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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Model contribution

to the Special Bulletin on "The relations between the constitutional courts and the other national courts, including the interference in this area of the action of the European courts"

prepared by the Belgium Court of Arbitration

Remark: As regards the link with the questionnaire (CDL-JU (2001) 18: when the contents of the summary is very close to one of the questions in the questionnaire, that number corresponding to the questionnaire concerning the national report for the Conference features in bold between brackets and is underlined.

This model uses version 12 of the Systematic Thesaurus. Please use the more recent version 13 for your contribution.

Belgium
Court of Arbitration

Identification: BEL-1986-C-001

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 25.03.1986 / **e**) 12/86 / **f**) / **g**) *Moniteur belge* (Official Gazette), 17.04.1986 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member States.

Keywords of the alphabetical index:

Preliminary question, subject-matter / Preliminary question, limitation / Bringing of a case before the Court of Arbitration, limits / Division of jurisdiction between the Constitutional Court and the court asking a preliminary question, applicability of legal rules to the facts of a case.

Headnotes:

Parties in proceedings before the Court of Arbitration may not modify, or cause to be modified, the content of questions referred to the Court.

It is up to the court to which a case is referred for hearing and decision, and to that court alone, to decide within the time limits on the applicability of a legal rule relied on in court and to decide, where necessary, whether or not it should consult the Court of Arbitration about the rule.

Even if the Court of Arbitration considers that the court handling the case is mistaken in its appreciation of the legislation applicable to the facts, it cannot correct the questions accordingly. Nor can it rule on the applicability of a legal rule to the relevant facts, if that rule has not submitted to it via the referral decision.

Summary:

The Court of Arbitration was asked to rule on the preliminary question of the compatibility of a decree of the Dutch Cultural Community of 19 July 1973 with the rules governing the

division of powers between the different sources of legislation in Belgium (see "Supplementary information 1").

One of the parties submitted that it was not the decree of 19 July 1973 that was applicable to the particular facts of the case but a French Community decree of 30 June 1982 (paragraph 3.A.1 of the preamble to the decision).

In its decision, the Court established the following principles: it is up to the inferior court to decide which legal rule is applicable to the case before it and to decide whether or not it is necessary to ask a preliminary question concerning the rule **(19)**. The parties may not modify the content of the preliminary question **(23)**, nor may the Court correct the questions as regards the applicability of the legal rule to the case pending before the inferior court **(17)** (paragraph 3.B.1 of the preamble to the decision) (see "Supplementary information 2").

Supplementary information:

1. Since Belgium is a federal country, the French, Flemish and German-speaking communities are empowered to enact their own legislation in the form of "decrees". The Cultural Council of the Dutch Cultural Community was the institution that preceded the establishment of the Flemish Community.

The "federal" courts are required, as appropriate, to apply the legal rules enacted by the federal authority, the three communities, or the three regions (the Walloon and Flemish Regions, and the Brussels-Capital Region). Where necessary, the Court of Arbitration rules, on the basis of preliminary questions, on which of these legislative bodies is competent to enact the particular legal rule to be applied by the court.

2. The principle established in this decision has been confirmed in many subsequent decisions (see, inter alia, decisions nos. 3/89, 18/91, 23/91, 77/92, 16/97, 23/98, 87/99). However, on occasion it has also been qualified, insofar as the Court of Arbitration has referred certain cases back to the inferior court and ordered it to make sure the question is still relevant, for example following retroactive amendment of the legal rule in question (see in particular decisions nos. 59/95, 19/96, 79/97, 59/98, 129/98, 137/98, 57/99, etc), or has declared that there is no question to answer if in the meantime it has declared the legal rule void (decisions nos. 72/94 and 73/94), or has rectified a material error (decision no. 60/95).

3. All the decisions are published on the Court's website (www.arbitrage.be), where they may be consulted in French, Dutch and German.

Languages:

French, Dutch, German.

Identification: BEL-1991-C-002

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 04.07.1991 / **e**) 18/91 / **f**) / **g**) *Moniteur belge* (Official Gazette), 22.08.1991 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.10 **General Principles** – Certainty of the law.
5.2 **Fundamental Rights** – Equality.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Preliminary question / Inheritance rights on intestacy / Lawful descent, natural child.

