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The preliminary ruling procedure as
part of a 'complete system of
remedies':

Does the obligation to seek a preliminary ruling
ensure effective judicial protection of individuals?

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Summary

Access to court is essential for the protection of all rights of individuals. The same holds true for the rights individuals derive from Community law. The Court of Justice of the European Communities (ECJ) is the only court competent to review the legality of acts of the Community institutions. In addition, the ECJ has the last word on the interpretation of Community law. Yet, direct access for individuals to the ECJ, pursuant to Article 230(4) EC, is strictly limited. Thus, the indirect access to the Court through national courts by means of the preliminary ruling procedure has become the most common procedural route for individuals. The Court has repeatedly indicated this procedure as an alternative to Article 230(4) EC and has emphasised the completeness of the system of remedies of the EC Treaty. Yet, the Court has indirectly admitted that the system of remedies is not as complete as it should be and has appealed to the responsibility of the Member States to amend the system.

The main problem with the preliminary ruling procedure is that it is not a matter of right for individuals. It is up to the national court to decide whether or not to seek a preliminary ruling and how to phrase the questions submitted to the ECJ. National courts “against whose decisions there is no judicial remedy” are obligated to refer questions of Community law to the ECJ, but the Court has ruled that the obligation is not absolute. Apparently it happens that these limitations, and the conditions for their application, are misconstrued or deliberately abused by national courts. This can lead to a denial of justice for individuals, as they are cut off from access to the only court that is fully competent to grant their claims. This is particularly apparent when it comes to claims based on the invalidity of Community acts.

Furthermore, the Court has taken a narrow view on the question of which courts are under an obligation pursuant to Article 234(3) EC and ruled that only the highest courts in the national hierarchy are under the obligation, even if admission to that court is subject to the grant of leave to appeal.

The purpose of this thesis is to examine whether individuals receive effective judicial protection by means of the preliminary ruling procedure, particularly in light of the obligation to refer as interpreted by the Court. To measure the effectiveness of the procedure in this respect, I use two parameters: the case law of the ECJ on access to national courts and the case law of the European Court of Human Rights (ECtHR).

My conclusion is that there are strong arguments for holding that the indirect access of individuals to justice by means of the preliminary ruling procedure neither fulfils the conditions which the ECJ itself has imposed on national courts, nor Articles 6 and 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR).

Abbreviations

AG	Advocate General
Am. J. Comp. L.	American Journal of Comparative Law
CFI	Court of First Instance
C.M.L.Rev.	Common Market Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
C.Y.E.L.S	Cambridge Yearbook of European Legal Studies
EC	European Community
ECHR	European Convention for Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
EC Treaty	European Community Treaty
E.L.Rev.	European Law Review
EuR	Europarecht
IGC	Intergovernmental Conference
M.L.R.	Modern Law Review
Mich. St. J. Int'l L	Michigan State Journal of International Law
OJ	Official Journal
TEU	Treaty on European Union
Y.E.L.	Yearbook of European Law

1 Introduction

1.1 The Problem

“From the point of view of an individual, rights conferred by a legal system are only effective and substantive if there are effective remedies available if those rights are infringed.”¹

EC law not only imposes obligations on individuals but also endows them with substantive rights; however, such rights are worthless if they are not enforceable, as the sentence quoted above implies.

Direct access to the ECJ is available for individuals pursuant to Article 230(4) EC; however, it is much more common for individuals to gain indirect access to the Court through the preliminary ruling procedure via national courts, *cf.* Article 234 EC. The Community legal system only allows individuals to bring action before the ECJ under very strict standing conditions². In spite of heavy criticism and forceful arguments for expansion of the conditions for individual standing (the right to bring an action), the ECJ has refused to alter its interpretation of Article 230(4) EC.³ Instead, the ECJ has repeatedly pointed to the possibility available to individuals, to institute proceedings before a national court and ask that court to refer questions to the ECJ if necessary, by means of the preliminary ruling procedure established by Article 234 EC.

This provides individuals only with indirect access to the ECJ, which is problematic.

The first problem is that this access is not a matter of right for individuals, but is in essence a choice for the national courts. According to its wording, Article 234 EC empowers or sometimes obligates national courts to seek preliminary rulings from the ECJ concerning the interpretation or validity of acts of the Community institutions (Community acts). The provision does not explicitly confer rights on individuals and in fact, individuals have no say over whether or not a national court requests a preliminary ruling or over the contents and form of the questions referred.⁴

The second problem is that national courts are not fully competent when it comes to deciding claims based on Community law. National courts do not have the power to declare Community acts invalid; this applies to both individual decisions and legislative acts.⁵ Nor can national courts shy away from their duty to apply Community law by simply setting it aside.⁶ In addition, the ECJ has the last word on the interpretation of EC law.

¹ Gormley, L.W., ‘Judicial review in EC and EU Law – Some architectural malfunctions and design improvements?’, 4 C.Y.E.L.S. (2001), p. 167.

² See Article 230(4) EC.

³ See ECJ Case 25/62, *Plaumann* [1963] ECR 95 and ECJ C-50/00 P, *Unión de Pequeños* [2002] ECR I-6677.

⁴ ECJ 44/65 *Hessische Knappschaft v. Maison Singer et Fils* [1965] ECR 965.

⁵ ECJ 314/85 *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁶ The doctrine of supremacy of EC law, *cf.* ECJ 6/64 *Costa v. Enel* [1964] ECR 585 and the duty of loyalty and sincere cooperation expressed in Article 10 EC.

The purpose of this thesis is to analyse the preliminary ruling procedure from the point of view of individuals' right of access to court. In the near absence of direct access to the ECJ, does indirect access through the national courts, by means of the preliminary ruling procedure, provide individuals with adequate access to justice?

From reading Article 234(3) EC, one's first response to this question could be: "Yes, courts of last instance are obliged, under Article 234(3) EC, to refer matters to the ECJ, so in the end the case should find its way to the Court." Here is where the main thrust of my study lies. Does the obligation some national courts are under really ensure adequate protection of individuals' rights in the Community?

On a closer look, at least two problems seem to arise, both of them due to the ECJ's case law on the interpretation of Article 234 EC. The first is that this obligation is certainly not absolute. A national court is not obligated to seek a ruling from the ECJ if the Community law matter is so clear that no interpretation is needed (*acte clair*⁷) or the question has already been answered in prior case-law of the Court (*acte éclairé*⁸). The second problem is that the ECJ has interpreted the term court or tribunal "against whose decisions there is no judicial remedy" in Article 234(3) EC very narrowly. The term only applies to the highest courts in the national hierarchy, as opposed to the court that *de facto* is, or most likely is, the highest court in the case. Thus, the Court has limited greatly the number of national courts that are obligated under Article 234(3) EC to refer matters to the ECJ.⁹

When trying to answer the question whether or not indirect access to the ECJ by means of the preliminary ruling procedure, in the light of its context of limited direct access, ensures access to justice for individuals, one must have a point of reference. Two reference points are chosen here as being the most appropriate. On the one hand, I use what I call 'the Community standard', i.e. the ECJ's own case law on access to justice for individuals in the Member States. On the other hand, I use 'the ECHR standard', i.e. Articles 6 and 13 of the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"). In other words, the questions I pose are firstly, whether the ECJ demands more of national courts when it comes to national procedural rules than of itself when it comes to Treaty rules on remedies, and secondly, whether *non-referral*¹⁰ constitutes an infringement of Articles 6 and 13 of the ECHR.

To sum up, the main purpose of this thesis is to answer this question: Does access to court through Article 234 EC ensure effective judicial protection, particularly in comparison with the Community standard and the ECHR standard?

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

⁸ ECJ Cases 28-30/62, *Da Costa* [1963] ECR 31 and case 283/81 *CILFIT* [1982] ECR 3415.

⁹ ECJ Case C-99/00, *Lyckeskog* [2002] ECR I-4839.

¹⁰ By 'non-referral' I mean the situation when a national court fails to seek a preliminary ruling to the ECJ despite its obligation to do so.

1.2 Delimitations

Before turning to the question of whether the preliminary ruling procedure ensures effective protection of individuals' rights, it is necessary to ask whether it is the Community's task at all to ensure effective judicial protection of individuals. This question relates to the classic debate on the nature of the Community. An entire thesis could be devoted to a consideration of this question; here, it is posed only as a preliminary matter in order to explain why I argue from the viewpoint that the Community has evolved into a constitutional entity with the consequence that the protection of individuals' rights must be a top priority on the Community's agenda.¹¹

The overall question of this thesis is whether individuals in the Community have effective access to justice by means of the preliminary ruling procedure. The question whether the Community's entire system of remedies ensures effective judicial protection would be too comprehensive for this thesis. Thus, I have chosen to limit myself to the preliminary ruling procedure in the light of the importance the ECJ has attached to that procedure and of the fact that it is *de facto* the procedure that is most accessible and most used by individuals. Furthermore, I have chosen to concentrate on the main function of Article 234 EC, which could ensure the rights of individuals, i.e. the obligation some courts are under to refer matters to the ECJ. Other aspects of the article, such as the authority of national courts of lower instance to request a preliminary ruling although they are not obligated to do so, lie outside the scope of this thesis. Moreover, the focus is on access to the ECJ through the preliminary ruling procedure, and not on access to the national courts, except as a parameter for comparison.

The preliminary ruling must be viewed in its context. For this purpose I will describe and discuss some of the most important case law on Article 230(4) EC, but other avenues for individuals to the ECJ, e.g. under Articles 241, 235 and 288(2), fall outside the scope of this thesis.

One consequence of my choice to focus on the obligation to refer is that when it comes to asking whether a breach of the ECHR standard can occur, I will only deal with the effect of non-referral. By non-referral is meant the situation when a national court refuses to refer a matter to the ECJ even though it is under obligation to do so. No consideration will be given to the question of whether delays in preliminary ruling proceedings lead to a breach of the ECHR, or whether failure to observe the ECJ's judgement could constitute a breach of the ECHR.

Furthermore, it is not my intention to analyse individual cases of alleged non-referrals. It is sufficient for the purpose of this thesis to note that several such instances are on record.

The coverage of this thesis is limited to Article 234 of the EC Treaty. The preliminary ruling procedure is also applicable in relation to matters relating to visas, asylum and immigration, under Article 68(1) EC, and to matters relating to police and judicial cooperation in criminal matters, under

¹¹ For others who have argued from this perspective, *see, e.g.*, Szyszczak, E., 'Making Europe more relevant to its citizens: Effective judicial process', 21 *E.L.Rev.* (1996), p. 364.

Article 35 TEU. However, access to the ECJ in those fields is limited to national courts of last instance. Consequently, the problems discussed in this thesis are amplified in these particular fields.¹²

In the conclusion, I describe briefly the consequences of non-referral, both in the broad sense (philosophical) and in the narrow sense, i.e. the legal remedies available to the Community and individuals. Furthermore, I discuss briefly whether these are sufficient and indicate some possible methods of improving the legal status of individuals. The next logical question after having asked whether the access to court through the preliminary ruling procedure infringes Articles 6 and 13 ECHR would be whether there exist sufficient remedies to rectify that situation. If not, this could constitute an infringement of Article 13 ECHR. However, space does not allow for a deep analysis of this subject and I consider it to be outside the scope of this thesis.

1.3 Method

The method I use for this thesis is that of legal dogmatics. It is written from an individuals' rights perspective and I try to take a critical approach. I analyse some of the ECJ's case law, some of which is quite recent, and also fundamental judgements that have reached 'maturity'. I soon noticed, while searching for and reading material, that there was abundance of publications on the practical problems in relation to the preliminary ruling procedure, which focused on how to improve the procedure from a 'docket-control' perspective. Furthermore, I found that plenty had been written from an individuals' rights perspective about the Court's narrow interpretation of the standing conditions pursuant to Article 230(4) EC. The first challenge of my work has been to try to put those pieces together and draw some conclusions where other authors had left off.

The second challenge of this thesis relates to what I consider its core: the comparison of the preliminary ruling procedure to Articles 6(1) and 13 ECHR. I came across several authors who indicated that the system of remedies or the limited direct access of individuals to the ECJ through Article 230(4) EC could breach Articles 6(1) and 13 of the ECHR, but few, if any, took their arguments further than that. My solution was to search through several textbooks on the ECHR to try to take in the fundamental judgements and draw some conclusions from them.

In Chapter 2, I try to shed some light on the preliminary question whether the Community should be concerned for the protection of rights of individuals. The core of the thesis, however, is to be found in Chapters 3 to 6. Chapters 3 to 5 are mainly descriptive but Chapter 6 contains my analysis. In Chapter 7, I discuss briefly the consequences of non-referral,

¹² Ward, A. expresses doubts as to whether the limited access to justice in these fields complies with the fundamental right to judicial review as reflected in Articles 6 and 13 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union, *see* Ward, A., 'Judicial architecture at the cross-roads: private parties and challenge to EC measures post Jégo-Quééré', 4 *C.Y.E.L.S.* (2001), p. 416, and by same author, 'Access to Justice' in *The European Union Charter of Fundamental Rights* (2004), p. 124.

only for the purpose of setting the main problem of the thesis in a wider context.

In this thesis, I always refer to the current numbers of Treaty provisions, even though the numbering may have changed since the judgement I am discussing was pronounced. Moreover, for simplicity's sake I have tried to speak only of the ECJ or the Court, even though what I am saying might as well apply to the CFI. Similarly, I have tried to speak only of the EC Treaty and not of the other foundation treaties. When I speak of the Convention, it is the ECHR that I am referring to, and when I speak of the Court with a capital C, it is either the ECJ or the ECtHR that I am referring to, depending on the context.

2 Rights of individuals in the Community

2.1 The nature of the Community: two theories.

Before addressing the main task of this thesis, to discuss the question of whether the Community, with its preliminary ruling procedure, ensures effective judicial protection for individuals, it is appropriate to consider whether protecting individuals' rights is the Community's responsibility at all, or whether it belongs solely to the Member States.

Individuals are usually subjects of states. The Community is not a state; it has its genesis in public international law and the subjects of public international law are usually states, not their citizens.

Despite its origin in public international law, it was clear from the beginning that the Community was different from most traditional international organisations. Its institutional framework was stronger. The founding treaties established institutions with the power to issue binding rules and a court to settle disputes of interpretation of the treaties.¹³ The preamble to the EC Treaty,¹⁴ which states that the Member States are "[d]etermined to lay the foundations of an ever closer union among the peoples of Europe", can also be seen as a strong indication that the Community was not only meant to be concerned with relations between states.¹⁵

European integration has come a long way since the Community was founded, yet there is by no means a consensus between participants or spectators of the Community 'project' on the nature of the Community today. Some claim that it has evolved into a 'constitutional entity' while others emphasise its roots in international treaties. There are two main opposite theories on the nature of the Community,¹⁶ and the importance of individuals' access to justice differs greatly depending on which of the two theories one adopts as a perspective.

