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## Practical Considerations Regarding the Preliminary Ruling Procedure Under Article 177 of the EEC Treaty

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# Practical Considerations Regarding the Preliminary Ruling Procedure Under Article 177 of the EEC Treaty

Manfred A. Dausen

## **Abstract**

Part I of this Article considers the role played by the preliminary ruling procedure in the context of the Community legal system as a whole. Part II discusses the types of questions that may be appropriately referred to the Court for preliminary ruling. Part III examines the various tribunals and courts that may make a reference to the Court of Justice. Part IV analyzes the tension in the relationship between the Court and the national courts of the Member States. Finally, Part V considers the legal effects of preliminary rulings.

# PRACTICAL CONSIDERATIONS REGARDING THE PRELIMINARY RULING PROCEDURE UNDER ARTICLE 177 OF THE EEC TREATY

*Manfred A. Dausen\**

## INTRODUCTION

The judicial function in the Community is divided between the national courts of the Member States and the Court of Justice (Court).<sup>1</sup> A national court has complete control over the proceedings pending before it and alone has jurisdiction to hand down the decision in those proceedings. It may be required to review questions of Community law relevant to the dispute. If in so doing it encounters difficulties, it may—and, in certain cases, it must—ask the Court for the necessary guidance to resolve such difficulties. The preliminary ruling procedure under Article 177 of the Treaty of Rome<sup>2</sup> (EEC Treaty

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This Article draws heavily upon the observations made in the author's book, *DAS VORABENTSCHEIDUNGSVERFAHREN NACH ARTIKEL 177 EWG-VERTRAG—EIN LEITFADEN FÜR DIE PRAXIS* (1985).

1. The drafters of the Treaties establishing the European Communities decided to entrust the task of ensuring that "in the interpretation and application of this Treaty the Law is observed" to an independent judicial body, the Court of Justice. Treaty establishing the European Economic Community, art. 164, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1, at 55 (Cmd. 5179-II) (official English transl.), 298 U.N.T.S. 11 (1958) (unofficial transl.) [hereinafter EEC Treaty]; Treaty instituting the European Coal and Steel Community (ECSC), art. 31, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 1, at 29 (Cmd. 5189), 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty establishing the European Atomic Energy Commission (EAEC), art. 136, Mar. 25, 1957, 1973 Gr. Brit. T.S. 201 (Cmd. 5179-II), 298 U.N.T.S. 167. By that decision, they made the concepts and principles of Community law justiciable, and at the same time, acknowledged that Community law constituted the foundation on which the economic and political unity of Europe was to be constructed.

In other words, the European Community was intended by its founders to be not merely an economic and social Community, not only a political organization based on the common history of European peoples, but also a legal Community which pursues its broad aims of integration within its own legal order. Thus economic and political activity, the dynamism of which was fully recognized, was brought under legal control and made subject to legislative objectives.

2. EEC Treaty, *supra* note 1, art. 177. Article 177 provides:

or Treaty) provides the mechanism for so doing. Under Article 177, the Court provides an interpretation of the Community law in question that is at once related to the facts and abstract. A national court must then apply the law to the facts established by it in light of the Community law as interpreted by the Court.

The procedure under Article 177 is intended to coordinate the decisions of the national courts in the sphere of Community law. It is above all a means of ensuring the uniformity of Community law. Additionally, as an intermediate procedure in the proceedings pending before the national court, it has evolved into an important guarantee of individual rights in the Community.

Since the early days of the Court, the preliminary ruling procedure has been a crucial element in its work. Although originally conceived as playing a relatively minor role, in the course of time the preliminary ruling procedure has become increasingly dominant. It has developed into a pillar of the Community legal order. One major reason for this is that the respective national laws and Community law increasingly influence and interact with each other and that economic and social activity in the Member States has been increasingly drawn into the Community field of action. It is characteristic of this development that the most important legal decisions of the Court have been given in preliminary ruling proceedings. For example, the "major" judgments on direct applicability and on the supremacy of Community law or the leading decisions in the area of the free movement of goods and persons have been

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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;
- (c) the interpretations 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.

preliminary rulings. The influence of those judgments as a creative force and the precedents they set have contributed decisively to the building of a coherent Community legal order with its own structure and principles.<sup>3</sup>

In this Article, I will attempt to show that notwithstanding all the alleged and actual imperfections and inadequacies, the preliminary ruling procedure has proved itself. Its effectiveness and importance for the legal process have exceeded the most ambitious expectations of the drafters of the Treaty. It is idle to speculate upon hypothetical developments. Throughout this Article, however, I have suggested that without the procedure, Community law would not exist in its present form as the uniformly applicable and supreme *jus commune* of the Member States.

The Court's handling of questions referred to it sometimes arouses criticism and indignation among the national courts. Thus, the Court has been accused of taking too many liberties in construing or interpreting the questions referred to it and of thus ignoring the real problem and its relationship to the specific facts. Moreover, on occasion the impression is given that—contrary to the formal assurance that the national court bears responsibility for the judgment to be given in the case<sup>4</sup>—the Court is in reality not content to provide the national court with the legal ruling sought but also wishes to ensure the application of its decision to the dispute in the main proceedings.

Insofar as shortcomings exist in the cooperation between the national courts and the Court of Justice—particularly regarding the submission of the reference and compliance with

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3. The important role of the procedure is reflected in the statistics. A comparison of the number of references and direct actions that have been brought before the Court—excluding staff cases and applications for the adoption of interim measures—shows that approximately half the proceedings (1444 out of a total of 3016 cases in the period from 1953 to 1985) were preliminary ruling proceedings. If those figures are broken down, it becomes clear that the procedure was used sparingly in the 1960's (the first reference was made in 1961) but that afterwards, particularly since the middle of the 1970's, references to the Court have considerably increased. In 1985, 139 requests for preliminary rulings were registered (as opposed to 229 direct actions excluding staff cases and applications for the adoption of interim measures).

4. See Case 53/79, *ONPTS v. Damiani*, 1980 E.C.R. 273, *Comm. Mkt. Rep. (CCH)* ¶ —; *Pigs Mktg. Bd. v. Redmond*, Case 83/78, 1978 E.C.R. 2347, 2368, *Comm. Mkt. Rep. (CCH)* ¶ 8559.

the preliminary ruling—they appear to be technical rather than based on principle. Problems of principle arise only in exceptional cases. It may be argued, however, that these difficulties are, as a rule, more imagined than real. Thus, although in many cases there is still considerable reluctance among the national courts to use the procedure, the reservations appear to be rooted in an insufficient knowledge or erroneous understanding of the mechanism of judicial cooperation.

Part I of this Article considers the role played by the preliminary ruling procedure in the context of the Community legal system as a whole. Part II discusses the types of questions that may be appropriately referred to the Court for preliminary ruling. Part III examines the various tribunals and courts that may make a reference to the Court of Justice. Part IV analyzes the tension in the relationship between the Court and the national courts of the Member States. Finally, Part V considers the legal effects of preliminary rulings.

### I. THE PRELIMINARY RULING PROCEDURE IN THE COMMUNITY LEGAL SYSTEM

The Treaties of the European Communities list exhaustively the proceedings that may come before the Court. Its jurisdiction is *ratione materiae* (competence d'attribution). Aside from the opinions concerning the external affairs of the Community,<sup>5</sup> the proceedings may be divided into two main groups: direct actions and preliminary rulings.

In direct actions, proceedings are brought by an applicant against a defendant. Thus, for example, the Commission or a Member State may bring an action before the Court against a Member State for infringement of the Treaty.<sup>6</sup> Proceedings may also be instituted for the annulment of a binding act of the Council or the Commission<sup>7</sup> or for failure to act in respect of a specific area of activity of the Council or the Commission.<sup>8</sup> The action for damages<sup>9</sup> allows for claims arising out of the Community's noncontractual liability. In competition cases,

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5. EEC Treaty, *supra* note 1, art. 228(1).

6. *Id.* arts. 169, 170.

7. *Id.* arts. 173, 174.

8. *Id.* art. 175.

9. *Id.* art. 178.

undertakings can bring actions against the decisions of the Commission in its capacity as the European cartel authority.<sup>10</sup> Finally, the Court settles disputes between Community officials and their appointing authority.<sup>11</sup>

There are major differences between those proceedings and preliminary ruling proceedings with regard to both the rules governing those proceedings and their function in the Community system of legal protection. The preliminary ruling procedure is not an independent procedure but merely a stage in the proceedings pending before the national court, in which the Court gives a "preliminary" ruling on certain questions which have arisen in the main proceedings. Ordinary concepts of adversarial procedure, such as standing and admissibility, the merits of an action, the rules of evidence, and *res judicata* are not relevant.

