



INSIGHT

PROTECTING THE JEWEL IN THE CROWN: THE *OGNYANOV* CASE AND THE PRELIMINARY REFERENCE PROCEDURE

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ABSTRACT: In *Ognyanov* (judgment of 5 July 2016, case C-614/14), the Court of Justice held that Bulgarian courts have to set aside a national rule aimed at protecting fundamental rights of the parties that has the effect of automatically disqualifying a court that refers questions for a preliminary ruling along with the factual and legal context of the case. The rules of procedure of the Court of Justice regard the factual and legal context of the case as a constitutive element of preliminary references. Knowledge of the facts of the case and the applicable national law allows the Court of Justice to control the domestic application of EU law. Failure to include an accurate factual and legal context of the case is a ground for the declaration of the manifest inadmissibility of a preliminary reference by the Court of Justice. The factual and legal context of a criminal case may, however, be drafted in such a way that compromises the impartiality of the court and the presumption of innocence of the accused.

KEYWORDS: preliminary references – national courts – impartiality – presumption of innocence – Court of Justice – admissibility.

I. THE *OGNYANOV* CASE

I.1. THE FACTS AND THE PRELIMINARY REFERENCE

Atanas Ognyanov is a Bulgarian national that was sentenced in Denmark to a term of 15 years' imprisonment for aggravated robbery and murder. He was held in a Danish prison for nineteen months and afterwards transferred to Bulgaria. On 25 November 2014, the *Sofiyski gradski sad* (Sofia City Court) referred questions for a preliminary ruling of the Court of Justice that regarded the interpretation of a Council framework decision.¹

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¹ Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC], para. 29.

In order to comply with Art. 94 of the Rules of Procedure² and with the Informative Note on references from national courts,³ paragraphs 2 to 4 of the reference included the factual and legal context of the case.⁴

The submission of the preliminary reference prompted the Bulgarian Public Prosecutor, a party in the proceedings, to ask for the disqualification of the referring court. The Prosecutor's request relates to a very strict approach to impartiality adopted in the Bulgarian legal order. A judicial decision is deemed void by bias whenever a judge expresses a provisional opinion on the substance of a case before the final judgment is delivered (Art. 29 of the Code of Criminal Procedure). According to settled national case-law, even the slightest indication with respect to the facts of the case or their legal classification leads to there being grounds for the disqualification of a judge.⁵ In the event of bias, the decision is set aside for the breach of essential procedural rules and the judge is liable to disciplinary proceedings.

After the incident raised by the Public Prosecutor, the Sofia City Court decided to stay the proceedings and asked the Court of Justice whether compliance with the procedural obligation of national courts to set out the factual and legal context of a reference for a preliminary ruling in criminal cases undermines the impartiality of the national court and the presumption of innocence of the accused protected by Arts 47 and 48 of the Charter of Fundamental Rights of the European Union ("EU Charter").⁶

1.2. THE DECISION OF THE COURT OF JUSTICE

In a judgement rendered on 5 July 2016, the Grand Chamber of the Court of Justice declared that the factual and legal context of the reference submitted by the Bulgarian court in case C-554/14 was a mere "response to the requirement of cooperation that is inherent in the preliminary reference mechanism" and could not "in itself" be considered a breach of Charter.⁷

The proper functioning of the "keystone of the EU judicial system" requires national courts to "scrupulously" respect the obligation to "define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which

² That establishes that in addition to the text of the question referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain: a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based; b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant case-law; c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity or certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

³ Informative Note on References from National Courts to the Court of Justice 2009/C 297/01, para. 22.

⁴ Court of Justice, judgment of 5 July 2016, case C-614/14, *Ognyanov* [GC], para. 11.

⁵ *Ibidem*, para. 7.

⁶ *Ibidem*, para. 13.

