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Preliminary Ruling procedure:
towards regionalisation?

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Summary

Article 234 of the EC Treaty contains the preliminary ruling procedure, a mechanism that not only constitutes integral part of the 'complete system of remedies' of the Community aimed at ensuring effective judicial protection, but also represents a linkage for such interconnection whereas Community law spills over the Member States' legal systems. Rulings made under preliminary reference to the ECJ have *de facto* outlined most of the principles of Community law.

During half a century this unique instrument of interaction has positively supported the evolution of the European legal system while, by a sustainable approach, has granted authority and respect for the national courts. The efficacy of Article 234 EC, clearly derived from the legal experience of the founding Member States, is not disputable as it has never been subject to substantial amendments.

Changes have instead occurred through the jurisprudence of the Court of Justice, initially meant to convey as many questions as possible in order to ensure the uniform enforcement of Community law and sustain the evolution of the Community. Subsequently, the Court has begun to intervene more actively, as example, rejecting the first non-genuine disputes and culminating with the recognition of the *acte clair* doctrine. The overall approach of the Court, together with the positive response of national courts has, however, caused the volume of preliminary references to increase more than the actual capacity of the Court to reply to them. Consequently, the system risks to collapse under the weight of the Court's workload.

This acknowledgment brings the discussion on the possible changes to be brought about the European legal system in general and to the preliminary reference in particular, in order to cope with the existing excess of references submitted to the ECJ. Moreover, recent case-law show the trend of the main actors to claim for the relaxation of the jurisprudential constraints introduced by the Court to the jurisdiction of national courts on question of interpretation, on one hand, and the denial of jurisdiction in the field of validity of Community law on the other. The resulting debate flows into the proposed regionalization. The proposal involves national supreme courts and the attribution to them of a higher degree of responsibilities in the matter of Community law. It thus entails the reduction of the demand of preliminary rulings from the Court by, under certain circumstances, providing those rulings at national level. The success of such mechanism depends, to a great degree, on the assessment of the ability for those national supreme courts to cope with issues of Community law without endangering the unity and immediacy of Community law. Other measures have also been proposed to curtail the workload of the ECJ. Some of these measures have been already adopted, although their changes have not yet been enforced.

In general terms, the suitability of a reform, whatever nature it may have, depends on its ability to strike both demand and supply of preliminary rulings at the same time. Notably, sole reduction of demand may not be enough to avoid the risks of collapse facing the system after the enlargement

of the EU and it is indeed, likely to deprive Article 234 EC of its successful features.

Preface

Ah! Another year has passed and sadly, the academic chapter of my life seems to move to its conclusion. Even so, after all, I could not have chosen a better scenario for such *finale*. These considerations may serve as thought on the importance of catching right away the value of the small precious things that experiences like that of the Master of European Affairs in Lund offer. Pebbles on the bed of the river of life. My personal pebbles!

A Giancarlo

Abbreviations

AG	Advocate General
CFI	Court of First Instance
Cost.	The Italian Constitution
CMLRev.	Common Market Law Review
CT	Treaty establishing a Constitution for Europe
EC	European Community
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
EC Treaty	Treaty establishing the European Community
ELRev.	European Law Review
IGC	Inter-Governmental Conference
IRLE	International Review of Law and Economics
MLR	Modern Law Review
NYR	Not Yet Reported
OJ	Official Journal
RPC	Rules of Procedure of the Court of Justice
TEU	Treaty of the European Union (Treaty of Maastricht)

Errata corrigenda

‘(...) in order to attack the *walidity* (...)’ , [validity]. At page 8.

1 Introduction

1.1 The Matter

The preliminary rulings procedure established under Article 234 of the Treaty establishing the European Community¹ was described by D. Anderson as ‘both the most fundamental and the most intriguing part of the evolving judicial architecture of Europe’, since it ‘uniquely, appoints the European Court as meeting-place between the legal order of the Community and those of its Member States’.²

Conceivably, the scenario prospected for the relation between these formally distinct legal orders encompass situations where interconnections and even overlaps are inevitable. The mechanism of preliminary reference set by Article 234 EC (former Article 177 of the EC Treaty) serves as linkage for such interconnection whereas Community law spills over the Member States’ legal systems.³

At first sight the importance of preliminary ruling in the development of Community law appears evident by the mere consideration of its constant recourse in numerous cases delivered by the Court of Justice (here in after “ECJ” or “the Court”). Rulings made under preliminary reference to the ECJ have *de facto* outlined most of the principles of Community law. From the principle of supremacy of Community law over national legislations in the 1970’s, the bursting jurisprudence of the Court have coped with the gaps embedded both in the EC Treaty and in secondary legislation providing effective protection of Community law rights through the principles of direct⁴ and indirect effect⁵ of Community provisions. In addition to the

¹ The Treaty establishing the European Community will be from now on referred as the ‘EC Treaty’.

² Anderson D., *References to the European Court*, London, (1995) Sweet and Maxwell, page ix.

³ In the ‘overlapping’ areas the situation is solved by the principle of supremacy of Community law developed through the jurisprudence of the Court of Justice of the European Communities. See in this respect the ruling of the Court of Justice in *Simmmenthal* (Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629), where the Court made it clear that Community law would take precedence even over national legislation that was adopted after the passage of the relevant EC norms. The existence of Community rules rendered automatically inapplicable any contrary provision of national law, and precluded the valid adoption of any new national law which was in conflict with the Community provisions. It followed, said the ECJ, that ‘every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule’ (para. 21).

⁴ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Administratie der Belastingen* [1963] ECR 1; Case 148/78, *Pubblico Ministero v. Ratti* [1979] ECR 1629; Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

⁵ Case 14/83, *von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89, *Marleasing S.A. v. Commercial Internacional de Alimentacion S.A.* [1990] ECR I-4135.

above, a substantial number of leading cases on general principles such as fundamental rights⁶, proportionality⁷, legal certainty⁸ and effective protection⁹ have been preliminary rulings.

Concluding this brief overview, also the very foundation of the Treaty, the so called “four freedoms”¹⁰, have all mainly been developed in preliminary ruling proceedings. Nevertheless, the significance of Article 234 EC has broader horizons than the ones described so far.

The drafters of the Treaty have provided the European Community with an important instrument which, apart from the substance of the rulings, has conferred legitimacy upon the Court and, indeed, upon the Community itself.¹¹ National and Community courts have a unique instrument of interaction capable of positively support the evolution of the European legal system while, by a sustainable approach, granting authority and respect for the Member States courts.

The efficacy of Article 234 EC is not disputable as its substantial changeless formulation proves. The success of its mechanism is also suggested by the extension of the reference system in the areas covered by Title IV of the EC Treaty and to the third pillar of the Union provided in Title VI of the Union Treaty.

Changes have instead occurred through the jurisprudence of the Court of Justice, initially meant to convey as many questions as possible in order to ensure the uniform enforcement of Community law and sustain the evolution of the Community. Subsequently, the Court has begun to intervene more actively, as example, rejecting the first non-genuine disputes and culminating with the recognition of the *acte clair* doctrine. The overall approach of the Court, together with the positive response of national courts has, however, caused the volume of preliminary references to increase more than the actual capacity of the Court to reply to them. Consequently, the system risks to collapse under the weight of the Court’s workload.

This acknowledgment brings the discussion on the possible changes to be brought about the European legal system in general and to the preliminary reference in particular, in order to cope with the existing excess of references submitted to the ECJ. Moreover, recent case-law show the trend of the main actors to claim for the relaxation of the jurisprudential constraints introduced by the Court to the jurisdiction of national courts on question of interpretation, on one hand, and the denial of jurisdiction in the field of validity of Community law on the other.

The resulting debate flows into the proposed regionalization. Regionalization, *per se*, is not a novel idea. A decade ago, a proposal seeks

⁶ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 260/89, *Ellinki Radiofonia Tileorassi* [1991] ECR I-2925.

⁷ Case 66/82, *Fromançais S.A. v. FORMA* [1983] ECR 395.

⁸ Case 169/80, *Administration des Douanes v. S.A. Gondrand Frères* [1981] ECR 1931.

⁹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

¹⁰ Free movements of good, free movement of persons, freedom to provide services and free movement of capitals.

¹¹ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 26.

to reconsider the jurisdictional structure of the Community by creating regional supra-national courts whose competence were to be divided geographically. The considered territorial partitioning of the jurisdiction of the Court of Justice on Community law to be attributed to a number of subordinate regional EC Courts did not meet general consent and had been therefore set aside.

The proposed relaxation of *acte clair* today, represents a way different reconsideration of regionalization. This time it involves national supreme courts and the attribution to them of a higher degree of responsibilities in the matter of Community law. Is regionalization a welcome change? Is it applicable at the present stage of the Union? Is it the most suitable? These are the issues the paper is eventually intended to answer.

1.2 Delimitation and Scope

This work discusses the evolution of the preliminary ruling procedure and the adjustments of both legislative and jurisprudential nature. For this purpose before assessing the procedure itself, a chapter is devoted to the introduction of the system of judicial protection of the European Union. Through this chapter it will be presented the procedure under Article 234 EC in relation with the other instruments established in the Treaty. A so called 'complete system of judicial remedies' as described by the Court.

Subsequently, part one of this work will introduce the preliminary ruling procedure and its historical development before moving forward to the analysis of relevant matter concerning its functioning and its development. For the purpose of this study, the issue of validity, albeit touched upon in both the first part and the second part, will be only partly assessed. The aim is to focus on interpretation in order to provide a comprehensive and exhaustive basis for the discussion on regionalization.

Furthermore, it is intention of the author to engage in the discussion about the reasons underlying the alleged need to modify the system, namely the increasing workload of the Court of Justice and the risks for the effectiveness of its rulings. In this view, the discussion will be extended also to changes other than regionalization. In particular, it would be presented the actual modification introduced by the Treaty of Nice and those brought about the rules of procedure of the Court. The aim, it is worth specifying from the beginning, is to provide with a reasonable set of alternative measure to cope with the reduction of the pressure facing the Court of Justice and illustrate benefits and limits of such measures. Is there a need to move from the current procedure established under Article 234?

Finally, the issue of Community competence or, more precisely, that of Community kompetenz-kompetenz will not be discussed here. Unfortunately, being the matter quite extensive and notably interconnected with the issues of proportionality and supremacy of Community law it has been necessary, for practical reasons, leave the matter to a further study.

1.3 Method

The analysis of the preliminary ruling procedure focuses on details of legislative and jurisprudential nature. Accordingly, the method adopted for the purpose of this study is that of legal dogmatic. The arguments presented will be sustained by systematic reference to primary legislation, case-law and, in some case, even national legislation. In particular, in order to keep coherency throughout the discussion, references to Articles contained in the Treaties are reported according to the current numbering in spite of the original numbering contained in older judgments of the Court of Justice.

Nonetheless, some relevant matters will be presented with reference to authors among which, judges, legal experts and Advocates General, in order to complete the legislative matrix and enrich the argumentations.

Indeed, being the second part of this work aimed at discussing and assessing the suitability of diverse proposals for the restructuring of preliminary rulings, the contribution of these authors is more than welcome. In addition, personal remarks and comments will provide the necessary corollary on the subject matter and, perhaps, some interesting thought for further reflections. Lastly, the method adopted in the latter part of this work is partly inductive as the discussion stems from the evidence provided by the statistics on the judicial activity of the ECJ.

2 The System of Judicial Protection of the EU

2.1 Historical development of the judicial system

Since the foundation of the Community in the 1950s the judicial system established has undergone few changes. After decades characterized by the absence of substantial modification, due mostly to the relative youth of the system and its stabilization, the Single European Act, in force since July 1987, introduced the first significant change through the establishment of the Court of First Instance (CFI) provided to assist the European Court of Justice. A new legislative cooperation was also introduced in various policy fields.

The second major modification occurred with the presentation by the Luxemburg presidency of the European Council in 1991 of a draft Treaty adopted, after numerous revisions, in Maastricht¹² in February 1992. The most striking feature of the Treaty introduced a ‘three pillars’ structure for the brand-new *European Union* and essentially restricted the jurisdiction of the European Court of Justice to the first: the Community pillar. Notably, the Union’s international identity was to be asserted through the second pillar of Common Foreign and Security Policy and third pillar which embrace Justice and Home Affairs and thus not subject to the jurisdiction of the ECJ.

Further considerable modifications have been introduced by the Treaty of Amsterdam in 1997. The aims of the 1996 Intergovernmental Conferences were mostly directed to the consolidation of the Community powers in response to the initial expectation and the perplexities arose together with the creation of the pillar system.¹³ In spite of its more cautious approach though, Advocate General Jacobs¹⁴ described the progresses brought in both the extension of the jurisdiction of the ECJ previously excluded from the first pillar and the conferral of certain new substantial forms of jurisdiction on the Court. Noticeably, he admits that the role of the Court has not significantly changed since the foundation on the European Communities.

More recently, amendments related the possibility for the CFI to decide upon certain disputes with a single judge whilst another proposal has been put forward by the Court as to the transferring of certain matters to the Court of First Instance by means of shifting the concerning direct actions to the latter. The new role of the CFI will be assessed in the next chapter of

¹² Also defined as the Treaty on the European Union (TEU).

¹³ Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, [2003] 3rd Edition, Oxford University Press, page 29.

¹⁴ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing. As reported by AG Francis Jacobs in the chapter “Introducing the Courts’ Paper”, page 9.

this work. Nonetheless, at this very early stage, it should be borne in mind that the *ratio* of many proposals refers to the lightening of the ECJ workload deemed to be, in the long term, detrimental to the quality of the judgement of the Court and eventually endangering the foundation of the judicial system itself.

2.2 The establishment of a system of judicial protection

2.2.1 Scope

The Treaty establishing the European Community has created, as the Court has repeatedly pointed out, “its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which *their courts are bound to apply*”.¹⁵ The system possesses its own institutions, legal capacity, and even capacity of representation on the international level. Moreover, by way of limiting their sovereign rights, the Member States led off the establishment of “a body of law which binds both their nationals and themselves”.¹⁶

At first sight, thus, Community law is to be distinguished from any other international agreement. The institutions of the European Community have legislative powers, the exercise of which produces provisions of law that spill over each national legal system of the Community.

Insofar as right and duties are conferred upon nationals and Member States, it is logical to provide those subjects with the necessary instruments to either enforce those rights or challenge alleged unjust acts and measures. Accordingly, the creator of the Treaty has provided for a set of measures to the attainment of judicial protection in the Community. Within this framework it should not be underestimated the role of national courts. And indeed how could Community law penetrate into the national legal systems without the contribution provided in the national judicial chambers? In this respect, it may be useful mentioning that, likewise the other national authorities, also the courts are, by wording of the Treaty both bound and empowered to:

“(...) take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”¹⁷

¹⁵ The establishment of the principle of Supremacy of Community law through the jurisprudence of the Court of Justice. See, as instance, Case 6/62, *Costa v. ENEL* [1964] ECR 585.

¹⁶ *Ibid.*

¹⁷ Article 10 EC Treaty.

Article 10 EC (also Article I-5 CT¹⁸) is, in other words, the legal basis for the principle that national courts must give effective remedies for breach of Community law. As Temple Lang argues, ‘the principle of effective protection could hardly be deducted or derived from the principle of primacy of Community law, and it is difficult to see any legal basis for it other than Article 10’.¹⁹ Among the duties of the national courts that Temple Lang derives from the principle of loyalty pursuant to Article 10 EC, is the duty of setting aside conflicting national law, that of giving complete remedies to individual and interpret Union law in the light of the wording and objectives of the Treaty.²⁰ Moreover, national courts are under a duty of raise issues of Community law ex-officio and importantly, refer a question under Article 234 EC, in case of conflicting judgment, to ensure uniform application of Community law and use the doctrine of *acte clair* in good faith.

Such duties have to be taken under proper consideration when assessing the role of national courts. Not only there are essentially six categories of legal dispute which the ECJ has jurisdiction upon: infringement actions, preliminary rulings, annulment proceedings, action for failure to act, action in damages and rulings on international agreements.²¹

Three main procedures come in evidence as to the purpose of this work, before shifting the focus on the sole preliminary ruling procedure: Article 226 and 230 EC as in relation with Article 234 of the EC Treaty. The provision under Article 226 EC provides the principal mechanism to pursue infringements of EC law by Member States by means of a direct action before the Court of Justice. It is clear that Member States should ensure not only the implementation of Community law in due time, but they shall also comply with the decision made by the Commission and the judgments of the ECJ. In addition, a failure to act can involve also national courts whenever those courts fail to fulfil their obligations.

Notably, should the Member States not complying with such measures, the efficacy of Community law would be put in jeopardy and the right that those provisions confer unenforceable before national courts. Within this context is thus necessary to briefly describe the infringement procedure established in Article 226 EC and its relation to Article 234 EC.

According to Article 226, the Commission, where considers that a Member State has failed to fulfil an obligation²², initiate proceeding either in response to a complaint from someone in a Member State, or on its own initiative. As the Commission has repeatedly stated, complaints from citizens constitute a significant source for the detection of infringements.²³

¹⁸ Article I-5 of the The Treaty establishing a Constitution for Europe, Official Journal C 310 , 16 December 2004.

¹⁹ Temple Lang, J., “The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections”, *ELRev.* 2001, page 87.

²⁰ *Ibid.* pages 88-89.

²¹ Peterson, J., & Shackleton, M., *The Institutions of the European Union* [2002] Oxford University Press, page 123.

²² Article 226 EC paragraph 1.

²³ Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, [2003] 3rd Edition, Oxford University Press, page 398.

The purpose of Article 226 EC is threefold. Primarily, it seeks for the compliance of the Member States – including their national courts - with the obligations arising from the Treaty. Secondly, it provides with a non-contentious procedure for the resolution of disputes between the Commission and the Member States. Finally, more relevantly in the context of this work, where the cases reach the ECJ they serve not only to bring breaches to an end, but also to give an important clarification of the law in question to the benefit of all the Member States.²⁴ The relation between Article 226 EC and the preliminary ruling procedure comes at stake both when a court of last resort has failed to seek a preliminary ruling despite being under an obligation to do so²⁵ and when the lawfulness of a national provision could have been subject to an infringement procedure under Article 226 and is instead raised by a national court under Article 234 EC in a proceeding pending before it. In case *van Gend en Loos*²⁶, the Court reasoned:

“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [226] and [227] to the diligence of the Commission and of the Member States.”²⁷

It has been discussed whether the Court has discretion to refuse to answer to a question referred for preliminary ruling when the Commission has already commenced a proceeding under Article 226 EC in respect of the same national law that is disputed before the referring national court.²⁸ The argumentation that preliminary ruling could be limited in such way never convinced the Court. Lord Mackenzie Stuart, ex-president of the Court, said that ‘in many cases Article [234] is not a substitute for Article [226]’.²⁹

Indeed the European Court of Justice will not refuse a preliminary reference even if it has already issued a judgment *ratione materiae* in a proceeding under Article 226 EC.³⁰ On these grounds, by the fact that proceeding under Article 226 EC are foreseeable, have been initiated or even decided, it constitutes no bar to the resort to a preliminary ruling. Moreover, the Court will, where appropriate, join a direct action to a preliminary reference for the purpose of the oral hearing or the opinion of the Advocate General.³¹

On the other hand, the Commission has never used its powers under Article 226 EC to start an infringement procedure against a Member State

²⁴ Steiner, J. & Woods, L., *Textbook on EC Law* [2003], 8th edition, Oxford University Press, pages 578-579.

²⁵ In this respect, see the discussion in § 3.5 and 3.6 below.

²⁶ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

²⁷ *Ibid.*

²⁸ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 125.

²⁹ *Ibid.*

³⁰ Case 13/78, *Joh. Eggers Sohn & Co. v Freie Hansestadt Bremen* [1978] ECR 1935.

³¹ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 126.

on the ground that one of its courts of last instance has failed to seek a preliminary ruling despite being under an obligation to do so.

Article 230 EC contains the provision for the annulment of enactments of the Community institutions by means of direct action begun in the European Court. The conditions for such procedure are extremely strict. Article 230 EC may be invoked only by privileged applicants, namely the Member States and other Community institutions or by natural or legal persons to whom the act is addressed or is of direct or individual concern.³²

In general individuals can rely on two autonomous procedures to challenge the validity of a Community act:

1. a direct action under Article 230 EC to bring the matter before the ECJ,
2. an indirect action under Article 234 EC raising the question in a national proceeding.

In this regard, the tendency of Court has generally been that of shifting the individual challenges to Community provisions to the use of the preliminary ruling procedure rather than that of the use of direct action.

The milestone judgment on the relationship between Article 230 and Article 234 of the EC Treaty is that of *TWD Textilwerke*.³³ The applicant in the national proceeding had been ordered to pay back a state aid by means of a decision which, though only addressed to the Federal Republic of Germany had been passed on to the applicant by the national administration. Thus, the applicant, although a copy of that decision had been sent to it by the Federal Ministry of Economic Affairs and that Ministry had explicitly informed it that it could bring an action under Article 230 EC against that decision before the Court of Justice, failed to do so within the two-month limitation period.³⁴ The essential argument advanced by *TWD* was that the remedies established by Articles 230 and 234 of the Treaty are autonomous, each being subject to its own conditions of admissibility. For this reason, failure to mount a direct challenge against a Commission decision under Article 230 EC does not therefore preclude a party from mounting an indirect challenge in the national courts and, by way of Article 234 EC, in the Court of Justice.

The Court held that since the applicant had been warned of the Council decision and did not bring proceeding under Article 230 EC the latter, in the name of legal certainty, could not rely on Article 234 EC to raise the invalidity of the contested act and the national court was bound by the unappealed decision.

Notably, this decision of the ECJ, is way out of line with its previous jurisprudence, which has been to promote challenges to validity under Article 234 EC rather than Article 230 EC. The resulting effect, due to the anxiety of the potential applicants, is that of bringing sometimes premature actions pursuant to Article 230 EC lest to be denied the opportunity to challenge Community legislation under Article 234 EC.

Advocate General Jacobs pointed out that:

³² Article 230 EC paragraphs 2,3,4.

³³ Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* [1994] ECR I-833.

³⁴ *Ibid.*, para. 11.

