDGES
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PRELIMINARY RULINGS PROCEDURES

National Reports[1] – Preparatory Questionnaire for the European Labour Court Judges Meeting

General Reporter:
Judge Gerhard KURAS, Supreme Court Panel President, Austria

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[1] The views and opinions expressed therein are those of the authors and do not necessarily reflect those of the International Labour Organization.

Belgium

Report by Judge Koen MESTDAGH

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

The vast majority of disputes which have been referred to the ECtJ by the Belgian Labour Courts, including the social chamber of the Court of Cassation, didn't concern labour law but social security, in particular the Regulation 883/2004 on the coordination of social security systems and its predecessor, the Regulation 1408/71.

Most labour law disputes which have been referred to the ECtJ by the Belgian Labour Courts concern the transfer of an undertaking or business (Council Directive 2001/23/EC or its predecessor, Council Directive 77/187/EEC). A few requests for preliminary ruling regard the Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

The last decade, the social chamber of the Court of Cassation has also requested for a preliminary ruling concerning:

- the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the judgment in the famous case C-157/15, *Achbita v. G4S Secure Solutions*, 14 March 2017 was ruled on our request);
- the Rome Convention on the law applicable to contractual obligations (case C-384/10, *Voogsgeerd v. Navimer*, 15 December 2011);
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (case C-116/08, *Meerts*, 22 October 2009).

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

The first-instance and second-instance courts can also refer requests for preliminary rulings to the ECtJ and effectively do so.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

A decision to request for preliminary ruling can in itself not be challenged. However, it is possible that the judgment contains decisions on other points of discussion as well and these can be challenged. Thus it is possible that when such a decision, prior in the reasoning that lead to the request for preliminary ruling, is not upheld, the request looses its subject.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

There isn't a legal obligation to suspend the proceedings in other cases. Thus the courts may have to refer the same or a similar request to the ECtJ again. However, usually the parties involved agree to suspend the proceedings when they are informed that a request for preliminary ruling on the same issue is pending.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

No. But it's possible to find this out on the website of the ECtJ by searching in the case law search form for pending cases originating from our country.

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

There is no obligation for Belgian judges to receive such training.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

Belgian courts, including the Court of Cassation, have no competence to review and repeal or not apply rules established by Parliamentary Act, regardless if the author is the Federal Parliament or a Regional Parliament. If the constitutionality of such a rule is questioned, the courts are in principle obliged to request for a preliminary ruling of the Constitutional Court.

On the other hand, on basis of article 159 of the Belgian Constitution every judge must refuse to apply a rule established by the executive power if it is found that such a rule is unconstitutional or contrary to a higher norm. Thus, if a rule established by a collective labour agreement that has been declared generally binding by Royal Decree, is found to be discriminating or otherwise unlawful, the judge must refuse to apply this rule.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

The ordinary civil courts. The decision given in last instance can be challenged before the Court of Cassation.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

It's unclear to me what exactly is meant by this question. If the question is whether there is a tendency to find maximally that the national regulations keep within the remaining margin of discretion, the answer is no.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

I have no knowledge of specific problems on this issue.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

No.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

Rather by individual parties.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an *ex officio* obligation?

We consider that article 267 TFEU both grants the parties a right of reference, as holds an ex officio obligation for the national judge.

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

To my knowledge, no such considerations have been expressed in Belgium yet.

Finland

Report by Judge Jorma Saloheimo, President of the Labour Court

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

The Labour Court has referred one case concerning the permissibility of a collectively agreed restriction on the use of temporary agency work (C-533/13, *AKT*). Two almost identical cases have concerned the right to paid maternity leave (C-512/11 and C-513/11, *Terveys- ja sosiaalialan neuvottelujärjestö TSN ry*

et al.). Also a District Court has requested a preliminary ruling on the right to maternity pay in Case C-116/06 *Kiiski*.

The Supreme Court has referred one case concerning the information and consultation of employees under the Directive 98/59 relating to collective redundancies (Case C-44/08, *Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy***).** Two cases have dealt with the transfer of undertakings, C-172/99, *Oy Liikenne Ab* and C-396/07 *Juuri*. One case related to the health and safety requirements of machinery and the importer's duties, C-40/04 *Syuichi Yonemoto*.

> The latest reference made by the Supreme Court concerns the applicability of the Working Time Directive 2003/88/EC to workers employed as 'relief parents' in children's villages during the absence of 'foster parents'. The activity is run by a child protection association organising the care and maintenance of children taken into care by the municipalities in a family environment within children's villages. Thus far only the opinion of the Advocate General is given in this case (C-175/16 *Hälvä and others*).

A Finnish District Court has requested a preliminary ruling on the safety of machinery, C-470/03 *AMG-COS-MET.*

One more request made by a District Court can be mentioned. The request dealt with the concept of minimum pay of posted workers and certain procedural issues in case C-396/13
Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna.

2. Are requests for preliminary rulings typically referred to the CJEU only by the Supreme Court or also by first-instance and second-instance courts?

All references that are in our knowledge are mentioned above in reply 1. As can be seen, no references in labour law matters seem to have been made by the Courts of Appeal. The relatively low activity of the Labour Court is explained by the fact that the competence of the Court is confined to collective labour law disputes.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged?

No.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

There is no obligation to suspend such other cases. However, if a court learns that a request has been made by another court, it is customary to suspend the proceedings. The requests made by the Supreme Court and the Labour Court are published on the internet, as are other decisions of these courts, meaning that information of these requests is easily accessible to other courts. Sometimes informal contacts between courts reveal that similar cases requiring interpretation of EU law are pending in both courts. This enables the courts to consult and agree which of them makes the request.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

No.

6. Must every judge receive training on the procedure for referring a case to the CJEU for a preliminary ruling?

Training on the subject is sometimes included in courses arranged to judges by the Ministry of Justice, but no systematic training of this kind, targeted to every judge, is arranged.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

Every court has a competence not to apply a statute for reasons of unconstitutionality, but the competence is subject to strict limits. Section 106 of the Constitution provides for primacy of the Constitution as follows:

> If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

Pursuant to the provision, a court cannot declare that an Act or part of it is null and void. All the court can do is to refrain from the application of such an Act in an individual case. This competence has been used very rarely.

There is no constitutional court in Finland.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

This is a task entrusted to the general courts, the Supreme Court itself in the last instance.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

I think in practice the courts tend to find a way to operate within the margin of discretion left for them, whenever possible.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

No special problems. The main difficulty in some cases has been to decide whether national law can be interpreted in accordance with an CJEU ruling, without breaking the *contra legem* rule. There have also

been some rulings which are framed in such a cryptic manner that their true meaning is difficult to find out.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

There is no regularity in this matter. Rather, it depends on which of the parties is on the winning or on the losing side. As the national proceedings continue, the losing party may try to explain that the ruling is more ambiguous than it really is.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

Since the labour market parties have a strong position in general in Finland, they are also most active in obtaining a preliminary ruling.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an *ex officio* obligation?

The parties do not have such a right, they can only try to persuade the court to make a reference.

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

No such ideas have been presented in Finland, to our knowledge.

Germany

Report by Judge Regine WINTER

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

   References for a preliminary ruling from the German labour courts addressed mainly sets of issues related to European directives such as the Directive 2001/23/EC (Transfers of Undertakings), Directive 2003/88/EC (certain aspects of the organisation of working time), Directive 98/59/EC (collective redundancies) and EU anti-discrimination law.