⁷ *Ibidem*, para. 23.

those questions are based".⁸ Without these elements the Court of Justice is unable to exercise its jurisdiction by providing useful answers to national courts, and Member States' governments and other interested parties will not have the opportunity to submit their observations.⁹

Bulgarian courts were thus obliged to set aside a national rule that obliges a referring court to disqualify itself from a pending case, on the ground that it has set out, in the request for a preliminary ruling, the factual and legal context of the case.¹⁰

1.3. WHY A GRAND CHAMBER?

Grand Chamber cases are widely expected in the EU legal community, as they are meant to be the *crème de la crème* of the case-law of the Court of Justice.¹¹ Such a formation is chosen when the subject-matter of a preliminary reference is difficult or important (Art. 60, para. 1 of the Rules of Procedure).

The questions referred in the second *Ognyanov* reference were not difficult. Advocate General Bot twice declared that the answers left "no room for doubt".¹² A Grand Chamber was chosen because the reference regarded the application of a national rule aimed at the protection of fundamental rights of the accused that had the effect of blocking the functioning of the "jewel in the crown" of the Court of Justice's jurisdiction.¹³

Similarly, to other Grand Chamber's cases,¹⁴ the Court of Justice's reasoning in *Ognyanov* is quite limited. It basically states that national courts must trump the application of a national rule that blocks the flow of the judicial dialogue with the Court of Justice. Limitations to this judicial mantra based on need to secure impartiality or the respect for the presumption of innocence in criminal cases were not discussed.

In order to understand *Ognyanov* it is necessary to ascertain why the factual and legal context of the national proceedings is considered a constitutive element of preliminary references. Knowledge of the facts of the case and the applicable national law are instrumental for the Court of Justice to control the domestic application of EU law (section II). Failure by the national court to define the factual and legislative context of the questions it is asking is a ground for a declaration of manifest inadmissibility of the preliminary reference by the Court of Justice (section III). The factual and legal context of a

⁸ *Ibidem*, paras 15, 18 and 19.

⁹ *Ibidem*, para. 20.

¹⁰ *Ibidem*, para. 26.

¹¹ See A. LAZOWSKI, *Advocates General and Grand Chamber Cases: Assistance with the Touch of Substitution*, in *Cambridge Yearbook of European Legal Studies*, 2011-2012, p. 635.

¹² Opinion of AG Bot delivered on 23 February 2016, case C-614/14, *Ognyanov*, paras 7 and 20.

¹³ P. CRAIG, G. DE BÜRCA, *EU – Law Text, Cases, and Materials*, Oxford: Oxford University Press, 2008, p. 460.

¹⁴ See A. LAZOWSKI, *Advocates General and Grand Chamber Cases*, cit., p. 636.

criminal case may, however, be presented in such a way that breaches fundamental rights of the parties (section IV).

II. PRELIMINARY REFERENCES AS AN INSTRUMENT OF CONTROL OF THE DOMESTIC APPLICATION OF EU LAW

The preliminary reference procedure follows three phases: (1) the national court refers a question to the Court of Justice whenever it has doubts on the interpretation or the validity of EU law; (2) the Court of Justice answers through a preliminary ruling; and (3) the national court applies the preliminary ruling to the pending case. Art. 267 TFEU establishes a procedural mechanism based on a “mandatory”¹⁵ division of tasks by which the Court of Justice interpret and national courts apply EU law.

Since interpretation is the search of the meaning of a provision that has to be found in its wording and spirit, in theory the Court of Justice could perform its hermeneutic mission in preliminary rulings without any factual support. However, an interpretation made in a vacuum would be a doctrinal opinion that could only be marginally useful for the national court, as it would not address the specific subject-matters that based the interpretative doubts that justified the lodging of the reference.¹⁶ Such an interpretation would be at odds with the mission of the Court of Justice in the preliminary ruling procedure, which is not to “formulate advisory opinions on general or hypothetical questions but to assist in the administration of justice in the Member States by providing a useful and correct interpretation of EU law”.¹⁷