“Failure to commence proceedings within that period extinguishes the right of action. That limitation period would be *deprived of all sense* and purpose if a person who undoubtedly has locus standi to challenge a decision under Article [230] could simply ignore the decision and contest its validity in subsequent proceedings brought to enforce the decision.”³⁵

The clear core of the argumentation of the Advocate General can be indeed summarised as *vigilantibus non dormientibus jura subveniunt*.³⁶ The conclusive argumentation of Jacobs, eventually also reached by the Court, is based on the following observation:

“A direct action under Article [230], which involves a full exchange of pleadings, as opposed to a single round of observations, is in general more appropriate for determining issues of fact than reference proceedings under Article [234], in which the Court's task is essentially to rule on questions of law.”³⁷

The sentence in *TWD* is undoubtedly depicting a departure from the previous scenario as to the relation between Article 230 and 234 EC. Notably, the ECJ has acknowledged the important limitation on the ambit of national proceedings on the validity of Community legislation derived from its judgment in *TWD* and therefore has mitigated some of the effects of its recent reasoning in *The Queen. v. Intervention Board for Agriculture*.³⁸ In this case the parties had, just as *TWD*, not sought to bring an action for annulment within the time limits set out in Article 230. Nonetheless, the ECJ accepted the preliminary ruling reference on the ground that it was not clear, as the parties were seeking to challenge a regulation, that they would have had standing to bring action under Article 230 EC.³⁹ It thus seems that the Court is well aware that national courts might have to enter into legal arguments as to whether someone did or did not have standing under Article 230 EC.⁴⁰ Concluding it can be inferred from the above case law that recourse to national proceedings should be barred only where it is obvious that a person would have standing under Article 230 EC.⁴¹

To be critical, I find this reasoning not really convincing. In the consideration that a private person - and not a Member State - could be *de facto* target of a Community measure, the mere obviousness of its standing pursuant to Article 230(4) EC shall not automatically tilt the balance towards a bar on the procedure under Article 234 EC. A further test shall

³⁵ Opinion of AG Jacobs in case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* [1994] ECR I-833, para. 17.

³⁶ The Latin maxim express the concept that “the law assists those who are vigilant, not those who sleep over their rights”.

³⁷ *Ibid.*, para. 20.

³⁸ Case C-241/95, *The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef Co. Ltd and Others* [1996] ECR I-6699.

³⁹ Steiner, J. & Woods, L., *Textbook on EC Law* [2003], 8th edition, Oxford University Press, page 554.

⁴⁰ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 128.

⁴¹ *Ibid.*

ascertain whether the failure to challenge a contested provision under Article 230 of the Treaty is to be imputed to *dolus* as implying *consilium alteri nocendi*.⁴² Adversely, in the absence of actual detriment to the rights and interests of third parties, and in order to preserve effective judicial protection, the door to procedures under Article 234 EC should be left open for the challenging of Community acts.

Despite my opinion, the discussion about the relation between Articles 230 and 234 EC as in the circumstances presented above can be summarised as follows:

Firstly, private parties who cannot rely on Article 230 EC for the challenging of a Community act may be able to do so in an indirect way through Article 234 EC.

Secondly, in case it is clear that a private party has standing under Article 230(4) EC he will not be able to use Article 234 EC, when the time-limit period as of paragraph 5 of Article 230 has expired.

2.2.2 Limits

The adequacy of the system of judicial protection created with the Treaties has been a long term argument. In the latter period, however, the issue has assumed the character of a real dispute. Clear actors are of 'course the Community Courts, but also the national courts – courts of last resort *in primis* – and private individuals. In the previous chapter I described the relation between certain provisions of the Treaty in their relation with the preliminary ruling procedure. *TWD* showed that in certain cases Article 234 cannot be considered an alternative to Article 230 EC to seek the annulment of a contested provision. Apart from the observations made above, it is necessary to consider whether Article 234 EC efficiently completes the system of judicial protection as it is at the moment. The issue will be the same as in the previous chapter: validity of Community law.

On first consideration as to the issue is to be dedicated to the fact that private parties are not free to challenge the validity of Community law by petitioning national courts. Instead, they shall wait for a national implementing measure to be issued in order to attack the validity of a Community provision. In addition, they are bound to convince the national judge to refer the question to the ECJ under article 234 EC, since the national court cannot rule on the validity of Community law. The argument for curtailing national jurisdiction in such way is based on the need for coherence as to the system of remedies, and, most importantly, the uniform application of Community law.⁴³

Recent cases illustrate the difficulties for private parties to persuade a national judge to refer a question pursuant to Article 234 EC to the ECJ not to consider the rather consistent degree of discretion enjoyed by the lawyers as to the raising of the issue in the first place. How efficient is a system of such nature?

⁴² 'The intention to damage third parties'.

⁴³ Ward, A., *Judicial Review and the Rights of Private Parties in EC Law*, [2000] Oxford University Press, page 262.

In addition, further limitation of the preliminary ruling procedure as alternative to direct actions has been pointed out by AG Jacobs in *Extramet*⁴⁴ and lately in *UPA*.⁴⁵

In *Extramet*, Jacobs first noted that ‘Article [230] contains no suggestion that the availability of the action for annulment depends on the absence of an alternative means of redress in the national courts of the Member States’.⁴⁶ After pointing out the substantial delays and extra costs of procedures in the national courts which carry the additional stage of a reference under Article 234 EC, Jacobs expressed his opinion on the nature of Article 230 as set against the preliminary ruling procedure:

“Article [234] might not provide an effective remedy in [technically difficult] cases because of the nature of the procedure. Where complex issues of law and fact are raised, only a full exchange of pleadings, in a direct action, is likely to be adequate, if those issues are to be properly considered. Moreover, it is only in a direct action before the Court that all the parties concerned by the imposition of the duty, including the Community industry, will be able to participate.”⁴⁷

In spite of the all the principles⁴⁸ developed by the ECJ which can be relied on as ground for the challenging of EC measures, it appears that those very principles cannot be fully applied by private parties.

Lately, the arguments of some applicants challenging the validity of a provision of Community law have tended to raise the logic according to which in case of lack of an effective remedy at the national level an individual shall be able to circumvent the difficult test of individual concern via Article 230(4) EC. Put it bluntly, ‘a deficient domestic judicial protection entail *locus standi* before the ECJ’.⁴⁹ In fact, as recent case-law has enlightened, the very limit of Treaty mechanism, as to the achievement of effective judicial protection, is encountered in the impossibility of challenging Community acts when enforced at national level albeit lacking national implementing provision. It is the case of those regulations whose validity has been disputed by private parties.⁵⁰

In 1998, a trade association that represents and acts in the interests of the small Spanish agricultural enterprises (Union de Pequeños Agricultores, here in after UPA) brought action against an amendment of the common

⁴⁴ Case C-358/89, *Extramet Industrie SA v Council of the European Communities* [1991] ECR I-2501.

⁴⁵ Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677.

⁴⁶ Opinion of AG Jacobs in case C-358/89, *Extramet* [1991] ECR I-2501, para. 70.

⁴⁷ *Ibid.*, para. 74.

⁴⁸ Among others: proportionality, legal certainty, legitimate expectations, equality, lack of power and infringement of essential procedural requirements and misuse of powers.

⁴⁹ Groussot, X., *The Role of the National Courts in the European Union: A Future Perspective*, 2005 SIEPS, page 61.

⁵⁰ Case C-263/02 P, *Commission v Jégo-Quéré* [2004] ECR I-03425. See in particular paragraph 12: “Jégo-Quéré had claimed that, in the circumstances, it had no right of action before the national courts, as Regulation No 1162/2001 does not provide for the adoption of any implementing measures by the Member States, and accordingly that, were its action before the Court of First Instance to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions (...)”.

organization of the market in oils and fats contained in a Community regulation. Notably, the action of the plaintiff was dismissed by the CFI on the ground of lack of individual concern.⁵¹

In the appealed proceeding before the ECJ⁵², the appellant hold that its action for annulment of the decision of the CFI had to be admitted since, in the view of an alleged lack of domestic legal remedy, it was a fundamental right to effective judicial protection.⁵³ The ECJ repeated the sentence of the CFI basing its dismissal of the appeal on the argument that action pursuant to Article 230(4) EC was only aimed at those individuals that could prove a direct and individual concern. While finding UPA not individually concerned, the Court held that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and that the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right said the Court, ‘has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms’.⁵⁴

The case raised some perplexities as it brought to the surface the issue of lack of judicial protection in a way no other case had before. Strictly connected to the latter case is the Court of First Instance judgment in *Jégo-Quéré*⁵⁵, where the CFI dismissed the Commission’s plea for inadmissibility in the proceeding brought by the plaintiff Jégo-Quéré for judicial review pursuant to Article 230 EC on the validity of the Commission Regulation 1162/2001 establishing measure for the preservation of stock of hake in certain Community fishing areas.⁵⁶

Jégo-Quéré is a fishing company established in France and operating in waters covered by the Regulation. It challenged the validity of the contested Regulation alleging breaches of the Community law principle of proportionality, equality, and the obligation to give reasons. In particular it contended that, by virtue of special features or special circumstances, it was *de facto* different from all other potential applicants and indeed the quasi-addressee of the provision.⁵⁷ The commission was of an opposite view and contested that Jégo-Quéré was not individually concerned in the sense of Article 230(4) EC. It then held that the plaintiff was not denied effective protection on the circumstance that it could still rely on the procedure pursuant to Article 235 and 288(2) EC for the non-contractual liability of the Institutions. Interestingly, the Commission did not take into consideration the alternative provided by an indirect challenge under Article 234 EC as a satisfactory option for seeking to challenge the validity of Community legislation.

⁵¹ Case T-173/98, *Union de Pequeños Agricultores v. Council* [1999] ECR II-3357.

⁵² Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677.

⁵³ *Ibid.*, para. 32.

⁵⁴ *Ibid.*, para. 39. As to the reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms see Case 222/84, *Johnston* [1986] ECR 1651, paragraph 18

⁵⁵ Case T-177/01, *Jégo-Quéré v. Commission of the European Communities* [2002] ECR II-2365.

⁵⁶ Here in after the ‘Regulation’.

⁵⁷ *Supra*, *Jégo-Quéré*, T-177/01, para. 20.

The most important, and also effective, argument provided by Jégo-Quéré was that a finding of inadmissibility would have left it without a remedy, due to the nature of the contested Regulation. There was no act at national level to attack in order to challenge the Community act indirectly through a preliminary ruling procedure. The CFI noted that on the basis of the ‘Plaumann formula’⁵⁸ of individual concern, the applicant was not individually concerned, since the provision was concerned to it only in its objective capacity as a whiting fishing operator.⁵⁹

The striking point of the decision of the CFI stems from the analysis of the possible denial of effective legal remedy in case the action brought by Jégo-Quéré were to be declared inadmissible. The CFI thus proceeded in the consideration on whether the two indirect routes to bring a case before the Community Courts – Article 234 or Articles 235 and 288(2) EC – were sufficient to justify the restrictive interpretation of Article 230(4) EC.

The result was, as also opined by AG Jacobs in *UPA*, that an action for damages was not an appropriate alternative, since the damage must already have been caused and the action is limited to censuring sufficiently serious infringements. Furthermore, a proceeding under Article 234 EC had to be excluded since a regulation was at issue and there were no acts of implementation at national level to challenge. On this consideration, the Court of First Instance elaborated a sweeping departure from the traditional Plaumann test. It thus reinterpreted the notion of individual concern as follows:

“a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.”⁶⁰

In the wake of the considerations that AG Jacobs had provided in *UPA* one month before, the reasoning of the CFI in *Jégo-Quéré* had conceivably great impact on the Court of Justice which noted that the CFI approach removed all meanings to the requirement of individual concern. The Court unsurprisingly overturned the judgment of the CFI. Its reasoning was of course consistent with its recent judgment in *UPA*.

As a basis the ECJ repeatedly stressed that Article 230, 241 and 234 EC provide for a complete system of judicial remedies.⁶¹ In addition, the ECJ stressed that it is for the national court, under Article 10 EC to interpret the domestic procedural rules ‘in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national

⁵⁸ The test of individual concern is also called Plaumann Test. See case 25/62, *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95.

⁵⁹ *Supra*, *Jégo-Quéré*, T-177/01, para. 30.

⁶⁰ *Ibid.*, para. 51.

⁶¹ Case C-263/02 P, *Commission of the European Communities v. Jégo-Quéré* [2004] ECR I-03425, para. 30.

measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act'.⁶²

In response to the reinterpretation of the test of individual concern made by the CFI, the Court held:

“(…) it should be pointed out that the fact that [the] Regulation (…) applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law that cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by [the] Regulation (…) may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly”.⁶³

Thus in contrast with the CFI, the ECJ states that the test of individual concern does not need reinterpretation and that the applicant in the case had two other alternative to consider in order to use Article 234 EC even in cases where the Community act impugned needs no implementation. This suggestion is openly exposed to criticism. Indeed, how could an applicant incite a domestic measure where such procedure is not required? Many regulations, in fact, do not provide for the input of national authorities. Yet the Court cannot require from the Member States (not yet?) to take a measure where the Member States are not permitted to do so. All in all, the test of individual concern has proved its constraints to challenges brought by individuals and shown the propensity of the Court⁶⁴ to keep the standing of individual limited lest the numbers of private challenges could choke up the machinery judicial system of the Community.

Those upholding this strict view argue that ‘the introduction of an individual action for annulment of measures of general application would even increase the already overwhelming workload of the Court’.⁶⁵ In *Jégo-Queré*, the ECJ clearly assumes the completeness of the system of legal remedies sufficient to satisfy the right to effective judicial protection. It is duty for the national courts to adapt their procedures to comply with this system. The position of the CFI was instead that, if the principle of effective judicial protection is no longer ensured by the set of remedies established in the Treaty as interpreted by the Court, the condition applicable to the test of admissibility under Article 230(4) EC, namely the Plaumann test, should be modified to ensure compliance with the concept of the completeness of the existent system of remedies. This view is basically shared by AG Jacobs’ opinion in both *UPA* and *Jégo-Queré*. I cannot but subscribe Jacobs’ reasoning. With regard to the granting of effective judicial protection and

⁶² Ibid., para. 32.

⁶³ Ibid., para. 35.

⁶⁴ As the Judgments in *UPA* and *Jégo-Queré* have shown.

⁶⁵ Schwarze, J., *The Legal Protection of the Individuals against Regulations in European Union law* [2004] European Public Law, Vol.10, n.2, Kluwer Law International, page 289.

especially as to the *locus standi* of individuals, a mere shifting of responsibility from the Community to the national tier of judicature is not sufficient. It is essential to keep in mind that national courts are not entitled to declare measures of Community law invalid and that, accordingly, a reference to the Court of Justice under Article 234 EC is, at the end of the day, no remedy⁶⁶ for the individual applicants. At the present stage of evolution of the Union, the *raison d'etre* for the limitation of individual judicial protection originating from the founding years of the Community no longer exists. As Jacobs says in *UPA*, a sufficiently robust legal framework has evolved which is unlikely to be shaken by the nullification of a single legislative act.⁶⁷

Jacobs specifies other objections to the use of Article 234 EC to challenge the validity of Community acts. Those are essentially:

- I. national courts are not able to declare Community law invalid;
- II. the principle of effective judicial protection demands that applicants have a right of access to a court which is competent to grant adequate remedies. Nonetheless it shall be borne in mind that, with (perhaps) the exceptions represented by the courts of last instance, national courts dispose of discretion to refer;
- III. there is no guarantee that the national court will formulate the right question to the ECJ. It is for the national judge to refer;
- IV. where there is no national measure to attack before the domestic court, it would be simply unacceptable that an individual would have to violate the provision he seeks to challenge and bear the risks of possible criminal consequences in case he is unsuccessful;
- V. Article 234 EC increases costs and delays.

Notwithstanding the grinding halt performed by the Court in *UPA* and *Jégo Queré*, the latest jurisprudence of the CFI and recent development have occurred in the draft Constitutional Treaty prepare the ground for significant changes in the field of the judicial remedies.

As to the CFI, in the latest case *Regione Siciliana*⁶⁸, interestingly the Commission does not deny that the applicant, Regione Siciliana, is individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC. It considers, instead, that the applicant is not directly concerned by the contested decision. The contested decision terminating the assistance received by the applicant was addressed to the Member State concerned, namely, the Italian Republic.

According to the applicant, on the other hand, the decision, which it acknowledges is not formally addressed to it, is nevertheless of direct concern to it in that the decision directly affects its legal situation. As a matter of fact, the addressee of the contested decision, namely, the Italian Republic, enjoys no discretion in its implementation.⁶⁹

⁶⁶ Schwarze, J., *The Legal Protection of the Individuals against Regulations in European Union law* [2004] European Public Law, Vol.10, n.2, Kluwer Law International, page 292.

⁶⁷ Opinion of AG Jacobs in Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 77.

⁶⁸ Case T-60/03, *Regione Siciliana v. Commission* [2005] NYR.

⁶⁹ *Ibid.*, para. 39.

The CFI acknowledged that such a decision, revoking the assistance in its entirety, must necessarily have directly affected the applicant's legal situation in several ways.⁷⁰ With regard first of all to the alteration of the applicant's legal situation, the contested decision has had the initial direct and immediate effect of changing the applicant's financial situation. The contested decision also directly alters the applicant's legal situation with regard to the duty to repay the sums paid by way of advances. On these circumstances:

“Inasmuch as it alters the applicant's legal situation directly, indeed co, as is apparent (...), the contested decision thus satisfies the conditions for the first criterion of direct concern (...).”⁷¹

The conditions referred by the CFI relate on the one hand, the fact that the measure at issue must directly affect the legal situation of the person concerned. On the other hand, that the measure must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.⁷² That is to say, direct applicability. The case *Regione Siciliana* provides yet a little opening as to the issue of standing under Article 230 EC. More improvements are however introduced, as presumable consequence from the jurisprudence in *UPA* and *Jégo Quéré*, by the Constitutional Treaty. Article III-365 CT provides, at paragraph 4, that:

“Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a *regulatory act* which is of direct concern to him or her and does not entail implementing measures.”

The most important change relates the introduction of the formulation “regulatory act of direct concern to a person and not entailing implementing measures”. Derives, from the wording of Article I-33 CT, that the specific mention to regulatory acts refers to binding administrative acts that do not imply any implementing measures. This new expression aim at resolving the problem of challenging self-executing acts and eventually, bring the direct action via 230 EC a closer step to effective judicial protection.

Another change occurred through Article I-29 (resembling Article 220 EC), which explicit the need to develop national procedural systems to overcome the remaining gaps in the Community judicial protection apparatus:

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”

Finally, Article I-9 CT introduces that:

⁷⁰ Ibid., para. 47.

⁷¹ Ibid., para. 55.

⁷² Ibid., para. 46.

“The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II”

The sentence refers to the preamble of the Charter of Fundamental Rights, thus including it in the Treaty and empowering the Union Courts to interpret it. Notably, Article 47(1) of the Charter of Fundamental Rights of the EU⁷³, states:

“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.”

Concluding, it appears from the discussion raised above, that private applicants will be able to contest a regulatory act lacking national implementing measure before the CFI as long as they can demonstrate a direct concern. Conversely, in the case of Community act implemented at the national level through a domestic measure, the Plaumann formula will still apply in the same strict manner as the Court of Justice intend it to be. In the latter event, Article 234 EC will still represent a valuable alternative.

⁷³ Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

3 PART 1: Preliminary Ruling Procedure

3.1 General introduction: function of preliminary ruling and division of competences

During the 1950's the hectic schedule of the negotiations for the establishment of the European Coal and Steel Community⁷⁴ (ECSC) was driving Western Europe out of the disastrous political situation consequent to the conflicts of the second world war. The founding Member States had the hard task of drafting a series of accords whose stability would have influenced the future commercial and political relations of the members within the Community.

The Treaty of Rome in 1957 took a step further. Legal experts from the Member States cooperated to the establishment of a supra-national system whose powers distinguished it from any previous international agreement. The shaping of a system of such grandness has understandably derived inspiration from many centuries of European nations' legal tradition. In this respect, the preliminary reference structure constitutes no exception; it is the fortunate fruit of the same inspiration.

The range of this particular instrument, extended *ab initio* to questions of interpretation, has shown its actual potential throughout the life of the Treaties. In 1984, Lord Mackenzie-Stuart, president of the European Court of Justice, attributed the introduction of the jurisdiction of the Court on interpretation to Nicola Catalano, the Italian Government's legal expert during the negotiation of the Treaty of Rome:

“Fortified by the experience of the Constitutional Court of Italy, Mr Catalano made the suggestion that (...) references should be extended to questions of interpretation. Was he able to foresee at the time the exceptional judicial evolution which would be made possible on that basis? At all events we can only recognize that, without that procedure, the greatest judgments of our Court would never have seen the light of day”⁷⁵

It is worthwhile observing that the Court has openly recognised the importance of the Member States legal traditions as sources inspiring the Community legal order. In *Internationale Handelsgesellschaft*, the Court ascertained:

⁷⁴ The Treaty establishing the European Coal and Steel Community was signed in Paris on 18 April 1951 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands. It was concluded for a period of fifty years and, having entered into force on 23 July 1952, has expired on 23 July 2002.

⁷⁵ Address in commemoration of Nicola Catalano, Court's Formal sitting of October 18, 1984.

“The general principles of law protected by the Court of Justice (...), inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. (...)”⁷⁶

Thus, overall, the comparative method adopted for the development of the general principles of Community law, which is influenced by what is ‘common’ to the laws of the Member States, also inspires the adoption of the specific procedures necessary to the functioning of the Community’s legal system.⁷⁷

As it has been already introduced, the procedure of preliminary reference is commonly understood and inspired by the procedures laid down by the Italian but also by the German Constitutions. More specifically, Article 134 of the Italian Constitution provides as follows:

“The Constitutional Court shall pass judgement on:

controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions;

conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;

accusations made against the President of the Republic and the Ministers, according to the provisions of the Constitution.”⁷⁸

The first paragraph of Article 134 Cost. introduces a procedural instrument whereby an Italian national court in case of serious doubts as to the validity

of a state law (any enactment having the force of law issued by the State and the Regions) must suspend the procedure and refer to the Corte Costituzionale for a ruling on the question. In its formulation the question of constitutional legitimacy and likewise the question for preliminary ruling under Community law, disclose the exercise of a certain discretion by the judge as to the making of the reference to the Corte Costituzionale.