   Some current examples:

   - Request for a preliminary ruling from the Bundesarbeitsgericht lodged on 9 February 2017 — IR v JQ (Case C-68/17): Article 4(2) of Directive 2000/78/EC, Difference of treatment on the ground of religion in the context of employment with a church;

- Request for a preliminary ruling from the Bundesarbeitsgericht lodged on 27 December 2016 — Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu (Case C-684/16): Article 7(1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Article 31(2) of the Charter, methods of exercising the right to annual leave;
- Request for a preliminary ruling from the Bundesarbeitsgericht lodged on 27 July 2016 — Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (Case C-414/16): Article 4(2) of Directive 2000/78/EC, Difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them;
- Request for a preliminary ruling from the Bundesarbeitsgericht — Case C-190/16, Fries v Lufthansa CityLine GmbH — Judgment of the ECJ 5 July 2017 — Air transport — Regulation (EU) No 1178/2011 — Holders of a pilot's licence who have attained the age of 65 prohibited from acting as pilots of aircraft engaged in commercial air transport — Validity — Charter of Fundamental Rights of the European Union — Article 15 — Freedom of occupation — Article 21 — Equal treatment — Discrimination on grounds of age — Commercial air transport — Concept
- Request for a preliminary ruling from the Bundesarbeitsgericht — Joined Cases C‑680/15 and C‑681/15, Asklepios Kliniken Langen-Seligenstadt GmbH, Asklepios Dienstleistungsgesellschaft mbH v Felja, Graf — Judgment of the ECJ 27 April 2017 — Transfer of undertakings, Article 3 of Council Directive 2001/23/EC, incorporation of clauses in individual contracts referring to collective labour agreements;
- Request for a preliminary ruling from the Bundesarbeitsgericht — Case C-670/15, Šalplachta — Judgment of the Court 26 July 2017 — Access to justice in cross-border disputes — Directive 2003/8/EC — Minimum common rules relating to legal aid granted for such disputes
- Request for a preliminary ruling from the Bundesarbeitsgericht — Case C-216/15, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH — Judgment of the ECJ 17 November 2016 — German Red Cross nursing staff association ("DRK-Schwesternschaft") - Nursing staff who do not have a contract of employment assigned to a health care institution by a not-for-profit association - Directive 2008/104/EC — Temporary agency work — Scope — Concept of 'worker' — Concept of 'economic activities'.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

This question requires a preface: Germany does not have a "Supreme Court of Justice", but five courts of last instance (Bundesgerichtshof/Federal Court of Justice, Bundesverwaltungsgericht/Federal Administrative Court, Bundesfinanzhof/Federal Finance Court, Bundesarbeitsgericht/Federal Labour Court, Bundessozialgericht/Federal Social Court) within a system of five types of courts (Ordinary courts, dealing with criminal and most civil cases; Administrative law courts; Tax law courts; Labour law courts and Social law courts), plus the Bundesverfassungsgericht/Federal Constitutional Court and the Länderverfassungsgerichte/Länder's constitutional courts.

In 2016 (different) German courts submitted in total 84 references for a preliminary ruling to the ECJ (in total 453 references have been submitted 2016 by courts of all member states) (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf).

In recent years requests for a preliminary ruling of German courts in the labour law area came often from the Federal Labour Court (for some examples see the answer to question 1) but also from first-instance Labour Courts and second-instance Land Labour Courts.

In past periods requests from first-instance Labour Courts and second-instance Land Labour Courts predominated.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged?

No, this is not possible according to German procedural rule *(see - inter alia - Germelmann u.a./Prütting, ArbGG, 9. Circulation 2017, § 45 Rn.63; Zöller, ZPO, 31. Circulation 2016, § 252 paragraph 1b)*.

However, a national procedural rule cannot call into question the discretion of national courts to submit a request to the Court of Justice for a preliminary ruling in cases where they have doubts as to the interpretation of EU law *(ECJ Judgment in Case C-416/10, 15 January 2013, Križan and Others, paragraph 67 and the case-law cited)*. Article 267 TFEU confers on national courts the power and, in certain circumstances, an obligation to make a reference to the Court once the national court forms the view, either of its own motion or at the request of the parties, that the substance of the dispute involves a question which falls within the scope of the first paragraph of that article *(ECJ Judgment in Case C-416/10, 15 January 2013, Križan and Others, paragraph 65 and the case-law cited)*. Article 267 TFEU confers this power to all national courts irrespective of their position in the national judicial system.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

Usually these proceedings will be suspended in analogous application of Paragraph 148 of the Code of civil procedure (Zivilprozessordnung; 'the ZPO')
(see Bundesarbeitsgericht/Federal Labour Court 20 May 2010 - 6 AZR 481/09 (A); Bundesgerichtshof/Federal Court of Justice 24 January 2012 – VIII ZR 236/10 –).

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

That question must be answered in the negative. There is no list at national level in Germany.

However, there are the standard possibilities, notably through the „InfoCuria" database of the ECJ (http://curia.europa.eu/juris/recherche.jsf?language=en).

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

That question too must be answered in the negative. No obligation for such training in Germany.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

The Bundesverfassungsgericht/Federal Constitutional Court is the only court that may declare statutes unconstitutional under the Grundgesetz/Constitution/Basic Law.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

Cases concerning reparation in the context of the liability of Member States for damage caused to individuals by breaches of Community law are subject to the competence of the ordinary courts in civil matters with the Bundesgerichtshof/Federal Court of Justice (see the answer to question 1) as court of last instance.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

I am not sure if I fully understand the scope of the question, but - as far as I can see - there is no such deliberate distinction made by any of the Senates of the Bundesarbeitsgericht/Federal Labour Court. This may be different in individual cases.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

Sometimes it appeared to be difficult at first glance but possible in the end.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

The scope of criticisms of decisions of the ECJ from both sides is more or less in balance with the scope of criticisms of decisions of national higher courts. Reliable information is not available.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

Information is not available.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an ex officio obligation?

Responsibility of national courts – no “right of reference” for the parties.

14. Are there considerations to improve the procedure for preliminary rulings?

a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?

c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

Such proposals are – as far as I can see – not been seriously taken into account in the German discussion.

Hungary

Report by the following judges: dr. Szilvia BORS, dr. Annamária FÜRJES, dr. Veronika GUBA, dr. Szilvia HALMOS, dr. Zoltán NÉMETH, dr. Bálint RÓZSAVÖLGYI, dr. László SZABÓ

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

Hungary joined the European Union in 2004 and since then Hungarian courts have submitted requests for preliminary rulings in 136 cases. Each year 10 to 20 requests for preliminary rulings are submitted, in 2013 20 requests, in 2014 23 requests, in 2015 14 requests and in 2016 15 requests, respectively.[1] A significant amount of the requests are related to administrative law. In relation to labour law disputes preliminary ruling proceedings were initiated in two cases:

With respect to the Nagy and others joint cases (C-488/12 to C-491/12 and C-526/12), the Debrecen Labour Court was the referring court. According to the facts of the case the previously effective laws on the legal status of government officials and civil servants provided the employer with the opportunity of unjustified dismissal, a dismissal without reasons being given.[2] In the cases before the Hungarian court the employers terminated the employment relationship of the plaintiffs in this manner. (Later on, the Constitutional Court of Hungary annulled the relevant statutory law with *ex nunc* effect, but it failed to prohibit their retrospective application in specific cases.) The Debrecen Labour Court submitted questions in relation to the interpretation of Article 30 of the Charter of Fundamental Rights of the European Union, with special respect to the followings: Could the referred provisions of the Charter be interpreted so that the employer, in the frame of a dismissal, is obliged to inform the employee in writing about the reasons of the dismissal, and/or the disregarding of the indication of the reasons by itself may result in the unlawfulness of the dismissal, or can the employer, in the course of a lawsuit, retrospectively indicate the reasons? The ECtJ in its decision established that the referred questions were not aimed at the interpretation of European Union law, thus the Court did not have jurisdiction to answer the questions.