Headnotes:

In continuing to enforce, on a transitional basis, a provision of the Civil Code which deprives natural children of their inheritance rights even after a judgment of the European Court of Human Rights declaring Belgium to be guilty of breaching Article 8 of the ECHR in conjunction with Article 14 (Judgment in the case of Marckx of 13 June 1979), the legislature violates the constitutional principles of equality and non-discrimination (former Articles 6 and 6*a* of the Constitution, currently (since 1994) Articles 10 and 11).

Summary:

Under former Article 756 of the Civil Code, natural children were not recognised as heirs and had no rights in respect of the property of their deceased father and mother unless they had been officially recognised. They also had no rights under the Article in respect of their parents' relatives' property. The Article was amended by an Act of 31 March 1987 but maintained, however, on a transitional basis for estates passed to heirs prior to the Act's entry into force on 6 June 1987.

A natural child applied to the Belgian civil courts to have his inheritance rights recognised. The Court of Cassation asked the Court of Arbitration to rule on the question of whether the transitional provision that applied the old law to estates passed to heirs in 1956 and 1983 was compatible with the principles of equality and non-discrimination.

The Court of Arbitration noted that the explanatory memorandum accompanying the amending bill was based, *inter alia*, on the view that it was necessary to put an end to the discrimination against natural children born out of wedlock, which constituted a "glaring exception" to the principle that all people were equal before the law. It also noted that in its Judgment in the case of Marckx v. Belgium of 13 June 1979, the European Court of Human Rights had considered that the limitations imposed on the rights of recognised natural children in respect of their right to inherit their mother's property and the fact that they had

no inheritance rights at all in respect of their close relatives on their mother's side breached Articles 8 and 14 of the ECHR **(43)**.

The Court found that the difference in the treatment of children born in and out of wedlock, in terms of their inheritance rights and as established under Article 756 of the Civil Code and kept in force on a transitional basis under Section 107 of the Act of 31 March 1987, breached the constitutional principles of equality and non-discrimination (former Articles 6 and 6a of the Constitution, currently (since 1994) Articles 10 and 11).

The Court then examined the question of to what extent its decision constituted *res judicata* **(37)**. It noted that according to Section 28 of the Special Act of 6 January 1989, a ruling handed down by the Court of Arbitration in respect of a preliminary question only constituted *res judicata* for the inferior court and other courts required to rule "on the same case". However, according to Sections 4.2 and 26, § 2, sub-paragraph 3.1 of the Act insofar as, the scope of such a ruling exceeded the limits laid down in Section 28, the Court needed to bear in mind the possible consequences of its decision for cases other than the case to which the preliminary question referred.

Accordingly, the Court observed that in its Judgment in the Marckx case, the European Court of Human Rights had pointed out that "the principle of legal certainty, which [was] necessarily inherent in the law of the Convention (…) [dispensed] the Belgian State from re-opening legal acts or situations that [pre-dated] the delivery of the [current] judgment" and found that the fact that estates passed to heirs prior to the Marckx Judgment were not affected by the unconstitutionality ruling was justified by the principle of legal certainty. It followed that former Article 756 of the Civil Code could still be applied to estates passed to heirs prior to 13 June 1979 but not to any passed to heirs after that date.

Supplementary information:

See also decision no. 83/93 of 1 December 1993.

Languages:

French, Dutch, German.

Identification: BEL-1991-C-003

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 04.07.1991 / **e**) 21/91 / **f**) / **g**) *Moniteur belge* (Official Gazette), 22.08.1991 / **h)**.

Keywords of the systematic thesaurus:

1.4.2 **Constitutional Justice** – Procedure – Summary procedure.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.

Keywords of the alphabetical index:

Preliminary question, obligation to request a preliminary ruling.

Headnotes:

Courts are not required to ask the Court of Arbitration for a preliminary ruling if the Court has already ruled on a question or appeal on the same subject-matter. If, however, the courts do request a preliminary ruling on the same question, the Court of Arbitration can adopt a shortened form of procedure and hand down an "immediate response decision".

Summary:

In its decision no. 9/91 of 2 May 1991, the Court of Arbitration ruled on a preliminary question. On 29 April 1991, it was asked by a police court to rule on the same question.

The Court found (Decision, Part IV) that the police court had not been in a position to make use of Section 26, § 2.1 of the Special Act of 6 January 1989 in relation to the Court of Arbitration, according to which it was dispensed from seeking a preliminary ruling from the Court if the Court had already ruled on a question with the same subject-matter. **(12) (35-37)**

The Court noted that a preliminary question could be considered to be "manifestly pointless" within the meaning of Section 72 of the Special Act of 6 January 1989 if the Court had already handed down a ruling on an identical question.