Such disposition is embodied in Article 1 of the Constitutional law regulating the norms concerning the ruling on constitutional legitimacy and on the independence of the Constitutional Court⁷⁹:

“The question of constitutional legitimacy of a law or act having the force of law of the Republic learned ex-officio or raised by either party during the

⁷⁶ Case 11/70, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁷⁷ As already mentioned: “By contrast with ordinary international treaties, the EEC Treaty has created *its own legal system* which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.” Case 6/62, *Costa v. ENEL* [1964] ECR 585.

⁷⁸ Costituzione della Repubblica Italiana of 27 dicembre 1947, Title VI, Section I “The Constitutional Court”, Article 134 Cost.

⁷⁹ Article 1 Legge costituzionale 9 febbraio 1948, n. 1 “*Norme sui giudizi di legittimità costituzionale e sulle garanzie di indipendenza della Corte costituzionale*” (*Gazzetta Ufficiale* n. 43 del 20 febbraio 1948).

proceeding, where considered not manifestly unfounded by the judge, is submitted to the Court for the decision.”

The analogy with the provision of EC law is evident but these similarities of national preliminary procedures with Article 234 EC have not facilitated the cooperation between national courts and Community courts. Indeed, sometimes they have hindered rather than facilitated the application of the preliminary ruling principle by national courts.⁸⁰

The reason stems partially from the scenario which, in spite of the clear national traditional inspiration, distinguish the Community procedure from the national paradigm. On the other hand, the question of constitutional legitimacy is addressed to a court which has a different role in the national sphere than the one of the ECJ in the Community legal system. The first is the guardian of the constitutionality of national law and as well as umpire of conflicts of institutional nature. The second has assumed a wider set of prerogatives due to the relative youth of the Community system which demands deeper commitment in both the interpretation of Community provisions and the creation of principles and guarantees that although not directly formulated by the Treaties are necessary to the maturation of EC law.

Interestingly, the three drafts of Article 234 EC, presented in December 1956, contained the word “interpretation” whilst subsequent outlines removed it before it was finally reinserted. All in all the inclusion of the interpretation among the tasks of the Court assumes central importance to the development of Community law. In connection with the above argument is the removal of the ‘exclusive’ right of the ECJ to decide questions of Community law. Again, the drafts of December 1956 contained the term:

“La Cour de Justice est seule compétente pour statuer, à titre préjudiciel, sur l’interprétation du présent Traité ainsi que sur la validité et l’interprétation des décisions (et recommandations) prises par les institutions de la Communauté (...).⁸¹

The wording of those drafts, as influenced by the German and the Italian paradigm, would have imposed upon the national courts an obligation to refer all question of Community law raised before them to the ECJ.

Apart from Constitutional aspects, the Italian Corte di Cassazione is the court devoted to control the rigorous observance and uniform interpretation of the law by the ordinary national tribunals and courts put before its jurisdiction. Its role, despite the non-binding nature of the *stare decisis* in the Italian legal system, is fundamental to the respect of the principle of legal certainty. Furthermore, it decides exclusively on the point of law, element that is in common with the Court of Justice of the European

⁸⁰ Bebr, G., *Development of Judicial Control of the European Communities* (1981) Martinus Nijhoff Publishers, page 498.

⁸¹ The Court of Justice shall have sole jurisdiction to give preliminary ruling on the interpretation of this Treaty and on the validity and interpretation of the decisions (and recommendations) taken by the institutions of the Community (...) unofficial translation from: Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 8, note 47.

Communities. Putting it concisely, it could hence be inferred that the ECJ has functions common to those of the Constitutional courts of the Member States but also elements comparable to those of the tribunals of last resort. Such considerations are conceivably suggestive but shall not induce to misleading assertions. The ECJ is neither a supra-national tribunal that summarise the functions of the member states highest courts, nor an appellate court.⁸²

The preliminary ruling reference pursuant to Article 234EC is the procedure adopted by courts and tribunals throughout the territory of the European Union to seek guidance on legal matters which fall under the competence of the European Court of Justice pursuant to the Treaty. The procedure is particularly designed to grant the ECJ with the power to put forward the development of the European Legal machinery and to assist its uniform enforcement and interpretation in each Member State.

The introduction delivered by Advocate General Lagrange in 1961 in *Bosch v. de Geus*⁸³, first case referred to the ECJ for preliminary ruling, testimonies of the expectation of the judicial panel as to the contribute of the preliminary reference to the development of the Community:

“This case (...) involves the working of a provision for the submission of preliminary questions which is apparently designed to lay a central part in the application of the Treaty. The progressive integration of the Treaty into the legal, social and economic life of the Member States must involve more and more frequently the application and, when the occasion arises, the interpretation (...) not only the provisions of the Treaty itself but also those of the Regulations adopted for its implementation will give rise to questions of interpretation and indeed of legality. Applied judiciously – one is tempted to say *loyally* – the provision of Article [234] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions. It is in this spirit that each side must solve the sometimes delicate problems which may arise in all systems of preliminary procedure, and which are necessary made more difficult in this case by the differences in the legal systems of the Member States as regards this type of procedure”.⁸⁴

As to the collaboration between the national and the Community tier of judicature, it is important to depict the absence of a hierarchical system. The founding Treaties do not explicitly refer to the supremacy of the Community level over the domestic orders.⁸⁵ Consistent to the character of the European

⁸² Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 4.

⁸³ Opinion of AG Lagrange in Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 45.

⁸⁴ Ibid. See also Weatherill, S., *Cases and Material on EU Law*, [2003] sixth edition, Oxford University Press.

⁸⁵ Groussot, X., *The Role of the National Courts in the European Union: A Future Perspective*, 2005 SIEPS, page 15.

legal order the Court do not impose⁸⁶ itself as a supreme appellate court but rather calls the national courts to an *alliance* entailing the responsibility of ensuring that “community law is applied and respected in the national legal systems”.⁸⁷ The nature of such cooperation has been thoroughly developed by the Court in its judgements:

“(…) as the court has consistently held, article [234] of the EEC Treaty establishes a framework for *close cooperation* between the national courts and the court of justice based on the assignment to each of different functions . Within that framework it is for the national court, which is alone in having a direct knowledge of the facts of the case, and which will have to give judgment in the case, to assess the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment. Similarly, it is for the national court to decide at what stage of the procedure it is necessary for it to refer a question to the court of justice for a preliminary ruling”.⁸⁸

Notably such will to involve the courts of the Member States into cooperation for the resolution of Community law issues also stems from the very founding treaties of the Communities.⁸⁹

The resulting “procedural link” has created ground for many national judges to use the reference system “rather as an architect is willing to seek advice of a consulting engineer or a quantity surveyor as a source of specialized expertise, needed by the architect to enable him to perform his task”.⁹⁰

The extent of the commitment of Community courts in the creation of an operational link with national courts is highlighted in the effort manifested, on the one hand, by the development of doctrines such that of “direct effect” countervailing the judicial *impasse* over provisions of Community law sufficiently operational⁹¹ and, on the other hand, by encouraging national judges to make use even of those provision lacking of direct effect. The latter approach is reported in 1989 by the Court’s reasoning in *Marleasing*⁹². In particular:

“(…) It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the

⁸⁶ The ECJ has not appellate status. Accordingly it may not rule on the validity of national law. In this respect see the judgment of the Court in Case 26/62, *van Gend en Loos* [1963] ECR 1.

⁸⁷ Case C-2/88 *Zwartveld* [1990] ECR I-3365, para 18.

⁸⁸ Case C-338/85 *Fratelli Pardini s.p.a. v. Minisero per il Commercio con l’Estero* [1988] ECR 2041, para 8.

⁸⁹ In particular Article 41 of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and Article 150 of the European Atomic Energy Community (Euratom Treaty).

⁹⁰ Sir Thomas Bingham, M.R., *Article 234 References to the European Court: Policy and Practice*, (Andenas ed., 1994), Page 45.

⁹¹ Case C-128/92, *H.J Banks CO. Ltd v. British Coal Corporation* [1994] ECR I-1209, per van Gerven A.G., page 1237, para. 27.

⁹² Case C-106/89, *Marleasing S.A. v. Commercial Internacional de Alimentacion S.A.* [1990] ECR I-4135.

wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty”.⁹³

Moreover, the functioning of the operational link is safeguarded by the Court’s efforts in accepting references erroneously expressed as to their form as long as they still meet the requirements *ad substantiam*. This approach has been elaborated in *Schwarze*, where the Court stated:

“Although the Court may have no jurisdiction under Article [234] to declare such a measure void, as the French government maintains, this provision does expressly confer jurisdiction on the court to decide on the validity of such a measure. If it appears that the real purpose of the questions submitted by a national court is concerned rather with the validity of community measures than with their interpretation, it is appropriate for the court to inform the national court at once of its view without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure under Article [234] and would be contrary to its very nature”.⁹⁴

To conclude this introduction on the Community’s preliminary reference it is to be noted that the procedure elaborated under article 234EC is not the sole measure of this kind provided by the European legislator. Similar procedures are rendered by Title IV of the EC Treaty in Article 68 EC and by Article 35 of the Treaty of European Union (TEU).

In addition, before the entering into force of the Nice Treaty in 2001, the ECJ alone was empowered to give preliminary rulings. Article 225(3)EC now accords the Court of First Instance jurisdiction for preliminary ruling in specific fields embodied in the Statute of the Court of Justice. Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.⁹⁵

The power of the ECJ of reviewing a decision given by the Court of First Instance on questions referred for a preliminary ruling represents an exception and it is subject to the conditions and the limits laid down by the Statute. The *rationale* lying behind the final part of Article 225(3) EC serves the cause of preventing serious risk of the unity or consistency of Community law and underline the prevalence of the ECJ in the structure of the European judicial system.

Apart from the Treaties, a *sui generis* preliminary reference is contained in various conventions among which the Rome Convention and the Brussels Convention deserve to be mentioned in the next chapters.

⁹³ *Ibid.*, para 8.

⁹⁴ Case 16/65, *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877, page 886.

⁹⁵ Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, [2003] 3rd Edition, Oxford University press, page 432.

3.2 Evolution of Article 234EC Treaty

3.2.1 Treaty reforms

Article 234 of the EC Treaty is by far the most widely used of the preliminary reference procedure. It reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

1. the interpretation of this Treaty;
2. the validity and interpretation of acts of the institutions of the Community and of the ECB;
3. the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The jurisdiction of the Court of Justice is evidently twofold. Article 234 EC expressly confers the ECJ jurisdiction to give preliminary ruling on:

- a. Interpretation, and
- b. Validity

Interestingly the word “interpretation” has been called into question as to the drafting of Article 234 EC (ex Article 177 EC). The three drafts presented in December 1956 had the term included, then subsequent outlines removed it before it was finally reinserted.

The Court has no jurisdiction on the application of Community law by national courts. Indeed, since its very early judgments, the Court has maintained a strict dividing line between interpretation and application⁹⁶ as well as an equally strict policy of non-interference over matters of what, when and how to refer. All in all, the inclusion of the interpretation among the tasks of the Court has been of central importance to the development of Community law. In the words of a German author:

‘Interpretation does not only consist of discovering the original meaning of a legal text, but of giving it, always with the proviso of respecting the words, the

⁹⁶ Steiner, J. & Woods, L., *Textbook on EC Law* [2003], 8th edition, Oxford University Press, page 548.

specific signification which its practical application postulates not only in “rethinking” , but in completing the thinking behind an idea’⁹⁷

In connection with the above argument is the removal of the exclusive right of the ECJ to decide questions of Community law. Again, the drafts of December 1956 contained the term:

“La Cour de Justice est seule compétente pour statuer, à titre prejudicial, sur l’interprétation du présent Traité ainsi que sur la validité et l’interprétation des décisions (et recommandations) prises par les institutions de la Communauté (...).”⁹⁸

The wording of those drafts affected, as discussed in the previous chapter, by the German and the Italian procedure, would have imposed upon the national courts an obligation to refer all question of Community law raised before them to the ECJ.

It thus appears that while the framers of the Treaty considered giving the European Court exclusive jurisdiction as to the decision upon both validity and interpretation of Community secondary acts, they surprisingly decided to leave the question open. Remarkably the decision to leave de facto room for national courts as to the interpretation of Community acts (except for the compulsory reference from the courts of last instance as of Article 234(3) EC) has resulted in an important key to keep national judge dip in the development of European legal system.⁹⁹ Indeed such choice has granted Community law a better penetration and diffusion at national level than it would have otherwise been in a situation of strict exclusivity for the Community courts.

The popularity of the procedure itself has derived benefit from the approach yield through Article 234 EC. National judges face the guidance in the field of Community law without losing jurisdiction or control over their matters, on one hand, and without having their questions to be exposed in an arrogant and didactic manner.¹⁰⁰ This seems to represent a perfect *trait d’union* between national and Community competence. However, the situation is surely not perfect. Too little is known about cases where preliminary question have not been raised where they should have been indeed referred to the Court. Supremacy of Community law still finds elements of resistance by some of the highest national courts. Notably, of those reluctant highest national courts some have never resorted to the preliminary ruling procedure or have even openly refused to do so.¹⁰¹

⁹⁷ De Richemont, J., “Integration of Community Law within the Legal Systems of the Member States: Article 177 of the Treaty of Rome”, [1978] *Journal des Notaires et des Avocats*, page 49.

⁹⁸ The Court of Justice shall have sole jurisdiction to give preliminary ruling on the interpretation of this Treaty and on the validity and interpretation of the decisions (and recommendations) taken by the institutions of the Community (...) unofficial translation from: Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 8, note 47.

⁹⁹ *Ibid.*, page 9.

¹⁰⁰ *Ibid.*, page 23.

¹⁰¹ Timmermans, C., “The European Union judicial system”, *CML Rev.* Vol.41, No.2, April 2004, page 399.

Far more disputable than the issue of non-exclusivity of interpretation by the Court is the alleged reliance upon the same approach as for the decisions on the “validity” of Community acts. The dangers of a decentralized control over question of validity is understandably of a greater impact to the uniform application of Community law. The anxieties of the Court emerged in 1975 as follows:

“The success and effectiveness of the procedure for preliminary ruling make it desirable that the confidence and cooperation between national and Community courts that already exist should be developed further. (...) *A provision should be included to prohibit national courts from treating a Community act as invalid, unless the European Court, having already considered the matter, has declared the act invalid. This is the position under the ECSC Treaty. (...)*

A legal dichotomy of this sort, whereby the practitioner and to a still certain extent the litigant is torn between two types of law, would be the cause of so much weakness, if not failure, that all argument leads to the future of the European Union being safeguarded by a unified system of law based on a fundamental concern of homogeneity, coherence and effectiveness.”¹⁰²

On these grounds the ECJ decided to depart from the literal wording of Article 234 EC and affirm its exclusive jurisdiction to declare Community acts invalid. In the decision in *Foto-Frost*¹⁰³, the Court firmly stated that national courts may consider the validity of a Community act. Nonetheless, the Court also held that national courts themselves have no jurisdiction to declare that a Community act is invalid (in *Foto-Frost* case, a Commission decision) thereby laying down an exception to such court’s discretion to refer under Article 234(2) EC. Only the Court of Justice, responsible for ensuring that Community law is applied uniformly in all the Member States, has the jurisdiction to declare void or invalid an act of a Community institution. It is clear that, despite the wording of Article 234 EC, the Court of Justice wishes to keep a tighter control on questions of validity. This tighter rein is, indeed, further evidenced by the stricter standard applied by the Court in suspension of Community legislation by way of interim relief – as in *Zuckerfabrik*¹⁰⁴ - as opposed to interim suspension of national legislation.

Exceptionally national courts may handle Community legislation as invalid while immediately referring the question to the Court.

In *Zuckerfabrik*, the Court sets three conditions for the granting of the power to suspend a national measure implementing an EC regulation to national courts¹⁰⁵:

- (i) if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court;

¹⁰² The ECJ’s “Suggestions with a view to the attainment of a European Union” (1975), *Bulletin of the European Communities*, Supplement 9/75, pages 20-21.

¹⁰³ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paras 12, 20.

¹⁰⁴ Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1991] ECR I-415.

¹⁰⁵ *Ibid.*, para 33.

(ii) if there is urgency and a threat of serious and irreparable damage to the applicant;

(iii) and if the national court takes due account of the Community's interests.

In particular, as the Court pointed out, exception to its exclusive power to declare an enactment of Community law invalid is justified *only* in the case of serious doubt, by the national court, as to the validity of the EC act on which the national measure is based, being the coherence of the system of interim legal protection is at stake.¹⁰⁶ Yet, such suspension is put forward merely by mean of interim relief, hence not judgment as to the validity of the Community act is actually issued.

It thus appears that exclusive jurisdiction on the validity of Community acts is said to be necessary in order to guarantee coherence in the system of legal remedies as a whole. As the Court considered in *Foto-Frost*¹⁰⁷ and repeated ten years after in *Woodspring District Council v. Bakers of Nailsea Ltd*¹⁰⁸,

“divergences between courts in the Member States as to the validity of Community acts would be liable to put in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty”¹⁰⁹

Two considerations have to be reported at this point of the analysis on the relation between national courts and the Community tear of judicature. It seems that the cooperation of the national judge is of fundamental importance as to the penetration of Community law at national level. Yet, due to the relative distinctive character of each national judicial system, the cooperation cannot extend to the extent of entrusting national courts to decide on the validity of Community law lest those courts would disharmonise the uniform application of EC law and eventually strike the legitimacy of the Community at its very foundation. Derives from the latter consideration that the assessment of the issue of ‘regionalization’ cannot depart from the necessary uniformity.

Thus far, it can be inferred that the reasons to amend the preliminary reference are inconsistent. All said and done, since its introduction, the article regulating the preliminary ruling procedure has undergone just a single amendment. The adoption of the Treaty of Maastricht (the TEU) in fact introduced the European Central Bank (ECB) among the bodies whose acts may be the subject for a preliminary ruling.¹¹⁰

However the Treaty of Nice, signed in February 2001, provided the basis for an important change in the judicial structure of the European Union

¹⁰⁶ Ibid., para 18.

¹⁰⁷ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

¹⁰⁸ Case C-27/95, *Woodspring District Council v. Bakers of Nailsea Ltd* [1997] ECR I-1847.

¹⁰⁹ *ibid.*, para. 20.

¹¹⁰ Article G(56) of the Maastricht Treaty “Provisions amending the Treaty establishing the European Economic Community with a view to establish the European Community”, of 7th February 1992.

whose course of action is still in progress: the amendment of Article 220 EC so as to give the Court of First Instance jurisdiction to hear and decide on certain questions referred for a preliminary ruling under Article 234 EC.

Amended Article 220 EC provides for the creation of “judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific cases”, which may be subject to the right of appeal. Amended Article 225 EC¹¹¹ will give the CFI the jurisdiction to give preliminary rulings, with certain restrictions, and to hear and determine other actions brought under Articles presently applicable only to the ECJ. This will alleviate the burden on the ECJ as litigation increases and also raise the status of the CFI.

In an editorial in the *Common Market Law Review* Arjen W.H.Meij commented on proposals made on the transfer of powers to the CFI:

Clearly, such a transfer only makes sense if the CFI continues its practice of hearing cases only in chambers of three or five judges, also for preliminary references transferred to it. Otherwise, such a transfer would amount to nothing but shifting the problem from one court to another. Such a transfer can only concern relatively technical matters, for which in fact specialized assistance will be needed, as is currently taking shape within the CFI for Community trademark cases. Two major problems which remain, are, on the one hand, how to select *ex ante* the cases to be transferred to the CFI and, on the other, how to preserve *ex post* the unity and coherence of Community law.

...

The best approach, because most practical in the short term, would probably be to make a modest, relatively experimental start by transferring to the CFI preliminary references in an area already within its jurisdiction, concerning questions submitted by the so-called community trade-mark courts of the Member States, relating to disputes on the infringement and validity of Community trade marks. The second point, the *ex post preservation of unity and coherence of Community law*, raises its own problems, although it seems common ground that appeal from a CFI judgment to the Court under the present general rules must be excluded. ... a transfer of preliminary jurisdiction requires *vis-à-vis* referring national courts, the unequivocal appearance of the Community courts as one, single institution Court of Justice, albeit composed of two different branches.¹¹²

Once more, considerations on the modification of the system of preliminary reference have positive approach only when preservation of the unity of Community law is granted.

¹¹¹ The new Article 225(3) EC reads as follows:

The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decision given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

¹¹² Guest Editorial, “Architects or Judges? Some comments in relation to the current debate”, *CML Rev.* Vol.37, No.5, October 2000, page 1043.

Furthermore, such transfer of competence shall serve as mean to reduce the workload at Community level. Conceivably, there would be no benefit for the streamlining of the EC judicial machinery if the measure resulted in a mere translation from one court to another. For this reason, the partial transfer of competence on preliminary reference to the CFI is said to be effective only if the composition of the Court of First Instance is reduced to chambers of three or five judges.

Interestingly, as judge Pernilla Lindh reports in the Courts' Paper, the judges of the CFI are quite hesitant about the idea of transferring preliminary rulings to their court.¹¹³ The reasons supporting this wavering approach reside mainly in the assumption that the matters to be transferred to the CFI will be those in which all kinds of issues of principle have arisen in the past. The risk is hence that of increasing the workload for the CFI while leaving the burden on the ECJ substantially unaltered since the nature of those issues of principle will most likely be brought before the Court.

Final consideration as to the new draft of Article 225 EC is due to the Statute that, apart from providing with the specific areas in which the CFI will have jurisdiction, may also provide for the Court of First Instance to be assisted by Advocates General. Thus, in the case of a judgement of the CFI encompassing serious risks for the unity or consistency of Community law, will be initially for the First Advocate General to propose a review to the ECJ where this may be considered necessary.¹¹⁴ Then, within one month, the Court will examine the proposal made by the First Advocate General and decide whether or not review the decision of the CFI. The details of the review procedure have not been shaped yet.