Under the Treaties, individuals are in principle not entitled to bring actions directly challenging the legislative measures of the Community institutions before the Court. They must institute proceedings in the national courts against implementing measures adopted by the national authorities. It is therefore all the more important to enable the national court to ask the Court to provide it with guidance in making its decision with regard to questions of Community law. Thus the Court of Justice is able at the same time to review the validity of a Community rule which has been challenged by individuals who may not themselves bring an action to have that measure declared void. In that respect the procedure under Article 177 fulfills the same function in the system of legal protection as an action for a declaration of nullity. At least to some extent it cancels out the restrictions which Article 173 of the EEC Treaty imposes on the right to bring an action.<sup>12</sup>

The preliminary ruling procedure shares certain common features with appeal proceedings. In addition to a function of

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10. *Id.* art. 172.

11. *Id.* art. 179.

12. *N.V. Internationale Crediet - en Handelsvereniging 'Rotterdam' & De Coöperatieve Suikerfabriek en Raffinaderij G.A. Puttershoek v. Minister van Landbouw en Visserij* (Netherlands Minister of Agriculture and Fisheries) (two references for a preliminary ruling by the *College van Beroep voor het Bedrijfsleven*), *Joined Cases 73 & 74/63*, 1964 E.C.R. 1, 22, *Comm. Mkt. Rep. (CCH)* ¶ — (opinion of Advocate General Roemer).

legal protection, it fulfills an important function of coordination. It differs from appeal proceedings, however, inasmuch as it is not intended to correct previously adopted decisions, but to provide national courts, before they deliver their judgments, with useful indications as to the substance of the applicable Community law. Consequently, the procedure is not based on the principle of a judicial hierarchy with lower and higher courts but on the principle of the coordination of the activity of courts of equal standing in pursuit of their common task: to ensure that Community law is observed in every area of society.<sup>13</sup>

The power of the Court to implement Community law is limited. Such implementation is generally a matter for the Member States (indirect implementation), unless the Treaties or secondary Community legislation provide for implementation by the Community institutions themselves (direct implementation). Apart from the internal regulations for the Community institutions and their staff, there are few examples of direct implementation.<sup>14</sup> The vast majority of Community legislation is implemented by the authorities of the Member States.<sup>15</sup>

Because the implementing measures of national administrations must be challenged under national law, matters of Community law come before the national courts and are within their jurisdiction. In principle, they are free to interpret and apply the relevant Community law as independent courts.<sup>16</sup> In

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13. The preliminary ruling procedure cannot, however, be compared to an advisory opinion, which serves as a preventive review of legality. It does not clarify hypothetical legal questions, but provides the national court with assistance in making its decision in a specific case pending before it. *See infra* text accompanying note 64.

14. They include competition law, EEC Treaty, *supra* note 1, arts. 85-91, the rules on State aids, *id.*, art. 92-94, and the rules on steel quotas, ECSC Treaty, *supra* note 1, art. 58.

15. Examples are the Common Customs Tariff, the complex rules governing the agricultural markets (levies and refunds, the collection and payment of monetary compensatory amounts and so on) or the rules on the free movement of persons (including social security law, the right of establishment and the freedom to provide services).

16. *Rewe-Zentralfinanz eG & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1976 E.C.R. 1989, 1997, Comm. Mkt. Rep. (CCH) ¶ 8382. "Applying the principle of co-operation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law." *Id.* para. 5.



other words the national court is the "ordinary" court of Community law with respect to all directly applicable rules of Community law.

In view of the fact that both the Court and the national courts are required to interpret and apply Community law, it is immediately clear that the decisions given would not be consistent without a central court to provide a uniform interpretation. Differences in legal methods and divergent legal concepts in the individual Member States could lead to differing views as to the relevance of directly applicable Community legislation and, in certain circumstances, as to the substance of the Community law held to be relevant. Differences can occur particularly where the scope and intention of national law are different from that of Community law, or where the expressions used in the various official languages have different meanings.

In national judicial systems, the uniformity of the law is ensured by the hierarchical structure of the courts.<sup>17</sup> Fundamental considerations of legal policy make that solution impossible in the Community sphere. The European Community was conceived as—and is, in its present stage of development—an entity which is not intended to resemble a State. Rather, it is a union of States founded upon the transfer of sovereign rights in limited areas. In such an organization it would not be possible to develop a judicial structure resembling that of the national legal orders.

Article 177, therefore, represents a compromise that considers the special features of the relationship between the Community legal order and the national legal orders of the Member States. It does not turn the Court into a European appeals court or court of cassation. Rather, it institutionalizes the requisite coordination and cooperation between that Court and the national courts by assigning to the Court the task of clarifying in advance in intermediate proceedings questions of Community law which the national courts consider relevant to their decision. It does not establish a hierarchical relationship between the national courts and the Court of Justice.

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17. *Cf.* C. WRIGHT, *THE LAW OF FEDERAL COURTS* 1-21 (4th ed. 1983) (discussion of federal judicial system in the United States).

## II. QUESTIONS FOR PRELIMINARY RULINGS

Article 177 limits the field of application of the preliminary ruling procedure strictly to rules of Community law so that national law as such can never be the subject of a preliminary ruling. The Court may neither interpret national law nor consider whether it is valid or applicable. In that respect the Court has repeatedly emphasized that under Article 177 it has no jurisdiction to interpret or review legal measures and provisions of national law,<sup>18</sup> much less assess the facts established by the national court.<sup>19</sup>

### A. Measures Subject to Review

The first paragraph of Article 177 expressly distinguishes between two types of questions that may be referred to the Court: questions of validity, i.e., the existence of Community law, and questions of interpretation, i.e., the context of Community law. The latter category can relate to the Treaty, the acts of the institutions of the Community, and the statutes of bodies established by an act of the Council. On the other hand, questions concerning validity can relate only to the acts of the institutions of the Community. However, both types of questions pursue the same fundamental aim: the review of Community rules in light of the requirements and the specific aims of the Community legal order. Thus, a national court is provided with the means of applying Community law correctly in the proceedings pending before it.<sup>20</sup>

By "Treaty," the drafters of Article 177 implied not only the treaty provisions but also the annexes, amendments, and Treaties of Accession of the Member States. The "acts of the institutions" of the Community, on the other hand, represent

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18. *E.g.*, *Fonderie Officine Riunite (FOR) v. Vereinigte Kammgarn - Spinnereien (VKS)*, Case 54/72, 1973 E.C.R. 193, 205, *Comm. Mkt. Rep. (CCH)* ¶ 8208; *Carmino Capolongo v. Azienda Agricola Maya*, Case 77/72, 1973 E.C.R. 611, 622, *Comm. Mkt. Rep. (CCH)* ¶ 8213.

19. *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, Case 107/83, 1984 E.C.R. 2971, 2988, *Comm. Mkt. Rep. (CCH)* ¶ 14,116 (reference for preliminary ruling from the French Cour de Cassation); *Mr. & Mrs. F. v. Belgian State*, Case 7/75, 1975 E.C.R. 679, 689, *Comm. Mkt. Rep. (CCH)* ¶ 4656.536 (preliminary ruling requested by the Tribunal du Travail de Nivelles).

20. *Demag AG v. Finanzamt Duisburg - Süd*, Case 27/74, 1974 E.C.R. 1037, 1046, *Comm. Mkt. Rep. (CCH)* ¶ 8288 (preliminary ruling requested by the Finanzgericht Düsseldorf).

“secondary” Community law, or those legal measures—other than merely internal measures—adopted by the institutions and other bodies of the Community. That law includes the measures set forth in Article 189 of the EEC Treaty, namely regulations, directives and decisions. Recommendations and opinions are not legally binding and, as such, are not covered by Article 177. Their interpretation may, however, become relevant in connection with other provisions, such as the duty to respect the objectives of the Community under Article 5 of the EEC Treaty.

Secondary Community law also includes international treaties that are concluded by the Community with nonmember countries or international organizations. According to an established principle laid down by the Court they form “an integral part of Community law.”<sup>21</sup> The same holds true for agreements, such as the General Agreements on Tariffs and Trade,<sup>22</sup> which were concluded by the Member States, but whose terms now fall within the competence of the Community. Such agreements are treated in the same way as agreements concluded by the Community itself, and therefore form part of Community law, because the Community has taken over from the Member States the obligations arising out of those agreements.<sup>23</sup>

Like international law and the legal orders of most Member States, the Community legal order is not limited only to the rules of positive law, but also embraces general principles, including especially, fundamental human rights. The Court

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21. *R. & V. Haegeman v. Belgian State*, Case 181/73, 1974 E.C.R. 449, 460, Comm. Mkt. Rep. (CCH) ¶ 8273 (preliminary ruling requested by Tribunal de première instance de Bruxelles); *see also* *Hauptzollamt Mainz v. C.A. Kupferberg et Cie.KG a.A.*, Case 104/81, 1982 E.C.R. 3641, 3662, Comm. Mkt. Rep. (CCH) ¶ 8877 (reference for preliminary ruling from Bundesfinanzhof).

22. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

23. *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero della Marina Mercantile, Circoscrizione doganale di Trieste & Ente Autonomo del Portodi Trieste*, Case 266/81, 1983 E.C.R. 731, 780, Comm. Mkt. Rep. (CCH) ¶ 14,001 (reference for preliminary ruling from the Corte Suprema di Cassazione); *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, Case 38/75, 1975 E.C.R. 1439, 1450, Comm. Mkt. Rep. (CCH) ¶ 8327 (preliminary ruling requested by Tarief commissie); *International Fruit Co. v. Produktschep Voor Groenten en Fruit*, Joined Cases 21-24/72, 1972 E.C.R. 1219, 1228, Comm. Mkt. Rep. (CCH) ¶ 8194.

has consistently recognized that such principles form an integral part of Community law and are to be taken into consideration by it in reaching its decisions.<sup>24</sup> The Court has developed that position from the legal policy which is expressed in the requirement, to which I have already referred, that the Court of Justice ensure that in the interpretation and application of the Treaties "the law is observed." It follows that questions concerning the existence or the content of unwritten principles may be referred to the Court.

A preliminary ruling may not concern the compatibility of national law with Community law, which must take precedence. However, the Court generally construes such questions to mean that the national court is "essentially" seeking criteria for the interpretation of the relevant Community law so that it can itself rule on compatibility.<sup>25</sup> Accordingly, it has always striven to provide the national court with an interpretation of Community law that corresponds to the particular features of the main proceedings, and on which the national court can rely in applying national law in accordance with the requirements of the Community legal order.

### B. *Validity and Interpretation*

As I have already discussed, Article 177 of the Treaty distinguishes between the review of validity and interpretation. While all Community law irrespective of its legislative status and hierarchical rank can be the object of a request for interpretation, only "the acts of the institutions of the Community" within the meaning of subparagraph (b) of the first paragraph

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24. Liselotte Hauer v. Land Rheinland-Pfalz, Case 44/79, 1979 E.C.R. 3727, 3744-45, Comm. Mkt. Rep. (CCH) ¶ 8629 (preliminary ruling requested by the Verwaltungsgericht Neustadt); J. Nold, Kohlen- und Baustoffgross-handlung v. Commission, Case 4/73, 1974 E.C.R. 491, 507, Comm. Mkt. Rep. (CCH) ¶ 162.51; Internationale Handels GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11/70, 1970 E.C.R. 1125, 1134, Comm. Mkt. Rep. (CCH) ¶ 8126 (reference for preliminary ruling by Verwaltungsgericht Frankfurt); Stauder v. City of Ulm, Sozialamt, Case 29/69, 1969 E.C.R. 419, 425, Comm. Mkt. Rep. (CCH) ¶ 8077.

25. Ministère Public v. Xavier Mirepoix, Case 54/85, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,320 (interpretation of Article 30 to determine whether national legislation prohibiting the use of a pesticide is compatible with Community law); Ministère Public of Luxembourg v. Madeleine Hein, née Muller, Case 10/71, 1971 E.C.R. 723, 729, Comm. Mkt. Rep. (CCH) ¶ 8140 (reference for preliminary ruling by Tribunal d'arrondissement of Luxembourg).

of Article 177 can be the subject of a preliminary ruling reviewing their validity.

Validity corresponds to legality.<sup>26</sup> However, it is striking that the Treaty refers to legality in connection with actions for a declaration of nullity under Article 173 of the Treaty, but not, however, in relation to the preliminary ruling procedure. There are in fact clear functional differences between an action under Article 173 and the review of validity in a preliminary ruling procedure. Such differences are related to the different objectives of the procedures. In contrast to an action under Article 173, a preliminary ruling procedure is not intended primarily as a means of reviewing specific acts of the Community institutions, but rather as a means of informing the national court of the state of applicable law. Those different aims are clearly reflected in the fact that a request for a review of validity in preliminary ruling proceedings is not restricted by a time limit and is subject to no restrictions regarding the persons entitled to bring an action.

Interpretation is, in accordance with normal linguistic usage, the ascertaining of the content and the importance of a specific rule. That includes the question of the duration of the validity of the measure in question. The fact that the provisions of Community law are published in several languages means that all relevant versions in the different official languages (nine at present) are to be compared on an equal basis.<sup>27</sup>

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26. *See, e.g.*, *Westzucker GmbH v. Einfuhr- und Vorratsstelle für Zucker*, Case 57/72, 1973 E.C.R. 321, 336, *Comm. Mkt. Rep. (CCH)* ¶ 8211 (preliminary ruling requested by the *Verwaltungsgerichtshof Hessen*) (in which the Court referred to the "legality of that measure" in reviewing the validity of a Commission Regulation); *see also Deuka, Deutsche Kraftfutter GmbH B.J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 78/74, 1975 E.C.R. 421, *Comm. Mkt. Rep. (CCH)* ¶ 8302; *Deuka, Deutsche Kraftfutter GmbH B.J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 5/75, 1975 E.C.R. 759, *Comm. Mkt. Rep. (CCH)* ¶ 8313 (preliminary rulings requested by the *Verwaltungsgerichtshof* and the *Verwaltungsgericht Frankfurt*, respectively); *Internationale Handel GmbH*, Case 11/70, 1970 E.C.R. 1125, *Comm. Mkt. Rep. (CCH)* ¶ 8126.

27. *E.g.*, *Knud Wendelboe, Forening af Arbejdsledere i Danmark (Ass'n of Supervisory Staff, Denmark), Handels-og Kontorfunktionærernes Forbund i Danmark (Union of Commercial & Clerical Employees) v. L.J. Music ApS*, Case 19/83, 1985 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ 14,179 (para. 13 of the judgment); *H.B.M. Abels v. The Administrative Board of the BedrijfsVereniging voor de Metaalindustrie en de Electrotechnische Industrie (Professional & Trade Ass'n for the Metal & Elec-*

The Court has attached great importance to a schematic and teleological interpretation based on the aims of the Treaty and the principle of the effectiveness (*effet utile*) of Community rules.<sup>28</sup> That interpretative method has had a profound effect. Thus, in particular, the Court has been able to develop the law creatively by filling lacunae (gaps). The method consists essentially in relying on general principles and actions of law to determine the meaning of, in particular, obscure legal concepts. At the same time, the Court has inferred from the principle of a unified Community legal order that its individual provisions are to be interpreted, as far as possible, so as to avoid conflict with other Community law provisions.

A characteristic feature of the Court's interpretative methodology is the development of a scheme of rules and exceptions. In other words, it applies the maxim that the fundamental principles of the Common Market and, in particular, the basic freedoms provided for in the EEC Treaty (e.g., movement of goods, movement of persons, freedom to provide services and free movement of capital) are to be interpreted broadly, while exceptions to and restrictions on those freedoms are to be interpreted strictly.<sup>29</sup> That rule represents a clear reversal of the traditional precept of international law stating that clauses in international treaties which restrict States' freedom

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trotechnical Industries), Case 135/83, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,176; *Stauder*, Case 29/69, 1969 E.C.R. 419, 424, Comm. Mkt. Rep. (CCH) ¶ 8077.

28. *See, e.g.*, *D.M. Levin v. Staatssecretaris van Justitie*, Case 53/81, 1982 E.C.R. 1035, Comm. Mkt. Rep. (CCH) ¶ 8821 (reference for preliminary ruling from the Netherlands Raad van State) (right of residence); *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 43/75, 1976 E.C.R. 455, Comm. Mkt. Rep. (CCH) ¶ 8346 (preliminary ruling requested by the Cour du travail Brussels) (equal pay for men and women); *Commission v. Council*, Case 22/70, 1971 E.C.R. 263, Comm. Mkt. Rep. (CCH) ¶ 8134 (power of the Community in external relations); *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Netherlands Inland Revenue Administration), Case 26/62, 1963 E.C.R. 1, 24, Comm. Mkt. Rep. (CCH) ¶ 8008 (the question of direct applicability).