In the case C-298/09 (RANI Slovakia s.r.o.), the Metropolitan High Court was the referring court. According to the facts of the case Hankook Tire Kft. as a user enterprise entered into a temporary work contract with RANI Slovakia s.r.o. as a temporary work agency hiring out 400 employees. Hankook Tire Kft. terminated the contract, which was not accepted by the temporary work agency and the latter requested the court to oblige the user enterprise to pay damages amounting to 1 096 608 EUR. The user enterprise referred to the followings: Hungarian legislation enables the practising of temporary employment activity exclusively by enterprises having a head office in the territory of the Member State in which the services are supplied, thus the contract is invalid and no compensation shall be requested from the user enterprise. The court's questions referred to the ECtJ were the followings: Based on the principle of freedom to provide services in the EU, can Article 59 of the Treaty of Rome and the Posting of Workers Directive[3] be interpreted in a way that the scope of user enterprises is limited to domestic enterprises, can domestic enterprises be subject to more favourable treatment

[1] Source of the figures: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf , page 108
[2] Act no. LVIII of 2010 on the Legal Status of Government Officials, section 8 (not in effect any more)
[3] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

compared to enterprises settled in other Member States during the authorisation of the activity, and/or can the public interest justify such differentiation? According to the decision of the ECtJ, the Treaty of Rome and the Posting of Workers Directive cannot be interpreted in a way that the Member State is entitled to authorise the practising of temporary employment activity only for enterprises having a head office in the territory of the Member State or to provide more favourable treatment to domestic enterprises than to enterprises having a head office in another Member State.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

Since Hungary's accession to the European Union in 2004, Hungarian courts[4] have submitted requests for preliminary rulings in 136 cases, 23 cases were referred by the Curia, 8 cases were brought by regional appellate courts and 105 cases were referred by district and high courts.[5] These statistics show that the referring courts are predominantly lower level courts.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged?

Following the decision of the ECtJ in the case C-210/06 (Cartesio Oktató és Szolgáltató Bt.), referred by a Hungarian court to the ECtJ, section 155/A of Act no. III of 1952 on the Code of Civil Procedure (hereinafter: CCP) was amended as of the 1st of January 2010. According to this amendment the court shall deliver a ruling to request the ECtJ to provide a preliminary ruling, and shall simultaneously order the stay of its proceedings. The ruling on requesting a preliminary ruling and the ruling to deny a motion for a preliminary reference may not be appealed separately. Before the amendment, such a separate appeal was possible, and the court of second instance could prevent the submission of a preliminary reference from the court of first instance to the ECtJ.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

According to Article 1 of Joint Opinion no. 3/2005 PK-KK (of 14 November 2005) of the Civil and Administrative Departments of the Supreme Court[6], if a question of law, based on facts already established in a legal dispute, arises in the subject matter of which the preliminary ruling of the ECtJ has already been requested in another legal dispute based on identical facts, the court may order the stay of its proceeding until the completion of the ECtJ's proceeding, provided that the preliminary ruling may have a substantial impact on the outcome of the case.

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[4] The Hungarian judiciary includes four levels:
1st level: district courts (110)
2nd level: high courts (20)
3rd level: regional appellate courts (5)
4th level: Curia (1)
The labour and administrative judiciary is separated from the ordinary court system at the lowest level. This branch includes the following levels:
1st level: administrative and labour courts (20)
2nd level: high courts (20)
3rd level: Curia (1)
See more about the structure of the Hungarian judicial system under Question 7.

[5] Source of the figures: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf, page 110

[6] The opinions of the Curia's departments are not binding on the courts, however, they have a strong guiding impact on the case-law of lower courts.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

The most comprehensive list can, of course, be found easily on the ECtJ's website (https://curia.europa.eu/).

Furthermore, Hungarian judges have the possibility to access the central intranet site of the judiciary, where, among several pieces of information of international relevance, a list of the referred Hungarian cases as well as their outcomes (judgement or order of the ECtJ) can be consulted.

On the website of the Ministry of Justice, judges can check the pending Hungarian preliminary references and their short description as well (http://eujog.im.kormany.hu/europai-birosagi-ugyek, in Hungarian). On the 1st of April 2017 there were 18 pending cases referred by Hungarian courts to the ECtJ.

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

The National Office for the Judiciary (hereinafter: NOJ) was established in 2012 as the central administrative organ of the judicial system, which operates as an entity independent from the government. The activity of the President of the NOJ is controlled by the National Judicial Council. The Hungarian Academy of Justice, as the NOJ's training centre, plays an important role in the training of the members of the judiciary with the aim of extending their professional knowledge, and organises numerous training sessions in connection with EU law and the preliminary ruling procedure as well.

Further, Hungarian judges and judicial staff members have the opportunity to apply for a wide range of study visits and scholarship programmes co-ordinated by the NOJ, occasionally in co-operation with prominent training providers, such as the European Academy of Law and the European Judicial Training Network, in order to broaden their knowledge in EU law.

The Network of Judicial Advisors on European Law also serves the better understanding of the European Union *acquis*. Based on their assignment as a result of calls for applications, the members of the Network (judges as judicial advisors) offer training courses and are engaged in consulting and providing the Hungarian judiciary's websites with European Union content. The purpose of this Network is to provide effective assistance to Hungarian courts in the proper application of EU law. Relying on their professional knowledge, judicial advisors help their fellow judges in applying EU law, and they inform the members of the judiciary about the case-law of the ECtJ and of the European Court of Human Rights. They can provide direct, tailor-made help to judges, even in the case of the drafting of a preliminary reference to the ECtJ in an individual dispute as well.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

The administrative and labour courts[7] have no competence to review and repeal statutes for reasons of unconstitutionality. Section 25 of Act no. CLI of 2011 on the Constitutional Court empowers all judges, irrespective of the level and status of the court, to initiate the *ex-post* review of the constitutionality of a specific statutory law before the Constitutional Court in the following way. If a judge, in the course of the adjudication of a concrete case, is bound to apply a legal regulation that (s)he perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, (s)he shall suspend the judicial proceedings and, in accordance with the Fundamental Law, shall submit a petition to request the Constitutional Court to declare that the impugned legal regulation or provision is contrary to the Fundamental Law, and/or to exclude the application of the legal regulation contrary to the Fundamental Law.