This digression on the evolution of the Community's preliminary procedure cannot be concluded without considering the procedure through the 'so called' Constitutional Treaty (CT).¹¹⁵

Article I-29 (3) CT states:

The Court of Justice of the European Union shall in accordance with Part III:

- a. rule on actions brought by a Member State, an institution or a natural or legal person;
- b. give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- c. rule in other cases provided for in the Constitution.

This Article deserves a comment here since, despite its mere reminding to the preliminary ruling procedure embodied in a provision belonging to Part III of the Treaty, it clearly reaffirms unaltered the role of the Court as to its judicial activity while opening for further competences when so provide the Constitution. The Court shall ensure that in the interpretation and application of the Constitution the law is observed.

¹¹³ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing, page 14.

¹¹⁴ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 20.

¹¹⁵ The Treaty establishing a Constitution for Europe, Official Journal C 310 , 16 December 2004.

At the present state of its formulation, however, the Constitutional Treaty does not provide remarkable changes in the extension of the Court's range of action. I personally attribute such result to the political difficulties encountered in the adoption of the Constitution for Europe.

Both national institutions and the public opinion, showed circumspection about the adoption of a Constitution thus constraining this further step of the Union. Whether such prudence is proportionate or not to the consequences deriving from the Constitutional Treaty is not at stake in this work. What is probative in this context is the effect of such approach. The rather mild changes brought by this last Treaty shows the timid approach of the European legislator lest to put in jeopardy the evolution of the Union.¹¹⁶

Article III-369 CT contains the preliminary reference's procedure:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- a. the interpretation of the Constitution;
- b. the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.

For the reason anticipated here above, the wording of Article III-369 CT has not changed from the formulation contained in the previous Treaties. Apart from consideration of political nature it shall be pointed out that once more the preliminary reference pursuant to Article 234 EC has proved its efficacy and thus since its first formulation has remained substantially the same.

¹¹⁶ In June 2005, after the negative result of the referendum proposing the adoption of the Constitutional Treaty, the president of the French Republic, Chirac declared to be "*well aware of the consequences which this situation involves for the partners of France and the European Union itself*". However, the negative vote of the French "by no means calls into question the historical and major engagement of France in the European construction industry. France is a country founder of the Union. It will continue to hold all its place to with it, in the respect of its engagements, and I will take care of it personally ", added the president in his letter addressed to the 24 other heads of State or government of the European Union. (<http://referendum-constitution-europeenne.france2.fr/11109045-fr.php>)

3.2.2 The jurisprudence of the Community Courts

If the analysis of the Treaty development of the Preliminary Ruling procedure has proved to be essentially steady, some more dynamism has been expressed through the ‘dialogue between courts’¹¹⁷ by way of their case law.

One first consideration deserves the establishment of the doctrine of *res judicata* and its close principle of *stare decisis*. In other words, is the preliminary ruling binding for the court that has referred the matter to the ECJ and, if so, to what extent? In general, the Court of Justice does not consider itself to be bound by its previous decisions though very seldom departs from its prior case law. As for the purpose of their value as precedent, the Court does not distinguish between preliminary ruling and judgments in direct action.

On the other hand, when an issue has been previously brought to the Court and a ruling already issued, national courts will adhere to the previous ruling. In *Milch-, Fett- und Eierkontor v. Hauptzollamt Saarbrücken*¹¹⁸, the Court points out that it ‘has already replied to these questions in its preliminary ruling on 4 April 1968 given in case 25/67 on a reference made by the same court in the same main proceedings’. In particular, ‘a judgment given by the court under Article [234] is binding on the national court hearing the case in which the decision is given’.¹¹⁹

In the decision of the Court, a precedent ruling issued on the same matter and on the same proceeding is to be considered binding, namely the referring national judge cannot ignore it. On this last argument, the Court specifies:

An interpretation given by the court of justice binds the national court in question but it is for the latter to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the court.¹²⁰

Indeed the proposition of binding effect of preliminary rulings have rarely been questioned by national courts. The meaning of the word binding has also been questioned by national courts. In particular, in *Benedetti v. Munari*¹²¹, the Court refused to distinguish between the binding effect of a preliminary ruling from that of a decision. It held that “the purpose of a preliminary ruling is to decide a question of law and that that ruling is *binding on* the national court as to the interpretation of the Community provisions and acts in question”.¹²²

¹¹⁷ Timmermans, C., “The European Union judicial system”, CML Rev. Vol.41, No.2, April 2004, page 397.

¹¹⁸ Case 29/68, *Milch-, Fett- und Eierkontor v. Hauptzollamt Saarbrücken* [1968] ECR 207.

¹¹⁹ *Ibid.* para. 2.

¹²⁰ *Ibid.* para. 3.

¹²¹ Case 52/76, *Benedetti v. Munari* [1977] ECR 163.

¹²² *Ibid.* para. 26.

The national judicature is thus bound to decide the matter pending before it in a manner consistent with the ruling it has received from the ECJ. After all, it can be inferred that the willingness to request a ruling encompasses the willingness to follow it.¹²³ Occasional departures from the general positive trend are due mostly to conflicts between the ruling of the Community courts and values of constitutional importance.¹²⁴

Secondly, another factor potentially calling into question the respect of a Court's preliminary ruling is the case where the national court receives a somehow unsatisfactory ruling. Third case happens when national courts consider that the ECJ has exceeded its jurisdiction.¹²⁵

The latter scenario clearly contrasts the possibility of extending the jurisdiction of the Court to give preliminary rulings outside the scope of Community law *strictu sensu*. Notably the wording of Article 234 EC does not restrict the preliminary reference to the scope of Community law. Article 234 EC would then extend also to the cases governed by national law referring to certain Community provision or concept. I might now not touch upon this argument too deeply.

However, it is relevant to present the development of 'the *Dzodzi* line of cases'¹²⁶ as a radical example of extension of interpretative jurisdiction outside the scope of Community law. A series of ten cases, which since *Leur-Bloem* are referred to as 'the *Dzodzi* line of cases', were solved by the Court according to the same principle of jurisdiction.¹²⁷ This principle was first established in *Dzodzi* and then essentially confirmed in the subsequent cases: the Court 'has jurisdiction to give preliminary rulings on questions concerning Community provisions' which have been 'rendered applicable either by domestic law or merely by virtue of terms in a contract'¹²⁸

¹²³ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 327.

¹²⁴ Case 11/70, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. This ruling of the Court became famous when the German Administrative Court sought a ruling on the matter from the Federal Constitutional Court (Bundesverfassungsgericht). In its first striking "solange" decision, the Bundesverfassungsgericht refused to recognise the supremacy of Community law as long as (solange) fundamental right were not protected under Community law in a similar manner as pursuant to the German constitution. The dispute ceased when, years later, the Bundesverfassungsgericht finally took account of the various changes that had occurred in Community law as to the ECJ development of a system of protection of fundamental rights.

¹²⁵ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 327.

¹²⁶ Case 166/84, *Thomasdünge v Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001; Joined Cases C-297/88 and C-197/89, *Dzodzi v Belgian State* [1990] ECR I-3763; Case C-231/89, *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] ECR I-4003; Case C-384/89, *Tomatis and Fulchiron* [1991] ECR I-127; Case C-73/89, *Fournier v Van Werven* [1992] ECR I-5621; Case C-88/91, *Federconsorzi* [1992] ECR I-4035; Case C-28/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161; Case C-130/95, *Giloy* [1997] ECR I-4291; Case C-247/97, *Schoonbrodt* [1998] ECR I-8112.

¹²⁷ Kaleda, S., L., *Extension of the preliminary rulings procedure outside the scope of Community law: 'The Dzodzi line of cases'* [2000] European Integration online Papers (EIoP) Vol. 4, N° 11, §1.1.

¹²⁸ Case C-28/95, *Leur-Bloem* [1997] ECR I-4161, para. 27. See Case C-88/91 *Federconsorzi* and Case C-73/89 *Fournier v Van Werven* for cases concerning references to Community law in contractual clauses.

The Court of Justice finds its jurisdiction on three main grounds. It considers, first, that it is solely for the national courts before which the dispute has been brought to determine both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions which they submit to the Court.¹²⁹

Secondly, the Court relies on the absence of a rule to the contrary, since it does not appear, either from the wording of Article 234 EC or from the objective of the procedure introduced by that Article, that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific circumstances in which the national law of a Member State refers to the content of that provision in order to establish the rules applicable to a situation which is purely internal to that State.¹³⁰

Finally, the Court is of the opinion that it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.¹³¹ Interestingly, the ECJ rejected jurisdiction in *Kleinwort Benson*¹³² on the ground that “reference to the provisions of the European Community law into the national law must be absolute and unconditional”.¹³³

All things considered, the acceptance of jurisdiction by the ECJ has encountered strong opposition by the Advocates General in every single judgment of the *Dzodzi* line. In the early *Thomasdünger* case, Advocate General Mancini concluded that the Court of Justice should not reply to the questions raised because (...) the Court would, in fact, be giving a ruling on the rules of domestic law into which those provisions had been incorporated, thereby losing their binding effect as Community provisions.¹³⁴

Advocate General Darmon in *Dzodzi* indicates three questions that should be considered before accepting jurisdiction in a particular cases. Firstly, whether the courts of last instance of the Member States are bound to refer for a preliminary ruling in a case similar to the *Dzodzi* case or not. Secondly, whether the interpretation given by the ECJ in a particular case is binding upon national courts. Finally, Darmon considers whether it is possible to challenge the legality of the provision of the EC law within the preliminary ruling procedure if it is concerned in the context of spontaneous harmonisation.¹³⁵

¹²⁹ Joined Cases C-297/88 and C-197/89, *Dzodzi v Belgian State* [1990] ECR I-3763, para. 34.

¹³⁰ *Ibid.*, para. 36.

¹³¹ *Ibid.*, para. 37.

¹³² Case C-346/93, *Kleinwort Benson v. City of Glasgow District Council* [1995] ECR I-615.

¹³³ *Ibid.*, paras. 20-25.

¹³⁴ Opinion of AG Mancini in Case 166/84 *Thomasdünger GmbH v Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, para. 2.

¹³⁵ Opinion of AG Darmon in Joined cases C-297/88 and C-197/89, *Dzodzi v Belgian State* [1990] ECR I-3763, para. 12.

Although leaving those questions deliberately open, he concludes finding that a reference made by national law to Community law does not have the effect of extending the latter's field of application.¹³⁶

In his extensive opinion in *Leur-Bloem* and *Giloy*, Advocate General Jacobs proposed to restrict the jurisdiction to the 'situations which can be said to have resulted naturally from the implementation of Community law and not from Community law being shifted sideways into a situation in which its application was never intended'.¹³⁷ The Advocate General particularly focused on the principle that every legal rule has to be interpreted in its *proper context of application*.¹³⁸ Accordingly, the Court is not able to provide useful interpretation in a dispute arising in a non-Community context. When interpreting the rule outside its proper context (in abstract), the Court runs the risk 'not only of failing to consider all relevant issues, but also of being misled by extraneous factors'.¹³⁹

In 2000, in *Kofisa*¹⁴⁰, Advocate General Ruiz-Jarabo Colomer refers to AG Darmon where he considers:

“that the aim of the preliminary-ruling procedure, namely to ensure the uniform effect of Community law, applies *only within the scope of Community law*, as defined by Community law itself and by itself alone. According to Advocate General Darmon, a reference made by a national law cannot extend the scope of Community law or, with it, the jurisdiction of the Court of Justice, since, in the final analysis, 'there is no Community law outside its field of application'”.¹⁴¹

To conclude this disputed argument, major oppositions to the extension of the preliminary ruling to matters falling outside the scope of Community law arise from the consideration that such rulings, being given upon domestic law, would lose its binding nature. Hence, the decision of the ECJ could be ignored by the national court.

Even so, a second argument seems to be more convincing. In a situation where the Court is struggling to carry on with the increasing workload while preserving the quality of its judgments, how convenient would it be to expand the role of the Court *extra iurisdictio* such as in the *Dzodzi* line of cases?

¹³⁶ *Ibid.*, para. 15.

¹³⁷ Opinion of AG Francis Jacobs in Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, para 81.

¹³⁸ *Ibid.*, Para. 49.

¹³⁹ *Ibid.*, paras. 50-52.

¹⁴⁰ Opinion of AG Ruiz-Jarabo Colomer in Case C-1/99, *Kofisa Italia S.r.l. v. Ministero delle Finanze and Servizio della Riscossione dei Tributi - San Paolo Riscossioni Genova S.p.a.* [2001] ECR I-207, paras. 20-23.

¹⁴¹ *Ibid.*, para. 23.

3.3 Preliminary Ruling proceedings other than Article 234EC Treaty

Apart from a few exception¹⁴², the Court's jurisdiction has been consolidated and, as it has been shown already, even extended by the Treaties of Amsterdam and Nice.¹⁴³ Accordingly, the Treaty of Amsterdam extended the preliminary reference mechanism in the areas covered by Title IV of the EC Treaty. Lately, the Court has also begun to extend its rulings as to the third pillar of the Union provided in Title VI of the Union Treaty in the wording of Article 35 TEU.

Finally, being expired in July 2002, Article 41 ECSC will not be reported in this work, though it may be significant to consider that during the lifetime of the Treaty – fifty years - it was never amended.

Article 68 EC (ex Article 73p) modifies the preliminary procedure pursuant to Article 234 EC in so far as it applies to Title IV of the EC Treaty which embrace visas, asylum, immigration and other policies related to free movement of persons. Its first paragraph reads as follows:

“Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”

The wording of this first paragraph makes clear that preliminary references can only be sought by the national judge whose decision there is no judicial remedy in national law. As instance, in Case C-555/03 the Tribunal du travail de Chareleroi (Belgium) made a reference to the Court under Article 68 EC for a preliminary ruling in the proceedings between Magali Warbecq and Ryanair Ltd on the interpretation of a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹⁴⁴ The limitation introduced by Article 68 EC is pointed out by the Court where:

“Regulation No 44/2001 was adopted on the basis of Article 61(c) EC, which appears in Part Three, Title IV of the EC Treaty. In those circumstances, only a national court or tribunal against whose decisions there is *no judicial remedy under national law* may request the Court to give a preliminary ruling on the interpretation of that regulation.”¹⁴⁵

¹⁴² Timmermans, C., “The European Union judicial system”, CML Rev. Vol.41, No.2, April 2004, page 398.

¹⁴³ Ibid.

¹⁴⁴ Order of the Court of 10 June 2004 in Case C-555/03, *Magali Warbecq v. Ryanair Ltd* [2004] ECR I-6041. See also case C-341/04, *Eurofood IFSC Ltd*. [2006] NYR.

¹⁴⁵ Ibid., para. 13.

The Court held that since it was not disputed that decisions taken by the national tribunal are amenable to appeal under national law, that court was not entitled to refer for preliminary ruling under Article 68 EC. The ECJ refused jurisdiction in the case at stake.¹⁴⁶ To put it bluntly, Article 68 EC provides that *only* the highest courts of appeal in the Member States may refer for preliminary rulings to the European Court of Justice in the fields of visa and immigration.

Third paragraph of Article 68 EC introduces a particular procedure whereby preliminary rulings on the interpretation of Title IV can be referred also by the Member States, the Council and the Commission. In any case, the ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

As regards police and judicial cooperation in criminal matters, constituting the third pillar of the European Union, some Member States (Denmark, Ireland, United Kingdom) have not accepted any competence for the Court of Justice under Article 35 TEU; others (Spain) have reserved the right to ask for preliminary rulings to the highest national courts. Others (Finland, Greece, Portugal and Sweden) allow all national courts to refer questions to the European Court of Justice. Nonetheless, the highest courts are not obliged to make such references. Only in seven Member States, so far, has the system of Article 234 EC been fully replicated.

In the milestone case *Pupino*¹⁴⁷, first striking case of this kind, criminal proceeding was brought against the nursery school teacher Maria Pupino before the tribunal of Florence. In the earlier investigation stage, the Public Prosecutor asked the judge in charge of the preliminary enquires the permission to take the testimony of height children (both witnesses and victims) before the opening of the trial in front of the court. In particular, the procedure would contravened the general principle of *auditur et altera pars*¹⁴⁸, in accordance to an exception established in order to protect dignity, modesty and character of certain categories of victims in the proceeding.¹⁴⁹ Ascertained the opposition of the defence the national court had to consider the compatibility of such derogation to the procedure with a non-binding Council Framework Decision dealing with the same matter.

Consequently, the Italian court asked the ECJ whether, in view of the Council Framework Decision on the standing of victims in criminal proceedings, 'a national court must have the ability to authorise young

¹⁴⁶ Ibid., paras. 14-15.

¹⁴⁷ Case C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

¹⁴⁸ General rule of procedure that necessitate the acquisition of testimony to be produced during the trial in the presence of both the two parties and the judge assigned to the case. The *rationale* is the guarantee that each party can address questions during the testimony in accordance to the principle of the fair trial.

¹⁴⁹ Article 398 (5a) ccp provides as follows: "(...) where the evidence involves minors under 16, the judge shall determine by order the place, time and particular circumstances for hearing evidence where a minor's situation makes it appropriate and necessary. In such cases, the hearing can be held in a place other than the court, in special facilities or, failing that, at the minor's home. The witness statements must be fully documented (...)". The prosecutor argued in particular that the evidence 'could not be deferred until the trial on account of the witnesses' extreme youth, inevitable alterations in their psychological state, and a possible process of repression' (para. 16).

children, who claim to have been victims of maltreatment, to give their testimony in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held'.¹⁵⁰

The Court at first noted that the Framework Decision was adopted based on the provisions of the EU Treaty on police and judicial cooperation in criminal matters, that is to say, the EU third pillar. On this ground, national courts can rely on the provision of Article 35 TEU whose first paragraph states:

“The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them.”

Inevitably, as the Italian and United Kingdom Governments punctually argued, the Treaty on European Union (unlike the EC Treaty) contains no obligation similar to that laid down in Article 10 EC, on which the case-law of the Court of Justice partially relied in order to justify the obligation to interpret national law in conformity with Community law.¹⁵¹ As a matter of fact, paragraph 2 of Article 35 TEU requires that:

“(...) any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.”

Notably, Italy is among those Member States that accepted the jurisdiction of the Court of Justice on the matters provided by Article 35 TEU. Thus, irrespective of the position held by the Italian and UK governments, the Court concluded that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. In applying national law, the Italian court is required to interpret it as far as possible in a way that conforms to the wording and the purpose of the Framework Decision in order to attain the result which that decision envisages.¹⁵² In other words, the choice as to form and methods to be adopted for the attainment of such result is up to national authorities.

Concluding, on those circumstances, the Court held that:

“achievement of the aims pursued by the abovementioned provisions of the framework decision require that a national court should be able (...) to use a special procedure, such as the Special Inquiry for early gathering of evidence provided for in the law of a Member State (...) if that procedure best

¹⁵⁰ Case C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para. 50.

¹⁵¹ Argument rejected by the ECJ. The Court held that “it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters.” Paras. 40-42.

¹⁵² *Ibid.*, para. 43.

corresponds to the situation of those victims and is necessary in order to prevent the loss of evidence, to reduce the repetition of questioning to a minimum, and to prevent the damaging consequences, for those victims, of their giving testimony at the trial.”¹⁵³

The judgment in *Pupino* shows clearly the willingness of the Court to give full application to the preliminary reference defined in Article 35 TEU ensuring uniformity in the area defining the third pillar of the European Union. Nonetheless, due to the extreme novel approach, the actual efficacy of this type of ruling is far from being settled. Further cases are required in order to depict a more neat *ratio decidendi* to the mechanism under Article 35 TEU.

3.4 Denial of jurisdiction: inadmissible references

3.4.1 Introduction

I might now clarify, since the title of this paragraph may lead to misjudgements, that denials of jurisdiction do not represent the ‘trend’ taken on by the Court as to the providing of references under the preliminary ruling procedure. What as been pointed out so far, on the contrary, shows but a negligent commitment of the Court of Justice. Sometimes, due to its excess of zeal, even to the extent of engaging in matters of disputable relevance or jurisdiction.

Nonetheless, certain bars to the referral under Article 234 EC are integral part of the policy of the Court which, albeit mostly resulting from the literal formulation of the Treaty, renders the attitude of the ECJ to keep the procedure in line with its very scope: ensure the development of the European Legal machinery and support its uniform enforcement and interpretation in each Member State. This chapter correspond to a ‘phase two’¹⁵⁴, albeit not neatly definable, of the development of preliminary ruling procedure. This is a phase of greater intervention by the Court after a first period characterised by a substantial willingness to receive references.

3.4.2 Lack of power

Article 234 EC provides that “any court or tribunal of a Member State”¹⁵⁵ may take a reference to the European Court. Interestingly, the English version of the Treaty is the sole providing two terms to express the range of national bodies entitled to refer to the ECJ for preliminary ruling.¹⁵⁶

¹⁵³ Ibid., para. 56.

¹⁵⁴ Bernard, C., and Sharpstone, E., “The Changing Face of Article 177 References” [1997] CMLRev. 34, 1113-1171 at 1119.

¹⁵⁵ Paragraph 2, Article 234 EC Treaty.

¹⁵⁶ See, as instance, the French and German versions : ‘Lorsqu’une telle question est soulevée devant une *juridiction* d’un des États membres, cette juridiction peut, si elle estime

Accordingly, the correct approach to the interpretation of Article 234 EC is not that of questioning whether the referring body is a ‘court’ in the first place and then, if not, whether it can be considered a ‘tribunal’.

