

## **New procedures for expediting references for a preliminary ruling in the area of freedom, security and justice**

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### **Introduction**

Since 2004, the desirability of speeding up references for a preliminary ruling made by national courts in the area of freedom, security and justice (Title IV of the EC Treaty - that is, cases likely to involve matters of great sensitivity where fundamental rights of the individual may be at stake in areas such as visas, asylum and criminal cases) has been under consideration, albeit on (apparently) a fitful basis. Eventually, the Council asked the Court of Justice of the European Communities (“the ECJ”) to suggest possible solutions to the problem. The ECJ responded by putting forward two possible options, elaborated in two discussions papers sent to the Council in September and December 2006. After considering the two options, the Council responded in April 2007 by selecting the second option and asking the ECJ to submit formal proposals for implementing that option. In July 2007, the ECJ proposed appropriate amendments to the Protocol on the Statute of the Court and to its Rules of Procedure. The ECJ’s proposals were adopted by the Council on 20 December 2007 with a view to their coming into effect in February 2008.<sup>1</sup>

At the moment, references in the area of freedom, security and justice may be made only by a national court or tribunal against whose decisions there is no judicial remedy.<sup>2</sup> Channelling references in such cases through courts of last instance inevitably puts additional pressure on the conduct of the reference procedure for one of two reasons: either the national courts have acted quickly because of the inherent urgency of the case, in which case for the ECJ to fail to do likewise would be distinctly unimpressive; or it has already taken a significant amount of time for the case to progress to the national court of last instance, in which case there is less time available for the reference procedure to be completed without the risk of an injustice. Even were such references to be made by lower courts (as has been proposed), the intrinsic features of the case

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<sup>1</sup> The documents emanating from the ECJ, including the proposed amendments to the State and the Rules of Procedure, can be found on its website.

<sup>2</sup> EC Treaty, Article 68(1).

may be incompatible with a slow determination of the reference. In particular, there are some legislative provisions that require cases to proceed swiftly to a determination.<sup>3</sup>

The two options proposed by the ECJ for resolving the problem are described below but references for a preliminary ruling in the area of freedom, security and justice cannot be treated in isolation from other references, not least because other references may also exhibit features justifying their speedy determination; and giving priority to one case necessarily involves slowing up the determination of another case. Focusing on one type of reference and ignoring the general picture is perfectly capable of producing a general deterioration in the quality of justice. Therefore, after the ECJ's options have been considered, some comments will be made about the general problem of speeding up references.

### **The options proposed by the ECJ**

Reduced to its essentials, the first option proposed by the ECJ was that: (i) the referring court would request the application of the urgent procedure; (ii) a specialist chamber would decide on the request; (iii) if the urgent procedure were applied, only the parties to the proceedings before the referring court, the Member State of the referring court, the Commission and the EC institution whose act was being challenged or was to be interpreted would participate in the reference proceedings; (iv) written observations would be submitted within a short period; (v) the specialist chamber (consisting of five judges and possibly three if the issues were not complex) would decide whether or not to have a hearing; (vi) judgment would be delivered without public delivery of the Advocate General's Opinion; (vii) the judgment could be reviewed by the ECJ (sitting without the judges who had decided the case the first time around) on the application of any interested person within the meaning of Article 23 of the Statute (other than the persons who had participated in the case first time around); (viii) if the ECJ overruled the decision of the specialist chamber, that would not affect the parties to the proceedings before the referring court who would remain bound by the erroneous decision of the specialist chamber.

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<sup>3</sup> For example, Article 11(3) of Council Regulation No. 2201/2003 (OJ 2003 No. L338/1) requires a court seised with an application for the return of a child that has been wrongfully removed from, or retained in, a Member State other than that in which the child habitually resides to deliver judgment within six weeks unless exceptional circumstances make that impossible. No doubt the need for a reference to the ECJ could be regarded as an exceptional circumstance; but that does not avoid the fact that the policy of the legislature is to have such cases dealt with quickly (for obvious reasons).

The first option was clearly based on the view that, in terms of the balance between a quick decision that removed any legal uncertainty and a decision that was legally perfect, the preference was for the former rather than the latter.

The obvious disadvantages with the first option were: (i) cases would, as a rule, be heard by only five judges however important they were; (ii) Member States, other than the State of the referring court, would not be able to participate in the proceedings however important an interest they had in the case and would be left with the disadvantageous possibility of seeking to persuade the ECJ to disagree with the judges who had originally decided the case, on a review of the original decision; and (iii) if the judgment given on review differed from the original judgment, that would not alter the result of the latter so far as the parties to it were concerned, thus risking the creation of a sense of injustice for the party who lost at the first stage.

In short, under the first option, speed in decision-making was achieved at a very high cost and the use of that option could well be seen as hazardous for one or other of the parties involved.