29. *See, e.g.*, *Simmenthal SpA v. Italian Minister for Finance*, Case 35/76, 1976 E.C.R. 1871, Comm. Mkt. Rep. (CCH) ¶ 8388 (preliminary ruling requested by the Pretore of Susa); *Roland Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, Comm. Mkt. Rep. (CCH) ¶ 8322 (preliminary ruling requested by the Tribunal administratif Paris); *Yvonne van Duyn v. Home Office*, Case 41/74, 1974 E.C.R. 1337, Comm. Mkt. Rep. (CCH) ¶ 8283 (preliminary ruling requested by the Chancery Division of the High Court of Justice); *Commission v. Government of the Italian Republic*, Case 7/61, 1961 E.C.R. 317, Comm. Mkt. Rep. (CCH) ¶ 8001.

of action are to be interpreted restrictively. By a varied and systematic application of that rule, the Court has been able, in the conflict between the requirements of the Community Treaties and the restrictive effects of national politics, to give precedence to the former.

Interpretation is to be distinguished from the application of Community law, as interpreted by the Court, to the established facts. Under the preliminary ruling procedure, the application of Community law is the sole responsibility of the national court. That is clear both from the wording of Article 177, which—in contrast to Article 164—refers merely to the interpretation and not to the application of Community law, and from the function of the preliminary ruling procedure, which is based on a strict division of duties between the national court and the Court of Justice. Thus the Court has repeatedly stated that in preliminary ruling proceedings it has no jurisdiction to decide the main proceedings. It cannot rule on the application of the Community law in question to the specific case.<sup>30</sup>

That may sometimes lead to practical difficulties, since the Court's interpretation can provide real assistance in the decisionmaking process of the national court only if it is sufficiently related to the particular features of the specific case. In that context the Court must take into account two opposing requirements. It must provide a sufficiently clear legal opinion that can be directly applied to the case in question, while avoiding at all costs anything that could be regarded as interference with the national court's prerogative of deciding the dispute before it. It must be particularly careful in cases in which not all the facts are available or where the national court has a certain discretion.<sup>31</sup>

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30. *Flaminio Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, Comm. Mkt. Rep. (CCH) ¶ 8023 (request for a preliminary ruling by the Giudice Conciliatore di Milano); *Da Costa en Schaake N.V., Jacob Meijer N.V. & Hoechst - Holland N.V. v. Nederlandse Belastingadministratie*, Joined Cases 28-30/62, 1963 E.C.R. 31, Comm. Mkt. Rep. (CCH) ¶ 8010 (reference for preliminary ruling by the Tariefcommissie).

31. *See, e.g.*, *Coditel S.A. Compagnie Générale pour la Diffusion de la Télévision v. Ciné - Vog Films SA*, Case 262/81, 1982 E.C.R. 3381, 3402, para. 18, Comm. Mkt. Rep. (CCH) ¶ 8865 (reference for preliminary ruling from Cour de Cassation of the Kingdom of Belgium); *Criminal Proceedings against Timothy Frederick Robertson*, Case 220/81, 1982 E.C.R. 2349, 2361, para. 13, Comm. Mkt. Rep. (CCH) ¶ 8851 (reference for a preliminary ruling from the Tribunal de Première Instance, Brus-

## III. THE NATIONAL COURTS

With respect to the bodies qualified to make a reference to the Court, Article 177 establishes in the first place an institutional definition, i.e. that any body of a Member State which possesses the status of a court or tribunal may make a reference to the Court. However, the above definition must be qualified by a functional element, because a reference is only admissible when it is made in connection with the judicial activity of the court or tribunal.

A. *The Institutional Definition*

A request for a preliminary ruling may only be made by a "court or tribunal of a Member State."<sup>32</sup> The expression "court or tribunal" would present no difficulties if it meant any body which is described as a court or tribunal under national law. However, a definition by reference to the legal order of the Member States would be unsatisfactory. Indeed, Article 177 envisions an independent Community law concept, to be defined by a comparison of the various legal orders of the Member States in accordance with the aims and the purpose of the preliminary ruling procedure.<sup>33</sup>

To qualify as a court or tribunal, a body's title is not important. Rather, its function and position in the relevant system of legal protection are the determining factors. If that were not the case, whole sectors of economic and social activity might be entirely or at least partially removed from the control of the Court. In that way, the aim, importance, and effect of the preliminary ruling procedure would be compromised.

In accordance with a principle common to all the Member States, a court or tribunal must be an independent body, i.e., it must have jurisdiction to decide disputes and must not be subject to instructions. The Court has adopted that principle by implication in a number of preliminary rulings. For instance, it has answered questions referred by the Italian "Pretore," a

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sels); Criminal Proceedings against Anton Adriaan Fietje, Case 27/80, 1980 E.C.R. 3839, 3854, para. 12, Comm. Mkt. Rep. (CCH) ¶ 8721 (preliminary ruling requested by the Arrondissementsrechtbank Assen).

32. EEC Treaty, *supra* note 1, art. 177, paras. 2, 3.

33. J. BOULOUIS & R.-M. CHEVALLIER, 1 GRANDS ARRETS DE LA COUR DE JUSTICE DES COMMUNAUTES EUROPEENES 136-37 (1978).



kind of justice of the peace. Similarly, it has recognized that the following bodies are entitled to refer to it for a preliminary ruling: the Centrale Raad van Beroep, the College van Beroep voor het Bedrijfsleven and the Tariefcommissie (Netherlands), the National Insurance Commissioner (United Kingdom),<sup>34</sup> and the Conseil d'Etat or Raad van State (Belgium, France, Luxembourg and the Netherlands).

Indications as to what is meant by "court or tribunal" under Article 177 may be found in the judgment in *Vaassen-Göbbels*,<sup>35</sup> which concerned a request for a preliminary ruling by the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf.<sup>36</sup> The Court accepted the request because the tribunal was properly constituted under Netherlands law, it was a permanent body charged with the settlement of disputes defined in general terms in provisions that corresponded to those applying to ordinary courts. Moreover, its jurisdiction was compulsory and it was bound to apply rules of law. Thus, it was a "court or tribunal within the meaning of Article 177" and as such was entitled to refer to the Court for a preliminary ruling.

Consequently, a court or tribunal within the meaning of Article 177 has the following procedural and substantive attributes: independence of the deciding body; a statutory basis, i.e., it must be a public body of the Member State concerned; its permanent character; its compulsory jurisdiction; the adversarial nature of the proceedings before it; the fact that it must apply rules of law.

It follows from the grounds of the judgment in *Vaassen-Göbbels*, a contrario, that purely private arbitration tribunals are not entitled to refer to the Court, particularly when they do not apply objective law, but decide disputes *ex aequo et bono*. The Court reached that conclusion expressly in a more recent decision, *Nordsee*,<sup>37</sup> which concerned a German arbitration tribunal.

34. This is now the Social Security Commissioner.

35. G. Vaassen (née Göbbels) Management of the Beambtenfonds voor het Mijnbedrijf, Case 61/65, 1966 E.C.R. 261, Comm. Mkt. Rep. (CCH) ¶ 8050 (reference for a preliminary ruling by the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf, Heerlen).

36. This is the Arbitration Tribunal of the fund for non-manual workers employed in the mining industry.

37. *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG & Reederei Friedrich*, Case 102/81, 1982 E.C.R. 1095,

The Court held that the tribunal in question had certain features of a genuine court, i.e., that the arbitration proceedings were conducted within the framework of the law, that the arbitrator had to decide according to the the law and his award had, as between the parties, the force of *res judicata* and would be enforceable if leave to issue execution were obtained. However, those considerations were not sufficient to give the arbitration tribunal the status of a "court or tribunal" within the meaning of Article 177. That was so because the parties in the main proceedings were free to specify in their contract whether they wished to use the arbitration procedure or to rely on the competent State courts to settle the dispute. Consequently, the German public authorities had not delegated to the arbitration tribunal the duty of ensuring compliance with the obligations arising under Community law.

This decision appears to be of considerable practical importance, because there is an increasing tendency in the Member States to resort to private arbitration tribunals to settle disputes relating to private law and, particularly, economic law. However, it must be added that the judgment emphasizes the particular features of the specific arbitration procedure in question and therefore does not necessarily mean that references may not be made by arbitration tribunals in procedures conducted under different rules.

Moreover, the grounds of the judgment expressly stated that references from State courts or tribunals related to arbitration proceedings are admissible. That means that national courts are entirely free to refer to the Court, if they consider it necessary, in connection with the assistance they must provide to arbitration tribunals in certain cases, or in relation to any review of the arbitration decision which they may be called upon to carry out. Therefore, unsatisfactory consequences arising from the fact that private arbitration tribunals may not make a reference to the Court may to some extent be corrected, inasmuch as the national courts may refer to the Court in connection with their participation in the adoption of an arbitration decision or the enforcement of that decision.

