



FACULTY OF LAW
University of Lund

Andreas Norberg

Preliminary rulings and the co-
operation between national and
European Courts.

Master thesis

20 points

Supervisor Joakim Nergelius

European Community Law

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Purpose and delimitation of the Study	6
1.2 Methodological considerations and out-line	6
1.3 Material	7
2 CHARACTERISTICS OF ARTICLE 234	9
2.1 Purpose of Preliminary rulings	9
2.2 Dialogue and co-operation	11
2.2.1 <i>Dialogue between courts</i>	11
2.2.2 <i>Divided jurisdiction</i>	12
2.2.3 <i>Different functions: interpretation and application</i>	12
2.2.4 <i>The alternative: hierarchy</i>	13
2.2.5 <i>Co-operation and the obligation to refer</i>	14
2.3 Importance of Preliminary rulings	15
2.3.1 <i>Development of Community law</i>	15
2.3.2 <i>Judicial politics</i>	16
2.3.3 <i>Protection of individuals</i>	17
2.4 Contemporary problems with the preliminary ruling system	18
3 COMMUNITY LAW PERSPECTIVE	21
3.1 Scope and Effect of article 234	21
3.1.1 <i>Courts and tribunals entitled to refer</i>	21
3.1.2 <i>Provisions of Community Law</i>	21
3.1.3 <i>Jurisdiction through renvoi</i>	22
3.1.4 <i>Raising the question</i>	23

3.1.5	<i>Decision necessary for Judgement</i>	24
3.1.6	<i>Right to refuse to give a preliminary ruling</i>	24
3.1.7	<i>Effects of preliminary rulings</i>	25
3.2	Obligations to refer	26
3.2.1	<i>Obligation under article 10</i>	26
3.2.2	<i>Obligation to refer questions of validity</i>	27
3.2.3	<i>General on the obligation under 234(3)</i>	28
3.2.4	<i>Courts of last Instance</i>	28
3.2.4.1	The Abstract Theory	29
3.2.4.2	The Concrete Theory	29
3.2.4.3	Swedish Courts – Lyckeskog	29
3.3	Exception from obligation to refer	31
3.3.1	<i>Exception I: Acte éclairé</i>	31
3.3.1.1	Da Costa – limited acte éclairé	31
3.3.1.2	CILFIT – extended acte éclairé	32
3.3.2	<i>Exception II: Acte clair</i>	33
3.3.2.1	Origin of the acte clair doctrine	33
3.3.2.2	Acte Clair in CILFIT	35
3.3.3	<i>Exception III: Necessary reference for solving the case</i>	36
3.3.4	<i>Exception IV: Interlocutory proceedings</i>	37
3.4	Extention of the exceptions? – challenges to CILFIT	38
3.4.1	<i>The Due report on reforms of article 234</i>	38
3.4.2	<i>The challenge from inside the Court</i>	40
3.4.3	<i>The challenge in the Lyckeskog-case</i>	41
3.4.4	<i>CILFIT: still going strong</i>	42
3.5	Consequences of failure to refer	43
3.5.1	<i>Infringement procedure</i>	44
3.5.1.1	Initial approach by the Commission	44
3.5.1.2	Recent approach	45

3.5.1.3	Concluding comments on article 226	49
3.5.2	<i>State liability</i>	51
3.5.2.1	Köbler	51
3.5.2.2	Köbler in relation to res judicata	54
3.6	Preliminary conclusions	55
4	THE SWEDISH APPROACH	58
4.1	References from Sweden	58
4.2	Swedish cases – early cases	59
4.2.1	<i>Volvo</i>	59
4.2.1.1	HD’s judgement	59
4.2.1.2	Analysis	60
4.2.1.3	Prelude before the Chancellor of Justice	61
4.2.2	<i>Barsebäck</i>	62
4.2.2.1	Environmental impact assessment	63
4.2.2.2	Competition law	67
4.2.2.3	Concluding remarks on Barsebäck	69
4.2.3	<i>Ramsbro</i>	71
4.2.3.1	Facts of the case and HD’s reasoning	71
4.2.3.2	Analysis	73
4.2.4	<i>Axfood</i>	74
4.2.4.1	Regeringsrätten’s judgement	74
4.2.4.2	Analysis	75
4.3	Recent Swedish case-law	76
4.3.1	<i>Wermdö Krog</i>	77
4.3.1.1	Regeringsrätten’s judgement	77
4.3.1.2	Analysis	78
4.3.2	<i>Overseas Betting et al</i>	80
4.3.3	<i>SAS v Luftfartsverket</i>	81
4.3.3.1	The facts of the case and Hovrätten’s reasoning	81

4.3.3.2	The appeal to HD	82
4.3.3.3	Analysis	82
4.3.4	<i>Boliden</i>	84
4.3.4.1	The facts of the case and HD's reasoning	84
4.3.4.2	Analysis of the intra-community trade criterion	85
4.3.4.3	Analysis of "jurisdiction through renvoi"	86
4.3.5	<i>Gränsövargen</i>	88
4.3.6	<i>Vägverket</i>	89
4.3.6.1	The intermediate judgement	90
4.3.6.2	Analysis	91
4.4	Concluding remarks on Swedish courts	92
5	CONCLUSIONS	94
	SUPPLEMENT	97
	BIBLIOGRAPHY	98
	TABLE OF CASES	105

Summary

The topic of this thesis is the preliminary ruling institution found in article 234 EC and especially the obligation of national courts of last instance to refer questions to the Court of Justice in paragraph three of this article. This institution is based on a co-operation between the ECJ and national courts giving each of the two types of courts their own tasks and responsibilities. More specifically the study seeks to evaluate recent developments in the case-law from both the ECJ and the Swedish courts of last instance from the perspective of this co-operative approach.

The co-operative approach entails a mutual respect for the other type of court's function and a focus on dialogue as a driving force in the development of Community law through preliminary rulings. This institute has been very important for the evolution of Community law. However current problems, notably the delays caused by the increased case-load of the ECJ, have led to the questioning of the institution's future.

The questioning of the present system has mainly focused on the *CILFIT* ruling in which the ECJ defined the limits of the exceptions to the obligation to refer questions of community law in article 234(3). The *CILFIT* judgement gives a strict interpretation to the most important of the four recognised exceptions to the obligation, the *acte clair* doctrine. Despite this criticism the ECJ has recently upheld the *CILFIT* ruling and the obligation for national courts of last instance must therefore be evaluated according to this ruling.

Importantly, there has been a development of the consequences of a failure to refer, which has taken two different forms. Firstly, I argue that the Commission has started to go further in its infringement proceedings based on actions by the national judiciaries, including a proceeding against Sweden. The Court has ruled in favour of the Commission in one of these cases, but has been cautious in its approach and showed a great respect for the independence of the judiciary, arguably to sustain the co-operative relationship between itself and the national courts.

Secondly, the Court has ruled in the *Köbler*-case that a non-referral can hold the Member State liable according to the principle of state liability. However, the Court has also in this area taken a cautious approach by applying stricter criteria for when state liability can be invoked in cases where the claim is based on actions by the judiciary. Therefore, my conclusion is that even if this recent development strengthens the position of the ECJ vis-à-vis national courts, the principle of co-operation is still guiding the Court. This increased possibility of control could in my opinion possibly be a first step towards giving national courts more responsibility in applying EC law.

By looking at statistics which show the number of references coming from Sweden and the attitude taken by Swedish courts of last instance in early cases, one can conclude that there is an apparent reluctance and in some cases even a refusal to send questions to the ECJ. When analysing cases from 2004, all of which have been considered by Bernitz to be possible infringements of the obligation to refer, it is apparent that the reluctance is still present. However, my conclusion is that in only one of these cases studied is it clear that the Swedish court was in breach of Community law by not referring a question. Given the strict criteria for state liability, it is, however, uncertain if even this, in my opinion rather obvious disregard of Community law can lead to a claim of liability.

In the Commission's infringement proceeding against Sweden, the Commission only refers to one case as constituting proof of a breach of the obligation to refer by Swedish courts. Interestingly, my conclusion is that this case in fact hardly can be seen as constituting a breach of the obligation.

In its traditional form, the co-operative relationship only includes the courts with no role for individuals. However, with the developments in *Köbler* and the reluctance of national courts to refer questions, the importance of the individual party as an active participant has increased. This seen in relation to development in other areas of EC law may indicate a changing character of the Community judicial system.

Preface

During the autumn semester 2000 I wrote my first University essay. The topic was the legal aspects of Sweden's relationship with the European Union. Now, ten semesters and many credits later, I have finished my second master thesis. The topic is the legal aspects of Sweden's relationship with the European Union.

One possible conclusion to draw from this could be that I have known what I wanted to do all along. Another possible conclusion is that this is a sign I have not developed at all during these five years.

Many of the friends, with whom I have discussed the post-student life with, can affirm that the former is not correct. However, I have to say thank you to all of you for making the present moment and these last five years in Lund, Montreal, South Africa, France and Belgium overshadow both the past and the future.

I would also like to thank the many motivating Professors and teachers who I have met during these last five years and whose influence on me allows me to think that the latter conclusion can be proved wrong as well. Here Professor Barbara Haskels at McGill University and Faculty involved in the Master of European Affairs Program in Lund, especially Professor Ole Elgström, supervisor of my Master thesis in political science, have to be mentioned.

Of course a very special thanks has to be directed to my supervisor during the development of this thesis, Professor Joakim Nergelius, and to jur. dr. Xavier Groussot for discussing my thesis plans with me.

Andreas Norberg,

Bruxelles 1st of October 2005

Abbreviations

AG	Advocate General
CFI	Court of First Instance
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
EIA	Environmental Impact Assessment
EC	European Community Treaty
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ELR	European Law Review
ERT	Europarättslig Tidskrift
EU	European Union
EuR	Europa Recht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
HD	Högsta Domstolen (the Supreme Court)
IGC	Intergovernmental Conference
IO	International Organizations
JK	Justitiekanslern
JT	Juridisktidskrift
MD	Marknadsdomstolen (the Market Court)
MEP	Member of the European Parliament
NFT	Nordisk Försäkringstidskrift
RB	Rättegångsbalken (the Swedish Procedural Code)
RP	Rules of Procedure of the Court of Justice
RTD eur	Revue Trimestrelle de Droit européen
SvJT	Svensk Juristtidning
The Court	European Court of Justice
YBEL	Yearbook of European Law

1 Introduction

“The intention in creating a federal tribunal was to deprive the state courts of the right to decide, each in its own way, questions of national interest, and in that manner to form a uniform body of jurisprudence interpreting the laws of the Union. That aim would not have been achieved if the courts of the particular states, while abstaining from judging cases as federal, had been able to judge them by pretending that they were not federal.”¹

In this way Tocqueville, writing about the United States in 1833 after his journey in North America undertaken to find a solution to the political problems of France after a failed attempt to unify Europe by force, summarised the problem of this thesis. In the *sui generis* legal system of the European Union, like in other more federal constructions like the American, several legal systems have to interact. This creates the problem of ensuring a uniform application of the law all over the Union. The hierarchical federal solution that Tocqueville found in the United States with the Supreme Court at the top was in his opinion “the most dangerous blow dealt against the sovereignty of the states.”²

This is probably one reason why a different solution was chosen in Europe. This solution is instead based on co-operation and dialogue. The co-operative solution includes that national courts, through the preliminary ruling system laid down in article 234 EC, ask questions of common interest, to the Community court who then gives an authoritative interpretation without any hierarchical structure being imposed. Instead of hierarchy, the model depends on all courts to fulfil their obligations, while they must remain within their proper role in the co-operation.

However, it is often held that the Court of Justice in Luxembourg has ambitions to become a Supreme Court like the American one, which would be to reject the co-operative model.³ Moreover, national courts, especially those of last instance and not least Swedish ones, are often blamed for not referring questions to the court. In fact, as I write, the Commission is in the middle of an infringement procedure against Sweden where the alleged breach of the Treaty consists of not having the proper legislation in place to ensure that courts of last instance fulfil their part of the co-operation.⁴

¹ Tocqueville Alexis de, “Democracy in America Vol. 1”, 2000, p 142.

² Ibid.

³ E.g Komárek Jan, “Federal Elements in the Community Judicial System: Building Coherence in the Community legal Order” 23 CMLRev (2005) pp 9-34 [hereinafter Komárek].

⁴ See ”Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG” Letter from the Commission in infringement proceeding number 2003/2161, dated 2004-10-19.

1.1 Purpose and delimitation of the Study

The purpose of the study is to evaluate how the co-operation between the European and Swedish courts works in practice regarding the obligation to make preliminary references. It is my intention to mainly focus my study on the recent developments within this field. Therefore, much attention is given to recent case-law from both the ECJ and Swedish courts and its implications on and conformity with the co-operative relationship between the national and Community judiciary. A secondary aim of this thesis is to give a presentation, in English, of some of the important Swedish cases, to readers without direct access to these cases.

Even if the co-operative relationship between courts affects a large number of areas, my thesis is limited to one aspect of article 234, namely the obligation to refer questions under the third paragraph of the article. I will therefore not consider other forms of preliminary references. Nor will I discuss in detail reform proposals to article 234. Many issues outside the direct scope of this thesis are, however, touched upon only to the extent that this obligation is affected. Moreover, my study is limited to one Member State, Sweden.

1.2 Methodological considerations and out-line

The purpose of this thesis demands that somewhat different approaches are used in the different sections of the thesis. To be able to view the relevant developments from a co-operative approach, I will commence by describing the fundamental nature of the preliminary ruling institute. Furthermore, chapter 2, where this is done, is intended as an introduction to the institution of preliminary rulings as such. The co-operative relationship and purpose of the preliminary rulings are described through looking at some of the most important cases from the ECJ.

The picture of co-operation arising from this could be criticised as being orthodox and only touching on later developments challenging this relationship. These recent developments are, however, only of indirect interest for the obligation to refer. From this description of co-operation in general, I formulate the meaning of co-operation in the specific field of this study. This can be seen as a hypothesis, which I then in the two subsequent chapters will test.

The purpose of chapter 3 on the Community law perspective is three-fold. First, there is a need to give a more general presentation of the meaning of article 234 (section 3.1). Secondly, to be able to evaluate Swedish case-law from the perspective of co-operation and the obligation to refer under article 234(3), it is important to know exactly how far this obligation goes (3.2-3.3). The method used for this is mainly a legal dogmatic analysis of the Court's jurisprudence. The chapter then continues by discussing some

recent developments. To draw the consequences from this, the same method is used in analysing the meaning of these rulings. In order to reach conclusions on the effects of this development on the co-operative relationship, I also use a more critical approach.

Turning in chapter 4 to the Swedish courts of last instance, I there analyse selected cases from these courts from the perspective of a Community law obligation to refer questions according to the findings in chapter 3. The choice to analyse a number of specific cases instead of a quantitative study was made on two grounds. Firstly, such quantitative studies have been conducted in a considerable number, even from a Swedish perspective (see section 4.1). Secondly, such studies do not show the reasoning of the national courts with regards to an obligation to refer, but can only indicate a tendency. Instead, I wish to critically evaluate the reasoning of the Swedish courts.

Critically evaluating case-law from the highest courts can be considered an ambitious project for a Master thesis, especially in a country where at least one judge on such a court prefers not hearing criticism even from immensely more qualified scholars than the author of this thesis.⁵ However, in doing this evaluation I try to place myself outside the Swedish system, assessing it from the point of view of a co-operative relationship with the ECJ. Since the obligation to refer is found in Community law, the analysis logically has to be made from this separate legal system. This “outsider” perspective opens up for a critical evaluation also of the case-law of a court that is supreme in the domestic system. Schooled within the Swedish legal discourse and socialised into this, I most often see the reasoning of the Swedish courts as both sound and coherent in its domestic context. In trying to transcend this system and evaluating the same cases from the perspective of Community obligations this is, however, not necessarily the case.

1.3 Material

Almost all sections of this thesis are based on both primary material, mostly case-law, and secondary material consistent mainly of legal academic works. I have considered it important to make frequent use of and refer to primary sources to facilitate for the interested reader, which has contributed to the length of the thesis. So has the wish to take different opinions, especially critical ones, in the doctrine into account; as well as the choice to quote primary material originally in Swedish through my own English translations and give the original in footnotes.

The most important issue to discuss regarding the material is the choice of Swedish cases. Like all research, mine builds on previous works also in this regard. The first four cases analysed are important cases, which often

⁵ See Lind Johan “Rättsfallsanalyser – recension eller analys” 7 JT (1995/96) pp 232-240, p 240.

appears in overviews of the relationship between Swedish and European courts. The following cases can be said to represent the most recent approach by Swedish courts. I have chosen to conduct detailed studies of the cases mentioned by Bernitz as indicating the continued reluctance towards references by Swedish courts.⁶ The study is thus conducted from the perspective that these are the recent cases where a co-operative conduct is least likely to be found. The alternative would be to look at all cases where Community law is touched upon. This would demand a large survey of cases, which has not been possible given the general limitations of a Master thesis, or to look at cases where a preliminary reference was made, which, however, would not test the co-operative mode of the Swedish courts.

⁶ See Bernitz, "Kommissionen ingriper mot Svenska sinstansers obenägenhet att begära förhandsavgörande" in ERT (2003), pp 109-116, p 111. [hereinafter Bernitz, "Kommissionen ingriper..."].

2 Characteristics of article 234

The predecessor of today's preliminary ruling system was found in article 41 of the ECSC Treaty from 1952. This rarely used article gave the Court an exclusive right to declare acts within its scope of jurisdiction invalid. When the same model of references was later introduced in the EEC-treaty, two important changes were made: the Court was given jurisdiction over interpretation of Community legislation; but it was not to have sole jurisdiction.⁷

Article 234 EC, former article 177, has only been amended once over the years and after the Maastricht Treaty entered into force in 1993, extending the Courts jurisdiction to acts of the ECB the article reads:

- “The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
- a) the interpretation of this Treaty;
 - b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
 - c) 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 same system with references from national courts has also been used in a number of other Treaties and Conventions, including the Euratom Treaty, and the Brussels, Lugano, Rome and Community Patent Conventions.

Today there even exist two other and limited forms of preliminary rulings within the Union's legal framework, but outside the scope of this thesis. Article 68 EC stipulates that preliminary rulings in relation to Title IV of the EC Treaty on visa, asylum, immigration and other policies related to the movement of persons can only be sought by courts of last instance. Article 35 TEU contains provisions for an optional preliminary ruling system regarding Community law on Police and Judicial Co-operation in criminal matters.

2.1 Purpose of Preliminary rulings

The Court has in *Rheinmühlen* stated its view on the purpose of the preliminary ruling system. Firstly it held that:

⁷ Anderson and Demetriou “References to the European Court, 2002, pp 7-10 [hereinafter Anderson and Demetriou].

“Article 177 is essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all states of the community.”⁸

The main purpose is thus to ensure the uniform interpretation of Community law. This aim of uniform interpretation has also been expressed by a negative formulation: “to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law”.⁹ This formulation seems to be more focused on keeping national judiciaries within the limits of Community law than the positive formulation in *Rheinmühlen*, which could be interpreted as giving more emphasis to the importance of ensuring equality of law for all union citizens than on the relationship between courts.¹⁰

Secondly, preliminary references are available to help the national courts by:

“[...] making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving community law its full effect within the framework of the judicial systems of the member states.”¹¹

Additional to the general purposes and objectives of article 234 the Court has specified the purpose of the obligation to refer under the third paragraph of the article. It held in *Gomes Valente* that:

“According to case-law that is well established, 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...”¹²

Naturally, the object of helping national courts with discretion to refer is not as important in the case of mandatory references. Since the Court often gives Community law a teleological interpretation, i.e. taking a provision’s purpose into account, these objectives are of direct importance.

⁸ C-166/73 *Rheinmühlen Düsseldorf / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR p 33 at 2 [hereinafter *Rheinmühlen*].

⁹ C-283/81 *Srl CILFIT v. Ministry of Health* [1982] ECR p 3415 at 7. References to the AG’s opinion in *CILFIT* are made to CMLR [1983] p 472 [hereinafter *CILFIT*].

¹⁰ For a similar interpretation in relation to the *CILFIT* case see Bebr Gerhard, “The Rambling Ghost of “Cohn-Bendit”: *Acte Clair* and the Court of Justice” 20 *CMLRev* (1983), pp 439-472, p 461. [hereinafter Bebr, “Cohn-Bendit”].

¹¹ *Ibid* at 2.

¹² C-393/98 *Ministerion Publico and António Gomes Valente* [2001] ECR I-1327, at 17 with references to further cases.

2.2 Dialogue and co-operation

The Court has often repeated that it is not superior to national courts, but rather regards the preliminary rulings as a co-operation between equal actors within separate jurisdictions. In *Schwarze* it was argued by France, intervening in the case, that the Court could not rule on validity when the question referred to it concerned interpretation. The Court held that:

“[such strict formal requirement] would be inappropriate to the special field of judicial cooperation under article 177 which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.”¹³

This idea of co-operation is important for the understanding of the nature of the preliminary rulings and the relationship to national courts. According to Rasmussen, the Court’s choice to promote this co-operative approach, rather than the alternative of a hierarchical structure, was based on the possibility of convincing national courts to accept this model.¹⁴ Indeed, even in a case, which more than any other symbolises the struggle for judicial supremacy in Europe, the Brunner-case, the Bundesverfassungsgericht chose to define its relationship with the Court of Justice as one of co-operation.¹⁵ A functioning co-operation could thus be the guiding principle to avoid clashes between national and Community Courts. Here I will look at what this co-operation means for preliminary rulings and the obligation to refer.

2.2.1 Dialogue between courts

The preliminary ruling procedure is often described as a direct dialogue between the courts.¹⁶ The basic structure is that a national court asks a question, the ECJ responds to this and thereafter the national court will use this answer in rendering the final verdict. The response by the Court is binding on the national court, which has not meant that the national courts have always loyally applied them correctly.¹⁷ The co-operative approach does not necessarily mean that the two courts must agree. If the national court finds the response unclear or unsatisfactory, it can ask for a new

¹³ C-16/65 *Schwarze / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR p. 1081.

¹⁴ Rasmussen Hjalte “European Court of Justice”, 1998, pp 131-133 [hereinafter Rasmussen “ECJ”].

¹⁵ “The Brunner-case” Case 2 BvR 2134/92 & 2159/92, p 175. Published in English in 69 CMLR (1994) 57, at 13.

¹⁶ E.g. Timmermas Christiaan, “The European Union’s Judicial System” 41 CMLRev (2004) pp 393-405, p 399 [hereinafter Timmermas].

¹⁷ See e.g. Judgement from Verwaltungsgericht Frankfurt/Main II/2 E 288/69. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1972] 11 CMLR 195 and NJA 1996 s 668, *Data-Delecta* from the Swedish Supreme Court.

preliminary ruling.¹⁸ National courts can in this manner protest within the co-operative structure. Tridimas mentions, as an example of this, Greek courts making references regarding questions of Community Company law leading to a changed attitude of the Court. The national courts thus played by the rules of co-operation and won the discussion with the ECJ.¹⁹ It could be claimed that Hovrätten in *Lyckeskog*, discussed below, tried to do the same thing with regard to the *acte clair* doctrine by, in effect, asking if this doctrine did still apply.²⁰

Important to remember is that the preliminary ruling is a dialogue between courts, where the parties before the national court are only “participants”.²¹ In *CILFIT*, the Court held that article 234 does not constitute a means of redress for individuals and that it is thus for the national court to decide whether or not to refer.²² A national court is even free to make a reference contrary to the wishes of the parties.²³

2.2.2 Divided jurisdiction

Already in the first preliminary ruling, *Bosch*, the Court held that national and European law “constitute two separate and distinct legal orders”.²⁴ Therefore, the Court did not consider itself competent to evaluate *why* the national court deemed it necessary to refer a question, since the Court’s role was simply to respond. In a subsequent case, *Foglia*, this has been described as a duty of the Court 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”²⁵. In a series of cases, including *Foglia*, the Court has extended the reasons for not giving a ruling and thereby enhanced its control over which cases to rule on.²⁶ (See also section 3.1.5.)

2.2.3 Different functions: interpretation and application

In the co-operation the courts have different roles and thus have to keep within their respective competence. The ECJ has explained its view of this separation of competences as follows:

¹⁸ Wiklund Ola “EG-domstolens tolkningsutrymme”, 1997, p 255 [hereinafter Wiklund].

¹⁹ Tridimas Takis “Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling System” 40 CMLRev (2003) pp 9-50, pp 39-41 [hereinafter Tridimas, “Knocking...”].

²⁰ See C-99/00 Criminal proceedings against Kenny Lyckeskog [2002] ECR p I-4839 [hereinafter Lyckeskog].

²¹ Wiklund p 255.

²² *CILFIT* at 9.

²³ Case 126/80, *Salonia v. Poidomani and Giglio*, [1981] ECR 1563, at 7.

²⁴ See C-13/61 *De Geus en Uitdenbogerd v Bosch and others* [1962] ECR p 89.

²⁵ C-104/79 *Foglia v Novello* [1980] ECR p 745 [hereinafter *Foglia*] at 11.

²⁶ See generally Barnard C and Sharpston E, “The Changing Face of Article 177 References” 34 CMLRev (1997) p 1113-1171 [hereinafter Barnard and Sharpston].

“Article 177 is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of Justice on the other, and it does not give the court [of justice, *my comment*] jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference.”²⁷

This division of labour is based on the dualistic view taken in *Bosch*, meaning that the Court of Justice does not have jurisdiction to rule on any question concerning the facts of the case. The Court has, however, held that it needs some information about the facts in order to give a ruling.²⁸ It has been held that it is indeed a part of the co-operation that the Court gives helpful rulings that directly relates to the case at hand, rather than in an abstract manner.²⁹ In theory this separation may seem clear, but the application of it has sometimes been questioned. It has been argued that the Court in a number of areas give very concrete rulings specific to the facts.³⁰ One author argues that this can have the adverse effect of infantilising national courts, so that they do not learn to work with Community law to the same extent as they would if they had been given a chance to apply it more frequently.³¹ I will return to this separation later on, since the question whether an interpretation is needed or not is crucial for deciding whether a reference should be made or not. My opinion is however, that the more accustomed national courts become to their role as community courts and the more interpretations by the Court they have to apply, the easier it must be to argue that a question can be solved without a new interpretation.

Furthermore, the Community law according to the Court “does not grant Community organs [including the Court itself, *my comment*] the authority to annul legislative or administrative acts of a Member State”.³² However, it is argued that, instead of directly reviewing a specific national law, the Court pronounces its opinion on the compatibility of a certain type of legislation with Community law and lets national courts take the final step of applying this guidance to the specific law in question.³³

2.2.4 The alternative: hierarchy

Instead of the horizontal co-operative system, the wording of article 234 could, according to Rasmussen, have been the foundation of a vertical

²⁷ C-5/77 *Tedeschi v Denkavit* [1977] ECR p 1555 at 17.

²⁸ See C-320-322/90 *Telemarsicabruzzo SpA v Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa* [1993] ECR p I-393 at 6-10.

²⁹ Schermers and Waelbroeck, “Judicial Protection in the European Communities, 1992, p 396 [hereinafter Schermers and Waelbroeck].

³⁰ Davies Gareth “*The Division of Powers between the European Court of Justice and National Courts*” Constitutional Web-papers, ConWEB No. 3/2004 available at <<http://les1.man.ac.uk/conweb/>> [hereinafter, Davies “The Division...”] and Rasmussen “ECJ”, p 151.

³¹ Davies “The Division...” pp 17-19.

³² C-6/60 *Jean-E Humblet v Belgian State* [1960] ECR 559.

³³ Mancini, “The Making of a Constitution for Europe” 26 *CMLRev*, pp 595-614 (1989) p 606 [hereinafter Mancini].

hierarchical structure.³⁴ Many of the features of such a system could be described by a superficial comparison with the US Supreme Court.³⁵ This court controls itself how many and which cases to take on. This has been suggested also for the Court of Justice, but so far rejected by the Member States.³⁶ Already the introduction of some criteria for controlling the incoming preliminary rulings has been criticised as changing the face of the co-operative system within the Community.³⁷

Secondly, the Supreme Court rules on the facts, with jurisdiction to give judgement on all aspects of the case. Thirdly, the American system is an appellate system, where the parties are allowed to appeal the judgements of their state's courts. This puts more focus on the parties and puts the Supreme Court in a position of reviewing the judgement of the lower court unknown to the Community system.³⁸

2.2.5 Co-operation and the obligation to refer

It has frequently been held that the Court in its case-law is now rejecting the co-operative model, by introducing features of a more hierarchical system like a modest docket control. When assessing the recent changes in relation to the obligation to make preliminary references from the perspective of a co-operative relationship, which features should we look for? The co-operation model is based on mutual trust, respect and confidence in the other court. Therefore, a court should neither do more, nor less, than its role in the co-operation prescribes.

For national courts, this means that they refer cases that they are obliged to refer according to the Treaty and the ECJ's authoritative interpretation thereof. In a system where the national courts did not do so, parties would be forced, where possible, to try other ways to obtain an authoritative ruling in their case.

For the Court of Justice, co-operation means that it bases its relation towards the national courts on confidence. In a co-operative system, they would not force national courts to make references. Furthermore, the Court should not review the judgements of national courts as in the hierarchical system. Considering the mutuality of a co-operative approach, these two features must to some extent be qualified to apply only when national courts fulfil their part of the co-operative relationship.

³⁴ Rasmussen "ECJ", pp 131-133.

³⁵ For a general presentation of the Supreme Court see Bogdan, "Komperativ rättskunskap", 2003, pp 131-138.

³⁶ See Craig Paul and de Búrca Gráinne, "EU Law", 2003, p 473- 479 [hereinafter Craig and de Búrca].

³⁷ Barnard and Sharpston.

³⁸ See Bogdan, "Komperativ rättskunskap", 2003, pp 131-138.

2.3 Importance of Preliminary rulings

The system of preliminary rulings has been considered to be “by far the most important aspect of the judicial system of the Community”³⁹ I will here point to three aspects of this importance, the development of Community law, the political power of the Court and what this means for individuals.

2.3.1 Development of Community law

It is mainly in preliminary rulings that the Court has been given the possibility to develop some of the fundamental principles of Community law and construct what is sometimes referred to as a “Constitution of Europe”.⁴⁰ Such rulings have defined e.g. indirect effect, the duty of Member State to ensure effective protection of Community law rights and state liability for breach of Community law. Furthermore, the four freedoms, equality between men and women and most of the general principles of Community law have been developed through preliminary rulings.⁴¹ I will in this part comment shortly on two of the most important developments and their relationship to preliminary rulings.

One of the most famous of the Courts judgements is *Van Gend en Loos*, given as a preliminary ruling. In this case the Court described the Community as constituting

“a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”⁴²

According to the Court it therefore followed from the wording, spirit and general scheme of the Treaty that it could produce direct effect and rights for individuals which national courts must protect.⁴³ The exact nature of the direct effect of Community law is still debated.⁴⁴ However, as Pescatore early on pointed out, it “boils down to a question of justiciability”, i.e. whether a provision is to be taken into account by national judges.⁴⁵

³⁹ Jacobs and Durand “References to the European Court”, 1975, p iii. Quoted by Anderson and Demetriou, p 24.

⁴⁰ See e.g. Mancini, p 595

⁴¹ See Anderson and Demetriou, p 24-25 with references to relevant case-law.

⁴² C-26/62 NV Algemene Transport – en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration der Belastingen [1963] ECR I [hereinafter van Gend en Loos].

⁴³ Ibid.

⁴⁴ E.g. Craig and de Búrca, p 179-182 giving one broad and one more narrow interpretation of direct effect.

⁴⁵ Pescatore, “The Doctrine of ‘Direct Effect’: An Infant Disease of Community Law” 8 ELR, (1983) pp 155-177, p 176.

Through direct effect national courts became guardians of Community law. As seen above, the preliminary reference system is a tool to help these courts fulfil this role in a satisfactory manner. Moreover, the Court in its reasoning in *Van Gend en Loos* took the very existence of article 234 as an indication that direct effect was intended. The argument was that if the intention of the founding Members was not that individuals would be able to invoke the Treaty before national courts, article 234 would be meaningless.⁴⁶

As a sequence to *Van Gend en Loos*, the Court in *Costa v ENEL* developed the principle of supremacy. The case reached the Court as a preliminary reference from a lower Italian Court regarding an unpaid electricity bill. The Court took this possibility to create the principle of supremacy:

“the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”⁴⁷

This is a sequel of the direct effect ruling, since it is only when no intermediary national law is needed that the question of supremacy will arise.⁴⁸ Furthermore, if one accepts Community rules to be efficient in fulfilling their aims, they have to be interpreted to mean the same thing throughout the Community. These interpretations made by the ECJ must all have supremacy over national laws.

