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OPINION STATEMENT

Opinion Statement FC 5/2018 on practical difficulties arising from the practices and procedures of the Court of Justice of the European Union

Prepared by the CFE Fiscal Committee
Submitted to the Court of Justice of the European Union in November 2018

This Opinion Statement details practical difficulties encountered by members of the CFE in cases heard by the Court of Justice of the European Union. The CFE is appreciative of the significant contribution that the Court of Justice has made to develop European jurisprudence and, in particular, in protecting citizens' rights and ensuring that measures are taken in a proportionate manner with proper procedural safeguards. This Opinion Statement seeks to provide some constructive comments on the practices and procedures of the Court of Justice.

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Ms. Stella Raventós, Chair of the CFE Fiscal Committee or Brodie McIntosh, Tax Technical Officer, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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I. General Remarks

The CFE is appreciative of the significant contribution that the Court of Justice has made to develop European jurisprudence and, in particular, in protecting citizens' rights and ensuring that measures are taken in a proportionate manner with proper procedural safeguards. This Opinion Statement seeks to provide some constructive comments on the practices and procedures of the Court of Justice with a view to further improvement[1]. The main procedural steps in references to the Court are the making of a reference, then the submission of written observations. In most cases, this is then followed by an oral hearing. The Advocate-General will then frequently deliver an Opinion, followed by a judgment of the Court.

II. The Making of a Reference

According to the *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling* (in OJEU C-439 of 25th November 2016), Point 13, the national judge should be:

> "(…) able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

We consider that this imposes a joint responsibility on the national Courts and the lawyers[2] before the national Court to provide the Court of Justice with all information necessary for it to be able to provide a useful reply to the questions referred by the national Court or tribunal, in accordance with Article 94 of the Rules of Procedure of The Court of Justice.

III. The Written Part of the Procedure

Article 23, second sub-paragraph, of the Statute of the Court of Justice states that:

> Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

According to Paragraph 10 of the *Practice directions to parties concerning cases brought before the Court* (in OJEU L-31 of 31th January 2014):

> On account of the non-adversarial nature of preliminary ruling proceedings, the lodging of written observations by the interested persons referred to in Article 23 of the Statute does not involve any specific formalities. Where a request for a preliminary ruling is served on them by the Court, those persons may thus submit, if they wish, written observations in which they set out their point of view on the request made by the referring Court or tribunal. The purpose of those observations — which must be lodged within a time-limit of two months from service of the request for a preliminary ruling (extended on account of distance by a single period of 10 days) that cannot otherwise be extended — is to help clarify for the Court the scope of that request, and above all the answers to be provided to the questions referred by the referring Court or tribunal.

[1] A consolidated version of the rules of the Court can be found at: https://curia.europa.eu/jcms/upload/docs/ application/pdf/2012-10/rp_en.pdf

[2] However, it is observed that national Courts can make a preliminary ruling to the Court of Justice even when the parties have not requested such a ruling.

In our opinion, the parties and their legal representatives have a responsibility to try and ensure that the Court has a correct appreciation of the facts. Sometimes the parties fail to adequately discharge this obligation, and the Court will request further clarification of the factual position. The Court has in some instances written to the parties in advance of the hearing requesting such clarification. The CFE considers that such an approach is to be encouraged, because it reduces the risks of misunderstandings that may arise if the issue is raised for the first time during the oral hearing.

When there are joined references, a party's ability to make representations may also be inhibited by the fact that it does not have any right to obtain information relating to the other reference. For example, in Joined Cases C-439/04 *Axel Kittel* (Civil case) and C-440/04 *Recolta Recycling* (Criminal case)[3], the lawyers of Axel Kittel had no access to information contained in the files of Recolta Recycling that had been submitted to the Court. The CFE considers that it would be desirable if the Court could order appropriate disclosure in such cases.

Sometimes, it may also become clear from the written observations of the other parties or other developments that the case will raise important points that were not referred by the national Court. Examples where this has happened have included:

(i) C-607/14 *Bookit v HMRC* and C-130/15 *NEC v HMRC*[4], where the Commission, in its written observations, contended that a supply by a taxable person acting as agent and a related supply made by it as principal could in certain circumstances be considered a single supply for VAT purposes. This issue had not been referred by the national court because the UK courts have ruled that aggregation of supplies by different taxable persons is not possible in the absence of abuse. If joint supplies by different taxable persons are a possibility, difficult questions will arise as to who is liable for how much VAT and as to how the place of supply rules should operate if the suppliers are in different countries. The judgments suggest that such an aggregation may be possible. Apart from the Commission, the only observations made on this issue were during the brief oral hearing.

(ii) C-326/15 *DNB Banka v Valsis ienemumu dienests* and C-605/15 *Minister Finansów v Aviva* cases[5], where the issue of whether the exemption in Article 132(1)(f) of the directive could apply to groupings of companies in the insurance and financial sector was considered by the Court even though it had not been raised in the references by the national Courts[6].

Neither the rules or practice directions explicitly make it clear that there is any right to make further written representations when there has been a reference in such cases[7]. The CFE considers that in such cases it is unsatisfactory for the parties to be limited to confining their response to the brief opportunity afforded during the oral hearing and considers that the Court's rules and procedures should make it clearer that the parties can seek to rely on further written observations on the new issues.