The judgment in *Nordsee* has, not surprisingly, produced

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Comm. Mkt. Rep. (CCH) ¶ 8822 (request for preliminary ruling from Walther Richter, Pres. of Hanseatisches Oberlandesgericht Bremen, arbitrator).

lively reactions. Certain commentators regret that the Court of Justice does not ensure unreservedly the uniform application of Community law in the increasingly important area of contractual arbitration. The majority, however, note with approval that the judgment places limits on the possibility of manipulation of the preliminary ruling procedure by private persons.

Questions of definition arise in particular with respect to professional bodies. In the first place, the Court has adopted as criteria the extent of State participation and the degree to which a State guarantees the independence of the body making the decision and confers legal effect on its decisions. In *Broekmeulen*, it found that the Dutch appeals committee for general medicine satisfied those requirements.<sup>38</sup> On the other hand, in *Borker*, it took the view that the Conseil de L'Ordre des Avocats did not possess the requisite attributes since it was empowered only to deliver an opinion and not to decide cases.<sup>39</sup>

#### B. *The Functional Definition*

A reference may be made to the Court only when the national court considers a decision necessary to enable it "to give judgment." Hence, a reference may not be made by a court which, although qualified under Article 177, is acting in the specific case as an administrative authority rather than a judicial body. Thus, for example, where it is acting as an appointing authority or when it adopts an administrative measure, Article 177 does not apply. Measures of that type, which do not concern judicial activity, do not represent judicial decisions within the meaning of Article 177.

Initially, various commentators raised the question whether certain summary proceedings were compatible with a reference for a preliminary ruling in view of the speed with which they must be completed.<sup>40</sup> In light of the Court's deci-

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38. *C. Broekmeulen v. Huisarts Registratie Commissie*, Case 246/80, 1981 E.C.R. 2311, 2328, para. 17, Comm. Mkt. Rep. (CCH) ¶ 8773 (reference for a preliminary ruling from the Commissie van Beroep Huisartsgeneeskunde, The Hague).

39. *Jules Borker*, Case 138/80, 1980 E.C.R. 1975, Comm. Mkt. Rep. (CCH) ¶ 8705 (preliminary ruling requested by the Conseil de l'Ordre des Avocats à la Cour de Paris).

40. The *type of proceedings* in which the question to be submitted arises is, on the

sions, the answer is clearly affirmative. In a number of judgments, the Court has both explicitly and implicitly confirmed that the urgency or the provisional character of such proceedings cannot affect a court's right to make a reference to the Court when its decision is based on Community law.<sup>41</sup>

Thus for example the judgments in *Stauder*,<sup>42</sup> *Deutsche Grammophon*<sup>43</sup> and *Polydor*<sup>44</sup> concerned requests for preliminary rulings in connection with proceedings arising out of an interim order or injunction. Other judgments concerned references from Italian courts in the pre-litigation stage of liquidation proceedings or administrative proceedings.<sup>45</sup> The Court stated that "Article 177 does not make the reference to the Court subject to whether the proceedings at the conclusion of which the national court has drawn up the reference for a preliminary ruling were or were not defended."<sup>46</sup> The same applies for an inquiry conducted by an examining magistrate, which inquiry under French law can precede the actual crimi-

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other hand, not important, provided that the request for a preliminary ruling comes from a national court which is sitting in its judicial capacity.

41. *See, e.g., Hoffmann-La Roche v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, Case 107/76, 1977 E.C.R. 957, 972, paras. 3-4, Comm. Mkt. Rep. (CCH) ¶ 8466 (preliminary ruling requested by the Oberlandesgericht Karlsruhe); *see also Elestina Esselina Christina Morson v. State of the Netherlands & Head of the Plaatselijke Politie, Seuradjie Jhanjan v. Netherlands*, Joined Cases 35 and 36/82, 1982 E.C.R. 3723, 3734, Comm. Mkt. Rep. (CCH) ¶ 8876 (references from Hoge Raad der Nederlanden).

42. *Erich Stauder v. City of Ulm, Sozialamt*, Case 29/69, 1969 E.C.R. 419, Comm. Mkt. Rep. (CCH) ¶ 8077.

43. *Deutsche Grammophon GmbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, Case 78/70, 1971 E.C.R. 487, Comm. Mkt. Rep. (CCH) ¶ 8106 (reference for a preliminary ruling by the Hanseatisches Oberlandesgericht Hamburg).

44. *Polydor Ltd. & RSO Records Inc. v. Harlequin Record Shops Ltd. & Simons Records Ltd.*, Case 270/80, 1982 E.C.R. 329, Comm. Mkt. Rep. (CCH) ¶ 8806 (reference for a preliminary ruling from the Court of Appeal of England and Wales).

45. *E.g., Birra Dreher SpA v. Amministrazione delle Finanze dello Stato*, Case 162/73, 1974 E.C.R. 201, Comm. Mkt. Rep. (CCH) ¶ 8264 (preliminary ruling requested by the Pretore di Roma); *Riseria Luigi Geddo v. Ente nazionale Risi*, Case 2/73, 1973 E.C.R. 865, Comm. Mkt. Rep. (CCH) ¶ 8219 (preliminary ruling requested by the Pretore di Milano); *Politi S.A.S. v. Ministry for Finance of the Italian Republic*, Case 43/71, 1971 E.C.R. 1039, Comm. Mkt. Rep. (CCH) ¶ 8159 (reference for a preliminary ruling by the President of the Tribunale di Torino); *Eunoma di Porro e C. v. Ministry of Education of the Italian Rep.*, Case 18/71, 1971 E.C.R. 811, Comm. Mkt. Rep. (CCH) ¶ 8148 (reference for a preliminary ruling by the Pres. of the Tribunale di Torino); *SpA SACE v. Ministry for Finance of the Italian Republic*, Case 33/70, 1970 E.C.R. 1213, Comm. Mkt. Rep. (CCH) ¶ 8117 (reference for a preliminary ruling by the Tribunale, Brescia).

46. *Birra Dreher*, 1974 E.C.R. at 211, para. 3.

nal proceedings.<sup>47</sup> A reference in connection with an objection raised in nonadversarial proceedings (e.g., against an order issued by the Registrar of companies) has likewise already been the subject of a preliminary ruling.<sup>48</sup>

Moreover, it follows from the principle of the division of jurisdiction between the national court and the Court of Justice that it is not for the Court to determine "whether the decision whereby a matter is brought before it was taken in accordance with the *rules of national law governing the organization of the courts and their procedure*."<sup>49</sup> Thus, in *Reina*, the Court dismissed the objection that the Chamber of the German administrative court to which the case had been assigned had made a reference to the Court without the participation of lay judges. This, it was claimed, was contrary to German procedural rules. The Court therefore considers a reference to have been properly made even when the national court is not properly constituted or when there has not been compliance with national provisions in relation to the staying of the proceedings and the reference.<sup>50</sup>

#### IV. *THE RIGHT AND THE DUTY TO MAKE REFERENCES*

According to the second paragraph of Article 177, any court or tribunal of a Member State may make a reference to the Court of Justice when it considers that a decision on a question of the kind referred to in that article is "necessary to enable it to give judgment." Under the third paragraph of Article 177, on the other hand, only certain national courts are under a duty to refer questions to the Court, namely those "against whose decisions there is no judicial remedy under national law." These phrases call for some clarification.

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47. *Procureur de la République v. René Chatain*, Case 65/79, 1980 E.C.R. 1345, Comm. Mkt. Rep. (CCH) ¶ 8671 (preliminary ruling requested by the Tribunal de Grande Instance, Nanterre).

48. *Friedrich Haaga GmbH*, Case 32/74, 1974 E.C.R. 1201, Comm. Mkt. Rep. (CCH) ¶ 8289 (preliminary ruling requested by the Bundesgerichtshof).

49. *Francesco Reina & Letizia Reina v. Landeskreditbank Baden - Württemberg*, Case 65/81, 1982 E.C.R. 33, 43, para. 7, Comm. Mkt. Rep. (CCH) ¶ 8790 (emphasis supplied).

50. *See id.* at 43, para. 8.

*A. The Right to Make a Reference*

## 1. The Power of Appraisal of the National Courts

Article 177 provides for direct cooperation between the Court of Justice and the national courts by means of a nonadversarial procedure. It follows from the cooperative nature of this procedure that the decision whether or not to refer a question to the Court is a matter solely for the court hearing the case and not for the parties to the proceedings before it. It is also for that court alone to determine the content of the questions to be referred. The parties, or—where appropriate—the State Prosecutor's Office, have no control over the referral of those questions or over their wording.<sup>51</sup>

The national court is therefore quite at liberty to make a reference to the Court even if the parties make no such request, or, when necessary, even if contrary to their expressed wish. Because this is a question of jurisdiction and thus falls within the area of public policy, the national court must be able to refer questions on its own motion. Furthermore, it would be contrary to good sense to prohibit it from referring questions to the Court simply because the issue concerned escaped the notice of the parties or because the parties wished to evade the application of Community law.