The functional jurisdictional division of tasks established by Art. 267 TFEU is in fact rather artificial. In the words of AG Lagrange:

“it must not be forgotten that the procedure under Article [267 TFEU] always functions within the framework of a dispute and that the substantive aspects of the litigation often contribute usefully to clarify the problem of abstract interpretation because an example helps to support a theory. However, in the courts the example is not chosen by theoreticians but is imposed on the judge as a reality”.¹⁸

The Court of Justice considers itself empowered to render preliminary rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it.¹⁹

¹⁵ Court of Justice, judgment of 22 November 1978, case 93/78, *Mateus Doego*, para. 5.

¹⁶ F.P. COUTINHO, *Os tribunais nacionais na ordem jurídica da União europeia: o caso português*, Coimbra: Coimbra Editora, 2014, p. 141.

¹⁷ Opinion of AG Bot, *Ognyanov*, case C-614/14, cit., para. 47. On this point, there is enough case-law from the Court of Justice.

¹⁸ Opinion of AG Lagrange delivered on 10 December 1963, case 75/63, *Unger*.

¹⁹ Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler et al.* [GC], para. 24.

Knowing the factual and legal context of a preliminary reference allows the Court of Justice to measure the domestic impact of its rulings. The latter are binding and frequently leave very little leeway to the national court.²⁰

This phenomenon is particularly clear whenever a dispute concerns the compatibility between EU law and national law. In *Costa/E.N.E.L.*, the Court of Justice stated that it “has no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article [258 TFEU]”.²¹ However, it considers itself bound to provide the referring court with “all the criteria for the interpretation of [EU] law which may enable it to assess whether [national] provisions are so compatible in order to give judgment in the proceedings before it”.²² According to a former member of the Court of Justice:

“the Court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible (with a EU law) measure. The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child’s play”.²³

The division of functions enshrined in Art. 267 TFEU does not prevent the Court of Justice from actively participating in the judicial application of EU law at the national level.²⁴ Beyond the rhetoric of judicial dialogue and cooperation, the preliminary reference procedure secures an effective control of the domestic application of EU law.²⁵ The dialogue among “equals” provided by Art. 267 TFEU is in reality more apparent than real, and it contains a paradox: “the function classified as ‘preliminary’ is in reality crucial, and the main function is in fact a mere operational accessory for the direct applicability [of EU law]”.²⁶

²⁰ In *Bosphorus*, the European Court of Human Rights commented that in the preliminary reference procedure while the Court of Justice’s “role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings”. See European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollary ve Ticaret Anonim Sirketi v. Ireland*, para. 153.

²¹ Court of Justice, judgment of 15 July 1964, case 6/64, *Costa/E.N.E.L.*

²² Court of Justice, judgment of 12 September 1996, joined cases C-254/94, C-255/94 and C-269/94, *Fattoria autonomia tabacchi et al.*, para. 27.

²³ G.F. MANCINI, *Democracy and Constitutionalism in the European Union: Collected Essays*, Oxford: Hart, 2000, p. 9.

²⁴ O. DUBOS, *Les Juridictions Nationales, Juge Communautaire*, Paris: Dalloz, 2001, p. 547.

²⁵ U. BERNITZ, *The Duty of Supreme Courts to Refer Cases to the ECJ: The Commission’s Action against Sweden*, in N. WAHL, P. CRAMÉR (eds), *Swedish Studies in European Law*, Oxford: Hart, 2006, p. 37 *et seq.*, p. 41.

²⁶ J. BOULOUIS, *Nouvelles réflexions à propos du caractère “préjudiciel” de la compétence de la Cour de Justice des Communautés européennes statuant sur renvoi des juridictions nationale*, in *Études de droit des Communautés européennes: mélanges offerts à Pierre-Henri Teitgen*, Paris: Pedone, 1984, p. 23 *et seq.*, p. 30.