It is rather that of considering, reserved considerations of legal hermeneutic, whether that body falls within the single class¹⁵⁷ of ‘court and tribunal’ as the term is understood by the ECJ. Commenting the situation in case *De Coster*¹⁵⁸, AG Colomer emphasises the lack of definition of the term national court or tribunal in the Treaty but also from the Court. Reportedly:

“the Court of Justice, (...) has merely laid down a number of criteria for guidance, such as whether the body is established by law, whether it is permanent and independent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether the decision is of a judicial nature, and whether it applies rules of law.”¹⁵⁹

This is precisely the guidance that will be discussed below in this chapter. Keeping on to the question of jurisdiction *ratione materiae* of national courts, the Advocate General refers of equivocal approach outlined by the Court’s case law and provocatively states:

“The profound *contradictions* noted between the solutions proposed by Advocates General in their Opinions and those adopted by the Court of Justice in its judgments illustrate that the path is badly signposted and there is therefore a risk of getting lost. The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted.”¹⁶⁰

The debate on the jurisdiction of the referring court begun indeed long time ago. In Vaassen-Göbbels¹⁶¹ reference for a preliminary ruling had been made by an arbitration tribunal which did not form part of the Netherlands legal system but had jurisdiction to hear appeals brought against the decisions of a social security institution. The Court of Justice set out, for the first time, five of the criteria which it considers determine whether a body constitutes a ‘court or tribunal’:

Firstly, whether the body concerned is established by law (statutory origin). Secondly, consideration has to be given as to the permanence of

qu'une décision sur ce point est nécessaire pour rendre son jugement, demander à la Cour de justice de statuer sur cette question.’

‘Wird eine derartige Frage einem *Gericht* eines Mitgliedstaats gestellt und hält dieses Gericht eine Entscheidung darüber zum Erlass seines Urteils für erforderlich, so kann es diese Frage dem Gerichtshof zur Entscheidung vorlegen.’

¹⁵⁷ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 31.

¹⁵⁸ Opinion of AG Colomer in case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445.

¹⁵⁹ *Ibid.*, para. 13.

¹⁶⁰ *Ibid.*, para. 14.

¹⁶¹ Case 61/65, *Vaassen-Göbbels v. Management of the Beambtenfonds voor het Mijnbedrijf* [1965] ECR 261.

such court or tribunal and to the binding nature of its decisions. Lastly, the Court touched upon the fundamental requirement of a procedure *inter partes* and of the application, by the national body, of the rule of law.

As AG Colomer refers¹⁶², since that judgment the Court has, in each case, ascertained whether those requirements are met. Nevertheless, it has also refined and perfected them, adding others, such as the requirement that the body should be independent which surprisingly was mentioned for the first time in the judgment in *Pretore di Salò*¹⁶³ in 1987 and adopted unconditionally in *Corbiau*.¹⁶⁴ It is significant that the criterion of independence, which is the most important feature that a court must display, should have to wait until 1987 to appear in a judgment of the Court of Justice.

One more observation deserves the opinion of AG Reischl in the Dutch case *Broekmeulen*¹⁶⁵, where it is said that the question on whether a referring body is a ‘court or a tribunal’ is a matter of Community law rather than national law.¹⁶⁶ Accordingly, even a body which is not described as court or tribunal in its own jurisdiction can, despite its *nomen juris* and where the conditions laid down by the Court are met, make a reference for preliminary ruling. The resulting case law on this issue is evidently long and not inconsistent. All things considered the list or requirements laid down by the Court appears to be non-absolute and, above all, non-exhaustive. The most relevant critic that can be addressed to the Court is that of its excessive focus on the facts of each individual case instead of firmly pondering objective criteria.

In fact, in the recent case *Abrahamsson*¹⁶⁷, the Swedish Board of Appeals for Higher Education (Överklagandenämnden för Högskolan) sought reference under Article 234 EC to the European Court of Justice to determine the compatibility with Community law of national legislation to encourage the appointment of women in institutes of higher education and universities. Particular in this case is the fact that all the members of the committee, an administrative body, are appointed by the Swedish Government. The required independence of such board is disputable though the Gordian knot relates the *inter partes* criterion. Regardless, the Court considered the question submitted by the Swedish board admissible based the following reasoning:

“It is clear from the legislative provisions and regulations mentioned in paragraphs 30 to 34 of this judgment that the Överklagandenämnden was established by law and is a permanent body which, although an administrative authority, is vested with judicial functions, that it applies rules of law and that

¹⁶² Opinion of AG Colomer in case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para. 17.

¹⁶³ Case 14/86, *Pretore di Salò v Persons unknown* [1987] ECR 2545, para. 7.

¹⁶⁴ Case C-24/92, *Pierre Corbiau v. Administration des Contributions* [1993] ECR I-1277, para. 15.

¹⁶⁵ Case 246/80, *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311.

¹⁶⁶ AG Reischl, CML Rev. Vol.91, No.1, 1982, pages 2335-2336.

¹⁶⁷ Case C-407/98, *Abrahamsson and Anderson* [2000] ECR I-5539.

the procedure before it is *inter partes*, even though Law 1986:223 does not expressly so provide.”¹⁶⁸

The tendency to relaxation of the criteria laid down in *Pretore di Salò* is pointed out by Advocate General Saggio. In his opinion, ‘the fact that the procedure is not *inter partes* is not, in itself, a conclusive reason for deciding that the referring body cannot be described as a court or tribunal; however, when the Court has accepted references for a preliminary ruling in summary proceedings where the defendant was not present, it has taken care to ensure that that deficiency was offset by a high level of impartiality and independence in the adjudicating body.’¹⁶⁹ Does this mean that the *inter partes* criterion is thus substitutable with a more than ever blur *quantum* (high level) of independence and impartiality? The AG does not specifically address such question when conceiving that ‘there are grounds for considering that the Appeals Board does meet the requirement in that respect’.¹⁷⁰

The conclusion of its reasoning gives anyway a negative response as to the admissibility of the preliminary reference from the Överklagandenämnden. The disputed impartiality of such court, in spite of the Swedish constitutional guarantees, is not conclusive. More specific rules on the conditions and detailed arrangements for terminating members' appointments would be needed.

In 2005 in *Syfait*¹⁷¹, the Court notes that the Greek competition authority (Epitropi Antagonismou) is subject to the supervision of the Minister for Development. Such supervision, according to the Court, empowers the minister to review within certain limits the lawfulness of the decisions adopted by the Epitropi Antagonismou.¹⁷² Moreover, despite the relative personal and operational independence enjoyed by the personal of such body, the ECJ considers the safeguards in respect of their dismissal or the termination of their appointment not sufficient. In other words, the Court holds that ‘Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which (...) may be akin to a party in the course of competition proceedings’.¹⁷³ On this ground, the Court has decided that it has no jurisdiction to answer to the question referred.

As far as the latter case is concerned, Advocate General Jacobs opined that in his view, ‘according to the information supplied in the order for reference, the Competition Commission clearly satisfies many of the criteria which the Court has in the past identified as relevant when considering whether a given body may be classified as a court or tribunal’.¹⁷⁴ In particular, he held:

¹⁶⁸ *Ibid.*, para. 36.

¹⁶⁹ Opinion of AG Saggio in Case C-407/98, *Abrahamsson and Anderson* [2000] ECR I-5539, para. 18.

¹⁷⁰ *Ibid.*

¹⁷¹ Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. Glaxosmithkline AEEVE* [2005] ECR I-4609.

¹⁷² *Ibid.*, para. 30.

¹⁷³ *Ibid.*, para. 33.

¹⁷⁴ Opinion of AG Jacobs in Case C-53/03, *Syfait* [2005] ECR I-4609, para. 20.

“It is apparent from the Court’s judgment in *Gabalfrisa* that operational separation between a judicial body and an administrative authority establishes judicial independence”¹⁷⁵

Jacobs thus considered the referring body a ‘court or tribunal’ in the sense of Article 234 EC. Once again, the Court’s view and that of the Advocates General do not coincide. This is symptomatic of the unclarity of the Treaty formulation to which the Court shall bear the duty to remediate.

3.4.3 Ex-parte references and hypothetical issues

The emblem of the Court’s reasoning on the issue of both ex-parte references and of hypothetical disputes is or, better said, are the two *Foglia v. Novello* cases, where the Court articulated and applied the requirement of a genuine dispute. In the first case, the Italian court asked the ECJ to assess the compatibility of EC law with a French tax imposed on imported wine. The parties appeared to agree on the breach of EC law constituted by the disputed levy and artificially constructed the dispute before the Italian court. As a result, the Court unpredictably refused the question for preliminary ruling and reasoned:

‘It thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are *in agreement as to the result to be attained* and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking’s bill which included a sum paid in respect of that tax.

The duty of the court of justice under Article [234] of the E(E)C Treaty is to supply all courts in the community with the information on the interpretation of community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty’.¹⁷⁶

In this controversial case, the reasoning of the Court for its denial of jurisdiction seems to arise on the fact that, in spite of the fulfilment of the criteria for the Italian Court (Pretura di Bra) to be considered a “Court” or

¹⁷⁵ Ibid., para. 28. The case cited is C-147/98, *Gabalfrisa and Others* [2000] ECR I-1577.

¹⁷⁶ Case 104/79, *Foglia v. Novello* [1980] ECR 745, para 10 and 11.

“Tribunal” pursuant to Article 234(2) EC, the question lacked of *inter partes* nature.

Although this criterion has been for long time considered fundamental to ascertain whether a referring body is a ‘court or tribunal’ in the sense of Article 234 EC, the Court has now stated on several occasions that ‘the requirements that the procedure be *inter partes* is not an absolute criterion’¹⁷⁷

Arguably, the importance of the *inter partes* element results evident where it grants the defendant the right to present his case in front of the national court during the proceeding. The acceptance of *ex parte* references has however been assessed in an unsatisfactory manner by the Court and Advocate General Warner criticised the decision recognizing that it had not been provided sufficient arguments on the point of admissibility, and therefore should have been reconsidered.¹⁷⁸

The Courts has, on the other hand, emphasised that in the context of *ex parte* proceedings, referring courts should take particular care to give the Court a detailed and complete account of the factual and legal context. Nor the ECJ is likely to reconsider its acceptance of *ex parte* references. Another example supporting this tendency is provided by the acceptance of the reference for preliminary ruling in *Pretore di Salò*¹⁷⁹ in which the official who made the reference was the only party in the case. Notably, in *Pretore di Salò* there is no real party excluded from the possibility to make submissions on the question of a reference.¹⁸⁰

3.4.4 Questions not relating Community law

As a matter of principle and pursuant to the wording of Article 234(1) EC, the Court of justice has jurisdiction on questions primarily relating the interpretation of the Treaty and the interpretation and validity of acts of the institutions of the Community. To the contrary, it shall decline jurisdiction whenever it finds that the question does not concern the interpretation or validity of Community law.

*Maurin*¹⁸¹ is a quite interesting case in this respect. In this case, a French criminal court referred a question to the ECJ asking whether is ‘the procedure for establishing whether an offence has been committed, (...) relating to products or services concerning the labelling and presentation of food products, and, more particularly, the fact that a report is not signed by the person concerned by an investigation, compatible with the general principles of law laid down by the Court of Justice, such as observance of the rights of the defence and of the adversarial nature of proceedings?’¹⁸²

¹⁷⁷ E.g. case C54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, para. 31; Case C-17/00, *François De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para. 14.

¹⁷⁸ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, pages 105-106.

¹⁷⁹ Case 14/86, *Pretore di Salò v Persons unknown* [1987] ECR 2545.

¹⁸⁰ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 106.

¹⁸¹ Case C-144/95, *Criminal proceedings against Jean-Louis Maurin* [1996] ECR I-2909.

¹⁸² *Ibid.*, para. 5.

The Court declined jurisdiction on the question pertained to national criminal law and was therefore outside of the scope of Community law.

Although the principle might seem clear as its meaning, it nonetheless can be of difficult application. This happens whenever the question raises an issue which lies on the edge between Community law and national jurisdiction. In these cases, the Court will give the referring court the benefit of the doubt and accept jurisdiction over the question referred.

3.4.5 Irrelevant questions

In this type of references, the matter does not relate the fact that the national court ought to refer a relevant question for preliminary ruling to the ECJ and decided not to but, rather the case where the question referred to the ECJ under article 234 EC is not relevant and therefore shouldn't have addressed to the ECJ at all.

The matter relates the formulation of Article 234 EC as to the use of the word "necessary". The jurisprudence of the Court considers the decision on a question of Community law to be necessary except when:

"That question is not relevant, that is to say if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case"¹⁸³

Hence, the use of the term relevant makes clear that what really matter for the Court is not whether the relevant point is necessary for the referring court but rather whether the referring court considers it necessary.

In *Furlanis*¹⁸⁴, the Court repeated its intention to respect the assessment of relevance made by the referring court:

"(...) the Court has consistently held that it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected *only if it is quite obvious* that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action".

Obviousness is accordingly the necessary requisite to curtail references on the basis of irrelevance. The *Bosman*¹⁸⁵ case well illustrate the respect paid by the ECJ to the assessment of relevance provided by national courts. The reference sought to establish whether two practices were compatible with Community law. In particular, the transfer fee which the new club must pay to the old club for a player after the termination of the contract and the

¹⁸³ Case 283/81, *sri CILFIT v. Ministry of Health* [1982] ECR 3415, para. 10.

¹⁸⁴ Case C-143/94, *Furlanis Costruzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS)* [1995] ECR I-3633.

¹⁸⁵ Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921.

“3+2” nationality rule which limited access of foreign players to national football competitions.¹⁸⁶ The Belgian football association, UEFA, and several Member States governments argued that ‘the questions relating to nationality clauses have no connection with the disputes, which concern only the application of the transfer rules. The impediments to his career which Mr Bosman claims arise out of those clauses are purely hypothetical and do not justify a preliminary ruling by the Court on the interpretation of the Treaty in that regard.’¹⁸⁷ Notwithstanding the counter-arguments provided, the Court held that

“(…) the issues in the main proceedings, taken as a whole, are not hypothetical and the national court has provided this Court with a clear statement of the surrounding facts, the rules in question and the grounds on which it believes that a decision on the questions submitted is *necessary* to enable it to give judgment”.¹⁸⁸

Since the national court considered that the application of the nationality clauses could impede Mr Bosman’s career, the Court therefore declared that it had jurisdiction to rule on both issues.

3.4.6 Other cases

Other cases, although of minor importance, can represent possible ground for declining jurisdiction. The effect of Article 234 EC conflicting with a proceeding under 226 or 230 EC has been discussed already in introductory the chapter relating the system of judicial protection of the EU at the beginning of this study.

Further possible grounds relates mainly the inadequate statement of facts or national law by the referring court¹⁸⁹, political questions¹⁹⁰, referring courts determining the validity of foreign law¹⁹¹ and question relating to conduct of non-party.¹⁹² This other forms of dismissal represent a new approach of the Court as to the acceptance of reference from national courts. Tridimas defines such approach, occurred in the 1990s, as the introduction of a docket control system by the ECJ.¹⁹³ One example is provided by its judgment in *Telemarsicabruzzo*¹⁹⁴, where the Vice Pretore di Frascati referred two questions on the compatibility with the Treaty of provision of Italian law restricting the right of private sector television channels to use certain frequencies. The orders for reference contained very little

¹⁸⁶ See Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 109.

¹⁸⁷ *Ibid.*, para. 57.

¹⁸⁸ *Ibid.*, para, 62.

¹⁸⁹ Joint cases C-320 to C-322/90, *Telemarsicabruzzo SpA v. Circostel* [1993] ECR I-393.

¹⁹⁰ E.g. case 93/78, *Lothar Mattheus v Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203.

¹⁹¹ Case 20/64, *S.A.R.L. Albatros v. Sopéco* [1965] ECR 29; case 244/78, *Union Latière Normande* [1979] ECR 2663; case C-105/94, *Ditta Angelo Celestini* [1997] ECR I-2971.

¹⁹² Case 52/76, *Benedetti v. Munari* [1977] ECR 163.

¹⁹³ Tridimas, T., “Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” [2003] CMLRev. Vol. 40, 9-50 at 12.

¹⁹⁴ See *supra* footnote *Telemarsicabruzzo*.

information about the factual background to the cases or the relevant provisions of Italian law. The Court, had complained that it had no information on these matters, although it had been able to derive some information from the referring court's file as well as from the written and oral observations submitted. However, that information was rather fragmentary¹⁹⁵ and did not enable the Court to interpret the Treaty competition rules in the light of the facts relating the request of the referring court.

According to Arnall, this approach of the Court is clearly influenced by its workload.¹⁹⁶ In fact, in cases where the background has not been properly set out by the national court, the tasks of the Court of Luxembourg are particularly time-consuming. The author, referring in particular to the judgment in *Telemarsicabruzzo* foresees two dangers for the procedure under Article 234 EC. On one hand, such restrictive approach could lead the Court to refuse to address a question which the national court needed to resolve in order to give judgment. Consequently, that national court would be in the situation either of making another reference or choose to deal with the question itself. On the other hand, national courts might be discouraged from using the preliminary ruling procedure. The limit of *Telemarsicabruzzo* line of authority should be acknowledged.¹⁹⁷

3.5 When National Courts refer for Preliminary Ruling

3.5.1 The ECJ 2005 guideline: the references from national courts for a preliminary ruling¹⁹⁸

The preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States.

The European Court has generally refrained from offering guidance to national courts on the exercise of their discretion to refer. As instance, in *Rheinmühlen*¹⁹⁹, the Court states:

“National courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part.”²⁰⁰

¹⁹⁵ Arnall, A., *The European Union and its Court of Justice* [1999] Oxford University Press, page 58.

¹⁹⁶ Arnall, A., “The Past and the Future of the Preliminary Ruling Procedure” [2002] *European Business Law Review*, pp.183-191 at the pages 184,185.

¹⁹⁷ *Supra* Arnall, page 185.

¹⁹⁸ 2005 Note ON References from National Courts for a Preliminary Ruling, OJ 2005/C 143/01.

¹⁹⁹ Case 166/73, *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33

²⁰⁰ *Ibid.*, para. 4.

Although most of the highest courts of the Member States share the same opinion of the ECJ, the higher court of England and Wales have issued guidance of their own. The 2005 Note on References from National Courts for a Preliminary Ruling are to be considered *soft law* thus not binding. Its scope is to provide a summary of practical advice stemming from the recent development of the procedure through the jurisprudence of the Court.

The guideline begins by reaffirming the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the law of the European Union and on the validity of acts of secondary legislation. That general jurisdiction is conferred on it by Article 234 of the EC Treaty and, in certain specific cases, by other provisions.

In the first place, while any court or tribunal *may* refer a question to the Court on the interpretation, courts or tribunals against whose decisions there is no judicial remedy under national law *must*, as a rule, refer such a question to the Court, unless the Court has already ruled on the point (*acte éclairé*), or unless the correct interpretation of the rule of Community law is obvious (*acte clair*).²⁰¹ Moreover, as already cited in chapter [3.4.5], the Court points out that it is for the national court to explain why the interpretation sought is necessary to enable it to give judgment.²⁰² Again important for the Court is not whether the relevant point is necessary for the referring court but rather whether the referring court considers it necessary.

The second part of the guideline deals with questions on the validity of Community acts. The ECJ alone may rule on the validity of acts of the EC Institutions. All national courts *must* therefore refer a question to the Court when they have doubts about the validity of a Community act. The order referring a question may be framed in any form permissible under national law. If a national court has serious doubts about the validity of a Community act on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the Community act to be invalid.²⁰³

A national court or tribunal may refer a question to the Court of Justice for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary. It is, however, desirable that a decision to seek a preliminary ruling should be taken when the proceedings have reached a stage at which the national court is able to define the factual and legal context of the question.²⁰⁴

It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard.

An interesting point introduced by the Court in its 2005 guideline is contained in paragraph 23:

²⁰¹ 2005 Note ON References from National Courts for a Preliminary Ruling, OJ 2005/C 143/01, paras.11-12.

²⁰² *Ibid.*, para. 14.

²⁰³ *Ibid.*, para. 16 (the “Foto-Frost doctrine”. See § 3.2.1 and below, § 3.6.2) and para. 17.

²⁰⁴ *Ibid.*, para. 19.

“(…) the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.”

I will return on this argument in the second part of this work when discussing the suitability of regionalization.

Being assessed the Court’s guideline for the reference under Article 234 EC, attention shall now be paid to the general factors which a national court may take into account when making the decision to refer. The necessity that a question is raised before a national ‘court or tribunal’ and the requirement that such court must consider that a decision on the question is necessary to enable it to give judgment has been discussed above.

The early approach to of the UK courts to the exercise of discretion accorded to them is reported in the judgment of the court of appeal in *Bulmer v Bollinger*²⁰⁵ by Lord Denning. The first condition precedent to a reference is that the question must be necessary and conclusive. The question must be indeed necessary for it to give judgment and the point must be such that nothing more remains but to give judgment. Secondly, the referring court must consider the previous rulings in order to ascertain if the same point has been already decided in a previous case. Thirdly, the national court may consider the point to be reasonably clear and free from doubt²⁰⁶ so that there is no need to interpret Community law but only to apply it, being the latter a clear task of national courts. Furthermore, the court shall assess the facts of the case before deciding to refer to the ECJ. Fourthly, Lord Denning suggest that the referring court, deciding whether to refer or not a question to the Court in Luxembourg, considers the time that it will take to get a ruling, the potential overloading of the ECJ, the expense of getting a ruling from the European Court and the wishes of the parties.

The judgment in *Bulmer v. Bollinger*, is definitely interesting from the point of issues enlightened. However, this ruling was not uncontroversial. The major critics arose as to the issue of whether a decision on the question posed is necessary to enable the court to give judgment.²⁰⁷

Also AG Jacobs intervened to criticise the guidelines suggested by Lord Denning:

“Lord Denning refers to these matters as grounds for refusing to exercise the discretion to refer; but there will be many situations (...) where time and costs will be saved by an early reference.

(...) the difficulty and importance of the point (...) clearly this is a matter which is proper for the court to consider in exercising its discretion. However, in Community law, as in English law, points of the first importance have often arisen in cases where little is at stake between the parties. *Costa v. ENEL* is the classic example, but there are many others.”²⁰⁸

²⁰⁵ H.P. *Bulmer Ltd. v. J. Bollinger SA* [1974] 2 WLR 202.

²⁰⁶ Interestingly the criteria described by Lord Denning in 1974 precedes the *acte clair* doctrine established by the Court in *CILFIT* only in 1981.

²⁰⁷ Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, [2003] 3rd Edition, Oxford University Press, page 455.

²⁰⁸ Jacobs, F., “When to refer to the European Court” [1974] 90 *Law Quarterly Review* 486 at 492.