In general, a national court hearing an action will only make a reference to the Court if it has a "question," that is, if it considers the ruling of the Court necessary for its own decision. The making of a reference thus presupposes the existence of a "real difficulty which would arouse doubt in the mind of an open-minded observer."<sup>52</sup> In general, such doubt only arises when the meaning and intent of a provision of Community law are not clear from its wording and context, or if there are real or apparent lacunae in the text. In that case the meaning of the text must be determined by means of an interpretative ruling, and the gaps in the applicable law filled.

Justification for the making of a reference under the second paragraph of Article 177 is to be found, however, not in the existence of objective uncertainty or lacunae in a provision

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51. *Hessische Knappschaft v. Maison Singer et fils*, Case 44/65, 1965 E.C.R. 965, 970, Comm. Mkt. Rep. (CCH) ¶ 8042 (reference for a preliminary ruling by the Cour d'appel, Colmar).

52. I E. LAFFERRIERE, *TRAITE DE JURISPRUDENCE ADMINISTRATIVE* 449 (1887).

of Community law but in the subjective view of the national court.<sup>53</sup> The important point is whether or not the national court decides whether it can ascertain with sufficient accuracy the existence and content of the rule of Community law in question. National courts would therefore be well advised to avoid setting the threshold of doubt too high and to make the widest possible use of their right to make references, in order to preclude any possibility of divergence between their jurisprudence and that of the Court of Justice. In this regard, due attention must be given to the fact that Community regulations are adopted in several languages, to the complexity of the subject matter, and to the technical and systematic characteristics of Community law.

The principle of procedural economy requires that the national court only refer a question to the Court of Justice when it is certain that the question is relevant to deciding the action of which it is seised. Such a requirement also accords with the principle of mutual confidence and cooperation.

The Court has consistently held that the relevance of the question referred is a matter exclusively for the national court hearing the action, which has a certain "power of appraisal" in that regard.<sup>54</sup> Since it is responsible for the decision to be taken and in the context of that decision must apply the relevant Community law to the specific case in hand, it alone is in a position to assess the necessity and relevance of the question referred. The Court is barred from making any such assessment, if for no other reason than that otherwise it would have to delve extensively into questions of national law.

The Court of Justice has developed this principle particularly clearly in recent cases. In the *Damiani* case,<sup>55</sup> one of the parties to the main proceedings argued that the question referred was "inopportune" in view of the various arguments relied on before the national court. The Court rejected this argument in the following terms:

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53. The conditions defining the extent of the duty to make a reference under the third paragraph of Article 177 are different.

54. *Pasquale Foglia v. Mariella Novello*, Case 244/80, 1981 E.C.R. 3045, 3062, para. 16, Comm. Mkt. Rep. (CCH) ¶ 8786 (*Foglia v. Novello II*).

55. *Office National des Pensions pour Travailleurs Salariés (O.N.P.T.S.) v. Fioravante Damiani*, Case 53/79, 1980 E.C.R. 273, 281, para. 5, Comm. Mkt. Rep. (CCH) ¶ — (request for preliminary ruling by Belgian Cour de Cassation).

It is not for this Court to pronounce on the expediency of the request for a preliminary ruling. As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty it is for the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, to appreciate, with full knowledge of the matter before it, the relevance of the question of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.<sup>56</sup>

For the same reasons, it is irrelevant from the point of view of Community law at what stage of the main proceedings the reference is made. For reasons of procedural economy, the national court should of course make the reference only at a stage of the proceedings after the relevant facts have been ascertained to a large extent and it is able properly to assess the expediency of the question to be referred. Such considerations are, however, a matter for the national court alone.

The national court's right to refer questions to the Court of Justice regarding the validity and interpretation of Community law is wide in scope and flows directly from the Treaty. As such, it cannot be restricted by the national legislature. In that regard Article 177 is *jus cogens*. The question of the scope of the right to make a reference is not entirely free of difficulty, however, because preliminary reference proceedings are merely an interlocutory stage in the main proceedings before the national court, the course of which is governed by the procedural rules of national law. A conflict of goals can arise in particular between the right of a lower court to make a reference and the procedural principle that it is bound by the judgments of a higher court. For example, such a conflict arises when an appellate court quashes a decision of a lower court and remits the matter to that court for judgment, and under national procedural law the lower court is bound by the appellate court's finding of law. Such a situation gave rise to the two

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56. *Id.* at 281, 282, para. 5; see also *Ministère Public v. Asjes* ("Nouvelles Frontières"), Cases 209-213/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,287 (reference for preliminary ruling from the Pretura, Bra); *Foglia v. Novello II*, Case 244/80, 1981 E.C.R. 3045, Comm. Mkt. Rep. (CCH) ¶ 8786.



*Rheinmühlen Düsseldorf* cases,<sup>57</sup> which concerned Paragraph 126(5) of the German Finanzgerichtsordnung—the Rules of Procedure in the Finanzgerichte—under which the trial court is bound by the legal ruling of the appellate court.

In those judgments, the Court emphasized the decisive importance of Article 177 in preserving the unity of Community law. That unity would be endangered if the lower court could be prevented, because it is bound on points of law by the rulings of the superior court from referring matters to the Court for a preliminary ruling. The lower court must therefore be free—if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law—to decide to refer to the Court questions on which there is doubt.

## 2. Review by the Court of Justice

Review by the Court depends upon the principles just stated. The national court bears the responsibility for the eventual judgment in the case and must decide, considering the facts of the case, whether or not it is necessary to obtain a preliminary ruling. However, there are inherent limits to the national court's power of appraisal that arise from the nature of the preliminary reference procedure itself, the observance of which is subject to review by the Court. It must be borne in mind that in proceedings under Article 177, the Court may rule only on questions of Community law, and that a preliminary ruling can only be requested by a court in the course of judicial proceedings. The Court has inferred from those principles that a reference for a preliminary ruling is only admissible if it concerns a question of Community law of the kind referred to in Article 177 which has arisen in the course of a genuine legal dispute. If one of those conditions is not met the Court has repeatedly held that it has no jurisdiction to entertain the question referred. This was the case, for example, with a question regarding the treatment under French social welfare law of a payment made under the German Bundesent-

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57. *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 166/73, 1974 E.C.R. 33, Comm. Mkt. Rep. (CCH) ¶ 8265; *Rheinmühlen - Düsseldorf v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel*, Case 146/73, 1974 E.C.R. 139, Comm. Mkt. Rep. (CCH) ¶ 8266.

schädigungsgesetz.<sup>58</sup>

The same line of reasoning was subsequently followed in two decisions on references for preliminary rulings by the acting judge at the Tribunal d'Instance of Hayange. In the first case, the judge asked the following question: "What protection does the Treaty afford with regard to observance of the fundamental principle of the independence of the judiciary in the application of the law?"<sup>59</sup> The main proceedings concerned a legal dispute which had arisen out of a traffic accident in France in which only French nationals were involved. In the second case, an action for the eviction of tenants, the judge asked whether an action against him for damages for a denial of justice was compatible with "the requirements inherent in the very nature of Community law applicable to this case."<sup>60</sup> In both cases, the Court held that it clearly had no jurisdiction to reply to the questions referred, since it was apparent from the grounds and wording of the decisions making the references that the questions did "not in any way relate either to the interpretation of the EEC Treaty or to the validity or interpretation of an act of a Community institution."<sup>61</sup>

The judgment in *Mattheus v. Doego*<sup>62</sup> follows the same approach. In that case the Amtsgericht in Essen had referred a number of questions on the interpretation of Article 237 of the EEC Treaty (admission of new Member States to the Community). In essence, it asked whether or not there were reasons based on Community law making the accession of Spain, Portugal, and Greece (1978) impossible in the foreseeable future. The Court declined jurisdiction on the ground that the legal conditions of such accession must first be delineated in the context of a well-defined procedure, that is, in political negoti-

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58. *Jacob Adlerblum v. Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés*, Case 93/75, 1975 E.C.R. 2147, paras. 1-4, Comm. Mkt. Rep. (CCH) ¶ — (federal law on compensation for victims of Nazi persecution).

59. Preliminary ruling by the Acting Judge at the Tribunal d'Instance, Hayange, Case 105/79, 1979 E.C.R. 2257, 2257, Comm. Mkt. Rep. (CCH) ¶ —.

60. Reference for a Preliminary ruling by the Acting Judge at the Tribunal d'Instance, Hayange, Case 68/80, 1980 E.C.R. 771, 771, Comm. Mkt. Rep. (CCH) ¶ —.