According to section 155/B of the CCP, the court's action may be requested by the party or the intervener who alleges that any legislation applicable to his case in progress is contrary to the Fundamental Law or to an international treaty. The ruling on initiating the proceedings of the Constitutional Court and the refusal of a request to initiate the proceedings of the Constitutional Court may not be contested separately.

If the Constitutional Court declares that a legal regulation in force or any provision thereof is contrary to the Fundamental Law, it shall annul the legal regulation or provision in whole or in part.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

In Hungary, the high courts have competence to decide on claims for state liability which are based on an alleged violation of EU law caused by a decision of the Curia.[8] According to section 6:549 of Act no. V on the Civil Code, liability for damages caused within the actions of courts shall be established only if the damage cannot be abated by common remedies.

According to the relevant provisions of the CCP,[9] the Curia examines petitions for the review of final judgements as an extraordinary remedy. Thus it may happen (as it happened in a case in 2013) that the Curia has to render a final decision in a case concerning the alleged violation of EU law caused by a decision of the Curia itself. In the aforementioned case, the Curia upheld the decisions of the lower courts, and the claim for damages was rejected, because the lower courts had applied EU law in a proper way. The Curia suggested that the claim for damages cannot be used as a repeated remedy in respect of the previous judgement and the courts' final decisions cannot be disputed in this way.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

[7] In Hungary, individual labour disputes are processed at first instance by one of the 20 administrative and labour courts, located in each county and in the capital. Appeals against their decisions can be lodged with the high courts located similarly in each county and in the capital. A petition for judicial review against the final decision of a high court can be submitted to the Curia, which is the highest judicial forum in Hungary. See more about the structure of the Hungarian judicial system under Question 2.
[8] See in detail on the judicial hierarchy under Question 2.
[9] CCP, sections 270 ff.

Hungarian domestic legislation in the field of the non-discrimination of workers is, in a number of aspects, more favourable to employees than the relevant EU directives. For example, by virtue of the provisions on the burden of proof under Hungarian equality law, a *prima facie* discrimination can be established if the plaintiff makes presumable that (s)he had a protected characteristic at the time of the commitment of the discriminatory act, and that (s)he suffered any disadvantage. This is sufficient to turn the burden of proof to the defendant (employer).[10] Since the domestic law is more permissive for employees than EU law, Hungarian courts can apply it without concerns about its compliance with EU law.

Nevertheless, there are other norms of domestic non-discrimination law, the compliance of which with the relevant EU law is more disputable (e. g. the grounds of justification of discrimination). However, Hungarian labour judges have so far not initiated any preliminary ruling proceeding in the field of non-discrimination law. This indicates that, in the field of the non-discrimination regulation in respect of employment relationships, Hungarian courts tend to decide questions by themselves, even if the case has EU law relevance as well.

In the field of the right to freedom of movement/establishment, Hungarian courts directly apply the Brussels I bis Regulation (1215/2012/EC) and the Rome I Regulation (539/2008/EC), so the question of conflict of laws between the national and EU law does not arise. The Posting of Workers Directive[11] of the EU is implemented in national labour law. However, in this field, Hungarian courts have already made a few references for a preliminary ruling to the ECtJ. In a specific case, the interpretation of EU directives on the practice of the profession of lawyers was unclear.[12] The Metropolitan High Court, proceeding at first instance, decided the case based on its own interpretation of the relevant EU law. Upon the appeal of the plaintiff against the decision of the Metropolitan High Court, the Metropolitan Appellate Court decided that the interpretation of the relevant EU directives requires the preliminary ruling of the ECtJ. This case indicates that it is not always obvious for the courts to decide whether there is room for a preliminary ruling proceeding, or the national court may interpret EU law by itself.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

If the ECtJ's judgement reveals the incompliance of the Hungarian national legislation with EU law, the decision is usually followed by an amendment of the domestic law. It happened for example in consequence of the ECtJ's judgement delivered in the RANI-case referred to in detail under Question 1. The relevant sections of Act no. XXII of 1992 on the Labour Code (the previous Labour Code, hereinafter: 1992 LC) had to be disregarded with respect to their incompliance with the PWD. This resulted in the appropriate amendment of the national law (section 193/D of the 2012 Labour Code).

There are more difficulties in the practice if the relevant national law is not amended, albeit its incompliance with EU law has been established. In the Tyco case (case C-266/14) the ECtJ held that the travelling time between home and the first and last places of work of those who have no fixed working place counts as working time, but this does not necessarily entitle them to extra pay. The Hungarian statutory law on working time still stipulates that working time shall not cover travel time from the

[10] Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, section 19
[11] Referred to under Question 1.
[12] Case C-359/09 (D. C. Ebert v. Budapesti Ügyvédi Kamara), judgement of the Court delivered on 3 February 2011

employee's home or place of residence to the place where work is in fact carried out and from the place of work to the employee's home or place of residence.[13] Although the national courts wish to implement the ruling of the ECtJ in the lawsuits, given the fact that the ECtJ's judgement does not concern the question of remuneration for the travelling time counting as working time, it is not clear how the amount of the wage for these times is to be calculated.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

Both employers and trade unions are entitled to request the court to initiate a preliminary ruling procedure. Due to the large and multilayered publicity of the judgments given in preliminary ruling proceedings, employers and trade unions can study their content without difficulties.

However, in absence of sufficient depth of information, the outcome of the preliminary ruling procedure is incorrectly interpreted, generalized by providing workers and trade union members with false or misleading information. For example, an organisation representing the interests of employees in the transportation branch displayed an information sheet on its website that, according to the Tyco-judgement of the ECtJ, the travelling time of all workers in the transportation branch shall be counted as working time.[14]

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

In the experience of the administrative and labour courts, collective partners are not especially active in formulating questions to refer and initiating preliminary reference proceedings.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely *an ex officio* obligation?

In accordance with Article 267 of the TFEU, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone.[15]

14. Are there considerations to improve the procedure for preliminary rulings?

From the 1st of January 2018, a new Code of Civil Procedure will be introduced. The new code is the outcome of a codification process of a few years with the involvement of the representatives of all legal professions (academic persons, judges, attorneys etc.). The national civil procedural aspects of the preliminary ruling procedure have not been subject to major changes. Hence, the main provisions on the Hungarian procedural phases of preliminary reference proceedings will presumably not be amended in the near future.

a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?

[13] LC, section 86, subsection (3)
[14] http://onlinetachograf.eu/kezdolap/dontott-az-eu-birosaga-az-utazasi-ido-is-a-munkaido-resze/ (in Hungarian)
[15] See in detail on the procedure of the reference under Question 3.

The decision of a judge to make a reference for a preliminary ruling to the ECtJ is not at all restricted by the parties' claims or preferences. The new Code of Civil Procedure will make no difference in that regard either.

b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?

Hungarian judges are not required to appear at the hearings of the ECtJ. It is not common that they participate in these hearings. The new Code of Civil Procedure introduces no new provisions in that aspect.

c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

The parties are already entitled to deliver their remarks and opinions on the referred question either in writing or orally at the hearings.

Ireland

Report by Judge Kevin Foley

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

The Irish Labour Court has made four references to the CJEU for a preliminary ruling. They are: -

Case C-243/95 *Hill and Stapleton v Revenue Commissioners*
ECLI:EU:C:1998:298
This case involved issues relating to equal pay as between men and women.