My understanding of the relationship between the preliminary reference system and these two fundamental constitutional principles is thus that the direct effect is based on the link between the Court of Justice and the national courts given by article 234. Moreover, the preliminary ruling system would not have been used nearly as much if Community law did not have direct effect. If Community law was not given supremacy, it would not be able to be uniform. Therefore the purpose of article 234 to ensure uniformity is dependent also on supremacy, which in itself depends on direct effect. The justifications of both these fundamental principles are therefore close to the purpose of article 234 as pronounced by the Court and the mutual dependence of the preliminary rulings and the two principles is obvious.

2.3.2 Judicial politics

This is not the place for an exhaustive review of accounts of the preliminary ruling from a more political or power-oriented perspective. However, I would like to point to some important ideas from the growing literature on this topic.

⁴⁶ See *Van Gend en Loos*. The same argumentation was later used to create direct effect of Directives, see *C-41/74 Van Duyn v Home Office* [1974] ECR p 1337 at 12.

⁴⁷ *C-6/64 Flaminio Costa / E.N.E.L.* [1964] ECR p. 1141.

⁴⁸ *C.f. Mancini*, p 600.

According to Alter, the doctrines of direct effect and supremacy, making national courts more involved in Community law, created a power base for the Court. The fact that it was the national and not the international court that took the final decision according to the co-operative approach, made a huge difference since politicians are more reluctant to disregard their own judiciary. By the support of national courts, which generally accepted the basic principles of Community law, the cost for politicians to supervene Community law rose.⁴⁹ National governments were forced into the domestic legal arena, which “imposes different rules of discourse.”⁵⁰

For Weiler, a first possible explanation of why national courts at large became allies to the ECJ and accepted the fundamental constitutional principles was that the latter gained legitimacy through its coherent legal reasoning and the fact that its members were well-respected lawyers from the national legal systems. Secondly, when national courts saw that courts in other member states started to rely on the ECJ, they endorsed the same idea of European integration as their counterparts. Finally, the co-operation with the Court meant, not least for lower courts, a judicial empowerment for both parts. Their interaction with Luxembourg gave many of the European lower courts a *de facto* judicial review power not enjoyed before. Supremacy and direct effect binding national governments lead to a strengthening of the judicial branch of Europe. Article 234 ensured that, at least lower, national courts did not feel that this empowerment of the Court was at their expense.⁵¹

2.3.3 Protection of individuals

As seen above, rights derived under Community law are according to the Court directly given to individuals within the Community.⁵² All individual rights lose their practical meaning if they are not given adequate protection. The role of article 234 to ensure individuals an effective remedy against breaches of their rights must be seen in relation to other procedural provisions of Community law. Regarding article 230, the Court through its case-law has limited the access for individuals to judicial review of

⁴⁹ Alter Karen “Who Are the “Masters of the Treaty”?: European Governments and the European Court of Justice” 52 IO (1998) pp 121-147, p 133.

⁵⁰ Weiler J.H.H. “A Quiet Revolution – The European Court of Justice and Its Interlocutors” 26 Comparative Political Studies (1994) pp 510-534, p 519.

⁵¹ Weiler J.H.H. “The Constitution of Europe”, 1999, p 33. For similar arguments based on an more institutionalist approach see Alter Karen, “The European Court’s Political Power” 19 West European Politics (1996) pp 458-487 and for a neo-functionalist approach see Burley Anne-Marie and Mattli Walter, “Europe Before the Court” 47 IO (1993) pp 58-64

⁵² This approach can, however, be challenged by a more sovereignty focused argument, holding that individuals derive their rights from national legislation referring to Community law by emphasizing the Public International Law roots of the Community. Such an approach would give the responsibility to protect individual rights to the Member States and not the Community. I will not discuss which of the two theories are correct but base my reasoning in this part on the Court’s ruling in Van Gend en Loos. On the two approaches see Zetterquist, Ola., “A Europe of the Member States or of the Citizens?”, Lund, 2002.

Community acts using this provision by imposing strict rules on *locus standi*.⁵³ Therefore, article 234 has in fact become the primary road to Luxembourg for individuals to protect their rights against Community measures.

Preliminary references, together with the principle of supremacy, also become an important feature in the protection of individuals against national measures infringing their Community law rights. Even if national legislation is outside the jurisdiction of the ECJ, it can decide whether a specific rule has direct effect and if a specific situation shall be considered to be in breach thereof. By specifying its judgements, the Court leaves little room for national courts not to follow its *de facto* judicial review when deciding which are the consequences of this in the individual case.⁵⁴

Another way of ensuring individual rights can be to complain to the Commission and take a matter to court through an infringement procedure. As the Commission itself has held, this is not the most efficient way to find a remedy⁵⁵ and the Commission has a great discretion regarding which cases of alleged infringement to proceed with.⁵⁶ The preliminary references have thus developed to be an important part of the protection of individual rights through judicial review of Community provisions through validity related questions and of national legislation through detailed rulings on the interpretation of Community law.⁵⁷

2.4 Contemporary problems with the preliminary ruling system

The preliminary ruling system has often been considered a tremendous success for the Communities legal system. However, according to Weiler, the paradox of this success is that in it "lie the roots of a future danger".⁵⁸ According to Toth, there are three main categories of problems with the current system. These are the increased workload of the Court, the problem of remedying breaches against the obligation to refer and problems relating

⁵³ See generally Ward Angela "Judicial Review and the Rights of Private Parties in EC Law", 2000, pp 202-249 [hereinafter Ward].

⁵⁴ Andersson Torbjörn "Rättskyddsprincipen", 1997, p 281.

⁵⁵ See Commission, "European Governance – A White Paper" COM (2001) 428 final.

⁵⁶ See generally Ibáñez, Alberto, 1998. "A Deeper insight into Article 169" Jean Monnet Working Papers 1998:11. New York University School of Law. Available online: <<http://www.jeanmonnetprogram.org/papers/papers98.html>>[hereinafter Ibáñez].

⁵⁷ C.f. Briem's recent LLM thesis on the how well the preliminary ruling system manages to protect individual rights. Briem Hildur, "The preliminary ruling procedure as part of a 'complete system of remedies': does the obligation to seek a preliminary ruling ensure effective judicial protection of individuals?", 2005.

⁵⁸ Weiler J.H.H. "The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC" in "Article 177 EEC: Experiences and Problems" Schermers et al (eds.), 1987, p 368 [hereinafter Weiler, The Paradox of Success].

to the actual proceedings.⁵⁹ Of these I will here only discuss the most notorious problem – the increased caseload facing the Court.

The number of references brought before the Court of Justice has increased drastically over the years – from 10 cases in 1954; 55 in 1964; 102 in 1974; 312 in 1984; 344 in 1994 to 531 in 2004.⁶⁰ Preliminary rulings constituted 45% of the cases completed by the ECJ between 2000-2004.⁶¹ Moreover, the increased number of rulings is likely to continue, given the enlargement of the Union and expansion of the scope of Community law.⁶² This leads to a number of problems including, according to Weiler, the risk of lower quality of the rulings and a risk of dilution of the normative effect of the rulings when the Court deals more with details than overseeing the development of Community law in a smaller number of important cases.⁶³ Normative dilution or not, the problem of an increased caseload is seen more directly in the time it takes for the Court to give a ruling. Between 1986 and 1999 the time to give a preliminary ruling increased from 15.5 to 23.5 months.⁶⁴

In a case regarding an alleged breach of the right to a fair trial in article 6 of the ECHR, the ECtHR had to rule on whether this right had been infringed by Greece where national proceedings was still pending after eleven years. This delay was inter alia due to a reference to the Court of Justice prolonging the case by two years and seven months. The ECtHR, however, did not consider that it could take this time into consideration, because in doing so it would challenge the system of preliminary rulings and the purpose thereof.⁶⁵ Even if the ECtHR understandably refrained from challenging the ECJ and gave its green light to the delays, the case points to the gravity of the problem for individuals, re-emphasising Gladstone's words "justice delayed is justice denied".

A number of proposals to reform the preliminary ruling system have been presented in order to solve this problem. I shall not discuss these here, but they include calls to give the Court greater "docket-control" to decide which

⁵⁹ Toth, "Observations on Certain Problems Involved in the Application of Article 177 EEC" in "Article 177 EEC: Experiences and Problems" Schermers et al (eds.), 1987, pp 394-400.

⁶⁰ Brown and Kennedy, "The Court of Justice of the European Communities", 2000, p 420 [hereinafter Brown and Kennedy] and the European Court of Justice "Annual report 2004" p 167 available online at <<http://curia.eu.int/en/instit/presentationfr/index.htm> 20050709> [hereinafter "Annual report 2004"].

⁶¹ See "Annual report 2004" p 168.

⁶² See Turner, Cathrine and Muñoz Rodolphe "Revising the Judicial Architecture of the European Union" 19 YBEL (1999) pp 1-93 discussing the problem thoroughly.

⁶³ Weiler "The Paradox of Success" pp 368-369.

⁶⁴ Brown and Kennedy, p 423 and "Annual report 2004" p 174.

⁶⁵ ECtHR-judgement in Pafitis and others v Greece, judgement given 26 February 1998 see Tridimas, "Knocking" pp 16-17.

cases to take on, greater responsibility for national courts to give its opinion on Community law and a greater role for the CFI.⁶⁶

⁶⁶ For a discussion see Dashwood Alan and Johnston Angus, “The Future of the Judicial System of the European Union”, 2001, pp 62-70 [hereinafter Dashwood and Johnston] and Rasmussen Hjalte, “Remedying the Crumbling EC Judicial System 37 CMLRev (2000), pp 1071-1112 [hereinafter Rasmussen “Remedying...”].

3 Community law perspective

In this chapter I will first shortly more generally comment on how the Court has interpreted article 234. This more general picture given in section 3.1 is focused on all national courts, not only those of last instance. Then I will give an overview of the obligation to refer questions to the Court, before giving a more detailed analysis of the obligation based on the third paragraph of the article and the most recent developments in relation to this.

3.1 Scope and Effect of article 234

3.1.1 Courts and tribunals entitled to refer

“[A]ny court or tribunal of a Member State” has jurisdiction to refer a question to the Court. The question whether a specific body is a “court or tribunal”⁶⁷ under Community law is not directly dependent on its status under national law, since this is a Community concept.⁶⁸ The Court has in its interpretation of the article developed a number of criteria important in determining a body’s status as a court or tribunal.⁶⁹ In one of the leading cases, *Dorsch Consult*, the Court stated that these included factors

“such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.”⁷⁰

Most importantly, the application of the criteria has led to the conclusion that an arbitral court can generally not make a reference under article 234.⁷¹ Of Swedish interest is for example that the Skatterättsnämnden in *Victoria Film* did not fall under the scope of the article, since it did not decide a dispute but rather expressed a view.⁷²

3.1.2 Provisions of Community Law

For a national court to be able to make a preliminary reference, the question has to relate to a provision of Community law falling under one of the categories in article 234(1). It is clear from article 234(1)a that the Court

⁶⁷ Considering that this distinction is specific to the English translation of the Treaty i.e. the other language versions speak only of “domstol” (Swedish), “Gericht” (German), “Jurisdiction” (French), the distinction must be without legal importance. In this thesis I, therefore, use courts referring to both “courts and tribunals”.

⁶⁸ See C-246/80 *Broekmeulen v. Huisarts Registratie Commissie*, [1981] ECR 2311 at 11

⁶⁹ For a discussion of the different conditions see generally Anderson and Demetriou, pp 31-46.

⁷⁰ C-54/96 *Dorsch Consult* [1997] ECR I-4961 at 23 with further references.

⁷¹ See C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG* [1982] ECR 1095.

⁷² C-134/97 *Victoria Film* [1998] ECR p I-7023.

may give rulings on the interpretation of the Treaty itself. Additional to the original EC Treaty, this provision also covers all Treaties amending or supplementing it and its protocols. Through specific provisions, Merger- and Accession Treaties can also fall under article 234(1)a.⁷³

Secondly, acts of the institutions of the Community and the ECB may be both interpreted and reviewed with regard to validity under article 234(2)b. The different types of acts that the Council, Commission and Parliament may make use of are according to article 249 EC regulations, directives, decisions, recommendations and opinions. Of these, only the first three types have binding force and they naturally fall within the scope of article 234(1)b. The Court has, however, held that it has jurisdiction to give preliminary rulings also regarding recommendations and opinions, since they can both have legal effects.⁷⁴ The Court has jurisdiction to review legislation also through direct actions under article 230 EC. In interpreting this latter provision, the Court has found that it has jurisdiction to review not only the types of acts referred to in article 249 EC but also *sui generis* acts, given that they produce legal effects.⁷⁵ Since references on validity have the same effect as a proceeding under article 230 EC it is, according to Anderson and Demetriou, likely that such *sui generis* acts fall within the scope of article 234(b).⁷⁶ Even if the meaning of Article 234(c) is somewhat unclear, I will not discuss this rarely used provision here.⁷⁷

3.1.3 Jurisdiction through renvoi

As seen from the wording of article 234, the Court does not have jurisdiction to interpret national legislation. In a series of cases the Court has been asked to interpret the meaning of Community law, when the conflict from which the questions arose took place within the context of national law, with the Community provisions transposed to national law or the national law referring to the Community provision. In *Dzodzi*, where the Court had been asked to interpret a Community law provision which Belgian law made reference to, the Court held that:

“it does not appear either from the wording of Article 177 or from the aim 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 case where the national law of a Member State

⁷³ Anderson and Demetriou, p 58.

⁷⁴ See inter alia C-113/75 *Frescassetti v. Amministrazione delle Finanze dello Stato*, [1976] ECR 983.

⁷⁵ See C-22/70 *Commission v. Council (the ERTA-case)* [1971] ECR 263 and C-327/91 *France v. Commission* [1994] ECR I-3641.

⁷⁶ Anderson and Demetriou, p 63-64.

⁷⁷ For a discussion see Hartley, 1998, “The Foundations of European Community Law”, 262-265 [hereinafter Hartley “Foundations”].

refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State.”⁷⁸

The Court continued by holding that this was in fact important in order to ensure a uniform interpretation of Community law and that it was for the national court, not the Court of Justice, to look at the circumstances under which the national court is obliged to apply Community law.⁷⁹ This line of reasoning has later been followed in a number of cases.⁸⁰

In *Kleinwort Benson* the Court, however, refused to give a ruling. The circumstances were such that the national act was not a complete reproduction of the relevant provision and the national court would according to it not have been obligated to follow the interpretation by the ECJ.⁸¹ Given subsequent rulings by the Court, the conclusion in *Kleinwort Benson* must, however, be considered to be limited to situations where the Community provision has been adapted to fit the national context.⁸² The reasoning by the Court has been criticised and it is still unclear how far this jurisdiction reaches.⁸³

3.1.4 Raising the question

A reference can be made when a question of Community law is “raised” in the proceedings before the national court. A question can be raised either by the parties or *ex officio* by the national court.⁸⁴ The ECJ in *Peterbroeck* held that a provision of national law that hinders a national court from raising a question of Community Law might be contrary to the Treaty. The Court, however, emphasised the circumstances of the case and especially highlighted that the Belgian Cour d’Appel was the first and only Court able to make a reference and that the national time-limit for raising the question had elapsed before this court held its hearing.⁸⁵

⁷⁸ Joint cases C-297/88 and C-197/89, *Massam Dzodzi v. Belgian State* [1990] ECR I-3763 at 36.

⁷⁹ *Ibid.* at 37 and 39.

⁸⁰ See for example C-28/95 *Leur-Bloem v. Inspecteur der Belastingdienst / Ondernemingen Amsterdam* [1997] ECR I-4161 [hereinafter *Leur-Bloem*] with a further reference to the “Dzodzi line of cases” in para. 27.

⁸¹ C-346/93 *Kleinwort Benson v. City of Glasgow District Council* [1995] ECR I-615 at 19 and 24 [hereinafter *Kleinwort Benson*].

⁸² C.f. Arnall, Dashwood, Ross and Wyatt, “Wyatt & Dashwood’s European Union Law”, p 267 [hereinafter *Wyatt & Dashwood*].

⁸³ For a discussion of the issue in general see Barnard and Sharpston, pp 1128-1133; Kaleda, Saulius Lukas “Extension of the preliminary rulings procedure outside the scope of Community law: ‘The Dzodzi line of cases’”, *European Integration online Papers (EIoP)* Vol. 4 (2000) N° 11; <<http://eiop.or.at/eiop/texte/2000-011a.htm>> [hereinafter *Kaleda*] and; Anderson and Demetriou, pp 69-73. For a critic of the Courts approach see AG Jacobs’ opinion in *Leur-Bloem* at 67-75 and Rasmussen, “Remedying...”, p 1083 holding the Court’s interpretation of article 234 to be “erroneous”.

⁸⁴ See C-126/80 *Saloma v. Poidomani* [1981] ECR 1563 at 7.

⁸⁵ C-312/93 *Peterbroeck v. Belgium* [1995] ECR I-4705 at 17-21.

In another case the Court held that a domestic duty to raise points of law *ex officio* due to public interest requires the national court to raise points of Community law to the same extent as comparable national rules. However, a court is not required to move beyond a passive role ascribed to it in civil suits where the parties through their pleadings define the conflict.⁸⁶ On the other hand, a national court must not consider a question to be raised only because a point of Community law has been raised by one of the parties. It has been held that a national court can refuse a reference when it considers “no *arguable point* of Community law to have been raised.”⁸⁷

3.1.5 Decision necessary for Judgement

A decision to the question referred has to be considered necessary by the national court. It can be discussed if the decision necessary for the judgement has to come from the ECJ or from the national court. The first interpretation would mean that references were admissible only when a preliminary ruling was necessary, i.e. when the national court did not consider itself capable of deciding.⁸⁸ If, on the other hand, it suffice that a decision on the point is needed from the national court in order to give a judgement, this would give a greater discretion to national courts to refer more questions. The Court supported this latter interpretation in *Rheinmühlen* and in subsequent cases.⁸⁹ As Anderson and Demetriou point out, this latter interpretation is more in line with the broad liberty given to national courts not falling under article 234(3) to refer questions. The ECJ moreover has never held a question to be inadmissible on the ground that the national court would be able to decide the referred question on its own, according to Anderson and Demetriou.⁹⁰

3.1.6 Right to refuse to give a preliminary ruling

According to rumours, the first preliminary ruling sent to Luxembourg was celebrated with champagne⁹¹ and the Court’s willingness to take on cases has been noted in the literature.⁹² However, more lately the Court has shown a greater willingness to gain control over which cases to rule on and admissibility has been declined in some cases. According to Barnard and Sharpston, these cases can be divided into three categories.⁹³ The first category consists of cases where the Court considers that it does not have

⁸⁶ C-430/93 Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705 at 15 and 22.

⁸⁷ Anderson and Demetriou, 2002, p 87, italics added.

⁸⁸ This interpretation can find supported by the Court in C-446/98 Fazenda Publica v. Camara Municipal do Porto [2000] ECR I-11435 at 48.

⁸⁹ See *Rheinmühlen* and C-261/95 Palmisani v. INPS [1997] ECR I-4025.

⁹⁰ Anderson and Demetriou, pp 90-91.

⁹¹ Barnard and Sharpston, p 1117.

⁹² E.g. Craig and de Búrca, pp 457-460.

⁹³ Barnard and Sharpston, p 1127.

jurisdiction under the Treaty.⁹⁴ The second group of cases constitutes a closer control of whether or not the conditions in article 234 are fulfilled, including that a case is “pending” before the referring court and that this is actually a “court or tribunal”.⁹⁵ A third group consists of cases where the Court seems to more closely scrutinise the nature of the national conflict and reason for the referral.⁹⁶ In these cases the Court has refused to give a ruling where the issue at hand was hypothetical or the referred question did not have any connection to the dispute before the national court;⁹⁷ where the Court feels that it has not been provided with sufficient information to rule on the matter⁹⁸ or when there is no “genuine dispute” before the national court.⁹⁹

The most important of these categories is undoubtedly the third, which indicates a departure from the court’s initial attitude. This new willingness to control its jurisdiction has even led voices in the doctrine to speak about a changed face of the preliminary rulings system and an emerging docket control system.¹⁰⁰

3.1.7 Effects of preliminary rulings

It was early on established that preliminary rulings are binding on the national court hearing the case in which the ruling is given.¹⁰¹ Given the division of roles between the two kinds of courts, this means that the referring court cannot base its decision on any other interpretation of Community law than the one given by the ECJ.¹⁰²

More controversial has been the question whether other national courts are bound by a ruling. Regarding rulings on validity, the Court has held that a national court has a choice either to accept the previous ruling or make a

⁹⁴ See e.g. C-167/94 Criminal proceedings against Grau Gormis and others [1995] ECR p I-1023; C-307/95 Max Mara v Ufficio del registro di Reggio Emilia [1995] ECR p I-5083; however compare with the Dzodzi line of cases described above at 3.1.3.

⁹⁵ See Barnard and Sharpston p 1133; C-338/85 Pandini v Ministero del commercio con l’estero [1988] ECR 2041 and C-24/94 Corbiau v Administration des Contributons [1993] ECR p I-1277.

⁹⁶ Barnard and Sharpston, p 1135.

⁹⁷ See C-83/91 Meilicke v ADV-ORGA [1992] ECR p I-4871.

⁹⁸ See Joint cases C-320-322/90 Telemarsicabruzzo and others v Circostel and others [1993] ECR p I-393.

⁹⁹ See Foglia at 11.

¹⁰⁰ C.f. Barnard and Sharpston and Rasmussen Hjalte “Docket Control Mechanisms, the EC Court and the Preliminary References Procedure” in “Article 177 References to the European Court – Policy and Practice” Andenas (ed) pp 83-103.

¹⁰¹ C-29/68 Milchkontor v. Hauptzollamt Saarbrücken [1969] ECR 165.

¹⁰² See C 52/76 Luigi Benedetti v Munari F.lli s.a.s. [1977] ECR 163 at 26.

new referral.¹⁰³ Without stating that the ruling has effect for other courts, this in effect gives them an *erga omnes* effect.¹⁰⁴

The question whether the rulings on interpretation should have the same effect or not touches on one of the main issues of this thesis and will be discussed more thoroughly below (section 3.3.1). Suffice to say at this stage that it has been the Court's opinion that other courts can rely on its interpretation of Community law in future cases.¹⁰⁵ Important is also that since 1991, according to article 104(3) of the Court's Rules of Procedure, the ECJ is entitled to refrain from giving a preliminary ruling and instead give its decision by form of a reasoned order pointing the national court in the right direction. This is the case when a question is "identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt"¹⁰⁶. This expeditious procedure was used in 10% of the preliminary rulings cases in 2001; 5% in 2002 and 7% in 2003.¹⁰⁷ The Court can also choose to contact the national court and draw its attention to the previous rulings and ask whether they still wish to obtain a preliminary ruling. This often leads to the withdrawal of the reference and an acceptance of an earlier ruling.¹⁰⁸

3.2 Obligations to refer

All national courts in the Member States are covered by article 234(2) and *may* thus refer a question to the Court. This discretion is sometimes replaced by a duty to refer. In this section I will shortly out-line different possible grounds for the duty to refer before turning to the main question of this thesis, the more specific obligation under article 234(3).

3.2.1 Obligation under article 10

It has in the doctrine been held that there exists a duty to refer certain questions to the ECJ based on the principle of loyalty enshrined in article 10 of the Treaty. Article 10 puts a duty on national courts to do what it can to ensure the clarification and uniform application of Community law. This duty would, according to Temple Lang, arise when a lower national court is faced with a question of Community law that has been answered in different manners by higher national courts in the own State or in other Member

¹⁰³ See C-66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato [1981] ECR 1191 at 13-14.

¹⁰⁴ See Craig and de Búrca, p 444.

¹⁰⁵ Anderson and Demetriou p 335-336.

¹⁰⁶ Article 104(3) of the Court's Rules of Procedure.

¹⁰⁷ Timmermas, p 402.

¹⁰⁸ Brown and Kennedy, p 233.

States. Moreover, the duty would arise when the lower court itself comes to a different conclusion than a superior court in any Member State.¹⁰⁹

3.2.2 Obligation to refer questions of validity

The Court has jurisdiction to rule on both the interpretation and validity of acts of the institutions of the Community, according to article 234(1)(b). Regarding validity, the Court has in *Foto-Frost* held that national courts cannot find such an act invalid themselves.¹¹⁰ The justification of this is that the Court has been given sole jurisdiction to declare an act void under article 230 and that the primary purpose of article 234, to ensure a uniform application of EC law, would be threatened if national courts were allowed to consider a Community act invalid.¹¹¹ If this *de facto* should be seen as an obligation to refer a question of validity and when this duty would arise has been much discussed.¹¹² AG Mancini's opinion in *Foto-Frost* was that a national court must refer a question when in doubt about its validity.¹¹³ Even if the Court did not pronounce its opinion regarding an obligation to refer, it held that the national court may reject argumentation about invalidity if it considers the grounds put forward for this as unfounded and therefore concludes that the measure is valid.¹¹⁴ National courts therefore do not have an obligation to refer every time a question on validity is raised, for example when it finds that the arguments before it are unfounded. Anderson and Demetriou, *de lege ferenda*, argue that national lower courts should be given a broader discretion to disregard from the question of invalidity and presume that the act is valid as long as it is not clearly invalid.¹¹⁵ In my opinion this question has to be seen in relation to the development of *locus standi* rules in direct actions under article 230 EC. As long as the Court does not liberalise these rules, it would be unfortunate for the protection of individuals to increase the difficulty to challenge an act through national courts.¹¹⁶

¹⁰⁹ See Temple Lang, "The Duties of National Courts under Community Constitutional Law" 22 ELR (1997), pp 3-18, p 15. The report from FIDE XIX Congress, 2002, Vol. 1 "The Duties of Co-operation of National Authorities and Courts and the Community Institutions under article 10 EC", p 8 where it is that the principle of co-operation applies to article 234 "in cases of conflicting judgements".

¹¹⁰ C-314/85 Firma Foto Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199 at 20.

¹¹¹ Ibid at 15 and 17 [hereinafter Foto-Frost].

¹¹² Anderson and Demetriou, p 150 and Glaesner Adrian, "Die Vorlagepflicht unterinstanzlicher Gerichte im Vorabentscheidungsverfahren" 25 EuR (1990) pp 143-151.

¹¹³ AG Mancini's opinion in Foto Frost at 9.

¹¹⁴ Foto Frost at 14.

¹¹⁵ Anderson and Demetriou, p 151-152.

¹¹⁶ See Rasmussen Hjalte, "Why is Article 173 Interpreted against Private Plaintiffs?" 5 ELR pp 112-127 (1980) on the relationship between articles 234 and 230 and Opinion of AG Jacobs in C-50/00, Unión de Pequeños Agricultores v Council [2002] ECR I-6677 on the problems with the *locus standi* rules of article 230.

Regarding interim proceedings, the Court has opened for a more flexible approach, elaborated on in *Zuckerfabrik*.¹¹⁷ If, in such proceedings, the national court has serious doubts regarding the validity of the act, has referred the matter to the Court and takes Community interest into account, the national court can, when necessary to prevent serious and irreparable damage, grant interim relief on the basis that the measure is supposed to be invalid.¹¹⁸

3.2.3 General on the obligation under 234(3)

Some of the courts of the Member States are not only entitled to refer under the second paragraph of article 234, but also required to do so under the third paragraph. These courts are those against whose decisions there is no judicial remedy under national law. Which they are will be discussed in section 3.2.4.

A first look at the wording of the obligation under article 234(3) can give the impression that a reference should be made automatically every time a Community law is touched upon. As we shall see below in section 3.3 there are a number of exceptions to this general rule. These exceptions have developed through the Court's case-law and have been discussed thoroughly and challenged from many directions, as will be discussed in section 3.4. The obligation is still interpreted in a considerably strict manner with few possibilities for exceptions. Moreover, recent developments in both ECJ and the Commission indicate a stricter enforcement of this obligation, as I will argue in section 3.5.

3.2.4 Courts of last Instance

One of the most frequently discussed questions¹¹⁹ is which national courts that fall under article 234(3), i.e. which national courts are considered to be the ones "against whose decisions there is no judicial remedy under national law". Such a court will in this thesis be referred to as a "court of last instance". Traditionally there are two approaches to the question. The question is, as Schermers puts it¹²⁰, whether it is the last instance in the case, as the so called concrete theory would hold, or the last instance in the

¹¹⁷ Joint cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1999] ECR I-415 C-465/93 [hereinafter *Zuckerfabrik*].

¹¹⁸ *Ibid* at 22-33; see also *Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

¹¹⁹ See generally Jacobs, Francis "Which courts and tribunals are bound to refer to the European Court?" 2 *ELR* pp 119-121 (1977); Hartley, "Foundations", pp 267-277 and for a Swedish and Finish perspective see Raitio Juha "What is the Court of Final Instance in the Framework of Article 234(3) EC in Sweden? – Preliminary Ruling in the Criminal Proceedings Against Kenny Roland Lyckeskog", *ERT* 2003 pp 160-166 [hereinafter Raitio].

¹²⁰ Cited in Jacobs, *ibid*.

country, which the abstract theory argues, that is obliged to refer?¹²¹ This is a question of Community law and can as such, as we shall see, in itself be a question of a preliminary reference. After presenting the two competing approaches, I will here discuss a recent preliminary ruling regarding the situation in Sweden.

3.2.4.1 The Abstract Theory

According to the abstract theory it is only the courts whose decisions are never subject to appeal under national law that should be considered courts of last instance. The facts that the plural (“decisions”) is used in the article would from a textual approach speak for this interpretation. Also, it has been argued that it cannot have been intended that minor unimportant cases, not possible to appeal in due to their triviality, would have to be referred.¹²²

3.2.4.2 The Concrete Theory

The competing approach holds that a reference has to be made every time that there is no possibility to appeal to a higher court *in the type of case* at hand. This would widen the number of national courts falling within the meaning of article 234(3) to include also some junior national courts. In its case-law, which is not entirely clear,¹²³ the Court has applied the concrete theory. In *Costa/ENEL* the giudice conciliatore in Milan, whose decision could generally be appealed against but not in the present case, due to the small amount of money involved in the case, was considered to have an obligation to refer.¹²⁴ Given the purpose of article 234(3) and the fact that the abstract theory would not guarantee that there always was a court falling under the paragraph, the concrete theory is to prefer from a teleological approach.¹²⁵

3.2.4.3 Swedish Courts – Lyckeskog

The Court has recently had the possibility to discuss the question in a preliminary reference from Hovrätten för Västra Sverige (Court of Appeal for Western Sweden), where in criminal proceedings against Mr Lyckeskog questions relating to the internal market arose.¹²⁶ According to Council Regulation (EEC) No 918/83, travellers from third countries are relieved from custom duties for goods in their personal luggage as long as this goods is of a non-commercial character. Mr Lyckeskog entered Sweden from

¹²¹ Note that other denominations for these standpoints appear in the literature. For example Weiler refers to the abstract theory as “Organic theory” and the concrete theory as “Specific Case Theory” Weiler “The Paradox of Success”, p 377.

¹²² See Anderson and Demetriou, p 165.

¹²³ Craig and de Búrca, p 438.

¹²⁴ C-6/64 Flaminio Costa v E.N.E.L. [1964] ECR 1141.

¹²⁵ C.f. Raitio, p 161.

¹²⁶ C-99/00 Criminal proceedings against Kenny Lyckeskog [2002] ECR p I-4839. The Lyckeskog-case has previously been discussed by Raitio, and Derlén Mattias, “Nationella slutinstansers skyldighet att fråga EG-domstolen – CILFIT-doktrinen efter Lyckeskog” ERT 2004 pp 85-93 [hereinafter Derlén].

Norway with 500 kg of rice in his car. By a decision of the local customs authorities the permitted duty-free quantity of rice was set at 20 kg. Therefore Mr. Lyckeskog was charged with attempt to smuggle the rice into Sweden. Hovrätten was, first, in doubt on whether it was a court falling under the third paragraph of article 234. Secondly, it held that it was able to answer the question on its own, even though the question could not be regarded as *acte clair* and asked if it then still had a responsibility to refer the question to the Court. Thirdly, it referred two questions on the substance of the relevant provision. The second question will be discussed below in section 3.4.3, whereas the two latter fall outside the scope of this thesis.

