



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 28 September 2006 (29.09)  
(OR. fr)**

**13272/06**

**JUR 356  
COUR 42  
JUSTCIV 208  
ASIM 66**

**COVER NOTE**

---

from : Mr V. SKOURIS, President of the Court of Justice  
date of receipt : 25 September 2006  
to : Mr Erkki TUOMIOJA, President of the Council of the European Union  
Subject : Treatment of questions referred for a preliminary ruling concerning the area of  
freedom, security and justice

---

Dear President,

The Brussels European Council of 4 and 5 November 2004 drew attention to the need for consideration to be given to the establishment of a procedure enabling the Court of Justice to give preliminary rulings speedily on questions referred to it concerning the area of freedom, security and justice and requested the Commission to put forward, after consulting the Court, a proposal to that effect.

In the course of its preparation to implement the changes sought by the European Council, the Court has reflected on the establishment of an emergency preliminary ruling procedure. The resulting considerations are set out in the document enclosed.

Any observations or suggestions the Council may wish to make in that connection will enable the Court to develop its thinking further and, in due time, to submit more detailed proposals.

(Complimentary close).

(s.) Vassilios SKOURIS

## **Discussion Paper on the treatment of questions referred for a preliminary ruling concerning the area of freedom, security and justice**

The preliminary ruling procedure laid down by Article 234 of the EC Treaty and Article 35 of the EU Treaty is a cooperative process between the courts and tribunals of the Member States and the Court of Justice. A national court or tribunal before which proceedings are brought may ask the Court of Justice to interpret Community law or to determine whether a Community measure is valid. The Court will hear the parties to the dispute before the national court or tribunal, the Member States and the Community institutions and will deliver a judgment or make an order in reply to the national court or tribunal, which will then continue its consideration of the dispute and adopt a decision resolving the matter.

The conduct of the proceedings before the Court of Justice is relatively complex, because of the number of participants and the language constraints. More often than not, such proceedings will last for almost 2 years. The Court has considered on several occasions whether it is possible to reduce the time taken for the treatment of questions referred for a preliminary ruling. The average duration of preliminary ruling procedures has thus been reduced from 25.5 months in 2003 to 20.4 months in 2005.

In view of the need to give a ruling more expeditiously in certain situations, the Rules of Procedure were also amended twice, in 2000, so as to permit, in some cases, recourse to an accelerated procedure for the treatment of cases.<sup>1</sup> Amendment of that kind may, however, prove to be inadequate in the light of the issues raised by the treatment of questions concerning the area of freedom, security and justice.

The object of this paper is therefore to suggest a number of ideas for discussion and to describe the steps the Court is contemplating taking as regards cases relating to the area of freedom, security and justice. The issue is particularly complex, since it is crucial in this field that the essential safeguards which have led to the success of the preliminary ruling procedure be maintained. It goes without saying that the options put forward are described in overview and that their implementation, which will take the form of draft rules, will require deeper and more detailed consideration.

---

<sup>1</sup> That procedure is laid down, as regards references for a preliminary ruling, in Article 104a of the Rules of Procedure of the Court of Justice.

## The issues

It should be noted that the Presidency Conclusions of the Brussels European Council of 4 and 5 November 2004 contain a sub-chapter on the Court of Justice in connection with the area of freedom, security and justice (point 3.1). A reference to Article III-369 of the Constitutional Treaty, which requires the Court to "act with the minimum of delay", is followed by the paragraph set out below:

*In this context and with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statute of the Court. The Commission is invited to bring forward – after consultation of the Court of Justice – a proposal to that effect.*

Cases concerning the area of freedom, security and justice before the national courts must often be dealt with within strict time-limits. That requirement, which is imposed irrespective of the fate of the Constitutional Treaty, may, in a number of cases, be the result of Community or national rules.

As regards **Community secondary legislation**, reference may be made by way of example to Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1) ("Brussels IIa"), which lays down a number of time-limits applying to the national courts, including a time-limit of six weeks for giving a ruling (except where exceptional circumstances make this impossible) where proceedings are brought before a court seeking the return of a child who has been wrongfully removed.<sup>2</sup>

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1) provides that the requested court is to execute the request without delay and, at the latest, within 90 days of receipt of the request from the court before which the proceedings are commenced.<sup>3</sup>

---

<sup>2</sup> Article 11(3). See also Articles 11(6), 15(5), and 31(1).