In accordance with the preliminary procedure set out in aforementioned Section 72 **(16)**, the Court decided not to examine the case any further (no exchange of documents and no hearing) and to deliver an "immediate response decision", which was the same as its ruling in decision no. 9/91.

Supplementary information:

1. Decisions of the Court of Arbitration setting aside a contested statutory provision (in principle *ex tunc*) are universally binding *(erga omnes)* (see, *inter alia*, decision no. 12/86 of 25 March 1986). Decisions dismissing applications to set aside are binding on courts in respect of the points of law in question (Section 9 of the Special Act of 6 January 1989).

A ruling on a preliminary question is binding only on the parties *(inter partes)* insofar as the court that has asked the question and any other court required to rule on the same case must comply with it (Section 28 of the aforementioned Special Act). However, other courts are not required to seek a preliminary ruling in respect of another case when the Court of Arbitration has already ruled on a question on the same subject (Section 26, § 2, sub-paragraph 2, of the Special Act).

Section 26 defines the circumstances that determine whether or not courts are required to seek a preliminary ruling. The cases where courts ruling at last instance can avoid asking a preliminary question are very limited and the question must be asked even if the Court of Arbitration has already ruled on it. Accordingly, such questions generally give rise to an "immediate response decision" after a shortened form of procedure.

The aforementioned provisions are published in Volume 3 (Basic Texts 2) of the Special Bulletin on Basic Texts, issue 2, and in the CODICES database, http://codices.coe.int/.

2. For the sake of comparison, see decision no. 119/98 (preliminary procedure and partial referral of the case to the inferior court so that it can assess whether or not a reply is still necessary).

3. For the binding effect *(inter partes)* of decisions dismissing applications to set aside, see in particular decision nos. 53/99 and 80/99.

Languages:

French, Dutch, German.

Identification: BEL-1993-C-004

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 08.07.1993 / **e**) 56/93 / **f**) / **g**) *Moniteur belge* (Official Gazette), 27.08.1993 / **h)**.

Keywords of the systematic thesaurus:

1.4.9 **Constitutional Justice** – Procedure – Parties.
1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Procedure / Preliminary question / Parties to the proceedings / Application to be joined to proceedings.

Headnotes:

Under Section 87, § 1 of the Special Act of 6 January 1989, when the Court of Arbitration hands down a preliminary ruling, anyone with an established interest in the case pending before the court which requests a preliminary ruling may, providing they submit a memorandum to the Court of Arbitration within the prescribed time-limit, be joined to the proceedings.

Parties with an established interest in similar cases, however, do not have this possibility of being joined to the proceedings.

In the event of an application from such parties, the Court of Arbitration must check that the Act governing its own organisation does not breach the principles of equality and non-discrimination laid down in Articles 10 and 11 of the Constitution. It considers itself competent to carry out this check on an interlocutory basis and rules the aforementioned Section 87, § 1 to be compatible with the constitutional principles of equality and non-discrimination.

Summary:

Applications from third parties to be joined to proceedings relating to preliminary questions are governed by the Special Act of 6 January 1989. In order to be joined to preliminary proceedings before the Court of Arbitration, a person must meet both of the conditions laid down in Section 87, § 1. In other words, he or she must have an established interest in the case pending before the court that sought the preliminary ruling and must have submitted a memorandum to the Court of Arbitration within the prescribed time-limit.

The Court found that people with an established interest in the case pending before the court that requested the preliminary ruling and people with in established interest in similar cases were treated differently **(23)**. It then found that this difference in treatment was justified, given the conditions governing the referral of cases for a preliminary ruling and the fact that the ruling constituted *res judicata* **(37)**. It was up to the court dealing with a particular case to refer it to the Court of Arbitration.

Section 28 of the aforementioned Special Act limits the scope of a ruling on a preliminary question to the case in respect of which the question is asked. Consequently, it is possible under the Act to limit applications to be joined to Court of Arbitration proceedings to people who can intervene in the case in issue.

Lastly, the Court found that while it was probably true that a ruling on a preliminary question could have an indirect impact on similar cases insofar as the court dealing with a similar case could consider that it did not have to seek a preliminary ruling from the Court of Arbitration because the Court had already handed down a ruling on a preliminary question on the same subject, there was nothing to prevent the parties to a similar case from trying to convince the court dealing with the case that it should also seek a preliminary ruling.