3.5.2 Article 234(3) EC: Compulsory reference

In the previous chapter, I have reported the referral pursuant to Article 234 EC as discretionary power of the national courts of the Member States. I have also described the approach of both national courts and the European Court as to the degree of such discretion when it comes to the decision as whether to refer a question to the ECJ under the second paragraph of Article 234 EC.

The wide discretion afforded by national courts is balanced, in Article 234(3) EC Treaty by a provision for mandatory reference from courts or tribunals against whose decisions there is *no judicial remedy* under national law. This formulation commonly refers to the courts of last instance against whose decisions there is no appeal. The first case where the Court detected such circumstance is *Costa v. ENEL*:

“National courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them.”²⁰⁹

The purpose of the provision established in Article 234(3) EC has been describes as follows:

“(…) that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice (…) and it is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State.”²¹⁰

To put it simply, the Treaty makes sure that as long as the unsuccessful litigant in the national proceeding is willing to exercise his right of appeal, the matter relating interpretation of Community law will eventually reach the Court of Justice, notwithstanding the negative opinion of the lower court as to the necessity of such reference.

The procedure can be understood as applying either to courts which are never subject to appeal, or to courts from which no appeal lies in the case in question.²¹¹ The distinction seems to be necessary. In fact, in the first case only national supreme courts would be under a duty to refer to the Court whereas, in the second scenario, the obligation would also embrace a variety of lower courts that, from time to time, could bring themselves under the same duty whenever the power to deny leave to appeal is exercised.

²⁰⁹ Case 6/62, *Costa v. ENEL* [1964] ECR 585.

²¹⁰ Case C-393/98, *Ministério Público and António Gomes Valente v Fazenda Pública* [2001] ECR I-1327, para. 17.

²¹¹ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 165.

The Court has openly adopted the latter interpretation, considering that Article 234(3) EC applies not only to those judicial bodies whose decision are always final, but also to those against those decision there is no judicial remedy in the case at issue.²¹²

3.5.3 Ex-officio reference

Reference is not limited to cases where one of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of Community law, but is also possible in cases in which a question of this kind is raised by the national court or tribunal of its own accord. In case *Salonia*²¹³, the Court found that a request from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.²¹⁴ In particular:

“(…) the fact that the parties to the main action failed to raise a point of Community law before the national court *does not preclude* the latter from bringing the matter before the Court of Justice. (…) the second and third paragraphs of Article [234] of the treaty are not intended to restrict this procedure exclusively to cases where one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of Community law, but also extend to cases where a question of this kind is raised by the national court or tribunal itself which considers that a decision thereon by the court of justice is ‘necessary to enable it to give judgment’.”²¹⁵

The same approach has been repeated in the milestone case *CILFIT*²¹⁶, where the Court formulates the matter in both positive and negative sense:

“It must in the first place be pointed out that Article [234] does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article [234]. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.”²¹⁷

The mere fact that the legal assistants, on behalf of their respective parties, have not sought to raise a point concerning the interpretation or the validity of Community law, does not preclude at all the possibility for the

²¹² *Supra*, *Costa v. ENEL* and case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* [1997] ECR I-6013, paras 24-26.

²¹³ Case 126/80, *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio* [1981] ECR 1563.

²¹⁴ *Ibid.*, para. 6.

²¹⁵ *Ibid.*, para. 7.

²¹⁶ Case 283/81, *CILFIT srl v. Ministry of Health* [1982] ECR 3415.

²¹⁷ *Ibid.*, para. 9.

judge to formulate a question for preliminary ruling under Article 234 EC *ex officio*.

3.6 Exceptions to the obligatory reference

3.6.1 ‘Acte Eclairé’

It appears from Article 234 EC, that the questions that must be referred by the courts of last instance pursuant to paragraph three are the same which may be referred by any other court or tribunal under Article 234(2). The circumstances in which a court in the sense of Article 234(3) is not obliged to refer to the ECJ were first established in *Da Costa*²¹⁸ in the early 1960's and then reaffirmed, twenty years later in *CILFIT*.²¹⁹

In *Da Costa*, a Dutch administrative court having final jurisdiction in revenue cases, referred a question for preliminary ruling almost identical to that formulated one month earlier by a national court in *van Gend en Loos*.²²⁰ The Court ruled:

Although the third paragraph of Article [234] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law (...) to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article [234] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is 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.²²¹

Notably, while holding that there was no obligation to refer in this case, the Court does not deny that there was discretion to refer the question by the national court having Court already answered to a previous similar reference. Accordingly, the rules of procedure of the Court of Justice contain, in Article 104(3), a fast track procedure that gives the Court the possibility to dispose of the case by means of an order instead of a judgment. The Advocates General must be heard, but is not required to deliver an Opinion:

“Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may (...) at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law.”²²²

²¹⁸ Joined cases 28-30/62, *Da Costa en Schaake NV and others v. Administratie der Belastingen* [1963] ECR 31.

²¹⁹ Case 283/81, *CILFIT srl v. Ministry of Health* [1982] ECR 3415.

²²⁰ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Administratie der Belastingen* [1963] ECR 1

²²¹ *Supra*, *Da Costa*.

²²² Article 104(3) of the *Rules of Procedure of the Court of Justice of the European Communities* of 19 June 1991 as amended 18 October 2005 (OJ L 288 of 29 October 2005, p. 51).

The formulation in *Da Costa* was repeated in *CILFIT* where the Court established a threefold exemption from the obligation pursuant to Article 234(3) EC:

- a. the question of EC law is irrelevant;
- b. the question has already been decided by the ECJ;
- c. the correct interpretation is so obvious as to leave no room for doubt.

As to second exemption the Court held that it applies 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'.²²³ This formulation known as the doctrine of *acte éclairé* has to be differentiated, albeit both deriving from the French legal experience, from the doctrine of *acte clair* which is the topic of the next chapter.

3.6.2 The *CILFIT* case and the 'Acte Clair' doctrine

In certain cases, a national court may feel that the answer to the issue is so clear that there is no need to refer the matter to the European Court. The reason for introducing the application of the *acte clair* doctrine in Community law resides essentially in the tendency of some national court to refuse to make reference under Article 234 EC on the base that the answer was obvious. Notably, the wording of Article 234 leaves no room for the application of *acte clair* or any other limitation to the obligation to refer. In this view, the adoption of such exception is the result of the judicial activism of the ECJ.

The doctrine of *acte clair* is derived from the French law and first referred to in the Court by Advocate General Lagrange in *Da Costa*.²²⁴ Nonetheless the conditions legitimating national courts to resort to such exception to Article 234(3) EC were considered in the *CILFIT* case.²²⁵ The plaintiff was a textile firm who challenged an Italian law imposing pecuniary duties allegedly in breach with a Community Regulation. The Italian Ministry of Health exhorted the Corte di Cassazione, a court in the sense of Article 234(3) EC, not to refer the question to the ECJ for preliminary ruling being the answer to the substantive question so obvious as to render a reference to the European Court redundant.

The Corte di Cassazione noted that this argument was indeed a matter of Community law itself and therefore asked the Court whether the third paragraph of Article 234 EC lays down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or it makes that obligation conditional on the prior finding of a reasonable interpretative doubt.²²⁶

The Court began its reasoning by assessing the criterion of irrelevance:

²²³ *Supra*, *CILFIT*, para. 14.

²²⁴ See Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 175.

²²⁵ Case 283/81, *CILFIT srl v. Ministry of Health* [1982] ECR 3415.

²²⁶ *Ibid.*, para. 4.

“Courts or tribunals are not obliged to refer to the court of justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case”²²⁷

It then establishes the conditions for the application of the doctrine of *acte éclairé* which, as discussed above, relates questions already decided by the ECJ. Finally, at paragraph 16 the Court set out the application of *acte clair* to Community law:

(...) the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

In this respect the national court should bear in mind that firstly, the interpretation of a provision of Community law involves a comparison of the different language versions of the provision concerned; Secondly, that the terms and concepts in Community law do not necessarily have the same meaning as the laws of the various member states; Thirdly, that every provision of Community law should be interpreted in the light of Community law as a whole, taking into consideration its objectives and its state of development at the moment of application of the provision in question. However, as Arnall points out, the *CILFIT* criteria as applied to the Court’s decision in *Foto-Frost*, only apply where the ‘question of Community law raised before the national court is one of interpretation’.²²⁸ Accordingly, where there is a possibility that a measure of Community law is invalid the national court of last resort must bring the matter before the Court of Justice. No exception applies.

The guidelines given by the Court in the *CILFIT* case are evidently very strict as to the application of exceptions to the obligation to refer. The implications of the ECJ’s decision in *CILFIT* have been considered by many commentators. One part of the doctrine accuses the Court of having ‘capitulated in the face of the resistance that its role under Article [234] encountered in the late 1960s and early 1970s on the part of some of Europe’s great courts’.²²⁹ Mancini oppose this view reminding that the judgment in *CILFIT* is fruit of the contrasts caused by certain supreme courts which blatantly defied the authority of the Court justifying themselves on the basis of the *acte clair* doctrine.

²²⁷ Ibid., para 10.

²²⁸ Arnall, A., *The European Union and its Court of Justice* [1999] Oxford University Press, page 67.

²²⁹ Mancini, G.F. and Keeling, D.T. as referred in Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, [2003] 3rd Edition, Oxford University Press, page 447.

Indeed the correct analysis of the *CILFIT* case, says Professor Rasmussen²³⁰, shows the strategy to “contract the ambit of the State courts’ role of codetermination in the process of ascertaining the content of Community law to a much narrower factual scope. The underlying judicial rationale of *CILFIT* is to enhance and strengthen the European Court’s control over what goes on in the last-resort State courts.²³¹ The situation facing the Court before the judgment in 1982 was the realization that national courts were going out of control. Thus, the transmission of new, more precise guidelines to the national courts had become urgent. *CILFIT* has ‘put on the brakes which *Da Costa*²³² failed to apply’.²³³

If thus *CILFIT* was not written by defeated Judges or by Judges reasoning themselves to sociological inevitability, what is the Court tactic in *CILFIT*?

Rasmussen suggests that a strategy of *give and take* would successfully lead to what is expected to the desired objective. That is a ‘curtailment of the spread of national interpretative judicial independence’.²³⁴ By recognizing the *acte clair* doctrine in principle and granting the national supreme courts the power to do lawfully what they were anyways doing unlawfully the Court is *giving* something to those courts. Conversely, by placing significant constraints on its exercise, the Court hoped to induce the supreme courts to use willingly the mechanism provided by the Treaty, thus *taking* something. Arnall perceived the judgment at stake as the spark that allowing national courts to decide by themselves on the point of Community law, would have eventually put in jeopardy the uniform enforcement of the Treaty.²³⁵

According to AG Jacobs’s opinion in *Wiener*²³⁶ the conditions established in *CILFIT* do not need to be reconsidered, except perhaps on one point, but that they should apply only in cases where a reference is truly appropriate to achieve the objectives of Article 234, namely when there is a general question and where there is a genuine need for uniform interpretation.²³⁷

As to the point to be reconsidered, Jacobs suggests that the *CILFIT* judgment should not be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages (today the official languages of the Union are twenty) since it would involve in many cases a disproportionate effort on the part of the national courts.²³⁸

In conclusion to this chapter about the exceptions to refer, is necessary to add that apart from the cases seen above, The Court held in *Morson*, that

²³⁰ Rasmussen, H., “The European Court’s Acte Clair Strategy In *CILFIT*” [1984] 9 ELRev. 242.

²³¹ *Ibid.*, pages 242, 243.

²³² Joined cases 28-30/62, *Da Costa en Schaake NV and others v. Administratie der Belastingen* [1963] ECR 31.

²³³ *Supra*, Rasmussen, page 251.

²³⁴ *Ibid.*, page 256.

²³⁵ Arnall, A., “The Use and Abuse of Article 177” [1989] 52 MLR 622, 626.

²³⁶ Opinion of AG Jacobs in case C-338/95, *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495.

²³⁷ *Ibid.*, para. 64.

²³⁸ *Ibid.*, para. 65.

there is no obligation for the highest court to refer either when giving judgment in interlocutory proceedings, provided that each of the parties is 'entitled to institute proceedings or to require proceedings to be instituted on the substance of the case even before the courts or tribunals of another jurisdictional system and that during such proceedings any question of Community law provisionally decided in the summary proceedings may be re-examined and be the subject of a reference to the Court under Article 234 EC'.²³⁹

²³⁹ Joint cases 35/82 and 36/82, *Morson and Jhanjan* [1982] ECR 3723, para. 10.

4 PART 2: Road to regionalization?

4.1 Introduction

The second part of this work deals with the discussion that, starting from the latest development of the Court's jurisprudence on preliminary ruling, will bring to the proposed relaxation of the *acte clair* criteria established in *CILFIT* and to the assessment of the issue of regionalization.

All in all, the comments presented below stem from the *sole* alleged risk for the Court to be overwhelmed by its case load due to main factors: the recent enlargement of the territory under its jurisdiction and the parallel rapid expansion of the areas of Community competence. I explicitly used the word 'sole' to stress that, as the steady formulation of Article 234 EC demonstrates, the preliminary ruling procedure is to be considered a victory of the Treaty and milestone to the achievement of a *ever closer Union*. Yet, paradoxically, such procedure seems to be victim²⁴⁰ of its own success: the more it is used the greater the burden on the ECJ. The greater the burden for the ECJ, the lower the effectiveness of the procedure and the quality of the reasoning.

On these grounds, this specific part will touch upon the possible solutions for the lightening of the workload of the Court by, on the one hand, giving due consideration to the recent developments the ECJ case law and, on the other hand, considering the foreseeable effects in future perspective.

4.2 Article 234EC in the light of the most recent jurisprudence

4.2.1 Kuhne & Heitz

The judicial system of the Community has not been expressly established as to create a hierarchical structure. Formally speaking, the ECJ does not stand at the top of the Community judicial system and moreover, the Treaty is silent as to the effect of its judgments. Thus, as pointed out above, in order to achieve its aim, the Court has had to rely on a cooperative paradigm, which it has been building with national courts since its very inception.

The result of such institutional perplexity as to the position of the ECJ may well lead to a more or less voluntary divergence between the Court in Luxemburg and the domestic tier of judicature as to the interpretation of Community law and, in particular, as to the opportune use of the system of preliminary reference.

²⁴⁰ Lenaerts, K., "The Unity of European law and the Overload of the ECJ – the System of Preliminary Ruling Revisited", in *The Future Of The European Judicial System. The Constitutional Role Of European Courts*, Berlin, 2. - 4. November 2005, page 2.

The potential risks for the uniform application of Community law are unquestionable. In the wake of such scenario, the Court seeks to prevent or remedy to incoherencies through its creative jurisprudence.

Two judgments of the Court in 2003 and 2004 provide a good example of such creativity.²⁴¹ The first, *Kühne & Heitz*²⁴² established another way in which the Court of Justice may ensure the correct application of Community law by national courts. In the second judgment, *Köbler*²⁴³, the Court confirmed that the principle of Member State liability for breaches of Community law also applies when a breach is attributable to a Member State court. The latter case will be assessed in the next chapter.

Kühne & Heitz was a company which sought the reopening of the administrative procedure because the competent authorities misinterpreted certain provisions of the customs tariff to its detriment. Although the company appealed against the contested administrative decision, in its judgment in 1991, that competent court dismissed the appeal. In 1994, the Court of Justice²⁴⁴ showed that the position of *Kühne & Heitz* was in fact correct.

Following that judgment, *Kühne & Heitz* requested from the custom authority (Productschap) ‘payment of the refunds which the latter had, in its view, wrongly required it to reimburse and sought payment of a sum equivalent to the greater amount which it would have received by way of refunds’.²⁴⁵ The subsequent rejection of the Productschap brought the matter once again in front of the competent court of appeal. This time the domestic court referred the question to the ECJ for preliminary ruling as follows:

Under Community law, in particular under the principle of Community solidarity contained in Article 10 EC, (...) is an administrative body required to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling?²⁴⁶

Interestingly, in its order for reference the national court admittedly confessed that *mistakenly* took the view that it was released from that obligation under Article 234(3) EC because, in application of the *CILFIT* criteria, it considered that the interpretation of the customs tariff subheadings concerned left no room for doubt (*acte clair*).²⁴⁷ The national court was in particular uncertain as to whether the principle of *res judicata* had to be relaxed in order to ensure full and uniform application of Community law.

The Courts notes that under Netherlands law, administrative bodies always have the power to reopen a final administrative decision provided that the interests of third parties is not adversely affected. Accordingly,

²⁴¹ Komarek, J., “Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order” [2005] CMLRev. Vol.42, N.1, 9-34 at 11.

²⁴² Case C-453/00, *Kühne & Heitz* [2004] ECR I-837.

²⁴³ Case C-224/01, *Köbler* [2003] ECR I-10239.

²⁴⁴ Case C-151/93, Voogd Vleesimport en –export [1994] ECR I-4915.

²⁴⁵ *Supra*, *Kühne & Heitz*, para. 9.

²⁴⁶ *Ibid.*, para.19.

²⁴⁷ *Ibid.*, para. 18.

those courts are under a duty, via Article 10 EC, to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

The most important concept outlined by the Court is that a final decision can be reopened only if it is allowed by national law. Thus, the principle of *res judicata* and the relative legal certainty still matter. The judgment in *Kühne & Heitz* offers important issues in perspective of the judgment in *Köbler*.²⁴⁸

4.2.2 Köbler

Mr. Köbler, an ordinary university professor at the University of Innsbruck, applied for the award of an increment which professors usually receive after fifteen years of service in Austrian universities. Köbler had worked in the higher education sector for more than the required period though partly in other Member States universities. By applying for the award, he specifically pointed out that the years of service spent in the public service of other Member States had to be taken into account according to a Council Regulation.

When his application was refused by the competent authority, he sought appeal to the Austrian administrative court of last instance. The latter court first decided to refer a question on the interpretation of the Regulation which Mr Köbler relied on to but then, at a certain stage of the proceeding, the court was made aware by the ECJ of a judgment which the Court had given in a similar case concerning Germany. In this view, the court of last instance withdrew its request for a preliminary ruling and subsequently, applying the *acte clair* doctrine, dismissed Mr Köbler's application.²⁴⁹

Mr Köbler decided to bring an action for damages before the regional civil court alleging that the judgment of the administrative court of last instance was in breach with Community law. The ECJ found that the Austrian administrative court had failed to apply the *CILFIT* guidelines in considering the resolution on the point of law at stake was clear from the settled case law of the Court. Therefore, no exception applying in that case,

²⁴⁸ *Supra*, Köbler.

²⁴⁹ *Ibid.*, para. 10.

the court was under the duty to refer the matter to the ECJ for a preliminary ruling.

Advocate General Léger maintained that, as a matter of principle, Member States could be held liable for national court decisions. The Court was of the same opinion.²⁵⁰ In other words, a Member State is, in principle, liable for the acts of all of its institutions. However, the Court specified that in order for the Member State to be required to make reparation for loss and damage caused to individuals, three conditions have to be fulfilled²⁵¹:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.

As it appears from the judgment in *Köbler*, the Court of Justice extends its *Francovich*²⁵² and *Brasserie du Pêcheur*²⁵³ case law to the judiciary tier of the Member States, holding that Member States are liable for damages caused to individuals by “manifest infringement” of EC law by their highest courts.²⁵⁴ The Court did not find, in the present case, that the decision of the Austrian court of last instance constituted a serious breach.

In order to determine whether the infringement is sufficiently serious it is for the competent national courts ‘taking into account the specific nature of the judicial function, [to] determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.’²⁵⁵

The required seriousness of the infringement is, conceivably, considered by the doctrine²⁵⁶ of difficult assessment. The case has, nevertheless, the merit to provide with the Court’s concerns about incorrect interpretation and application of Community law within national legal orders. Notably, domestic courts of last instance represent the bottleneck between national and Community legal order. When applying the *acte clair* doctrine those courts do not allow the Court of Justice to have its say. In perspective of a regionalization, certainly, national high courts should be encouraged to take more responsibility for resolving questions of Community law by themselves. The overall scope of a regionalized system relies on the ability of domestic courts to show maturity as to the correct assessment of issue of Community law avoiding as far as possible to overload the Court of Justice with preliminary rulings.

²⁵⁰ Ibid., para. 50.

²⁵¹ Ibid., para. 51.

²⁵² Joined cases C-6/90 and C-9/90, *Andrea Francovich and Bonifaci* [1991] ECR I-5403.

²⁵³ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

²⁵⁴ Wattel, P. J., “Köbler, CILFIT and Welthgrove: We can’t Go On Meeting Like This” [2004] CMLRev. Vol. 41, 177-190 at 177.

²⁵⁵ Supra, Köbler, para. 59.

²⁵⁶ Groussot, X., *The Role of the National Courts in the European Union: A Future Perspective*, 2005 SIEPS, page 85.

The other side of the coin, it appears clearly in *Köbler*, it that more power goes side by side with the relative responsibilities. The combination of *Köbler* and *CILFIT* leads to the determination that if the courts specified under Article 234(3) EC want to avoid the risk of making its government liable for damages, it had better to refer for preliminary ruling to the ECJ in every case involving a question of EC law possibly conferring rights on individuals which is not *acte éclairé*.²⁵⁷

All in all, the judgment in *Köbler* seem to have represented a warning to national supreme courts, that the *acte clair* still represents the exception to the wording of the Treaty and shall not be abused. But then, as Wittel points out, ‘if *Köbler* is not to be taken that seriously, then it is just another source of legal uncertainty and arrears for years’.²⁵⁸ Lastly, AG Léger proposes a final test²⁵⁹, on the wave of the mechanism adopted by the European Court of Human Rights, to ascertain whether the breach of Community law is sufficiently serious as to consider a Member State liable for the act or omission of a domestic court. It would be interesting to see how *Köbler* is understood by the supreme courts of the ten new Member States of the European Union.

4.3 The ‘relaxation’ of the ‘Acte Clair’ doctrine

It has been suggested by a considerable part of the doctrine that the Court should acknowledge the *widespread*²⁶⁰ disregard, by Community courts of last instance, of the *CILFIT* criteria relaxing them in order to allow domestic courts to decide the point of Community law even where the matter has not been yet subject to ECJ rulings.