Important for the case is that according to Swedish law, this type of decision by Hovrätten can always be appealed to Högsta Domstolen (the Supreme Court, hereinafter HD). HD may according to paragraph 10 chapter 54 RB (Code of Procedure) grant leave to appeal only if a) it is important for the uniform application of the law¹²⁷ or b) there are particular reasons for hearing the appeal, such as serious omission or error by Hovrätten.

In his opinion in the case, AG Tizzano based his argument on the purpose of article 234(3) EC and the nature of co-operation established by the article.¹²⁸ The fact that HD under Swedish law must¹²⁹ grant leave to appeal if the uniform interpretation of law, including Community law, is an issue that means HD is not hindered from referring a question to the Court when examining a request for leave to appeal. This should ensure the compliance with article 234. Thus, Hovrätten in AG Tizzano's opinion should not be considered a court of last instance.¹³⁰

The thirteen judges at the ECJ deciding the case came to the same conclusion. After restating the purpose of the obligation to refer, the Court held that when a decision from an Appellant Court can be challenged before the Supreme Court, this decision is not given by a court of last instance. The fact that an appeal is subject to a declaration of admissibility before the case is tried on its merits does not take away this judicial remedy from the parties of the case. The parties always have this right to appeal in the Swedish system. Therefore HD, when examining the admissibility or in the main proceedings, is obliged to make a reference.¹³¹

In his comment on the case Raitio questions the ruling. Given that the Swedish Supreme Courts do not publish their reasoning behind a decision not giving leave to appeal, the ECJ, in his opinion, is going too far in its literal approach to law, giving the abstract theory a too strong position. I would disagree with Raitio. The Court's judgement is, as I see it, only based

¹²⁷ ”[V]ikt för ledning av rättstillämpningen” RB 54:10:1:1.

¹²⁸ AG Tizzano's opinion in Lyckeskog at 41-42.

¹²⁹ AG Tizzano use the word “must” whereas it is clear from the Swedish law that this in is not mandatory.

¹³⁰ Ibid at 44 to 48.

¹³¹ Lyckeskog at 16-19.

on a literal, positivist view of law in regard to its interpretation of Swedish procedural law. The interpretation of article 234(3) EC is, on the other hand, based on a teleological interpretation setting down the purpose which the national legislation has to fulfil. The reasoning is also limited to “*decisions of a national appellate court which can be challenged by the parties*”¹³², indicating that it would not apply to decisions in cases where the possibility to appeal does not exist.¹³³ As I read the judgement, the Court has in fact taken into account the nature of the type of case rather than the type of court. The literal interpretation of Swedish law can be criticised, but it would in my opinion be surprising if the Court had embarked on a contextual interpretation based on how HD delivers its decisions on admissibility, especially as the Court under article 234 does not have jurisdiction to interpret national law. Considering that the six Hovrätter (Courts of Appeal) in 2004 decided 23294 cases, whereas HD decided 5205 cases, in which leave to appeal was denied in 4499¹³⁴ *Lyckeskog* limits dramatically the number of cases where preliminary rulings are compulsory.

3.3 Exception from obligation to refer

The obligation in article 234(3) is formulated as being absolute. However, the Court early on introduced exceptions to this obligation, today including exceptions for *acte éclairé*, non-necessary questions, questions arising in interlocutory cases and most importantly the so-called rule of *acte clair*, the extent of which has been widely discussed in the doctrine. In this section, I will describe how the exceptions developed and the scope of them today.

3.3.1 Exception I: *Acte éclairé*

3.3.1.1 *Da Costa* – limited *acte éclairé*

The first case in which the Court discussed whether the obligation under article 234(3) was absolute was *Da Costa*.¹³⁵ The circumstances of the case were as follows. The Dutch Tariefcommissie referred questions of the interpretation of article 25 EC, which were almost identical to questions that it had referred to the ECJ only a month earlier in the famous *van Gend en Loos*-case. Instead of joining the two cases, repeat its judgement or dismiss the case on the ground that it did not have any substance after the *Van Gend*

¹³² *Lyckeskog* at 16, italics added.

¹³³ In Sweden this is the case under a number of circumstances, see for example RB 54:1:1 and 3; 54:2; 54:7 and 54:8.

¹³⁴ Domstolsverket, “Domstolsstatistik: Courts statistics Official statistics of Sweden 2004” available online <http://www.dom.se/dom/DVhemsida/Domstolsstatistik/domstolsstatistik_2004.pdf>.

¹³⁵ Joint Cases 28-30/62 *Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie* [1963] ECR 31, [hereinafter: *Da Costa*].

en Loos judgement was given, the Court chose to discuss the obligation under article 234(3).¹³⁶ It held that:

“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 - like the *Tariefcommissie* - 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.”¹³⁷

Even if the circumstances in which the national court did not have to refer a question because it was *acte éclairé* were limited to materially identical question in a similar case decided on by a preliminary ruling, the *Da Costa* case was an acceptance of limitations of the obligation, indicating that the article should not be interpreted literally.

According to Rasmussen, the introduction of very limited discretion for courts of last instance was, however, not the primary feature of the case. Instead the case is more important in laying down that a judgement by the Court can have effect out-side the case in which it is given, i.e. have *erga omnes* authority.¹³⁸ In fact, Craig and de Búrca recognise the *Da Costa*-ruling as the seed to a system of precedent in the EC-legal order.¹³⁹

3.3.1.2 CILFIT – extended acte éclairé

The limits of the obligation to refer remained discussed by both scholars and national courts even after the Court confirmed its ruling in *Da Costa* in *Internationale Crediet*.¹⁴⁰

The Court did not develop its jurisprudence significantly until twenty years later, in *CILFIT*. In this case an Italian company, CILFIT, claimed that a fixed health inspection levy which they had been paying was too high, inter alia on the ground that the national law was inapplicable due to a Council Regulation.¹⁴¹ However, the product, wool, for which CILFIT were required to pay the duties, was not included in the list in Annex II to the Regulation and thus outside the scope of the rule referred to by CILFIT. According to the defendant in the national process, this made the question so obvious that a preliminary reference was unnecessary. The Italian court of last instance recognized that this in itself was a question for the ECJ to interpret and

¹³⁶ See Rasmussen Hjalte, “The European Court’s Acte Clair Strategy in CILFIT” 9 ELR pp 242- 1984, E. L. Rev. pp 242-259, pp 245-251 [hereinafter Rasmussen “Acte Clair Strategy”].

¹³⁷ *Da Costa*, third ground.

¹³⁸ Rasmussen “Acte Clair Strategy” pp 245-251.

¹³⁹ Craig and de Búrca, p 440.

¹⁴⁰ See Joint Cases 73 and 74/63 *NV Internationale Crediet- en Handelsvereniging "Rotterdam" and De Cooperatieve Suikerfabriek en Raffinaderij G.A. "Puttershoek" v Netherlands Minister of Agriculture and Fisheries*, [1964] ECR p 3.

¹⁴¹ Council Regulation (EEC) 827/68.

referred the question whether the obligation to refer under article 234(3) was “conditional on the prior finding of a reasonable interpretative doubt?”¹⁴²

The Court of Justice started its reasoning on the *acte éclairé* doctrine by citing the *Da Costa* limitations to the obligation in article 234(3). However, it then went further by stating that:

“The same effect, [...] may be produced 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.”¹⁴³

Obviously, this is an extension of *acte éclairé*. Firstly, national courts can rely on decisions given by the Court in other types of proceedings than preliminary rulings. Moreover, the issue does no longer have to be “materially identical” with the previous ruling. The Court this way facilitates for the national courts to use the *acte éclairé* doctrine by taking away formal requirements and instead letting them concentrate on the substance of the cases.

In one way, however, the Court restricted the *acte éclairé* doctrine. Under *Da Costa* it was necessary with “*an* interpretation” in “*a* preliminary ruling” (italics added), whereas the Court in *CILFIT* refers to “previous decisions” in plural. The point that *acte éclairé*, post-*CILFIT*, requires an established jurisprudence from the Court is much more apparent in the French expression “jurisprudence établie” or in the language of the case (Italian) “giurisprudenza costante”.¹⁴⁴ Importantly, the Court adds that the liberty to refer any question of Community law still remains for all national courts, even if there would be an established jurisprudence on the matter.¹⁴⁵

By extending the types of decisions with an *erga omnes* effect, the Court developed the system of precedent, further shifting the structure between the ECJ and national courts from a vertical towards a hierarchical relation, according to *Craig and de Búrca*.¹⁴⁶

3.3.2 Exception II: Acte clair

3.3.2.1 Origin of the acte clair doctrine

AG Capotorti in his opinion given in the *CILFIT*-case correctly identified that the question referred to the Court was made with the doctrine of *acte clair* in mind, meaning according to him “that if a provision is unequivocal

¹⁴² *CILFIT* at 4.

¹⁴³ *CILFIT* at 14.

¹⁴⁴ In German the wording is “gefestigte Rechtsprechung”. The subsequent Swedish translation is more ambiguous: “en rättspraxis hos EG-domstolen”. C.f. Bebr, “Cohn-Bendit”, p 463.

¹⁴⁵ *CILFIT* at 15.

¹⁴⁶ *Craig and de Búrca*, p 442. See also Rasmussen “Acte Clair Strategy”.

there is no need to interpret it”.¹⁴⁷ As AG Capotorti moreover points out, the doctrine of *acte clair* derives from French Law, but similar institutes exists in for example Italian law. The French judicial system is constructed according to a principle of separation of powers between the judicial and executive organs of the judiciary. An administrative court must under some circumstances refer questions to the ordinary courts. This obligation to send a preliminary question (*question préjudicielle*) is limited by the theory of *acte clair*. Therefore, in France the obligation to refer exists, in the words of Laferrière, only where there is “a real difficulty, raised by the parties or spontaneously recognized by the court of a kind to create doubt in an enlightened mind.”¹⁴⁸

Even if former AG Lagrange advocated the cautious use of *acte clair* in the European context¹⁴⁹, at least one Member of the Court, Pescatore, had expressed a great scepticism towards the doctrine prior to the *CILFIT* ruling. Pescatore’s criticism was that it rested on too subjective criteria and that the doctrine is a parallogism, since the statement that an act is clear is in itself an interpretation.¹⁵⁰

Many of the national courts, however, applied the doctrine of *acte clair* on preliminary references. In the much discussed *Cohn-Bendit*-case the French Conseil d’Etat made a number of interpretations of Community law without referring to the Court of Justice. Most importantly, it held that it followed “clearly from Article [249]”¹⁵¹ that Directives could not be invoked against an individual administrative act. That a reference was not made is remarkable, given the rulings by the Court of Justice giving Directives direct effect both in general¹⁵² and for the specific article of the Directive concerned¹⁵³ and that the Commissaire du government in the case, with a similar role to the AG before the ECJ, held that a reference was necessary.¹⁵⁴ Shortly after the *Cohn-Bendit* ruling, the Bundesfinanzhof in Germany held that it was “beyond any reasonable doubt”¹⁵⁵ that Directives could not have direct effect and did therefore not refer a question.¹⁵⁶ According to Bebr, these two national judgements given closely before *CILFIT*, when the ruling in *Da Costa*, in effect contradicting the doctrine of *acte clair*, was still the only authoritative ruling, are examples of abuses of

¹⁴⁷ *CILFIT*, p 480.

¹⁴⁸ Cited by Lagrange, Maurice, “The Theory of the Acte Claire: A Bone of Contention or a Source of Unity?” 8 *CMLRev* (1971) pp 313-324, p 314 [hereinafter Lagrange] 1971 p 315.

¹⁴⁹ *Ibid.* pp 321-324.

¹⁵⁰ Pescatore Pierre, “L’attitude des juridictions nationales à l’égard du problème des effets directs du droit communautaire”, 6 *RTD eur* 6 (1970) pp 296-302, p 300

¹⁵¹ “...il *resort clairement* de l’article 189...” Conseil d’Etat, *Ministre de l’intérieur v. Cohen-Bendit*, Arrêt 22 December 1978, 1 *CMLR* (1980) 543 p 564, italics added.

¹⁵² See for example C-9/70 *Grad v. Finanzamt Traunstein* (1970) *ECR* 825.

¹⁵³ See C-41/74, *van Duyn v. Home Office* (1974) *ECR* 1337.

¹⁵⁴ See Bebr “*Cohn-Bendit*”, pp 440-448.

¹⁵⁵ “[A]ußerhalb jeden ernstlichen Zweifels”; *Bundesfinanzhof Case V B 51/80 Re Value Added Tax Directives*, 1 *CMLR* (1982) 527 p 531.

¹⁵⁶ See Bebr “*Cohn-Bendit*”, pp 449-454.

the *acte clair* doctrine by national courts. However, the abuse was not systematic, since references were made from the two national courts concerning questions of technical nature. The reluctance to refer justified by *acte clair* was mostly seen in cases of greater principal importance.¹⁵⁷ Thus, the context in which the Court gave its *CILFIT* judgement was such that *acte clair* had already been used or abused by national courts in important cases.

3.3.2.2 Acte Clair in CILFIT

AG Capotorti argued forcefully against an introduction of *acte clair* in Community law, using inter alia the same reasoning as Pescatore before him. He also highlighted the specific difficulties in the novel and multi-lingual Community legal system compared to the, for a judge, well known domestic system.¹⁵⁸

However, the Court took the opportunity to state a different opinion on *acte clair*, which allows an exception from the obligation to refer if the correct application of community law is “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.”¹⁵⁹ When applying this newly gained, but for a long time used discretion, a Court of last instance must be convinced that “the matter is equally obvious to the courts of the other Member States and to the Court of Justice.”¹⁶⁰ Interestingly the Court refers to all courts of *other* Member States and not only courts of last instance. However, if a lower court in the *same* legal system would come to a different conclusion than the court of last instance of that legal system, a situation not covered by the wording of the judgement, I would argue that it is probable that the question does not fall under *acte clair*, since it is not obvious that no court in the Community would not reason like this lower court.

This, in itself demanding exercise of assessing how the thousands of Courts of the Community would rule, is according to the ECJ to be made on the basis of three characteristics of Community law. Firstly, a court has to take into account that Community law appears in several equally authoritative language versions.¹⁶¹ At the time of *CILFIT* the Community had seven official languages – today twenty languages have to be considered.

Secondly, the terminology is peculiar to Community law. Therefore, even if a term seems to be clear for a national judge, it may have a different meaning in Community law than in any of the national legal systems.¹⁶²

¹⁵⁷ Ibid., pp 455-457.

¹⁵⁸ *CILFIT* pp. 480-483.

¹⁵⁹ *CILFIT* at 16.

¹⁶⁰ Ibid.

¹⁶¹ Ibid. at 18.

¹⁶² Ibid at 19.

Thirdly, the specific provision of Community law has to be put in its proper context and interpreted in the light of Community law as a whole, with account taken to the state of evolution of Community law on the date when the provision is to be applied.¹⁶³

These requirements have been described as “intimidating” by an English judge¹⁶⁴ and they are indeed putting a lot of pressure on a national Court wishing to use the *acte clair* doctrine in accordance with Community law. In fact, far from everyone welcomed the ruling as giving national courts more flexibility or as an endorsement of the doctrine, as Millarg and Wyatt did.¹⁶⁵

Often quoted is Rasmussen’s argument that the Court, who seemingly gave national courts some discretion, at the same time took this away by introducing the “intimidating” conditions for *acte clair*, thereby reducing the *de facto* possibility of using the doctrine by raising a warning to every Court trying to interpret a Community provision on its own.¹⁶⁶ Later, Rasmussen has argued for the need of a “CILFIT II”, which should “enlarge considerably the scope of Community acts which are deemed to be *actes clairs*.”¹⁶⁷

On the contrary, as Arnall has shown, by discussing cases from the English courts in which *CILFIT* was discussed without leading to a referral, the ruling could not only be used but also abused.¹⁶⁸ Through *CILFIT* the *acte clair* doctrine became a part of Community law and the ruling, in fact, gave national courts a way of justifying their reluctance to co-operate with ECJ while appearing to apply Community law. Since it is for national courts to apply the ECJ’s interpretation of the doctrine, they will have the possibility to shape the doctrine contrary to Community law.¹⁶⁹ The question addressed in chapter 4 of this paper will directly address this risk in relation to Swedish courts.

3.3.3 Exception III: Necessary reference for solving the case

Even if article 234(3) does not mention that a reference has to be necessary for solving the case, as does the article’s second paragraph, the Court in *CILFIT* held that

¹⁶³ Ibid at 20.

¹⁶⁴ Queen’s Bench Divisional Court Regina v. Secretary of State for Transport, ex parte Factortame 2 CMLR (1989) 353, p 379 para. 60.

¹⁶⁵ See Millarg E, “Anermerkung” EuR (1983), pp 163-168 and Wyatt, “Article 177(3) - the Court cautiously endorses the *acte clair* doctrine” 8 ELR (1983) p 179-182.

¹⁶⁶ Rasmussen, “Acte Clair Strategy”, p 257-259.

¹⁶⁷ Rasmussen, “Remedying...”, p 1109, italics in original.

¹⁶⁸ Arnall Anthony, “The use and abuse of article 177 EEC” 52 Modern Law Review (1989) pp 622-639.

¹⁶⁹ For this view see also Bebr, “Cohn-Bendit”, p 471.

“it follows from the relationship between the second and third paragraphs of Article [234] that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of community law is necessary to enable them to give judgment.”¹⁷⁰

The discretion for national courts with an obligation to refer naturally constitutes an exception from this obligation. The Court thus continued:

“Accordingly, those 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.”¹⁷¹

This negative formulation might be better understood in comparison with Lord Denning’s famous *obiter dicta* directed to lower English courts. He interpreted “necessary” as to mean: “the point must be such that, whichever way the point is decided, it is conclusive of the case.”¹⁷² My argument is that the *negative formulation*, adopted by the Court in relation to courts of last instance, has to be seen as much more limited than Lord Denning’s recommendation to lower courts.¹⁷³ The question must not be conclusive, but on the contrary the national court must be convinced that it can in no way affect the out-come of the case.

3.3.4 Exception IV: Interlocutory proceedings

Already in 1977, in *Centrafarm*, the Court had declared that the obligation to refer does not cover interlocutory proceedings for interim measures, even where no remedy is available against this decision under national law. The justification for the ruling was that the purpose of article 234, as well as the special purpose of its third paragraph, is satisfied in the following main proceedings. The exception is, therefore, qualified to interim proceedings where

“each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the court under article 177.”¹⁷⁴

The Court in *Centrafarm* mentioned both questions of validity and interpretation. However, in regards to validity the judgement has to be considered in relation to *Zuckerfabrik* and therefore to some extent overruled.¹⁷⁵ With regard to questions of interpretation, not considered in

¹⁷⁰ CILFIT at 10.

¹⁷¹ Ibid.

¹⁷² Court of Appeal, H.P. Bulmer Ltd v J Bollinger SA 2 CMLR (1974) 91 [hereinafter *Bulmer v Bollinger*].

¹⁷³ It has to be noted that Lord Denning’s approach has to a large extent been replaced by a less strict interpretation also in English courts. See Anderson and Demetriou, p 94.

¹⁷⁴ C-107/6 Hoffmann-La Roche / Centrafarm [1977] ECR p. 957 at 5-6.

¹⁷⁵ See above section 3.2.2. regarding Foto-Frost and Zuckerfabrick.

Zuckerfabrik, it has on the other hand been reaffirmed in *Morson en Jhanjan*.¹⁷⁶

3.4 Extention of the exceptions? – challenges to CILFIT

As seen above, the Court's ruling in *CILFIT* was received in different ways in the scholarly comments on the case. In this section I will point to some challenges and constructive criticism to it from different actors.

3.4.1 The Due report on reforms of article 234

Because of the present problems with the Community judicial system, especially the increased caseload described above, the Commission took the initiative to establish a Working Party on the Future of the European Communities' Court system. The Working Party, chaired by Ole Due, gave its final report, often referred to as the Due report, in January 2000 before the Nice IGC.¹⁷⁷

The Due-report proposed a number of relatively moderate changes in the preliminary ruling procedure, which it generally heralds as “an undeniable success”.¹⁷⁸ These include a change in the Court's rules of procedure, making it easier to respond to references where the answer is obvious; better information to national courts encouraging and enabling them to make more decisions on their own regarding Community law; reducing the number of premature and ill-prepared references; and, most importantly, an amendment of Article 234.¹⁷⁹

In the amended article 234 advocated by the Due-report is found a criteria that there must be “reasonable doubt”¹⁸⁰ regarding the interpretation of Community law before a referral is made. This change would in fact introduce the *acte clair* doctrine into the Treaty. The report laconically dismissed that an amendment would change the meaning of *acte clair*, stating that “it will be for the Court of Justice to determine whether or not it needs to be made more flexible.”¹⁸¹ The report, however, continued stating

¹⁷⁶ Joined cases 35-36/82 *Morson and Jhanjan v State of Netherlands* [1982] ECR p 3723 at 8-10.

¹⁷⁷ The Document is published in its entirety as an Annex to Dashwood and Johnston, pp 145-204 and commented on by Rasmussen, “Remedying...”. See also Ole Due “The Working Party Report”, in Dashwood and Johnston, pp 87-94. Of the Working Party's seven members, five have been members of either the ECJ or CFI, one is a former Commission civil servant and one is public prosecutor of Spain.

¹⁷⁸ See Dashwood and Johnston, p 162.

¹⁷⁹ *Ibid*, pp 164-169.

¹⁸⁰ The Due-report's amended article 234(3) simply adds “provided that the question is of sufficient importance to Community law and that there is reasonable doubt as to the answer to that question” to the existing paragraph. *Ibid*, p 203.

¹⁸¹ *Ibid* p 165.

that the rigid obligation in article 234(3) has not, in practice, been possible to follow.¹⁸²

This opinion by former members of the Court, two of which took part in the *CILFIT*-ruling, is exceptional. To hold the *acte clair* doctrine as unworkable has to be seen as a harsh criticism of the strict interpretation of the criteria made in *CILFIT*. It is also an invitation to the present members of the Court to review the *acte clair* doctrine. The amendment proposed by the Due-report should if it was adopted by the Member States do away with the argument sometimes raised, that it is impossible to give any more discretion to national courts given the wording of article 234(3) EC.¹⁸³

The ECJ and CFI then produced a report of its own on the future judicial architecture, in which the Courts do not discuss a revised approach to *acte clair* as a possible way of reforming the preliminary reference system.¹⁸⁴ This silence should be noted, but it would in my opinion be surprising if the Court decided to discuss its own case-law in such a report.

The outcome of the Nice IGC was not a changed article 234. However, one possibly important change was made to the preliminary rulings institution, by giving the CFI jurisdiction to hear such cases “in specific areas laid down by the Statute [for the Court of Justice].”¹⁸⁵ It is still to be seen which areas that will be entrusted to the CFI. Clear from article 225(3) is that CFI is not given total control over these areas, since as a safeguard mechanism, the Court will in exceptional cases be able to review these rulings.¹⁸⁶

Article 104(3) of the RP was also amended in May 2000, making it easier to use this expeditious procedure.¹⁸⁷ Interestingly, the wording after this amendment speaks of “reasonable doubt”, as the Due-report, and not that it must be obvious that there is no reasonable doubt as in *CILFIT*. There is, however, in my opinion a big difference between letting a national court have a larger discretion in this regard and letting the ECJ expedite its handling of these cases. Just as today, the Court can still be the judge of how the Community law should be interpreted by taking on cases of interest, whereas with a relaxed *acte clair* doctrine greater discretion and more of the interpretative role would be given to national courts.¹⁸⁸ Moreover, most of the use of article 104(3) is based on *acte éclairé* and not *acte clair*.¹⁸⁹

¹⁸² Ibid p 165.

¹⁸³ This argument was inter alia raised by AG Tizzano in his opinion to Lyckeskog at 64 and by Edwards David “Reform of Article 234 Procedure: the limits of the Possible” in “Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley” O’Keeffe (ed.) 2000, pp 119-142.

¹⁸⁴ The Courts’ report is published in its entirety as an Annex in Dashwood and Johnston, pp 113-143, see especially pp 133-140.

¹⁸⁵ Article 225(3) EC.

¹⁸⁶ See Tridimas, “Knocking” for a discussion, pp 20-21.

¹⁸⁷ See Brown and Kennedy, p 241 and above section 3.1.7.

¹⁸⁸ C.f. AG Tizzano’s Opinion in Lyckeskog at 53.

¹⁸⁹ C.f. Timmermas, p 402.

3.4.2 The challenge from inside the Court

In *Wiener*¹⁹⁰ questions regarding the tariff classification of nightdresses were referred to the Court. A similar question had already been decided on in *Neckermann Versand*,¹⁹¹ which led AG Jacobs to deliberate on the necessity of an obligation to make a preliminary reference in such cases. His argument starts by showing the ambiguity of the distinction between “application” and “interpretation” of law. Also when the question seems clear or when it has already been decided upon, it will always be possible to distinguish the facts of a new case from those in previous cases. This makes an “interpretation” necessary in every case, which would make the Court collapse under its own caseload, if it was to give all those “interpretations”. Therefore both national courts and the ECJ must start to show more self-constraint, according to AG Jacobs.¹⁹²

Self-constraint can, however, not help courts under an obligation to refer, if the *CILFIT* conditions were to be applied strictly to all questions. AG Jacobs’s argument is that the criteria should not be applied to all questions since the ruling has to be seen from the evolutionary perspective that the Court refers to in *CILFIT*. The fact that both the volume and scope of Community law have increased drastically, alongside the established case-law, could lead to an excessive use of references, when in fact national courts have a greater possibility today than before to apply the principles developed by the Court. Moreover, a strict application of *CILFIT* would, according to AG Jacobs, lead to divergence in the number of cases arriving from different Member States due to differences in the judicial systems.¹⁹³ Considering the multitude of factors influencing the number of preliminary references from different countries¹⁹⁴, a divergence would probably exist anyway.

The defence of a strict interpretation of *CILFIT*, based on its objective criteria, is often made with reference to individual cases where a court of last instance has refused to refer a question. A general theory of article 234 should, however, not be based on such an approach. Moreover, criteria like the one in *CILFIT* cannot solve the problem of national courts “deliberately taking a different view”.¹⁹⁵

¹⁹⁰ C-338/95, *Wiener S.I. GmbH v. Hauptzollamt Emmerich*, ECR [1997] I-6495 [hereinafter *Wiener*].

¹⁹¹ C-395/93 *Neckermann Versand v. Hauptzollamt Frankfurt am Main-Ost* [1994] ECR I-4027.

¹⁹² AG Jacobs’ Opinion in *Wiener* at 15-18.

¹⁹³ *Ibid* at 58-62. Regarding the differences in number of references from different Member States, AG Jacobs’s argument has to be read as meaning an even greater divergence given the situation today visualised in the statistics found in the Supplement.

¹⁹⁴ See Section 4.1 below for some of these factors and further references to quantitative studies on the phenomenon.

¹⁹⁵ *Ibid* at 63.

Instead, the *CILFIT* criteria should only apply “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.”¹⁹⁶ From the reasoning in the opinion and the subject matter of the *Wiener*-case, it can be concluded that one such situation where a reference is not needed is when national courts ask very specific questions, only applicable to the case at hand regarding Community law of an equally specific nature.¹⁹⁷ AG Jacobs holds that with this restricted use, the *CILFIT* criteria can remain in use, save for the condition that all language versions have to be considered, something not even the Court always follows. Instead of the linguistic criterion, national courts should put more emphasis on interpreting Community law in its proper context.

In its judgement, the Court does not give any comment on AG Jacobs’s opinion in this regard. Instead it chose to be quiet on the issue, which could mean either that it disagreed with the AG, that it did not feel ready to leave the *CILFIT* criteria or that it could not agree on a common standing regarding *acte clair*.¹⁹⁸

AG Jacobs’s opinion is in my view very interesting. Many of his arguments are similar to AG Capotorti’s in *CILFIT*, but his conclusion is the opposite. His acknowledgement of the two different problems of caseload and “revolting” national courts and the possibility of a strict *acte clair* doctrine to solve the former but not the latter is in my opinion fruitful as a starting point of a discussion of a reformed preliminary ruling system. Also, his qualified approach recognises the difficulties imbedded in the different roles based on the ambiguous separation of interpretation and application. However, the problem with his approach is that it introduces a more subjective criterion, in assessing when a question is of general importance.

3.4.3 The challenge in the *Lyckeskog*-case

I have already mentioned the *Lyckeskog*-case and we have seen that Hovrätten’s second question to the Court was whether or not it had to refer a question that it considered clear, even if it was not covered by neither the *acte clair* nor the *acte éclairé* exceptions. This is of course a direct challenge of the *CILFIT* ruling, in effect asking if it is not time to make a new interpretation of article 234(3).

The opinion by AG Tizzano in the case takes a more conservative approach towards *CILFIT*. He considered the ruling to be a balanced compromise between the risk of receiving too many references and the purpose of the paragraph and providing coherent guidance to national courts. To give any further discretion to national courts by introducing subjective criteria would, in his opinion, even threaten the unity and supremacy of Community law

¹⁹⁶ Ibid at 64.

¹⁹⁷ C.f. ibid at 11 and 16.

¹⁹⁸ See Derlén.

and not be possible within the wording of the Treaty.¹⁹⁹ Regarding the more and more acute problems with the Court receiving to many cases, AG Tizzano's opinion was that a reviewed *acte clair* doctrine would not make a large difference. Instead this problem could be solved through the use of article 104(3) RP and more self-constraint in making references by Courts which do not have an obligation to refer.²⁰⁰ At large, the AG's opinion was an unconditional support of all aspects of the *CILFIT* criteria, including the multilingual interpretation requirement.²⁰¹

Unfortunately, the Court once again remained silent on the question of *acte clair*. As we have seen, Hovrätten was not considered a court of last instance and therefore it was seen as unnecessary to answer the second question of the case.²⁰² However the Court, when answering the first question, holds that the objective of article 234(3) "is secured when, *subject to the limits accepted by the Court of Justice (CILFIT)*, supreme courts are bound by this obligation to refer [...]".²⁰³ By making a reference to *CILFIT* and doing so in a discussion on the specific objective of the third paragraph of article 234 EC, I would argue that the Court indirectly pronounces its continued support of the *CILFIT* ruling and thus implicitly its opinion regarding the second question. Clear is, that there has not been a change in the *acte clair* doctrine as a consequence of Hovrätten's preliminary reference. Such a change is in my opinion unlikely to take place in a close future, given that *Lyckeskog* was decided by thirteen of the then fifteen judges.²⁰⁴

Important to note is that the *Lyckeskog*-judgement was pronounced before the enlargement of the Union. One possibility is that the ECJ does not want to introduce a relaxed attitude towards the obligation to refer until the courts of last instance in the new Member States have been used to referring questions. Even if the judiciary in old member states are mature enough to take greater responsibility of the handling of Community law, this is not necessarily the case in the new Member States.²⁰⁵

3.4.4 CILFIT: still going strong

As seen above, the Court has not changed its approach to *acte clair* since *CILFIT*, although invited to do so. Here I have discussed two elaborated alternatives to the strict approach, both rejected by the Member States in the

¹⁹⁹ AG Jacobs' Opinion in Wiener at 56 and 64-65.

²⁰⁰ Ibid 67-68.

²⁰¹ Ibid the question is treated in paragraphs 49-76.

²⁰² *Lyckeskog* at 21.

²⁰³ Ibid at 15, italics added.

²⁰⁴ C.f. Derlén, who do not consider the reference to *CILFIT* and instead speculates on the reluctance to take a stand on the issue. He, however, comes to the same conclusion as I that a change initiated by the Court is not probable in the near future.

²⁰⁵ See Edwards David "Reform of Article 234 Procedure: the limits of the Possible" in "Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley" O'Keefe (ed.) 2000 pp 119-142, p 125.

case of the Due-report and the Court through its silence in *Wiener*. Interesting to note is that both proposals consider it possible for the Court to adopt a more relaxed approach without any change in the Treaty. On the other hand, AG Tizzano in his defence of *CILFIT* in *Lyckeskog* argues that it is not possible to give more discretion to national courts if the Treaty is not changed.