Consequently, Section 87, § 1 of the Special Act of 6 January 1989 does not violate the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) by not allowing applications to be joined to the proceedings to be submitted by people who do not have an established interest in the case pending before the court that referred the case for a preliminary ruling.

Supplementary information:

1. See also decisions nos. 57/93, 65/93, 7/94, 60/95, 82/95, 10/97, 35/97 and 26/2001, which are based on the same provision of the Act.

2. See also, however, decision no. 55/99, according to which parties to a case similar to the case that gave rise to the preliminary question could be joined to the proceedings given that, in both cases brought before the *Conseil d'Etat*, the parties had requested that the Court of Arbitration be asked to rule on a preliminary question and the *Conseil d'Etat* had reserved judgment on the cases until the Court of Arbitration had ruled on the question asked in relation to the case in question. See also decision no. 126/2000, which adopts the same solution insofar as the case brought by the intervening party before the industrial tribunal in Brussels was referred by the tribunal to the special list pending the Court of Arbitration's ruling on the preliminary question submitted by the industrial tribunal in Antwerp in this case.

Languages:

French, Dutch, German.

Identification: BEL-1993-C-005

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 15.07.1993 / **e**) 63/93 / **f**) / **g**) *Moniteur belge* (Official Gazette), 02.09.1993 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.

Keywords of the alphabetical index:

Preliminary question, subject-matter / Preliminary question, limitation / Bringing of a case before the Court of Arbitration, limits.

Headnotes:

In cases where a preliminary question regarding compliance with the constitutional principle of equality (Article 10 of the Constitution) concerns a provision that provides for a number of distinctions, the Court of Arbitration limits its examination to the distinction which, having regard to the facts of the case and the wording of the preliminary question, constitutes the subject-matter of the case.

In other words, the Court does not rule in an abstract manner on the constitutionality of the contested provision but answers a preliminary question in relation to the case pending before the inferior court.

Summary:

Mr E. Van Daele started receiving a special advance pension payable on redundancy under a collective agreement at the age of 57. His application to receive an old-age pension when he reached the age of 60 was rejected on the ground that he was already claiming an advance pension under a collective agreement and was not entitled to an old-age pension before the age of 65. He lodged an appeal against this decision with the industrial tribunal.

The industrial tribunal in Antwerp requested a preliminary ruling on the question of whether or not Section 2 of the Act of 20 July 1990 “establishing a flexible retirement age for salaried workers and adapting salaried workers’ pensions to the changes in the general standard of living” was consistent with the constitutional principle of equality and non-discrimination (former Articles 6 and 6a of the Constitution, currently Articles 10 and 11) insofar as men receiving an advance pension under a collective agreement were not entitled to claim the old-age pension before the age of 65, whereas, in principle, anyone else could claim it from the age of 60.

The Court of Arbitration noted that the case that had given rise to the preliminary question concerned an appeal lodged by a male claimant of an advance pension under a collective agreement on the ground that he was not entitled to claim the old-age pension from the age of 60.

The Court found that it was not necessary in order to answer this question to carry out a specific comparison, within the category of people in receipt of advance pensions under a collective agreement, between male and female beneficiaries, which would also have meant assessing the contested provision's compliance with Articles 6 and 6a (currently Articles 10 and 11) of the Constitution, taken in conjunction with (former) Article 119 of the EC Treaty, as interpreted by the Court of Justice **(46)**.

Having regard to the particular facts of the case and the wording of the preliminary question, the Court of Arbitration therefore limited its examination **(6)** to the distinction made between a claimant of an advance pension under a collective agreement and anyone else claiming an old-age pension from the age of 60. (The outcome of the case in terms of its merits is not important here.)

Supplementary information:

See **by way of analogy** in particular decisons nos. 21/96, 39/96, 23/97, 54/98, 58/2000.

Languages:

French, Dutch, German.

Identification: BEL-1996-C-006

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 15.05.1996 / **e**) 32/96 / **f**) / **g**) *Moniteur belge* (Official Gazette), 20.06.1996 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.

Keywords of the alphabetical index:

Division of jurisdiction between the Constitutional Court and the court asking a preliminary question, interpretation of the legal rules applicable to the facts of the case.

