

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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The European Court of Justice as lawful Judge

Austrian Constitutional Court
Judgement from December 11th, 1995
VfSlg. 14.390

1. Preliminary Reference Procedure under Article 234 EC

a. The Regulation

As supremacy¹ and direct effect characterise European Community law,² many questions concerning its validity and interpretation arise in the Member States. Who adjudicates those questions? Courts at the European level, national (constitutional) courts or both? The preliminary reference procedure under Article 234 EC³ answers this question of competencies.⁴ Article 234 EC can be qualified as a procedural link between the national courts and the European Court of Justice (ECJ); it provides that

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

1 Cf. *Korinek*, Die doppelte Bedingtheit von gemeinschaftsrechts-ausführenden innerstaatlichen Rechtsvorschriften, in *Hammer/Somek/Stelzer/Weichselbaum* (eds.), *Demokratie und sozialer Rechtsstaat in Europa – Festschrift für Theo Öhlinger* (2004) 131.

2 See *Posch*, Community law and Austrian constitutional law, in this issue.

3 Treaty establishing the European Community (consolidated text), OJ 2002 C 325/33.

4 Cf. *Ipsen*, *Europäisches Gemeinschaftsrecht* (1972) paras. 10/22-26; for detailed information on the preliminary ruling procedure see *Oppermann*, *Europarecht*³ (2005) § 9 paras. 53 et seq; *Streinz*, *Europarecht*⁷ (2005) paras. 630 et seq; *Thun-Hohenstein/Cede/Hafner*, *Europarecht*⁵ (2005) 214 et seq.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

b. The Role and the Content of Article 234 EC

The purpose of Article 234 EC is to ensure the proper application and uniform interpretation of the European Community law in all Member States.⁵ The preliminary ruling procedure is an interlocutory procedure: provided that the concrete question is relevant for the decision, national courts stay their proceedings and make reference to the ECJ under Article 234 EC;⁶ then the ECJ makes a decision concerning the interpretation of primary or secondary European Community law, but does not decide the case, rather its decision has a binding effect on the judgement of the reference-court which then has to make a decision on its national case, taking the decision of the ECJ into consideration.⁷ Article 234 EC also fulfils an important function regarding the protection of individual rights.⁸ Whereas the individual legal protection under Article 230 (4) EC (action for annulment) is limited due to the requirements of direct and individual concern, Article 234 EC offers individuals a possibility to invoke European Community law before national courts. In fact, the litigants do not have the right to refer a question to the ECJ,⁹ they can merely suggest the reference before the national courts; those, if required, have to refer the pending case to the ECJ. Numerous basic principles of the European Community law, such as the direct effect of directives¹⁰ and state-liability,¹¹ have been developed by the ECJ through preliminary decisions.¹²

The legal terms court and tribunal in Article 234 (2) and (3) EC do not have the same meaning as they have in the Member States. Rather, they have to be understood in a European context. The ECJ established some criteria a national office must meet in order to be qualified as a court or tribunal in the legal sense of Article 234 (2) and (3) EC: "In order to determine whether a body making a

5 ECJ Case 283/81, *CILFIT* [1982] ECR 3415, para. 7.

6 Cf. also Article 225 (3) EC, Article 68 EC and Article 35 EU.

7 See *Kotschnigg*, Bindungswirkung von Vorabentscheidungen des EuGH – Binding Effect of Decisions of the European Court, SWI 1998, 362; *Pollak*, Bindungswirkung von Auslegungsurteilen des Europäischen Gerichtshofes (EuGH) im Vorabentscheidungsverfahren, RZ 1998, 190.

8 See *Griller*, Individueller Rechtsschutz und Gemeinschaftsrecht, in *Aicher/Holoubek/Korinek* (eds.), *Gemeinschaftsrecht und Wirtschaftsrecht – Zentrale Probleme der Einwirkung des Gemeinschaftsrechts auf das österreichische Wirtschaftsrecht* (2000) 122 et seq; *Fischer/Köck/Karollus*, *Europarecht*⁴ (2002) para. 1428.

9 Cf. ECJ Case 283/81, *CILFIT* [1982] ECR 3415, para. 9.

10 ECJ Case 9/70, *Grad* [1970] ECR 825; Case C-91/92, *Faccini Dori* [1994] ECR I-3325.

11 See especially the leading cases ECJ joined cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357; joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur* [1996] I-1029.

