

ADMINISTRATIVE JUSTICE AND PRELIMINARY REFERENCES

TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

ANNUAL REPORT – 2015 - ITALY

(June 2015)

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CONTENTS

- 1. PRELIMINARY QUESTION OF INTERPRETATION AND JUDGMENT OF RELEVANCE**
- 2. PRECLUSIONS IN ADMINISTRATIVE TRIALS AND OBLIGATORY PRELIMINARY REFERENCE**
- 3. REPERCUSSIONS ON THE REASONABLE LENGTH OF TRIALS AND ON THE RESPONSIBILITY OF THE JUDGE IN THE EVENT OF FAILURE TO REFER**
- 4. THE RESPONSE OF THE COURT OF JUSTICE: THE REFERRAL JUDGE, “MASTER” OF THE RELEVANCE OF THE QUESTION**
- 5. PRELIMINARY RELEVANCE QUESTION AND FAIR COOPERATION AMONG JUDGES**

1. PRELIMINARY QUESTION OF INTERPRETATION AND JUDGMENT OF RELEVANCE

Over the last few years administrative justice has displayed an increasing interest in the use of references submitted for preliminary rulings to the Court of Justice of the European Union (art. 267, par. 3, TFEU) and in current relations between the aforesaid institution and national procedural rules.

The Italian Council of State has even made use of the instrument in question for the very purpose of obtaining clarifications from the European judge regarding procedures relating to its practice, and regarding the scope of its own assessment of admissibility when request for referral is submitted by the claimant.

As a rule, requests formulated by the party to the proceedings oblige the supreme court judge to make preliminary reference when these concern questions of interpretation of European Union law, questions which are fundamental to making a ruling on the judgment, or questions not completely identical to others already ruled on by the Court of Justice, as well as questions on which the correct application of European Union law “is not so obvious as to leave no room for any reasonable doubt on the solution to be applied to the questions raised”.

The Italian administrative judge has, nonetheless, identified a possible conflict between the obligation to refer and national procedural rules which would render inadmissible questions submitted with insufficient relevance.

The Council of State criticises the formulating of questions in generic terms, or those referring to patently irrelevant European Union norms which would lead to a ruling of irrelevance or of inadmissibility or, alternatively, a complete reformulation of the interpretive question by the judge.

Other limits on preliminary reference derive from Italian procedural law: the generic nature of the normative parameter invoked; the improper use of the preliminary reference with which a solution to the specific case is asked of the Court of Justice; the formulation of questions using elements of the specific case, on occasion not reconstructed impartially; the confusing of question of “interpretation of European Union law” and application of the same law in the case at issue.

The Council of State ponders the scope of its own judgment of admissibility of the preliminary question and laments the reduction of its powers of evaluation (or of “filter”) vis-à-vis the claimant's request: preliminary reference could only be denied if the European Union Law norm is clear beyond all reasonable doubt.

Since art. 267, par. 3, TFEU establishes the obligation to refer if the party raises a preliminary question. It would appear that the national judge has no power to establish whether “the community law is clear” and raises no doubts over interpretation. Here, the Council of State could not therefore refuse a preliminary reference, as it could for a question of constitutional legitimacy.

In some cases the Court of Justice criticises the lack of relevance of the question which has in error been raised by the national judge.

It is not, however, clear what scope the national judge has to reject relevance, when to evaluate the relevance it is, in any event, necessary to establish whether European Union Law is applicable in the case at issue. Nor is it clear what the legal consequences are should the national judge reject the relevance of the question of interpretation of European Union law, having wrongly judged whether this is applicable or not to the case in point.

2. PRECLUSIONS IN ADMINISTRATIVE TRIALS AND OBLIGATORY PRELIMINARY REFERENCE

It is necessary to identify those principles of the Italian administrative trial which may come into conflict with the obligation to submit a preliminary reference to the Court of Justice.

A request for a preliminary ruling submitted by the appellant may be seen as grounds of appeal: “grounds of appeal” on the basis of national procedural rules. Thus, the evaluation of the very request for a preliminary ruling, constituting, as it does, “grounds of appeal”, must respect the principle of the specificity of the formulation (generic grounds are inadmissible), and that according to which grounds may not be altered once the proceedings are underway.