Both in its case-law as well as in the Courts' report on the reform of the Community's judicial architecture, the ECJ refrains from directly addressing the question of an extension of the exceptions from the obligation to refer. It is not clear if the Court considers it possible to make a change given the present wording of the Treaty. The Court has, however, in many cases made interpretations that, to put it mildly, stretches the wording of the Treaty.²⁰⁶

The conclusion must be that the Court has had plenty of possibilities to change its approach, but has not done so. The silence can either be interpreted as indicating that disagreement exists in the Court, or that the Court is so convinced by the approach taken in *CILFIT* that it considers it unnecessary to even comment on the issue. As Community law stands today, the *acte clair* and *éclairé* exceptions must be seen as strictly limited according to the criteria in *CILFIT*.

3.5 Consequences of failure to refer

As already noted, the preliminary ruling system does not give individual parties the right to appeal a decision from a national court to the Court of Justice. Traditionally, there are therefore no consequences for a failure by a national court to fulfil the obligation to refer inherent in the system of preliminary ruling.

It is foreseeable that national law could establish remedies against a breach of the obligation to refer. In Spain, Italy, Austrian and Germany the Constitutional Courts has jurisdiction to try such a question.²⁰⁷ In Germany the Bundesverfassungsgericht has considered the ECJ being such a "lawful judge", from whose jurisdiction no one can be removed according to the German Basic Law.²⁰⁸ This remedy is however only available when the decision is evidently flawed, e.g. by giving preference to an interpretation

²⁰⁶ See e.g. Hartley Trevor "Constitutional Problems of the European Union", 1999, pp 22-42, whose opinion I do not share in all cases.

²⁰⁷ Anderson and Demetriou, p 185 and Breuer Marten "State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria" 29 ELR (2004) pp 243-254, p 251 [hereinafter Breuer "State liability"].

²⁰⁸ Artikel 101(1) (2. Satz) Grundgesetz reads „Niemand darf seinem gesetzlichen Richter entzogen werden.“ See Bundesverfassungsgericht Case 2 BvR 197/83, in Entscheidungen des Bundesverfassungsgerichts Vol 73 pp 339.

that is obviously not correct or when a court consciously deviates from an interpretation given by the ECJ.²⁰⁹

It is also possible that an individual can find remedy in taking the case to the ECtHR. Even if the ECHR does not give individuals a general right to have a case referred to the ECJ, an arbitrary refusal not to do so might be considered a breach of the fairness of proceedings and “equality of arms” principle under article 6(1) ECHR.²¹⁰

However, I will not examine these two possibilities under international and national law further, but concentrate on the two possibilities available under Community law – infringement procedure and complaints concerning state liability.

3.5.1 Infringement procedure

Under article 226 EC, the Commission shall initiate an infringement proceeding against a Member State who it considers to be in breach of the Treaty. The Commission has a wide discretion to decide whether or not to initiate a proceeding and how to proceed with an alleged case of infringement. It is generally accepted that the Commission will try to steer clear of politically controversial issues when fulfilling its task as Guardian of the Treaty.²¹¹ Even if the Commission has depoliticised its policy, it still makes great use of its discretion and in most cases prefers a solution based on negotiations instead of a formal procedure.²¹²

3.5.1.1 Initial approach by the Commission

Even if it has for a long time been clear that Member States are responsible for breaches by its constitutionally independent institutions,²¹³ the Commission’s initial approach was to avoid proceedings based on breaches by national courts. As a response to a question from a MEP in relation to a specific case of alleged violation of article 234 by a French court, the Commission held that article 226 EC was applicable to breaches by national courts. However, the Commission did not take action and justified this with the fear of negatively affecting the independence of the judiciary. Instead it preferred to proceed by persuasion, better informing national courts and through mutual consultations.²¹⁴ The Commission again in 1983, when

²⁰⁹ See Bundesverfassungsgericht, Case 2 BvL 12, 13/88, 2 BvR 1436/87 in *Entscheidungen des Bundesverfassungsgerichts Vol 82* pp159, pp 195. See also “Breuer “State liability”, p 252-253.

²¹⁰ C.f. Breuer “State liability”, p 251-252.

²¹¹ See e.g. Craig and de Búrca, p 407 and 424. On the infringement procedure in general see generally Ibáñez.

²¹² See Norberg Andreas “Bargaining down the Law – the Commission’s method to ensure compliance with EC-law as bargaining or judicial procedure”, 2005 Available online <http://theses.lub.lu.se/archive/2005/05/20/1116580669-10703199/Bargain_down_the_law_FINAL.pdf>.

²¹³ See e.g. C-77/69 Commission v. Belgium [1970] ECR 237 at 15.

²¹⁴ See Scermers and Waelbroeck, p 306.

responding to a new question from an MEP, took a similar approach. This time, the fear that an infringement procedure could disturb the co-operation between national courts and the ECJ was directly referred to by the Commission.²¹⁵

Situations in which the Commission has taken actions do however exist. Once in 1974 and again in 1990, the Commission sent informal letters to the German government after decisions by German courts. Neither of the cases were pursued further.²¹⁶ Also Sweden has been the addressee of a similar letter following the *Barsebäck*-case analysed below, which, perhaps because of a settlement between the involved parties, was not followed by further action.²¹⁷ In 1977 AG Warner took a likewise reluctant position towards infringement proceedings against the judiciary when stating that it was obvious that a bad decision of a court did not mean that a Member State was in breach of its obligations. Only through deliberately ignoring or disregarding Community law could article 226 be used, according to AG Warner. This statement appeared in an opinion given to a preliminary reference from a British court, which, however, did not force the court to take a stand on the question.²¹⁸

3.5.1.2 Recent approach

As seen above, the Commission's approach towards breaches of Community law by national courts has been a very cautious one. I will, however, in this section, on the basis of three recent infringement proceedings reaching different stages, argue that this approach now seems to be changing.

Commission v Italy

In the first proceeding, the background was a provision in Italian law, creating a presumption that certain charges levied contrary to Community law were passed on to consumers and therefore not repayable. Although this rule had been amended when found inconsistent with Community law,²¹⁹ the same presumption was still applied by Italian courts, which led to references to the Court.²²⁰ Therefore, the Commission took action holding that the new law, as applied by courts and authorities, was contrary to Community law. It especially referred to the case-law of Corte suprema di cassazione (Supreme Court of Appeal) creating a *de facto* presumption,

²¹⁵ Written question No 526/83 by Mr Alan Tyrrell and Answer given by Mr Thorn on behalf of the Commission, Official Journal 1983-10-06, C 268/25.

²¹⁶ See Schermers and Waelbroeck, p 305-308 and Anderson and Demetriou, p 186.

²¹⁷ See Nergelius Joakim, "Förvaltningsprocess, Normprövning och Europarätt", 2000, p 119 [hereinafter Nergelius, "Förvaltningsprocess..."].

²¹⁸ Opinion of AG Warner in C-30/77 R. v. Bouchereau [1977] ECR 1999 p 2021.

²¹⁹ C-199/82 San Giorgio [1983] ECR 3595 and C-104/86 Commission v. Italy [1988] ECR 1799.

²²⁰ See C-343/96 Dilexport [1999] ECR I-579.

which was being relied upon by lower Italian courts.²²¹ What is remarkable in the Commission's allegations is that it for the first time focused on the Court's misapplication of Community law.²²²

The ECJ, sitting in full court, started its reasoning by repeating earlier case-law saying that failure to fulfil obligations under the Treaty can be conducted by any organ of the state²²³, i.e. also the judiciary. Moreover, as the Court also had held in previous cases,²²⁴ legislation has to be seen in the light of the interpretation given to it by national courts. It continues:

“isolated or numerically insignificant judicial decisions [or] a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.”²²⁵

The Court concludes from the finding that the relevant provision was applied in accordance with Community law by some Italian courts but not others, and that the provision was thus at least not clear enough to be in accordance with Community law.²²⁶ Even if the starting point of the case was whether the law *per se* was in accordance with Community law,²²⁷ the failure to amend it constituted a breach, when courts and authorities interpreted it contrary to Community law.²²⁸

According to Breuer, the Court preferred to declare that the legislator was in breach of EC law through its insufficient clarifications rather than to criticise the national courts.²²⁹ On the other hand, the case can be seen as an instance of two state functions jointly being responsible for the breach, where the judiciaries' involvement was in fact crucial for this breach.²³⁰ I tend to agree with this latter approach, given the statement of the Court that the legislation was in accordance with Community law and that what in fact turned it into a breach was the case-law from national courts and actions by national authorities.

²²¹ C-129/00 *Commission v. Italy* [2003] ECR 4637 at 11, 14 and 15 [hereinafter *Commission v Italy*].

²²² C.f. Komárek p 23 It must however be noted that the Commission's allegations concern actions by the Italian authorities as well as judiciary.

²²³ See C-77/69 *Commission v. Belgium* [1970] ECR 237 at 15.

²²⁴ See C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, at 36.

²²⁵ *Commission v. Italy*.

²²⁶ *Ibid* at 33.

²²⁷ *Ibid* at 31.

²²⁸ *Ibid* at 41.

²²⁹ Breuer „Urteile mitgliedstaatlicher Gerichte als möglicher Gegenstand eines Vertragsverletzungsverfahrens gem. Art. 226?“ (2004) *EuZW* p 199. See Komárek, p 25 for a similar conclusion.

²³⁰ Hoffstätter B.R. “The problem of non-compliant National Courts in European Community Law”, 2005, pp 148-150 [hereinafter Hoffstätter] .

The Lyckeskog Prelude

The second infringement procedure is a still ongoing continuation of *Lyckeskog*. As seen above, the Court found that the obligation under article 234(3) was not for Hovrätten but for HD to fulfil, either during the main proceedings or during the examination of an application for leave to appeal if such leave is not granted.

In the United Kingdom, this interpretation of the obligation led to a review of the rules for leave to appeal to the House of Lords. When considering a petition or application for leave to appeal, the Appeal Committee will now after *Lyckeskog* give reason for their recommendation to refuse leave, indicating why a referral to the ECJ is not necessary. If the Committee considers itself unable to give a recommendation without a reference to the ECJ it will recommend the House to make such a reference.²³¹

Similar changes have so far not been made in Sweden. Within seven months of the judgement, the Commission required to hear the Swedish government's opinion on the issue.²³² The Swedish standpoint was that the procedural law of Sweden gives HD the possibility to consider Community law when deciding on an application for leave to appeal. It may in fact also make a preliminary reference before granting leave to appeal.²³³ The Commission, not satisfied with these assurances, initiated a formal infringement procedure, which through the formulation of a Reasoned Opinion has now reached the final stage before a referral to the Court.

In the Reasoned Opinion, the Commission, after pointing to the fact that HD until 2002 had made only two referrals to the ECJ, retains three arguments why the Swedish practice constitutes a breach of article 234.²³⁴ Firstly, Sweden has not countered the statement by Hovrätten in *Lyckeskog* that a misinterpretation of Community law does not constitute a sufficient ground for the granting of a leave to appeal. If this is the case, an amendment of the procedural law is required according to the Commission. Secondly, the Commission claims that preliminary references are not regularly made when deciding on an application of leave to appeal and makes a special reference

²³¹ Thirty-eighth Report from House of Lords, Appeal Committee, "Petitions for leave to appeal: Reasons for the refusal of leave", 3 April 2003, available on-line <www.publications.parliament.uk/pa/ld200203/ldselect/ldappeal/89/89.pdf>, See also the Commission's letter to Sweden, "Formell underrättelse" in infringement proceeding number 2003/2161, dated 2004-04-05 at 16.

²³² "Informell skrivelse rörande svenskt prövningstillstånd i förhållande till artikel 234 EG". Letter from the Commission in infringement proceeding number 2003/2161, dated 2003-01-21.

²³³ "Ang. Informell skrivelse rörande svenskt prövningstillstånd i förhållande till art 234 i fördraget" pp 6-7 Letter from Swedish Government in infringement proceeding number 2003/2161, dated 2003-03-14.

²³⁴ "Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG" Letter from the Commission in infringement proceeding number 2003/2161, dated 2004-10-19 at 23-26.

to the *SAS v Luftfartsverket*-case.²³⁵ The Swedish comment to this was that the fact that such a reference has never been made does not mean that the Swedish system is in breach of article 234(3), indicating that there might never have been any cases where a reference was necessary.²³⁶ Finally, it is held by the Commission that the lack of reasoning in regards to Community law when rejecting an application for leave constitutes a breach of Community law in itself.

In its answer to the Reasoned Opinion, the Swedish government stood by its argument that the Swedish legislation is sufficient, but opened up for improvements. A report, set to propose new rules for courts of last instance, is at the moment being prepared in the Ministry of Justice. Furthermore, four recent decisions from HD are included in the answer in order to show that the decisions not to grant leave to appeal do not lack reasoning on Community law.²³⁷ However, as Bernitz points out, neither of the included decisions led to a preliminary reference.²³⁸

It is obvious that at least two of the three grounds leading the Commission to send its Reasoned Opinion are directly related to the practice of the judiciary and not to the Swedish legislation. The Commission's reasoning is, however, similar to the Court's in *Commission v Italy*. The procedural legislation *per se* allows for references, but due to the practice of HD the legislation is in need of an amendment in order to ensure that the national courts will fulfil their obligations. Even though focusing on the need of a legislative change, the Commission feels obliged to justify its action by pointing to the finding in *Köbler* that legal responsibility for the actions of a constitutionally independent body does not threaten the independence of the judiciary.²³⁹

As of July 2005, no application to the Court under article 226 has yet been made against Sweden. If the forthcoming report from the Ministry of Justice does not satisfy the Commission, the case is in my opinion likely to be taken to the Court.

²³⁵ Decision T-2137-01 See below at 4.3.3. where the interpretation of the Commission is questioned.

²³⁶ See "Svar på formell underrättelse" Letter from the Swedish Government in infringement proceeding number 2003/2161, dated 2004-05-26. C.f. Dufwa Bill, "Kommissionen och svensk domstolspraxis" NFT 2004 pp 299-304, p 302-303.

²³⁷ "Svar på motiverat yttrande om överträdelse av artikel 234 tredje stycket EG" Letter from the Swedish Government in infringement proceeding number 2003/2161, dated 2004-12-15.

²³⁸ Bernitz, "Kommissionen ingriper..." I will comment on the two of the four cases below under section 4.3.

²³⁹ See "Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG" Letter from the Commission in infringement proceeding number 2003/2161, dated 2004-10-19 at 24-25. Regarding *Köbler* see below at 3.5.2.

Hoge Raad

The third infringement proceeding was opened in February 2004 against the Netherlands, following a judgement from Hoge Raad der Nederlanden (the Supreme Court). In its judgement, Hoge Raad held that a person with a valid certificate of being a posted worker within the meaning of Regulation (EEC) 1408/71 was no longer entitled to the social benefits that such a certificate normally gives right to. This was because the worker in fact had been living and working in another Member State for almost the whole period referred to in the certificate.

The Commission's opinion about this judgement is that "the Netherlands Supreme Court's reasoning is not consistent with the fundamental principles of Community law on freedom of movement for workers..."²⁴⁰ which was based on three grounds. Firstly, it was said to ignore the content and objective of Regulation 1408/71. Secondly, that it is contrary to the case-law of the ECJ in which certificates of the kind discussed in the case are considered to be valid and binding until withdrawn. Finally, the Commission holds that the judgement might lead to deviations from the principle of a single applicable legislation also put down by the said Regulation.²⁴¹

What is noteworthy in this case is that the Commission focuses on a sole individual case in which the national court of last instance has misapplied Community law. All of the grounds of the alleged breach relates directly to the judgement and the attitude of the Hoge Raad and in no way to the legislator or executive. It must however be remembered that the case is not directly concerned with preliminary references. Furthermore, it is not certain that the Commission has an intention to proceed with the case, but may only wish to demonstrate that it monitors the judiciary. The sole fact that the Commission starts a formal procedure against a Member State can have an effect on the Member States behaviour, i.e. the Commission can put pressure on the Member State to change its behaviour simply by showing interest in a question.²⁴²

3.5.1.3 Concluding comments on article 226

As we have seen, the Commission has in two of those three cases proceeded quite far in the infringement proceedings. In these two cases it can be argued that the Commission and the Court are in fact turning against the national legislator and not the judiciary. Both the ECJ in *Commission v Italy*, and the

²⁴⁰ European Commission, Press Release of 9th of February 2004, IP/04/178.

²⁴¹ Ibid. A word of caution is called for here. Since I have not been able to find the Commission's decision to start a proceeding but only their press release stating their reasons for doing so, I have been forced to rely only on this later document.

²⁴² For an evaluation of the Commission's strategy in individual cases see Norberg Andreas "Bargaining down the Law – the Commission's method to ensure compliance with EC-law as bargaining or judicial procedure", 2005, pp 18-34 Available online <http://theses.lub.lu.se/archive/2005/05/20/1116580669-10703199/Bargain_down_the_law_FINAL.pdf>.

Commission in the procedure against Sweden, emphasise the structural nature of the problem rather than individual cases. This can be seen as an opening for putting the blame on the legislator, who could not have been made responsible for individual judgements.²⁴³ On the other hand, in the follow up to *Lyckeskog*, the Commission is in fact making use of an individual case to prove its point and the proceeding against Hoge Raad is focused directly on one specific judgement.

Moreover, in the cases against Italy and Sweden, the law *per se* is not seen as a breach of the two State's obligations under Community law. The breach appears only as a consequence of the practice of the national courts. The reluctance of first the Court and later the Commission to infringe directly and formally upon the independence of the judiciary can in my opinion be explained by the co-operative relationship between national and European courts.²⁴⁴ By focusing on a large number of cases and criticising them from the point of view that the legislation is too ambiguous, the Court can review the development of national case-law in general, without having to take a stand on the individual case. The national court then naturally has an obligation under the principle of loyalty to change its attitude in future cases. Furthermore, the Court, with the help of the Commission, can rely on the national governments, ultimately under the threat of an article 228 EC-penalty, to use means available to it to enforce such a change in the judiciary if necessary. In this way, the ECJ avoids moving outside the co-operation model by claiming superiority over the national courts in the individual case, but enhances its possibilities of ensuring that systematic differences in the interpretation of Community law will develop between the Member States.

It is, in my opinion, clear that *Commission v Italy* shows that the infringements proceedings can be based on faults by the national judiciary. The criteria of a not insignificant number of flawed judgements mean, however, that it is harder to base an infringement proceeding on actions by the judiciary than other State organs where actions of one single instance suffice to constitute a breach.

In the case against Italy, no single case was discussed by the Court, even if the Commission made references to one in order to explain how the Italian courts had been arguing. It is probable that the Court in a possible future case against Sweden will use the same tactic of basing its operative part of the judgement on the legislator's responsibility, although the breach is dependent on the judiciary. What will be interesting to see is how the ECJ will treat the individual case, used in the Commissions argumentation as an example of an individual breach of the obligation under 234. This might point out the direction for proceedings based solely on an individual case,

²⁴³ C.f. Breuer „Urteile mitgliedstaatlicher Gerichte als möglicher Gegenstand eines Vertragsverletzungsverfahrens gem. Art. 226?“ (2004) EuZW p 199 with regard to *Commission v Italy*.

²⁴⁴ Hofstötter, pp 149-151 for a similar interpretation of *Commission v Italy*.

like the one regarding Hoge Raad. My guess is, however, that the Court will continue to refrain from discussing individual instances of breaches when not necessary, and only in an extraordinary case consider this a breach.

3.5.2 State liability

The principle of state liability for breaches of Community law was introduced in the *Francovich*-case.²⁴⁵ The meaning of the principle is that when three criteria, further elaborated on in *Brasserie du pêcheur / Factortame III*²⁴⁶ are fulfilled, an individual can claim damages for breach of Community law before national courts.

In short, the three criteria are, firstly, that the rule of law infringed must be intended to confer rights on individuals. Secondly, the breach must be sufficiently serious. Finally, there must be a direct causal link between the breach of the obligation of the State and the damage sustained by the injured parties.²⁴⁷ The Court based its reasoning on the principle of loyalty²⁴⁸ and on the Community's own liability under article 288 EC.²⁴⁹ Drawing on international law, the Court in 1996 stated that state liability could not depend on which body of the State the breach is attributed to, indicating that also actions by the judiciary are covered.²⁵⁰

3.5.2.1 Köbler

In the recent *Köbler*-case²⁵¹ the Court, after much speculation in the doctrine, finally explicitly pronounced its opinion on liability for breaches by the judiciary. The case has its background in a process before the Austrian Verwaltungsgerichtshof (Supreme Administrative Court), where Köbler, a University professor, had claimed that it was inconsistent with Community law that the time he had worked as a professor in another Member State was not taken into account, when he applied for a bonus intended for persons who had been working as university professors in Austria for more than 15 years. The Verwaltungsgerichtshof made a preliminary reference in order to be able to answer if this was infringing the right of free movement for workers. However, after being asked by the Court if the answer could not be found in a judgement given after the question was referred,²⁵² the request for a preliminary ruling was

²⁴⁵ Joint cases C-6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357 [hereinafter *Francovich*]. On state liability see generally Craig and de Búrca, pp 257-273.

²⁴⁶ C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany, and R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029 [hereinafter *Brasserie du Pêcheur/Factortame*].

²⁴⁷ *Ibid* at 51.

²⁴⁸ *Francovich*, at 36.

²⁴⁹ *Brasserie du Pêcheur/Factortame*, at 28-29 and 47.

²⁵⁰ *Ibid* at 34.

²⁵¹ C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR p I-10239 [hereinafter *Köbler*].

²⁵² C-15/96 *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg* [1998] ECR I-47.

withdrawn. Prima facie the new ruling from the Court was favourable for Köbler. However, the Verwaltungsgerichtshof differentiated Köbler's situation from that in the case decided by the ECJ and dismissed his application, on the ground that a loyalty bonus could justify a derogation from Community law. Köbler then brought a new action, this time claiming damages before a lower court on the ground that the judgement of the Verwaltungsgerichtshof was counter to directly applicable provisions of Community law, due to a misinterpretation of the case-law. In this new proceeding, the lower court made a preliminary reference, asking inter alia whether a state can be liable also for conduct of its supreme court.

The Court, sitting in full session, repeated its position out-lined in *Brasserie du Pêcheur/ Factortame*, that based on international law, a State is to be seen as a unity and thus responsible also for the conduct of its judiciary.²⁵³ The role of the judiciary is especially important in order to ensure the effectiveness of rights derived by individuals from Community law and from this follows, according to the ECJ, that individuals must have a possibility of obtaining redress in the case of damage caused by national courts.²⁵⁴

Regarding the conditions governing State liability for the actions of courts of last instance, the Court first states that they are the same as the ones found in *Brasserie du pêcheur / Factortame III* for other State bodies.²⁵⁵ It continues, commenting on the second condition, that state liability in the context of the a court of last instance “can be incurred only in *the exceptional case* where the court *manifestly* infringed the applicable law.”²⁵⁶ The factors to take into account when determining this are the same factors as outlined in earlier cases in regards to other state organs, including the degree of clarity and precision of the rule infringed; whether the infringement was intentional and excusable or not and; the position taken by a Community institution.²⁵⁷ The ECJ, however, makes one important addition in stating that of importance is also the “non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC”.²⁵⁸ This is also highlighted by AG Léger's opinion in the case, containing three examples of when liability could come into question. These are a ruling against the clear meaning and scope of an act; a decision contrary to the case-law of the Court and, thirdly, a manifest disregard of the obligation to refer,²⁵⁹ all of which the Court seems to give importance to in its judgement.²⁶⁰

²⁵³ Köbler, at 32.

²⁵⁴ Ibid at 33-36.

²⁵⁵ Ibid at 52.

²⁵⁶ Ibid at 53, italics added.

²⁵⁷ Ibid at 55. C.f. *Brasserie du Pêcheur/Factortame* at 56, where the same factors are listed, except for the fact that the discretion of the body in breach is not mentioned in Köbler.

²⁵⁸ Köbler at 55.

²⁵⁹ AG Léger's opinion in Köbler at 139-144.

²⁶⁰ Köbler at 55-56.

Important to remember in relation to article 234 is that the Court did not consider that this article confers any rights on individuals. Instead, the Court solely relied on the substantial right of free movement behind Köbler's claims in the first process to fulfil the first condition for state liability.²⁶¹

After discussing the conditions for liability, the Court then turned to the specific circumstances in *Köbler* and found that it had not decided on the compatibility of loyalty bonuses in its earlier case-law relied on by the Verwaltungsgerichtshof. It then found the national provision to be incompatible with Community law.²⁶² Therefore, the Austrian court was in breach of the article 234(3) EC when deciding to the contrary without referring the question to the ECJ. However, since the question was neither clear nor decided by the Court and the fault was owing to the incorrect reading of the Court's judgement, the breach cannot be regarded as manifest and is therefore not fulfilling the second criteria of being sufficiently serious.²⁶³

For this thesis it is important to note that the Court, in the same case where it answered the long discussed question of liability for acts by the judiciary, once more recognises the validity of the *CILFIT* ruling.²⁶⁴ While settling this general question, the Court raises new questions as to the extent of the liability by remodelling the *Brasserie du pêcheur / Factortame*-conditions. In contrast to acts by other state bodies, breaches by the judiciary have to be *manifest* and liability is only possible in *exceptional* cases.²⁶⁵ In the application of these new criteria in the specific case of Mr Köbler, the Court takes a rather cautious approach. The *Köbler* case can be understood to mean that national courts are safe from liability claims whenever they *only* make an "incorrect reading" of the ECJ's case-law. This gives national courts great discretion to interpret case-law in their application thereof, without risking to make the state liable. However, the ECJ has before, according to Hartley, found it wise to qualify a newly established doctrine in the case where it is first introduced, in order to avoid criticism and then in subsequent cases let the doctrine apply fully.²⁶⁶ At least one member of a national Supreme Court has already expressed his fears, not to say anger, over the ruling in *Köbler* in relation to *CILFIT*. According to that author, it will be hard to decide claims of liability and the question what would have happened had the matter been referred, without, as was done in *Köbler*, making a new reference.²⁶⁷ It will therefore be interesting to see how the principle will be developed further. Until the Court elaborates on the

²⁶¹ See Köbler at 101-103 and Wegener Bernhard, "(Fehl-)Urteilsverantwortung und Richterspruchprivileg in der Haftung der Mitgliedsstaaten für die Verletzung von Gemeinschaftsrecht" in EuR (2004), pp 84-91, pp 89-90 [hereinafter Wegener].

²⁶² Köbler at 88.

²⁶³ Ibid at 118-124.

²⁶⁴ Ibid at 118.

²⁶⁵ Ibid at 56.

²⁶⁶ Hartley "Foundations", p 79.

²⁶⁷ Wattel Peter (Advocate General at Hoge Raad), "Köbler, CILFIT and Welthgrove: we can't go on meeting like this" 41 CMLR (2004) pp 177-190.

remodelled criteria, we have to presume that the Court has chosen to give some leeway to national courts. This, in my opinion, can be explained by the importance of their co-operation with for the ECJ.

Ovwexer agrees that the higher threshold for courts is motivated by the principle of co-operation, but is critical thereof. From the perspective of protection of individuals, it does not matter which state body is responsible and the ECJ in this way fails to protect the individual properly.²⁶⁸ Komárek, on the other hand, interprets *Köbler* in a more “federalist” manner as *de facto* tying down the national courts without creating a formal hierarchy and creating a special kind of appellate system by allowing a “second attempt” to have a question referred to the ECJ. I, however, find his conclusion that the case shows that the ECJ acts as a true Supreme Court of a judicial system with a federal nature²⁶⁹ to go too far. Clearly the possible scope for national courts to interpret Community law is more limited post-*Köbler*, when the risk of a liability claim has been established but the cautious application has not yet created a *de facto* hierarchy. Therefore, I agree with Auby’s more modest statement that *Köbler* “donne au système, non pas un caractère hiérarchique, mais une plus grande verticalité.”²⁷⁰

3.5.2.2 Köbler in relation to res judicata

The interveners in *Köbler*²⁷¹ raised a number of concerns with an extension of state liability to courts of last instance, including the independence of the judiciary and it was argued that this could lead to a diminution of the authority of such courts and legal certainty. I will here comment on the issue of res judicata, also addressed by several interveners and the Court in *Köbler*, and relate this to another recent case from the ECJ.

The principle of res judicata means that a matter adjudicated is held to be true and a new case of the same subject-matter, legal basis and parties can not be opened. Both AG Léger and the Court found that this principle was not threatened by *Köbler*, since in the new proceedings regarding damages neither the subject-matter nor the parties would be the same.²⁷² The Court emphasised that “the principle of state liability [...requires...] reparation, but not revision of the judicial decision which was responsible for the

²⁶⁸ Obwexer Walter, “Anmerkung” 2003 EuZW pp 726-728. Differently Botella, who makes a strict interpretation of *Köbler* when claiming that the Court considerably limits the discretion of national courts and that this put emphasis on the protection of individuals. Botella, Anne-Sophie, “La responsabilité du juge national” in RTD eur, pp 283-315, (2004) p 306.

²⁶⁹ See Komárek pp 12-18 and 33-34.

²⁷⁰ Auby, Jean Bernard, “Physionomie du contentieux administrative européen” in “What’s new in European Administration Law?” Ziller Jacques (ed.) EUI Working Paper Law 2005/10 pp 15-18, p 16. Out-side the scope of this analysis is the interesting question of how *Köbler* will affect the hierarchy of national judicial orders when lower courts can be faced with liability claims against the judgement of a higher court.

²⁷¹ Indicating the importance of the case, five Member States and the Commission submitted their written observation to the Court.

²⁷² AG Léger’s opinion in *Köbler* at 95-106 and *Köbler* judgement at 37-40.

damage.”²⁷³ In other words, both a decision holding that Prof. Köbler was not entitled to a loyalty bonus and one giving him damages for this could have effect simultaneously.²⁷⁴

In *Kühne & Heitz*, the Court was faced with the question whether an administrative body was required to reopen a decision, which had become final, to ensure the full operation of Community law as it had been interpreted in subsequent rulings from the ECJ.²⁷⁵ The Court answered this in the affirmative. It follows from the principle of co-operation that a decision shall be re-examined when (a) the body under national law has such powers to reopen a case (b) the decision is final as a result of a decision by a court of last instance (c) the decision was, with regard to subsequent case-law from the ECJ, a misinterpretation of Community law and a preliminary reference under article 234(3) was not made and (d) the concerned parties complained immediately after becoming aware of the new decision by the ECJ.²⁷⁶

The decision in *Kühne & Heitz* can be claimed to have more direct bearing on the principle of co-operation than *Köbler*, since it concerns the possibility of direct review of decisions of national authorities.²⁷⁷ The case-law from the ECJ is thus given a kind of retroactive effect on individual cases already decided finally. Returning to *Köbler*, Komárek argues²⁷⁸ that after the failure to receive damages, probably all of the criteria pronounced in *Kühne & Heitz* for a reopening of the initial case were fulfilled. Even if the Court has made it hard to succeed in claims for damages, such claims could be used to produce a preliminary ruling on the administrative decision questioned in the first case, which in turn can be the basis of a *Kühne & Heitz*-challenge of the case. The two cases lead to a new possibility for individuals to challenge, under certain circumstances, national judgements and obtain a change of the initial judgement and not only compensation.

3.6 Preliminary conclusions

The first conclusion that can be drawn from the recent case-law from the Court of Justice is that the traditional approach towards the obligation to refer is still valid. The much-criticised *CILFIT* interpretation of the extent of the exceptions from the obligation has been upheld by the Court. The Court has had plenty of opportunity to reject this interpretation, but has chosen not

²⁷³ Köbler at 39.

²⁷⁴ C.f. Wegener, pp 87-89.

²⁷⁵ C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837. For a comment see Caranta, 42 CMLRev (2005) pp 179-188 “C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, Judg...” [hereinafter *Kühne & Heitz*].

²⁷⁶ *Ibid* at 28.

²⁷⁷ C.f. Scherr Kathrin Maria, “The concept of Administrative self-remedy under EC law” in “What’s new in European Administration Law?” Ziller Jacques (ed.) EUI Working Paper Law 2005/10 p 55.

²⁷⁸ Komárek, pp 20-21.

to do so. This interpretation of the obligation to refer is as we seen rather strict and, it could be argued, in itself threatening a co-operative approach by forcing national courts of last instance to refer through its “intimidating” conditions. However, *CILFIT* in fact puts down exceptions to the “automatic” obligation in the Treaty. The risk of turning courts of last instance into “post-offices”, merely admitting appeals to send to Luxembourg, is not real if the distinction between interpretation and application can be upheld.