The first theory, which I will call *the Sovereignty theory*, claims that Community law still owes its validity to international law and the legal systems of the Member States;¹⁷ in other words, the Member States are still the masters of the treaties and the Community is in essence an international organisation. According to this theory, individuals' rights are derived only

¹³ Mancini, F., 'The making of a constitution for Europe', 26 *C.M.L.Rev.* (1989), p. 595.

¹⁴ The Treaty establishing the European Community (Treaty of Rome) OJ C 325, 24.12.2002, p. 33 (hereinafter the EC Treaty).

¹⁵ See Mancini, G. F. and Keeling, D.T., 'Democracy and the European Court of Justice', 57:2 *M.L.R.* (1994), p. 186 (where the authors refer to this statement in the preamble as the 'genetic code' of the Community).

¹⁶ See Zetterquist, O., 'A Europe of the Member States or of the Citizens?' (Doctoral dissertation, 2002), p. 29.

¹⁷ Hartley, T.C., *Constitutional Problems of the European Union* (1999), p. 179.

from the national statute, which introduced Community law into the national legal system¹⁸. Since rights derive from the national legal system, their protection is a matter for the Member States and their national courts in the last resort.

The second theory, which I will call *the Constitutional theory*, claims that the Community's legal order has evolved from public international law into a constitutional legal order.¹⁹ According to this theory, individuals are subjects of Community law and their rights derive straight from the Community's legal order. If one views the Community from this perspective, access to courts and justice for individuals is not only a responsibility of the Community but it is a task of immense importance.

It is fair to say that the ECJ seems a firm believer in the latter theory.²⁰ The Court has sought to 'constitutionalise' the Treaty²¹ by claiming, as early as in the 1960's, that the Community is "a new legal order" and that the EC Treaty is more than merely an agreement creating obligations between states.²² The Court has even explicitly referred to the EC Treaty as "the constitutional charter" of the Community.²³ According to MacCormick, the Court's fundamental decisions in *Van Gend en Loos*,²⁴ *Costa v. ENEL*²⁵ and *Simmenthal*²⁶ "necessarily imply that the foundation treaties ... amount effectively to the constitutional framework of a quite special entity".²⁷ These decisions, by which the Court developed the doctrines of *direct effect*, *supremacy*, and *pre-emption*, have played a key role in the evolution of the Community. Not only have these doctrines had tremendous consequences for the effectiveness of Community law, but they have also given individuals status as actors in the Community legal system by endowing them with rights that they can enforce before national courts.

2.2 The ECJ's argument for the 'sui generis' nature of the Community

Opinions differ on whether the Court had sufficient legal grounds for bringing individuals to play in a game traditionally reserved for states. Adherents of the sovereignty theory have accused the Court of judicial activism and even "revolting judicial behaviour".²⁸ It is instructive to take a

¹⁸ *Ibid*, p. 135.

¹⁹ Weiler, J.H.H., *The Constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration* (1999), p. 295. Weiler also compares constitutionalism to "the DOS or Windows of the European Community", *ibid*, p. 221.

²⁰ See, e.g., Zetterquist, O., (2002), pp. 26 and 29, where the author claims that it is chiefly the ECJ which is responsible for the constitutionalisation of the Community.

²¹ Mancini, F. (1989), p. 596.

²² ECJ C-26/62 *Van Gend en Loos* [1963] ECR 1.

²³ Opinion 1/91 of the Court (ECJ)[1991] ECR I-6084, para 21 and ECJ case 294/83 *Les Verts* [1986] ECR 1339, para 23.

²⁴ ECJ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

²⁵ ECJ Case 6/64, *Costa v. ENEL* [1964] ECR 585.

²⁶ ECJ Case 106/77, *Simmenthal* [1978] ECR 629.

²⁷ MacCormick, N., *Questioning Sovereignty* (1999), pp. 97-98.

²⁸ Rasmussen, H., *On law and policy in the European Court of Justice* (1986), p. 12.

closer look at the ECJ's argument in the famous case of *van Gend en Loos*²⁹ where the Court held for the first time that:

“The Community constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community” [emphasis added].³⁰

The Court held that this conclusion was to be drawn from the following arguments:

1. The objective of the Treaty, to establish a Common Market, is of direct concern to individuals in the Community.
2. The preamble of the Treaty refers not only to governments but to peoples.
3. The Treaty establishes institutions endowed with sovereign rights, the exercise of which affects not only Member States but also their citizens.
4. The citizens of the Member States play a part in the functioning of the Community through the European Parliament and the Economic and Social Committee.
5. The preliminary ruling procedure would be pointless if Community law could not be invoked by citizens before their national courts.³¹

From a ‘normal’ lawyer’s point of view, the Court’s arguments are not as convincing as would have been desirable³², considering the drastic departure from the traditional understanding, which was that the effect of public international law was a matter for national constitutional law.³³

The first four arguments taken together basically all say that the Community is created as a Community of citizens and not only as a Community of Member States. It is easier to understand the use of these arguments and the Court’s conclusion in the light of what the Court says about its method of interpretation. The court refers to “the spirit, the general scheme and the wording”, which indicates that the Court is resorting to teleological interpretation.³⁴ The Court’s ‘constitutionalisation’ of the Treaties by means of the teleological method of interpretation has often provoked disapproval in the Member States, but Mancini famously justified

²⁹ ECJ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

³⁰ *Ibid*, p. 12. The ‘sui generis’ argumentation was repeated to support the principle of supremacy in ECJ Case 6/64 *Costa v. ENEL* [1964] ECR 585, but interestingly national judiciaries have not accepted this reasoning as legal basis for supremacy of Community law, see Alter, K., ‘The European Court’s Political Power’ 19:3 *West European Politics* (1996), p. 462.

³¹ *Ibid* (*Van Gend en Loos*), p. 12.

³² See, e.g., Douglas-Scott, S., *Constitutional Law of the European Union* (2002), p. 283 (who holds that the arguments are ‘rather thin’).

³³ See Hartley, T.C. (1999), p. 24.

³⁴ See Douglas-Scott, S. (2002), p. 283.

the Court's approach by comparing the 'ever closer union' statement in the preamble to the EC Treaty to a genetic code of the Community.³⁵

Hartley takes a critical view of the fifth argument above. He claims that Community law could be directly effective on the basis of national constitutional law in *some* of the Member States (monist States),³⁶ which is a normal situation in public international law even though it may be undesirable. In addition, he claims that the preliminary ruling procedure would not be meaningless if the ECJ had not developed the doctrine of direct effect, since there would still be need for national courts to ask for a preliminary ruling on the interpretation or validity of Community law in order to be able to interpret national law in harmony with it.³⁷

Others have presented strong arguments in favour of the Courts finding in *Van Gend en Loos*. Pescatore's argument is appealing in its simplicity. According to him, the purpose of any legal rule is to operate effectively and he refers to direct effect as the normal condition or "state of health" of any rule of law. Therefore, direct effect must be presumed and it is the absence of direct effect that should cause concern.³⁸ However, Pescatore fails to defend his position towards those, like Hartley, who would claim that a legal rule is not rendered meaningless although it does not have direct effect, since it has, after all, effect between States.³⁹

I would like to raise three more arguments in support of the Court's 'sui generis' reasoning and the claim that the Community has evolved into a constitutional entity. The first of these is that the Member States have subsequently accepted the Court's finding that the Community is a new legal order and a Community of not only states but of citizens as well. Although there have been both political and judicial outbursts in some of the Member States, on the whole the Court's jurisprudence has been relatively quietly accepted⁴⁰ and the Member States have not amended the EC Treaty to suppress the activism of the Court, despite several opportunities to do so.⁴¹

The second argument is based on the idea that public international law has not always been confined to relations between states. Public international law has its origins in the Roman '*Jus Gentium*', which was originally the law that the Romans applied between themselves and foreigners.⁴² The idea of law governing the relations between states did not exist in antiquity; consequently, the subjects of *Jus Gentium* were

³⁵ Mancini, G.F. and Keeling, D.T. (1994), p. 186.

³⁶ Only the Netherlands, Luxembourg and possibly France would have given priority to international treaties according to AG Römer's Opinion in ECJ Case 26/62 *Van Gend en Loos* [1963] ECR 1, p. 23.

³⁷ See Hartley, T.C. (1999), pp. 26 (footnote 8) and 28.

³⁸ Pescatore, P., 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', 8 *E.L.Rev.* (1983), p. 155 and 177.

³⁹ See Hartley, T.C. (1999), p. 26 (where the author claims that it would not have prevented the Community from functioning if the Court had rejected direct effect).

⁴⁰ See Douglas-Scott, S. (2002), p. 263 (who compares the European experience to the opposition to the jurisdiction of the U.S. Supreme Court in the 19th century).

⁴¹ *But cf.* Hartley, T.C. (1999), p. 57 (who rejects the 'tacit assent' argument).

⁴² Ruddy, F.S., *International Law in the Enlightenment* (1975), p. 3.

individuals.⁴³ Accordingly, the idea of holding that individuals are subjects to Community law does not seem so far fetched.

The third argument, which the Court did not advance in *Van Gend en Loos*, but has frequently applied ever since, is that the Community is based on the rule of law and therefore fundamental rights of individuals, such as the right of access to court, must be protected by the Community.⁴⁴ This argument is based on the rule of law in the wider sense,⁴⁵ which “embraces the idea that individual rights must receive legal protection”.⁴⁶ The rule of law in this wider sense and constitutionalism, which can be defined as “adherence to the principles of limited constitutional government”,⁴⁷ are arguably synonyms⁴⁸ and a typical catalogue of constitutional rights must include the right of access to court.⁴⁹

All of these arguments are, of course, contestable and, as previously mentioned, there is by no means a consensus between commentators on the nature of the Community. However, the arguments that have been produced in favour of the constitutional theory, by the ECJ and others, are sufficient, in my opinion, to justify analysis of the preliminary ruling procedure from the constitutional theory perspective.

⁴³ Miller, D. (ed.), *The Blackwell Encyclopaedia of Political Thought* (1987), p. 447.

⁴⁴ See, e.g., ECJ 294/83, *Parti Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339.

⁴⁵ Also referred to as the ‘substantive rule of law’ or the ‘extended rule of law’, see generally Craig, P., ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, [1997] *Public Law*, pp. 477-484 and Alder, J., *General principles of constitutional and administrative law* (2002), pp. 95-97.

⁴⁶ Miller, D. (ed.) (1987), p. 459.

⁴⁷ See Barendt, E., *An Introduction to Constitutional Law* (1998), p. 4.

⁴⁸ Miller, D. (ed.) (1987), pp. 103 and 459.

⁴⁹ *Ibid*, p. 459.

3 Assessing the effectiveness of judicial protection

To be able to assess whether the system of remedies provided for in the Treaty, and the preliminary ruling procedure in particular, provides for effective access to justice for individuals, it is necessary to have some sort of a parameter or a point of reference. In this thesis, I use the two parameters that I find most appropriate, which I shall refer to as the ‘Community standard’ and ‘the ECHR standard’.

3.1 The Community standard

3.1.1 General

By the ‘Community standard’ I am mainly referring to the principles developed by the ECJ which limit national procedural autonomy and which national courts must take into account, e.g. when deciding on the admissibility of Community law claims. The Community legal system is a decentralized system in the sense that the national authorities implement and apply Community law in the Member States, so any claims against those authorities must be brought in national courts, which can refer questions of Community law to the ECJ when necessary.⁵⁰ The Community has not harmonised procedural rules, with the consequence that the Community legal system is dependent on national procedural rules. Thus, *national procedural autonomy* is the general rule, though it has been limited by principles developed in the ECJ’s case law.⁵¹ Despite the general rule of national procedural autonomy, it may be more accurate to say that national judges cannot assume that national procedural rules apply as they are, but must consider whether they obstruct the effective application of EC law.⁵²

Thus, it is up to Member States to provide for remedies for breaches of Community law, and national courts are under an obligation, pursuant to Article 10 EC,⁵³ to ensure the effectiveness of Community law, e.g. by interpreting national law in conformity with Community law, even if this entails the “creation” of a remedy where one does not exist.⁵⁴

⁵⁰ See Jacobs, F.G., ‘Enforcing Community rights and obligations in national courts: striking the balance’, in Biondi, A. and Lonbay, J. (eds.), *Remedies for breach of EC law* (1997), p. 25.

⁵¹ See Jacobs, F.G., ‘Access to justice as a fundamental right in European law’ in Rodríguez Iglesias, G.C. et al (eds.), *Mélanges en hommage à Fernand Schockweiler* (1999), p. 209.

⁵² Anderson, T., *Rättskyddsprincipen* (1997), pp. 144-145.

⁵³ Brealy, M. and Hoskins, M., *Remedies in EC law*, p. 53. See also, e.g., Temple Lang, J., ‘The Duties of National Courts under Community Constitutional Law’, 22 *E.L.Rev.* (1997), p. 3, and by same author, ‘The principle of effective protection of Community rights’, in O’Keeffe et al (eds.) *Judicial review in Euroepan Union law: essays in honor of Lord Slynn of Hadley* (2000), pp. 235-236.

⁵⁴ ECJ C-213/89, *Factortame I*[1990] ECR I-2433.

Initially the Court seemed reluctant to interfere with the autonomy of the national procedural systems. However, in the 1970s, in the *Rewe*⁵⁵ and the *Comet*⁵⁶ cases, the court established that two minimum requirements, the principles of equivalence and effectiveness,⁵⁷ set limits to the principle of national procedural autonomy. *The principle of equivalence*, or non-discrimination, essentially means that claims based on Community law should not be treated less favorably in national legal systems than claims based on national law. *The principle of effectiveness* initially only demanded that enforcement of Community claims should not be impossible or ‘virtually impossible’,⁵⁸ but the ECJ subsequently expanded the principle to mean that enforcement should not be ‘excessively difficult’.⁵⁹ The principle of effectiveness does not entail that there can be no limits on the application of Community law, but only that the application must be proper and that adequate remedies must be available.⁶⁰

3.1.2 The general principle of effective judicial protection

The principle of effective judicial protection can be said to be an expansion or reinforcement of the general principle of effectiveness.⁶¹ In *Johnston*,⁶² the ECJ established that the principle of effective judicial protection is one of the general principles of Community law. Mrs Johnston was employed as a police officer in Northern Ireland but her contract was not renewed for reasons that had to do with her gender. This decision was justified with reference to national security and the protection of public safety and order, by means of a certificate issued by the Secretary of State, which according to a national procedural rule was to be considered “conclusive evidence that it was done for that purpose.”⁶³ The ECJ agreed with Mrs Johnston that the national procedural rule in question in effect deprived her of the possibility of asserting rights conferred by the ‘Equal Treatment Directive’⁶⁴ before the national court. The Court held that:

“The requirement of judicial control stipulated by ... [Article 6 of the directive] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13

⁵⁵ ECJ Case 33/76, *Rewe* [1976] ECR 1989, para 5.

⁵⁶ ECJ Case 45/76, *Comet* [1976] ECR 2043, paras. 12-16.