Case C-191/03 *North Western Health Board v McKenna*
ECLI:EU:C:2005:513
This case involved a dispute concerning the right to payments from the employer during periods of absence caused by pregnancy related illness.

Case 268/06 *IMPACT v Minister for Agriculture* ECLI:EU:C:2008:223

This case related to various issues of interpretation in relation to the Framework Agreement on Working Time given effect by Directive 1999/70/EC. It also involved questions concerning the application of the European Law Principles of Equivalence and Effectiveness.

C-443/15 Parris v Trinity College Dublin ECLI:EU:C:2016:897

This case involved questions relating to discrimination in relation to occupational pensions on grounds of age and sexual orientation.

The Irish High Court also made a reference in an employment related case:
C-427/11 Kenny and others v Minister for Justice Equality and Law Reform ECLI:EU:C:2013:122

This case involved a dispute concerning equal pay as between men and women.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

The majority of references from Ireland in employment related cases have come from the Labour Court which is the second instance Court. An appeal lies from the Labour Court to the High Court (and not beyond) but is confined to a point of law. The reference in *Kenny,* referred to above, arose from such an appeal from a decision of the Labour Court.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

Yes. Under the Irish Constitution all decisions of inferior courts (including the Labour Court) can be challenged by way of judicial review by the High Court. However, the grounds upon which such a challenge could be brought are narrow and no such challenge has ever been taken against a decision to make a reference.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

Where the outcome of a subsequent case is likely to turn on the interpretation of European Law that forms the subject matter of a reference, the case would be stayed until the CJEU gives its preliminary ruling. That occurred following the reference in *Hill and Stapleton* where a number of cases were subsequently taken based on similar facts and raising the same questions of law. These cases were stayed, by consent, until the Court of Justice gave judgment.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

Yes. They are reported in a number of law reports which all available to members of all courts

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

No. There is no mandatory requirement for judges to undergo training on the process of referral. The Labour Court is currently providing training to its members in that regard.

7. Do abour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

Under the Irish Constitution questions concerning the validity of laws, having regard to the provisions of the Constitution, are reserved to the High Court at first instance and on appeal to the Court of Appeal and the Supreme Court. The only exception to this rule is where the President of Ireland seeks a ruling on the Constitutionality of a proposed law. In such circumstances the question is referred directly to the Supreme Court.

Statutory Courts, such as the Labour Court, The District Court and the Circuit Court cannot entertain questions concerning the Constitutionality of laws.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

Matters relating to State liability for failure to properly apply European Union law are reserved to the High Court at first instance.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

The Doctrine of Supremacy of EU law is generally understood in this jurisdiction as requiring the application of EU law over conflicting provisions of national law. This is achieved by applying the principle of conforming interpretation where possible and where this is not possible by the application of the principle of direct effect where that principle applies.

In this context, a conflict between EU law and national law would only arise where the State exceeds the margin of discretion which it is allowed in the implementation of non-directly effective EU law. It is only in that context that this question could arise.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

No such difficulties has been encountered in this jurisdiction.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

Rarely do both employers and worker representative have a difficulty.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

In three of the four cases referred to at question 1, the reference was requested by a trade union representing affected workers. In the fourth case the reference was requested by an individual litigant.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an ex officio obligation?

The decision to refer a case for a preliminary ruling is reserved to the court seized of the case. While it is common practice to consult the parties, and to allow them to make submissions on whether a reference should be made and the questions that might be referred, the decision on a reference is reserved solely to the Court.

14. Are there considerations to improve the procedure for preliminary rulings?

a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

There are no plans to address the matters referred to a and b above. With regard to c, it is the practice of this court, in making a reference, to express its opinion on the submissions made by the parties in the main proceedings and to indicate its views on the questions referred for a ruling by the Court of Justice.

Israel

Report by Judge Hon. Judge Yigal Plitman, President of the Israeli National Labour Court

Israel is not a member of the EU, and therefore the procedure of reference for a preliminary ruling by the European Union Court of Justice does not apply.

The Israeli legal system is a mixed system, based mainly on the Anglo-American system. Therefore, Israeli Labour Courts of first or second instance, i.e., Regional Labour Courts or the National Labour Court, do not refer questions regarding the interpretation of relevant laws to their superior courts (to the National Labour Court- if the dispute is being litigated at the Regional Labour Courts; or to the Supreme Court sitting as the High Court of Justice- if the case is heard at the National Labour Court). Instead, the first instance court that hears the case has to determine on its own both the factual and the legal matters. Obviously, in doing so, the relevant court will adhere to the superior courts' previous rulings and precedents on that paticular legal matter. It should be noted, though, that the decision of the court of first instance (i.e., the Regional Labour Court) may be appealed to the higher instance (the National Labour Court). If the decision is appealed, the higher instance court has the power to either adopt or overturn the lower court's interpretation of law.

As an exception to this general rule, it should be mentioned that on several occasions the Regional Labour Courts do suspend hearings or handing down their decisions on issues that are still being

litigated at the National Labour Court- or the Supreme Court sitting as the High Court of Justice- in order to verify that their decisions will apply the latest interpretation of the law. Recently, for example, the Regional Labour Courts suspended all hearings in cases dealing with the issue of entitlement to social security allowance to guaranty minimal income to people who own a private car, until the National Labout Court determined under which circumstances such ownership will not deprive the aforementioned social security allowance.

Lastly, in refernce to questio 7, the israeli labour courts have competences to review and repeal or not apply statutes for reasons of unconstitutionality. Israel does not have a specific constitutional court to which this competence is reserved.

Italy

Report by Judge Filippo Curcuruto

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

Fixed-term contracts, mainly in the public sector; collective dismissal cases; transfer of undertaking cases; discrimination cases.

2. Are requests for preliminary rulings typically referred to the ECJ only by the Supreme Court or also by first-instance and second-instance courts?

The opposite is the case. The Supreme Court rarely asks for a preliminary ruling, although in this last period it has been addressing the ECJ more frequently than in the past.

The majority of them are being referred to the ECJ by first-instance labour judges and to a lesser extent by the Appeal Courts.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

NO. The request for a preliminary ruling automatically suspends the proceeding until the decision of the ECJ and the suspension cannot be challenged.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

NO. It is up to the other judges to decide whether or not to ask for a preliminary ruling themselves. If they decide not to address the ECJ they need to keep the procedure pending before them.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

Not to my knowledge. In any cases there aren't official lists, except for the preliminary ruling requests referred by the Supreme Court.

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

The judiciary training center ("Scuola Superiore della Magistratura") regularly organises seminars in this area. It is up to each judge to decide whether or not to take part in them. Of course the participation to the seminars is strongly encouraged.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

The judge doesn't have the power not to apply the internal law even if he believes that it infringes the Constitution. In this case he needs to address the Constitutional Court which is exclusively competent in this respect.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

There aren't special legal provisions on the matter. Therefore the Tribunal first and the Court of appeal as a second instance judges are competent. Of course the case could be brought before the Supreme court as the last instance judge.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

NO.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

Generally speaking the answer is no.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

See answer n. 10

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

By both of them.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an *ex officio* obligation?

It is an "ex officio" obligation. Parties of course may request the judge to ask for a preliminary ruling and may submit to him their opinion on the issue. But the judge may ask for a p.r. even if none of the parties has requested him to do so.

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

I'm not in favor of the solutions under a) and b).