12 For the development of the law by judicial interpretation see *Schroeder*, Zu eingebildeten und realen Gefahren durch kompetenzüberschreitende Rechtsakte der Europäischen Gemeinschaft, *EuR* 1999, 452; *Calliess*, *Grundlagen, Grenzen und Perspektiven europäischen Richterrechts*, *NJW* 2005, 929.

reference is a court or tribunal for the purposes of Article 177 [now Article 234] of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent."¹³ According to Article 234 (2) EC any court or tribunal of a Member State has the right to refer a case to the ECJ; national courts of last resort¹⁴ have the obligation to make a preliminary reference under Article 234 (3) EC.¹⁵ There are only two exceptions to those general principles to be taken into account. Firstly, national courts against whose decisions there is a judicial remedy under national law and which have doubts about the validity of a Community act have to refer the case to the ECJ, as they have no jurisdiction to declare that acts of Community institutions are invalid.¹⁶ Secondly, the ECJ created in its *CILFIT* judgment¹⁷ some criteria that relieve national courts or tribunals of last resort of their duty to make a preliminary reference. There is no duty to refer a question to the ECJ, if that question is not relevant,¹⁸ if the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case,¹⁹ if previous decisions of the Court have already dealt with the point of law in question²⁰ or if the correct application of Community law is so obvious as to leave no scope for any reasonable doubt²¹ (*acte clair*). The majority of questions appearing in national courts and referring to Community law do not satisfy this criterion of obviousness, so that national courts of last resort are in most cases required to make a preliminary reference under Article 234 EC. But what are the legal consequences if such a public authority breaches its obligation to bring the matter before the ECJ?

c. Legal Consequences of a Breach of Article 234 EC

On the Community level, a violation of Article 234 (3) EC caused by a Member State court decision is a violation of the EC-Treaty and provokes an infringement proceeding opened by the Commission under Article 226 EC. Due to the principle of judicial independence, the Commission is very careful with the exercise of its

13 ECJ Case C-54/96, *Dorsch Consult* [1997] ECR I-4961, para. 23.

14 For the obligation to refer and the definition of a court or tribunal against whose decisions there is no judicial remedy under national law see ECJ Case C-99/00, *Lyckeskog* [2002] ECR I-4839.

15 Cf. *Schoibl*, Zum Umfang der Vorlagepflicht nationaler Gerichte an den Europäischen Gerichtshof nach Art 177 EG-V – Anmerkungen zu OGH 27.6.1995, 4 Ob 1043/95 und OGH 9.5.1995, 4 Ob 37/95, WBI 1996, 10; *Vcelouch*, Gerichtskompetenz und EU (1996) 26 et seq; *Herzig*, Aktuelle Fragen zur Praxis des Vorabentscheidungsverfahrens in Österreich, WBI 2003, 245; *Öhlinger/Potacs*, Gemeinschaftsrecht und staatliches Recht – Die Anwendung des Europarechts im innerstaatlichen Bereich³ (2006) 182 et seq.

16 ECJ Case 314/85, *Foto-Frost* [1987] ECR 4199, para. 15.

17 ECJ Case 283/81, *CILFIT* [1982] ECR 3415.

18 *Ibid*, para. 10.

19 *Ibid*, para. 13.

20 *Ibid*, para. 14.

21 *Ibid*, para.16.

competence as Guardian of the Treaties, if the breach of Community law derives from the non-reference of a national court.²² Another remedy, this time resulting from the ECJ case law, can be found in the principle of state liability. The ECJ has repeatedly held²³ that the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law, for which the State is responsible, is inherent in the system of the EC-Treaty. The responsible State is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive.²⁴ The principle of state liability applies in particular to national courts adjudicating at last resort.²⁵ Finally, a violation of Article 234 (3) EC can also have consequences on the national constitutional level, which has been stated by the Austrian Constitutional Court firstly in 1995. Circumstances and main results of that case are presented in the following part.

2. Austrian Constitutional Court – Judgement of December 11th, 1995 (VfSlg. 14.390)²⁶

a. The Circumstances of the Case

The complaining social insurance agency wanted to award a public works contract for the construction of a rehabilitation centre in Upper Austria by an open procedure under Section 11 (2) Federal Act on Procurement (*Bundesvergabegesetz*, hereinafter *BVergG*).²⁷ Amongst others, the Consortium M/S (*Arbeitsgemeinschaft*, hereinafter *ARGE*) and the *ARGE F/I* submitted a tender, whereas the latter additionally submitted a free alternative tender including five alternatives. As the *ARGE F/I* was supposed to obtain the award of contracts, the *ARGE M/S* initiated an arbitration process before the Federal Procurement Control Commission (*Bundes-Vergabekontrollkommission*, *B-VKK*): They argued that due to the combination of a main tender and alternative tenders, single positions have been mixed and a new tender has been created. These consequences would frustrate an equal treatment of the involved tenderers. The Federal Procurement Control Commission was of the same opinion. Due to the system of an alternative tender, including several alternatives with single positions which could be combined in various ways, the contracting authority could not find out the most economically advantageous tender. Hence, the principle of equal treatment would be violated.