<sup>3</sup> Article 10(1).

Under other Community measures, the time-limits imposed mainly concern the administrative authorities. <sup>4</sup> On occasion, the Community rules, in setting time-limits which apply to the administrative authorities, encourage Member States to lay down time-limits for their courts and tribunals as well. <sup>5</sup>

As regards procedural mechanisms introduced by the **legislation of Member States**, consideration of the laws of those States shows that on numerous occasions the national courts have been required to observe time-limits or to give urgent or priority treatment to cases involving asylum, immigration and/or matrimonial matters and matters of parental responsibility.

Such mechanisms involve the reduction of time-limits or the elimination of certain stages of the procedure, recourse to courts having fewer judges and the imposition of mandatory time-limits for ruling on the case. There are major variations in the duration of national proceedings, which may last for a few days or several months or more.

It goes without saying that the examples given above show that it is possible that such mechanisms may in the near future be imposed by new national and/or Community measures.

It is true that Article 68 EC restricts the application of Article 234 EC to courts or tribunals of last instance. However, in a number of cases, national law provides that a question may be referred, not by a supreme court but by a court or tribunal of first or second instance which is at the same time a court of last instance. In addition, putting the fate of the Constitutional Treaty to one side, the second indent of Article 67(2) EC authorises the Council, acting unanimously, to adapt the provisions of the Treaty relating to the powers of the Court of Justice. Indeed, the Commission has recently issued a communication which envisages the abolition of the restriction to courts or tribunals of last instance of the right to refer a question for a preliminary ruling. <sup>6</sup>

---

<sup>4</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) ("Dublin" system) lays down a number of time-limits to that effect (one month, two months . . .). Those time-limits may be postponed, for example in the case of an appeal or review with suspensive effect (Articles 17, 18 and 20 of the Council Regulation and Article 9(1) of the Commission implementing Regulation No 1560/2003 of 2 September 2003). But such a postponement gives rise to an obligation to inform the responsible Member State without delay, which underlines the requirement to comply with the time-limit, as the general rule.

<sup>5</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) provides that applicants for asylum are to have the right to an effective remedy before a court or tribunal against, inter alia, decisions taken on an application for asylum and a decision to withdraw refugee status. The directive provides that Member States may lay down time-limits for the national court or tribunal to examine the decision of the administrative authority (Article 39(4)).

<sup>6</sup> See Communication COM(2006) 346 final of 28 June 2006 from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities on adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection.

## The options under consideration

The Court's experience shows that only a significant amendment of the existing procedural rules could ensure that a reference for a preliminary ruling concerning the area of freedom, security and justice was dealt with sufficiently expeditiously. By referring to the need to amend the Statute of the Court of Justice, the European Council appears to adopt the same view.

Although it came into force over five years ago, the **accelerated procedure** has been used on only three occasions to date,<sup>7</sup> only one of which involved a reference for a preliminary ruling. That experience shows that notwithstanding the high degree of emphasis placed on the expeditious conduct of the proceedings, the time between the case being brought and the Court's delivering judgment was 76 [for the reference for a preliminary ruling], 168 and 171 days, respectively.

In the case of the reference for a preliminary ruling, out of all of those days only one week was taken up by the Court's decision and the drafting of the judgment. The remainder was taken up by procedural time-limits and the periods required for translations which are essential to the treatment of the case. Those procedural time-limits and the time taken for translation can hardly be reduced.

The Court is therefore of the view that it is necessary to contemplate the creation of a new type of procedure, enabling a case to be dealt with in an even shorter time than that allowed by the Rules of Procedure for a case under the accelerated procedure. In order for that objective to be met, consideration could be given to entrusting the treatment of those cases to a special Chamber, which would follow a particularly streamlined procedure, possibly counterbalanced by a safeguard in the form of an opportunity for re-examination.