⁵⁷ See, e.g., Prechal, S., ‘EC requirements for an effective remedy’, in Biondi, A. *et al* (eds.), *Remedies for breach of EC law* (1997), p. 3.

⁵⁸ Also referred to as “the principle of practical possibility”, see Craig, P. and de Búrca, G., *EU Law: text, cases and materials* (2003), p. 232.

⁵⁹ See Craig, P. and de Búrca, G., *EU Law: text, cases and materials* (2003), p. 242.

⁶⁰ See Jacobs, F.G., (1997), p. 27.

⁶¹ Prechal, S. (1997) p. 4.

⁶² ECJ Case 222/84 *Johnston* [1986] ECR 1651.

⁶³ *Ibid*, para 3.

⁶⁴ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40, hereinafter the Equal Treatment Directive)

of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.⁶⁵

The Court held that Article 6 of the directive, interpreted in the light of this general principle of effective judicial protection, entailed that “all persons have the right to obtain an effective remedy in a competent court”.⁶⁶

The conclusion to be drawn from the reasoning of the Court and the particular circumstances of the case, is that there must not only be access to court, but that the remedy of access to court must be effective⁶⁷ in the sense that a person must not be totally precluded from asserting a right under Community law in national courts.

In *Heylens*,⁶⁸ a case where the fundamental right of free movement of workers was at issue, the Court emphasised the fundamental character of the general principle of effective judicial protection. The situation was similar to *Johnston*, in the sense that there was no avenue for judicial review of the administrative decision in question. The Court held that “the *existence* of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is *essential* in order to secure for the individual effective protection for his right” [emphasis added].⁶⁹ Furthermore, the Court held that effective judicial review requires that the reasoning behind administrative decisions be cited, in order to allow applicants to decide, “with a full knowledge of the relevant facts, whether there is any point in their applying to the courts.”⁷⁰

Subsequent case law has further clarified the scope of the *Johnston* principle of effective judicial protection.

In *Coote*,⁷¹ the Court indicated that the principle of effective judicial protection might not be fully applicable if the enforcement of Community rights is *completely precluded*.⁷² The Equal Treatment Directive was also at issue in this case, as in *Johnston*. Ms. Coote, who was dismissed from her job because of pregnancy, had brought claims against her employer for sexual discrimination. Consequently, her employer refused to provide her with a reference, which she claimed made it difficult for her to seek new employment. The Court held that “fear of such measures, *where no legal remedy is available against them*, might deter workers ... from pursuing their claims by judicial process” [emphasis added],⁷³ which indicates that the outcome might have been different if there had been some sort of legal remedy.

Interestingly, the Court stretched very far when it held that the directive obligated Member States, not only to take measures to protect employees against *dismissal* by the employer, as a reaction to any legal proceedings aimed at enforcing compliance with the principle of equal treatment, as the

⁶⁵ ECJ Case 222/84 *Johnston* [1986] ECR 1651, para 18.

⁶⁶ *Ibid*, para 19.

⁶⁷ See Ward, A., *Judicial review and the rights of private parties in EC law* (2000), p. 71.

⁶⁸ ECJ Case 222/86 *Heylens* [1987] ECR 4097.

⁶⁹ *Ibid*, para 14.

⁷⁰ *Ibid*, para 15.

⁷¹ ECJ C-185/97 *Coote* [1998] ECR I-5199.

⁷² See Ward, A. (2000), p. 79.

⁷³ ECJ C-185/97 *Coote* [1998] ECR I-5199, para 24.

clear wording of Article 7 of the directive suggested, but that in light of the objective of the directive and the fundamental nature of the right to effective judicial protection, the legislator's intention could not be to limit the protection of individuals to cases of dismissal.⁷⁴ Thus, Article 6 of the directive, interpreted in the light of the general principle of effective judicial protection, was found to cover retaliatory measures that took place after an employment relationship has ended, despite the apparently clear wording of Article 7 of the directive. This indicates that, at least in the intolerable situation where a judicial remedy would otherwise be wholly precluded, the Court goes quite far to cure that situation.

The Court took a more conservative view in *Upjohn*,⁷⁵ where it held that an administrative decision, based on complex assessments in the medico-pharmacological field, did not need to be reviewed by a court capable of "substitut[ing] their assessment of the facts ... for the assessment made by the national authorities".⁷⁶

3.1.3 The Charter of Fundamental Rights

The principle of effective legal remedies is codified in Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter).⁷⁷ The Charter is not a legally binding document, but its content does, however, form a part of the Treaty establishing a Constitution for Europe (hereinafter the Constitutional Treaty)⁷⁸ which will become legally binding if all the Member States ratify it. Article II-107 of the Constitutional Treaty, which is identical with Article 47 of the Charter, reads:

"Right to an effective remedy and to a fair trial"

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

The first two paragraphs of the provision are based on Articles 13 and 6, respectively, of the ECHR. The scope of Article II-107 of the Constitutional Treaty is, however, more extensive than that of Articles 13 and 6 ECHR in two respects. Firstly, it guarantees the right to an effective remedy before *a tribunal*, as opposed to "a national authority" according to Article 13 of the ECHR. Secondly, its scope is not limited to "civil rights",

⁷⁴ *Ibid*, paras. 26-27.

⁷⁵ ECJ C-120/97 *Upjohn* [1999] ECR I-223.

⁷⁶ *Ibid*, para 33.

⁷⁷ OJ C 364, 18.12.2000, p. 1.

⁷⁸ OJ C 169, 18.7.2003, p. 1. The latest version of the Constitutional Treaty is to be found at: < <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>>, visited on 9 May 2005.

as opposed to the scope of Article 6(1) ECHR, but applies to all rights protected by the Union.⁷⁹

The Explanations⁸⁰ accompanying Article II-107 of the Constitutional Treaty declare that the incorporation of the general principle of the right to an effective remedy before a court is *not* intended to change the system of remedies provided for in the Treaty and specifically not the conditions for the admissibility of direct actions of private applicants before the ECJ.⁸¹

However, the CFI in *Jégo-Quéré*⁸² tried to use Article 47 of the Charter for that purpose, arguing that the remedies for individuals provided for in Article 234 EC, on the one hand, and in Articles 235 and 288(2) EC, on the other:

“can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.”

The Charter does not really create any new rights,⁸³ but only reaffirms fundamental rights, which the ECJ already respects.⁸⁴ However, its value lies in the fact that it makes the rights more visible to the public,⁸⁵ and if all Member States ratify the Constitutional Treaty, it will make it easier for the ECJ to refer to the rights it promulgates. The ECJ has not yet referred to the Charter in its judgements, although some Advocates General and the CFI have occasionally done so.⁸⁶

In the light of the foregoing, Article 47 of the Charter does not seem to add anything new to the Community standard and the ECHR standard.

⁷⁹ Declaration concerning the Explanations relating to the Charter of Fundamental rights, CIG 87/1/04 ADD 2 REV 2, pp. 59-60, available at <<http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02re02.en04.pdf>>, visited on 9 May 2005.

⁸⁰ *Ibid.*, p. 59.

⁸¹ *Ibid.*

⁸² CFI T-177/01 *Jégo-Quéré* [2002] ECR II-2365. The case will be dealt with in Chapter 4.

⁸³ *But cf.* Morijn, J., ‘Judicial Reference to the EU Fundamental Rights Charter: first experiences and possible prospects’, p. 3-4 (for discussion of opposing views on whether or not the Charter creates new rights).

Available at <http://europa.eu.int/constitution/futurum/conothacad_2002_en.htm>, visited on 4 May 2005.

⁸⁴ See the Preamble to the Charter of Fundamental Rights of the European Union <[http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000X1218\(01\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000X1218(01):EN:HTML)>, visited on 4 May 2005.

⁸⁵ Curtin, D., ‘The “EU Human Rights Charter” and the Union legal order: the ‘banns’ before the marriage?’ in O’Keeffe, D. *et al* (eds), *Judicial review in European Union law: essays in honor of Lord Slynn of Hadley*(2000), p. 312.

⁸⁶ For further information, see Morijn, J., *supra* note 84.

3.2 The ECHR standard

Articles 6 and 13 of the European Convention for the protection of Human rights and Fundamental Freedoms⁸⁷ protect the fundamental rights of access to court and the right to an effective remedy.

The Community is not a party to the Convention. Thus, the Community or its institutions cannot, as such, be held liable for breaches of the Convention.⁸⁸ On the other hand, all the Member States are parties to the Convention. Furthermore, the ECtHR has subjected Community law to its scrutiny and has gone to considerable lengths in holding the Member States liable for Community primary law that violates the Convention.⁸⁹

Even though the Community is not a party to the ECHR, the ECJ long ago established that fundamental rights are part of the general principles of law, which the Community must respect, and that in safeguarding these rights, the Court “draw[s] inspiration from constitutional traditions common to the Member States ... [and] international treaties for the protection of human rights”.⁹⁰ Among such international treaties, the ECHR has special significance.⁹¹ Furthermore, Article 6(2) TEU refers explicitly to the Convention, and the Charter⁹² is partly built on it.

The above justifies comparison of the preliminary ruling procedure to the ECHR. However, when using the ECHR and the case law of the ECtHR as comparison, it must be kept in mind that there may be a difference in fundamental rights protection between the Community and the ECHR, since the Community not only respects fundamental rights as protected by the ECHR but also as established by constitutional traditions common to the Member States.⁹³

Several commentators have expressed doubts as to whether the system of remedies established by the EC Treaty is compatible with the right of access to court and an effective remedy as protected by Articles 6 and 13 ECHR.⁹⁴ The ECtHR has not yet dealt with this question.⁹⁵

⁸⁷ The European Convention for the protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, 4 November 1950 (hereinafter the ECHR).

⁸⁸ *But cf.* Canor, I., ‘Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe’, 25 E.L.Rev. (2000), p. 12 (who argues that the ECtHR could hold the Community directly liable).

⁸⁹ ECtHR *Matthews v. the United Kingdom*, 18 February 1999, Application no. 24833/94, Reports of Judgments and Decisions 1999-I.

⁹⁰ *E.g.*, ECJ Case 4/73 *Nold* [1974] ECR 491, para 13.

⁹¹ ECJ C-260/89, *ERT*[1991] ECR 2925, para 41.

⁹² *See* Chapter 3, section 1.3.

⁹³ Article 6(2) of the Treaty on European Union (Maastricht Treaty, TEU) OJ C 325, 24.12.2002, p. 5.

⁹⁴ *See, e.g.*, Douglas-Scott, S. (2002), p. 461; Schermers, H.G. and Waelbroeck, D.F., *Judicial Protection in the European Union* (2001), pp. 272 and 451; Ward, A. (2004), p. 123 and Cortes Martin, J.M., ‘At the European constitutional crossroads: easing the conditions for standing of individuals seeking judicial review of Community acts’, 12 Mich. St. J. Int’l L (2003), p. 154.

⁹⁵ *Ibid.*

3.2.1 Article 6(1) ECHR

Article 6(1) ECHR reads as follows:

“Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

As a preliminary matter, it is right to note that Article 6(1) is more limited in scope than Article 47 of the Charter, as it is limited to civil rights and obligations.⁹⁶

Two fundamental cases of the ECtHR, the *Golder* and the *Airey* cases, illustrate the essence of the Court’s position towards the right of access to court.

In *Golder*⁹⁷ the ECtHR established that *general access to court* is inherent in Article 6(1), even though the provision does not expressly indicate such a right.⁹⁸ The Court drew attention to the fact that the preamble to the Convention, and also the Statute of the Council of Europe, refer to the rule of law and stated that “in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”⁹⁹ Moreover, by reference to the Vienna Convention, the Court stated that Article 6(1) had to be read in the light of two universally recognised principles of law; the principle that a civil claim must be capable of being submitted to a judge and the principle of international law, which forbids denial of justice.¹⁰⁰ Furthermore, the ECtHR found it inconceivable if Article 6(1) “should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.”

Not only did the Court establish that Article 6(1) protects the right of access to court, but also that “[h]indrance in fact can contravene the Convention just like a legal impediment.”¹⁰¹

The Court pointed out, however, that the right of access to court is not absolute. Because the Convention does not put the right forward in express terms, there must be room for some limitations; however, any limitations *must not impair the very essence of the right*.¹⁰²

In *Ashingdane*,¹⁰³ the applicant had access to courts, only to be told that his actions were barred by law. The Court held that it might not be enough to have access to court to exhaust the requirements of Article 6(1), but that it had to “be established that the degree of access afforded under the national

⁹⁶ Article 6 also applies to criminal charges but that is irrelevant for the topic of this thesis.

⁹⁷ ECtHR *Golder v. United Kingdom*, Judgement of 21 February 1975, A 18.

⁹⁸ van Dijk, P. *et al.*, *Theory and Practice of the European Convention on Human Rights* (1998), p. 418.

⁹⁹ ECtHR *Golder v. United Kingdom*, *supra* note 98., para 34.

¹⁰⁰ ECtHR *Golder v. United Kingdom*, *supra* note 98., para 34.

¹⁰¹ *Ibid.*, para 26.

¹⁰² *Ibid.*, para 38. See also ECtHR *De Geouffre de la Pradelle v. France*, Judgement of 16 December 1992, A 253-B, para 28.

¹⁰³ ECtHR *Ashingdane v. the United Kingdom*, Judgment of 18 May 1985, A 93.

legislation was sufficient to secure the individual's "right to a court", having regard to the rule of law in a democratic society". Furthermore, the Court ruled that any limitations to the right of access to court require a *legitimate aim* and must be reasonably *proportionate* to the aim pursued.¹⁰⁴

In *Airey*,¹⁰⁵ the ECtHR took a step further and ruled that access to court must not only exist in theory but must also be effective.¹⁰⁶ The dispute concerned whether the applicant had been deprived of his right of access to court because no legal aid was available to her and she could not afford to hire a lawyer to plead her case in court. The Court held that "The Convention is intended to guarantee not rights that are *theoretical or illusory* but rights that are *practical and effective*" and that "This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial."¹⁰⁷ The Court repeated that "hindrance in fact can contravene the Convention just like a legal impediment"¹⁰⁸ and concluded that the applicant had in fact been deprived of an effective right of access to court because no legal aid was available for those without means to pay for legal counsel.

The right of access to court should be considered as a *guarantee* of ultimate judicial control.¹⁰⁹ It is sufficient for the purposes of Article 6 ECHR if its conditions are fulfilled at the last procedural stage. However, this may not hold completely true if the last procedural stage does not have full jurisdiction to review the case. In that case, the lower instance, which had full jurisdiction, may also have to fulfil the conditions of Article 6 ECHR; otherwise there will be a breach of the article.