As a result of this conclusion having been made by the arbitration board, the social insurance agency accepted the tender of the *ARGE M/S*. The tender of the

22 Cf. *Streinz*, *Europarecht*⁷ (2005) para. 659; for Austria see Article 87 (1) *B-VG*: "Judges are independent in the exercise of their judicial office."

23 ECJ joined cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357, para. 35; joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer* [1996] ECR I-4845, para. 20.

24 ECJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur* [1996] I-1029, para. 34

25 ECJ Case 224/01, *Köbler* [2003] ECR I-10239, paras. 33 et seq.

26 *ÖZW* 1996, 24 with an annotation by *Gutknecht* (28 et seq.).

27 Federal Law Gazette No. 462/1993 as amended on Federal Law Gazette No. 917/1993.

ARGE F/I was rejected because of partial inadmissibility of the free alternative tender. Thereafter the ARGE F/I addressed the Federal Procurement Office (Bundesvergabeamt, BVA) and applied for control of the award of contracts under Section 91 (3) BVergG. Contrary to the Federal Procurement Control Commission, the Federal Procurement Office detected that the contracting authority had not chosen the most economically advantageous tender – brought in by the ARGE F/I – for the award of the public works contract.

The decision of the Federal Procurement Office was the subject of the social insurance agency's appeal to the Austrian Constitutional Court under Article 144 (1) Federal Constitution Law (Bundes-Verfassungsgesetz, hereinafter B-VG).²⁸ Based on this decision, the applicant claimed a violation of its rights to equal treatment before the law under Article 7 (1) B-VG²⁹ and to a lawful judge under Article 83 (2) B-VG; he furthermore argued that the decision was based on unconstitutional provisions of the Federal Act of Procurements. From the applicant's point of view, the Federal Procurement Office being qualified as tribunal in terms of Article 177 (3) ECT [now Article 234 (3) EC]³⁰ has not provided a lawful judge under Article 83 (2) B-VG to the applicant by not referring the applicant's case to the ECJ. The relevant preliminary question was whether Article 19 of the Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts³¹ requires an interpretation of the applied provisions of the Federal Act of Procurements to the effect that alternative tenders have to be accepted entirely, or whether such tenders could partially and together with a part of the main tender be the basis of the award of contracts.

b. The Court's Assessment

At first, the Constitutional Court qualified the Federal Procurement Office not only as independent administrative authority according to Article 20 (2) B-VG and Article 133 point 4 B-VG, but also as court under Article 234 EC. The Federal Procurement Office meets the criteria developed by the ECJ to be qualified as a court in the sense of the Community law. As decisions of the Federal Procurement Office are excluded from the jurisdiction of the Administrative Court, it has to be qualified as court of last resort under Article 234 (3) EC. Due to the limited extent of the subsequent control through the Constitutional Court, the admissibility

28 Federal Law Gazette No. 1/1930.

29 "All nationals (Austrian citizens) are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. The Republic (Federation, Laender and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life."

30 The Treaty of Amsterdam, OJ 1997 C 340/93, led to a renumeration of the Treaties, cf. Article 12 (1) of the Treaty of Amsterdam: "The articles, titles and sections of the Treaty on European Union and of the Treaty establishing the European Community, as amended by the provisions of this Treaty, shall be renumbered in accordance with the tables of equivalences set out in the Annex to this Treaty, which shall form an integral part thereof." For a better understanding the original Article 177 ECT will be replaced through Article 234 EC in the following text.

31 OJ 1993 L 199/54.

of a constitutional complaint has no impact on the Federal Procurement Office's characterisation as court of last resort.

Thereafter, the Constitutional Court agreed that a violation of the duty to make a preliminary reference under Article 234 (3) EC also induces a violation of the right to a lawful judge under Article 83 (2) B-VG which states that no one may be deprived of his lawful judge. Article 83 (2) B-VG is a procedural fundamental right. The jurisdiction of the Constitutional Court is based on an extensive comprehension of Article 83 (2) B-VG: "Judge" according to this constitutional provision does not only refer to a court, but also to each public authority provided on the legal basis of a statute or a regulation for deciding something. Having said this, the ECJ has to be considered a lawful judge. According to Article 234 (1) EC, the ECJ bindingly decides about the interpretation of primary and secondary Community law. The national body remains in its position as lawful judge. It has to decide the pending case, but by doing this it is bound to the preliminary ruling of the ECJ, which has a monopoly concerning the interpretation of Community law. This dualism of legal protection is described as cooperation of the courts in literature and judicature.

From the Constitutional Court's point of view, a national office violating its duty to refer a question to the ECJ under Article 234 (3) EC is breaching the legal system of responsibilities including Article 234 EC; this national office is denying the parties their lawful judge insofar as the ECJ cannot decide a question being reserved to its (exclusive) jurisdiction. Such an official failure infringes upon the legal responsibilities and therefrom causes a violation of Article 83 (2) B-VG.