If the claimant wishes to challenge the administrative act contested as being in conflict with European Union Law, without treating the same criticism as “grounds of appeal”, at this point his conduct would be in violation of the principles of the Italian Administrative Trial Code.

The claimant would, in fact, be making improper use of the question of interpretation of EU law, without clarifying and defining the scope of the question submitted.

The query submitted to the European Union Judge produces a rigid alternative:

1) the primacy of EU law prevails over national procedural systems and thus dictates that the judge, even in infringement of national procedural rules, must interpret, amend and adapt the application by the party, in such a way that the preliminary query raised by the party complies with the relevant prerequisites, both in form and in substance;

2) or, alternatively, national procedural autonomy prevails and the judge may not correct and modify the application by the party or avoid undue reference without liability for violation of art. 267, par. 3, TFEU.

According to the Council of State, the obligation to submit a preliminary reference would not hinder critical evaluation, on the part of the *a quo* judge, of the question of interpretation of European Union law, permitting him to avoid referring the question should

he deem, on the basis of a parameter of reasonableness and professional diligence, that the European norm is “reasonably clear” and does not require further clarification.

There remains, however, doubt and interpretations conflict. The administrative judge, in an original way, formulates an alternative preliminary interpretive question. He drafts a “main” referral for the eventuality that the Court of Justice accepts the thesis of the “wide mesh filter” and in this instance the preliminary question is that formulated by the claimant. He also puts forward a “subordinate” question, as evidenced by the reformulation of the application by the party, drafted by the Council of State itself.

3. REPERCUSSIONS ON THE REASONABLE LENGTH OF THE TRIAL AND ON THE RESPONSIBILITY OF THE JUDGE IN THE EVENT OF FAILURE TO REFER

Other questions of interpretation concern the compatibility of the obligation to delay proceedings with the principle of reasonable length of trial, as ratified by Italian law, by European Union Law itself and by international conventional law. The administrative judge wishes to know whether a lengthening of trial duration may lead to the reference and preliminary ruling stage at the CJEU being excluded from the calculation of trial length.

Clarification is sought regarding instances in which failure to submit a preliminary reference would give rise to a “manifest violation of community law”, and whether this notion may be of different scope and application with regard to special proceedings against the State for “compensation for damage caused in the exercise of judicial functions and civil liability of judges” and of general proceedings against the State for violation of community law. Such clarification would go some way towards avoiding the situation where national judges, for fear of violating community law, burden the Court of Justice with merely “defensive” referrals designed to prevent civil liability suits against judges.

The Council of State is seeking clarifications, following the recent ruling by the Court of Justice challenging the validity of the Italian law on the civil liability of judges, deeming the limitations on liability provided for therein to be contrary to EU law.

The recent intervention by the Italian legislature to amend the regulations regarding the civil liability of judges confirms the concerns of the Council of State, where it states that “in the event of a manifest violation of European Union law one must also take into account not only the non-observance of the obligation to submit a preliminary reference in accordance with article 267, paragraph three, of the Treaty on the Functioning of the European Union, but also the conflict of the act or provision with the interpretation expressed by the Court of Justice of the European Union”.

4. THE RESPONSE OF THE COURT OF JUSTICE: THE REFERRAL JUDGE, “MASTER” OF THE RELEVANCE OF THE QUESTION

With regard to the evaluation of the relevance of the question of interpretation, the national judge is *master*. There remain doubts on the scope of such an evaluation, also in terms of the applicability of the European norm to the judgment pending to which the party to the proceedings makes reference. The Italian administrative judge is bound by the grounds of the parties, and this may therefore induce the judge himself, in debatable cases, to extend the range of preliminary reference; above all with regard to the framing of the specific case with regard to the specific case outlined by the supranational source.

The crucial point regards the use of the preliminary reference as grounds of appeal, regulated by national procedural norms on application by the party.