61. Order of the Court 27 June 1979, Case 105/79, 1979 E.C.R. 2257, Comm. Mkt. Rep. (CCH) ¶ —; Order of the Court 12 March 1980, Case 68/80, 1980 E.C.R. 771, Comm. Mkt. Rep. (CCH) ¶ —.

62. *Lothar Mattheus v. Doego Fruchtimport und Tufkühlkost eG*, Case 93/78, 1978 E.C.R. 2203, paras. 4-7, Comm. Mkt. Rep. (CCH) ¶ 8517.

ations, so that it was not possible to determine their content judicially in advance.<sup>63</sup> The reasoning of the Court in that case (which shows careful adherence to the "political question doctrine") may lie in the fact that Article 237 does not normally have consequences for a private contract and the parties cannot create such consequences by agreement. The parties to the action before the national court should not be able to compel the Court to make a highly political statement regarding the fundamental organization of the Community unless it is necessary.

The Court also pays strict attention to the question of whether or not its answer will serve to resolve a genuine dispute. It considers in that regard that the duty assigned to it by Article 177 is not that of delivering purely advisory opinions on general or hypothetical questions.<sup>64</sup> The Court should not be confused with a legal adviser who may be asked at will for legal information. That concept was emphasized in the two *Foglia v. Novello* cases, in which an Italian court, the Pretura di Bra, referred to the Court a number of questions regarding the compatibility with Community law of a French tax. The Court held that the questions referred did not fall within the framework of the duties of the Court under Article 177 and therefore declined jurisdiction.<sup>65</sup>

The key reason for judgment was the finding that the action involved a fictitious dispute or an artificial device contrary to the normal division of jurisdiction between the courts of the various Member States and between those courts and the Court of Justice.<sup>66</sup> In the Court's view, the parties agreed as to the result sought, and they intended, by means of a contract governed by private law, to induce the Court to give a judgment that was not in fact necessary and to evade the jurisdiction of the French courts. It appears from the facts of the case that in their submissions to the Court, both parties to the main proceedings described the alleged discrimination in French tax

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63. *Id.* at 2211, para. 7.

64. *Foglia v. Novello II*, Case 244/80, 1981 E.C.R. at 3045, para. 18; *see supra* note 13.

65. *Pasquale Foglia v. Mariella Novello*, Case 104/79, 1980 E.C.R. 745, paras. 11-12, *Comm. Mkt. Rep. (CCH) ¶ 8659 (Foglia v. Novello I)*; *Foglia v. Novello II*, Case 244/80, 1981 E.C.R. 3045, paras. 32-34, *Comm. Mkt. Rep. (CCH) ¶ 8786*.

66. *Foglia v. Novello II*, 1981 E.C.R. at 3061, para. 13.

law in substantially the same terms and agreed that the tax regulation in question should be ruled contrary to Community law:

It must in fact be emphasized that the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.

Furthermore, it should be pointed out that, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in a position to make any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction.<sup>67</sup>

These judgments caused something of a sensation in legal circles. Although they may seem revolutionary at first glance, however, their practical effect should not be overestimated. They concerned a case of a rare and exceptional nature. The Court was opposed above all to manipulation of the procedure by the parties contrary to the spirit and intent of the judicial cooperation provided for by the Treaty. Such manipulations must not be permitted to turn the preliminary reference procedure into a surreptitious infringement procedure. It would certainly be wrong, therefore, to see in these judgments a tendency on the part of the Court to place restrictions on the reference procedures, or a new departure in its jurisprudence. Indeed, the "fictitious dispute" argument has been made in subsequent proceedings, but the Court has never again ap-

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67. *Id.* at 3062-63, paras. 18-19.

plied the principle developed in *Foglia v. Novello*.<sup>68</sup> However, in borderline cases, national courts would be well advised, when making a reference for a preliminary ruling, to add a statement of the reasons which have led them in that particular case to refer a question whose scope seems to go beyond the legal issue necessary for the decision of the case.

Apart from the cases discussed in which the reference for a preliminary ruling clearly did not concern Community law or did not arise out of a genuine dispute, the Court has declined to entertain references only in cases where the reference to the provision of Community law in question was clearly incorrect,<sup>69</sup> and the real subject matter of the reference could not be ascertained from the reasons stated in the decision making the reference or from the documents before the Court. In such a case it would be sheer formalism to provide an answer to the question referred. It would not help the national court in making its decision. In such cases, the Court has not declined jurisdiction but has limited itself to stating that in light of the factual and legal circumstances of the main proceedings "no reply need be given to the question referred by the national court,"<sup>70</sup> or that "it is unnecessary for the Court to give a ruling."<sup>71</sup>

Such a practice is not of course intended to impinge upon the jurisdiction of the national court. Rather, it should be understood as a manifestation of the cooperative nature of the preliminary reference procedure—cooperation that would be entirely lacking if a ruling were made which clearly would not assist the national court in reaching a decision.

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68. *Michele Bestini v. Regione Lazio*, Cases 98/162 and 258/85, 1986 E.C.R. — (paras. 5-8 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 43,338; *SpA Vinal v. SpA Orbat*, Case 46/80, 1981 E.C.R. 77, 91, para. 5, *Comm. Mkt. Rep. (CCH)* ¶ 8724; *Chemical Farmaceutici SpA v. DAF SpA*, Case 140/79, 1981 E.C.R. 1, 13, para. 7, *Comm. Mkt. Rep. (CCH)* ¶ 8723.

69. *Cf. Thomasdunger v. Oberfinanzdirektion Frankfurt am Main*, Case 166/84, 1985 E.C.R. —, *Comm. Mkt. Rep. (CCH)* ¶ —; *SpA Salgoil v. Italian Ministry for Foreign Trade*, Case 13/68, 1968 E.C.R. 453, 459-60, *Comm. Mkt. Rep. (CCH)* ¶ 8072.

70. *Rijksdienst voor Werknemerspensionen v. Alice Vlaeminck*, Case 132/81, 1982 E.C.R. 2953, 2964, *Comm. Mkt. Rep. (CCH)* ¶ —.

71. *Celestri & Co. SpA v. Ministry of France*, Case 172/84, 1985 E.C.R. — (para. 17 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ —; *cf. C. WRIGHT, supra* note 16, §§ 52-52A, at 302-30 (discussion of abstention doctrines).

### B. *The Duty of Courts of Last Instance to Make References*

The only courts that are obliged to refer questions are those against whose decisions there is no judicial remedy under national law, that is, courts of last instance.<sup>72</sup> Other courts are simply entitled to make references. The Treaty merely ensures that they have the assistance of the Court of Justice when for reasons of expediency they wish it to clarify a preliminary question of Community law. The question of whether or not a court decides at last instance is thus the criterion that determines whether or not a court entitled to make references is obliged to do so under the third paragraph of Article 177.

#### 1. The Meaning of the Term "Court of Last Instance"

In academic circles there is some controversy over whether the term "court of last instance" is to be understood in a concrete (functional) or abstract (institutional) sense. According to the abstract (institutional) approach, only the highest courts in the judicial hierarchy are obliged to make references.<sup>73</sup> According to the concrete (functional) approach, on the other hand, the duty to make a reference is determined by the nature of the proceedings in the particular case. It relates not to the position of the relevant court in the judicial hierarchy but rather to the nature of the decision to be made. Along

72. EEC Treaty, *supra* note 1, art. 177, para. 3 (courts of last instance are those after which there is no judicial remedy).

73. The following courts may be regarded as hierarchically highest in the European Community Member States (except Spain and Portugal):

*Belgium:* Cour de Cassation; Conseil d'Etat.

*Denmark:* Hojesteret.

*Federal Republic of Germany:* Bundesverfassungsgericht; Bundesgerichtshof; Bundesverwaltungsgericht; Bundesarbeitsgericht; Bundesfinanzhof; Bundessozialgericht.

*Greece:* Asrios Pagos (Court of Cassation); Symboulío Epikratias (Council of State); Anotato Idiko Dikastrio (Supreme Special Court).

*France:* Cour de Cassation; Conseil d'Etat.

*Ireland:* Supreme Court.

*Italy:* Corte Costituzionale; Corte Suprema di Cassazione; Consiglio di Stato.

*Luxembourg:* Cour de Cassation; Conseil d'Etat.

*Netherlands:* Hoge Raad; Raad van State; Centrale Raad van Beroep; College van Beroep voor het Bedrijfsleven; Tariefcommissie.