III. LEGAL AND FACTUAL CONTEXT AS A CRITERION OF ADMISSIBILITY OF PRELIMINARY REFERENCES

The factual and legal context of a preliminary reference was not considered an essential element of requests for preliminary rulings until the 1990s. The need to engage national courts in using the procedure provided by Art. 267 TFEU led the Court of Justice to be careful not to antagonize national courts by refusing to reply to references that were insufficiently reasoned. In *Bertini*, the Court declared that to “decline to reply to the questions submitted by the national court solely for that reason would not be in the interests of procedural autonomy”.²⁷

A steep increase in the number of preliminary references was probably the cause for *Telemarsicabruzzo*, in which the Court of Justice declared the inadmissibility of the preliminary reference by pointing out that:

“the need to provide an interpretation of [EU] law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based”.²⁸

Telemarsicabruzzo was a “judicial typhoon”,²⁹ and the starting point for an “avalanche of orders of inadmissibility”.³⁰ The wide discretion in the assessment of the criteria of admissibility was even compared to the one followed by the US Supreme Court in the *writ of certiorari* procedure.³¹ Requests for a preliminary ruling were declared inadmissible when “to vague as to the legal and factual situations envisaged by the national court”,³² and when they don’t “give at the very least some explanation of the reasons for the choice of the [EU law] provisions of which it requests an interpretation and

²⁷ Court of Justice, judgment of 12 June 1986, joined cases C-98/85, C-162/85 and C-258/85, *Bertini*, para. 7.

²⁸ Court of Justice, judgment of 26 January 1993, joined cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo*, para. 5.

²⁹ J.L.C. VILAÇA, *Reenvio prejudicial para o Tribunal das Comunidades*, in *Cadernos de Justiça Administrativa*, 2006, p. 3 *et seq.*, p. 631.

³⁰ A. BARAV, *Transmutations préjudicielles*, in N. COLNERIC, D. EDWARD, J.P. PUISSOCHET, D.R. COLOMER (eds), *Une communauté de droit. Festschrift für Gil Carlos Rodríguez Iglesias*, Berlin: Berliner Wissenschafts-Verlag, 2003, p. 621 *et seq.*, p. 631.

³¹ N. PIÇARRA, *Anotação ao acórdão do Tribunal de Justiça da União Europeia, de 8 de Setembro de 2009, Liga Portuguesa de Futebol Profissional e Bwin International Ltd contra Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07*, in M.L. DUARTE, L. FERNANDES, F.P. COUTINHO (coord.), *20 Anos de Jurisprudência da União sobre Casos Portugueses. O que fica do diálogo entre os juízes portugueses e o Tribunal de Justiça da União Europeia*, Lisboa: Instituto Diplomático, 2011, p. 311 *et seq.*, p. 318.

³² Court of Justice, order of 2 February 1996, case C-257/95, *Bresle*, para. 17.

on the link it establishes between those provisions and the national legislation applicable to the dispute".³³

This case-law was criticized inside the Court of Justice as applying "an inappropriately strict standard".³⁴ The rejection of a reference for a preliminary ruling is a refusal of dialogue and may induce national courts to decide a question of EU law without the assistance of the Court of Justice.³⁵ A decision of inadmissibility should therefore be restricted to exceptional cases in which an inadequate account of the factual and legal context of the main proceedings seriously impairs the usefulness of the preliminary ruling of the Court of Justice. That will be the case of requests solely submitted with the text of the questions.³⁶ In all other circumstances, a pedagogical alternative – and much more akin to the idea of judicial cooperation – is to request a clarification from the referring court on a given factual or legal element (Art. 101, para. 1 of the Rules of Procedure).