Headnotes:

It is not up to the Court of Arbitration to settle a dispute about the exact scope of the contested provisions on which an inferior court has already ruled. However, in cases where

the Court considers that a legal rule, as interpreted by an inferior court, violates the Constitution, and that another interpretation is possible according to which the legal rule would not be unconstitutional, the Court has a duty to draw attention, in the operative words of its ruling, to the interpretation that would avoid declaring the legal rule unconstitutional.

Summary:

In two cases, property owners claimed compensation (under Articles 1382, 1383 or 544 of the Civil Code) for damage caused to their property as a result of work carried out by the State. The government had submitted that by virtue of special legal provisions claims against the Belgian State were time-barred after five years.

The courts asked the Court of Arbitration to rule on the question of whether or not the fact that the victims of damage caused by the State had only five years in which to bring their compensation claims, even though the limitation for bringing such claims under ordinary law was thirty years, violated the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The victims submitted that although their claims were based on provisions of ordinary law (Articles 1382, 1383 and 544 of the Civil Code), the courts dealing with the cases had expressly considered that it was the five-year limitation period that was applicable. In other words, the courts held that the special provisions were to be interpreted as also applying when actions brought against the State concerned a claim for compensation on the ground of unlawful behaviour.

In proceedings before the Court of Arbitration, a number of parties again challenged the interpretation of the provisions by the courts handling the cases **(23)**.

The Court of Arbitration found that the courts handling the cases had handed down an express ruling on the matter **(17)** and that the question the Court of Arbitration had to decide was whether or not, according to their interpretation by inferior courts, the contested provisions breached Articles 10 and 11 of the Constitution **(21)**. The Court added, however, that while it seemed that the provisions, as interpreted by inferior courts, did indeed violate Articles 10 and 11, it would also have to examine whether or not they were consistent with the principles of equality and non-discrimination if interpreted differently **(39)**.

The Court held that it was discriminatory to impose a five-year limitation period on a claim for compensation for damage caused to property as a result of work carried out by the State when the limitation period for bringing the same claim against a private party was thirty years. In particular, the Court took into account the fact that damage caused to immovable property is sometimes not apparent until several years after work has been carried out.

On that basis, the Court found that, as interpreted by the courts handling the cases, the contested provisions were discriminatory. It added, however, that it was also possible, as a number of parties had submitted, to interpret the provisions differently, in such a way that the difference in treatment no longer applied and they were no longer discriminatory. The operative words of the judgment give both interpretations. **(36) (39) (41)**.

Supplementary information:

1. See and compare with, in particular, decisions nos. 27/93, 64/93, 32/96, 66/96, 29/97, 101/99, and 105/99. Concerning the question of whether superior courts take the particular way legal rules are interpreted into account, see in particular decisions nos. 117/99 and 26/2000 (Living law, Questionnaire No 36).

2. In decision 26/2000, the Court of Arbitration had to rule on a preliminary question asked by a court of appeal in a case that had already been brought before a court of first instance, a court of appeal and the Court of Cassation. After the Court of Cassation had set aside the appeal court decision, the case was referred to another court of appeal. One of the parties submitted that the Court of Arbitration lacked the necessary jurisdiction to rule on the question insofar as it could not criticise an interpretation already given to the contested law by the Court of Cassation in the same case. The Court of Arbitration rejected this plea, claiming jurisdiction under the Constitution and pointing out that its role was not to decide whether or not the Court of Cassation's interpretation was correct but to consider whether or not, according to that interpretation, the legal rule was compatible with Articles 10 and 11 of the Constitution. In so doing, it did not encroach on the jurisdiction of the ordinary courts.

Languages:

French, Dutch, German.

Identification: BEL-1996-C-007

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 13.11.1996 / **e**) 65/96 / **f**) / **g**) *Moniteur belge* (Official Gazette), 25.01.1997 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.

Keywords of the alphabetical index:

Preliminary question / Court that asks a preliminary question / Court, definition.

Headnotes:

Article 142, paragraph 3 of the Constitution provides that "The Court of [Arbitration] may receive submissions, on an interlocutory basis, from any court". Sections 26 to 30 of the Special Act of 6 January 1989 regarding the Court of Arbitration are concerned with requests for preliminary rulings submitted to the Court of Arbitration by other courts.

The Court has to define what is understood by "court" **(11).**

Summary:

The Standing Committee of Appeal for Refugees asked the Court of Arbitration to rule on a preliminary question.