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3 6 July 2006.
4 26 May 2016.
5 21 September 2017.
6 The issue also arose in C-616/15 *EC v Germany.*
7 Article 126 RP refers to a right of reply and rejoinder in direct actions and article 175 contains a similar right in relation to appeals.

IV. The Importance of the Public Hearing

Article 76, paragraph 1, of the Rules of Procedure of the Court of Justice (RP) (consolidated version) states:

> 1. Any reasoned requests for a hearing shall be submitted within three weeks after service on the parties or the interested persons referred to in Article 23 of the Statute of notification of the close of the written part of the procedure. (…).

The parties (or their representatives) have the right to request an oral hearing. It is clearly important to make a request in cases where a party wants an opportunity to comment on the written observations of the other parties. Concerning the procedure of the oral hearing itself, the CFE would particularly like to encourage the continuation of the practice of having an introductory meeting between the advocates and the judges prior to the hearing commencing, where the judges indicate what points they propose to raise. However, in addition, the CFE would also like to encourage the Court to send any additional or revised questions to the parties in writing in the period following the notification of the hearing and the hearing itself, where possible, in order for parties to be able to prepare an appropriate response to provide in oral submissions to these further questions, and avoid any misunderstandings of fact.

One other concern that the CFE has with the oral part of the procedure is the increasingly short time, now generally 15 minutes, that parties have to make representations. The CFE appreciates the pressures on the Court's time and that it is possible to make a reasoned application for a longer hearing. However, there have been a number of occasions when clients have told members of the Fiscal Committee that they feel that the shortness of the time to make representations means that they have not had a proper opportunity to present their case. Perceptions are important, and the CFE therefore considers that it would be desirable to give the parties a longer period to present their case. This is particularly true if new points arise prior to the oral hearing which the parties have not had an opportunity to address in their written observations.

V. The Importance of the Clarity and Completeness of the Ruling

Article 104 of RP reads:

> 1. Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.
> 2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

In order to prevent the need for a national Court to make a further reference in the same case or in other cases raising similar facts, the CFE believes that the Court's rulings must be sufficiently clear and comprehensive. The CFE in particular observes that:

(i) the Opinions of the Advocate General can frequently be very helpful in determining the legal consequences of a judgment of the Court. Article 20 of the Statutes of the Court states that the Court can dispense with the need for an Opinion when it considers that the case raises no new points of law. Although the very welcome increase in the number

of Advocate Generals may reduce problems going forward, this power seems to have been increasingly used in recent years. However, the consequences of dispensing with the Opinions may well be an increase in disputes in national Courts and the increased need for further references. This is because the Opinions can frequently assist in understanding judgments from the Court. For example, there was no Advocate-General's Opinion in C-175/09 *HMRC v Axa UK*[8], C-607/14 *Bookit v HMRC* and C-130/15 *NEC v HMRC*[9]. In the *Bookit* and *NEC* cases, this was despite the fact that the Commission's observations potentially raised a new and important question on the aggregation of supplies by different taxable persons. The United Kingdom's Upper Tribunal considered that these decisions were difficult to reconcile, and therefore made a further reference in C/5/17 *HMRC v DPAS*[10]. There were also significant disputes about the consequences of the Court's judgment in Joined Cases C-53/09 and C-55/09 *HMRC v Loyalty Management UK Ltd* and *Baxi Group v HMRC*[11]: see [2013] UKSC 42[12]. Again there was no Advocate-General's Opinion in those cases;

(ii) when an Advocate General produces an Opinion, it would also be helpful if the Court could indicate to what extent it agrees or disagrees with the statements made by the Advocate-General. A recent example of the difficulties that can arise from the failure to do this is provided by the United Kingdom First-tier Tribunal decision in *Blackrock Investment Management (UK) Ltd v HMRC* [2017] UKFTT 633 (TC)[13]. The Tribunal at paragraphs 197-199 observed that AG Cruz Villalon at paragraphs 27, 36-37 of his Opinion in C-275/11 *GFBk Gesellscaft v Finanzamt*[14] considered that supplies might not qualify as supplies of "management" falling within Article 135(1)(g) of the Principal VAT Directive unless they have *"a significant degree of autonomy as regards its contents".* The Tribunal doubted whether there was any such requirement and also observed that there was nothing in the judgment of the Court that suggested that it was endorsing these comments. However, it still considered that it should make a finding that the supplies were, in any event, sufficiently autonomous. If the Court had commented on the issue, the position would, obviously, have been even clearer.

As we indicated at the outset, the contribution made by the Court to European jurisprudence is greatly welcomed and appreciated by the CFE. Addressing the issues raised in this Opinion Statement is likely to further increase the respect with which the Court is quite correctly held. In some instances, it may also assist the effective management of the Court resources, by reducing the need for further references to be made to clarify the impact of earlier judgments.

[8] 28 October 2010.
[9] 26 May 2016.
[10] 21 March 2018.
[11] 7 October 2010
[12] 20 June 2013.
[13] 15 August 2017.
[14] 7 March 2013.