IV. PRELIMINARY REFERENCES AND FUNDAMENTAL RIGHTS

The Court of Justice rejected in *Ognyanov* the existence of an immediate and direct link between the breach of fundamental rights of the parties and the submission of the factual and legal context of the main proceedings in a request for a preliminary ruling. The inclusion of factual and legal elements in preliminary references is not "in itself" a breach of the right to a fair trial.³⁷ This position was further developed by Advocate General Bot with references to settled case-law of the European Court of Human Rights, according to which the circumstance that a judge has taken pre-trial decisions cannot "by itself" be considered a breach of impartiality.³⁸

The strict interpretation of the criterion of bias followed by Bulgarian case-law determines that "even the most insignificant comment with respect to the facts of the case or their legal classification" automatically entails the judge's disqualification.³⁹ This draconian approach to impartiality leaves last instance Bulgarian criminal court judges be-

³³ Court of Justice, order of 12 December 1997, case C-167/94, *Gomis*, para. 9.

³⁴ Opinion of AG Lenz delivered on 20 September 1995, case C-415/93, *Bosman*, para. 75.

³⁵ A declaration of inadmissibility does not affect the obligation of national courts against whose decisions there is no judicial remedy under national law to refer for a preliminary ruling (Art. 267, para. 3, TFUE), but may indispose these courts to resume any kind of cooperation with the Court of Justice.

³⁶ Court of Justice, order of 2 July 1999, case C-158/99, *Corticeira Amorim*. The same reasoning applies to a request for a preliminary ruling that refers to the factual and legal context submitted in other preliminary reference requests (Court of Justice, order of 9 March 2001, case C-88/00 *DAFSE II*; Court of Justice, order of 22 November 2001, case C-223/00, *DAFSE III*, para. 7) or to facts found in other judgments (Court of Justice, order of 11 February 2004, joined cases C-438/03, C-439/03, C-509/03 and C-2/04, *Cannito*, para. 12).

³⁷ *Ognyanov* [GC], case C-614/14, cit., para. 32.

³⁸ Opinion of AG Bot, *Ognyanov*, case C-614/14, cit., para. 83, referring to European Court of Human Rights, judgment of 6 June 2000, no. 34130/96, *Morel v. France*, para. 45.

³⁹ *Ibidem*, paras 29 and 31.

tween a “rock and a hard place”.⁴⁰ On the one hand, the refusal to submit questions for a preliminary ruling based on the ground that, in so doing, referring judges are liable to disqualification and disciplinary penalties for setting out the factual and legal context of the case “unquestionably constitute a violation of Article 6 of the ECHR”,⁴¹ and opens the path to state liability actions based on a judicial breach of EU law.⁴² On the other hand, compliance with the national rule on impartiality precludes the fulfillment of the obligations set forth in Art. 94 of the Rules of Procedure, and transforms the lodging of references for a preliminary ruling of the Court of Justice into a useless exercise because a reference submitted in such circumstances will inevitably meet a declaration of manifest inadmissibility in Luxembourg.⁴³

One cannot but agree with the Court’s finding that the inclusion of the factual and legal context in a request for a preliminary ruling does not automatically impair the impartiality of the referring national court. As a general rule, the statement of the most relevant facts and legal provisions does not label the referring national court as biased or partial. However, pathological situations may emerge where that statement is drafted in such a way that breaches fundamental rights of the parties protected by the EU Charter. That will happen when the statement includes a biased selection of facts, a partial legal qualification of the facts, or, particularly, a premature expression of an opinion on a person’s guilt.⁴⁴

In *Ognyanov*, the Court of Justice made no substantive review in regard to the respect for fundamental rights of the statement of facts and legal provisions included in the reference submitted in case C-554/14. A review of the observance of the right to the presumption of innocence was obviously not necessary, as Mr. Ognyanov had already been found guilty of the offence. As regards the observance of the duty of impartiality, Advocate General Bot considered that the detail of the referring court’s “findings of facts and law demonstrates a thorough knowledge of the case file which, to [his] mind,

⁴⁰ F. GUIOT, *Si souffler n’est pas jouer, renvoyer n’est pas juger: la présentation du cadre factuel dans le cadre de la procédure préjudicielle ne met pas en cause l’impartialité du juge pénale*, in *Journal d’Actualité des Droits Européens*, 21 October 2016, revue.jade.eu, mentions that these judges are placed in a “diabolical situation”.