The most important developments have instead taken place regarding the consequences of a non-referral. There have been movements on both of the Community’s fronts – infringement proceedings and state liability. It is today obvious that the non-referral could lead to such liability. At the same time, the Commission has made it clear in three recent infringement proceedings that the national judiciary is no longer a politically protected area. The argument against such proceedings, based on the possible negative effects on the co-operation between national courts and the ECJ, is apparently not considered as strong any longer in the Berlaymont building. Since clearly formulated means to force through references do now exist, will this turn the dialogue into an interrogation?

There is one common characteristic in the Court’s reasoning in both *Köbler* and *Commission v Italy*, which was later taken up by the Commission in the Lyckeskog-prelude, that speaks against this. The Court treats breaches by the judiciary more tolerantly than breaches by other state organs. In *Köbler*, this is seen both in the requirement of a *manifest breach* and due to the fact that liability is only incurred in *exceptional cases*. This is to raise the threshold for what is accepted compared to other breaches. In *Commission v Italy*, the Court turned in its reasoning, from a focus on the national courts to finally concluding that the legislator was in breach due to the courts’ actions. To address the legislator and maybe even demand a joint responsibility with another state organ before ruling that the national judiciary is in breach of the Treaty, must be seen as a very careful approach by the ECJ. Also in this case, the ECJ introduced certain qualifications in its emphasis on more systematic breaches and in requiring a significant number of cases.

Since the co-operative approach is founded on mutual trust, this is in my opinion a natural cautiousness in line with this approach. The Court has given the national courts significant leeway, but it is shown that its trust is not unlimited when it is apparent that it is not mutual. The co-operative approach cannot demand that the ECJ shall continue its co-operative approach towards national courts, when these are manifestly disregarding their part of the co-operation. If, however, the combination of *Köbler* and *Kühne & Heitz* would lead to a quasi-appeal system, this could in my opinion threaten the co-operative approach.

I do not see the ruling in *Köbler* and *Commission v Italy* as a direct threat to the co-operation between national and European courts. The rulings are often seen as a limitation of the freedom of the national courts. However, I

would instead argue *de lege ferenda* that these cases should be the starting point of a development towards giving national courts more responsibility. Seen in its proper context, it is obvious that *CILFIT* came at a time where the *acte clair* doctrine had been abused by national courts and when the Court's caseload was much smaller than today. Like AG Jacobs, I think an important distinction has to be made between the two problems of increased caseload and revolting national courts. AG Jacobs's conclusion was that the latter problem could not be faced by the strict criteria in *CILFIT* concerning which cases to refer. The Court should therefore, in a "*CILFIT II*", focus on the former. Through the recent cases discussed here, the Community has in my opinion developed more efficient tools in order to solve the problem of revolting courts. It should therefore continue reforming the judicial structure by loosening up the *CILFIT* criteria to allow for minor questions to be solved by national courts. More haste to do this, however, could lead to a slower integration of the new Member States into the legal system of the Community.

When I now turn to see how Swedish courts follow the principle of co-operation in the context of Article 234(3), I naturally do this from the *de lege lata* perspective of "*CILFIT*" and not a *de lege ferenda* perspective of a possible "*CILFIT II*".

4 The Swedish approach

In the previous chapters we have seen the obligations arising from article 234 and the principles of loyalty and co-operation imbedded in article 10 EC. I shall in this chapter examine a number of Swedish cases from this Community law perspective. However, I will start by shortly comparing the number of references from Sweden with that from other Member States. In section 4.2 I then turn to examining one early and one more recent case, each from the two most important courts of Sweden, HD and Regeringsrätten. In section 4.3 I will then examine six cases from Swedish courts of last instance during 2004, all pointed out as possible infringements of the obligation to refer.

4.1 References from Sweden

There exist great variations between the use of preliminary references in different Member States (see Supplement) and I can only sketch a big picture in this section.

During Sweden's ten first years in the EU, Swedish Courts made fifty references to the ECJ. Of these five was made from HD, three from MD (the Market court), 15 from Regeringsrätten and the other 27 references from other courts.²⁷⁹ Making reliable comparisons based on statistics between the attitudes of judges in different countries is hard. The number of references is affected by many different factors, for example population, how long the country has been a member of the Union, intra-community trade and legal culture.²⁸⁰

Comparing the three states joining the Union in 1995, it is apparent that far less references have come from Sweden and Finland than Austria, where the courts made no less than 261 references 1995-2004. During those ten years Swedish courts have made slightly more references than Finnish. However, in the last five years there have been as many references from the less populated Finland as from Sweden.²⁸¹

The average of 5 references per year from Sweden is not low in relation to some other comparable EU members, such as Portugal and Ireland. It has

²⁷⁹ The European Court of Justice's "Annual report 2004" p 187.

²⁸⁰ Thanks to a well developed database, there are numerous statistically based studies on preliminary rulings. See for example Sweet, Alec Stone and Thomas L. Brunell "The European Court and the national courts: a statistical analysis of preliminary references, 1961-95" 5 *Journal of European Public Policy* (1998) pp 66-97. Carrubba Clifford and Murah Lacey, "Legal Integration and Use of the Preliminary Ruling Process in the European Union" in 59 *IO* (2005) pp 399-418.

²⁸¹ For a more developed analysis of references from Sweden and Finland, see Sankari, "EU Law in Finland and Sweden: a Survey of the Preliminary References, National Jurisprudence and legal Integration", *ERT* (2003) pp 508-534.

even been argued that Swedish courts, together with the Finnish and Austrian, have learned to make use of article 234 relatively fast.²⁸² It is, however, clear from a glance at the statistics that Swedish courts would be far from the first choice for a “forum-shopping” litigant wishing to bring a case to the ECJ and that Swedish courts have a small part in the problem of an increased caseload in Luxembourg.

4.2 Swedish cases – early cases

The following four cases have all been discussed in the literature as constituting possible infringements of the obligation to refer. I analyse them here to give a background to the more recent approach and to see how the courts have treated the obligation.

4.2.1 Volvo

Shortly after Sweden became member of the EU, the following case relating to the protection of trademarks was filed in Stockholm District Court. The background was that the respondent, a company called DS Larm operating a garage, had advertised its services with signs saying: “VOLVO service” and also answered the phone with the same words. However, it was neither an authorised Volvo garage, nor had it obtained permission to use the registered trademark “VOLVO”.²⁸³ DS Larm instead held that the use of “VOLVO” in its advertisement would fall under article 3§ of the Swedish trademark law²⁸⁴ or, at least, article 6 of Directive 89/104²⁸⁵ implemented by the Swedish law. In article 5 of the said Directive the rights of the holder of a trademark is listed and article 6 constitutes an exception to this provision. The Article states that third parties can not be hindered from using a trade mark where it is necessary to indicate inter alia the kind; quality; quantity; intended purpose; or other characteristics of goods or services (6(1)b) or the intended purpose of a product or service, in particular as accessories or spare parts (6(1)c), provided it is used in accordance with honest practices in industrial or commercial matters.

4.2.1.1 HD’s judgement

Ruling in the case, HD took as its starting point that only the company Volvo has the right to use and authorise the trademark for services and repairs if a commercial connection between the company and the service is implied. Applying the Swedish legislation, HD concerning the exceptions in article 6(1)b of the Directive held that “VOLVO” does not fulfil the criteria of describing such a characteristic of the product. Concerning article 6(1)c, it was emphasised that the reference to the trademark had to be made so that

²⁸² Anderson and Demetriou, p 29.

²⁸³ NJA 1998 s 474, p 474-475.

²⁸⁴ Varumärkeslagen (1960:644).

²⁸⁵ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, Official Journal L 040, 11/02/1989 p 1-7.

every mistake regarding the commercial connection with its proprietor is out of question. Since this, according to HD, was not the case, DS Larm could not rely on these exceptions and may thus not continue to use “VOLVO” in its marketing.²⁸⁶ Nothing is said in the judgement about DS Larm’s argument that a preliminary reference should be made, since HD rejected this in a separate decision.²⁸⁷

4.2.1.2 Analysis

It is obvious from the judgement that the only exception from the obligation to refer possible to rely on is the *acte clair* doctrine. It can, however, be questioned how clear Community law was at the time of the judgement. The Court in *Dior* had ruled that a parallel importer, who had used the name and picture of the products for sale and advertised the products in a manner to which the owner of the trademark objected, could rely on the exception from article 5 found in article 7 of the trade mark Directive as long as the reputation of the trademark was not damaged.²⁸⁸ According to Pehrson, it is not obvious that the same right to use a trademark was to apply to the sale of spare parts and services. HD however did not consider if the Court’s reasoning in *Dior* regarding article 7(1) of the Directive could be applied to article 6(1) thereof as well. The Court had not pronounced its opinion on this question, which therefore had to be considered as unclear. Instead of discussing this possibility HD, according to Pehrson, ruled the case in accordance with settled Swedish case-law.²⁸⁹

Remembering the strict criteria in *CILFIT*, stating that in order to consider an *acte as clair* the national court must be confident that other courts would come to the same conclusion, it is interesting to note that in February 1997, Hoge Raad made a reference to the Court regarding the interpretation of articles 5 to 7 of the same Directive as discussed by HD. The referral was made within a process against a garage that had used advertising saying inter alia “Repairs and maintenance of BMWs” and “BMW specialist”. The questions referred were, in brief, whether this fell within the framework of article 5 and if so whether the exceptions to this provision in the subsequent articles applied. The Court took on the question in plenum, indicating the importance given to it. Its decision regarding article 6(1)c was that the use concerned must be held to be necessary to indicate the intended purpose of the service and allowed as long as it does not take unfair advantage of the repute of the trademark by, in an illegitimate way, creating an impression

²⁸⁶ See NJA 1998 s 474, pp 484-487.

²⁸⁷ Decision of the 11th of June 1997. See Nergelius, “Förvaltningsprocess...”, p 71 and JK’s decision 3646-99-40..

²⁸⁸ C-337/95 Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV [1997] ECR I-6013 at 38 and 48.

²⁸⁹ Pehrson Lars “Möjligheten att återopa annans varumärke vid marknadsföring av reparationer” JT (1998/99) pp 390- 396, p 393-396. See also Bernitz Ulf “Barsebäcksdomen i Regeringsrätten – borde förhandsavgörande av EG-domstolen ha begärts” JT (1999/00), pp 964-970 at p 969 [hereinafter Bernitz, “Barsebäcksdomen”], making the same argument.

that there is a commercial connection between the service and the proprietor of the trade mark.²⁹⁰ The Court is making a strong link between its reasoning regarding article 6 and 7 and seems to give more weight than HD to the purposes behind these articles. In the doctrine it has been held both that this interpretation was less strict than the one given by HD²⁹¹ and that the Court came to the same conclusion as HD.²⁹²

4.2.1.3 Prelude before the Chancellor of Justice

After the judgement in the *BMW*-case, DS Larm filed a request for damages to Justitiekanslern, JK (the Office of the Chancellor of Justice). In the request, based on the *Francovich* doctrine, it was held that the Swedish State was liable to pay damages on the ground that HD acted in breach of Community law when not referring the question to the Court. JK, in his decision, stated that HD and the ECJ reasoned likewise, although it is admitted that HD's judgement is formulated as being stricter in its protection of the proprietor of the trademark. The different circumstances of the two cases would, however, led to different outcomes both according to HD's and the ECJ's reasoning. Therefore, JK considered that the act could not be considered unclear and the claim for damages was dismissed.

JK continued his decision with an interesting *obiter dictum* in which he gives his opinion on State liability for non-referrals. Firstly, he stated that even if HD was in breach of the Treaty, damages could not be rewarded due to the fact that the case in his opinion would not have been decided differently after ECJ had given the correct interpretation and hence no damage has been suffered. Secondly, even if there was damage done, it is out of the question that the State would have to pay damages for a minor error in a judgement from a Supreme Court.²⁹³

As seen both in the doctrine and JK's decision, it is likely that DS Larm was judged according to stricter criteria than would have been the case if the question had been referred. That the outcome would not have been different is beside the point in relation to *acte clair*. What is important is that HD could not have known how the Court would interpret the relevant provisions, just as Hoge Raat did not know this in 1997. The reference by the latter had already been lodged in Luxembourg when HD gave its ruling. The HD thus had an alternative to a referral in the possibility of awaiting the ECJ's ruling and then consider the matter as *clair* or *éclairé*. Had it referred,

²⁹⁰ C-63/97 Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik [1999] ECR I-905 at 51-64 [hereinafter BMW]; for a comment see Bonet Georges "Propriétés intellectuelles" in RTDEur. (2000) pp 99-138, pp 122-126.

²⁹¹ Kockvedgaard and Levin, "Lärobok i Immaterialrätt", 2000, p 337; Bernitz "Barsebäcksdomen", p 969 and; Björkenfeldt Mats "Replik på professor Bernitz debattartikel, HD och EG-domstolen – om vikten av förhandsavgöranden och HD-domar som inte bör ses som prejudikat, JT 2001-02 s. 955ff" JT (2002-03) pp 208-210.

²⁹² Karlsson Kent and Hägglund Fredrik "En kartläggning av Sveriges fem första år med EG-rätt" ERT (1999) pp 437-519, p 458. These authors, however, agree that HD should have made a preliminary ruling.

²⁹³ Decision by JK, case-nr 3646-99-40, delivered 7th of February 2002.

it is according to Bernitz, likely that the Court would have decided the two cases together.²⁹⁴ The garage, which partly because of the judgement went bankrupt, would probably have appreciated if HD had done what Nergelius recommends²⁹⁵ and what its Dutch counterpart practised: to play it safe and refer.

4.2.2 Barsebäck

The *Barsebäck*-case²⁹⁶ has been described as one of the most important cases in Sweden during the last century²⁹⁷ and the background to the case is one of the most contested political issues during the last 30 years – nuclear power.²⁹⁸ The government together with two supporting parties in February 1997 came to an agreement that one of the nuclear reactors in Barsebäck would close down as of July 1998. Based on this agreement, an Act on the phasing out of nuclear power²⁹⁹ was drafted and adopted by Parliament after Lagrådet (the Council on Legislation) conducted its judicial preview without any major critique.³⁰⁰ Before enacting the legislation, delegating to the Government the power to decide which power plants to be closed, the Parliament had pronounced that the plant in Barsebäck was to be closed first.³⁰¹ This unusual legislative process is also shown in the criticism directed towards the Act for not being general but rather drafted with one particular case in mind.³⁰²

After the expected decision by the Government to close power plant 1 in Barsebäck, the company to which the decision was directed, Barsebäck Kraft AB, its owner Sydkraft AB and PreussenElektra AG, a German corporation controlling 28 % of the votes in Sydkraft, applied for legal review of the decision. Regeringsrätten, the only competent instance to try such cases, took on the case after first deciding to suspend the decision from being executed before the legality of it had been reviewed.³⁰³ A number of

²⁹⁴ Bernitz Ulf, "Sverige och Europarätten", 2002, p 129 [hereinafter Bernitz "Sverige och Europarätten"].

²⁹⁵ See Nergelius, "Förvaltningsprocess...", p 71.

²⁹⁶ RÅ 1999 ref 76.

²⁹⁷ Nergelius, "Förvaltningsprocess...", p 102.

²⁹⁸ This background is based on the presentation given by Nergelius "Förvaltningsprocess..." and the facts presented in RÅ 1999 ref 76 p 423-427. The issue once decided in a referendum in 1980 has all potential to be the decisive issue in the 2006 election.

²⁹⁹ Lag (1997:1320) om kärnkraftens avveckling.

³⁰⁰ The preview in this case has been criticised by Nergelius Joakim "Problemet lagrådet – oberoende granskningsinstans eller regeringens förlängda arm?" SvJT (1997) pp 562-572 and later defended by one former member of the Council, Vängby Staffan "Förhandsavgörande från EG-domstolen – en replik till Jan-Mikael Bexhed" JT (1999/00) pp 248-250.

³⁰¹ See prop. 1996/97:176 and rskr 1996/272.

³⁰² See Warnling-Nerep, "Lex Barsebäck: kan vi lita på lagstiftaren och lagrådet?" JT (1997/98), pp 286-297, especially pp 290-294.

³⁰³ See Lag (1988:205) om rättsprövning av vissa förvaltningsbeslut especially § 1(3) and, regarding the decision to suspend the decision, see Eklund Hans "Inhibition – ett nödvändigt ont?" JT (1998/99) pp 51-79.

important issues concerning Swedish constitutional law, the position of Sydskraft and PreussenElektra as a party to the proceeding, proportionality and the ECHR were raised in the case. I will, however, focus my analysis of the judgement on the two major Community law issues involved.³⁰⁴

4.2.2.1 Environmental impact assessment

One of the arguments of the applicants was that an Environmental impact assessment (EIA) had not been made before the Government made its decision and since it was not obvious that the lack of such an EIA was without importance, the decision should therefore be annulled.³⁰⁵ The legal background to this argument is a Swedish provision holding that if the Court finds that a decision is in breach of a legal rule and it is not obvious that the error is without significance for the decision, the court shall annul the decision.³⁰⁶ Council Directive 85/337/EEC, implemented in Swedish law,³⁰⁷ states that an EIA is mandatory for certain projects listed in Annex 1 to the Directive (article 4). At the time of the decision, the Annex entailed as one type of such projects “nuclear power stations and other nuclear reactors”. A change had been made through Council Directive 97/11/EEC adding, “including the dismantling or decommissioning of such power stations or reactors” to the provision but the dead-line for the implementation of the change had not expired. According to the applicants, the amendment made in 1997 was only a specification and did not introduce anything new in substance broadening the scope of the Directive and thereby *e contrario* excluding the application of the Directive on the decision at hand as the Government argued. Furthermore, the parties disagreed on the question whether the situation at hand was falling under the exception in article 1(5) of the Directive for projects the details of which were adopted through an “act of national legislation”.

Regeringsrätten commenced its reasoning by going through a number of different parts of the Directive, which it regarded as necessary to interpret in order to come to a decision on whether the Directive was applicable or not. This list of issues included how the amendments should guide the interpretation of the original Directive, if a non-voluntary closure of a power plant is to be considered within the scope of the Directive and the meaning of “details” and “act of national legislation” in the exception in article 1(5),

³⁰⁴ For presentations focusing on other topics in the case see e.g. Åhman Karin ”Barsebäck ur ett egendomsrättsligt perspektiv” ERT (1999) pp 661-677; and Sterzel Fredrik, ”Barsebäcksmålet” JT (1999/00) pp 658-675 [hereinafter Sterzel]. Regarding the principle of proportionality in relation to Community law see Groussot Xavier ”Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?” 2005, pp 546-552 and for other in the case more secondary questions of Community law see Böckwall Carl “Gemenskapsrättens uniforma tillämpning i fara? – om Regeringsrättens ovilja att hänskjuta EG-rättsliga frågor I Barsebäcksmålet” ERT (1999) pp 711-720.

³⁰⁵ The courts reasoning regarding this issue is found in RÅ 1999 ref 76 pp 451-458.

³⁰⁶ 5§ Lag (1988:205) om rättsprövning av vissa förvaltningsbeslut.

³⁰⁷ When the Barsebäck-case was decided through Lag (1987:12) om hushållning med naturresurser m.m. (NRL), today in Chapter 6 Miljöbalken.

where different language versions and purpose of the Directive is discussed. The conclusion that Regeringsrätten drew from this is that “there, on a number of issues, is more than one possible interpretation.”³⁰⁸ What Regeringsrätten stated was basically that the act is not an *acte clair* with regard to its scope.

Regeringsrätten then turned to the question whether or not this means that a referral to the Court had to be made. According to Regeringsrätten, “for such an action to be justified, a prerequisite is that an answer to the question whether the Directive is applicable really is needed to decide the case.”³⁰⁹ It then presented construed two possible scenarios where no referral would be needed. This would have been the case, firstly, if the material available in the study behind the decision was enough to fulfil the requirements of the Directive or, secondly, if the material was not sufficient to fulfil the requirements but it was obvious that the lack in the material was not extensive enough to have had any influence on the Government’s decision.

Therefore, to be able to make the decision to refer or not, Regeringsrätten first had to consider whether the material available in fact fulfilled the Directive’s requirements. The Directive contains no rules on the form of the EIA, but additional to the recommendations in Annex 3 of what an EIA should entail, article 5(2) puts down minimum requirements for what it must contain. Moreover, article 6 of the Directive demands that the information in the EIA is communicated with both authorities and the public. The material that Regeringsrätten looked at and evaluated against these provisions and the Swedish implementation thereof was different governmental reports regarding nuclear power dating from 1979 and later. Especially two reports from 1986 and 1995 are pointed out in the judgement.³¹⁰ The conclusion is that the material “in substance more than enough equals what would be required by an EIA”.³¹¹ However, it is found that the material does neither include a non-technical summary of the required information mandatory according to article 5(2) indent 4 of the Directive, nor had it been made available in the manner demanded by article 6 thereof. This, in my opinion, makes the conclusion that the material is enough questionable.

Regeringsrätten, on the contrary, is of the opinion that even if an EIA fulfilling these mandatory requirements had been made, this would not add anything new to the material and it is therefore obvious that this lack is without significance for the decision. Its conclusion was therefore that a referral of the question whether the Directive is applicable to the situation is unnecessary.

³⁰⁸ ”[En analys av tolkningsfrågorna] ger enligt Regeringsrättens uppfattning vid handen att det på en rad punkter finns mer än ett möjligt tolkningsalternativ” RÅ 1999 ref 76 at 456.

³⁰⁹ ”En förutsättning för att en sådan åtgärd skall vara befogad är att ett svar på frågan om direktivets tillämpning verkligen behövs för att avgöra rättsprövningsmålet.” Ibid at 456.

³¹⁰ Ibid at 450 and 458. The reports referred to are SOU 1995:139-140 and Ds I 1986:11.

³¹¹ ”materialet motsvarar i sak mer än väl vad som skulle kunna krävas av en MKB...” ibid p 458.

Several scholars have discussed Regeringsrätten's line of reasoning and the decision not to refer a question to the ECJ. The arguments defending Regeringsrätten have primarily been put forward by Sterzel and Mahmoudi. Mahmoudi holds that there was no reason to have any doubts as to the scope of the Directive, i.e. that it was an instance of *acte clair* that the dismantling of a power plant was not covered and that the argument by the applicant could have been dismissed this way. This argument is based on article 3(2) in the amending Directive, stating that the original Directive shall apply to requests for developments consents prior to March 1999.³¹² Ebbesson disagrees with this reasoning on the ground that there is no need to protect the legal certainty of the Government, granting the consent, of the same kind as there is to protect the individuals making the application. Therefore, there is no justification for not making an interpretation loyal to the EU and thus take the new Directive into account.³¹³ As both Ebbesson and Bernitz point out, the case-law from the ECJ shows that it tends to interpret the requirement of conducting an EIA strict and is reluctant to admit exceptions from this requirement.³¹⁴ Mahmoudi also agrees that since Regeringsrätten was in doubt it ought to have referred the question, making his argument merely a guess on what the Court would have ruled if it was given the opportunity.

Sterzel gives three arguments in relation to this issue as to why it was correct not to refer.³¹⁵ First, he holds that the case should not be made waiting another couple of years because of a reference. It is in my opinion clear that this argument has no bearing whatsoever in Community law. The exceptions to the obligation to refer do not include a consideration of the time that a reference takes.³¹⁶ Secondly, he asks the question, if a referral must be made even if no judge in the national court found the question to be unclear. The answer to this question, probably intended to be rhetorical, must from a Community perspective be: Yes, if it is not obvious that all other national courts and the ECJ would come to the same conclusion.³¹⁷ His third argument is, in my opinion, the only one with some bearing in Community law, namely that a question shall only be referred if it is necessary for a decision. Quitzow argues contrary to this, claiming that what is important is not whether the national court found the issue necessary or not but if a referral is needed in order to secure a uniform application of law. It seems like Quitzow bases this argument on the principle of loyalty. My opinion is that the obligation based on article 10 cannot be interpreted as

³¹² Mahmoudi, Said "Barsebäcksmålet och kravet på MKB", JT (2000/01) pp 215-219.

³¹³ Ebbesson Jonas, "Miljökonsekvensbedömningar när kärnkraftverk avvecklas?" JT (1999/00) pp 895-902, p 900-901 [hereinafter Ebbesson]. See also C-80/86 Kolpinghuis Nijmegen [1987] ECR 3969.

³¹⁴ Ebbesson, p 900-901; Bernitz, "Barsebäcksdomen", p 964; c.f. C-435/97 World Wildlife Fund v Autonome Provinz Bozen [1999] I-5613.

³¹⁵ Sterzel, pp 671-672.

³¹⁶ Except maybe as a justification of the exception concerning interim decisions.

³¹⁷ See CILFIT at 16.

being this far-reaching.³¹⁸ To extend this obligation as Quitzow suggests would create an obligation to refer every question that would be interesting to have tried before the Court, i.e. including the type of hypothetical questions the Court said no to in *Melicke*.³¹⁹

Without referring to *CILFIT*, it seems like Regeringsrätten in its reasoning did consider the different exceptions for not referring and after explicitly rejecting *acte clair*, it relied on there not being any question raised that was necessary to decide.³²⁰ The problem with this reasoning is, in my opinion, that it in fact is based on an interpretation of the Directive, which is far from clear. The Court has not made a clear ruling on the form or content of an EIA³²¹ and it is doubtful if the Court would uphold some of the interpretations that Regeringsrätten's reasoning relies on. For example, is it clear that it is only a non-technical presentation that is lacking in the material? Can general reports on the closure of nuclear power plants be relied on at all or should the requirement of an EIA made "in the light of each individual case" in article 3 of the Directive be interpreted as to mean that a specific EIA had to be made? Can already available material, some of it old, be considered an EIA at all? Is the debate in Parliament and in the public on nuclear power in general sufficient to be considered a "detailed arrangement for [...] information and consultation" of the public on the EIA according to article 6?³²²

I do not intend to answer these questions, I just wish to raise them in order to show that the reasoning of Regeringsrätten in fact depends on a number of interpretations of unclear provisions, which are necessary to apply in order to come to a decision. However, it is foreseeable that the Court, given its strict interpretation of the Directive, would consider the material in the case as not constituting an EIA or having severe faults. It would then be for Regeringsrätten to decide if *this*, possibly more extensive breach and lack of a newly produced EIA, was to be seen in relation to the Swedish law. The attitude to consider that nothing the ECJ could possibly say could affect the decision in this regard is, in my opinion, strange.

³¹⁸ Quitzow Carl Michael, "Sterzel och Regeringsrätten" JT (1999/00) pp 973-978

³¹⁹ See C-83/91 *Meilicke v ADV-ORGA* [1992] ECR p I-4871.

³²⁰ C.f. Nergelius, "Förvaltningsprocess..." pp 115-116 who interprets the reasoning of Regeringsrätten the same way.

³²¹ In C-301/95 *Commission v Germany* [1998] ECR I-6135 especially at 51-52 the question if German law is contrary to article 5(2) is touched on but not tested. In C-431/92 *Commission v Germany* [1995] ECR I-2189 at 41-45 an EIA is briefly scrutinised but the claim that it does not fulfil the requirements is dismissed due to lack of evidence. In the subsequent preliminary ruling C-287/98 *State of the Grand Duchy of Luxembourg v Linster* [2000] ECR I-6917 at 55-57 the Court makes an interesting connection between the two questions concerning the requirements of the Directive and interpretation of article 1(5) and seems to give a strict interpretation the minimum requirements.

³²² C.f. Ebbesson, p 898-899.

4.2.2.2 Competition law

The background to the applicants' arguments in relation to competition law³²³ was the fact that the largest actor on the Swedish energy-market and Sydkraft's competitor, Vattenfall, is a state-owned company. To close down Barsebäck and not one of Vattenfall's nuclear power plants would according to the applicants strengthen its already dominant position. Vattenfall would according to Community competition law not be allowed to take action with similar effects as the action by its owner, the State, e.g. through a take-over of the plant from Sydkraft.³²⁴

The legislation of importance for this part of the judgement is mainly articles 82 EC, on companies' abuse of dominant position and 86 EC, on public undertakings being subject to the Treaty's competition rules and prohibiting Member States to enact measures contrary to these rules. The parties disagreed on several points of law, including how to define the relevant market; whether Vattenfall was dominant on this market; if articles 82 and 86(1) could be applied to situations as the one at hand, where the challenged decision was not directed towards Vattenfall and if the Government through its decision strengthened the position of Vattenfall abusively.

The judgement does not go into detail on many of these arguments. What Regeringsrätten instead does, after stating that the decision by the Government in fact could lead to a strengthened position for Vattenfall, is to take a more general approach towards the Community rules on state intervention. As Regeringsrätten acknowledges, many issues within this field are still unclear, even though there is extensive case-law from the ECJ. Uncontested is, however, that the possibility of state intervention exists when there is a public interest to protect but that these activities, according to article 86 EC, must take the rules on free movement and competition into account. By accepting the purposes behind the law upon which the contested decision is based, the state intervention was considered to be justified as dictated by public interests.

Regeringsrätten continued by holding that there is nothing, in the competition rules, hindering neither a total closedown of all nuclear power plants nor a nationalisation of all such plants. According to Regeringsrätten the relevant question is therefore, whether Community law entails a requirement to close down Vattenfall's nuclear power plants first, as long as the company has a dominant position to ensure, that it is not given a competitive advantage during the process of a total close down of all nuclear power. No such requirement is found in the ECJ's jurisprudence and since the decision had already been found not to breach the principle of proportionality and the law to be justified with public interests and in

³²³ The part of the judgement here reported is found on RÅ 1999 ref 76 pp 478-484.

³²⁴ The applicant did refer to C-6/72 Europemballage Corporation and Continental Can Company v Commission [1973] ERC 215 on this account.

accordance with fundamental principles of law, the decision to close down Barsebäck first could, according to Regeringsrätten, not be considered to be in breach of the EC competition rules. Finally, Regeringsrätten added that there was no need to send any competition-related questions to Luxembourg.

The reasoning with regard to competition law has also been criticised in the doctrine. The only attempt to defend the Court's argumentation is Sterzel's opinion that the applicant's arguments in this part seem "twisted". Since he is not discussing the competition rules closer before considering the judgement to be "impervious",³²⁵ I will turn directly to some of the critique raised.

Nergelius' main critique is that Regeringsrätten decided the case after a discussion on something else than the factual situation. Without explicitly stating so, Regeringsrätten draws the conclusion that the decision at hand is in accordance with Community law since the more far-reaching intervention mentioned above would be. A total nationalisation would obviously raise different questions than a decision to close down one out of twelve reactors.³²⁶ However, in Regeringsrätten's defence it has to be said that the law on which the decision was based foresees a total closure of all nuclear power plants. The question is, thus, if the decision should be seen in relation to hypothetical decisions to be taken dependent on the future political majorities or as an individual decision? In my opinion this has to be seen in the light of the unusual procedure in the Parliament of first deciding which power plant to be closed down first and then enacting the law delegating this decision-making power to the Government, having in mind that the closure of the state owned reactor, as Nergelius points out, was not even considered. Retrospectively, it can be noted that so far only Barsebäck's reactors have been closed.

Furthermore, a requirement of a competition neutral closure is not the same thing as a direct demand that Vattenfall's plants should close first. The reason why such a requirement cannot be found in the Court's case-law is simply because it has never been tried before.³²⁷ What Regeringsrätten is saying about the lack of guidance from the Court can only be interpreted as meaning that the question is not *acte éclairé*. It is, however, of considerable importance and the statement by Regeringsrätten is in my opinion an indication that the question should have been referred.

According to Quitzow, there were already at the time of the *Barsebäck* judgement case-law from ECJ in the field of telecommunications indicating that the solution given by Regeringsrätten is not clear. For example, the ECJ has emphasised that an equality of opportunity has to be ensured in

³²⁵ Sterzel, p 672-673. In Swedish "skruvade" and "vattentät".

³²⁶ Nergelius, "Förvaltningsprocess..." pp 117-118.

³²⁷ Ibid.

such cases,³²⁸ which was not discussed in *Barsebäck*. Regeringsrätten is not in a position to make an authoritative decision meaning that these cases are not of interest for the electricity market, as it implicitly did.³²⁹ The case can, as explicitly stated in the judgement and through the lengthy discussion of the issue, not be considered falling under the *acte clair* exception.