In principle, the court or tribunal in question must have *full jurisdiction* to rule on the dispute at hand, i.e. it must be able to determine both questions of law and fact and must not consider itself bound by a determination of a considerable part of the dispute made by another non-judicial body.¹¹⁰ However, this principle does not seem completely unreserved.¹¹¹ The answer to the question whether a review limited to law satisfies Article 6(1) seems to depend on whether a shortcoming in the procedure at a lower stage can be remedied on appeal.¹¹² In *Le Compte, Van Leuven and De Meyere*,¹¹³ the Court held that a review limited to law was not sufficient for the purpose of Article 6(1), whereas in *Bryan v. the*

¹⁰⁴ *Ibid*, para 57. See also, e.g., ECtHR, *Lithgow and others*, Judgement of 8 July 1986, A 102, para 194, and Merrills, J.G. and Robertson, A.H., *Human Rights in Europe: A study of the European Convention on Human Rights*, Fourth Edition (2001), pp. 90-91.

¹⁰⁵ ECtHR *Airey v. Ireland*, Judgement of 9 October 1979, A 32.

¹⁰⁶ Ovey, C. and White, R., *European Convention on Human Rights*, Third Edition (2002), p. 152.

¹⁰⁷ ECtHR *Airey v. Ireland*, *supra* note 107, para 24.

¹⁰⁸ *Ibid*, para 25.

¹⁰⁹ Merrills, J.G. and Robertson, A.H. (2001), p. 90.

¹¹⁰ See van Dijk, P. *et al* (1998), pp. 419 and 420.

¹¹¹ See, e.g., Danelius, H., *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (2002), pp. 161, where the author claims that "Frågan om en sådan [laglighets-]prövning är tillräckligt omfattande för att uppfylla kraven i artikel 6:1 kan inte generellt besvaras"

¹¹² See *ibid*, pp. 152-153.

¹¹³ ECtHR *Le Compte, Van Leuven and De Meyere*, Judgement of 10 February 1983, A 43, para 51.

United Kingdom the Court took a less strict approach and held that a court satisfied Article 6(1) since it could reasonably be expected that a review in specialised fields of law could be limited.¹¹⁴

Similarly, when a review is restricted to questions of the legality of the decision, and does not cover how the administrative authority exercised its margin of appreciation, the answer to the question of whether such a limited review satisfies Article 6(1) seems to depend on whether the reviewing court is able to review the arguments put forward by the parties in the case at hand.¹¹⁵

There are quite a number of cases where the ECtHR has held that a review by a tribunal with limited jurisdiction does not satisfy Article 6(1). For example, in the cases of *W, B and R v. the United Kingdom*¹¹⁶, which concerned a dispute between parents of children put into public foster care and the local authority, judicial review of the authority's decisions was confined to "ensuring, in brief, that the authority did not act illegally, unreasonably or unfairly" and could not be extended to the merits of the decision. The Court ruled that there had been a violation of Article 6(1) ECHR, as there was "no possibility of a "determination" in accordance with the requirements of Article 6(1) of the parent's right in regard to access [...] unless he or she [could] have the local authority's decision reviewed by a tribunal having jurisdiction to examine *the merits of the matter*."¹¹⁷

Similarly, in *Obermeier*,¹¹⁸ the Court held that there had been a breach of Article 6(1) of the Convention. The Austrian Administrative Court had held that it could only determine whether the discretion enjoyed by the administrative authorities had been used in a manner compatible with the object and purpose of the law. The Court held that such a limited review could not be "considered to be an effective judicial review under Article 6(1)".

Article 6(1) ECHR cannot be employed to challenge the substantive content of national law. In other words, the right of access to court applies only to rights provided for by national law.¹¹⁹ Consequently, Article 6(1) does not require that there be a court with the power to perform a constitutional review (judicial review).¹²⁰ The leading case is *James and others v. the United Kingdom*¹²¹ where the applicants (property owners), claimed that they had been deprived of their property through the exercise of their tenants' rights under the Leasehold Reform Act 1967. They claimed a breach of Article 6(1) since, under the scheme set up by the leasehold legislation, they had no means of challenging the tenants' right to enfranchise, once the objective criteria of the legislation were satisfied. The Court held that Article 6(1) does not, by itself, guarantee any particular

¹¹⁴ ECtHR *Bryan v. the United Kingdom*, Judgment of 22 November 1995, A 335, paras. 40-47.

¹¹⁵ Danelius, H. (2002), p. 161.

¹¹⁶ ECtHR *W, B and R v. the United Kingdom*, Judgements of 8 July 1987, A 121, pp. 35-36, 79-80 and 125-126 respectively.

¹¹⁷ *Ibid* (B v the United Kingdom), para 82.

¹¹⁸ ECtHR *Obermeier v. Austria*, Judgment of 28 June 1990, A 179.

¹¹⁹ Ovey, C. and White, R. (2002), p. 153.

¹²⁰ Danelius, H. (2002), p. 155.

¹²¹ ECtHR *James and others v. United Kingdom*, Judgement of 21 February 1986, A 98.

content of the substantive law of the Contracting States and, furthermore, that it “does *not* require that there be a national court with *competence to invalidate or override national law*” [emphasis added].¹²² Also, the Court drew attention to the fact that in case of non-compliance with the leasehold legislation the applicants had unimpeded access to a court competent to determine such issue.¹²³

3.2.2 Article 13 ECHR

Article 13 ECHR reads as follows:

“Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 13 ECHR provides for a right to an effective remedy where rights under the Convention have been violated. This right comes into effect immediately when an alleged breach of the Convention takes place.¹²⁴ That means that it is not a precondition that the ECtHR shall have established that a violation has taken place. The only condition is that the claim of a violation must be ‘arguable’; in other words, a *prima facie* case must be made.¹²⁵ The scope of Article 13 ECHR can be described as partly subsidiary to Article 6(1) ECHR and partly overlapping with it. Its scope is wider, as it provides for a remedy before an ‘authority’, which is wider than the ‘tribunal’ of Article 6(1) and because even if there is no breach of Article 6(1), there could still be a breach of Article 13. This could be so if an applicant does not have access to an effective remedy for his claim that Article 6(1) ECHR has been violated.¹²⁶

Overall, one can say that the conditions that must be met in order to fulfil the conditions of Article 13 ECHR regarding an effective remedy are similar to what has already been described above in the section about Article 6(1) ECHR. The ECtHR has emphasised that the remedy available must be effective, i.e. it must not only exist formally but must be practically available.¹²⁷ Factual circumstances, i.e. acts or omissions by authorities, can constitute infringements of Article 13 ECHR, just as legislation can.¹²⁸ Furthermore, Article 13 ECHR cannot be employed to challenge the content of legislation.¹²⁹ As Ovey and White explain, that would be “tantamount to allowing judicial review of legislation” and that would “require the incorporation of the Convention” into the national legal system.¹³⁰

¹²² *Ibid*, para 81.

¹²³ *Ibid*.

¹²⁴ *See, e.g., ECtHR Klass and others v. Germany*, Judgement of 6 September 1978, A 28, para 64.

¹²⁵ *See Ovey, C. and White, R. (2002)*, pp. 388-389.

¹²⁶ *See generally Danelius, H. (2002)*, pp. 355-356

¹²⁷ *See, e.g., ibid*, p. 352 and *Ovey, C. and White, R. (2002)*, p. 395.

¹²⁸ *Ibid*, p. 392.

¹²⁹ *See, e.g., ECtHR Gustafsson v. Sweden*, Judgement of 25 April 1996, Reports 1996-II.

¹³⁰ *Ovey, C. and White, R. (2002)*, p. 394, and *Danelius, H. (2002)*, p. 357.

A good summary of the principles for interpretation of Article 13 ECHR can be found in the *Leander*¹³¹ case. The summary includes the following two principles, which I find most relevant for the topic of this thesis:

1. There should be a remedy “in order both to have [a] claim *decided* and, if appropriate, to obtain redress” [emphasis added].¹³²
2. “Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms”.¹³³

¹³¹ ECtHR *Leander v. Sweden*, Judgement of 26 March 1987, A 116.

¹³² *Ibid.*, para 77.

¹³³ *Ibid.*

4 The system of judicial remedies in the Community.

4.1 The legacy of public international law.

As already mentioned in Chapter 2, the Community has its genesis in public international law, which usually has only states as subjects and not individuals. Even though from the beginning the Community was not a traditional international organisation, this explains why the system of remedies provided for in the EC Treaty takes the form it does today.

The ECJ is not an appellate or “supreme” court, to which all the national courts are subordinate.¹³⁴ Such does not seem to have been the intention of the authors of the treaty,¹³⁵ and this does not seem likely to change unless further integration takes place in the Community towards the establishment of a federal state. Article 230(4) EC, which provides for individual standing in cases involving actions for the annulment of Community acts, must in fact be viewed as exceptional in the field of international treaties.

The preliminary ruling procedure established in Article 234 EC is much more in line with the Community’s genesis in public international law. According to the wording of Article 234 EC, *national courts*, not individuals, are empowered or obligated to seek a preliminary ruling from the ECJ. The individual has no independent right, but is at the mercy of the national court as to whether his case will be considered by the ECJ. This procedure really assumes a dialogue, on a horizontal cooperative level, between the national court and the ECJ.

4.2 Means of individual access to the Court other than the preliminary ruling procedure.

In order to put the preliminary ruling procedure in its context, a brief overview of other avenues for individuals to the ECJ will now be given. Article 234 EC is part of what the ECJ has referred to as a *complete system of legal remedies* set up by the EC Treaty and designed to ensure judicial review of the legality of acts of the institutions.¹³⁶ Articles 230(4) and 241 EC constitute the rest of the ‘complete system’, and these three articles are supposed to complement each other.

¹³⁴ See, e.g., Schermers, H.G. (2001), pp. 197 and 228, and Hartley, T.C. (2003), p. 269.

¹³⁵ But cf. Rasmussen, H., *European Court of Justice* (1998), p. 131 (who submits that the wording of Article 234 does not rule out hierarchical or vertical organization of the relationship between the Court and the national courts, but a horizontal organization interpretation was chosen by the Court).

¹³⁶ ECJ C-50/00 P *Unión de Pequeños*, para 40 and ECJ case 294/83 *Les Verts* [1986] ECR 1339, para 23.

Furthermore, as the CFI pointed out in *Jégo-Quéré*,¹³⁷ individuals can sue Community institutions for damages on the basis of Articles 235 and 288(2) EC.

Regarding Article 241, it is sufficient to point out that the provision does not allow for an independent avenue to the ECJ; it only allows individuals to plead illegality of Community acts if proceedings are brought against them before the ECJ.

As for Community liability for damages under Articles 235 and 288(2) EC, it is sufficient to point out that this avenue serves other purposes than to allow, as the aforementioned ‘complete system’ does, for a review of the legality of acts of the Community institutions, i.e. it does not allow for the annulment of the measure in question.¹³⁸ Furthermore, the applicant must prove that strict conditions are fulfilled before a Community institution can be held liable for damages.¹³⁹

4.2.1 Article 230(4) EC – direct action.

4.2.1.1 The ‘Plaumann test’ of individual concern

Article 230(4) EC provides for access by individuals (“non-privileged applicants”) to dispute the legality of Community acts. No problems arise when the act in question is addressed to the applicant himself, but if the applicant is affected by an act that is addressed to another person, or if the act in question is in the form of a regulation, then it must be of “direct and individual concern” to the applicant. The ECJ has interpreted this condition very strictly. The leading case is *Plaumann*, where the ECJ proclaimed that individuals, other than the addressee of a decision, may only claim to be individually concerned “if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”.¹⁴⁰

In effect this means that an individual must first prove that he is part of a closed category of persons affected by the act in question; closed in the sense that there must be no chance of an extension of the group at any time in the future. Secondly, an individual must prove that he can be distinguished from all other members of the group, almost to the extent that it is ‘as if’ the contested decision were addressed to him.¹⁴¹

¹³⁷ CFI case T-177/01 *Jégo-Quéré* [2002] ECR II-2365.

¹³⁸ Ward, A. (2001), p. 415.

¹³⁹ For a short summary of the disadvantages of directing individuals to this procedural route, see, e.g., CFI case T-177/01, *Jégo-Quéré et Cie SA v. Commission* [2002] ECR II-2365, para 46, and A. Ward (2001), pp. 423-424.

¹⁴⁰ ECJ case 25/62 *Plaumann* [1963] ECR 95.

¹⁴¹ See Corthaut, T., ‘Case CFI May 3, 2002, *Jégo-Quéré v. Commission*, T-177/01 and C-50/00 P ECJ July 25, 2002, *Unión de Pequeños Agricultores v. Council*’, 9 *Colum. J. Eur. L.* (2002), p. 142.

The ‘Plaumann test’ has been heavily criticised for practically ruling out individual standing.¹⁴² One commentator compares the possibility of individual standing to “a mirage in the desert, ever receding and never capable of being grasped”.¹⁴³ It has also been pointed out that it frequently happens, due to the structure of decision making in the Community, that decisions of Community institutions are directed to the Member States’ institutions, although the ‘real addressees’ are individuals in the Member States,¹⁴⁴ making the ECJ’s strict interpretation of “individual concern” all the more unjust.

4.2.1.2 *Unión de Pequeños* and *Jégo-Quéré*.

After *Plaumann*, the ECJ more or less stuck firmly to its strict test of individual concern, with some isolated exceptions in cases with special features, with the consequence that the case law on standing of individuals was criticised for being incoherent, complex and impairing legal certainty.¹⁴⁵

Mr. Advocate General Jacobs made a convincing attempt in *Unión de Pequeños*¹⁴⁶ to alter the Plaumann test. The CFI supported AG Jacobs’ attempt in its judgement in *Jégo-Quéré*¹⁴⁷, which the Court delivered after the AG had delivered his opinion in *Unión de Pequeños* but before the ECJ had given its ruling.

What was common to both cases was that there were no implementing measures that could be challenged before the national courts. Both AG Jacobs and the CFI recommended a relaxation of the strict Plaumann test of individual concern, although their suggestions differed in scope.

Despite these laudable attempts, the ECJ did not change its long-standing Plaumann test of ‘individual concern’. In both cases, first in *Unión de Pequeños* and then in *Jégo-Quéré*, the Court began its argumentation by stating that the Community is based on the rule of law and individuals are thus entitled to effective judicial protection. The Court reiterated the well-known formulation, that with Articles 230, 241 and 234 EC, the Treaty has established “a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions”. The Court maintained that individuals who do not have standing under Article 230(4) EC to challenge legislation *directly*, can rely on either one of the *indirect* means provided for in Articles 241 and 234 EC to challenge legislation.¹⁴⁸ However, after insisting on the completeness of the Community system of remedies, the Court chose not to accept responsibility for ensuring its completeness. Instead, by reference to Article 10 EC, the Court pointed to the responsibility of the Member States and their national

¹⁴² See Ragolle, F., ‘Access to justice for private applicants in the Community legal order: recent (r)evolutions’, 28 *E.L.Rev.* (2003), p. 90.

¹⁴³ See Craig P. and de Búrca, G. (2003), p. 489.

¹⁴⁴ See *ibid.*, p. 490.