The Court could only rule on the question if the Standing Committee could be deemed to constitute a court.

The Court found that the Committee could be deemed to constitute a court having regard to the following factors: 1) the membership of the Committee, 2) the conditions of appointment of its members, which guaranteed that they were independent of the government, 3) the Committee's recognised powers of investigation and enquiry, 4) the fact that both parties were represented in hearings organised by the Committee, 5) the special obligation for the Committee to give reasons for its decisions, and 6) the possibility of appealing against its decisions on points of law before the Court of Cassation. The Court also found that the judicial nature of the Committee had been confirmed at various stages of the Special Act's drafting process.

On this basis, the Court held that it had the necessary jurisdiction to rule on the preliminary question.

Languages:

French, Dutch, German.

Identification: BEL-1997-1-001

a) Belgium / **b**) Court of Arbitration / **c**) / **d**) 19.02.1997 / **e**) 6/97 / **f**) / **g**) *Moniteur belge* (Official Gazette), 04.03.1997; *Cour d'arbitrage - Arrêts* (Official Digest), 1997, p. 77 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
3.25.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.

Keywords of the alphabetical index:

Preliminary ruling, Court of Justice of the EC / Teaching, medicine / Teaching, general medicine / Profession, medical / Free movement of persons / Free movement of services / Right of establishment, mutual recognition of diplomas.

Headnotes:

The Court referred three preliminary points of law to the Court of Justice of the European Communities, concerning the interpretation of the provisions of Council Directive 93/16/EEC of 5 April 1993 designed to facilitate the free movement of doctors and the mutual recognition of diplomas, with particular reference to training in general medical practice (Title IV of the directive). The questions asked were:

1. Should the directive, and in particular Title IV, be interpreted as meaning that specific training in general medical practice cannot begin in Belgium unless the person concerned has obtained a diploma of doctor of medicine, surgery and obstetrics ("physician" in the Flemish community)?

2. Does the requirement laid down by Article 31 of the Directive, in accordance with which specific training in general medical practice must "entail the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works", mean that the candidate may perform the activities of a doctor, which in Belgium are restricted to those holding the diploma of :"doctor of medicine, surgery and obstetrics" ("physician" in the Flemish community)?

3. If so, should that provision be interpreted as meaning that the candidate may perform such activities from the beginning of the specific training in general medical practice, which in the Flemish community begins in the seventh year of medical studies, i.e. before being awarded the diploma in medicine, surgery and obstetrics ("physician" in the Flemish community)?

Summary:

This judgment is the first in which a Constitutional Court refers a preliminary point of law to the Court of Justice of the European Communities.

A medical union filed an appeal to set aside a decree of the Flemish Community relating to specific training in general medical practice, adopted primarily in order to transpose the provisions of Title IV of Council Directive 93/16/EEC of 5 April 1993 to the Flemish Community.

In Belgium, basic medical studies last seven years. The contested decree authorises students to begin specific training in general medical practice at the beginning of the final year of the seven year course. This first year of specific training is supplemented by two additional years of general medical training.

There are problems in interpreting the European Directive: Articles 23 and 30 stipulate that students having completed six years of medical training may be admitted to specific training in general medical practice, whereas Article 3 considers that the basic diploma of formal medical qualifications in Belgium is that of doctor of medicine, surgery and obstetrics ("physician" in the Flemish community). In Belgium, this diploma is awarded only after seven years of studies, but the contested decree authorises the start of the specific training from the beginning of the seventh year. Does the Directive authorise this specific training from the beginning of the seventh year of studies or is it necessary to wait until the basic training has been completed? This is the subject matter of the first preliminary point of law.

The second relates to one aspect of the specific training required by the Directive: does the personal participation of the trainee in the professional activities and responsibilities of the person with whom he or she works imply the exercise of activities restricted to those holding the basic diploma of formal medical qualifications? The reply to this question is relevant for consideration of the grounds on which the applicant relies on the provisions of Belgian law on medical monopoly with regard to the medical profession.

The third preliminary point of law will be considered only if there is an affirmative reply to the second. Should this personal participation of the trainee be initiated at the beginning of the specific training, i.e. from the seventh year of basic training (in accordance with the contested decree), or should it wait until the beginning of the additional two years of training which do not commence until the diploma of doctor has been awarded?