Reduced to its essentials, the second option starts off in the same way as the first and then continues as follows: (iii) the parties to the proceedings before the referring court, the Member State of the referring court, the Commission and the EC institution whose act was being challenged or was to be interpreted would submit written observations (unless the written procedure were dispensed with, as could be the case in situations of extreme urgency) within a time limit determined by the degree of urgency and complexity of the case; (iv) the date of the hearing is fixed by reference to the degree of urgency and complexity of the case; (v) at the hearing, all parties able to participate in a preliminary ruling may make submissions (although only some of them will have been able to submit written observations). The procedure would then continue as in a normal case.

The second option reduces the time taken by the preliminary ruling procedure. It does not give the same possibilities as the first option of speeding up the determination of a case but avoids all the disadvantages of the first option.

The relative merits of the two options vary depending upon whether they are assessed from the viewpoint of the immediate parties to the proceedings before the referring court or from the

viewpoint of the States and institutions entitled to participate in references for a preliminary ruling.

So far as the immediate parties are concerned, the first option is more attractive than the second if their primary concern is to obtain a speedy decision and they are prepared to run the risk that speed may be obtained at the expense of a legally correct decision. Not all parties can be assumed to be of that mind. Normally parties wish to have a legally correct decision at the earliest opportunity and would prefer not to be faced with a decision that is (arguably) incorrect. Where judgments are subject to an appeal, there is always the risk that a judgment may be legally incorrect and parties have to reconcile themselves to that risk. However, it is not attractive for a legal system to offer *expedition* in decision-making on the basis that expedition will put the parties at risk. The first option was not couched as a “fast but wrong” option; it was intended to produce a “fast but right” conclusion. However, the first option clearly envisaged that there might well be cases in which the decision at the first stage would be reversed (without affecting the immediate parties to the case). Thus, from the perspective of the immediate parties to the case, the first option posed for them a risk and they would have to have been advised of that before they pressed the referring court to request the first option (had that option been adopted).

From the viewpoint of the States and institutions normally entitled to participate in a reference for a preliminary ruling, the second option was clearly more advantageous than the first. From their perspective, it may be assumed, obtaining a definitive ruling at the earliest opportunity prevails over the desirability of obtaining a swift but non-definitive ruling. However, it can be assumed that that concern would not arise in all cases.

Although it might be thought that the interests of the immediate parties to the proceedings ought to prevail over those of States and institutions able to participate in them, the public interest predominates in references for a preliminary ruling. Having said that, the public interest is more evident in some cases than it is in others; and the first and second options may not have been an adequate reflection of the shifting balance between the interests of the immediate parties and the public interest in references for a preliminary ruling.

Those different interests could have been reconciled if both options had been taken up on the basis that use of the first option, if requested by the referring court (in the light of the submissions put to it by the parties before it), would be subject to there being no objection from a State or

institution that would be prevented from participating in the proceedings if the first option were used. If such an objection were made, the case would be disposed of under the second option. If that solution had been adopted, the first option could have been simplified further by removing the review stage (which, incidentally, would have made the first option more attractive by removing the risk referred to above): if no Member State or institution had manifested an interest in participating in the proceedings at the first stage, it is difficult to see how any of them could have justified requesting a review of the judgment.

In the event, the second option was adopted. In terms of the choice between the two options, that was clearly the best decision. However, as noted above, there is a wider context to be considered.

### **The general problem of speeding up references**

References for a preliminary ruling in the area of freedom, security and justice are likely to raise serious questions concerning (among other things) the liberty of individuals that, certainly in the early years, need to be settled definitively at the earliest opportunity. However, not every such case will have the same degree of urgency; and not every one will necessarily be more urgent than some at least of the references made to the ECJ under Article 234.

The degree of urgency in a case is a relative concept. It reflects in part the circumstances surrounding the case and in part involves a comparison with other cases. It is therefore difficult, and probably unwise, to define in abstract terms a category of cases as meriting speedy disposition irrespective of the particular features of the individual cases that fall within the category. It is perfectly possible for a “normal” reference under Article 234 to exhibit features demanding more urgent treatment even than an urgent case in the area of freedom, security and justice.

At present, references for a preliminary ruling can be dealt with: (i) under the normal procedure; (ii) under a separate procedure (the accelerated procedure) if the circumstances of the case show that it is a matter of “exceptional urgency” (not just “urgent”) – see Article 104a of the Court of Justice’s Rules of Procedure; and (iii) under the normal procedure but with priority over other cases, where there are “special circumstances” – see Article 55(2) of the Rules of Procedure.

The average time taken under the normal procedure is 20 months (although recently cases have taken of the order of 12 months). Under the accelerated procedure, that can be reduced to some two and a half months.<sup>4</sup> The normal procedure with priority given is capable of knocking a few months off the time taken to dispose of a reference but will not produce reductions as significant as those achievable under the accelerated procedure.

The accelerated procedure is very flexible because the length of time between the commencement of proceedings by lodgment of the order for reference at the ECJ and the date of the hearing is determined by the President and the written part of the procedure is fitted within that time frame.