⁴¹ *Ognyanov* [GC], case C-614/14, cit., para. 102. In the judgment of 8 April 2014, no. 17120/09, *Dhahbi v. Italy*, the European Court of Human Rights considered that the breach of the duty to refer questions for a preliminary ruling of the Court of Justice may infringe the right to a fair hearing (Art. 6 of the European Convention on Human Rights).

⁴² The breach of the obligation to submit a reference for a preliminary ruling under Art. 267, para. 3, TFUE is one of the criteria for assessing whether a last instance court has manifestly disregarded the applicable EU law in State liability actions (Court of Justice, judgment of 30 December 2003, case C-224/01, *Köbler*, para. 55).

⁴³ *Ognyanov* [GC], case C-614/14, cit., para. 25.

⁴⁴ According to AG Bot, *Ognyanov*, case C-614/14, cit., para. 89, such an opinion “would indisputably run foul of the presumption of innocence”.

does not warrant that court being suspected of bias".⁴⁵ Since we had no access to those findings we cannot dispute this assessment.

V. CONCLUDING REMARKS

The decision of the Court of Justice in *Ognyanov* is in its essence irreproachable. The application of the national rule on judicial impartiality led "to the absurd and paradoxical result that a court submitting a request for a preliminary ruling in accordance with EU law would then be regarded, under national legislation, as infringing the fundamental rights of the parties".⁴⁶ The sanctions attached to the breach of impartiality would have the effect of deterring in practice courts from using the procedure provided by Art. 267 TFEU, thereby compromising the uniform interpretation and the effectiveness of EU law in the Bulgarian legal order.

Ognyanov cannot, however, be read as immunizing requests for a preliminary reference of the Court of Justice against a substantive review of the respect of fundamental rights protected by the Charter. It simply rejects the disqualification of the national court on the ground of bias as an automatic effect of the submission of a reference that includes the factual and legal context of the case.⁴⁷

Ognyanov also left unanswered several other legal questions related to the obligation of national courts to include the factual and legal context of the main proceedings in their requests for a preliminary ruling. Is there a higher threshold of precision and motivation of requests that can have an impact on the accused's freedom?⁴⁸ What should be the legal standard on impartiality adopted by the Court of Justice when assessing the drafting of the factual and legal context of a case? If a request for a preliminary ruling is considered to be biased, has the Court of Justice the power to require the referring court to inhibit itself in favour of a different court?⁴⁹

To the extent that the preliminary reference mechanism presents national courts with issues that "are sometimes difficult to manage",⁵⁰ *Ognyanov* (case C-614/14) was a missed opportunity to shed some light on some of those issues.

⁴⁵ *Ibidem*, para. 86.

⁴⁶ *Ibidem*, para. 97.

⁴⁷ A. SANCHEZ-GRAELLS, *CJUE Confirms Incompatibility between Automatic Judicial Inhibition Rules and References for a Preliminary Ruling: Need to Reform (C-614/14)*, in *How to Crack a Nut*, 7 July 2016, www.howtocrackanut.com.

⁴⁸ Opinion of AG Bot, *Ognyanov*, case C-614/14, cit., para. 68.

⁴⁹ A. SANCHEZ-GRAELLS, *A Plea for a More Nuanced Approach than AG Bot's to the Interaction between Article 267 TFEU and Fundamental Rights to Fair Trial and Presumption of Innocence*, in *How to Crack a Nut*, case C-614/14, 24 February 2016, www.howtocrackanut.com.

⁵⁰ Opinion of AG Bot, *Ognyanov*, case C-614/14, cit., para. 6.