¹⁴⁵ See Ragolle, F. (2003), p. 93, and ECJ C-50/00 P *Unión de Pequeños* [2002] ECR I-6677, AG’s Opinion, para 64.

¹⁴⁶ *Ibid.* (*Unión de Pequeños*, the Judgement).

¹⁴⁷ CFI T-177/01 *Jégo-Quéré* [2002] ECR II-2365.

¹⁴⁸ ECJ C-50/00 P *Unión de Pequeños* [2002] ECR I-6677, para 40, and ECJ C-263/02 P, *Commission v. Jégo-Quéré* [2004] ECR 0, para 30.

courts to ensure that national procedural rules respect the principle of effective judicial protection.¹⁴⁹ The Court rejected the solution proposed by the applicant, to hold admissible actions in situations where individuals are barred from access to national courts, as the Court would then have to examine and interpret national procedural law, thus going beyond its jurisdiction.¹⁵⁰ Furthermore, the Court held that even though the condition of ‘individual concern’ must be interpreted in the light of the principle of effective judicial protection, interpretation of the condition could not go so far as to set the condition aside.¹⁵¹ In other words, the Court held that the wording of Article 230(4) did not allow for a wider interpretation than that adopted by the Court in *Plaumann*.

In *Unión de Pequeños*¹⁵² the Court added a curious remark by submitting that a different system of remedies could be envisaged, but that it was for the Member States to reform the system by a Treaty amendment.¹⁵³ Thus, the Court implicitly admitted that the system of remedies was not as complete as it should be. This remark makes it clear that the Court considers it to be a task for the Member States to remedy the flaws of the system by a Treaty amendment.¹⁵⁴

Interestingly, In *Jégo-Quéré* the Court gave a direct answer to one of the points raised by AG Jacobs. The Court held that where an individual is affected by Community law and there is no national implementing measure, he should be able to seek a measure from the authorities which can be contested before national courts, thus enabling him to challenge the Community act indirectly.¹⁵⁵

Amendment of Article 230(4) EC is proposed in Article III-365 (4) of the Constitutional Treaty,¹⁵⁶ which aims at improving judicial protection of individuals affected by general legislative acts of the Community in the event of a lack of national implementing measures. Commentators seem to agree that this step is an improvement, although only partial.¹⁵⁷

¹⁴⁹ *Ibid* (*Unión de Pequeños*), paras 41-42 and *ibid* (*Commission v Jégo-Quéré*), paras 31-32.

¹⁵⁰ *Ibid* (*Unión de Pequeños*), para 43 and *ibid* (*Commission v Jégo-Quéré*), para 33.

¹⁵¹ *Ibid* (*Unión de Pequeños*), para 44 and *ibid* (*Commission v Jégo-Quéré*), para 36. In the latter case the Court explicitly stated that the CFI’s interpretation of ‘individual concern’ removed all meaning from the requirement, *ibid*, paras. 37-38.

¹⁵² *Ibid* (*Unión de Pequeños*).

¹⁵³ *Ibid* (*Unión de Pequeños*), para 45.

¹⁵⁴ This position is reflected in the Court’s report to the Intergovernmental Conference of 1996 where the Court brought up the possibility of relaxation of the standing rules in article 230(4) EC and the court described it as questionable whether Article 230(4) EC sufficiently guarantees effective judicial protection. See Report of the ECJ submitted to the IGC 1996 <<http://europa.eu.int/comm/eurostat/research/index.htm?http://europa.eu.int/en/comm/eurostat/research/viros/search3.htm&1>>, visited on 5 January 2005. See also Douglas-Scott, S. (2002), p. 462 and Schermers, H.G. and Waelbroeck, D.F. (2001), p. 450.

¹⁵⁵ ECJ C-263/02 P, *Commission v Jégo-Quéré* [2004] ECR 0, para 35. This argument of the Court is criticised by Brown, C. and Morijn, J., in ‘Case C-263/02 P, *Commission v. Jégo-Quéré & Cie SA*, judgment of the Sixth Chamber, 1 April 2004, nyr’, 41 *C.M.L.Rev.* (2004), pp. 1648-1649.

¹⁵⁶ OJ C 169, 18.7.2003, p. 1. The latest version of the Constitutional Treaty is to be found at: <<http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>>, visited on 9 May 2005.

¹⁵⁷ See, e.g., Brown, C. and Morijn, J. (2004), pp. 1655-1657, and Jacobs, F.G., ‘The evolution of the European legal order’, 41 *C.M.L.Rev.* (2004), p. 314.

5 The Preliminary Ruling Procedure

5.1 General

The preliminary ruling procedure serves two primary functions. Firstly, it provides for alternative means for individuals to challenge the legality of Community acts, and in that respect, the ECJ has repeatedly pointed to Article 234 EC as a substitute for Article 230(4). Secondly, the procedure has a function in the field of the interpretation of Community law.¹⁵⁸

The ECJ has repeatedly held that the objective of the preliminary ruling procedure is to ensure uniformity in the interpretation and application of Community law in all the Member States.¹⁵⁹ Furthermore, the Court has held that “the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State.”¹⁶⁰

5.2 Disadvantages of indirect access to the ECJ

In his opinion in *Unión de Pequeños*,¹⁶¹ AG Jacobs summed up the main disadvantages¹⁶² of having to make use of the preliminary ruling procedure instead of applying Article 230(4) EC:¹⁶³

1. National courts are not competent to invalidate Community acts.
2. Access to the ECJ via Article 234 EC is not a matter of right for individuals.
3. Lack of implementing measures can make the procedure inaccessible.
4. Practical disadvantages: cost and delays.
5. Procedural disadvantages: standing of the Community institution issuing an alleged invalid act, intervention, public information and time limits.

As described in Chapter 4 above, the ECJ in *Unión de Pequeños* did not respond directly to each of those points put forward by the AG, but only

¹⁵⁸ See generally Schermers, H.G. and Waelbroeck, D.F. (2001), pp. 227-228.

¹⁵⁹ See, e.g., ECJ case 166/73 *Rheinmühlen* [1974] ECR 38, para 2, and ECJ case 66/88 *ICC* [1981] ECR 1191, para 13.

¹⁶⁰ ECJ C-107/76 *Hoffmann-La Roche* [1977] ECR 957, para 5.

¹⁶¹ ECJ C-50/00 P *Unión de Pequeños*, [2002] ECR I-6677.

¹⁶² Or even all of them according to one commentator, see Brown, C. and Morijn, J. (2004), p. 1650.

¹⁶³ ECJ C-50/00 P *Unión de Pequeños* [2002] ECR I-6677, AG’s Opinion, paras. 40-48.

indirectly acknowledged that there was a problem by drawing attention to the responsibility of the Member States. In *Jégo-Quéré*, however, the Court responded to point 3, the problem that there may be no national implementing measure to challenge before the national courts. On that point I refer to Chapter 4, section 2.1.2 above. As for points 4 and 5 above, these could possibly lead to a breach of the ECHR; however, they lie outside the scope of this thesis and will not be discussed further.

5.2.1 National courts' lack of competence

The fact that there is a division of judicial powers between the ECJ and the national courts presents problems in respect of access to justice for individuals. The preliminary ruling procedure is decentralised and the national courts are Community courts in the sense that they apply Community law and decide the merits of a case. Yet, national courts do not have full jurisdiction to decide disputes on Community law brought before them since the ECJ and the CFI hold the sole power to declare Community acts invalid¹⁶⁴ and have the final word in questions of interpretation of Community law, both as regards primary law and secondary legislation.¹⁶⁵

Thus, the ECJ has the sole jurisdiction to review the legality not only of individual decisions but also of general legislative acts of the Community institutions,¹⁶⁶ in other words; to perform what is usually referred to as a judicial review¹⁶⁷ of Community secondary legislation.

This division of power between the national courts and the ECJ/CFI makes the preliminary ruling procedure questionable from the standpoint of individuals. It means in effect that if there is a question as to the validity of a Community act, the national court is completely incompetent to grant the plaintiff what he asks for.¹⁶⁸ Thus, the problem seems particularly prominent when there is a question of validity, as AG Jacobs rightly points out.

AG Jacobs contrasts the situation involving a question of validity, in which national courts have strictly limited competence, to the situation involving only a question of interpretation, in which national courts play an important role.¹⁶⁹ However, his argumentation must be viewed in the light of his purpose, which was to convince the Court to reconsider its interpretation of Article 230(4). AG Jacobs did not explicitly deny that national courts' lack of competence could be problematic in situations that involved only the interpretation of Community law. In my view, if a court of last instance disregards its obligation to seek interpretation from the ECJ and makes a decision that does not conform to the ECJ's interpretation of

¹⁶⁴ ECJ case 314/85 *Foto-Frost* [1987] ECR 4199, see Chapter 5, section 3.1.

¹⁶⁵ Pernice, I., 'The Charter of fundamental rights in the constitution of the European Union', < http://europa.eu.int/constitution/futurum/conothacad_2002_en.htm>, visited on 12 April 2005.

¹⁶⁶ See, e.g., Jacobs, F.G. (1999), p. 202.

¹⁶⁷ Judicial review can be defined as "the power of courts to control the compatibility of legislation and executive acts with the terms of the constitution", see Barendt, E. (1998), p. 17.

¹⁶⁸ See Chapter 5, section 3.1.

¹⁶⁹ ECJ C-50/00 P, *Unión de Pequeños*, [2002] ECR I-6677, AG's Opinion, para 41.

the same provision in an existing or a subsequent judgement, the individual is left with a wrong judgement and without a remedy. This situation differs from one in which final judgements are made on the interpretation of national law, because such judgements can, of course, be criticised but they cannot be held to be wrong with the same force as when two legal systems meet, as is the case with Community law.

5.2.2 Not a matter of right

Mr. Advocate General Jacob's second point is that the preliminary ruling procedure is not available as a matter of right for individuals.¹⁷⁰ Article 234(3) EC does not explicitly confer rights on individuals, although it subjects some national courts to the duty to refer matters to the ECJ. This is a legacy of the Community's genesis in public international law, as is mentioned above in Chapter 4, section 1. Thus, it is for the national court to decide whether to seek a preliminary ruling. The national court formulates the questions referred and sends the case-file to the ECJ, along with its comments on the matter. Some national courts give much consideration to the wishes of the parties, but the fact remains that the parties have no right to send the ECJ their own reformulation of the questions referred by the national court.¹⁷¹

AG Jacobs pointed out that even national courts of highest instance may wrongfully assume that the Community act in question is valid and thus decline to seek a preliminary ruling on the matter.¹⁷² Furthermore, he drew attention to the fact that since it is the national court's task to formulate the questions referred, the individual may find his claim redefined, possibly with the result that the range of measures the individual seeks to challenge, or the grounds of invalidity he seeks to rely on, become limited.¹⁷³

In other words, the effectiveness of the preliminary ruling procedure is "entirely dependent on the good will of national courts."¹⁷⁴

5.3 The obligation on national courts to refer matters to the ECJ

The obligation imposed on some courts under Article 234 EC to refer matters to the ECJ could make up for the fact that individuals' access the Court is indirect, i.e. not a matter of right.

The wording of Article 234 EC might lead one to assume that courts of lower instance were never under an obligation to refer matters to the ECJ

¹⁷⁰ *Ibid*, para. 42

¹⁷¹ ECJ case 44/65 *Hessische* [1965] ECR 965.

¹⁷² Which national courts can do although they cannot declare a Community act *invalid*, see ECJ case 314/85 *Foto-Frost* [1987] ECR 4199.

¹⁷³ ECJ C-50/00 P, *Unión de Pequeños* [2002] ECR I-6677, AG's Opinion, para 42.

¹⁷⁴ Mancini, G.F. and Keeling, D.T. (1994), p. 182.

and that the courts of last instance were always under an absolute obligation to refer.¹⁷⁵ However, neither of these presumptions is true.

5.3.1 The obligation on courts of lower instance

Despite the wording of Article 234(2) EC, the ECJ ruled in *Foto-Frost*¹⁷⁶ that it had exclusive power to review the validity of Community acts. To the surprise of many commentators, the Court held that the wording of Article 234(2) EC did not settle the question of whether lower courts were empowered to review the validity of Community acts.¹⁷⁷ The essence of the Court's ruling is that national courts of lower instance may consider the validity of Community acts and may find that they are valid, as "by taking that action they are not calling the existence of the Community measure into question".¹⁷⁸ National courts, on the other hand, do not have the power to declare Community acts invalid.¹⁷⁹

The Court based its ruling on the need to secure uniformity of the Community legal order and to ensure legal certainty. In support of its finding, the Court reasoned that the coherence of the system of remedies requires that the Court have exclusive jurisdiction to review the validity of Community acts (the Court referred to the fact that Article 230 EC gives the ECJ exclusive jurisdiction to declare Community acts void). In addition, the court stressed practical considerations by pointing out that the ECJ is in the best position to undertake a validity review.¹⁸⁰

The above must be qualified in two respects. If the ECJ has already ruled that the act in question is invalid, then national courts can, and in fact must, hold that act invalid, or else refer the matter to the ECJ if they are inclined to revert from a ruling the ECJ has already given.¹⁸¹ Furthermore, national courts may suspend the application of a Community act by granting interim relief.¹⁸²

5.3.2 The obligation on courts of last instance: limitations

Courts of last instance have the same discretion as lower courts to assess whether a decision on a question of Community law is *necessary* to enable them to give judgement.¹⁸³ A different interpretation of Article 234(3)

¹⁷⁵ Derlén, M., 'Nationella slutinstansers skyldighet att fråga EG-domstolen – CILFIT-doktrinen efter Lyckeskog', 1 *Europarättslig tidskrift* (2004), p. 87.

¹⁷⁶ ECJ case 314/85 *Foto-Frost* [1987] ECR 4199.

¹⁷⁷ Bebr, G., 'The reinforcement of the constitutional review of Community acts under Article 177 EEC Treaty', 25 *C.M.L.Rev* (1998), p. 677.

¹⁷⁸ ECJ *Foto-Frost*, *supra* note 180, para 14.

¹⁷⁹ *Ibid*, para 15.

¹⁸⁰ *Ibid*, paras 16-18. For a more detailed analysis of the Court's arguments, see Bebr, G. (1998), pp. 669-670.

¹⁸¹ ECJ case 66/80 *ICC* [1981] ECR 1191, para 13. See also Schermers, H.G. and Waelbroeck, D.F.(2001), p. 266.

¹⁸² ECJ C-143/88 and 92/89 *Zuckerfabrik* [1991] ECR I-415. See also Anderson, D.W.K. and Demetriou, M., *References to the European Court* (2002), p. 149.