The Court of Justice itself has, in the last few years, stated that the dispositive principle in the administrative trial forbids the national judge to raise on his own initiative grounds founded on the violation of community norms, without this conflicting with the principles of equivalence and effectiveness of legal protection. This does not preclude the

administrative judge from raising questions on his own initiative provided that the principle of the adversarial process is respected.

The European Union judge reiterates that the identification and formulation of questions to be submitted to the CJEU are a matter for the national judge, and that the litigating parties in the main proceedings may not modify their scope. The national judge is at liberty to invite the litigating parties to suggest formulations in the drafting of the preliminary questions but only the judge himself may decide on the form and content of the questions.

The Court of Justice expresses itself tersely on “national procedural rules”, which the Council of State had invoked “without, however, clarifying their exact scope”: for the Court it is sufficient to call to mind that “such norms cannot reduce the competence and the obligations incumbent upon a national judge in his capacity as judge of referral in accordance with article 267 TFEU”.

Such an interpretation allows the Court of Justice to avoid tackling any possible effect of the principle of reasonable length of trial, since the question was only formulated for the eventuality in which article 267 TFEU should be taken to mean that it imposes upon the national supreme court judge an unconditional obligation to submit a preliminary reference of a question of interpretation of the law of the Union, raised by one of the litigating parties.

5. PRELIMINARY RELEVANCE QUESTION AND FAIR COOPERATION AMONG JUDGES

Even before the pronouncement of the Judge of the European Union in response to the queries formulated, Section V of the Council of State rejected any notion of the existence of an obligation to refer to the Court of Justice the question of interpretation of a community norm, when this is not deemed relevant in coming to a ruling, or when it deems that an *acte clair* is present, which, in light of the existence of previous rulings of the Court, or of the

obviousness of the interpretation, renders preliminary reference superfluous (or not obligatory).

In this case too, nonetheless, the administrative judge was able to establish the irrelevance of the question put forward, it not being relevant in terms of the *thema decidendum*, without, however, touching on the problem of the use of the preliminary reference as grounds of appeal.

In one case, indeed, the prerequisites to raise a question for preliminary reference before the Court of Justice in relation to compatibility of the measures with the founding treaty. In a further case, refusal to refer was based on the “clarity, unequivocal nature and patency of a correct application of community law”.

Finally the Council of State has ruled out the existence of an unconditional right of individual citizens always to see a preliminary question of interpretation on the part of a supreme court raised.

The Court of Justice's sensibilities have changed somewhat as regards the admissibility of preliminary references not adequately justified.

Criticisms concern the formerly “generous approach” of the Court in assessing the admissibility of requests, which begs the question as to whether the Court “ought not now adopt a more rigorous approach to the matter”. The extension of the jurisdiction of the Court following the coming into force of the Treaty of Lisbon, as well as the expansion of the European Union in the last decade, might diminish the efficiency of European justice.

In 2014 there were almost 40 lawsuits in which the Court rejected requests for preliminary rulings due to inadmissibility or to patent absence of jurisdiction. In an equally significant number of lawsuits, the requests of the national judges were, in part, rejected for the same reasons. Orders for referral are frequently groundless in terms of the relevance of the European provisions relating to the referral judgment, while judges, on the contrary, often have doubts about the compatibility of national normative provisions with Union law,

without, however, identifying any specific EU provision as a parameter for the assessment of relevance.

The more rigorous approach assumed by the Court of Justice is founded on art. 19, par. 1, TEU, which designates as custodians of the respect for the judicial and jurisdictional systems of the EU both the Courts and the jurisdictional organs of the Member States.

The principle of fair cooperation among judges must therefore apply in a reciprocal way: if the national judge is *master* of the evaluation of preliminary question of relevance, he must also be aware of the limits which the Treaties place on the scope of the Court of Justice.

In these terms, the assessment of relevance, which the administrative judge has also reclaimed in the supreme administrative court on questions raised by the parties, necessitates greater care in the formulation of queries for the Court of Justice, in view of the latter's increased rigor in evaluating whether to accept preliminary references.