For the letter c) see n. 13

Norway

Report by Judges Jakob Wahl, Tron Løkken Sundet and Marit B. Frogner

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

A short note on the EEA Agreement

Norway is not a member of the EU, but one of three EFTA states (Norway, Iceland and Liechtenstein) parties to the Agreement on the European Economic Area (EEA Agreement) between these EFTA states and the European Union and its member states. The EEA Agreement ensures that Norway takes part in the EU Single Market with access to the benefits of the free movements of persons, goods, services and capital.

One aspect of the EEA Agreement from the Norwegian perspective was the ability to retain sovereignty within the agreement. In order for EEA law to be applicable in Norwegian law, EEA law needs to be transformed into Norwegian legislation. EEA law that has not been transformed into Norwegian law is not as such applicable by Norwegian courts, due to the dualistic approach to international law. In other words: Even though the EEA Agreement is based on principles of homogeneity, reciprocity and loyal cooperation between the national courts and the EFTA Court, novel EU legislation does not have direct effect or primacy as part of the Norwegian legal system.

The principle of homogeneity is central to the EEA Agreement. To maintain homogeneity, the EEA Agreement is continuously updated and amended to ensure that the legislation of the EEA Agreement is in line with EU Single Market legislation, and this legislation is subsequently incorporated into Norwegian law. Protocol 35 to the EEA Agreement states that EEA law that is incorporated, must prevail

in cases of conflict between implemented EEA rules and other statutory provisions. The legal basis for this "primacy" in Norwegian law is purely statutory, and not stated in the constitution. It does not prevent the parliament from introducing legislation setting aside implemented EEA law, although this would be a breach of the EEA Agreement.

Novel EU legislation which is deemed EEA relevant is continuously added to the EEA Agreement through decisions of the EEA Joint Committee. Norway, Iceland and Liechtenstein do not have formal access to the EU decision-making process, but they are able to give input during the preparatory phase, when the Commission draws up proposals for new legislation which may be incorporated into the EEA Agreement.

In addition to the fundamental freedoms, there are regulations on social policy in the EEA Agreement part V chapter 1 arts 66–71. The relevant regulations on social policy are incorporated into the EEA Agreement through Annex XVIII. One notable area of EU law is not fully implemented in the EEA Agreement: The equal treatment directives (Dir. 2000/43/EC and Dir. 2000/78/EC) are not incorporated into the EEA Agreement.

The EFTA Court

The Surveillance and Court Agreement established an independent surveillance authority, the EFTA Surveillance Authority, and a court, the EFTA Court, to ensure that the Norwegian authorities and Norwegian companies comply with the EEA Agreement. These institutions are basically the EFTA equivalents to the European Commission and the Court of Justice.
The EFTA Court deals with direct actions and preliminary references (cf "preliminary rulings" in EU law). The court only issues rulings in direct actions, cf The Surveillance and Court Agreement art. 34 which states:

> "The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.
> Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.
> An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law."

The EFTA Court issues "advisory opinions" on the interpretation of the EEA Agreement. The decisions by the EFTA Court are called "judgements" like the decisions by the CJEU, but the legal status of the decisions by the EFTA Court and the CJEU are different. Also, the national court "may" request an opinion. There is some discussion as to whether the national courts under the EEA Agreement are under an obligation to refer questions to the EFTA Court. The prevailing view is that there is no such obligation.

Labour law and the EFTA Court

The main part of the EEA Agreement mirrors the substantive provisions of the EC Treaty as it stood at the time of the negotiations on the EEA Agreement in 1990–1992. In addition to the different wording of the provisions, there is an increased contextual difference between EU law and EEA law; for example,

the EEA Agreement has no Charter on fundamental rights and does not refer to the EU Charter. This has been ameliated by the EFTA Court's reference to fundamental rights as part of the "unwritten principles of EEA law". The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see i.a. the EFTA Court's opinion in E-14/15 Holship).

According to the EEA Agreement art. 6, provisions in the EEA Agreement that are identical to the provisions in the EU, "shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement". The Surveillance and Court Agreement art. 3.2 also states that when interpreting the EEA Agreement, the EFTA Court shall pay "due account" to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement.

As we mentioned earlier, the principle of homogeneity is an important element in the EEA Agreement, and the EFTA Court interprets the corresponding provisions of the EEA agreement in the light of the new EU rules (and case law) where this is required. The concept of "due account" of subsequent development in EU law has led to a dynamic approach from the EFTA Court. For example, in case E-8/*00* LO, and assessing whether collective agreements were exempt from the prohibition on cartels in the EEA Agreement art 53 (cf TEUF art 101),the EFTA Court stated with reference to the aim of homogeneity and the preamble in the EEA Agreement that the reasoning behind the limits on the application of TEUF art 101 as laid out in the CJEUs decision in case C-67/96 *Albany,* also could be applied within the EEA Agreement.

Subsequent case law from the EFTA court is in line with this approach. Thus, labour law is basically identical in substance in the EEA and EU. In cases where there are relevant decisions from the Court of Justice, they will be taken into account. Where there is no previous case law from the Court of Justice, the EFTA Court must make its own assessment. As the EFTA Court consists of only three judges, and with no Advocat Generals, there is a risk of judicial conflict if the Court of Justice in subsequent case law reaches a different conclusion, see answers to question 10 below.

Of the EFTA Court's case law in the period 1994–2016, about 16 cases are related to social policy and labour law. Among these are several opinions on the directive on transfer of undertakings, one on the working time directive, one on the directive on posting of workers and two on the relationship between freedom of establishment, competition law and collective action.

The low number of requests to the EFTA Court must take in to account that Norwegian courts generally apply case law from the Court of Justice when interpreting EEA law. If there is relevant case law from the Court of Justice, the national court may decide that an advisory opinion from the EFTA Court is unnecessary.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

Requests for advisory opinions are most often made by first or second instance courts. Requests for advisory opinions have been made by Norwegian Courts in a six cases (including cases on labour law).

The Norwegian Labour Court has made one request for an advisory opinion on competition law and collective agreements.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

No.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

In other proceedings, the courts may decide to suspend the case either of its own motion or on application by the parties.

The importance of case law from the Court of Justice is illustrated by a case concerning age discrimination (where the EFTA cannot issue advisory proceedings, cf. answers to question 1 above). The Norwegian statute is based on the directive even though the directive falls outside the scope of the EEA Agreement. The preparatory works stated that the provision should be interpreted in light of the directive. Proceedings before the Supreme Court were suspended awaiting the Court of Justice's decision in the Prigge case (C-447/09), because the court found that the decision in Prigge could have a bearing on the assessment to be made in the case pending before the court.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

No.

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

There are general introductory courses for newly appointed judges in the general courts, but no specialized training for referrals for advisory opinions.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

There is no constitutional court in Norway. Any court, be it the Norwegian Labour Court or any of the general courts, may review the constitutionality of any statute the court is to apply in a case.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

Claims for state liability are decided by the general courts, ultimately by the Supreme Court. There are no special procedural rules on claims based on state liability for violation of EEA law.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between

the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

Within the context of the EEA Agreement, it should be noted that the EFTA Court only issues "advisory opinions", see comments on question 1 above. The decisions are not formally binding for national courts. The Norwegian Supreme Court has stated that the courts must make an independent assessment on the interpretation of EEA law, but must attach "significant importance" to the opinion of the EFTA Court. In other words, there is here in principle an opening for deviating from the opinion of the EFTA Court. However, such an approach may seem at odds with the principle of loyalty and homogeneity that the EEA Agreement is based on.