¹⁸³ See, e.g., ECJ case 283/81 *CILFIT* [1982] ECR 3415, paras 9-10.

would have been unacceptable, as courts of last instance would have been forced to refer questions to the ECJ, even though the questions were of no relevance for the solution of the case.¹⁸⁴

The ECJ has ruled that the duty to refer is not absolute; exceptions may occur not only when the court exercises its discretion on whether referral is necessary, but also for other reasons. Courts of last resort can be relieved of their duties in three kinds of situations.¹⁸⁵ The first of these is when questions of Community law arise in national interlocutory proceedings. The ECJ has ruled that even if an order for interim relief is not open to appeal as such, the court that issues the order is not under obligation to refer if the order could be subject to review at a later stage, i.e. in the ‘main action’.¹⁸⁶ This situation does not appear to present any particular problems relevant to this thesis.

The other two situations, which can relieve courts of last instance of their duty to refer, are often referred to by the French terms *acte éclairé* and *acte clair*.

5.3.2.1 Acte éclairé

The obligation to refer can become superfluous when the ECJ has already ruled on the matter in another case. This is often referred to as the principle of *acte éclairé*. In the words of the ECJ in *Da Costa*, “the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance.”¹⁸⁷ According to the Court, such would be the case “especially when the question raised is *materially identical* with a question which has already been the subject of a preliminary ruling in a similar case” [emphasis added].¹⁸⁸ In *Da Costa* the Court thus established that its judgements have value as precedents, at least when the questions are identical.¹⁸⁹

In *CILFIT* the Court broadened the scope of the *acte éclairé* principle in two respects. It held that the existence of a precedent could have the same effects on the obligation laid down in Article 234(3), where the Court has “already dealt with the *point of law* in question, *irrespective of the nature of the proceedings* which led to the decisions, even though the questions at issue are *not strictly identical*” [emphasis added].¹⁹⁰

5.3.2.2 Acte clair

The judgement in *CILFIT* is of vast importance for reasons other than those already mentioned. In *CILFIT*, the Court was faced with the question of

¹⁸⁴ Hartley, T.C. (2003), pp. 292-293.

¹⁸⁵ See ter Kuile, B.H., ‘To Refer or not to Refer: About the Last Paragraph of Article 177 of the EC Treaty’, in Curtin, D. and Heukels, T. (eds.), *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, Volume II (1994), pp. 381-382.

¹⁸⁶ ECJ case 107/76 *Hoffmann-La Roche* [1977] ECR 957.

¹⁸⁷ ECJ cases 28-30/62 *Da Costa* [1963] ECR 31, p 38.

¹⁸⁸ *Ibid.*

¹⁸⁹ But note that as the ECJ is not an appellate court, national courts are never precluded from asking the Court the same question again, see ECJ case 66/80 *ICC* [1981] ECR 1191, para 14. For implications of the development of precedent for the relationship between the ECJ and national courts, see generally Craig, P. and de Búrca, G. (2003), p. 442 *et seq.*

¹⁹⁰ ECJ case 283/81 *CILFIT* [1982] ECR 3415, paras. 13-14.

whether the principle of *acte clair*, which French courts had advanced and started to apply in relation to Community law questions that were raised in French courtrooms, could be applied to relieve courts of their duty under Article 234(3) EC.

The theory of *acte clair* is that “if a provision is unequivocal there is no need to interpret it.”¹⁹¹

The Court, against the Advocate General’s opinion, reached the conclusion that the principle of *acte clair* was in fact applicable, thus introducing the third, and perhaps most important, qualification to the obligation of Article 234(3) into Community law. However, the Court laid down strict conditions that must be fulfilled before the principle of *acte clair* is applied. The court must be “convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.”¹⁹² This assessment must be made “on the basis of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.”¹⁹³ This includes, according to the Court, an evaluation of different language versions of the Community law in question, due concern to the peculiarity of Community law terminology and legal concepts, which “do not necessarily have the same meaning in Community law and in the law of the various Member States.”¹⁹⁴ Furthermore, national courts must pay due regard to the context of the Community law provision in question, the objectives thereof and to the state of evolution of Community law at the time the provision is to be applied.

Mr. Advocate General Capotorti’s arguments against incorporation of the “French born” principle of *acte clair* are interesting to read in the context of the topic of this thesis. He argued, firstly, that the principle was ‘France-specific’ and its application in Community law was not appropriate and secondly that it was inconceivable for a provision of law to need no interpretation. Thirdly, he argued that evidence showed that the *acte clair* principle had in fact been applied in an anomalous manner, pointing to several such examples in the case law of the French Conseil d’Etat.¹⁹⁵

Commentators’ views on the *CILFIT* conditions for application of the principle of *acte clair* seem to fall into two opposite groups. According to one view, *CILFIT* practically casts the door wide open for national judges who want to evade the obligation to refer matters to the ECJ.¹⁹⁶ It has been submitted that the conditions laid down in the judgement do not really “have any teeth”, except perhaps for the requirement of a comparison of different language versions.¹⁹⁷ The other view, most famously put forward by Rasmussen, claims that the ECJ’s strategy in *CILFIT* is wholly different

¹⁹¹ *Ibid.*, AG’s Opinion, para 4.

¹⁹² *Ibid.*, the Judgement, para 16.

¹⁹³ *Ibid.*, para 21.

¹⁹⁴ *Ibid.*, paras. 18-19.

¹⁹⁵ *Ibid.*, AG’s Opinion, para 4.

¹⁹⁶ See, e.g., Arnall, A., “The use and abuse of Article 177 EEC”, 52 *M.L.R.* (1989), p. 626; Rasmussen, H., ‘The European Court’s *acte clair* strategy in *CILFIT*’, 9 *E.L.Rev.* (1984), p. 242; Steiner, J., *et al.*, *Textbook on EC Law*, Eighth Edition (2003), p. 567 and Derlén, M. (2004), p. 87. The last author refers to this view as a *de jure* perspective.

¹⁹⁷ *Ibid.*, Arnall, A., p. 626.

from what appears at first sight; in reality, the strategy is to enhance the ECJ's control over the national courts of last instance.¹⁹⁸ The ECJ is said to achieve this by a strategy of 'give and take'. The Court gives the national courts of last instance some leeway by introducing the principle of *acte clair*, however, it revokes that leeway by setting forth conditions, which are so strict that if they are interpreted sensibly they leave the national courts no room for manoeuvre.¹⁹⁹ This latter view has been declared by judge Mancini to be the correct analysis of *CILFIT*.²⁰⁰

Initially, the *acte clair* principle was viewed very suspiciously by commentators.²⁰¹ The AG's opinion in *CILFIT* is a good example of this wariness. With time, the principle was accepted and there have even been voices advocating a new and relaxed interpretation of the *CILFIT* conditions for application of the *acte clair* principle, claiming that any conscientious judge would hesitate and most likely avoid applying the principle of *acte clair* under the unreasonably strict conditions put forward in *CILFIT*. In *Wiener*,²⁰² AG Jacobs argued that excessive resort to the preliminary ruling procedure, following the ongoing expansion of Community law, would prejudice the quality, coherence and accessibility of the ECJ's case law.²⁰³ He suggested a relaxation of one of the *CILFIT* conditions, the condition regarding a comparison of different language versions of Community measures. Moreover, he expressed the opinion that the conditions "should apply only where a reference is truly appropriate [...], namely when there is a general question and where there is a genuine need for uniform interpretation."²⁰⁴ The ECJ, however, did not utter a word in response to his suggestion.

In *Lyckeskog*,²⁰⁵ the Court was once more confronted with a question on whether the *CILFIT* conditions should be relaxed. The Swedish appeal court, which referred the matter, considered that the *CILFIT* conditions were not fulfilled in the case at hand. Yet, the court was of the opinion that it could decide on the matter without a preliminary ruling from the ECJ. The Commission recommended a revision of the *CILFIT* conditions on only one account; the condition that the national court must be convinced that the correct application of Community law is as obvious to the ECJ and the other national courts. Mr. Advocate General Tizzano, however, rejected any relaxation of the *CILFIT* conditions.²⁰⁶ The Court itself managed to avoid giving an answer to this particular question.²⁰⁷

¹⁹⁸ Rasmussen, H. (1984), pp. 243 and 253 *et seq.* See also Derlén, M. (2004), p. 87 (who refers to this view as a *de facto* perspective).

¹⁹⁹ *Ibid*, Rasmussen, H., p. 256 *et seq.*

²⁰⁰ Mancini, G.F. and Keeling, D.T. (1991), p. 4.

²⁰¹ See, e.g., Timmermans, C., 'The European Union's judicial system', 41 C.M.L.Rev. (2004), p. 401.

²⁰² ECJ C-338/95 *Wiener SI GmbH v. Hauptzollamt Emmerich* [1997] ECR I-6495.

²⁰³ *Ibid*, AG's Opinion, para 60.

²⁰⁴ *Ibid*, paras. 64-65.

²⁰⁵ ECJ C-99/00 *Lyckeskog* [2002] ECR I-04839. The case will be discussed in Chapter 5, section 4.2 below.

²⁰⁶ *Ibid*, AG's Opinion, para 60 *et seq.*

²⁰⁷ *Ibid*, the Judgement, para 21. For a discussion about the meaning of this latest avoidance of the Court to address the question whether the *CILFIT*-conditions should be relaxed, see Derlén, M. (2004), pp. 92-93.

The current situation therefore remains the same as when the *CILFIT* judgement was delivered: national courts of last instance must take due regard to the *CILFIT* conditions before applying the principle of *acte clair* to a question of Community law.

5.4 Which court is under obligation pursuant to Article 234(3) EC?

5.4.1 Two theories

The question of which court in a Member State is a court “against whose decisions there is no judicial remedy under national law” was unresolved until quite recently. There were two main theories on the meaning of those words, the ‘abstract theory’ and the ‘concrete theory’.

According to the *abstract theory*, the quoted words of Article 234(3) EC only refer to the highest court in the state, usually the Supreme Court.²⁰⁸ Arguments in favour of this theory include the wording of the provision (‘decisions’ in the plural form), savings of cost by not obligating too many courts to refer, and the claim that it is satisfactory to impose this duty only on the highest national courts, as only those courts have the specific role of guaranteeing the uniform interpretation and unity of national law.²⁰⁹ This theory is based on the assumption that ultimately there should be a reference to the ECJ, even if only at the very last stage in the national proceedings. However, this theory could present some problems, as access to the highest court is usually limited to cases that could set precedents. For example, access to the highest courts in Sweden and the United Kingdom is subject to a grant of leave to appeal. If the abstract theory is correct, it seems possible that a case could be barred from being examined by the highest court of the State in question, the only court that is under obligation to refer matters to the ECJ. Thus, if no reference to the ECJ has been made before the lower instances, denial of leave to appeal could mean denial of justice.

According to the *concrete theory*, these words refer to the court, which in practice is the court of last instance in the case in question. Procedural limitations, such as the existence of a leave-to-appeal system, must be taken into account and an assessment must be made of whether a judgment will in reality be final. If so, then the Court handling the case must be subject to a duty to refer to the ECJ, even though it is the lowest court of the state.²¹⁰

²⁰⁸ Constitutional courts are usually considered to stand outside the hierarchy of courts due to their limited jurisdiction and thus do not count as courts of last instance. Conversely, if appeal to a supreme court is limited to review in law (cassation) that court will still count as the court of last instance for the purpose of Article 234(3) EC. See generally Schermers, H.G. and Waelbroeck, D.F. (2001), pp. 269-271 and Jacobs, F. ‘Which courts and tribunals are bound to refer to the European Court?’, 2 *E.L.Rev.* (1977) p.120.

²⁰⁹ See generally, Schermers, H.G. and Waelbroeck, D.F. (2001), p. 267, and Hartley, T.C. (2003), pp. 283-284.

²¹⁰ Raitio, J., ‘What is the court of final instance in the framework of Article 234(3) EC in Sweden? – Preliminary Ruling in the Criminal Proceedings Against Kenny Roland Lyckeskog’, 1 *Europarättslig tidskrift* (2003), p. 161.

This theory is obviously better suited to ensure effective judicial protection of individuals²¹¹ and to secure uniformity of Community law and prevent the emergence of national case law that is not in conformity with it.²¹² The latter objective has been emphasised in the Court's case law²¹³ and thus most commentators were led to believe that the ECJ favoured the concrete theory although the question had never been directly dealt with by the Court.²¹⁴

5.4.2 The *Lyckeskog* case

The Court finally addressed this question directly in *Lyckeskog*.²¹⁵ The facts of the case were, in short, that criminal proceedings were brought against Mr Lyckeskog for importing 500 kg of rice to Sweden without declaring the importation to the customs authorities. The case was first tried before a district court (Tingsrätt) and then before a court of Appeal (Hovrätt) which decided to stay the proceedings and refer the matter to the ECJ. The Court of Appeal's first question to the ECJ was whether or not it should be considered a court of last instance in the sense of Article 234(3) EC. The Court of Appeal was of the opinion that the question should be answered in the affirmative, since its decisions are reviewed by the Supreme Court (Högsta Domstolen) only if the latter declares the appeal admissible. Furthermore, leave to appeal is only granted on the condition that the case is either important for the uniform application of the law (a possible precedent) or there are exceptional reasons for hearing the appeal, such as a formal defect, or if the decision by the Court of Appeal manifestly rests on a serious omission or error.

Statistics supplied to the ECJ by the Swedish Government showed that leave to appeal is only granted in 3-4% of the cases in which it is sought. The Court of Appeal pointed out that minor errors in interpretation or application of Community law did not constitute grounds for leave to appeal.

Nevertheless, the ECJ, following the Advocate General's opinion, opted for the abstract theory. The Court reiterated its well-known phrase that the obligation laid down in Article 234(3) EC is "in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State".²¹⁶ The Court found that this objective is secured when national supreme courts are obliged to refer matters to the ECJ.²¹⁷ The Court declared that a national system in which admission to the Supreme Court is dependant on a

²¹¹ See Douglas-Scott, S. (2002), p. 243 and Schermers, H.G. and Waelbroeck, D.F. (2001), p. 267.

²¹² See Hartley, T.C. (2003), pp. 283-284.

²¹³ See, e.g., ECJ C-107/76 *Hoffmann-La Roche* [1977] ECR 957, para 5.

²¹⁴ See, e.g., Schermers, H.G. and Waelbroeck, D.F. (2001), p. 268; Anderson, D.W.K. and Demetriou, M. (2002), p. 165, and Raitio, J. (2003), p. 161. Many commentators had referred to ECJ case 6/64 *Costa Enel* [1964] ECR 592 as a proof that the ECJ favored the concrete theory.

²¹⁵ ECJ C-99/00 *Lyckeskog* [2002] ECR I-04839.

²¹⁶ *Ibid*, para 14.

²¹⁷ *Ibid*, para 15.

grant of leave to appeal does not deprive individuals of a judicial remedy. This, the Court held, was true for Sweden, as real access to the Supreme Court existed in normal circumstances (not only in exceptional circumstances such as when new facts emerge) and therefore the Court of Appeal (Hovrätten) could not be considered to be a court of last instance for the purpose of Article 234(3) EC.