It is understood that, because the accelerated procedure is limited to cases of “exceptional” urgency, the view has been taken by the ECJ that all the steps of the accelerated procedure must be taken in the shortest possible time. That, it is understood, applies just as much to the time within which the ECJ’s translation service must produce translations, and to the time after the hearing by which the ECJ envisages producing its judgment, as to the time by which interested parties must lodge their written observations.

The result is that the accelerated procedure, as so conceived and applied, imposes a heavy burden upon the ECJ and involves putting back every other case.

Any speeding up of a case results in the deferment of some other case; and both of the ECJ’s two options would have that effect just as much as any other proposal to expedite or accelerate or give priority to the disposal of cases that exhibit particular reasons why they should be decided before other cases, as the ECJ appears to recognise.

However, prioritising cases is a necessary factor in the proper administration of justice because, as a matter of principle, it is unjust to hold up a case in which really serious matters requiring a speedy resolution are at issue while mundane cases are being resolved: while every case ought to be decided in good time, some cases are intrinsically more urgent than others.

Where the national courts and tribunals have done their best to expedite a case through the domestic legal order because of its importance and a reference then has to be made to the ECJ, it

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<sup>4</sup> See Case C-189/01 *Jippes and others v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689, which (until very recently) was the only reference for a preliminary ruling ever to have benefited

would be extremely unfortunate – and contrary to the proper administration of justice – if the ECJ were not then able to progress the reference quickly.

In addition, in cases that obviously ought to be referred to the ECJ, there would be a risk that national courts or tribunals would not expedite an urgent case if the ECJ were unable to deal quickly with the reference: why should a national court or tribunal give priority to a case over other cases if an inevitable reference to the ECJ cannot be disposed of quickly?

The question underlying the ECJ's two options for references in the area of freedom, security and justice is really whether or not its Rules of Procedure are sufficiently flexible to enable it properly to prioritise cases bearing in mind that: (i) prioritising cases requires a comparison between them; and (ii) the circumstances giving rise to a claim to priority will vary from case to case.

At the moment, there appear to be two extreme positions: the normal procedure which, even with priority given, lasts a relatively long time in a case that is genuinely urgent; and the accelerated procedure, which offers a very quick solution, but only for “exceptionally” urgent cases, and has so far been used only once or twice. There is no intermediate position.

## **Conclusion**

The problem posed by the devising of a special procedure for references in the area of freedom, security and justice is that it does not really address the underlying problem. It is an *ad hoc* solution to one part of a bigger issue and, despite its intrinsic merits, is perfectly capable of having unintended adverse consequences.

The problem of the time taken by the ECJ to dispose of references for a preliminary ruling (and, now, by the Court of First Instance to dispose of the cases before it) is not new. It has been around since the early 1980s. In large part, the problem is one of inadequate resources. Given that adequate resources are not likely to be forthcoming, it is perfectly reasonable to look around for other solutions; and no one would wish to decry any positive step to improve the position, however, *ad hoc* or partial it might be.

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from the accelerated procedure.

However, it may be that we are missing a trick by failing to capitalize on the flexibility of the accelerated procedure. As noted above, the accelerated procedure enables the ECJ itself to determine the *tempo* of the proceedings by reference to the relative degree of urgency posed by a case by comparison with others.

Under Article 104a, as it is currently worded, the accelerated procedure is confined to cases of “exceptional” urgency; and that seems to have caused the ECJ (rightly, given the present wording of Article 104a) to view the accelerated procedure as requiring it to determine the *tempo* of the proceedings rigidly as the shortest possible time frame within which the case can be decided.

If the word “exceptional” were deleted from Article 104a, the ECJ would be able to react more flexibly to cases that pose different degrees of urgency ranging from the truly exceptional to the merely urgent. It would not be constrained to apply Article 104a in the way that it seems to have done. It could vary the *tempo* of the accelerated procedure in accordance with the relative importance and urgency of the case. It would also not be obliged to fast track cases that were “merely” urgent unless it had the capacity to do so and that seemed the right thing to do having regard to the other cases before it.

That solution would also avoid the difficulty posed by the adoption of a special solution to the problem posed by references for a preliminary ruling in the area of freedom, security and justice: that of the urgent reference in that area that receives better treatment than an even more urgent and more important reference under Article 234.

Finally, the preliminary ruling procedure in its current form is a very simple procedure that in principle need last only a few months between the receipt of the order for reference by the ECJ and the delivery of the preliminary ruling. The reasons for the current average time taken up by preliminary rulings are well-known and long-standing.

References for a preliminary ruling are conceived as a procedure dominated by the public interest (whence the ability of States and institutions to participate in the proceedings). That imposes a cost in terms of time and resources. Now that the number of potential parties to a reference for a preliminary ruling exceeds 30 (the parties to the proceedings before the referring court, each Member State, Community institutions and, in some cases, EEA States and the EFTA

Surveillance Authority), there is a strong argument for saying that the time has come for a more fundamental reconsideration of the reference procedure.