With reference to the *CILFIT* criteria of the ECJ³² the Constitutional Court interprets the so called *acte clair* doctrine in a way that a national court is only violating its duty to make a preliminary reference to the ECJ under Article 234 (3) EC if it has doubts about the compatibility of its interpretation of the national law and the applicable Community law. Since the Federal Procurement Office has neither decided inconsistently for the existing jurisdiction of the ECJ, nor has it ignored European provisions, the Constitutional Court did not see any constitutional violation in the present case.

3. Further Developments

The Austrian Constitutional Court maintained its jurisdiction concerning the ECJ as lawful judge under Article 83 (2) B-VG.³³ In another case related to public procurement (VfSlg. 14.889/1997),³⁴ the Constitutional Court stated explicitly that all violation, not just gross violation, of the duty to make a preliminary reference

32 Supra 1.b.

33 For more detailed information on Article 83 (2) B-VG see *Holzinger in Korinek/Holoubek (eds.), Österreichisches Bundesverfassungsrecht – Textsammlung und Kommentar*, 5. Lfg. (2002); *Mayer, B-VG, Kurzkommentar*⁴ (2007) 306 et seq; *Thienel, Verwaltungsverfahrenrecht*⁴ (2006) 47 et seq; *Öhlinger, Verfassungsrecht*⁷ (2007) paras. 949 et seq; *Walter/Mayer/Kucsko-Stadlmayer, Grundriss des österreichischen Bundesverfassungsrechts*¹⁰ (2007) paras. 1514 et seq; *Morscher/Christ, Aktuelles zum gesetzlichen Richter*, *AnwBl* 2007, 75.

34 Cf. *Holoubek, Vergaberechtsschutz im Spiegel der Rechtsprechung des Verfassungsgerichtshofs*, *ÖZW* 1998, 75.

to the ECJ under Article 234 (3) EC leads to a breach of the right to a lawful judge.³⁵ In this important point, the jurisdiction of the Austrian Constitutional Court differs from the lawful judge approach first adopted by the German Federal Constitutional Court: under Article 101 Basic Law for the Federal Republic of Germany (Grundgesetz, GG) the right to a lawful judge is violated if a national court, in arbitrarily failing to refer a case to the ECJ, breaches its duty according to Article 234 (3) EC.³⁶

In contrast to the leading case presented above the Constitutional Court saw a violation of Article 83 (2) B-VG caused by the Federal Procurement Office in failing to make a preliminary reference in several cases.³⁷ As administrative authorities based on collegial principle under Article 133 point 4 B-VG basically are qualified as courts of last resort in the legal sense of Article 234 (3) EC,³⁸ most decisions of the Constitutional Court dealing with the interplay between Article 83 (2) B-VG and Article 234 (3) EC are related to the central question: whether independent administrative authorities – taken the *CILFIT* criteria as a basis – are obliged to ask the ECJ for a preliminary decision. On the contrary, the Independent Administrative Tribunals (Unabhängige Verwaltungssenate [der Länder], UVS) are not courts of last resort under Article 234 (3) EC, as their decisions are subject to the jurisdiction of the Administrative Court (VfSlg. 15.766/2000).³⁹ Another interesting question would be whether the Constitutional Court itself is supposed to refer a case to the ECJ.⁴⁰

The lawful judge approach chosen by the Constitutional Court perfectly combines the Austrian constitutional law and jurisdiction with the requirements resulting from the European Community law. Considered as lawful judge under Article 83 (2) B-VG, the ECJ attains a position in the Austrian legal system corresponding to its responsibilities pursuant to Article 234 EC.

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35 See *Holzinger*, Der Verfassungsgerichtshof und das Gemeinschaftsrecht, in *Hammer/Somek/Stelzer/Weichselbaum* (eds.), *Demokratie und sozialer Rechtsstaat in Europa – Festschrift für Theo Öhlinger* (2004) 142 (145).

36 Article 101 (1) GG: "Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge."; see BVerfGE 82, 159 (195 et seq.).

37 E.g. VfSlg. 14.607/1996; 14.889/1997; 16.118/2001.

38 See *Winkler*, Zur Wahrung des Gemeinschaftsrechts bei Kollegialbehörden nach Art 133 Z 4 B-VG durch den VfGH, JBl 1998, 551 (555 et seq.).

39 Cf. *Walter/Mayer*, Grundriss des österreichischen Verwaltungsverfahrenrechts⁸ (2003) para. 548/14a.

40 In answer to this question see *Jedliczka*, The Austrian Constitutional Court and the European Court of Justice, in this issue.