Example: Interpreting the Posting of Workers Directive

This approach to advisory opinions has led to the Supreme Court indicating a willingness to deviate from the opinions of EFTA Court when interpreting the posting of workers directive. In 2013, the Norwegian Supreme Court considered the validity of several benefits that applied according to regulations passed according to the Act on General Application of Collective Agreements. The Tariff Board had in 2008 passed regulations concerning partial application of the Engineering Industry's collective agreement for the maritime construction industry 2008–2010. The regulations included provisions relating to working hours, minimum hourly wage, overtime pay, out-of-town allowance and compensation for expenses incurred for travel, board and lodging. Eight maritime construction companies joined by the Confederation of Norwegian Enterprise (NHO) and one of its member organisations, The Federation of Norwegian Industries (NI), claimed that the regulations were invalid, mainly on the ground that it was not compatible with the Posting of Workers Directive and EEA art. 36 (cf. art. 56 TFEU) on free movement of services. The Court of appeal had requested an advisory opinion from the EFTA Court. The Supreme Court dismissed the employer's appeal and disagreed with the EFTA Court's interpretation of the Directive. The out-of-town allowance constituted about 20 per cent of the hourly rate. The EFTA-court said, inter alia, that the allowance should be considered in relation to art. 36. The Supreme Court noted in an obiter dictum, that it found it "difficult to reconcile the EFTA Court's view that an examination under art. 36 is also required with the case law of the Court of Justice of the European Union and the purpose of the Directive". The court did not form a final opinion on this as it found it evident that out-of-town allowance was compatible with the provision. The Supreme Court made similar comments on the EFTA Courts opinion on whether expenses for travel, board and lodging was covered by the directive's concept of "pay". There was much discussion of the Supreme Court's decision, and in recent cases the Supreme Court has been reluctant to make an independent assessment of EEA law, and instead closely followed the opinion of the EFTA Court, even in cases where it was not clear if the opinion of the EFTA Court was compatible with case law from the Court of Justice.

Example: Collective agreements and competition law

One area of discussion in Norway is the relationship between the activities of trade unions, including their right to take industrial action, and the market freedoms, including competition law. With the cases E-8/00 LO, E-2/11 STX and E-14/15 Holship before both the EFTA Court and Norwegian courts, the clash between fundamental rights and market freedoms became a part of the discussion in the EEA. An aspect of the relationship between labour law and market law, is the principle that competition law does not apply to terms and conditions of work based on collective agreements. If an agreement is entered into following collective bargaining between employers and employees, and the agreement

pursues the objective of improving conditions of work and employment, competition law will not apply. The scope of this "immunity" for collective agreements is of particular importance in the Nordic countries. It has been argued in cases before the Norwegian courts that the EFTA Court has gone further in applying competition law to collective agreements than the Court of Justice. The Norwegian Labour Court has been doubtful as to whether the EFTA Court's interpretation of EEA arts. 53 and 54 is fully in line with case law from the Court of Justice. In Case E-14/15 Holship, the trade union argued unsuccessfully before the Norwegian Supreme Court (sitting as full court) that the EFTA Court's advisory opinion should be disregarded when interpreting arts. 53 and 54. The majority of 10 justices decided the case on a different legal basis (Art. 31 on the freedom of establishment) and just referred in passing to the EFTA Court's opinion on arts. 53 and 54. The minority of seven justices, on the other hand, deviated from the EFTA Court's opinion because they found the opinion to be based on factual errors. Thus, neither the majority nor the minority dealt with the suggestion that the EFTA Court's understanding of the immunity for collective agreements was too strict, presumably leaving the matter open for further discussion.

Example: Interpreting the Working Time Directive

A case concerning the Working Time directive also |raises the question whether the EFTA Court's approach is consistent with case law from the Court of Justice. The M'Bye case (E-5/15) dealt with working time in cohabitant care arrangements. Therapists at the clinic "Stiftelsen Fossumkollektivet" for the treatment of young people with alcohol or drug problems, had a working time based on '3 days work, 7 days rest, 4 days work, 7 days rest' (3-7-4-7), amounting on average to 56 working hours per week. Due to financial losses, and purely for this reason, the clinic proposed changing the working time to a 7-7-rotation, which could amount to a weekly working time of 84 hours. Under Norwegian law, there was a temporary regulation on working time at cohabitant care institutions according to which employees may consent to a weekly working time of more than 48 hours, and more than 60 hours if the employee has housing in or attached to the clinic. Employees who do not have housing in or near the clinic, may freely revoke the consent. The change in the working time arrangement at the Fossumkollektivet clinic made it possible to reduce the number of therapists necessary for each team. The employees were asked to consent to this change, and those who did not were given notice, combined with an offer of re-hiring based on the new terms and conditions on working time.

Three questions were raised before the EFTA Court: 1) Is a working time amounting to on average 84 hours per week compatible with the directive? 2) Is a provision in national law that declares that a consent to work more than 60 hours per week cannot be revoked, compatible with the directive?, and 3) Is a notice of dismissal, given after the worker has declined to consent to a working time arrangement of more than 48 hours over a seven day period, combined with an offer of re-hiring on new terms, a detriment within the meaning of the directive art. 22(1)(b)?

The EFTA Court found all this to be compatible with the directive. The EFTA Court noted the need to protect the health and safety of the worker, but added that as long as these requirements are fulfilled, the parties must be able to exercise their right to freedom of contract and the need to strike a fair balance between the interests of workers and employers. The EFTA Court also noted that the directive aims for flexibility in the application of certain provisions, and acknowledges the interests of the employer. According to art. 17(2), if there is a derogation, the workers concerned are to be afforded "equivalent periods of compensatory rest", or "in exceptional cases … appropriate protection". The Court of Justice has underlined that an exception from the right to compensatory rest is only allowed

under “absolutely exceptional” circumstances. The EFTA Court’s opinion adds an element of flexibility when implementing an extraordinary working time regime due to economic reasons, and not connected to the work or care itself. This interpretation is hard to reconcile with the derogation clauses as narrow exceptions from the minimum requirements.

The same goes for the EFTA Court’s assessment of the prohibition in art. 17(1)(b). A worker who chooses not to consent to derogation from Art. 6 cannot be subjected to any detriment because of this. The special circumstances in this case was that the economic reasons for introducing a new working time arrangement were basically the same as those given for the dismissal of workers who did not consent. It could be argued that when a notice was given in combination with an offer of re-hiring, it could dissuade the worker from exercising his or her minimum rights. Even though the need for consent and the reasons for notice were interconnected, the EFTA Court found that there was no detriment. When the case was heard by the Court of appeal, the workers argued that the national court should make an independent assessment of the case law from the Court of Justice and reject the EFTA Court’s opinion. The Court of appeal limited itself to declaring that it could not see any faults with the EFTA Court’s reasoning. The Appeal Court’s approach is more in line with the majority’s approach in the Norwegian Supreme Court’s decision in the Holship case.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

See answers to question 9.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

See answers to question 9.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

N/A.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an ex officio obligation?