One of the justifications put forward by the Court for its ruling was that according to Swedish law, uncertainty as to the interpretation of Community law could give rise to a review by the Supreme Court. The ECJ emphasised the Supreme Court's obligation pursuant to Article 234(3) EC to refer matters to the ECJ, subject to the limits accepted by the Court (*CILFIT*). After ascertaining that Swedish procedural rules did not stand in the way of such a procedure, the ECJ submitted that the highest court was obligated to request a preliminary ruling when deciding on a request for leave to appeal in a case involving Community law, if the highest court was inclined to deny this request and there was no possibility of referring the case back to a lower instance.

Neither the Court nor the AG addressed the Court of Appeal's statement that minor errors in the interpretation or application of Community law did not constitute grounds for leave to appeal to the Supreme Court. The Commission, however, refers to this statement in a reasoned opinion issued recently to Sweden pursuant to Article 226 EC.²¹⁸ According to the reasoned opinion, Sweden failed to fulfil its obligation pursuant to Article 234(3) EC, e.g. by not taking measures against the practice of the courts of last instance of refraining from requesting preliminary rulings from the ECJ when requests for leave to appeal are considered. In its response to the Commission, the Swedish Government claims that the accusation is unfounded; however, a proposal for an amendment of national law is in preparation, which will remove any doubts as to the obligation of courts of last instance to refer matters to the ECJ and will obligate them to cite the motives behind decisions not to refer.

²¹⁸ Motiverat Yttrande (Reasoned Opinion) dated 13 October 2004, ref: 2003/2161 C(2004) 3899, available at <http://www.pointlex.se/filarkiv/document/2004/11/9/EU-motivering_0.pdf>, visited on 18 March 2005.

6 Analysis

6.1 General

In general, it can be said that the preliminary ruling procedure is a success, thanks mostly to the willingness of national courts of lower instance to refer matters to the ECJ.²¹⁹ However, there have been far fewer referrals from courts that are actually under obligation to refer (courts of last instance) and their questions have been criticised for being very narrow and technical, as opposed to the fundamental questions, which have tended to come from lower courts.

I think it is fair to maintain that national supreme courts of most or even all of the Member States fail to respect their obligation to refer matters to the ECJ from time to time.²²⁰ According to Rasmussen, there is a considerable number of cases of non-compliance with Article 234(3) EC on record.²²¹ Failures may, of course, occur by accident, but deliberate non-referrals also seem to occur²²² and some Member States' courts have been criticised more than others for their unwillingness to seek preliminary rulings.²²³ Sometimes non-referrals are decided under the pretence of the principles of *acte clair* and *acte éclairé*, while at other times national courts cite no reasons to justify their non-referrals.

There could be several reasons why national courts choose to ignore their obligation to refer. The main reasons include delays, cost, the wishes of the parties, unfamiliarity with Community law, misconstruction of the 'necessity' proviso, political reasons and judicial attitudes.²²⁴ This is where the limitations of *acte clair* and *acte éclairé* come in, giving the courts of

²¹⁹ See Douglas-Scott, S. (2002), p. 226.

²²⁰ A complete empirical research in support of this statement does not seem available, as such a research would be an "insurmountable task", see H.Rasmussen (1986), p. 304. However, in support of the statement, see, e.g., Mancini, G.F. and Keeling, D.T. (1991), p. 4; Anderson, D.W.K. and Demetriou, M. (2002), pp. 177-180; and Timmermans, C. (2004), p. 399. Furthermore, surveys of application of Community law by national courts are available in some of the Commission's annual reports on monitoring the application of community law, see, e.g., the 19th annual report, available at <http://europa.eu.int/celex/cgi/sga_rqst?SESS=6013!CTXT=19!UNIQ=20!APPLIC=celexe xt!FILE=VISU_visom_19_0_4!DGP=0!VI_all0#texte, visited on 28 april 2005. For a critical view of Swedish non-referrals, see, e.g., Bernitz, U., 'Kommissionen ingriper mot svenska sistainstansers obenägenhet at begäre förhandsavgöranden', 1 Europarättslig tidskrift (2005), pp. 114-115.

²²¹ See Rasmussen, H. (1998), p. 131 and for an overview of selected cases, see generally Rasmussen, H. (1986), pp. 304-335.

²²² Anderson, D.W.K. and Demetriou, M. (2002), p. 179-180.

²²³ The French Conseil d'État's Judgement in *Cohn-Bendit* is perhaps the most famous (infamous) example; see Bebr, G., 'The rambling ghost of Cohn-Bendit: acte clair and the Court of Justice', 20 *C.M.L.Rev.* (1983), pp. 439-472.

²²⁴ For an overview over some of the factors which discourage national judges from referring, see Schermers, H.G. and Watson, J.S., 'Report of the Conference' in Schermers, H.G. et al, *Article 177 EEC: Experiences and Problems* (1987), pp. 8-12.

last instance a chance to evade their obligation to refer when for some reason they prefer not to.

Some commentators have said it is better to have occasional breaches of the obligation to refer, rather than to endanger the good relationship between the ECJ and the national courts. There may be some truth in this, but from the perspective of the protection of individual's rights, it is unfortunate.

There has also been an ongoing discussion about possible amendments of Article 234 EC to meet the increasing volume of referrals and the consequent delays involved in the proceedings. It has been proposed to limit further or even abolish the duty to refer. Other suggestions include taking away the discretion of courts of lower instances to seek a preliminary ruling. Such suggestions have not as yet been implemented. According to Timmermans, limiting the obligation to refer would both "sit[] uneasily with the character of the preliminary procedure as a dialogue based on cooperation [and disregard] the need for legal protection of the parties concerned".²²⁵

The discussion on the preliminary ruling procedure seems much more devoted to practicality than to protection of rights. The emphasis is on uniformity of Community law and docket control, not on the necessity of individuals' access to court.²²⁶ This strikes me as inappropriate in the light of the emphasis the ECJ has placed on Article 234 EC as a substitute for Article 230(4) EC.

6.2 National courts' lack of competence to declare Community acts invalid

In *Foto-Frost*²²⁷ the ECJ took away the competence national courts of lower instances might have thought they had to declare Community acts invalid, pursuant to Article 234(2) EC. Yet, the Court did not take away the power to review Community acts and declare them valid. This presents a limitation of the obligation to refer. Ward points out that the coherence of Community law is equally imperilled by the authority of national courts to declare Community acts valid.²²⁸ However that may be, the more relevant question for this thesis is whether this interpretation has adverse effects for judicial protection of individuals.

In *Foto-Frost*, the Court does not answer the question of how much doubt there must be in a judge's mind in order for him to be obliged to refer a question on the validity of a Community act to the ECJ. Anderson and Demetriou mention three possible answers to this question. The first is that the court should always refer if there is the slightest doubt of validity. The second is that the court should always refer if the plea of invalidity is considered to have some merits. The third possible answer, which Anderson and Demetriou favour, is that the court has a broader discretionary right, based on the principle that Community acts may be presumed valid

²²⁵ Timmermans, C. (2004), p. 402.

²²⁶ Curtin, D., (2000), p. 315.

²²⁷ ECJ case 314/85 *Foto-Frost* [1987] ECR 4199.

²²⁸ Ward, A. (2000), pp. 267-268.

until they are found invalid by a competent court.²²⁹ Other commentators seem to support this view.²³⁰

In my view this position, that national courts can declare Community acts valid whereas they cannot declare such acts invalid, invites the risk that national courts will become inclined to shrug off any doubts raised and declare the act valid, in order to save time and efforts.²³¹

6.3 Exceptions from the obligation to refer: *acte clair* and *acte éclairé*

What the ECJ's judgements in *da Costa* and *CILFIT* have in common is that they limit the obligation of national courts of last instance to seek preliminary rulings from the ECJ. In my view, the obligation to refer is an essential safeguard from the individual's standpoint and is, in fact, essential if the preliminary ruling procedure is to be regarded as a procedure capable of protecting individuals' rights.

The limitations to the obligation granted to national courts in these judgements may be perfectly justifiable from a political and practical perspective, but from the individual's point of view, they may present ample possibilities for denial of justice.

It is fair to say that it is no easy task for a national court to fulfil all the *CILFIT* conditions. Some claim it would take a "quasi-encyclopaedic knowledge of both Community law and the national law of all Member States".²³² On that basis, I can agree with Rasmussen that the strategy in *CILFIT* is not to weaken the obligation of Article 234(3) but to secure national courts' compliance with it.²³³ However, that strategy seems to me to have failed. A likely explanation is that the *CILFIT* conditions are so strict that they are impossible to fulfil for most, or all, national courts. Facing such conditions, a national judge has, in my view, only two choices. He can completely surrender and seek a preliminary ruling every single time there is a slightest doubt as to a Community law matter. Alternatively, he can defy the system by accepting what Rasmussen calls "the giving part" (*acte clair*) of the *CILFIT* judgement and ignoring the "taking part" (the conditions) of *CILFIT* or replacing it with his own common sense. The former option is bad from a docket-control perspective but the latter is even worse from the individual's perspective.

Anderson and Demetriou suggest a relaxation of the *CILFIT* conditions to the point where they correspond to Article 104(3) of the Court's Rules of Procedure.²³⁴ The provision enables the Court to dispose of preliminary references by an order where the answer to a question "may be clearly deduced from existing case law or where the answer to the question admits

²²⁹ Anderson, D.W.K. and Demetriou, M. (2002), pp. 150-152.

²³⁰ See, e.g., Ward, A. (2001), p. 415 and Temple Lang, J. (2003), p. 107.

²³¹ See Schermers, H.G. and Waelbroeck, D.F. (2001), p. 453, *but c.f.* Anderson, D.W.K. and Demetriou, M. (2002), p. 150 (who claim that this divided jurisdiction makes national judges reluctant to decide on points of invalidity for themselves).

²³² See Schermers, H.G. and Watson, J.S. (1987), p. 8.

²³³ See, e.g., Rasmussen, H. (1984), p. 253 *et seq.*

²³⁴ Court of Justice – codified version of the Rules of Procedure, OJ C 34, 1.2.2001, p.1

of no reasonable doubt”. Their argument is that it is preposterous to oblige national courts to seek preliminary rulings where the ECJ can dispose of the reference by order.²³⁵

In my view, relaxation of the conditions, despite the adverse effects of having too strict conditions, would not be the right step from the individual’s perspective while Article 234 EC serves as their main route to the ECJ.

As regards *acte éclairé*, *CILFIT* expanded the conditions of *da Costa* so making them provide for considerable leeway for national judges. Non-referrals no doubt occur under the pretence of *acte éclairé*. What the ECJ can do to avoid manipulation of the principle of *acte éclairé* is to make sure that its judgements are as clear and precise as possible.

6.4 The ECJ’s interpretation of Article 234(3) EC in *Lyckeskog*

In *Lyckeskog*²³⁶ the Court adopted the solution, presented by the British Government, that courts of last instance should consider the question of referral at the stage when admissibility of an appeal is considered. In legal terms, the Court interpreted the words “a case pending” in Article 234(3) EC to mean that application for leave to appeal falls within their scope. It is by no means obvious that this should be so.²³⁷

By adopting this solution, the Court was able to take a very narrow view on what constitutes a court “against whose decisions there is no judicial remedy”, thus limiting considerably the number of courts under obligation pursuant to Article 234(3) EC. Taking such a narrow view seems at odds with the Court’s former approach, e.g. in *CILFIT*, where the Court in effect interpreted the obligation pursuant to Article 234(3) very strictly and shrewdly tried to ensure compliance with it. Perhaps the Court’s workload makes it less keen to receive referrals in cases that are not considered important enough to be admitted on appeal to the highest judicial level in the national hierarchy.²³⁸

Furthermore, the Court’s narrow approach in *Lyckeskog* does not fit well with the fact that it has repeatedly identified Article 234 EC as the main route to judicial control for individuals and as substitute for direct access to the Court pursuant to Article 230(4) EC.²³⁹ It may be true that the uniformity of Community law is adequately ensured despite this narrow view, but the question is whether the Court is right in holding that leave-of-appeal systems do not have the effect of depriving individuals of judicial protection. The Commission’s reasoned opinion against Sweden indicates that there is a real problem with non-referrals in relation to the Swedish

²³⁵ Anderson D. and Demetriou M. (2002), p. 182. *But c.f.* Edward, D., ‘National Courts – the Powerhouse of Community Law’, 5 C.Y.E.L.S. (2002-2003), pp. 7-8, who claims that Article 104 of the Court’s Rules of Procedure render a relaxation of the *CILFIT*-conditions unnecessary.

²³⁶ ECJ C-99/00 *Lyckeskog* [2002] ECR I-04839.

²³⁷ *See* Hartley, T.C. (2003), p. 285.

²³⁸ *Ibid.*, p. 284.

²³⁹ *See, e.g.*, ECJ C-50/00 P, *Unión de Pequeños*, [2002] ECR I-6677.

leave-of-appeal system, although the Commission only points at one example as a certain breach.²⁴⁰

Perhaps it is fair to say that the problem lies in national law and practice, which must adjust to Community law, and not with the ECJ's interpretation of Article 234(3) EC. On the other hand, it may be held that the Court's verdict in *Lyckeskog* does not take due regard of the hindrances in national law and practice. It may all boil down to the question raised at the beginning of this thesis, whether the Community is responsible for giving individuals effective judicial protection. The outcome in *Lyckeskog* seems more in line with the sovereignty theory, which seems at odds with the Court's reasoning in many of its fundamental judgements.²⁴¹

My conclusion is that, at least in theory, the interpretation of Article 234(3) EC in *Lyckeskog* should prevent situations in which no court considers itself under an obligation to refer. However, the reasoned opinion of the Commission indicates that national law and practice may still need to be adjusted to the Court's finding. Thus, the Court's narrow interpretation in *Lyckeskog* increases risk of non-referral, at least for the time being,

Furthermore, I think the message the Court gave national courts in *Lyckeskog* may discourage national courts of lower instance from seeking preliminary rulings. Firstly, the judgement relieves national courts of lower instance from the obligation to seek preliminary rulings if a formal possibility of appeal exists, even if the chances of the appeal's being admitted are very slim. In the light of the view expressed by many commentators that the ECJ favoured the 'concrete theory',²⁴² it is quite likely that national courts of lower instance have generally acted in accordance with that theory.²⁴³ Moreover, the judgement may be understood as the Court's plea for fewer referrals and thus may revive old ideas that national courts should avoid 'disturbing' the ECJ with preliminary referrals.²⁴⁴

6.5 Comparison with the two standards

The Community standard and the ECHR standard described in Chapter 3 have common features, although the case law of the ECtHR is naturally more developed. One can say that the Community standard contains the core of the ECHR standard but that the ECtHR has elaborated the latter standard further. Consequently, it serves no purpose to consider the two standards separately, so I will apply them simultaneously to the question

²⁴⁰ Motiverat Yttrande (Reasoned Opinion), 13. October 2004, ref: 2003/2161 C(2004) 3899, available at <http://www.pointlex.se/filarkiv/document/2004/11/9/EU-motivering_0.pdf>, visited on 18 March 2005, p. 3. The case in question is commented by Bernitz, U., in 'Missbruk av dominerande ställning i form av prisdiskriminering - restitution och betalningsbefrielse', 2 *Europarättslig tidskrift* (2003), pp. 382-386.

