

The full report is available at www.sieps.se

Summary of the report

Preliminary Rulings by the EU Court of Justice – The Attitude and Practice of the Swedish Courts

Ulf Bernitz

Nowadays, the Swedish courts are not only the courts of the Kingdom of Sweden. They are integrated into a European legal and judicial system comprising the whole of the EU. Within that system, the Swedish courts constitute the national arm of the EU legal order, having independent responsibility for its full effect and correct application within Sweden. The Swedish courts have been given a new role which, on the whole, had no counterpart before Sweden's entry into the EEA in 1994 and the EU in 1995.

The actual practice of the Swedish courts when it comes to requesting preliminary rulings from the EU Court of Justice (EUJ) is of core importance for the application and impact of EU law within the Swedish legal system. After fifteen years of membership there is now much experience available in relation to the Swedish application of the preliminary ruling system. Swedish courts have been criticized for being too restrictive in requesting preliminary rulings and, when doing so, referring the cases unnecessarily late in the litigation process. In 2004, the European Commission started infringement proceedings against Sweden arguing that the Swedish courts were too restrictive in their application of the preliminary ruling procedure and thus Sweden was failing to fulfil its Treaty obligations. In total, the EUJ has decided 67 preliminary ruling cases at the request of a Swedish court in the years 1995 to 2009 inclusive, i.e., less than five cases per year.

The primary purpose of the present Report is to clarify the Swedish case law and the attitude of the courts when it comes to requesting preliminary rulings.

Culture differences

It is evidently demonstrated by the statistics, that there are essential differences in culture between the member states in relation to referring cases to the EUJ. Sweden does not have noticeably fewer references in comparison with Denmark, Finland, Ireland and Portugal, but it certainly has

fewer in comparison with the Netherlands and Belgium and, in particular, Austria. Looking at the general picture, there is scope for a substantial increase in the number of Swedish cases referred without cause for criticism for overburdening the EUJ. The statistics from the different member states indicate that even a doubling, for instance, of the amount of cases referred by Swedish courts would fall within what can be considered as normal European practice in this regard.

Constant amount of references

The amount of cases referred from Swedish courts has remained fairly constant over the years. It is not possible to point to any lasting change that could be connected to the above mentioned Commission's infringement proceedings. Also, the reasons now given by the Supreme Courts in cases involving EU law, in which leave is not granted, tend to be very short and not particularly informative, even though the law was changed due to the infringement proceedings. Thus, the infringement proceedings instigated by the Commission do not seem to have had much effect.

Important questions but no references concerning constitutional issues

The very large majority of the cases from Swedish courts have dealt with important legal issues of EU law which have been unclear or, in any case, not sufficiently clarified. When a Swedish court has taken the decision to refer a case to the EUJ, there has nearly always been good reason to do so.

However, there are no Swedish cases in which Swedish courts have openly displayed a reluctance to accept the supremacy of EU law. However, sometimes the lack of references might point in this direction, indicating a certain silent resistance.

Further, there are no cases in which Swedish courts have referred issues related to public procurement, state aid, consumer law or criminal procedure. There is no case so far in which a Swedish court has made use of the new urgent preliminary ruling procedure. Turning to areas of law where there are remarkably few cases referred from Sweden, one might mention environmental law, social law and immigration law. Naturally, this list is not exhaustive.

Overall assessment

The Report makes the overall assessment that the attitude of Swedish courts are more open today than it was during the first period of Swedish EU membership, but it is still possible, as the statistics clearly demonstrate, to observe a certain caution. New developments influencing legal culture have a tendency not to penetrate the legal system quickly and, as mentioned, the infringement proceedings brought by the Commission, and the consequent legislative amendment about the duty of the courts of last instance to give reasons, have hardly had the effects intended. It would be difficult to regard the present situation as fully satisfactory. According to the overall picture, there still exists an exaggerated restrictiveness and in some instances probably a reluctance in Swedish courts towards referring cases to the EUJ. This tendency is evident in particular among lower courts and might function to the detriment of the legal security of the parties in cases involving EU law. There is scope for a decisive increase in the amount of Swedish cases referred to the EUJ without causing any criticism of Swedish courts for overburdening the latter.

The full report is available at www.sieps.se