The fact that ordinary domestic courts enjoy, according to Article 234 EC second paragraph, considerable discretion as to the decision to refer a question for preliminary ruling whereas superior courts are still bound to resort to the Court of Justice whenever issues of Community law are brought before them should not at this stage represent a paradox anymore.²⁶¹

The purpose of the third paragraph of Article 234 EC is to ‘prevent a body of national law from coming into existence in any Member State’.²⁶²

However, in the opinion delivered in *Wiener*²⁶³, a case pending before the Court relating *inter alia* whether certain women’s garment were to be classified for custom purposes ‘pyjamas’, Advocate General Jacobs

²⁵⁷ Wattel, P. J., “Köbler, CILFIT and Welthgrove: We can’t Go On Meeting Like This” [2004] CMLRev. Vol. 41, 177-190 at 178.

²⁵⁸ Ibid., page 190.

²⁵⁹ Opinion of AG Léger in case C-224/01, *Köbler* [2003] ECR I-10239, paras. 108-114.

²⁶⁰ Anderson, D. & Demetriou, M., *References to the European Court, Second Edition* (2002) London Sweet & Maxwell

²⁶¹ See § 3.5.2.

²⁶² Case 107/76, *Hoffman-La Roche* [1977] ECR 957, para. 5.

²⁶³ Opinion of AG Jacobs in case C-338/95 *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495.

questions the necessity for the Court to be asked to rule in every case where a question of interpretation of Community law arise.²⁶⁴

Although commending the German court's compliance with its obligation to refer pursuant to Article 234(3) EC and the Court's commitment to reply to every question relating Community law arising before national courts, this approach presents, as drawback, the trend of attracting a virtually infinite number of questions of interpretation.²⁶⁵ Considering the increasing workload of the Court, it is neither appropriate nor materially possible for the Court to continue to respond fully to all references which, through the creativity of lawyers and judges, are couched in terms of interpretation. On this basis, the Advocate General suggested that the only solution is a greater measure self-restraint on the part of both national courts and the ECJ. In particular, for national courts of last instance, a reference will be most appropriate 'where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union.'²⁶⁶ As to the Court, Jacobs proposed that:

"In some areas of Community law, where there is already an established body of case-law, (...) unless it were shown that a novel issue of principle was raised the Court would not consider the particular merits of such references; it would simply recall its existing case-law"

The suggestion presented in *Wiener* is that of a relaxation of the duty of the domestic highest courts to refer to the ECJ as established in *CILFIT*. National courts should then refer to the ECJ only questions appropriate as to the achievement of the objectives of Article 234 EC.²⁶⁷ In addition to the last considerations, it might seem that sometimes, had a national court more time and expertise at its disposal to consider an issue of EC law, a reference might have been found to be unnecessary.²⁶⁸ With a proper organization, so to say, the number of preliminary references could be reduced and the clarity of the references made improved.

A direct invitation to the relaxation of the *CILFIT* criteria has come, in *Lyckeskog* case²⁶⁹, directly from the Swedish court of appeal. The domestic court clearly considered itself able to resolve the questions of Community law raised before it even if the matter cannot be said to be *acte clair*.²⁷⁰ In this respect, also AG Tizzano advocated a functional, not literal approach to *CILFIT*:

"In my view, the Court is insisting not that the national court should always compare the various language versions of a provision but that it should bear in

²⁶⁴ Ibid., para. 10.

²⁶⁵ Ibid., paras. 13,14,15.

²⁶⁶ Ibid., para. 20.

²⁶⁷ Ibid., para. 64.

²⁶⁸ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing, page 66.

²⁶⁹ Case C-99/00, *Criminal proceedings against Kenny Roland Lyckeskog* [2002] ECR I-4839.

²⁷⁰ Ibid., paras. 20,21.

mind that the provision in question produces the same legal effects in all those versions so that, before assuming that an interpretation is correct, it must be sure that it is not doing so merely for reasons associated with the wording of the provision.²⁷¹

Nonetheless, concerns continue to persist on the ability of national courts to cope with matters of Community law by themselves. The Commission, as instance, has repeatedly rejected the idea of relaxing the obligation to refer imposed on the courts of last resort, observing ‘that the advantages of such flexibility are very slight and that there are real dangers for the uniform application of Community law’²⁷², especially after the enlargement.

All this said, a coherent proposal appears to be that of relaxing the *CILFIT* conditions as to make them corresponding to the language of Article 104(3) of the Court’s Rules of Procedure which enables the Court the possibility to dispose of a case by order. As the fast track procedure is used where a question may clearly be deduced by existing case law or where the answer admits no reasonable doubt²⁷³, the same criteria may be used to cushion the restrictions of *CILFIT*.

4.4 Does *CILFIT* influence *Foto-Frost?* *Schul* case and its issues

As seen in the previous chapters national courts are under a duty to submit reference for preliminary ruling on the validity of Community law, whereas retaining substantial discretion as to the referral of question of interpretation. The safety anchor provided by Article 234 paragraph 3, has been attacked by the doctrine of *acte clair*. Whenever the interpretation of a provision of Community law is clear and leave no room for any reasonable doubt as to the manner in which the question raised is to be resolved, national courts of last resort can avoid the resort to Article 234 EC and solve the matter ‘domestically’.

The judgment of the Court in *Schul*²⁷⁴ clarifies another important point as to when national courts must use the preliminary ruling procedure.

In *Schul*, a Dutch court was faced with a dispute which called into question a Commission regulation on sugar which resembles the exact formulation used in another Commission regulation on poultry meat. The reason for such likeness derived from the fact that both provisions concerned import duties to be levied on products and not the product themselves.

Notably, the Court, in its judgment in case *Kloosterboer Rotterdam*²⁷⁵, declared invalid relevant paragraphs of the Commission regulation in the

²⁷¹ Opinion of AG Tizzano in case C-99/00, *Lyckeskog* [2002] ECR I-4839, para. 75.

²⁷² Arnall, A., “The Past and the Future of the Preliminary Ruling Procedure” [2002] European Business Law Review, pp.183-191 at 187.

²⁷³ See § 3.6.1.

²⁷⁴ Case C-461/03, *Gaston Schul Douane-expediteur BV* [2005] NYR.

²⁷⁵ Case C-317/99, *Kloosterboer Rotterdam* [2001] ECR I-9863.

poultry meat and egg sector.²⁷⁶ The Dutch court had therefore the following question to submit to ECJ:

“Is a court or tribunal as referred to in the third paragraph of Article 234 EC also required under that provision to submit to the Court of Justice a question (...) concerning the validity of provisions of a regulation where the Court of Justice has ruled that analogous provisions of another, comparable regulation are invalid, or may it refrain from applying the first-mentioned provisions in view of the clear analogies between them and the provisions declared invalid?”

The question is *per se* perfectly logic. In other words, the domestic court asked the Court whether the guidelines established in *CILFIT* were to be applied in cases concerning the validity of Community law as relaxing the *Foto-Frost* doctrine.

The reaction of the Court of Justice is, nonetheless, predictable. Indeed the Court began its reasoning by recalling paragraph twenty of its judgment in *Foto-Frost* where it stated that ‘national courts have no jurisdiction themselves to determine that acts of Community institutions are invalid’.²⁷⁷

It then continued stating that the interpretation adopted in the *CILFIT* judgment, referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts²⁷⁸, thus rejecting in absolute terms the idea of any analogical extension of *acte clair* doctrine to questions of validity. The opinion of AG Colomer departs from the view of the Court. The Advocate General criticises in particular the way the ECJ attributed the exclusive jurisdiction on question of validity of EC law to itself by means of a ‘judicial acrobatic leap’.²⁷⁹ By maintaining the compel on the national court to refer the matter of Community law for preliminary ruling in the present case, notwithstanding the manifest nullity of the norm at issue, denotes an excessive formalistic rigour.²⁸⁰ Such rigour does not reflect the principle of good administration of justice to which the Court relies on. Notably, the judgment in *Foto-Frost* has not been transposed into law by the Community legislator, considering that it had several occasions, in particular the Treaties of Maastricht, Amsterdam, Nizza and the Constitutional Treaty. Such hush shall induce to reflect on the difficulties in accepting the way the Court has established its monopoly on the questions of validity.

The opposition of the Court is unsurprisingly firm but the idea introduced by the Dutch court introduces an interesting consideration in perspective of lightening the workload of the Court. In a nutshell, to what extent should the relaxation influence the mechanism formulated in Article 234 EC Treaty without depriving the preliminary reference of its very nature?

²⁷⁶ *Supra*, *Schul*, para. 9.

²⁷⁷ *Ibid.*, para. 17.

²⁷⁸ *Ibid.*, para. 19.

²⁷⁹ Opinion of AG Colomer in case C-461/03, *Gaston Schul Douane-expediteur BV* [2005] NYR, para. 81.

²⁸⁰ *Ibid.*, para. 88.

4.5 Preliminary Reference: seeking balance between demand and supply

4.5.1 Current situation

The future of the Preliminary Ruling procedure is cause of most of the anxieties manifested at the level of Community Courts. In particular, as has been introduced above, Advocate General Jacobs refers the necessity of a radical reform of the procedure if the present trend of increasing numbers of references persists.²⁸¹ The year was 2001 and the prediction for the increasing of references ex Article 234EC by the national courts were rather alarmists. This prediction was indeed supported by the number of references made in 1998 which increased of 85 per cent compared to the figures of 1992.²⁸² The main reasons justifying such astonishing growth is that, in the first place that the Union is enlarging. In addition, the scope and field of application of Union law is in expansion. These circumstances have caused in the 1990s an impressive increment of preliminary references.

How is the Court to be able to continue to function effectively in the light of both the substantial increasing of caseload since the adoption of the Treaty of Amsterdam and the enlargement of the EU area to the current twenty-five member states?

Indeed, according to the last statistics provided by the Court of Justice, so far the overall workload has not been subject significant fluctuations apart from the figures referring to the cases completed which have grown from 494 in 2003 to a remarkable 665 in 2004.²⁸³ As to the references for preliminary ruling, the number of procedures has in 2004 finally almost reached the quantum observed in year 2000, after four years characterised by a mild dip.²⁸⁴

Although, as the graphs at the end of this work show, the demand for preliminary references has not grown in the last years, further increases may be expected. The general trend is, however that of the number of cases introduced in the Court every year exceeds the number of cases dealt with. As a result, the average length of the proceedings continues to increase. The Judge of the Court of Justice Edward in 1999 went beyond the mere acknowledgment of the situation. He claimed that 'if the number of incoming cases rises disproportionately to the number of cases decided, delays can only get longer and, ultimately, the system will break down'.²⁸⁵

²⁸¹ Dashwood, A. & Johnston, A., as reported by AG Francis Jacobs in the chapter: *Introducing the Courts' Paper*, page 11.

²⁸² Tridimas, T., "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" [2003] CMLRev. Vol. 40, 9-50 at 16.

²⁸³ Statistics on the judicial activity of the Court of Justice as reported in the "2004 Annual Report" page 168 and 175. See also supplement A and B.

²⁸⁴ Ibid. The statistics report the number of references for preliminary ruling as follows: 268 in 2000; 182 in 2001; 241 in 2002, 233 in 2003; 262 in 2004. See Supplement A and B.

²⁸⁵ Edward, D., "The Preliminary Reference Procedure: Constraints and Remedies", (1999) CCBE/College of Europe Colloquium Bruges, Revisiting the European Union's Judicial System Assessing the Possible Solutions Revisiting the Preliminary Ruling Mechanism, page 16.

The system seems to resist so far, but a judicious captain knows when to flip course not to hit the shoal. Despite that, since the new enlargement of the Union in 2004, the relative quantum of references have not increased significantly is to be attributed to a certain time lag before the full weight of references from the new Member States will be felt.²⁸⁶

All in all the situation facing the Court at the present stage can be perfectly described by borrowing concepts derived from the economic experience. More precisely, Tridimas describes²⁸⁷ the preliminary ruling procedure as the supply of a service from the Court of Justice to the Member States. The demand is represented, instead, by the number of orders for reference issued by national courts. In this view, the solution for the optimal functioning of the preliminary mechanism is represented by the balancing of supply and demand. The drawn parallel has the undisputable advantage of presenting the general drift of the various solutions proposed in such a way they can be understood to affect either the demand or the supply of the service at stake.

4.5.2 Regionalization

The Court, as seen in *Schul*²⁸⁸, continues to consider the requirement of uniform application of Community law by national courts vital where the validity of Community act is in question. Any discussion that pertains regionalization cannot divert from the consideration of such fundamental requirement.

That of regionalization is *prima facie* a relatively new approach. However, a first discussion about regionalization has occurred already a decade ago on the occasion of a proposal to establish a system of regional Community Courts. That suggestion, in particular, considered a territorial partitioning of the jurisdiction of the Court of Justice on Community law to be attributed to a number of subordinate regional EC Courts whose decision is subject to review by the 'central' ECJ.

The proposal did not anyway meet the general consent of the doctrine, as it appeared to bring to a trend of supra-national diversification against the tide of the process of Europeanization of the Member States as one single Union.

The increasing workload caused by the enlargement of the Union and the expansion of matters of Community competence has yet brought part of the authors to reconsider the issue of regionalization among the possible solutions to sustain the effectiveness of the rulings of the Court of Justice and, especially, that of preliminary rulings. Nevertheless, the regionalized approach proposed in recent debates together with the relaxation of the criteria drawn by the ECJ in its judgment in *CILFIT*, operates in a rather different perspective than its precursor.

²⁸⁶ Lenaerts, K., "The Unity of European law and the Overload of the ECJ – the System of Preliminary Ruling Revisited", in: *The Future Of The European Judicial System. The Constitutional Role Of European Courts*, Berlin, 2. - 4. November 2005, page 3.

²⁸⁷ Tridimas, T., "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" [2003] CMLRev. Vol. 40, 9-50 at 16.

²⁸⁸ *Supra, Schul*.

It has been pointed out in the previous chapters, that the imbalance between the demand and the supply of preliminary rulings is likely to cause the collapse of the judicial system of the Union. In order to achieve such balance, regionalization is aimed at reduce the demand.

Many actors have progressively manifested the necessity of a change in the system of preliminary reference. Interestingly, also from the part of the Advocates General the line maintained as to the procedure under Article 234 EC has changed considerably in the past years. One for all, Jacobs, considers the future of European law to be inevitably undergoing a process of regionalization entailing the empowerment of national courts.²⁸⁹ Thus, in contrast with the precedent idea of regionalization, in this case the process would involve the domestic courts rather than the creation of supra-national Community courts.

Domestic highest courts express more and more insistently their proneness to accept more responsibilities in the field of Community law. It should not be ignored that, after all, many Judges of the Court of Justice happen to seat in their own national supreme courts and that they certainly bring to the respective domestic courts their 'Community experience'.

Regionalization would thus confer to national supreme courts a lower degree of constraint as to the duty to refer to the Court under Article 234 EC paragraph three. It would, nonetheless leave the discretion of the national court of lower instance intact so that their quota of orders for references would not vary.

Another aspect to be considered is that of the twofold jurisdiction provided for preliminary ruling under Article 234 EC, namely interpretation and validity. The relaxation of the *CILFIT* criteria does not encompass the automatic extension of the jurisdiction of national courts over question of validity. Indeed, to put it in business terms, as *Schul* proves, the question of relaxing the *Foto-Frost* doctrine is off the table.

Another important issue is represented by the considerations on effective judicial protection. As it has been pointed out above²⁹⁰, The Courts supports the idea that the Treaty has instituted a complete system of judicial remedies sufficient to grant effective judicial protection. How is the process of regionalization going to maintain such effectiveness? Assuming that no further changes would be brought about the mechanism to challenge the validity of Community acts, where *Jégo Quéré*²⁹¹ and *Regione Siciliana*²⁹² depict the current mild evolution, what is going to happen to judicial protection on question of interpretation?

As Wattel maintains, if the Court of Justice wants to keep up both *Köbler* and *CILFIT*, 'it must itself make very clear its new policies, the progression

²⁸⁹ See in this respect, Groussot, X., *The Role of the National Courts in the European Union: A Future Perspective*, 2005 SIEPS, page 84.

²⁹⁰ See § 2.2.2.

²⁹¹ Case C-263/02 P, *Commission of the European Communities v. Jégo-Quéré* [2004] ECR I-03425.

²⁹² Case T-60/03, *Regione Siciliana v. Commission* [2005] NYR.

in its views, and its regrets or abandonment of earlier cases'²⁹³ as it did with in *Keck*²⁹⁴ in the area of free movement of goods.

The difficulties of relaxing the *CILFIT* criteria can be summarised in this simple question: for which Estonian judge is it 'obvious' what his Portuguese or French colleague would consider 'obvious' or vice versa? Evidently, it is of fundamental importance to establish new guidelines containing as objective as possible criteria in order to leave little doubt as to whether a matter is obvious or not.

In this respect, the legislator would have to adjust the role of the Court of Justice, modifying once and for all the referral paradigm that has characterized the cooperation link so far into an appellate model proximal to that of the US supreme court. Not only, as *Keck* showed, the Court is meant to keep control upon the activity of the domestic courts of last resort by establishing the possibility to engage the Member States liability in the case where those courts commit a manifest breach of Community law by abusing the *acte clair* doctrine. Regionalization would thus require the creation of a final test to ascertain whether a breach of EC law is sufficiently serious or vice versa, if it is excusable with the consequence that judgment of national courts will be challengeable in front of the ECJ. In other words, the Court of Justice would have to extend *Francovich* to the judiciary despite its independence from the executive and sanction a Member State when its domestic court has failed to apply Community law in *bona fide* or *culpa gravis*.

Whether regionalization is a welcome solution or not depends, in last instance, on its efficacy reduce the workload of the Court and preserve the uniform enforcement of EU law.

4.5.3 Is the Union ready for regionalization?

Several critics can be listed as to the suitability of regionalization as possible solution for the workload of the ECJ.

Firstly, it has not been proved that a regionalized mechanism would automatically alleviate the burdens facing the European Court of Justice. Indeed, statistics report that, in the period from year 1960 to 2000, only 1173 rulings out of 4381 came from courts of last instance²⁹⁵, that is to say less than 27 per cent of the total. It follows that the mere relaxing of the *CILFIT* criteria on the one hand and the unaltered discretionary power to refer granted to the ordinary courts on the other hand do not represent a suitable solution, as the number of references to the Court of Justice would not sufficiently decrease. More over, if - as Tridimas comments - 'restricting the possibility of a reference to national courts of last instance would severely

²⁹³ Wattel, P. J., "Köbler, CILFIT and Welthgrove: We can't Go On Meeting Like This" [2004] CMLRev. Vol. 41, 177-190 at 179.

²⁹⁴ Joined case C-267/91 and C-268/91, *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.

²⁹⁵ Groussot, X., *The Role of the National Courts in the European Union: A Future Perspective*, 2005 SIEPS, page 84.

reduce access to justice and the immediacy of Community law²⁹⁶, all the more restrictions on domestic ordinary courts could be extremely unpopular where, in the context of regionalization, resulted in a even higher constraint to the access to justice.

Secondly, as Judge Edward pints out, ‘while it may be true that the final courts of the existing Member States are sufficiently familiar with Community law to be absolved of the obligation to refer, the same may not be true after enlargement’.²⁹⁷ It is worth noting that, in spite of the fact that some national courts which have been in the past regular user of preliminary references could undoubtedly be trusted to resolve questions of Community law by themselves, many other courts, primarily those belonging to the new Member States - with due respect to their commendable commitment – leave perplexities as to their familiarity with EC law.²⁹⁸ Indeed, none can predict the potential detrimental effects of the relaxation of *acte clair* to the uniform enforcement of Community law by those inexperienced courts. Unfortunately, enthusiasm does not suffice. It seems thus reasonable to assert that those courts should rely on the assistance provided by the Court of Justice in order to face this steep learning curve.

Thirdly, the conferral of a greater ‘range of action’ to national supreme courts - regardless of their experience in Community law – contrasts with the very reason that brought the Court to the adoption of the *CILFIT* criteria in the first place, namely the need to avoid the actual abuses of national courts as to the application of the *acte clair* doctrine.

Fourthly, the *acte clair* is, notably, still a jurisprudential exception. The wording of Article 234(3) EC does not contain exceptions and no amendment in this sense has been done in the Constitutional Treaty. In the absence of interventions of the legislator, such exception, as any other exception, should be interpreted strictly for the sake of legal certainty.

All in all the drawbacks of the system presented here lays not only on the approach of intervening solely – and scarcely - on the demand of preliminary rulings. The bulk of national judicial bodies is not yet ready to cope with the responsibility arising from a process of regionalization.

On these grounds it can be concluded that neither the relaxation of *acte clair* doctrine in yet a desirable choice, nor the relative proposal of regionalization is applicable in a near future.

²⁹⁶ Tridimas, T., “Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” [2003] CMLRev. Vol. 40, 9-50 at 17.

²⁹⁷ Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 182.

²⁹⁸ Arnall, A., “The Past and the Future of the Preliminary Ruling Procedure” [2002] European Business Law Review, pp.183-191 at 185.

5 Conclusions

5.1 Other proposed solutions

The acknowledgment of inadequacy of the proposed regionalization does not conclude the discussion on the problem of excess of case-load and the need to rebalance the demand for preliminary references with the current supply capacity of the ECJ. This issue is imposing itself in alarmist terms and, indeed, a solution is still necessary. Among various proposals, three deserve particular consideration in this last chapter.

The first is a measure that of limits the national courts empowered to refer a question of preliminary ruling to the ECJ. The two main options would be to reserve that power exclusively to the courts of last resort or that of excluding only the national courts of first instance.

The rationale underlying the Court's jurisprudence is the concern to make the preliminary ruling procedure available as widely as possible in order to ensure the highest possible grade of uniform interpretation of Community law. For this reason, it seems necessary for all national courts to retain the right to refer questions to the Court of Justice. In support to this it shall be bear in mind that 'a single reference made at an early stage by a lower court is surely more economical than creating a logjam of cases on the same point making their way up to the national court hierarchy until a reference can be made.'²⁹⁹ Uniform application of Community law frequently depends on a ruling on the interpretation of a question raised before a national court not having to wait the outcome of appeal proceedings.³⁰⁰

Another option would be that of reconsidering the definition of 'court or tribunal' pursuant to Article 234 EC Treaty.