Supplementary information:

This case is most probably the first in which a constitutional court has submitted a preliminary question to the European Court of Justice in Luxembourg. **(45)**

Cross-references:

See already BEL-1997-1-001.

Languages:

French, Dutch, German.

Identification: BEL-1997-C-008

a) Belgium / b) Court of Arbitration / c) / d) 18.07.1997 / e) 54/97 / f) / g) *Moniteur belge* (Official Gazette), 03.10.1997 / h).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.

Keywords of the alphabetical index:

Division of jurisdiction between the Constitutional Court and the court asking a preliminary question.

Headnotes:

In Belgium, the Court of Arbitration has sole jurisdiction over the review of the constitutionality of legislation; jurisdiction over the review of the constitutionality of decisions taken by the government and its agencies rests with the ordinary or administrative courts.

The Court of Arbitration has jurisdiction to rule on preliminary questions concerning the compliance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), where appropriate interpreted in conjunction with Articles 6.1, 13 and 14 ECHR, of a legal provision which, according to its interpretation by an inferior court, authorises the King to decide under what circumstances a person may inspect documents in a criminal case file or obtain copies of such documents, insofar as it gives a legal foundation to a royal decree which provides for a difference in treatment.

Summary:

Under Article 1380, paragraph 2 of the Judicial Code, the King may decide under what circumstances a person may be allowed to inspect documents in a criminal case file or to obtain copies of such documents. Article 125 of the Royal Decree of 28 December 1950, which lays down general rules governing court fees in criminal cases, states that the authorisation of either the Principal Crown Prosecutor at the Court of Appeal or the Judge Advocate General is expressly required before a person can have access to the criminal case file. According to case-law, the Principal Crown Prosecutor has unfettered discretion in this area, and there is no legal provision for lodging an appeal in court should the Prosecutor decide to refuse access to the file.

The parents of a crime victim were granted permission to inspect the criminal case file, but only subject to certain conditions which, in their view, meant inspection was impossible in practice. They asked the President of the court of first instance, as a matter of urgency, to request permission to obtain a copy of parts of the file. The President of the court of first instance asked the Court of Arbitration to rule on the question of whether or not Article 1380, paragraph 2 of the Judicial Code was discriminatory insofar as it gave a legal foundation to the aforementioned royal decree and in so doing allowed a distinction to be made between people who could only have access to a criminal case file under conditions decided by the King (such as the party claiming damages in a criminal case, who requires the permission of the Principal Crown Prosecutor) and other people, such as the accused, or parties in a civil action, whose scope for inspecting the case files and procedural documents and obtaining copies was broader.

In the proceedings before the Court of Arbitration, the Council of Ministers **(23)** submitted that the Court lacked the necessary jurisdiction to rule on this case, insofar as the difference in treatment complained of was the result not of primary legislation but of the aforementioned royal decree, which was an executive regulation.

The Court confirmed that it could only rule on whether or not a difference in treatment was justified in the light of the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) if the difference in treatment was the result of legislation **(3)**. It added that when a legislative body delegated authority, it was generally to

be assumed that the lawmaker's intention in delegating authority was that such authority should only be exercised in accordance with Articles 10 and 11 of the Constitution.

However, the Court observed that in the case in question, Article 1380, paragraph 2 of the Judicial Code authorised the King to decide under what circumstances a person was able to inspect documents in a criminal case file or obtain copies of such documents, and in so doing had allowed a distinction to be made. According to the inferior court, the contested law was to be interpreted as giving a legal foundation to the executive decree. The Court would therefore examine the measure set out in the royal decree not in order to rule on its compliance with the Constitution, for which it lacked jurisdiction, but only insofar as, under the contested law, the power invested in the Principal Crown Prosecutor as a result of the royal decree could be assumed **(21)** to have a legal foundation.

On this basis, the Court declared that it had the necessary jurisdiction to rule on the preliminary question (subsequent outcome of the case (violation) is not important here).

Supplementary information:

1. See and compare with, in particular, decisions nos. 71/92, 33/97, 1/98, 16/99, 113/99, 18/2000, 109/2000 and 133/2000.

2. This decision is also characterised by the fact that in carrying out its review on the basis of Articles 10 and 11 of the Constitution (principles of equality and non-discrimination), the Court took into account fundamental rights guaranteed under the Constitution and international treaties (in this case, Articles 6.1, 13 and 14 ECHR). Discriminatory infringement of these fundamental rights may be deemed contrary to Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.