That new procedure, which might be called the **emergency preliminary ruling procedure**, could be used in cases concerning the area of freedom, security and justice, where the urgent need to give a ruling does not, practically speaking, allow the time-limits under the normal procedure or the accelerated procedure to be observed.

One possibility would be to designate a Chamber for that purpose, which would handle all cases in which the emergency preliminary ruling procedure is requested by a national court. The creation of such a special Chamber would allow new and more appropriate working practices to be introduced. That Chamber would determine whether the matter was truly urgent and whether the new procedure should apply (filtering of cases). It would decide whether to give a ruling itself or to send the case to a larger Chamber should that be necessary (allocation of cases).

---

<sup>7</sup> In Case C-189/01 *Jippes and Others*, Case C-39/03 P *Commission v Argedon and Others* and Case C-27/04 *Commission v Council* (Stability Pact).

The Advocate General would continue to be involved in the treatment of cases falling under the emergency preliminary ruling procedure. He would be heard before the decision on the application for an emergency preliminary ruling procedure and before that of the Chamber giving a ruling on the case.

Two principal options may be envisaged.

### Option I

The emergency preliminary ruling procedure would be a new type of procedure which would not, at the first stage, involve the participation of all the Member States and institutions. The only parties having the right to participate in the procedure would be the parties to the dispute before the national court, the Member State of the court which made the reference for a preliminary ruling, the Commission and the institutions responsible for the measure whose validity is challenged or the interpretation of which is sought. It would be possible to lodge brief written observations and/or to arrange a hearing, depending on the circumstances. The Court would make an order, which would then be notified to all the Member States and the institutions.

In order to allow the Member States and the institutions to defend their position notwithstanding their exclusion from the first stage of the procedure, provision could be made for an opportunity for re-examination. That could be requested, for example, within a period of one month. The new procedure of re-examination would lead to the delivery of a judgment.

Failing a request for re-examination, the order adopted following the emergency preliminary ruling procedure would become final. By contrast, if re-examination were to be approved, the interpretation of Community law given in the judgment resulting from that re-examination would replace that set out in the order previously made in the emergency preliminary ruling procedure.

### Option II

The second option would involve a procedure in which all the parties referred to in Article 23 of the Statute of the Court of Justice would participate, but with stricter practical rules (translation into all languages only of the questions referred for a preliminary ruling, setting of a shorter time-limit for replying than under the accelerated procedure, laying down a maximum length for observations or having no written observations, having no Advocate General's Opinion, although he would still be heard in the same way as under the accelerated procedure). The Court would give a judgment which would be subject to the normal rules, that is to say without an opportunity for re-examination.

## **Discussion**

The Court is very conscious of the concern of the Member States and institutions to be able to participate in cases referred for a preliminary ruling, especially where these relate to new and sensitive fields. Furthermore, that participation is extremely useful, because it allows for a debate in which different points of view are expressed, in the context of diverse legal systems, which permits the Court to be better informed.

However, it is also necessary to take into account the fact that Community or national rules may require that a case be dealt with particularly expeditiously. If it were to be provided that only the parties to the dispute before the national court, together with the Member State from which the reference for a preliminary ruling is made, the Commission and, where relevant, the institutions responsible for the measure whose validity is challenged or the interpretation of which is sought could participate (Option I), that would reduce the time taken for the treatment of the case by eliminating the stage of translation of the questions referred for a preliminary ruling and streamlining the procedure. Option II, which would enable the Court, depending on the circumstances, to reduce the duration of the written stage of the procedure or to provide that there would only be an oral procedure, would already result in a valuable reduction in the time taken. However, the procedure under Option II would clearly still take longer overall than under Option I (subject, of course, to any re-examination in the latter case).

In any event, and irrespective of the option decided upon, the Court would always retain the possibility of dismissing an application for an emergency preliminary ruling procedure and of making the case subject to the normal procedure or the accelerated procedure.

## **Conclusion**

The Court is conscious that the solution to be adopted must balance the expeditious handling of cases against the protection of a number of procedural safeguards without the essential character of the reference for a preliminary ruling being altered.

The Court will welcome any observations and suggestions the Council may have to make that will enable the Court further to develop its thinking and to present, in due time, its proposals.

---

---