²⁴¹ See Chapter 2.

²⁴² See Chapter 5, section 4.1.

²⁴³ The concrete theory has e.g. been employed by Finnish courts, see Raitio, J. (2003), p. 161.

²⁴⁴ See, e.g., Anderson, D.W.K. and Demetriou, M. (2002), pp. 131-132.

whether access to the ECJ provides individuals with effective judicial protection through the preliminary ruling procedure.

Both standards stress that there must be access to court and that this access must be effective (*Johnston, Heylens* and *Golder, Airey*). The Community standard stresses the fundamental nature of the right of access to court (*Heylens*). The ECHR standard adds that hindrances in fact as well as hindrances in law can constitute a breach of Articles 6 and 13 ECHR (*Golder, Airey*).

However, both standards accept limitations to the right of effective judicial protection. The ECtHR has held that such limitations must not impair the very essence of the right and that any limitations require a legitimate aim and must be reasonably proportionate. Furthermore, the ECtHR does not require that there be a court with the power to invalidate or override national law (*James and others v. the United Kingdom; Leander*).

It is this last statement which at first sight seems to indicate that the national courts' lack of competence to declare Community acts invalid would not be in breach of the ECHR standard. On closer examination, however, this first impression does not seem to hold true. The ECHR is clearly an agreement under public international law in the traditional sense. Article 1 of the Convention only places an obligation on the Contracting Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in section I of [the] Convention". It does not lay down an obligation on the Contracting Parties to incorporate the Convention into national law or give any instructions on how to implement the Convention. This explains why the ECtHR could not interpret Articles 6 and 13 ECHR to require that there be courts with the power of judicial review. In effect, that would have meant obligating the Contracting Parties to incorporate the Convention into national law.²⁴⁵

The Community's legal order, on the other hand, despite its genesis in public international law, is a *sui generis* supranational legal order.²⁴⁶ Community law has supremacy over national law, both prior and subsequent legislation.²⁴⁷ Moreover, all national courts must set aside any provision of national legislation that conflicts with Community law.²⁴⁸ In this sense, every national court is a constitutional court. This constitutes an important difference between Community law and the ECHR. In my opinion, this difference makes for a strong argument in favour of a different outcome from ECtHR's case law in this respect, such as *James and others v. the United Kingdom* mentioned above. In the Community's legal system, individuals can already ask national courts to set aside national law that conflicts with Community law, and national courts are competent to endorse that claim. Thus, it seems awkward that individuals do not have the same access to a competent court when it comes to legislation stemming from the Community institutions that infringes a higher Community norm. One cannot avoid recalling the principle of equivalence, although that principle was developed in a different context. My conclusion is that the division of

²⁴⁵ See Ovey, C. and White, R (2002), p. 394 and Chapter 3, section 2.2 of this thesis.

²⁴⁶ ECJ C-26/62 *Van Gend en Loos* [1963] ECR 1.

²⁴⁷ ECJ 6/64 *Costa v. ENEL* [1964] ECR 585.

²⁴⁸ ECJ 106/77, *Simmenthal* [1978] ECR 629, para 21.

competences between national courts and the ECJ when it comes to a review of invalidity makes the situation of the individual in case of non-referral intolerable and in conflict with both the Community standard and the ECHR standard.

Other aspects of the two standards also seem to confirm this conclusion. As previously mentioned, the right of access to court can be limited as long as the limitation does not impair the very essence of the right, serves a legitimate aim and is proportionate to the aim.²⁴⁹ The main reason why only the ECJ and the CFI are competent to declare Community acts invalid is because this is considered the only way to ensure the uniformity of Community law. There may very well be a legitimate aim behind the decision to restrict the power to invalidate Community acts to the only common courts in the Community, but that must be distinguished from the aim behind the existing system of remedies. In effect, the system of remedies does not subject the Community legislator to the same measure of control as the national legislators. If that were the aim, which I do not claim it is, it would certainly not be a legitimate aim. Furthermore, even if a legitimate aim is taken for granted, it is hard to accept that subjecting individuals to the defective preliminary ruling procedure, as (almost) the only means of access to the only fully competent court, is proportionate to that undefined aim.

Finally, according to the ECHR standard, rights should not be theoretical and illusory but practical and effective, and this applies particularly to the right of access to courts.²⁵⁰ It may be questioned, in the light of the ECJ's case law, whether the obligation to refer has not become too limited to be able to secure individuals the right of access to court. According to Swedish statistics, submitted in the *Lyckeskog* proceedings, out of the 24,000 judgements handed down each year by the appeal courts, leave to appeal is sought in 5,000, and granted only in ca. 150-200 cases, i.e. in 3-4% of all applications for leave to appeal and 0.6-0.8% of the total number of cases.²⁵¹ How many of these cases involved questions of Community law is not known, but the figures seem quite low when viewed from the perspective of individuals' access to court.

²⁴⁹ See Chapter 3, section 2.1.

²⁵⁰ *Ibid.*

²⁵¹ See ECJ C-99/00 *Lyckeskog* [2002] ECR I-04839, AG's Opinion, para 7.

7 Concluding remarks

7.1 Politico-philosophical consequences of non-referral

It may be asked, what the consequences are if the Community does not ensure effective judicial protection for individuals' rights under Community law.

According to Locke, a political society must have “a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders”.²⁵² The Community meets these conditions.²⁵³

The second of the three conditions for government, according to Locke, is that there must be a common judge.²⁵⁴ According to Locke, “where there is no longer the administration of justice, for the securing of men's rights ... there certainly is no government left”.²⁵⁵ Thus, if government exceeds the limit of its power and the citizens have no common ‘judge on earth,’ they can only ‘appeal to heaven’. This puts them back into the state of nature or anarchy.²⁵⁶ When there is no common judge, but the government still sits in power, the government is in fact the judge of its own actions. That means that the rule of law is not upheld, but the arbitrary rule of men.²⁵⁷ In the absence of a common judge, law and state power lose their moral claim to obedience.²⁵⁸ The duty of citizens to obey the law goes hand in hand with the duty of the state to protect them. If men are subject to the arbitrary will of other men (the government), then the foundation of society disappears, since the reason for men to enter into a political society is to protect their rights from the arbitrary will of other men.²⁵⁹ In this situation, the citizens may have a right of resistance or even revolution.

If Locke's theory is applied to the situation at issue in this thesis, one can conclude that the denial of effective judicial protection, which follows from non-referral, may release individuals in the Community from the moral duty to obey Community law²⁶⁰ and in essence lead to the dissolution of the Community.

²⁵² Locke, J., *Two Treatises of Government* (Second Treatise para 87), in Shapiro, I., *Two Treatises of Government and A Letter Concerning Toleration – John Locke*, p. 137.

²⁵³ Zetterquist, O. (2002), p. 31.

²⁵⁴ Locke, J., (2003), p. 155 (Second Treatise, para 125).

²⁵⁵ *Ibid*, p. 196 (Second Treatise, para 219).

²⁵⁶ *Ibid*, p. 137 (Second Treatise, para 87).

²⁵⁷ See Zetterquist, O. (2002) p. 384.

²⁵⁸ *Ibid*, p. 385.

²⁵⁹ Locke, J., (2003), pp. 154-155 (Second Treatise, para 123).

²⁶⁰ See Zetterquist, O. (2002) p. 385.

7.2 Legal remedies for non-referral

A distinction must be made between legal effects of non-referrals in the national legal system and legal effects of non-referrals in the Community legal system. A judgement of a national court of last resort will have final and binding effects and be enforceable in the national legal system, even though the judgement would be considered invalid on grounds of non-referral in the Community legal system.²⁶¹ Unless there is a remedy available for non-referral, the individual will have no choice but to accept the consequences of such a ‘flawed’ judgement. Lack of an effective remedy for non-referral could constitute a breach of Article 13 ECHR.²⁶²

There are some remedies available in the legal systems of the Member States and the Community. The Member State in question could be held liable for a breach of article 234(3) EC committed by the national judiciary.²⁶³ In national proceedings instigated for this purpose it would have to be established whether there was a breach of Article 234(3) EC and for that purpose, a preliminary ruling would have to be sought.²⁶⁴

Furthermore, the Commission can instigate proceedings pursuant to Article 226 EC, as it has recently done against Sweden.²⁶⁵ The individual can benefit indirectly from such proceedings, as they can help him prove that there was in fact a breach of Article 234(3) EC.²⁶⁶

In some national legal systems, there may be remedies for non-referral. The German Federal Constitutional Court (*Bundesverfassungsgericht*) has held that non-referral can constitute a breach of Article 101 of the German constitution (*Grundgesetz*) if it is ‘evidently arbitrary’.²⁶⁷

Moreover, it may be possible to bring a case against a Member State before the ECtHR, and claim that a non-referral violates Articles 6 and 13 ECHR. However, this does not seem to have happened yet. This possibility can be inferred from the ECtHR’s judgement in *Matthews v. the United Kingdom*, where the Court held itself competent to review primary Community law.²⁶⁸ The wording of Article 234 EC, however, may present problems in this respect, as it does not explicitly endow individuals with rights, and Articles 6 and 13 ECHR only protect rights that are granted by national law. One could argue, though, that despite its wording, Article 234 EC does endow individuals with rights; rights which are derived from the obligation of national courts to seek preliminary rulings. The ECJ seems to

²⁶¹ See ter Kuile, B.H. (1994), p. 384.

²⁶² See Chapter 3, section 2.2. The question whether lack of effective remedies for non-referrals lies outside the scope of this thesis, see Chapter 1, section 2.

²⁶³ See ECJ C-224/01 *Köbler* [2003] ECR I-10239.

²⁶⁴ See ter Kuile, B.H. (1994), p. 385.

²⁶⁵ Motiverat Yttrande (Reasoned Opinion) dated 13 October 2004, ref: 2003/2161 C(2004) 3899, available at <http://www.pointlex.se/filarkiv/document/2004/11/9/EU-motivering_0.pdf>, visited on 18 March 2005.

²⁶⁶ But see Rasmussen, H., (1998) p. 131 (who claims that Article 226 EC provides only for a weak and inadequate remedy against non-referrals).

²⁶⁷ See, e.g., Douglas-Scott, S. (2002), pp. 302-303, and Pernice, I., *supra* note 169, p. 34, and Hilf, M., ‘Der Justizkonflikt um EG-Richtlinien: gelöst’, 1 *EuR* (1998), p. 3.

²⁶⁸ See Chapter 3, section 2. See also Douglas-Scott, S. (2002), p. 302-303, and Pernice, I., *supra* note 169, p. 34.

accept this kind of argumentation. In *Van Gend en Loos*,²⁶⁹ for example, the rights which the Court was so anxious to protect by developing the doctrine of direct effect were derived from the negative obligation imposed on the Member States pursuant to Article 25 EC (previously Article 12 EC). The ECtHR also seems to approve of such reasoning, as can be seen from the *Dangeville*²⁷⁰ case, where the Court acknowledged that a directive addressed to the Member States had created substantive rights for the applicant.

These are the remedies that I see as being available in the event of non-referral. Of them, the German constitutional complaint, which follows from Article 101 of the *Grundgesetz*, seems the only adequate one for individuals. Such a remedy, however, does not appear to be common in the Member States.²⁷¹

7.3 *De lege ferenda*: some suggestions

The system of remedies has been a topic of discussion within the Community for quite some time and some interesting proposals have been submitted.

One solution could be to try to compel the Member States to adopt a similar solution to the German constitutional complaint. This solution has the advantage that the traditional division of power between the ECJ and the national courts could be maintained.²⁷² Article I-29(1) of the Constitutional Treaty provides that the “Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.”²⁷³ This provision might help facilitate reforms of the procedural laws of the Member States, if all the Member States ratify the Constitutional Treaty. However, it does not really create new rights or obligations but merely codifies the existing case law of the Court. The advantages of the solution are that it is in line with the principle of subsidiarity²⁷⁴ and it is favourable to docket-control objectives. The downside is that this solution does not ensure uniformity in individuals’ fundamental rights protection.²⁷⁵

Another solution could be to adopt a *special human rights complaint procedure* for individuals. The procedure envisaged would enable individuals to challenge Community acts, both individual and legislative acts, directly, but the cause of action would be limited to alleged violations of ‘fundamental rights’.²⁷⁶

Pernice describes two possible versions of such a procedure. Both could be in the form of amendments to Article 234 EC. The first would be in the

²⁶⁹ ECJ case 26/62 *Van Gend en Loos* [1963] ECR 1.

²⁷⁰ ECtHR *S.A. Dangeville v. France*, Judgement of 16 April 2002, Reports 2002-III (Application no. 36677/97), para 47.

²⁷¹ Mancini, G.F. and Keeling, D.T., (1991), p. 1.

²⁷² See Pernice, I., *supra* note 169, p. 34.

²⁷³ OJ C 169, 18.7.2003, p. 1. The latest version of the Constitutional Treaty is available at: <<http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>>, visited on 9 May 2005.

²⁷⁴ See Article 5 EC.

²⁷⁵ Pernice, I., *supra* note 169, pp. 34-35.

²⁷⁶ Usher, J.A., ‘Direct and individual concern – an effective remedy or a conventional solution?’ 28 E.L.Rev. (2003), p. 596.

form of an appeal against the refusal by a national court to seek a preliminary ruling. This solution is problematic, as it would alter the current spirit of co-operation underlying the system of remedies and create a hierarchy between the ECJ and national courts, which supreme courts of the Member States would hardly accept.²⁷⁷ The second version Pernice describes would be in the form of individual 'direct reference'. This procedure would in essence grant individuals the right to seek a preliminary ruling themselves if national courts refuse to do so. The ECJ would give its ruling on the Community act in question, but not on the decision of the national court not to seek a preliminary ruling. The national court would be obliged to wait for the judgement of the ECJ before giving its final ruling.²⁷⁸ This latter solution is not as broad in scope as the former.

In my opinion, Pernice's suggestions, especially the latter, seem appealing. Unfortunately, the Working Group II for the European Convention on the Future of Europe rejected the idea of a special human rights complaint procedure.²⁷⁹

Other solutions include the classic claim for amendment of the standing conditions of Article 230(4) EC²⁸⁰ and claims that national courts should be granted competence to set aside invalid Community acts.

Furthermore, accession of the Community to the ECtHR would without doubt increase judicial protection of individuals' fundamental rights, by enabling that Court to scrutinize acts of the institutions of the Community.

²⁷⁷ See Pernice, I., *supra* note 169, p. 35.

²⁷⁸ *Ibid.*

²⁷⁹ See Final Report of Working Group II, 22.10.2002, CONV 354/02, available at <http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGII>, visited on 19 May 2005, p. 15.

²⁸⁰ See, e.g., Gormley, L.W. (2001), p. 187.

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