It should also be noted that the Commission had initiated an inquiry into the competition aspects of the case. Sydkraft argued that the results of this inquiry should be awaited before ruling on the matter. Regeringsrätten, however, decided against this without discussing it in the judgement, which even if out-side the scope of this thesis in my opinion could be considered a breach of the principle of co-operation in itself.³³⁰

4.2.2.3 Concluding remarks on Barsebäck

As we have seen, Regeringsrätten had to decide one highly complex question of competition law³³¹ and one unclear issue of what to require from an EIA. It is remarkable that it did so itself without even discussing the *CILFIT* exceptions and its very extensive interpretation thereof.

It has been argued that one possible explanation and justification of this reluctance is that the Court of Justice should not decide a contentious national political question.³³² The Court of Justice has possibly declined jurisdiction in one case, due to the politically sensitive character of the question of which criteria should apply for accession to the Community.³³³ This does however not constitute a reason for national courts to refrain from referring questions.³³⁴ I agree with the opinion that it is not for courts in general to give obviously political decisions. However, judgements on contentious issues will always be more or less political. This is definitely true for the *Barsebäck* case, marking an enhanced judicialization of Swedish politics.³³⁵ Also ECJ does probably take political considerations into account when deciding cases.³³⁶ More important is, however, that it is without doubt within the tasks of the courts to make sure that the political decisions are taken in a way which protects the legal certainty and rights of

³²⁸ E.g. C-202/88 France v Commission [1991] ECR I-1223 at 51.

³²⁹ Quitzow Carl Michael, "Sterzel och Regeringsrätten" JT (1999/00) pp 973-978, p 976.

³³⁰ RÅ 1999 ref 76 p 484.

³³¹ I should be noted that Regeringsrätten normally does not have to rule on competition law and that it was not familiar with the questions within this field of law.

³³² Sterzel, p 672.

³³³ C-93/78 Mattheus v Doego [1978] ECR p 2203. For such an interpretation of the case, see Rasmussen Hjalte, "Issues of Admissibility and Justiciability in EC Judicial Adjudication of Federalism Disputes under Article 117 EEC" in "Article 177 EEC: Experiences and Problems" Schermers et al (eds.) 1987, pp 388-391.

³³⁴ It could be argued that the national courts do not have an obligation to apply the interpretation given if the ECJ goes further than its competence as a judicial body allows. It is however no possibility to discuss this question further in this thesis.

³³⁵ C.f. Nergelius, "Förvaltningsprocess...", p 102.

³³⁶ See e.g. Garrett Geoffrey "The Politics of Legal integration in the European Union" 49 IO (1995) pp 171-181.

individuals. A referral to the ECJ must, therefore, be seen as both a politically and judicially neutral solution for Regeringsrätten.

I still have not touched on the most insightful defence of the Barsebäck judgement, coming from Bull.³³⁷ His starting point is that Regeringsrätten did not interpret the *acte clair* doctrine in accordance with *CILFIT*, but that this was a good thing and that national courts should take such increased responsibility for ensuring the effectiveness of Community law. The ruling is in his opinion in line with the reasoning by AG Jacobs in *Wiener* (see section 3.4.2). Regarding Jacobs's opinion, to which I am generally positive, it seems strange to argue as Bull does, that the complex questions of principled importance raised in *Barsebäck* would be considered as such minor questions of details that Jacobs had in mind. Furthermore, Jacobs's opinion is a proposal addressed to the *Court of Justice* to overrule its previous reading of article 234(3). This is of course very different from arguing that *national courts* should overrule the ECJ's interpretation of the Treaty, which is what Bull applauds Regeringsrätten for doing. I agree with Bull that the obligation under 234(3) should be regarded as dynamic and must be discussed openly.³³⁸ However, this must lead to the conclusion that it should be challenged through the co-operational relationship between the courts, through an open dialogue with the ECJ provided for in article 234(3) rather than by a rejection of the ECJ's jurisprudence in the closed national legal system. I therefore hold Göta Hovrätt's challenge to *CILFIT* in *Lyckeskog* to be worth much more praise than Regeringsrätten's judgement in *Barsebäck*. Bull, moreover, finds arguments in support of the non-referral in the cost and time saved thereby and the positive effects on the ECJ's caseload, all of which has been held to be of importance by Vängby as well.³³⁹ My opinion is, on the contrary, that this primarily must be seen as a problem for the ECJ. Furthermore, the relatively limited number of references from Sweden takes away most of the force of the caseload argument in the Swedish context. The self-restraint needed should, as I see it, mainly be practised by lower courts without an obligation to refer.

As an epilogue to the case it can be noted that Sydkraft applied for a new trial on the ground that the law obviously had been misapplied and argued that Regeringsrätten should refer the question to the ECJ. Regeringsrätten, deciding this case with a new set of judges, stated that the judgement in the case was based on analysis and judgements on complicated legal questions and that it is natural that different opinions regarding the solution of these

³³⁷ Bull Thomas, "Nationella domstolar och europeisk konstitutionalism" ERT (1999) pp 678- 701.

³³⁸ Bull Thomas, "En viktig struntsak", SvJT (2001) pp 91-95, p 95.

³³⁹ Vängby Staffan "Undantag från EG-rättens överhöghet", JT (1998/99) pp 363- 372. See also the response to this by Bexhed Jan-Mikael "Om kravet att begära. förhandsavgörande från EG-domstolen – Vängby och EG-domstolen", JT (1998/99) pp 818-826.

were possible.³⁴⁰ Even if this was not enough for a new trial, it can be regarded as a subtle critic that the questions were not *acte clair*.³⁴¹

4.2.3 Ramsbro

4.2.3.1 Facts of the case and HD's reasoning

In the so-called Ramsbro-case,³⁴² Mr Ramsbro was accused of publishing personal information about others on the Internet and transferring such information abroad. Mr Ramsbro had himself published material on a web page, including material in which people referred to by name were accused of severe criminal offences against Bank and Contract laws. The stated purpose of the web page was to establish a forum for information and discussion about how Banks, Financial houses and individual capitalists caused damages before, during and after the crises in the Swedish Bank-sector in the mid-90's.³⁴³ The relevant Community law question related to Directive 95/46,³⁴⁴ giving protection to individuals with regard to the processing of personal data. The question was if the material published could fall under the exception from the Directive's protection found in article 9:

“Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”

The Swedish Act implementing the provision³⁴⁵ is different since it does not contain the word “necessary”, limiting the scope of the allowed derogations. Furthermore, the Swedish text makes a very general reference to the two Basic laws giving constitutional protection to the freedom of expression in Sweden.³⁴⁶ The fact that the article is an exception from a general rule is therefore not as apparent in the Swedish text.

³⁴⁰ RÅ 1999 not 247 ”Utredningen i rättsprövningsmålet [...] bygger på analyser och bedömningar av flera komplicerade juridiska frågor. Det ligger närmast i sakens natur att utrymme finns för skilda uppfattningar om på vilket sätt de olika frågorna bort lösas.”

³⁴¹ C.f. Nergelius “Förvaltningsprocess...”, p 121.

³⁴² NJA 2001 s 409.

³⁴³ For the background to the case see NJA 2001 s 409, pp 409-414.

³⁴⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995 p. 31-50.

³⁴⁵ “Personuppgiftslagen” (Lag 1998:204) The District Court ruled the case on older Swedish law, Datalagen (1973:289). Both the Appeal Court and the Supreme Court, however, uses the new legislation, c.f. Lagen (1964:163) om införande av brottsbalken 5§.

³⁴⁶ The Swedish law, Personuppgiftslagen 7§, reads: “Bestämmelserna i denna lag tillämpas inte i den utsträckning det skulle strida mot bestämmelserna om tryck- och yttrandefrihet i tryckfrihetsförordningen eller yttrandefrihetsförordningen. Bestämmelserna i 9-29 och 33-44 §§ samt 45§ första stycket och 47-49§§ skall inte tillämpas på sådan behandling av personuppgifter som sker uteslutande för journalistiska ändamål eller konstnärligt eller

Svea Hovrätt only discussed the Swedish law and found that the exception for journalistic purposes could not be applied. Although the published texts had journalistic purposes, they did not *solely* have such purposes.³⁴⁷

Mr Ramsbro appealed and HD then argued differently.³⁴⁸ It thoroughly discussed the Directive, which, it is said in the judgement, leaves room for different interpretations. It is pointed out that the Swedish preparatory works do not give much guidance for the application, due to the close relationship to the Directive. HD does, however, not mention the justification for this, clearly stated in the preparatory works as being that it is only the ECJ that can make authoritative interpretations of the Directive.³⁴⁹ After concluding that the Directive has to be interpreted in accordance with the ECHR, HD held that the interpretation of the exception for journalistic purposes had to be seen in the light of both article 8, protecting private life, and article 10, regarding the freedom of expression. A conflict between the two articles has to be solved by using the principle of proportionality whereby the interpretation of what is necessary, according to the ECtHR, may differ between different countries. Also in the preparatory works of the Swedish law, HD found support for an interpretation taking the national Constitutional tradition of strong protection of the freedom of expression into account. To determine the meaning of “journalistic purpose”, HD also relied on statements in the Swedish preparatory works and the fact that Sweden, when the Directive was decided, made a declaration to the Council’s minutes that can be read in favour of an extensive interpretation of the concept, including also non-professional journalistic activities. Therefore, HD found Mr Ramsbro’s publications to have a “journalistic purpose” in the sense of the Directive. The offensive comments also found in the material did not change this, as the Prosecutor argued, because, according to HD, such offensive comments have to be regarded as normal for a critical public debate. With regard to the fact that the purpose has to have *solely* journalistic purposes, HD made a different interpretation than Hovrätten. It bases its argument, that the determining fact is whether the material is editorial or not (e.g. advertisements or invoice information), on a recommendation from a Community working party set up by the Directive. “Solely” does therefore for HD not mean that the text cannot also be intended for other purposes. To these findings HD laconically adds that it “has not judged it to be necessary to request a preliminary ruling”.³⁵⁰

litterärt skapande.” See Bernitz, Ulf, ”HD och EG-domstolen – om vikten av förhandsavgöranden och HD-domar som inte bör ses som prejudikat”, i JT(2001/02), pp 955-960 p 957, [hereinafter Bernitz ”HD och EG-domstolen”].

³⁴⁷ NJA 2001 s 409, pp 422-423.

³⁴⁸ The following sections is based on HD’s reasoning, *ibid* pp 424-429.

³⁴⁹ See prop. 1997/98:44 p 37-38.

³⁵⁰ ”HD, som mot bakgrund av vad som anförts inte bedömt det som nödvändigt att inhämta något förhandsavgörande från EG-domstolen...” NJA 2001 s 409, p 429.

4.2.3.2 Analysis

What does HD mean by saying that it is not “necessary” to refer the question to the ECJ? From a Community law perspective, the first thought is that HD considered that an interpretation on the EC law question was not necessary in order to decide a case (c.f. exception III section 3.3.3). However, as we have seen HD spends the greater part of the judgement interpreting the Directive and the final outcome is a direct consequence of this interpretation. This is apparent when comparing with the judgement given by Hovrätten, with a different interpretation of “solely”, with the effect that Mr Ramsbro could not rely on the exception saving him from a conviction in HD. The interpretations of both the words “journalistic” and “solely” are thus decisive for the case. HD did not make any reference to case-law from the Court, which to my knowledge does not exist on the relevant questions.³⁵¹ It could therefore not be an instance of *acte éclairé*.

Finally we have to consider whether it is a question of *acte clair*? In my opinion, it is obviously not. Firstly, it is evident from the long and careful reasoning that HD itself gave the question considerable thought. Secondly, the *CILFIT* requirement demands not only that the national court itself is sure that the question is clear, but also that all other courts would agree with this interpretation. In the present case, Hovrätten chose to make a different interpretation regarding the meaning of “solely”. Even if Hovrätten did not comment on the Directive itself, this should in my opinion raise doubts regarding the clarity of the concept in HD. Thirdly, the Swedish Bill had already been criticised by Lagrådet (the Law Council) for not obviously being compatible with the Directive. Its conclusion, which HD points to, was that the ECJ might very well regard the wide exception of a general reference to the Constitutional protection of the freedom of expression as not being in conformity with the Directive.³⁵² Furthermore, the Swedish government in the legislative Bill refrained from clarifying the Swedish law, due to the fact that it was considered hard and even unsuitable to interpret the Directive before the Court had had a chance to do so.³⁵³ Therefore, it is in my opinion not an *acte clair* situation either.

Bernitz has noted that there may even be reasons to suspect that the Court would come to a different conclusion than HD. Firstly, HD in fact made an extensive interpretation of an exception to the general rule in the Directive. Secondly, compared to many Member States, Sweden has a weak protection of personal integrity lacking e.g. rules on financial slander.³⁵⁴ I would add to these two arguments that it is unlikely that the Court would give the same weight to the material on which HD based its arguments. When interpreting a Directive, Swedish preparatory works cannot be given more weight, if any at all, than other countries’ legislation. HD only commented on Danish and

³⁵¹ C.f. Bernitz, ”HD och EG-domstolen“, p 957.

³⁵² Lagrådets yttrande included in prop 1997/98 p 231-245, p 236.

³⁵³ See prop. 1997/98:44, p 38.

³⁵⁴ Bernitz, “HD och EG-domstolen”, p 957.

Norwegian legislation in its reasoning. Furthermore, in *Antonissen* the Court held that a minute from a Council meeting was of “no legal significance”.³⁵⁵ It could also be discussed how much a court can rely on case-law from ECtHR, allowing for different standards in different countries on what is necessary with regard to protection of the freedom of expression and private life when the question concerns legislation, which by its very nature is intended to be applicable in different countries. The fact that the Directive gives some discretion to the national legislator does not take away the need for a uniform application of the Directive *per se* and the limits of this discretion.

For my purpose it is, however, not necessary to reach the impossible conclusion on how the ECJ would have ruled.³⁵⁶ The point is that the case shows a reluctance from HD of making a reference to the ECJ regarding a question of principle in the new and dynamic field of Internet journalism. It is unfortunate that HD did not refer the matter, but fortunate that this did not lead to the conviction of Mr Ramsbro.

4.2.4 Axfood

4.2.4.1 Regeringsrätten’s judgement

As a sequence to the famous *Franzén*-case on the Swedish alcohol-monopoly, the Axfood-case concerns the repayment of fees lifted contrary to Community law.³⁵⁷ As a consequence of *Franzén*, the Swedish application and supervisory fee for obtaining a permit for wholesale of alcohol was reduced and later the permit-based system was removed. The complainant in the present case, Axfood, demanded repayment of the fees it had paid contrary to Community law plus interest.³⁵⁸ On the basis of the requirement to protect Community law rights found in the Court’s case-law,³⁵⁹ Regeringsrätten found that the fees had to be repaid in their whole. In the absence of procedural provisions in Community law, this should be done according to national rules.³⁶⁰

Turning then to the right of Axfood to receive interest on the amount wrongfully paid, Regeringsrätten referred to two cases from the Court. First,

³⁵⁵ C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745 at 18. See also Case C-329/95 *VAG Sverige* [1997] ECR I-2675 at 21-23. For a different interpretation of the *Antonissen*-case, see Hartley, Trevor C, 1999, “Constitutional Problems of the European Union, p 75.

³⁵⁶ Moreover, I tend to appreciate the weight given to the freedom of expression by HD.

³⁵⁷ The case (RÅ 2002 ref 108) has been discussed from a Community law perspective by Engström Johanna, “RÅ 2002 ref 108 och rätten till ett “effektivt rättsmedel” – den EG-rättsliga rätten till återbetalning av rättsstridigt uttagna avgifter och rätten till ränta i svensk tappning” ERT (2005) pp 340-363 [hereinafter Engström].

³⁵⁸ See *Alkoholförordningen* (1994:2046) and RÅ 2002 ref 108 pp 530-532.

³⁵⁹ See C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* [1983] ERC p 3595 and C-188/95 *Fantask and others v Industriministeriet* [1997] ECR p I-6783.

³⁶⁰ See C-10-22/97 *Ministero delle Finanze v IN.CO.GE.'90 and others* [1998] ECR p I-6307. For a critical discussion, see Engström pp 348-352 .

it noted that there can exist such a right according to *Marshall*.³⁶¹ Regeringsrätten, however, first made a distinction between Axfood's situation, where the question was about repayment of fees, and *Marshall* on compensation for damages. Secondly, it concluded that in cases like the present one, interest is not required by Community law and based this on a reference to *Sutton*.³⁶² Therefore, no requirement to pay interest was found neither in Community nor in Swedish law³⁶³ and the claim could not be approved.³⁶⁴

4.2.4.2 Analysis

The question of a preliminary reference is not discussed in the judgement, but the court seems to have based its decision not to refer on the *acte éclairé* or *acte clair* doctrine. Engström, however, holds that this conclusion is highly questionable.³⁶⁵ As Regeringsrätten points out, the situation in *Axfood* was not a clear parallel to *Marshall*. However, it is not a clear parallel to *Sutton* either. The situation in the latter case was that Ms Sutton had unlawfully been refused an allowance. The difference between this case and *Marshall*, which justified the difference in out-come, was according to the Court that in a situation where interest must be regarded as an essential component of compensation, the interest does not constitute reparation for loss or damage sustained.³⁶⁶ Therefore, concluding the relevant part of the *Sutton*-case, the Court held that under the relevant Directive "social security benefit are not compensatory in nature, with the result that payment of interest cannot be required [...]"³⁶⁷ The difference between the two cases has been considered ambiguous in the doctrine and has been much discussed.³⁶⁸ What Regeringsrätten, according to Engström did, was to consider *Sutton* the general rule and *Marshall* an exception confined to claims of compensation of damages without considering other cases from the ECJ.³⁶⁹ Importantly, in *Hoechst*,³⁷⁰ the Court ruled that interest had to be paid to a claimant who was forced to pay taxes in advance contrary to Community law. In this case, the applicant could not claim to have the capital sum repaid since it had not paid too much but only too early. Noteworthy is, that interest was awarded out-side the limited field of damage. Furthermore, AG Fennelly in his opinion to the case made the following statement:

³⁶¹ C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR p I-4367.

³⁶² C-66/95 *The Queen / Secretary of State for Social Security, ex parte Sutton* [1997] ECR p I-2163 [hereinafter *Sutton*].

³⁶³ *Alkoholförordningen* (1994:2046) and *Räntelagen* (1975:635).

³⁶⁴ For Regeringsrätten's reasoning see RÅ 2002 ref 108, pp 538-542.

³⁶⁵ See Engström, 352-362.

³⁶⁶ *Sutton* at 23-24.

³⁶⁷ *Sutton* at 27.

³⁶⁸ E.g. Ward p 124-126; Engström p 353.

³⁶⁹ Engström, p 357.

³⁷⁰ C-397/98 and 410/98 *Metallgesellschaft Ltd and others Hoechst AG, Hoechst UK Ltd v Commissioners of Inland Revenue HM Attorney General* [2001] ECR p I-1727 [hereinafter *Hoechst*].

“it is without question that a Member State may, in principle, be required to pay interest on a capital sum unlawfully levied in contravention to Community law, albeit in accordance with the applicable national legal provisions [...]”³⁷¹

The Court came to the same conclusion as the AG, but did not comment on the situation of unlawfully levied capital sums. Engström’s conclusion on the issue is that what is decisive is not if the claim is compensatory in nature, as in *Marshall*, or not, as in *Sutton*, but rather, whether the interest is an essential component of the right in question, as in *Marshall* and *Hoechst* but not *Sutton*. Furthermore, the CFI has held that a company had the right to interest on a capital sum levied unlawfully by the Commission on the ground that the Commission otherwise would make an unjustified enrichment.³⁷² This does not mean that the same applies to Member States, but it has to be held as a possibility³⁷³ not discussed by Regeringsrätten.³⁷⁴

The doctrine, as we have seen, has been puzzled by the seemingly abstruse distinction between *Marshall* and *Sutton*. According to Ward, one possible, but however somewhat problematic interpretation is that the conclusion in *Sutton* is a limited exception to the general rule of *Marshall*, i.e. the opposite of Regeringsrätten’s interpretation. This would mean that “the refusal of the Court of Justice to award interest [in *Sutton*] would have no effect on disputes concerning repayment of illegally-levied charges.”³⁷⁵ Considering the issues mentioned above, I hold it as being a brave statement that Community law does not require a payment of interest in Axfood’s situation and the “*acte*” can in my opinion neither be considered *clair* nor *éclairé*.

4.3 Recent Swedish case-law

To give a picture of preliminary rulings up to date with the latest developments, I will in this section analyse a number of cases from 2004, which have been pointed out by Bernitz as indicating a reluctance to refer within Swedish courts of last instance.³⁷⁶

³⁷¹ Opinion of AG Fennelly in *Hoechst*, at 47.

³⁷² T-171/99 *Corus UK Ltd v Commission* [2001] ECR p II-2967 and Engström, p 360.

³⁷³ It can be noted that concerning State liability, another area relating to the individual’s right to effective remedies, the Court did base this fundamental principle *inter alia* on what applied to the Community regarding non-contractual liability. See *Brasserie du Pêcheur / Factortame* at 28-29.

³⁷⁴ Regeringsrätten, however, discussed and rejected the argument raised by Statens folkhälsoinstitut that Axfood would make an unjustified enrichment if the capital sum was repaid. See RÅ 2002 ref 108 p 541.

³⁷⁵ Ward, p 125.

³⁷⁶ See Bernitz, “Kommissionen ingriper...”.

4.3.1 Wermdö Krog

4.3.1.1 Regeringsrätten's judgement

Swedish monopolies have since the Swedish membership in the EU been challenged from a Community law perspective. The Wermdö case³⁷⁷ regards the gambling-market. According to the Swedish legislation, Lotterilagen (1994:1000), large scale gambling is subject to a licensing procedure, through which only a few Swedish operators have obtained a licence. The two major actors on the Swedish market are the state-controlled *Svenska Spel AB* and *Aktiebolaget Trav och Galopp* (ATG). The national legislation forbids commercial promotion of gambling without permission and gambling organised abroad.³⁷⁸ In the present case, the Swedish authority responsible for supervising gambling, Lotteriinspektionen, had imposed a conditional fine on Wermdö Krog for promoting gambling organised by Overseas Betting in England.³⁷⁹ Wermdö Krog appealed and the case was eventually decided by Regeringsrätten.

Regeringsrätten started by saying that the Swedish rules are contrary to articles 43 EC, on free movement of services, and 49 EC, on the freedom of establishment. Derogations from these rules are, however, accepted when falling under either the exceptions found in the Treaty, articles 45, 46 and 55 EC or the far-reaching exceptions developed by the Court.³⁸⁰ Thereafter, before discussing the substance of the case, it stated that “considering the existing case-law, room for a preliminary reference hardly exists”.³⁸¹

Looking at relevant case-law from the ECJ, it is noted that the Member States have a wide discretion when restricting gambling. The discretion is, however, not unlimited and the restrictions must be applied in a non-discriminatory manner and be justified by legitimate public interests such as limiting the dangerous effects of gambling. Furthermore, it is not seen as a problem that the gambling restrictions lead to a profit for the State. This cannot in itself justify the derogation from the general Community rules or

³⁷⁷ RÅ 2004 ref 95.

³⁷⁸ Lotterilagen (1994:1000) 38§.

³⁷⁹ It can be noted that the rules have become stricter after the events in the present case and can today lead to a maximum of two years in prison.

³⁸⁰ Regeringsrätten relied on the following cases: Case C-275/92, *Her Majesty's Customs and Exercise v. Gerhart Shindler and Jörg Schindler* [1994] ECR p I-1039; Case C-124/1997, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen Valtio* [1999] ECR p I-6067; Case C-67/98, *Questore di Verona v. Diego Zenatti* [1999] ECR p I-7289 and; Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and others*, [2001] ECR p I-13013 [hereinafter Gambelli].

³⁸¹ “En sådan är att något utrymme för att begära förhandsavgörande mot bakgrund av existerande praxis knappast föreligger. EG-domstolen har tämligen tydligt gjort klart, att några ytterligare preciseringar i ett mål som det nu förevarande inte behövs på gemenskapsnivå, utan att det ankommer på den nationella domstolen att med tillämpning av angivna kriterier avgöra, om det inhemska lotterisystemet kan godtas.” RÅ 2004 ref 95.

be the main reason for the restrictions, but only be an incidental beneficial consequence.³⁸² Regeringsrätten then found in the case-law of the Court that the proportionality test is not given great importance in this specific field and national courts have been given great discretion to assess whether the domestic regulations appear to be proportional.

Turning then to the evaluation of the Swedish act against the Community law criteria, Regeringsrätten found that the legislation was not discriminatory since both illegal Swedish and foreign gambling is prohibited. The main argument from Wermdö Krog was, however, that the reason behind the Swedish act is not public protection but to ensure State revenue. Regarding the sometimes aggressive marketing of gambling and development of new gambling forms it was held that this indeed encourages gambling. However, it has to be shown that the purpose of this is to benefit the public purse. Even if it is naïve, according to Regeringsrätten, to think that the profits play a totally subordinate role for the authorities when allowing this marketing, it cannot be presumed that this would be the sole or dominating motive. Finally, Regeringsrätten rejected the argument that the public supervision is inefficient and thus not protecting the public by holding that even if inefficient, it is not totally irrelevant and has some positive effects. It thus concluded that the Swedish legislation was compatible with Community law.

4.3.1.2 Analysis

In his critical examination of the ruling, Wahl focuses on the application of the criteria and not the interpretation thereof. He, however, raises the question, to what extent actions by the State-controlled companies can be attributed to the Government, when assessing to what extent the Member State encourages people to gamble. This has not been clarified by ECJ.³⁸³ Regeringsrätten seems to consider the degree of tolerance showed by the State towards the gambling companies' marketing rather than attributing, any of the actions of the State-controlled gambling companies actions to the State, which Wahl holds as being an easy way around the Community rules.³⁸⁴

Additional to this, I am not entirely convinced that the ECJ's statement that considerations of public concern cannot be invoked in so far as authorities encourage gambling "to the financial benefit of the public purse"³⁸⁵, was intended to mean that the financial interest must be the sole or dominant reason behind the action by the authorities, as Regeringsrätten holds. This is especially so since the Court in *Gambelli* also holds that the financial interests can only be an incidental consequence of the legitimate justification. To legitimate the restrictions as such and particular actions on

³⁸² C.f. *Gambelli* at 62.

³⁸³ Wahl Nils "Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten?", ERT (2005) pp 119-128, p 126; c.f. *Gambelli* at 68-69.

³⁸⁴ *Ibid.*

³⁸⁵ *Gambelli*. at 69.

the other hand are of course different issues, but it can be discussed why the aim to increase the public purse would be allowed as a substantial, although not sole or dominant, motivation for encouraging gambling, but only as a very insignificant by-product of the restrictions.³⁸⁶

It is of interest for this line of reasoning that the Commission, two weeks before the judgement, sent a Formal Notice to the Swedish government regarding the Swedish gambling act. In this Formal notice, the Commission considers that the real purpose behind the Swedish legislation is financial rather than any of the legitimate ones. The Commission supports this opinion with much the same arguments as Wermdö Krog, i.e. primarily based on the marketing and introduction of new forms of gambling. The legal background against which this is measured is *Gambelli*. The Commission, however, does not cite the paragraph of the case interpreted by Regeringsrätten to mean that the authorities' dominating motivation when allowing the marketing must have been the strengthening of the public purse. Instead the Commission stresses that the importance of financial consequences can only be an incidental consequence.³⁸⁷

Is this a different interpretation indicating that the question is neither *acte éclairé* nor *clair* or is it a question of application of the conditions laid down by ECJ? If the latter is the case, Regeringsrätten was correct in not referring. It also has to be remembered that national courts have been given an increased discretion regarding this question and the Commission's opinion can therefore not be considered as final. However, it seems to me that the Commission indeed uses different and stricter criteria than Regeringsrätten when assessing the Swedish Act. In my opinion, this indicates an ambiguity as to the exact extent of the derogations developed by the Court, that in my opinion only the ECJ itself can clarify.

It can be noted that the Commission also holds that the punishments for breaches of the Swedish Act are not proportionate to the purposes that the legislation is said to have.³⁸⁸ However, these questions were not of relevance before Regeringsrätten and it is therefore of no importance for the question whether a reference should have been made or not.

Bernitz has argued that it is doubtful if the Swedish legislation is in accordance with Community law considering recent case-law from the ECJ. Furthermore, he interprets *Gambelli* as a development towards stricter requirements on national legislation.³⁸⁹ In my opinion, this dynamic development makes a clarification from the ECJ more desirable.

³⁸⁶ Ibid at 62.

³⁸⁷ "Formell underrättelse" in infringement proceeding number 2001/4826, dated 2004-10-13 at 26-27.

³⁸⁸ Ibid. at 28.

³⁸⁹ Bernitz Ulf "Nationella spelmonopol i ljuset av Gambellimålet" ERT 2004 pp 451-461.

Given the notorious ambiguity in the distinction between interpretation and application and the discretion given to national courts in this field, I am reluctant to claim that Regeringsrätten was in breach of its obligation. Given Sweden's answer to the Formal Notice, which disagrees with the Commission on all points *inter alia* by referring to Regeringsrätten's judgement,³⁹⁰ the question might be taken to the Court of Justice anyway. The ECJ will then in the infringement procedure be the final umpire as to both the interpretation and the application of Community law. If it will come to a different conclusion, it is unfortunate for Wermdö Krog that it did not have the chance to hear this opinion in its case.

Furthermore, the language used by Regeringsrätten to dismiss the possibility of a reference is in my opinion worrying. What does the statement that there does not exist any room for a reference mean? The ECJ has made it clear that the national courts are always welcome with questions even though the Court has ruled on the matter before, save as in exceptional circumstances, and never refused to give a ruling on the ground that the national court could solve the question by itself.³⁹¹ If Regeringsrätten, with an obligation to refer, considers a reference as not being possible to make, what signals will this send to lower courts without such an obligation?

4.3.2 Overseas Betting et al

A similar question to the one before Regeringsrätten in Wermdö Krog, arose in an application for leave to appeal to HD. In its decision, HD is referring back to Regeringsrätten's judgement and especially the statement that "considering the existing case-law, room for a preliminary reference hardly exists."³⁹² HD finds no reason to come to a different conclusion.

This decision has been included in the response given to the Commission from the Swedish government in the infringement procedure following *Lyckeskog* (see above section 3.5.1.2). As stated above, I find this formulation to be troublesome from a Community law perspective. When referred to by HD and later used by the Government as an example of correct reasoning on the question of preliminary references, this attitude, indicating that national courts are not allowed to disturb the ECJ if case-law exists within the relevant field, is given too much authority in the Swedish legal system.

³⁹⁰ "Formell underrättelse om den svenska lagstiftningen om spelautomater" in infringement proceeding number 2001/4826, dated 2004-12-15, see p 2.

³⁹¹ Anderson and Demetriou, p 91.

³⁹² Decision B-3986-01 given 2004-12-08 and included in "Svar på motiverat yttrande om överträdelse av artikel 234 tredje stycket EG", letter from the Swedish Government in infringement proceeding number 2003/2161, dated 2004-12-15.

4.3.3 SAS v Luftfartsverket

The competition case of SAS v Luftfartsverket is also one of the cases included in the Swedish answer to the Commission with regard to the infringement procedure started in the aftermath of *Lyckeskog*. The case was decided by Hovrätten in 2001 and leave to appeal was not granted by HD. This decision, not to give leave to appeal, was thereafter challenged before HD by a demand for a new trial and a claim that the decision should be set aside due to the grave procedural error of not referring the question to the ECJ. The Commission in its Reasoned Opinion makes reference to the decision not to give leave to appeal, whereas the Swedish government in its response includes the latter decision by HD. I will start by presenting the relevant issues in Hovrätten's judgement.³⁹³

4.3.3.1 The facts of the case and Hovrätten's reasoning

Luftfartsverket, LFV (Swedish civil aviation authority) and SAS in 1988 concluded an agreement regarding the construction of a new terminal at Arlanda airport and SAS contributing payments for this terminal. After a deregulation of domestic flights in Sweden, whereby SAS faced increased competition, the agreement ceased to have effect in 1993. In 1992, a new agreement on the principles of SAS's continued responsibility for some of the costs of the terminal had been concluded and in 1993 a new agreement whereby the continued responsibility for these costs was regulated was signed. SAS in Hovrätten claimed that these two agreements were invalid *inter alia* on the grounds that they constituted an abusive use of LFV's dominant position contrary to §19 of the Swedish competition law and article 82 EC, since the effect of the agreements was that SAS paid a much higher price than other companies for its traffic at Arlanda. LFV, focusing its defence on contract and not competition law, argued that the sums paid by SAS could not be compared to the ones paid by other companies, since they were not compensation for traffic. Instead they were remaining payments under the agreement from 1988 for the building of the terminal, which had been constructed largely according to the wishes of SAS leading to extra costs for LFV.