As discussed in previous chapters³⁰¹, the wording of Article 234 EC is not specific as to the 'court or tribunal' empowered to make reference. The jurisprudence of the Court creates similar uncertainty as list or requirements laid down are very elastic and non-exhaustive. Ironically, by interpreting the notion of court or tribunal broadly, the Court actively contributes to the increase in demand for preliminary rulings. Among the Advocates General, Colomer suggests in his opinion in *Dorsch Consult*³⁰² a more restrictive definition of court or tribunal:

²⁹⁹ Edward, D., "The Preliminary Reference Procedure: Constraints and Remedies", (1999) CCBE/College of Europe Colloquium Bruges, Revisiting the European Union's Judicial System Assessing the Possible Solutions Revisiting the Preliminary Ruling Mechanism, page 6.

³⁰⁰ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing, page 135.

³⁰¹ In particular see § 3.4.2.

³⁰² Opinion of AG Colomer in case C54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961, paras. 85,86.

“a body that is part of the court system of a Member State which acts independently to decide a case, in accordance with legal criteria, in adversarial proceedings, always constitutes a court or a tribunal within the meaning of Article 234 EC.”

Thus bodies falling outside that definition would be excluded from making references except where ‘no further legal remedy can be pursued and provided that safeguards of independence and adversarial procedure are available’.³⁰³

A second proposal is that of introducing a filter system to enable the Court of Justice to choose which questions referred for preliminary ruling need to be answered according to criteria such as novelty, complexity and importance. The mechanism, as the regional system and that of limiting the national courts empowered to make references, aim to affect the demand for preliminary ruling.

The particularity of a filter system resides in the possibility to discard cases of lesser importance from the perspective of the uniformity of Community law. The application of such filter would incite national courts to choose selectively the questions to refer and thus encourage them to exercise their tasks as general courts of Community jurisdiction. The drawback of this system is represented by the potential impairing of the cooperation between national courts and the Court in Luxembourg. The cooperation is based on the assumption that the Court will answer any reference brought by courts or tribunals that fulfil the requirements of admissibility. The filtering system risks, hence, to be unpopular. In case a question is relevant and the factual and legal background are correctly assessed, a refusal by the ECJ could seriously put on the line the spirit of cooperation, which is a *condicio sine qua non* for the functioning of the procedure under Article 234 EC.

In order to mitigate such effect it would be necessary to introduce a system whereby a referring national court would be asked to include in its reference a proposed reply to the question addressed to the ECJ.³⁰⁴ Where the Court considers that the proposed solution is correctly assessed, it can simply reply in the terms indicated (green light procedure), increasing the cooperation with national courts and avoiding the detrimental impact of a reference being rejected for lack of interest.

The third proposal relates the actual conferral on the Court of First Instance (renamed ‘General Court’ in the Constitutional Treaty), of jurisdiction on certain matters in preliminary ruling proceedings. In this respect, the Nice agreement³⁰⁵ introduced an important amendment in the third paragraph of Article 225 EC:

The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

³⁰³ Ibid., para. 95.

³⁰⁴ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing, page 136.

³⁰⁵ See § 3.1.

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected."

The Article establishes a significant departure from the traditional approach under which preliminary rulings were exclusive jurisdiction of the ECJ. Despite some criticism, such change is considered by a majority of the authors and most of the Member States as a 'welcome development'³⁰⁶, above all from a functionalistic approach. At first sight, it can be noted that this particular proposal has bite for the increasing of supply of preliminary rulings rather than the curtailing of the demand.

As to the departure from the traditional exclusivity of the Court of Justice, criticism is in most of the cases unjustified. One may indeed recall that under Article 234 EC the ECJ acts as court of both first and last instance. The situation in itself may be deemed to be a violation of a fundamental principle of justice.³⁰⁷

In this respect, Tridimas notes that 'there is no reason why all references should be entrusted to a *single court* other than the need to ensure the coherence of jurisprudence and the uniformity of Community law'³⁰⁸, since the novel formulation of Article 225(3) EC addresses those needs.

In particular, under the second limb of the paragraph, the CFI can on his own initiative transfer a question brought before it to the Court for a ruling, whenever the question at issue is likely to affect the unity and consistency of Community law. More importantly, the ECJ will maintain control on preliminary rulings, since the decisions given by the Court of First Instance can be reviewed by the ECJ in case the unity and consistency of Community law is at risk and the CFI has not submitted the question to the Court by its own initiative.

Despite its revolutionary change, the Treaty of Nice contains only the embryo for a reallocation of jurisdiction between the Community courts. The Statute agreed at Nice does not yet define any areas in which the CFI will have preliminary rulings jurisdiction. However, the Council, acting unanimously, will be able to amend the relevant provisions.

The essential features of the review of the ECJ under Article 225(3) EC will also be defined in the Statute which will specify in particular³⁰⁹:

³⁰⁶ See, in particular, Tridimas, T., "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" [2003] CMLRev. Vol. 40, 9-50 at 20.

³⁰⁷ De Búrca G., & Weiler, J. H.H., *The European Court of Justice* [2001] Oxford University Press, page 220.

³⁰⁸ *Ibid.*, para. 21.

³⁰⁹ Arnall, A., "The Past and the Future of the Preliminary Ruling Procedure" [2002] European Business Law Review, pp.183-191 at 189.

- the role of the parties in proceedings before the Court of Justice, in order to safeguard their rights;
- the effect of the review procedure on the enforceability of the decision of the Court of First Instance;
- the effect of the Court of Justice decision on the dispute between the parties.

These last issues represent the actual Gordian knot of the transferral of preliminary rulings to the CFI. In particular, the mechanism of securing the oversights of the CFI in the exercise of its jurisdiction has raised perplexities as to the possible consequences for both the credibility of the Court of First Instance and the authority of its rulings. Accordingly, in case the exceptional review of the ECJ was to become actually frequent, the confidence of national judges in the CFI and their willingness to refer would be compromised.³¹⁰

Apart from considerations of pure credibility, there are also procedural issues to assess. As a matter of fact, if the decisions of the CFI were to be subject to the control of the Court of Justice, national courts would feel not free to apply the rulings until it has been decided whether the latter is to be reviewed or not which, in the most fortunate case, would prolong the pending national proceeding of one month.³¹¹ Moreover, what specific areas shall be subject to the jurisdiction of the Court of First Instance for preliminary ruling? Advocate General Jacobs considers the definition of those matters a not easy task, since most of the cases raise questions in different areas and ‘even when a reference appears to be confined to a particular topic, it may raise much more wide-ranging and fundamental problems’.³¹² In addition, Jacobs holds that the transfer of preliminary jurisdiction to the CFI in competition law or other matters in which the CFI acts as real first instance court would not work. The reason is that, in the latter case, the Court would only have exceptional jurisdiction to review preliminary rulings on matters in which it has full appeal jurisdiction – on the point of law – in relation to direct actions of the CFI. Thus, in order to preserve coherency to the overall system, it would be necessary to ensure parallelism between direct actions and preliminary rulings.³¹³

To conclude, it is worth recalling that the reactions of the judges of the Court of First Instance are not enthusiastic,³¹⁴ especially for what it concerns the reduction of delays which conversely would increase in case of necessity of appeal to the Court of Justice. The latter concerns, however, do not deprive this proposal of its qualities as to the achievement of reduction

³¹⁰ Ibid., page 190.

³¹¹ That is to say: until the First Advocate General has decided whether to propose the review to the Court of Justice or not. In fact, under Article 62 of the Statute agreed at Nice, it is for the First Advocate General to ascertain that the conditions set out in the third limb of Article 225(3) EC are met and thus that a review of the ECJ is required.

³¹² See Lenaerts, K., “The Unity of European law and the Overload of the ECJ – the System of Preliminary Ruling Revisited”, in *The Future Of The European Judicial System. The Constitutional Role Of European Courts*, Berlin, 2. - 4. November 2005, page 23.

³¹³ Ibid., page 25.

³¹⁴ Judge Pernilla Lindh in Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing at page 14.

of volume of preliminary rulings to the Court. Those benefits will appear more evident in the light of other procedural changes occurred to the Court's Rules of Procedure aimed at streamline the process of dealing with references from national courts.

5.2 The future of the ECJ

Three main changes have been introduced in the Rules of Procedure of the Court of Justice (here in after RPC). Firstly, Article 104a RPC enables references of exceptional urgency to be dealt according to a 'fast track' procedure. Such procedure derogates from the procedure normally applicable and reduced the period within which the written observation may be submitted from 2 months to 15 days.³¹⁵ Importantly, the Advocate General must be heard but a written opinion is not required.

A second change is introduced by Article 104(5) RPC where the Court may, after hearing the Advocate General, request clarifications³¹⁶ from the national court. This expedient aims at reducing the dismissal of inadequately explained references that, otherwise, normally are reformulated and sent back to the Court.

Thirdly, the third paragraph of Article 104 RPC, provides the Courts with the power to give its decision by reasoned order where the matter of the question referred to it admits no reasonable doubt. Notably, in precedence, this possibility was only permitted where the question referred 'is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law'.

These changes together with the amendment of Article 225(3) EC represent the solution adopted for curtailing the pressure on the Court of Justice from the increasing volume of preliminary rulings.

Concluding this discussion, it is worth considering that the Constitutional Treaty does not provide for significant changes to the preliminary ruling procedure.³¹⁷

Indeed, over the past fifteen years the Union has been involved in continuous Treaty reforms. This process could have possibly put in question the jurisdiction of the Court or parts of its case law. As Timmermans wittily considers:

"looking back today, and at the same time looking to the future, the 2003 Draft Constitutional Treaty, the Court has got through this process remarkably well."³¹⁸

As Tridimas points out, 'Article [I-29] CT formally recognises the emergence of a separate tier of Union Courts'.³¹⁹ The Article states that the

³¹⁵ Arnall, A., "The Past and the Future of the Preliminary Ruling Procedure" [2002] European Business Law Review, pp.183-191 at 188.

³¹⁶ E.g. see case C-235/03, *QDQ Media SA v. Alejandro Omedas Lecha* [2005] ECR I-1937.

³¹⁷ As repeatedly reported throughout this work. See § 2.2.2, 3.2.1, 4.4 and 4.5.3.

³¹⁸ Timmermans, C., "The European Union judicial system", CML Rev. Vol.41, No.2, April 2004, page 398.

Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. It immediately appears that the Court of First Instance has been renamed ‘General Court’ (in the draft ‘High Court’) and that the ‘judicial panels’ introduced by the amended Article 225 EC are in the Constitutional Treaty defined as ‘specialized courts’. The reason for such *maquillage* resides in the acknowledgement that the CFI does not always decide cases in first instance but in some cases act as final court.

The second limb of Art. I-29 CT introduces, as seen above³²⁰, the duty for national courts to provide sufficient remedies to ensure effective judicial protection. For the first time it has been explicitly mentioned in the Treaties.

While Article 220 EC and Article I-29 CT set out the essential role of the Court of Justice, those languages do not reflect the actual significance that the Court has as Institution. The ECJ effectiveness is based on the importance of law and legal order to the creation, functioning, cohesion and development of the Union³²¹. Such features are unlikely to change in the near future. The ECJ represents a measure of central control which is still vital in order to prevent “supra-national” law from fragmenting into a series of local variants.³²²

5.3 The new role of the National Courts

The initial choice of the Treaty framers was directed to cooperation between the Court of Justice and the national courts. The reasons, it is now evident, was the need to keep the national tier of judicature in foreground while, in a pure neo-functionalistic approach, using such cooperation at national level to enforce and develop Community law. In other words, considering the decentralized character of the judicial system of the Community, the ECJ has to rely on national courts for the enforcement of EC law in general and of its ruling in particular. Moreover, among all the mechanisms of control to which the Court is subject, the risk of a ‘rebellion’ by the national courts is the most powerful.³²³

In reality the initial partnership between the ECJ and the national judges has been gradually distorted by the ever more assertive attitude of the Court. Some author³²⁴ affirms that the cynical approach to the matter would consist in the acknowledgment that the term cooperation has run parallel to the

³¹⁹ Tridimas, T. & Nebbia, P., (eds.) *European Union Law for the Twenty-first Century*, [2004] Hart Publishing, pages 116-117.

³²⁰ In § 2.3.

³²¹ House of Lords, “The future role of the European Court of Justice. Report with evidence”, Sixth report of Session 2002-2003, Published by the Authority of the House of Lords, London: the Stationery Office Limited, para. 25.

³²² Anderson, D. & Demetriou, M., *References to the European Court*, Second Edition (2002) London Sweet & Maxwell, page 4.

³²³ Tridimas, T., “Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” [2003] CMLRev. Vol. 40, 9-50 at 37.

³²⁴ E.g. see de la Mare, T., “Article 177 and Legal Integration”, in: Craig, P. & De Búrca, G. (eds.), *The Evolution of EU Law* [1999] Oxford University Press, 215-260 at pages 227-228.

development of integrationist doctrines such as direct effect and supremacy of Community which have transformed cooperation in coordination.

The ‘rebellion’ of the national supreme courts has resulted in the recognition of a certain degree of autonomy by the Court of Justice. *CILFIT* testimonies of such a change. Discussions on the relaxation of those very criteria, albeit not yet applicable, will lead the national courts toward a new phase where the judicial system of the Union will have to be reconsidered. If and when the process of regionalization will occur, national courts of last resort will no longer be compelled to refer questions of interpretation of Community law, but ‘the Court of Justice will be called upon to deal with a small number of references on those questions made by the Council, the Commission and Member States’.³²⁵ In this view, considering the necessary process of maturation of the courts of the current new Member States together with further enlargements of the Union, it can be asserted that a proposal of regionalization will have to be reconsidered in twenty or thirty years. Indeed, it would have no sense to have a two or three-speed legal system of the Union in a moment where the Union already risks a two-speed economy.

5.4 Further considerations

Before concluding this study there is perhaps one last pawn to be added on the checkerboard. The 2005 Court’s guidelines on the references from national courts contain an interesting feature whereby:

“(…) the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.”³²⁶

Had the domestic highest courts the possibility to submit a reference with a suggestion as to the possible solution, the speed of the Court’s rulings would significantly increase and the national courts would have in return the attribution of more responsibilities in the field of EC law. Such possibility presents a two fold series of benefits. On the one hand it could be used as empirical study as to the degree of ‘maturity’ of the national courts with a view to a potential future regionalization. On the other hand, such relaxed system would most likely encounter positive reactions at the domestic tier contributing to the reestablishment of a degree of confidence at Community level.

In the nick of time, as second phase, the relaxation of *CILFIT* could take effect and the system could be completed by supply the Community with a more objective Köbler-type redress mechanism, paying due attention to maintain such safety measure as means of redress in case of serious

³²⁵ Dashwood, A. & Johnston, A., *The Future of the Judicial System of the European Union*, [2001] Oxford and Portland Oregon, Hart Publishing, page 50.

³²⁶ 2005 Note on References from National Courts for a Preliminary Ruling, OJ 2005, C143/01, at paragraph 23.

breaches rather than impose it as punishment for the national courts through their Member States.

A device to curtail the volume of preliminary rulings, must in my view, consider both measures to improve the supply capacity of the service and measures to reduce *cum grano salis*³²⁷ the demand by clarifying the outlines of self-restraint of national courts as auspicated by AG Jacobs.³²⁸

At the end of the day, the demand should not be reduced by imposing bars and legal constraints. Perhaps, considering the need for uniformity and immediacy of Community law after the enlargement of the Union and the expansion of Community competence in new areas, the demand for preliminary rulings should not be discouraged at all. The opening of the way for the CFI to acquire jurisdiction over preliminary references as affected by the Treaty of Nice is a welcome change. Despite of the fragmentation of the preliminary procedure, the safeguards introduced by Article 225(3) are fertile ground for the Court to maintain its unifying influence. The future of the Court and that of preliminary rulings after Nice will thus be that of preserving the integrity and coherence of the Community legal order in an era of constitutionalism pluralism and diversity.³²⁹

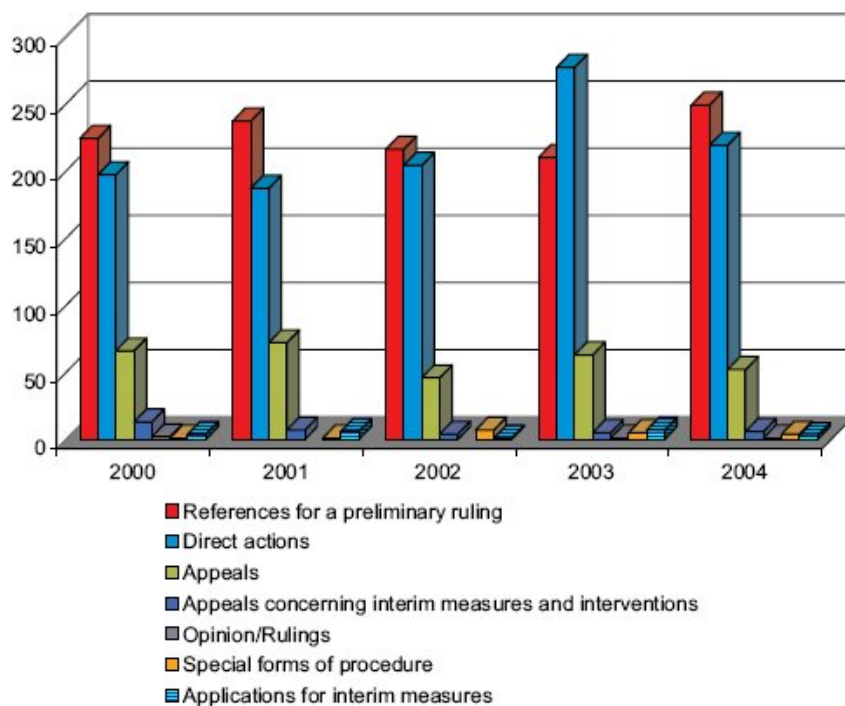
³²⁷ With due caution and consideration.

³²⁸ Opinion of AG Jacobs in case C-338/95, *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495, para18. See also § 3.6.2.

³²⁹ Tridimas, T., "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" [2003] CMLRev. Vol. 40, 9-50 at 46.

Supplement A

New cases Nature of the proceedings (2000-2004)¹



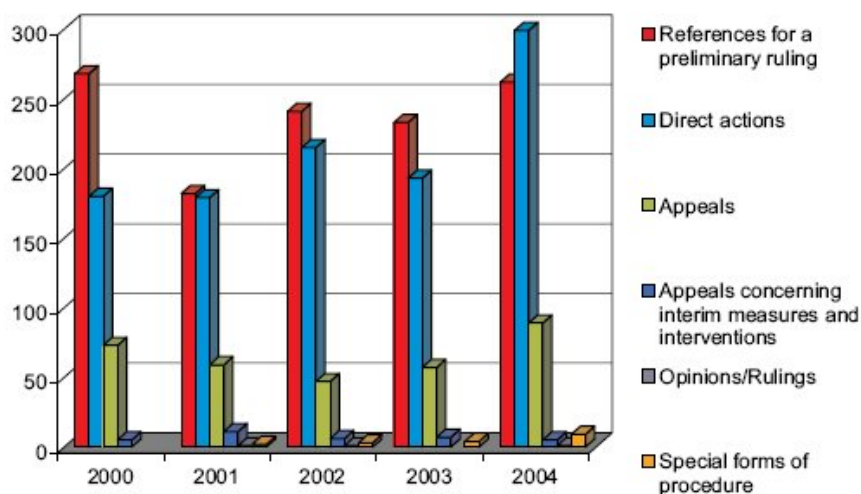
	2000	2001	2002	2003	2004
References for a preliminary ruling	224	237	216	210	249
Direct actions	197	187	204	277	219
Appeals	66	72	46	63	52
Appeals concerning interim measures and interventions	13	7	4	5	6
Opinion/Rulings	2			1	1
Special forms of procedure	1	1	7	5	4
Total	503	504	477	561	531
Applications for interim measures	4	6	1	7	3

¹ The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

Supplement B

Case completed

Nature of Proceedings (2000-2004)^{1 2}



	2000	2001	2002	2003	2004
References for a preliminary ruling	268	182	241	233	262
Direct actions	180	179	215	193	299
Appeals	73	59	47	57	89
Appeals concerning interim measures and interventions	5	11	6	7	5
Opinions/Rulings		1	1		1
Special forms of procedure		2	3	4	9
Total	526	434	513	494	665

¹ The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the grounds of similarity (one case number = one case).

² The following are considered to be 'special forms of procedure': taxation of costs (Article 74 of the Rules of Procedure); legal aid (Article 76 of the Rules of Procedure); application to set a judgment aside (Article 94 of the Rules of Procedure); third party proceedings (Article 97 of the Rules of Procedure); interpretation of a judgment (Article 102 of the Rules of Procedure); revision of a judgment (Article 98 of the Rules of Procedure); rectification of a judgment (Article 66 of the Rules of Procedure); attachment procedure (Protocol on Privileges and Immunities); cases concerning immunity (Protocol on Privileges and Immunities).

Supplement C

General trend in the work of the Court relating preliminary rulings and direct actions

New cases

Year	Direct actions	References for a preliminary ruling	Year	Direct actions	References for a preliminary ruling
1953	4		1979	1218	106
1954	10		1980	180	99
1955	9		1981	214	108
1956	11		1982	217	129
1957	19		1983	199	98
1958	43		1984	183	129
1959	47		1985	294	139
1960	23		1986	238	91
1961	25	1	1987	251	144
1962	30	5	1988	193	179
1963	99	6	1989	244	139
1964	49	6	1990	221	141
1965	55	7	1991	142	186
1966	30	1	1992	253	162
1967	14	23	1993	265	204
1968	24	9	1994	128	203
1969	60	17	1995	109	251
1970	47	32	1996	132	256
1971	59	37	1997	169	239
1972	42	40	1998	147	264
1973	131	61	1999	214	255
1974	63	39	2000	199	224
1975	62	69	2001	187	237
1976	52	75	2002	204	216
1977	74	84	2003	278	210
1978	147	123	2004	220	249
			Total	7528	5293

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