The parties have no right of reference; this is to be determined by the court, but the parties request for an advisory opinion will be taken

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

As mentioned in our reply to question 1, the courts are not under an obligation to request an advisory opinion from the EFTA Court. There has been a discussion on whether Norwegian courts, and especially the Norwegian Supreme Court, have been to reluctant to request advisory opinions.

Slovenia

Report by Judge Marjana Lubinič

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

Until now, the Supreme Court of the Republic of Slovenia (Labour and social law division) hasn't referred any issue to the ECJ for preliminary ruling.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

The requests for preliminary rulings are referred to ECJ also by the courts of first instance (until now only by the Administrative Court of first instance) and by the appellate (second-instance) courts.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

No. The decision to make a reference to the Court of Justice for a preliminary ruling cannot be challenged. The proceeding in the case is suspended (stayed) and no legal remedy is allowed against the decision of suspension.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

The suspension of proceedings (with the formal act of suspension) in other cases with the same or similar question is not provided by law. But it is reasonable for a judge to postpone the proceedings.

However if that specific case is conducted as a “sample procedure”, other cases which deal with the same or similar actual state and the same legal foundation (against the same complainant) are suspended too.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

Yes, there is a list available on the intranet of Slovenian courts.

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

No. It is a matter of personal interest.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

Labour and social act provides that decision-making on the accordance of collective agreements with each other and on the compliance of collective agreements with the statute is within the jurisdiction of labour courts. Considering that judges are bound by the Constitution and statute when performing the judicial office (see explanation bellow), the judicial review of the conformity of collective agreements with the statute simultaneously includes the review of their conformity with the Constitution.

According to Article 125 of the Slovenian Constitution, the judges, in their decision-making process, are bound by the constitution and statute, whereby the word statute in this context stands for the acts adopted by the parliament. Therefore, labour courts (as well as other courts) are able not to apply regulations, which are subordinate to statutes and are normally adopted by different administrative bodies, for reasons of unconstitutionality (exceptio illegalis). However if the labour court establishes that a statute which has to be used in the specific case is unconstitutional, it has to suspend the proceedings in that case and commence the proceedings for the review of the constitutionality of the statute before the Constitutional Court.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

The civil courts.

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

No.

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

Knowing the decisions of ECJ I believe, that the national courts in some cases have difficulties in applying the results of preliminary rulings. It seems that the answer given by the ECJ is not always clear and straightforward.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

Yes.

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

Mostly by individual parties.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an ex officio obligation?

A referral to the Court of Justice may be requested by one of the parties involved in the dispute, but the judge (the court) is not bound by such a request.

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

C. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure.

Spain

Report by Judge María Milagros Calvo Ibarlucea

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

Employers subrogation when consecutive contractors dealing with a thidr partie and questions referring to rerirement pensions and other social benefits.

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

Yes they are also.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

Yes it can be

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

Yes, they are

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

No they are not

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

Not needed.

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

No, they have not, the competence is reserved to the specific constitutional court.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

There is a court , that makes parte of the Supreme Court , formed by representatives of the chambers of the Supreme court that have competence on any claim on wrong decisions from the Court , under some special requirements .

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?

The only margin of distintction is that one taht allows nantiona law improving EU law. There is the example abour pregnancy that in spanish law makes radically unlawful the dismissal even when there is not knowledge about the prenancy on the side of the employer

10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

Yes there are

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?

Yes

12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

Yes they are

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an *ex officio* obligation?

It is granted.

14. Are there considerations to improve the procedure for preliminary rulings?

No

a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?
b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?
c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

Sweden

Report by Judge Karin Renman

1. What are the main issues in labour-law disputes which are referred to the European Court of Justice (ECtJ) for preliminary rulings?

The Labor Court has obtained a preliminary ruling from the European Court of Justice in four cases. The first was a target of salary comparison under the Equal Pay Directive (75/117/EEC). The second, so-called Laval case, which concerned the interpretation of the rules on freedom of movement for services and on the posting of workers when industrial actions were taken. The third case, Fonnship, concerned the applicability of EEA rules on the free movement of services in connection with industrial actions against a Panama-flagged vessel owned by a Norwegian company. The fourth case concerns the calculation of employment time when calculating the length of notice period when applying the transfers of undertakings directive (2001/23/EC).

2. Are requests for preliminary rulings typically referred to the ECtJ only by the Supreme Court or also by first-instance and second-instance courts?

The Labour court is the final instance and are therefore obliged to request a preliminary ruling if the EU law is not clear. It is therefore primarily the Labor Court which has asked preliminary rulings from the European Court of Justice. Courts of the first instance can also do so, but it's not common.

3. Can a decision to request for preliminary ruling by a first-instance or second-instance court be challenged ?

No, not a decision by the Labor Court. A decision by the district court to obtain a preliminary ruling may be appealed to the Labor Court. Due to the Case C-210/06 (Cartesio Oktató és Szolgáltató bt), the Labor Court has ruled that the assessment of whether it is considered unnecessary to obtain a preliminary ruling should be made restrictive.

4. If a preliminary ruling has been requested in a specific case, what happens to other cases which deal with the same question? Are these proceedings suspended?

In such cases a stay of proceedings is normally issued but that is not mandatory.

5. Are there lists, to which all judges have access, where all preliminary rulings requested are listed?

No

6. Must every judge receive training on the procedure for referring a case to the ECtJ for a preliminary ruling?

No

7. Do labour courts also have competences under national constitutional law to review and repeal and/or not apply statutes for reasons of unconstitutionality (for example lack of objectivity), or is this competence reserved to a specific constitutional court?

Sweden has no constitutional court. The Constitution stipulates that courts may not apply a regulation that is contrary to the Constitution.

8. Who has competences to decide on claims for state liability which are derived from an alleged violation of EU law caused by a decision of the Supreme Court?

Claims for damages against the state are handled by the attorney general (*justitiekanslern*).

9. When judging the objectivity of national regulations from the perspective of the right of non-discrimination or the right to free movement, is a deliberate distinction being made between the issue of interpreting EU law and the margin of discretion remaining for national labour and social law when applying EU law?
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10. Are there difficulties in accommodating the results of preliminary rulings in the labour-law regime?

There may be difficulties in the light of Sweden's specificity regarding the labor market system.

11. Does the impression arise occasionally that both employers and employee collective representatives have difficulties with the outcome of preliminary rulings?
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12. Are procedures for preliminary rulings encouraged rather by collective representatives of interests or individual parties?

In some cases, certain parties request that the court gives preliminary rulings even though the party already knows that the Court does not share that assessment.

There are cases were the preliminary rulings have been encouraged by labour market organisations, in order to challenge national law. There are also examples were individual parties has been pursuing there own interest.

13. Have parties been granted a right of reference for preliminary ruling, or is this merely an ex officio obligation?

The parties are invited by the court to give their comments on how the question is to be formulated.

14. Are there considerations to improve the procedure for preliminary rulings?
    a. To restrict the obligation to refer to cases, where parties apply for a preliminary ruling?

No, the criticism of Sweden has rather been that we ask for too few preliminary decisions.

    b. Participation by a judge of the requesting bench in the hearing or deliberation at the ECtJ?

No

    c. Possibility to express an opinion on the statements submitted by the parties and the parties involved in the procedure?

No.

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