Hovrätten reasoned from a Community law perspective concerning competition rules and referred to case-law from both CFI and ECJ, when concluding that the fact that SAS is a part to the agreement did not alter the mandatory requirements found in the competition rules. The fact that article 82 EC is a mandatory rule made Hovrätten conclude that even if LFV's claim that the agreement is valid based on contract law would be correct, the contract must still be compatible with the competition rules. Hovrätten then

³⁹³ Hovrätten's judgement of the 27th of April 2001, case T-33/00. This case has been commented by Bernitz Ulf "Missbruk av dominerande ställning i form av prisdiskriminering – restitution och betalningsbefrielse" ERT (2003) pp 382-386 [hereinafter Bernitz, "Missbruk..."].

found that the sums paid under the agreements from 1992 and 1993 were, as SAS had claimed, payments for the company's traffic at the airport. As such these sums led to a higher price for traffic for SAS than for other companies. Since LFV could not show that this price differentiation was objectively defensible, this constituted an abuse of LFV's dominant position. Therefore, the agreement was considered to be in breach of the relevant competition rules. The interesting question was what legal effects this would have. In Swedish law there are no rules directly demanding that the agreement should then be considered void, but according to the preparatory works to §36 of the Contracts Act³⁹⁴ invalidity should be the consequence of an agreement in breach of mandatory competition rules. Regarding Community law, Hovrätten noted that national courts must make sure that it is given full effect and that rights derived there from are protected efficiently. Hovrätten also noted that the ECJ has held that fees paid contrary to Community law must be repayable. Therefore, it came to the conclusion that the agreement should be considered invalid and SAS was relieved from the duty to pay more than other companies for traffic. Sums already paid under the two agreements should be repaid.³⁹⁵

4.3.3.2 The appeal to HD

Leave to appeal was rejected by a decision of the 11th of November 2002, without any reasoning from HD.³⁹⁶ Even if HD's decision not to take on the question was not reasoned, it develops its reasoning when faced with the claim that the case should be given a new trial. Regarding the question of effects of an established breach of competition law, HD holds that it is of importance that Hovrätten applied the Swedish rules parallel to the Community law. When Hovrätten interpreted the Swedish law as to mean that the agreement would be void and have the effects mentioned above it is, according to HD, obvious that this is not contrary to Community law, since a more far-reaching consequence could not be demanded to ensure the efficient implementation thereof.³⁹⁷ The reasoning of HD is strange, since LFV hardly argued for more far-reaching consequences but rather that this effect should be qualified. The question is, however, if the issues in the case were *acte clair* or not when HD dismissed the application for leave to appeal?

4.3.3.3 Analysis

Bernitz has criticized the fact that leave to appeal was not granted and the question not referred. He bases his argument on the fact that Hovrätten considered the effect of a breach of article 82 to be that the agreement is invalid. Contrary to article 81, the Treaty does not state that this is the effect

³⁹⁴ Lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

³⁹⁵ Göta Hovrätt's judgement T-33/00 especially p 9-19. For the background to the case see also the judgement from the lower court, Norrköpings tingsrätt, T 2746-96, both available on-line at <http://www.pointlex.se/pub/standard.asp?art_id=22485&iM=4>, 2005-07-20

³⁹⁶ Bernitz "Missbruk...".

³⁹⁷ Decision of the 9th of December 2004 in case Ö 1891-03.

of a breach and the ECJ has never held that this is the case. Bernitz admits that this is probably correct, but he is of the opinion that a clarifying judgement from the ECJ on this point of law would have been welcomed, to specify the conditions under which a contract could be declared invalid. Furthermore, he holds that it is highly probable that Hovrätten in its reasoning implicitly considers that a breach of article 82 EC can lead to liability for damages. ECJ has held that this is the case for breaches of article 81 but never for breaches of article 82 EC.³⁹⁸

By explicitly referring to the case and Bernitz's article in its Formal Notice and Reasoned Opinion, the Commission seems to agree with this argumentation and that it was wrong to consider the question *acte clair*. However, it is very interesting that the Commission argues that the question should have been referred on the ground that Hovrätten has applied article 82 EC as creating liability for damages and does not mention that the effect actually given to the agreement was restitution and relief from the liability of payment.³⁹⁹ Damages have not been claimed by SAS, the judgement does not speak about damages and, as Bernitz states, the only connection hereto is implicit. It is from this perspective hard to argue that an answer to the question whether article 82 EC can lead to liability for damages was necessary in order to come to a decision and in my opinion this question falls under exception III as outlined above.

An overview of the doctrine shows that the question whether an agreement can be declared void is taken as being clear. According to Goyder,⁴⁰⁰ the direct effect of the Article leads to the conclusion that the contract can be declared void and unenforceable. Arnulf, Wyatt and Dashwood all hold that "it is clear from general principles of law that a national court would be required to refrain from giving effect to an agreement caught by the prohibition in [Article 82]".⁴⁰¹ Both Immenga and Mestmäcker⁴⁰² as well as Schröter⁴⁰³ argue that a contract can be declared void and that this is for the national court to decide based on national procedural laws. To support this argument both works refer to the *BRT*-case, which also Hovrätten made reference to. In this case it is inter alia stated that:

"if abusive practices are exposed, it is also for the [national] court to decide whether and to what extent they affect the interests of authors or third parties concerned, with

³⁹⁸ Bernitz, "Missbruk...".

³⁹⁹ See European Commission, "*Formell underrättelse*" dated 2004-04-05 at 11 and "Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG" Letter from the Commission dated 2004-10-19 at 23.

⁴⁰⁰ Goyder DG "EC Competition Law, 1998, p 368-369.

⁴⁰¹ Wyatt & Dashwood, p 643.

⁴⁰² Immenga Ulrich and Mestmäcker Ernst-Joachim, "EG-Wettbewerbsrecht Kommentar Band I", 1997, pp 692-693.

⁴⁰³ Schröter Helmuth, "Artikel 82 EG-Vertrag – Mi[ss]brauch marktbeherrschender Stellung" in "Kommentar zum Europäischen Wettbewerbsrecht Schröter, Jacob and Mederer (eds.), 2003, pp 790-985, pp 833-837.

a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions”⁴⁰⁴

There seems to be agreement on this point of law in the doctrine, which Bernitz also emphasises. The *BRT*-case can also give support to the solution given by Hovrätten. This is, in my opinion, the starting point when determining whether HD had an obligation to refer the question. My opinion is that even if it might be interesting to hear the Court’s opinion on the matter, this cannot be the basis of an obligation to refer. I would argue that the fact that the agreement can be declared void probably falls under the *acte clair* doctrine and that the question regarding damages was not relevant for the case. It is therefore strange, in my opinion, that the Commission focuses on this latter point of law when claiming that the case is a “clear proof” of the breach of article 234(3).⁴⁰⁵ HD’s lack of reasoning can of course be criticised and it must be noted that when it finally does present its reasoning on the issue, it is in a process where the procedural thresholds are much higher for a review of the judgement.

4.3.4 Boliden

4.3.4.1 The facts of the case and HD’s reasoning

The *Boliden* case⁴⁰⁶ is also relating to Community competition law. The background to the case is a clause in a standard form contract agreed on by buyers and sellers of electricity. The agreement entailed a clause according to which the price would be changed according to future changes in the taxation or fees relating to electricity. The clause had the effect that all sellers of electricity automatically put the increased costs of a raised tax on the buyers. The claimant, Boliden, argued that this clause was in breach of §6 of the Swedish competition law as being a concerted practice. The Swedish Competition Authority had also concluded that the clause had the effect of limiting the competition between the sellers of electricity in breach of this paragraph. The clause had been included in a contract between Boliden and, at the time of the trial, Stockholm Energi. Boliden argued that this part of the contract should be considered invalid according to §7 of the Swedish law, because it was the result of the concerted practice through its connection to the standard form agreement and that it should thus not be liable to pay all the extra costs resulting from two tax-raises during 1996.

After having its claims rejected in two lower courts, Boliden in HD argued that the question whether invalidity according to article 81(2) EC also concerns clauses expressing or being the result of a concerted practice, when this clause is attached to a contract (in a “följdavtal”) concluded between a

⁴⁰⁴ C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR p 313 at 14.

⁴⁰⁵ The Commission wrote: ”...ett klart bevis...” ”Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG” Letter from the Commission dated 2004-10-19 at 23.

⁴⁰⁶ NJA 2004 s 804.

participant in the concerted practice and a third party should be referred to ECJ. The answer to this question, which HD also found, cannot be considered to be clear and the ECJ has not directly expressed its opinion in the matter.⁴⁰⁷

The Swedish law was modelled after Community law, so that article 6§ is similar to article 81(1) EC and §7 corresponds to article 81(2) EC. Since the practice was found to have no effect on the trade between Member States, Community law was, however, not directly applicable to the case. The question was therefore if HD still should refer the question according to the reasoning developed in the *Dzodzi*-line of cases (see section 3.1.3.). HD started by stating that ECJ has considered itself to have jurisdiction over some questions of interpretation of national law when this was based on community law. However, according to *Kleinwort Benson*, a prerequisite for a reference under such circumstances is that domestic law is formulated in a manner which means that the national court will be bound by the ruling of the ECJ. HD, referring to *Leur-Bloem*, holds that this is a question for the national court to decide. In the preparatory works of the Swedish legislation it is held that the reason why the provisions are modelled after Community law inter alia is to make ECJ's jurisprudence applicable. However, the preparatory works point out that some specific features of Community law are not as important in the domestic context and that sometimes specific Swedish conditions have to be considered when applying the national law.⁴⁰⁸ Therefore, HD concluded that the conditions for referring the question were not fulfilled and it is clear that the ground for this finding is that it does not consider itself bound by a ruling from ECJ on this question.

4.3.4.2 Analysis of the intra-community trade criterion

The first question that needs to be addressed when discussing HD's decision not to refer, is if the conclusion that Community law was not directly applicable in the case can be supported. HD, just like Hovrätten, does not discuss this question but only concludes that intra-community trade was not affected. One commentator⁴⁰⁹ argues that HD should have made a more careful assessment of the market to be able to come to this conclusion. The condition that there has to be an effect on the trade between Member States has been given a very broad interpretation. Important for the case at hand, the ECJ has ruled that individual cases have to be seen

“in the context in which they occur and where they might combine with others to have cumulative effect on competition [...] the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining

⁴⁰⁷ See the submissions in the case made regarding this issue by Ulf Bernitz, supporting Boliden, and Lars Pehrson and Nils Wahl, supporting Stockholm Energi. Available on-line www.pointlex.se/pub/standard.asp?art_id=20354&iM=, 2005-07-20.

⁴⁰⁸ See prop. 1992/93:56 p 21 ”Ny konkurrenslagstiftning”.

⁴⁰⁹ Stenberg Hans, ”Professor i analys: HD missade pröva konkurrensbegränsning”, Available online at <www.pointlex.se/pub/standard.asp?art_id=818588&iM=>[hereinafter Stenberg].

whether by way of a possible alteration of competition trade between Member States is capable of being affected.”⁴¹⁰

In the present case concerning a standard form contract, by its very nature being one of several similar contracts, this is of course of the greatest importance. If HD would have any doubts in this regard, it had the possibility of consulting the Commission on this question.⁴¹¹ Therefore, Stenberg argues that the obligation to investigate properly if Community law is applicable directly has not been fulfilled.⁴¹² Considering that this is a question for the national court to decide and that the misapplication of Community law is far from obvious, it is hard to conclude directly from this that HD here did breach the obligation under article 234(3).

4.3.4.3 Analysis of “jurisdiction through renvoi”

The preparatory works on which HD based the conclusion that it would not be bound by the ruling from the ECJ were written before Sweden became member of the EU and before much of the development of ECJ’s “jurisdiction through renvoi”. The preparatory works do therefore not take this possibility into account. The room for specific Swedish solutions must, in my opinion, be considered to have decreased through the membership in the Union, when inter alia the principle of loyalty became effective. It can, moreover, not be argued that the actual legal provision in national law has been altered to fit the national context, as was the case in *Kleinwort Benson* in which ECJ refused to give a ruling. In this case, the domestic provisions were only a partial reproduction of the provision that the ECJ had jurisdiction over, designed to produce divergence between the two. Decisive in this case was that the national court was according to the national legislation only required to regard the ECJ’s ruling and not to decide “by applying *absolutely and unconditionally* the interpretation [...] provided to [the national court] by the Court”.⁴¹³ In the subsequent *Kofisa*-case the Court, however, admitted a case when the national law

“does not expressly provide that the national authorities may adopt amendments designed to give rise to divergence between the national provision and the corresponding Community provision.”⁴¹⁴

It is not uncommon that national competition law corresponds to Community law and the ECJ has already been faced with the situation of a national court referring a question when applying national competition law. In *Bronner*, an Austrian court found that it could only apply national law even though intra-community trade was effected. The court ruled that

⁴¹⁰ C-234/89 *Delimitis v Henninger Bräu* [1991] ECR p-935 at 14.

⁴¹¹ See “Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC” Official Journal C 101, 27/04/2004 p 54-64 see e.g. at 17.

⁴¹² Stenberg.

⁴¹³ *Kleinwort Benson* at 20, italics added.

⁴¹⁴ C-1/99 *Kofisa Italia Srl v Ministero delle Finanze* [2001] ECR p I-207 at 30.

“the fact that a national court is dealing with a restrictive practices dispute *by applying national competition law* should not prevent it from making reference to the Court on the interpretation of Community law on the matter, and in particular on the interpretation of Article [82 EC] in relation to that same situation, when it considers that a conflict between Community law and national law is capable of arising.”⁴¹⁵

A distinction between this case and *Boliden* can, however, be made in that the Austrian court found Community trade to be affected. This finding was, however, challenged before the ECJ by the Commission and one of the parties of the national proceedings, but the Court did not take this into consideration and argued that due to the co-operative relationship between national and Community courts, it was not for the ECJ to question why the national court made a reference.⁴¹⁶ It is therefore not clear if the ruling should be limited to cases where Community law has potential of being directly applicable or not.⁴¹⁷

The question is, if the statement in the preparatory works is of such character that it makes Swedish courts unbound by the ruling from the ECJ. The Community jurisprudence is said to have great importance, but the courts are, in the preparatory works, not said to be directly bound thereby. However, it is only in specific situations where Swedish conditions or specific Community purposes with the competition law have to be considered, that national courts are encouraged by the preparatory works to disregard this case-law. My conclusion is that the general purpose of the Swedish legislation of creating national rules conform with Community rules implies that the legislator possibly would have encouraged the national courts to refer questions where there is no need to take the specific Swedish context into consideration, if this possibility would have been foreseen at the time. There is nothing in *Boliden* that indicates that the circumstances required a specific Swedish interpretation.⁴¹⁸ Furthermore, considering the ruling in *Kofisa* and that there in the Swedish *legislation* is no explicit restriction to the effect of a ruling from the ECJ, the Court would probably consider a reference admissible.⁴¹⁹

The last question that has to be addressed is if there is an *obligation* to refer questions where the jurisdiction of ECJ is based solely on renvoi. The question has not been addressed directly by the Court, although it has emphasised the discretion enjoyed by national courts to determine if a reference is needed.⁴²⁰ Moreover, the Court has held that the purpose of the

⁴¹⁵ C- 7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG. [1998] ECR p I-7791 at 20 [hereinafter Bronner], italics added.

⁴¹⁶ Ibid. at 15-17.

⁴¹⁷ Kaleda

⁴¹⁸ C.f. Stenberg.

⁴¹⁹ C.f. Bernitz “Sverige of Europarätten”, pp 29-37 on the ECJ’s restrictive use of preparatory works.

⁴²⁰ E.g. Bronner at 16-17.

Dzodzi-line of cases is to enable and not to force national courts to make uniform applications.⁴²¹ This, together with the fact that such an obligation can only exist where there is an obligation to apply Community law *per se* and that the limits of the Courts jurisdiction are unclear, makes Tridimas conclude that such an obligation does probably not exist.⁴²²

In my opinion, the ECJ would go far outside its competence and role in a co-operative relationship if it would extend the obligation to refer questions arising under national law and the idea of two distinct and separate legal systems, whereupon this co-operative relation is based, would definitely be set aside. I therefore agree with Tridimas on this point and thus conclude that there is no *obligation* but probably a *possibility* to refer in the case, given the finding that Community law was not directly applicable. It is, however, unfortunate from a Community law perspective that the question regarding effects of breaches against competition law was not clarified. If a reference had been made, HD could also have referred questions to clarify the limits of ECJ's jurisdiction through *renvoi* and the possibility of an obligation to refer such questions.

4.3.5 Gränsövargen

The Gränsövargen case⁴²³ is not relating to any of the more common questions of Community law, but rather the Swedish Hunting legislation and the protection of endangered species. In this criminal proceeding the defendant, H.M., was accused of shooting a wolf. When H.M. shot the wolf it was in the meadow where his cows and calves were kept and the wolf had shortly before attacked sheep close by.

According to the Swedish Hunting Act⁴²⁴, wolf is protected and may only be killed if this is allowed according to special rules. The punishment for breach of the provision is a fine or imprisonment of maximum four years in severe cases. Wolf is also protected under Community law by Council Directive 92/43⁴²⁵, requiring in article 12(1)(a) that the Member States have a strict system of protection, prohibiting all forms of deliberate killing of wolf in the wild nature. According to article 16, derogations from this are allowed provided that there is no satisfactory alternative, that the derogation is not detrimental to the maintenance of the population of the specie and that derogations are motivated by one of the justified ends listed in the article, including the prevention of serious damage to livestock. Derogations from the general prohibition in order to prevent damages are in Sweden made by the Government's regulation of hunting.⁴²⁶ In this Swedish regulation,

⁴²¹ See e.g. Leur-Bloom at 24.

⁴²² Tridimas, "Knocking" p 36-37.

⁴²³ NJA 2004 s 786.

⁴²⁴ Jaktlagen (1987:259) §3.

⁴²⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206 , 22/07/1992 p 7-50.

⁴²⁶ Jaktförordningen (1987:907) see especially §§ 23a-29.

conditions for derogation corresponding to those in article 16 of the said Directive are put down in §23a. This paragraph does, however, not cover §28 of the same regulation, which the defendant used in his defence in the present case. §28 states that if a wolf has harmed a domestic animal and there are legitimate reasons to fear a new attack, the owner of the animals may kill the attacking wolf if this is done in immediate connection with the attack. There are no further limitations to this national provision, as there are to the Community law rule. HD therefore states that it is questionable if this provision is compatible with the protection enjoyed by wolves through the Council Directive. It then went on to decide if H.M. can rely on §28 in the case at hand. It was found that H.M. shot the wolf ten minutes after it had killed the sheep and that the wolf had moved 500 meters from the place where the attack occurred. Therefore, the killing could according to HD not be considered to be in immediate connection with this attack. The question whether or not §28 is compatible with the Directive is, therefore, of no importance in the case at hand since the Swedish provision is not applicable.

Bernitz wonders if HD should not have given the ECJ a possibility to develop the Community legal provisions on hunting to prevent damages. Cases in this field have to come from a limited number of Member States where predator of this kind exists, which Bernitz implicitly seems to hold as reason for a referral.⁴²⁷

I cannot agree with Bernitz on this issue. In my opinion, HD has solved the Community law problem of the case in a recommendable manner.⁴²⁸ It has first solved all purely national questions of law and all relevant questions of fact and found that the answer to the question of Community law in no way can affect the out-come. The question must therefore fall under the “necessity exception” from the obligation to refer. Bernitz’s argumentation seems to be based on a far-reaching obligation to refer unclear questions, based on the principle of loyalty, that I cannot support. HD’s judgement can instead be seen as an invitation to the legislator to change the Swedish legislation, due to the fact that it might be in breach of Community law or, if this does not happen, the initiating of an infringement proceeding.

4.3.6 Vägverket

The background to the competition case MD 2004:21⁴²⁹ was an agreement between Vägverket (Swedish Road Administration) and a number of large asphalt-producers. The Swedish Competition Authority brought actions

⁴²⁷ Benitz, “Kommissionen ingriper...” p 115.

⁴²⁸ C.f. Joint Cases 36 and 71/80 Irish Creamery Milk Suppliers Association v Ireland [1981] ECR p 735 at 6 and Lord Denning’s recommendation on which questions are necessary to refer in *Bulmer v Bollinger*: “As a general rule you cannot tell whether it is necessary to decide a point until all the facts are ascertained. So in general it is best to decide the facts first. See, however, above section 3.3.4.

⁴²⁹ MD 2004:21. The case has been commented by Henriksson “I kartell mot sig själv: Kommentar till avgörandet MD 2004:21 om räckvidden av 6§ konkurrenslagen/artikel 81.1 EG”, JT (2004/05) pp 422-432 [hereinafter Henriksson].

against the producers and Vägverket on the ground that the agreement was contrary to the prohibition of cartels in §6 of the Swedish Competition Act.⁴³⁰

4.3.6.1 The intermediate judgement

The problematic questions of the intermediate judgement analysed here were that Vägverket was both the buyer and through one of its units, “Vägverket Produktion”, also a producer and as such party to the agreement. Vägverket argued that regarding its own procurements the court, in an intermediate judgement, should dismiss the claims against it since it could not be considered to be in breach of the article, since this would mean that it was part of a cartel directed against it-self. In the same proceedings, the companies claimed that the agreement could not be considered to prevent, restrict or distort competition when one of the parties to it was also the buyer.⁴³¹ Tingsrätten (the District court) dismissed both arguments, basing its reasoning on the purpose of the legislation to protect the public and not individual parties.⁴³² The case was appealed to Marknadsdomstolen (MD), deciding the case as the last instance.

When the case was decided by MD, Council regulation 1/2003⁴³³ had entered into force. The regulation stated in article 3(1) that when national competition rules are applied to agreements, which may affect the trade between Member States, they shall also apply Article 81 to the agreement. Vägverket claimed that the questions regarding its standing as an undertaking company and whether the competition could be seen as distorted should be referred to the ECJ.

MD started by concluding that even if Vägverket through different units, such as “Vägverket Produktion”, acts in a number of fields, it shall be considered as one unit in the proceedings. Considering its involvement in the alleged breach, Vägverket has to be considered as primarily acting as a supplier of asphalt. From this initial concussion, it cannot be ruled out that agreement was distorting competition. MD found that the intra-community trade was affected and the Treaty was therefore applicable. However, there was in MD’s opinion nothing in article 81(1) that would lead to different findings than the abovementioned ones. The short judgement ends with a statement that there are no reasons to refer the question to ECJ.⁴³⁴

⁴³⁰ Konkurrens lagen (1993:20).

⁴³¹ See MD 2004:21, p 391.

⁴³² MD 2004:21 p 431-432.

⁴³³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 04/01/2003, p 1-25.

⁴³⁴ For MD’s reasoning see MD 2004:21, pp 381-385.

4.3.6.2 Analysis

The result of the judgement is that even if Vägverket is considered a unit, this unit is divided and Vägverket is seen both as a supplier and, although not explicitly stated, a buyer. The result of the main proceedings can therefore be that Vägverket is in a cartel directed towards itself. Since the Treaty is applicable, it is of importance to see if this conclusion by the MD can be considered as *acte clair*.

According to the “group economic unit doctrine”, developed by the Commission and upheld by the Court, it is the independence of a subsidiary or other corporate bodies from the “core company” that is decisive for the question whether or not it should be regarded as a part of the larger company or as a company of its own.⁴³⁵ According to Henriksson, the decision to regard Vägverket as one unit is clearly in accordance with this doctrine and the literature in the field. The subsequent finding that Vägverket still has acted in a way that can have distorted competition is, on the contrary, highly questionable considering both opinions in the doctrine and case-law from ECJ.⁴³⁶ The ECJ has in a number of cases held that article 81(1) EC is not applicable to agreements within a single economic unit. For example, the Court in *Bodson* held that article 85

“is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.”⁴³⁷

The conclusion according to Henriksson, with which I agree, is that MD’s interpretation of article 81(1) is much stricter than previous case-law from the ECJ. Not only is the *acte not clair* on this question, but MD does in fact not even discuss the case-law of the ECJ before finding that the applicability of Community law would not change anything compared to the decision based on Swedish law and the fact that there is no reason to refer the question. This is not to say that the actions by the respondents were lawful, which is for the main proceedings to find out. However, the lack of any reasoning from a Community law perspective on this unclear question and the rather strange finding is remarkable considering the strict *CILFIT* criteria.

⁴³⁵ Goyder, “EC Competition Law”, 1998, p 91-92.

⁴³⁶ Henriksson, p 426-427.

⁴³⁷ C-30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR 2479 p.2479at 19. See also C-22/71 *Béguelin Import v G.L. Import Export* [1971] p 949) and C-73/95 *Vihov v Commission* [1996] p. I-5457.

4.4 Concluding remarks on Swedish courts

The statistics showing that Swedish courts are far from the most frequent writers of preliminary references is easier to understand after the analysis of older cases given in this chapter. The reasoning by Regeringsrätten and HD in all four cases shows a great reluctance to refer questions. On this, most Swedish legal scholars seems to agree, even if there is more disagreement on the rather normative question if this is a good thing or not. Most important is the refusal to refer the questions in *Barsebäck*. The case has a great importance of principle and together with the other cases makes one think of the attitude by French and German courts before *CILFIT*. I would argue that all these four cases together with MD's decision in the more recent *Vägverket* case are examples of breaches of the obligation to refer given the ruling in *CILFIT*. Thereby the principle of co-operation is also threatened. Dialogue as the momentum in the development of Community law is made impossible through the exclusion of one of the parties.

More difficult is to claim that the five more recent cases from HD and Regeringsrätten are examples of breaches of the obligation. *Wermdö krog*, I would generally tend to regard as a case where a referral should have been made, but the specific field in question is one where the ECJ has held that many issues are to be decided by the national courts. The case, in my opinion, also shows the problems of relying on the very difficult distinction between interpretation and application.

Considering that relatively clear breaches can be found in case-law from Swedish courts, including HD, the Commission's interpretation of the *SAS* case is surprising. This interpretation is in my opinion stretching the obligation to make references even to questions only implicitly touched upon and without any effect on the outcome of the case.

The reasoning in *Boliden* is arguably the most interesting of the recent cases in treating the dynamic development following *Dzodzi*. In my opinion, HD should have elaborated more on both how it came to the conclusion that there was no effect on intra-community trade and on the more recent "*Dzodzi*" cases of inter alia *Bronner*. A ruling on the obligation relative to the possibility of a referral of question raised in connection with national law would have been interesting, but my conclusion must be that there is probably no breach of the obligation to refer in the case.

The principle of co-operation covers much more than the fulfilment of the obligation to refer under article 234(3). For example, the hasty conclusion regarding the trade effect in *Boliden*, without using the help of the Commission, might be conflicting with this principle. Also, the principle of co-operation might indicate that the proper rule for courts of last instance should be "when in doubt if there is any doubt, refer." This, however, after a proper analysis can not be the basis of a claim that the obligation has been breached in a specific case, especially not when the Commission and the

Court of Justice have started to pursue breaches committed by the national judiciary and established the principle of state liability with regard to courts of last instance.

Is it, for example, possible that the *Köbler* criteria for state liability could be fulfilled in any of the cases analysed here? This is an extremely difficult question to answer. Not only must the breach be manifest, which happens only in exceptional cases. A causal link between this breach and the damage must also be proved. Moreover, even if a breach of the obligation to refer could be found in cases such as *Boliden*, *Axfood* and *Wermdö Krog*, it could be possible that Regeringsrätten and HD could be defended in the same way as the Verwaltungsgerichtshof in *Köbler*, i.e. that is that it *only* misinterpreted the ECJ's decisions, which it indeed discussed more or less carefully. The direct question in *Ramsbro* was regarding criminal liability and Mr Ramsbro can not be said to have incurred any damages. It might have been different if the individuals who Mr Ramsbro offended had claimed damages and the outcome of this was dependent on the finding in the criminal proceedings.

Since we do not know the outcome of the main proceedings in *Vägverket* yet, we can not know if the non-referral of the questions already decided will cause any damages to the parties. Concerning whether the breach that I have argued can be found in the case was sufficiently serious, we have to remember that MD made away with Community law in one sentence, stating that it would not affect the findings under Swedish law. However, there is in my opinion reason to believe that the ECJ would come to a different conclusion than MD considering its previous case-law. This is in my opinion rather serious and a manifest disregard of Community law. Since the Competition authority claims a total of 1.6 billion Swedish crowns in the case, it might be a very expensive reminder to Swedish courts of the importance for individuals of preliminary references. In *Barsebäck*, the breach is in my opinion not as manifest and clear. Depending on the further development of the state liability principle, it might also be possible to claim that Regeringsrätten only misinterpreted Community law.

Finally, it is interesting to note that JK in the aftermath of the *Volvo* case applied qualifications with regard to liability based on the judiciary's actions, when holding that minor errors cannot be the basis of liability. Such qualifications have also been made, as we have seen, by Bundesverfassungsgericht, ECtHR and later by the Court of Justice in *Köbler*. JK's practice seems to be similar to the European one already existing. Of course, the national practise in this regard has to take the development in *Köbler* into account. Even if I do think there was a breach of the obligation in the *Volvo*-case, it is doubtful if it would be considered sufficiently serious under post-*Köbler* criteria and if there was a causal effect, which JK argued against.

5 Conclusions

The preliminary rulings instrument, as well as the co-operative approach described above, has in my opinion been crucial for the development of Community law and its acceptance within the national legal systems. But how respected has the principle of co-operation been in the recent European and Swedish jurisprudence?

The ECJ, supported by the Commission, has strengthened its control over national courts in different ways without loosening up the strict obligation to refer questions to it. However, the ECJ has, in my opinion, not disregarded the co-operative relationship. By the development in *Köbler* and *Commission v Italy*, the limits of the co-operative relationship might be stretched but the principle of co-operation has, in my opinion, been used as a guiding principle in this recent development.

From Swedish courts we have seen challenges to the strict interpretation of the exceptions from the obligation to refer. These challenges have been made both in accordance with the co-operative relationship as in *Lyckeskog*, but, as I have argued above, also in the form of breach of the obligation under article 234(3), as in the recent *Vägverket* case. It must, however, be noted that this was the only clear breach of the obligation to refer that could be found in the cases from 2004 analysed in this paper, which are the cases where a breach was most likely to be found. This is in my opinion also the only case where an application of the ECJ's conditions for state liability developed in *Köbler* might lead to liability for Sweden. From this, it is hard to argue that there exist systematic breaches of the obligation, even if there definitely seems to be a systematic reluctance to refer. Breaches of the obligation have been found, but most surprising is that the only case on which the Commission explicitly relies in its ongoing infringement proceeding can in my opinion hardly be seen as a breach and definitely not as a "clear proof" of breaches as the Commission argues.

The reluctance found in the Swedish courts towards making references can be defended by referring to problems faced by the ECJ, with regard to its increased caseload. However, this self-restraint, which Swedish courts of last instance have taken upon themselves, may also risk leading to breaches of Community law and that the purpose behind article 234(3) remains unfulfilled. Given the defence of the *CILFIT* from new Luxembourg rulings, Swedish courts seem more concerned about the problems of the ECJ than the ECJ itself. Moreover, considering the relatively small amount of references from Sweden, this concern is in my opinion unnecessary and tends to deprive European citizens in Sweden from having their Community law rights protected on the basis of authoritative interpretations thereof.

Many of the recent cases from the ECJ analysed in this thesis have great importance for the individual. In *Kühne & Heitz*, explicitly motivated by the obligation to cooperate put on national administrations, individuals are

given a way to complain if this co-operation has not been fulfilled through a preliminary reference. Although this procedural right is dependent on national law, its position thus becomes better protected against non-co-operation and against non-referrals. Moreover, the Court in *Köbler* justifies the existence of state liability with the protection of individuals. In the doctrine, the perspective of protection of individual rights has also been emphasised when the case has been interpreted. As seen above, for example Obwexer argues that through the less strict criteria for liability conducted by the judiciary, the protection of rights for individuals with the misfortune of having their rights infringed by courts of last instance instead of by other state organs is threatened.⁴³⁸

The traditional model of co-operation is, however, a model with only courts as actors. Maybe these recent rulings can be seen as a move towards a greater concern for the individual in the judicial architecture of the Union? Even if the preliminary rulings have always been important for individuals, these two cases seem to give individuals direct rights and remedies in relation to the instrument. Interestingly, a similar trend – from international co-operation to a citizen-oriented approach – has been noted regarding the infringement procedure.⁴³⁹ If this trend continues in relation to preliminary references, this will take away the focus on co-operation that has been present since the first preliminary ruling was delivered by the ECJ. This will put more pressure on individuals to actively process their way to Luxembourg than in the traditional theory behind the co-operative relationship, according to which the parties do not play an active part.

From the national perspective, we also see that when the courts of last instance fail to fulfil their part of the co-operative relationship, individuals are forced to turn to other procedural mechanisms to ensure that their rights under Community law are given a proper interpretation and protection. We have seen that Sydkraft in *Barsebäck* turned to the Commission regarding the questions of Competition law; the infringement proceeding concerning the Swedish gambling act is a result of such complaints; in *Volvo*, the garage turned to JK for damages and there has been a number of demands for new trials from litigants in proceedings where a reference was not made. These additional proceedings have to be taken into consideration before a national court decides not to refer, on the explicit or implicit ground that it will save time and money.

The co-operative approach is likely to face many challenges in the near future with more cases from more courts being referred to Luxembourg. However, I believe that it is crucial for the continued functioning of the Communities' legal system that co-operation remains or develops into a guiding principle in all 26 legal systems. Timmermas guess that “[m]aybe

⁴³⁸ Obwexer Walter, ”Anmerkung” 2003 EuZW pp 726-728.

⁴³⁹ Rawlings, “Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement” 2000.

dialogue is easier between judges than politicians.”⁴⁴⁰ I, however, hope and find it crucial that dialogue can be a driving force in both the political and legal integration in Europe.

⁴⁴⁰ Timmermas “Knocking...”, p 399.

Supplement

Number of preliminary references per year and Member State.

	BE	DK	DE	EL	ES	FR	IRL	IT	LU	NL	AT	PT	FI	SE	UK
1989	13	2	47	2	2	28	1	10	1	18		1			14
1990	17	5	34	2	6	21	4	25	4	9		2			12
1991	19	2	54	3	5	29	2	36	2	17		3			14
1992	16	3	62	1	5	15		22	1	18		1			18
1993	22	7	57	5	7	22	1	24	1	43		3			12
1994	19	4	44		13	36	2	46	1	13		1			24
1995	14	8	51	10	10	43	3	58	2	19	2	5		6	20
1996	30	4	66	4	6	24		70	2	10	6	6	3	4	21
1997	19	7	46	2	9	10	1	50	3	24	35	2	6	7	18
1998	12	7	49	5	55	16	3	39	2	21	16	7	2	6	24
1999	13	3	49	3	4	17	2	43	4	23	56	7	4	5	22
2000	15	3	47	3	5	12	2	50		12	31	8	5	4	26
2001	10	5	53	4	4	15	1	40	2	14	57	4	3	4	21
2002	18	8	59	7	3	8		37	4	12	31	3	7	5	14
2003	18	3	43	4	8	9	2	45	4	28	15	1	4	4	22
2004	24	4	50	18	8	21	1	48	1	28	12	1	4	5	22
Total	495	104	1414	92	153	676	45	844	57	610	261	55	38	50	396

Source: European Court of Justice, "Annual Report 2004" p 187.

Bibliography

- Alter, Karen. 'The European Court's Political Power' 19:3 *West European Politics* (1996), pp. 458-487.
- Alter, Karen. "Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice", in 52 *International Organizations*, (1998), pp 121-147.
- Anderson, David and Demetriou, Marie. *References to the European Court*, Second Edition, Sweet & Maxwell, London, 2002.
- Anderson, Torbjörn. *Rättskyddsprincipen: EG-rätt och nationell sanktions- och processrätt ur ett Svenskt civilprocessuellt perspektiv*, Iustus Förlag AB, Uppsala, 1997.
- Arnall, Anthony. "The use and abuse of article 177 EEC" 52 *Modern Law Review*, (1989), pp 622-639.
- Arnall, A.M.; Dashwood, A.A.; Ross, M.G. and Wyatt D.A., "Wyatt & Dashwood's European Union Law", Fourth Edition, Sweet & Maxwell, 2000.
- Auby, Jean Bernard. "Physionomie du contentieux administratif européen" in "What's new in European Administration Law?" Ziller, Jacques (ed.), EUI Working Paper Law 2005/10, (2005), pp 15-18. available online <<http://www.iue.it/PUB/law05-10.pdf>> 2005-07-25.
- Barnard, C. and Sharpston, E. "The Changing Face of Article 177 References" 34 *CM L Rev*, (1997), pp 1113-1171.
- Bebr, Gerhard. "The Rambling Ghost of "Cohn-Bendit": *Acte Clair* and the Court of Justice" 20 *CML Rev*, (1983), pp 439-472.
- Bernitz, Ulf. "Barsebäcksdomen i Regeringsrätten – borde förhandsavgörande av EG-domstolen ha begärts" 11 *JT* (1999/00) pp 964-970.
- Bernitz, Ulf. "HD och EG-domstolen – om vikten av förhandsavgöranden och HD-domar som inte bör ses som prejudikat" 13 *JT* (2001/02) pp 955-960.
- Bernitz, Ulf. "Sverige och Europarätten", Nordstedts Juridik AB, 2002.
- Bernitz, Ulf. "Kommissionen ingriper mot Svenska sistainstansers obenägenhet att begära förhandsavgörande" *ERT* (2005) pp 109-116.
- Bernitz, Ulf. "Missbruk av dominerande ställning i form av prisdiskriminering – restitution och betalningsbefrielse" *ERT* (2003) pp 382-386.
- Bernitz, Ulf. "Nationella spelmonopol i ljuset av Gambellimålet" *ERT* (2004) pp 451-461.
- Bexhed, Jan-Mikael. "Om kravet att begära förhandsavgörande från EG-domstolen – Vängby och EG-domstolen" 10 *JT* (1998/99) pp 818-826.
- Björkenfeldt, Mats. "Replik på professor Bernitz debattartikel, HD och EG-domstolen – om vikten av förhandsavgöranden och HD-domar som inte bör ses som prejudikat, JT 2001-02 s. 955ff" 14 *JT* (2002/03) 208-210.
- Bogdan, Michael. "Komparativ rättskunskap" second edition, Nordstedts Juridik 2003.
- Bonet, Georges. "Propriétés intellectuelles" 36 *RTD eur.* (2000) pp 99-138.

- Botella, Anne-Sophie. "La responsabilidad del juez nacional" 40 *RTD eur* (2004) pp 283-315.
- Breuer, Marten. "Urteile mitgliedstaatlicher Gerichte als möglicher Gegenstand eines Vertragsverletzungsverfahrens gem. Art. 226?" 15 *EuZW* (2004) p 199.
- Breuer, Marten. "State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria" 29 *ELRev* (2004) pp 243-254.
- Briem, Hildur. "*The preliminary ruling procedure as part of a 'complete system of remedies': does the obligation to seek a preliminary ruling ensure effective judicial protection of individuals?*" L.L.M-thesis Lund University, Faculty of Law, 2005.
- Brown, Neville and Kennedy, Tom. "*The Court of Justice of the European Communities*", Sweet & Maxwell, 2000.
- Bull, Thomas. "Nationella domstolar och europeisk konstitutionalism" *ERT* (1999) pp 678- 701.
- Bull, Thomas. "En viktig struntsak", 86 *SvJT* 2001 pp 91-95.
- Burley, Anne-Marie and Mattli, Walter. "Europe Before the Court" 47 *International Organizations* (1993) pp 58-64.
- Böckwall, Carl. "Gemenskapsrättens uniforma tillämpning I fara? – om Regeringsrättens ovilja att hänskjuta EG-rättsliga frågor I Barsebäcksmålet" *ERT* (1999) pp 711-720.
- Caranta, Roberto. "C-453/00, Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren, Judg..." 42 *CMLRev* (2005) pp 179-188.
- Carrubba, Clifford and Murah, Lacey. "Legal Integration and Use of the Preliminary Ruling Process in the European Union" in 59 *International Organizations* (2005) pp 399-418.
- Craig, Paul and de Búrca, Gráinne. "*EU Law*", Oxford University Press, 2003.
- Dashwood, Alan and Johnston, Angus. "The Future of the Judicial System of the European Union" Hart Publishing 2001.
- Davies, Gareth. "*The Division of Powers between the European Court of Justice and National Courts*" Constitutional Web-papers, ConWEB No. 3/2004 available at <<http://esl.man.ac.uk/conweb/>> 2005-07-21.
- Derlén, Mattias. "Nationella slutinstansers skyldighet att fråga EG-domstolen – CILFIT-doktrinen efter Lyckeskog" *ERT* (2004) pp 85-93
- Due, Ole. "The Working Party Report" in "*The Future of the Judicial System of the European Union*" Dashwood and Johnston (eds.) Hart Publishing 2001.
- Dufwa, Bill. "Kommissionen och svensk domstolspraxis" *NFT* 2004 pp 299-304.
- Ebbesson, Jonas. "Miljökonsekvensbedömningar när kärnkraftverk avvecklas?" 11 *JT* (1999/00) pp 895-902.
- Edwards, David. "Reform of Article 234 Procedure: the limits of the Possible" in "*Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*" O'Keefe (ed.) Kluwer Law International, 2000, pp 119-142.
- Eklund, Hans. "Inhibition – ett nödvändigt ont?" 10 *JT* (1998/99) p 51-79.
- Engström, Johanna. "Rå 2002 ref 108 och rätten till ett "effektivt rättsmedel" – den EG-rättsliga rätten till återbetalning av rättsstridigt

- uttagna avgifter och rätten till ränta i svensk tappning” *ERT* (2005) pp 340-363.
- Garett, Geoffrey. “The Politics of Legal integration in the European Union” 49 *International Organization* (1995) pp 171-181.
- Glaesner, Adrian. “Die Vorlagepflicht unterinstanzlicher Gerichte im Vorabentscheidungsverfahren“ 25 *EuR* (1990) pp 143-151.
- Goyder, D.G. “*EC Competition Law*”, Third edition, Clearendon 1998.
- Groussot, Xavier. ”*Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?*” Doctorial Dissertation at Faculty of Law Lund University, 2005.
- Hartley, Trevor. “*The Foundations of European Community Law*”, Oxford University Press 1998.
- Hartley, Trevor. “*Constitutional Problems of the European Union*”, Hart, 1999.
- Henriksson, Lars. “I kartell mot sig själv: Kommentar till avgörandet MD 2004:21 om räckvidden av 6§ konkurrenslagen/artikel 81.1 EG”, 16 *JT* (2004/05) pp 422-432.
- Hoffstötter, B.R. “*The problem of non-compliant National Courts in European Community Law*” Doctorial Dissertation at Universität St. Gallen Hochschule für Wirtschafts-, Rechts- und Socialwissenschaften, 2005.
- Ibáñez, Alberto. 1998. “*A Deeper insight into Article 169*” Jean Monnet Working Papers 1998:11. New York University School of Law. Available on-line: <http://www.jeanmonnetprogram.org/papers/papers98.html> 2005-07-23.
- Immenga, Ulrich and Mestmäcker, Ernst-Joachim. ”*EG-Wettbewerbsrecht Kommentar Band I*” Verlag CH Beck, 1997.
- Jacobs, Francis. “Which courts and tribunals are bound to refer to the European Court?” 2 *ELRev* (1977) pp 119-121.
- Kaleda, Saulius Lukas. “*Extension of the preliminary rulings procedure outside the scope of Community law: ‘The Dzodzi line of cases’*”, European Integration online Papers (EIoP) Vol. 4 (2000) N° 11, available online: <<http://eiop.or.at/eiop/texte/2000-011a.htm>> 2005-07-15.
- Karlsson, Kent and Hägglund, Fredrik. “En kartläggning av Sveriges fem första år med EG-rätt” *ERT* (1999) pp 437-519.
- Koktvedgaard, Morgens and Levin, Marianne. ”*Lärobok i Immaterialrätt*”, sixth edition, Norstedts Juridik, 2000.
- Komárek, Jan. “Federal Elements in the Community Judicial System: Building Coherence in the Community legal Order” 23 *CMLRev* (2005) pp 9-34.
- Lagrange, Maurice. ”The Theory of the Acte Claire: A Bone of Contention or a Source of Unity?” 8 *CMLRev* (1971) pp 313-324.
- Lind, Johan. “Rättsfallsanalyser – recension eller analys” 7 *JT* (1995/96) pp 232-240.
- Mahmoudi, Said. ”Barsebäcksmålet och kravet på MKB”, 12 *JT* (2000/01) pp 215-219.
- Mancini, Fredrico. “The Making of a Constitution for Europe” 26 *CMLRev* (1989) pp 595-614.
- Millarg, E. ”Anermerkung” 18 *EuR* (1983) pp 163-168.

- Nergelius, Joakim. "Problemet lagrådet – oberoende granskningsinstans eller regeringens förlängda arm?" *SvJT* (1997) pp 562-572.
- Nergelius, Joakim. "*Förvaltningsprocess, Normprövning och Europarätt*" Norstedts Juridik, 2000.
- Norberg, Andreas. "*Bargaining down the Law – the Commission's method to ensure compliance with EC-law as bargaining or judicial procedure*", Master Thesis Department of Political Science at Lund University, 2005. Available online: <http://theses.lub.lu.se/archive/2005/05/20/1116580669-10703-199/Bargain_down_the_law_FINAL.pdf, 2005-07-21> 2005-07-10.
- Obwexer, Walter. "Anmerkung" 14 *EuZW* (2003) pp 726-728.
- Pehrson, Lars. "Möjligheten att åberopa annans varumärke vid marknadsföring av reparationer" 10 *JT* (1998/99) pp 390- 396.
- Pescatore, Pierre. "The Doctrine of 'Direct Effect': An Infant Disease of Community Law" 8 *ELR*, (1983) pp 155-177.
- Pescatore, Pierre. "L'attitude des juridictions nationales à l'égard du problème des effets directs du droit communautaire", 6 *RTD eur* (1970) pp 296-302.
- Quitow, Carl Michael. "Sterzel och Regeringsrätten" 11 *JT* (1999/00) pp 973-978.
- Raitio, Juha. "What is the Court of Final Instance in the Framework of Article 234(3) EC in Sweden? – Preliminary Ruling in the Criminal Proceedings Against Kenny Roland Lyckeskog" *ERT* (2003) pp 160-166.
- Rasmussen, Hjalte. "Why is Article 173 Interpreted against Private Plaintiffs?" 5 *ELR* (1980) pp 112-127.
- Rasmussen, Hjalte. "The European Court's Acte Clair Strategy in CILFIT" 9 *ELR* (1984) pp 242-259.
- Rasmussen, Hjalte. "Issues of Admissibility and Justiciability in EC Judicial Adjudication of Federalism Disputes under Article 117 EEC" in "*Article 177 EEC: Experiences and Problems*" Schermers et al (eds.) pp 379-391, North-Holland, 1987.
- Rasmussen, Hjalte. "Docket Control Mechanisms, the EC Court and the Preliminary References Procedure" in "*Article 177 References to the European Court – Policy and Practice*" Andenas (ed) pp 83-103 Butterworths 1994.
- Rasmussen, Hjalte. "*European Court of Justice*", GadJura, 1998.
- Rasmusen, Hjalte. "Remedying the Crumbling EC Judicial System 37 *CMLRev* (2000), pp 1071-1112.
- Rawlings, Richard. "Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement" 6 *ELJ* (2000) pp 4-28.
- Sankari, Suvi. "EU Law in Finland and Sweden: a Survey of the Preliminary References, National Jurisprudence and legal Integration", *ERT* 2003 pp 508-534.
- Schermers, Henry and Waelbroeck, Denis. "*Judicial Protection in the European Communities*" Fifth edition, Kluwer, 1992.
- Scherr, Kathrin Maria. "The concept of Administrative self-remedy under EC law" in "*What's new in European Administration Law?*" Ziller Jacques (ed.) EUI Working Paper Law 2005/10 available online <<http://www.iue.it/PUB/law05-10.pdf>> 2005-07-25.

- Schröter, Helmuth. "Artikel 82 EG-Vertrag – Mißbrauch marktbeherrschender Stellung" in "Kommentar zum Europäischen Wettbewerbsrecht" Schröter, Jacob and Mederer (eds.), pp 790-985 Nomos Verlagsgesellschaft 2003.
- Stenberg, Hans. "Professor i analys: HD missade pröva konkurrensbegränsning", 2005 Available online at www.pointlex.se/pub/standard.asp?art_id=818588&iM=, 2005-07-20.
- Sterzel, Fredrik. "Barsebäcksmålet" 11 *JT* (1999/00) pp 658-675.
- Sweet, Alec Stone and Thomas L., Brunell. "The European Court and the national courts: a statistical analysis of preliminary references, 1961-95" 5 *Journal of European Public Policy* (1998) pp 66-97.
- Temple Lang, John. "The Duties of National Courts under Community Constitutional Law" 22 *ELR* (1997) pp 3-18.
- Timmermas, Christiaan. "The European Union's Judicial System" 41 *CMLRev* (2004) pp 393-405.
- Tocqueville, Alexis. "Democracy in America" Harper & Row, 2000.
- Toth, A.G. "Observations on Certain Problems Involved in the Application of Article 177 EEC" in "Article 177 EEC: Experiences and Problems" Schermers et al (eds.) pp 394-400 North-Holland 1987.
- Tridimas, Takis. "Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling System" 40 *CMLRev* (2003) pp 9-50.
- Turner, Cathrine and Muñoz, Rodolphe. "Revising the Judicial Architecture of the European Union" 19 *YBEL* (1999) pp 1-93.
- Wahl, Nils. "Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten?", *ERT* (2005) pp 119-128.
- Ward, Angela. "Judicial Review and the Rights of Private Parties in EC Law" Oxford University Press 2000.
- Warnling-Nerep, Wiweka "Lex Barsebäck: kan vi lita på lagstiftaren och lagrådet?" 9 *JT* (1997/98) pp 286-297.
- Wattel, Peter. "Köbler, CILFIT and Welthgrove: we can't go on meeting like this" 41 *CMLRev* (2004) pp 177-190.
- Wegener, Bernhard. "(Fehl-)Urteilsverantwortung und Richterspruchprivileg in der Haftung der Mitgliedsstaaten für die Verletzung von Gemeinschaftsrecht" 39 *EuR* (2004), pp 84-91.
- Weiler, J.H.H. "The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC" in "Article 177 EEC: Experiences and Problems" Schermers et al (eds.) North-Holland 1987.
- Weiler, J.H.H. "A Quiet Revolution – The European Court of Justice and Its Interlocutors" 26 *Comparative Political Studies* (1994) pp 510-534.
- Weiler, J.H.H. "The Constitution of Europe", Cambridge University Press 1999.
- Wiklund, Ola. "EG-domstolens tolkningsutrymme" Juristförlaget 1997.
- Wyatt, Derrick. "Article 177(3) - the Court cautiously endorses the acte clair doctrine" 8 *ELR* (1983) pp 179-182.
- Vängby, Staffan. "Undantag från EG-rättens överhöghet" 10 *JT* (1998/99) pp 363- 372.

Vängby, Staffan. "Förhandsavgörande från EG-domstolen – en replik till Jan-Mikael Bexhed" 11 *JT* (1999/00) pp 248-250.
Zetterquist, Ola. "A Europe of the Member States or of the Citizens?" Doctorial Dissertation Faculty of Law Lund University 2002.
Åhman, Karin. "Barsebäck ur ett egendomsrättsligt perspektiv" *ERT* (1999) pp 661-677.

Official publications

European Union

"European Governance – A White Paper" COM (2001) 428 final. 21.11.01.
"Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC" Official Journal C 101, 27/04/2004 p 54-64.
Official Journal 1983-10-06, C 268, p 25, "Written question No 526/83 by Mr Alan Tyrrell and Answer given by Mr Thorn on behalf of the Commission".

Sweden

Ds I 1986:11 "Efter Tjernoby: Konsekvenser för energipolitiken, kärnsäkerheten, strålskydd och miljöskydd".
Proposition 1992/93:56 p 21 "Ny konkurrenslagstiftning".
Proposition 1996/97:176 "Lag om kärnkraftens avveckling".
Proposition 1997/98:44 "Personuppgiftslag".
Riksdagskrivelse 1996:272.
SOU 1995:139-140 "Omställning av energisystemet".

Reports

Domstolsverket, "Domstolsstatistik: Courts statistics Official statistics of Sweden 2004" available online <http://www.dom.se/dom/DVhemsida/Domstolsstatistik/domstolsstatistik_2004.pdf>, 2005-06-20.
European Court of Justice "Annual report 2004" available online: <http://curia.eu.int/en/instit/presentationfr/index.htm> 2005-07-09.
FIDE XIX Report from FIDE XIX Congress 2002 Vol. 1 "The Duties of Co-operation of National Authorities and Courts and the Community Institutions under article 10 EC".
House of Lords, Thirty-eighth Report from House of Lords, Appeal Committee, "Petitions for leave to appeal: Reasons for the refusal of leave", 3rd April 2003, available online www.publications.parliament.uk/pa/ld200203/ldselect/ldappeal/89/89.pdf, 2005-07-12.

Communication in Infringement Proceedings

Infringement proceeding number 2003/2161 regarding article 234(3) EC
European Commission, "Informell skrivelse rörande svenskt prövningstillstånd i förhållande till artikel 234 EG", Informal letter dated 2003-01-21.
European Commission, "Formell underrättelse" Formal Notice dated 2004-04-05.

European Commission, ”*Motiverat yrkande riktat till Sverige till följd av överträdelse av artikel 234, tredje stycket EG*” Reasoned Opinion dated 2004-10-19.

Swedish Government ”*Ang. Informell skrivelse rörande svenskt prövningstillstånd i förhållande till art 234 i fördraget*” Response to informal letter dated 2003-03-14.

Swedish Government ”*Svar på formell underrättelse*” Response to Formal Notice dated 2004-05-26.

Swedish Government ”*Svar på motiverat yttrande om överträdelse av artikel 234 tredje stycket EG*” Response to Reasoned Opinion dated 2004-12-15.

Infringement proceeding number 2001/4826 regarding gambling in Sweden.

European Commission ”*Formell underrättelse*” Formal Notice dated 2004-10-13.

Swedish Government ”*Formell underrättelse om den svenska lagstiftningen om spelautomater*” Response to Formal Notice dated 2004-12-15.

Other sources

Bernitz Ulf, submission to the Court in *Boliden* supporting Boliden. Online: www.pointlex.se/pub/standard.asp?art_id=20354&iM=2005-07-20.

European Commission, Press Release of 9th of February 2004, IP/04/178.

Pehrson Lars and Nils Wahl, submission to the Court in *Boliden* supporting Stockholm Energi. Online: see Bernitz above.

Table of Cases

European Court of Justice

- C-6/60 Jean-E Humblet v Belgian State [1960] ECR 559
C-13/61 De Geus en Uitdenbogerd v Bosch and others [1962] ECR p 89.
C-26/62 N.V. Algemene Transport-en Expeditie Ondernemig van Gend en Loos v. Nederlandse administratie der belastingen, [1963] ECR 1
Joint Cases 28-30/62 Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie [1963] ECR 31
Joint Cases 73 and 74/63 NV Internationale Crediet- en Handelsvereniging "Rotterdam" and De Cooperatieve Suikerfabriek en Raffinaderij G.A. "Puttershoek" v Netherlands Minister of Agriculture and Fisheries, [1964] ECR p 3
C-6/64 Flaminio Costa / E.N.E.L. [1964] ECR p. 1141
C-16/65 Schwarze / Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1965] ECR p. 1081
C-29/68 Milchkontor v. Hauptzollamt Saarbrücken [1969] ECR 165
C-77/69 Commission v. Belgium [1970] ECR 237
C-9/70 Grad v. Finanzamt Traunstein (1970) ECR 825
C-22/70 Commission v. Council (the ERTA-case) [1971] ECR 263
C-22/71 Béguelin Import v G.L. Import Export [1971] p 949
C-6/72 Europemballage Corporation and Continental Can Company v Commission [1973] ERC 215
C-127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior [1974] ECR p 313
C-166/73 Rheinmühlen Düsseldorf / Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR p 33
C-41/74 Van Duyn v Home Office [1974] ECR p 1337
C-113/75 Freccassetti v. Amministrazione delle Finanze dello Stato, [1976] ECR 983
C-52/76 Luigi Benedetti v Munari F.lli s.a.s. [1977] ECR 163
C-107/76 Hoffmann-La Roche / Centrafarm [1977] ECR p. 957
C-5/77 Tedeschi v Denkavit [1977] ECR p 1555
C-30/77 R. v. Bouchereau [1977] ECR 1999
C-93/78 Mattheus v Doego [1978] ECR p 2203
C-104/79, Paquale Foglia v Mariella Novello [1980] ECR 745
Joint Cases 36 and 71/80 Irish Creamery Milk Suppliers Association v Ireland [1981] ECR p 735
C-66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato [1981] ECR 1191
C-126/80, Salonia v. Poidomani and Giglio, [1981] ECR p 1563
C-246/80 Broekmeulen v. Huisarts Registratie Commissie, [1981] ECR 2311
C-102/81 Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG [1982] ECR 1095
C-283/81 Srl CILFIT v. Ministry of Health [1982] ECR p 3415 in CMLR [1983] p 472

Joined cases 35-36/82 *Morson and Jhanjan v State of Netherlands* [1982] p 3723
 C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* [1983] ERC p 3595
 C-314/85 *Firma Foto Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199
 C-338/85 *Pandini v Ministero del commercio con l'estero* [1988] ECR 2041
 C-80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969
 C-104/86 *Commission v. Italy* [1988] ECR 1799
 C-30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR 2479 p.2479
 Joint cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1999] ECR I-415
 C-202/88 *France v Commission* [1991] ECR I-1223
 Joint cases C-297/88 and C-197/89, *Massam Dzodzi v. Belgian State* [1990] ECR I-3763
 C-234/89 *Delimitis v Henninger Bräu* [1991] ECR p-935
 C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745
 Joint cases C-320-322/90 *Telemarsicabruzzo SpA v Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa* [1993] ECR p I-393
 Joint cases C-6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357
 C-83/91 *Meilicke v ADV-ORGA* [1992] ECR p I-4871
 C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR p I-4367
 C-327/91 *France v. Commission* [1994] ECR I-3641
 C-24/92 *Corbiau v Administration des Contributons* [1993] ECR p I-1277
 C-275/92, *Her Majesty's Customs and Exercise v. Gerhart Shindler and Jörg Schindler* [1994] ECR I-1039;
 C-382/92 *Commission v United Kingdom* [1994] ECR I-2435
 C-431/92 *Commission v Germany* [1995] ECR I-2189
 Joint cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany, and R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029
 C-312/93 *Peterbroeck v. Belgium* [1995] ECR I-4705
 C-346/93 *Kleinwort Benson v. City of Glasgow District Council* [1995] ECR I-615
 C-395/93 *Neckermann Versand v. hauptzollamt Frankfurt am Main-Ost* [1994] ECR I-4027
 C-430/93 *Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705
 C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761
 C-167/94 *Criminal proceedings against Grau Gormis and others* [1995] ECR p I-1023
 C-28/95 *Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam* [1997] ECR I-4161
 C-66/95 *The Queen / Secretary of State for Social Security, ex parte Sutton* [1997] ECR p I-2163

C-73/95 Viho v Commission [1996] p. I-5457
 C-188/95 Fantask and others v Industriministeriet [1997] ECR p I-6783
 C-261/95 Palmisani v. INPS [1997] ECR I-4025
 C-301/95 Commission v Germany [1998] ECR I-6135
 C-307/95 Max Mara v Ufficio del registro di Reggio Emilia [1995] ECR p I-5083
 C-329/95 VAG Sverige [1997] ECR I-2675
 C-337/95 Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV [1997] ECR I-6013
 C-338/95, Wiener S.I. GmbH v. Hauptzollamt Emmerich, ECR [1997] I-6495
 C-15/96 Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg [1998] ECR I-47
 C-54/96 Dorsch Consult [1997] ECR I-4961
 C-343/96 Dilexport [1999] ECR I-579
 C- 7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriften-verlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG. [1998] ECR p I-7791
 C-10-22/97 Ministero delle Finanze v IN.CO.GE.'90 and others [1998] ECR p I-6307.
 C-63/97 Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik [1999] ECR I-905
 C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylän) and Suomen Valtio [1999] ECR I-6067
 C-134/97 Victoria Film [1998] ECR p I-7023
 C-435/97 World Wildlife Fund v Autonome Provinz Bozen [1999] I-5613
 C-67/98, Questore di Verona v. Diego Zenatti [1999] ECR I-7289
 C-287/98 State of the Grand Duchy of Luxembourg v Linster [2000] ECR I-6917
 C-393/98 Ministerion Publico and António Gomes Valente [2001] ECR I-1327
 C-397/98 and 410/98 Metallgesellschaft Ltd and others Hoechst AG, Hoechst UK Ltd v Commissioners of Inland Revenue HM Attorney General [2001] ECR p I-1727
 C-446/98 Fazenda Publica v. Camara Municipal do Porto [2000] ECR I-11435
 C-1/99 Kofisa Italia Srl v Ministero delle Finanze [2001] ECR p I-207
 C-50/00, Unión de Pequeños Agricultores v Council [2002] ECR I-6677
 C-99/00 Criminal proceedings against Kenny Lyckeskog [2002] ECR p I-4839
 C-129/00 Commission v. Italy [2003] ECR 4637
 C-453/00, Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren [2004] ECR I-837
 C-224/01 Gerhard Köbler v Republik Österreich [2003] ECR p I-10239
 C-243/01, Criminal proceedings against Piergiorgio Gambelli and others, [2001] ECR I-13013

Court of First Instance

T-171/99 Corus UK Ltd v Commission [2001] ECR p II-2967

European Court of Human Rights

Pafitis and others v Greece, judgement given 26 February 1998

Germany

Bundesfinanzhof Case V B 51/80 Re Value Added Tax Directives, 1 CMLR (1982) 527

Bundesverfassungsgericht 2 BvR 1436/87 in Entscheidungen des Bundesverfassungsgerichts Vol 82 pp159.

Bundesverfassungsgericht 2 BvR 2134/92 & 2159/92 in Entscheidungen des Bundesverfassungsgerichts Vol. 89, p 155 and 1 CMLR (1994) 57

Bundesverfassungsgericht, 2 BvR 197/83, in Entscheidungen des Bundesverfassungsgerichts Vol 73 pp 339.

Vervaltungsgericht Frankfurt/Main II/2 E 288/69 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel [1972] 11 CMLR 195

France

Conseil d'Etat, Ministre de l'interieur v. Cohen-Bendit, Arrêt 22 December 1978, 1 CMLR (1980) 543

Sweden

Högsta Domstolen

NJA 1996 s 668. Data-Delecta

NJA 1998 s 474 Volvo.

Decision in case T-2137-01. SAS I

Decision in case B-3986-01 Oversee Betting

NJA 2001 s 409 Ramsbro

Decision in case Ö 1891-03. SAS II

NJA 2004 s 786 Gränsövargen

NJA 2004 s 804 Boliden

Regeringsrätten

RÅ 1999 ref 76 Barsebäck

RÅ 2002 ref 108 Axfood

RÅ 2004 ref 95 Wermdö Krog

RÅ 1999 not 247 Barsebäck II

Other courts and JK

Göta Hovrätt judgement in case T-33/00. SAS.

JK Decision in case 3646-99-40, delivered 7th of February 2002. Volvo.

Marknadsdomstolen MD 2004:21

Norköpings tingsrätt judgement in case T 2746-96 SAS.

United Kingdom

Court of Appeal, H.P. Bulmer Ltd v J Bollinger SA 2 CMLR (1974) 91 Queen's Bench

Divisional Court Regina v. Secretary of State for Transport, ex parte Factortame 2 CMLR (1989) 353