*United Kingdom:* House of Lords; Privy Council.

with the courts "at the top of the judicial pyramid" it is argued that Article 177 applies to courts "which must from time to time give final decisions, but only in such cases,"<sup>74</sup> that is, where because of the nature of the dispute of which it is seised (for example, the amount at issue) there is no appeal from its decision. That can in practice give rise to problems of delimitation, for example, where it is not clear from the outset whether or not it will be possible to appeal from the decision to be given (e.g., where a specific sum must be attained before an appeal is possible, or where leave to appeal must be obtained from that court itself or from the appeal court).

The concrete theory has in its favor the fact that it ensures that individual rights are protected at all levels of the judicial hierarchy. The danger of divergent interpretations really arises only at the level of the courts of last instance. Such courts make decisions that cannot subsequently be modified. Only then can the incorrect interpretation and application of Community law have definitive harmful consequences for the individual. In contrast, in earlier stages of the proceedings, any errors on the part of the lower court may be raised in an appeal under national law and corrected by the superior courts.

The advantage of the abstract theory, on the other hand, is that it prevents the Court from being overloaded with proceedings of minor importance. It is oriented less to the protection of legal rights than to the necessity of protecting the integrity of the legal system. The decisions of the highest courts clearly have a far-reaching effect as precedents. They influence trends in the lower courts and thus constitute the "hard core" of national case law.<sup>75</sup> Discrepancies, differences of opinion, and the resulting legal uncertainty at that level seriously endanger the unity and existence of the Community legal order.

The Court of Justice has not yet clearly decided the issue, but seems inclined toward the concrete approach. Indications of that may be found in particular in the Court's judgment in *Costa v. ENEL* on a reference from the Giudice Conciliatore,

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74. G. VANDERSANDEN & A. BARAV, *CONTENTIEUX COMMUNAUTAIRE* 281 (1977).

75. *Srl C.I.L.F.I.T. & Lanificio di Gavardo SpA v. Ministry of Health*, Case 283/81, 1982 E.C.R. 3415, 3432, 3440, para. 8, *Comm. Mkt. Rep. (CCH)* ¶ 8875 (opinion of Advocate General Capotorti).

Milan.<sup>76</sup>

## 2. The Scope of the Duty to Make References

The scope of the duty of courts of last instance to make references has been the object of doctrinal debate since the Community's inception. Academic opinion is virtually unanimous in holding that there is no duty to make a reference when there can be no reasonable doubt as to the validity or interpretation of the relevant Community law. That conclusion finds some support in the wording of the second paragraph of Article 177, according to which the courts of the Member States may only refer questions to the Court if they consider that the Court's ruling "is necessary."

To support their position, commentators generally refer to the *acte clair* doctrine, derived from the French legal system. Concern for the orderly administration of justice requires that the courts refuse to permit dilatory tactics that would unnecessarily prolong the proceedings. It is argued, therefore, that a reference for a preliminary ruling should be considered only if there is real difficulty in ascertaining the content and scope of Community law.

The *acte clair* doctrine arose in France in connection with the principle of separation of powers between the executive and the judiciary in the interpretation and application of international treaties. The interpretation of such treaties is reserved to the executive, because it bears the responsibility at the international level. The courts may only apply them. If interpretation is necessary, courts must ask the Ministry of Foreign Affairs for an official and authoritative clarification of the

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76. *Flaminio Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, Comm. Mkt. Rep. (CCH) ¶ 8023. The Court of Justice has held on more than one occasion that the duty of courts of last instance to make references arises only in substantive proceedings and not in proceedings for interim measures or interlocutory injunctions; in such cases the parties remain at liberty to make the appropriate submissions in the main proceedings. The requirements arising from the purpose of Article 177 are observed as regards summary proceedings where "ordinary proceedings as to the substance, permitting the re-examination of any question of Community law provisionally decided in the summary proceedings, must be instituted either in all circumstances or when the unsuccessful party so requires." *Hoffmann-La Roche v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, Case 107/76, 1977 E.C.R. 957, para. 5, Comm. Mkt. Rep. (CCH) ¶ 8414; *Elestina Christina Morson v. State of the Netherlands & Head of the Plaatselijke Politie*, Joined Cases 35 & 36/82, 1982 E.C.R. 3723, para. 8, Comm. Mkt. Rep. (CCH) ¶ 8876.



provisions of the treaty in question. To restrict the role of the executive and limit its influence on their judgments, the courts developed the *acte clair* doctrine, thus retaining the power to determine whether or not genuine difficulties of interpretation exist and recovering a broad margin of discretion.<sup>77</sup>

In the 1960s, the French Conseil d'Etat and—to a lesser extent—the Cour de Cassation used the *acte clair* doctrine to curtail the scope of their obligation to make references under the third paragraph of Article 177. That enabled them to substitute their own interpretation of Community law for the interpretation of the Court.<sup>78</sup>

As a result, the highest courts of a number of other Member States rallied to the *acte clair* doctrine. In one case the German Bundesverwaltungsgericht refused to refer a question to the Court on the ground that the material provision of Community law was not in question. There was no room for interpretation, the German court reasoned, “since this provision does not need interpretation.”<sup>79</sup>

Commentators on European law, however, have largely rejected the *acte clair* doctrine. It is generally recognized that the duty to make a reference does not extend to questions to which an impartial lawyer could reasonably give only one answer. It is objected, however, that the overly hasty acceptance of such a practice would inevitably weaken the duty to make references and thus undermine the preliminary reference procedure. A matter cannot be assumed to be “clear” simply because the national court believes that it can be subjectively certain of the content of the relevant Community law, but only where, objectively speaking, there is no doubt at all as to the validity and meaning of the rule of law in question. Although the right to make references depends on the subjective opinion of the national court, attention must still be focused on the objective circumstances. Otherwise, the scope of the duty to

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77. *C.I.L.F.I.T.*, Case 283/81, 1982 E.C.R. 3432, 3435, Comm. Mkt. Rep. (CCH) ¶ 8875 (opinion of Advocate General Capotorti).

78. Conseil d'Etat: *SHELL BERRE* 344 (1964); SYNDICAT NATIONAL DES IMPORTATEURS FRANÇAIS EN PRODUITS LAITIERS 41 (1967); SYNDICAT DES IMPORTATEURS DE VETEMENTS ET PRODUITS ARTISANAUX 209 (1979) (Jurisprudence); Cour de Cassation: *LAPEYRE* 465 (1967) (Jurisprudence); *Pieron & Dufour*, BULLETIN DES ARRETS DE LA COUR DE CASSATION 692 (Chambre Criminelle, 1973); see also L.-J. CONSTANTINCO, *DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN* 831 (1977).

79. Judgment of 14 Feb. 1969, 31 *Entsch. BverwG.* 279, 284.

make references would depend on a national court's self-confidence and its readiness to make decisions. This might foster the manipulation of the duty to make references by courts accustomed to making decisions independently, thus frustrating the objective of that duty: the preservation of the unity of Community law.

In its *Da Costa* judgment, the Court expressed the view that the duty to make references under paragraph 3 of Article 177 is in principle unrestricted and admits of exception only where in a particular case the authority of a ruling already given by the Court in a similar case may "deprive the obligation of its purpose and thus empty it of its substance."<sup>80</sup>

That point of view was further developed and qualified in the *C.I.L.F.I.T.* judgment.<sup>81</sup> The main point of the question referred was whether and to what extent the existence of an obligation to make a reference under paragraph 3 of Article 177 depended "on the prior finding of a reasonable interpretative doubt."<sup>82</sup> In its ruling the Court at last defined the scope and limits of the duty of courts of last instance to make references both generally and in the context of the case, and in doing so laid down the following main criteria: (i) Article 177 of the Treaty does not constitute a means of redress available to the parties to the proceedings before a national court. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that a national court is obliged to make a reference. Where necessary, however, it may refer a matter to the Court of Justice on its own motion. (ii) Because the question of the necessity of the reference is a matter for the jurisdiction of a national court, it is not obliged to make a reference if the question raised is not relevant, that is, if the answer to that question can in no way affect the outcome of the case. Nor is a national court obliged to make a reference where previous decisions of the Court of Justice 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 ques-

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80. *Da Costa*, Joined Cases 28-30/62, 1963 E.C.R. 31, 38, Comm. Mkt. Rep. (CCH) ¶ 8010, at 7239.

81. *C.I.L.F.I.T.*, Case 283/81, 1982 E.C.R. 3432, Comm. Mkt. Rep. (CCH) ¶ 8875.

82. *Id.* at 3432, para. 1.

tions at issue are not strictly identical to those already resolved. (iii) Finally, there is no obligation to make a reference when "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." That statement is, however, restricted by the necessity of ensuring that the threshold of reasonable doubt is defined according to objective criteria, and that the specific difficulties of interpreting Community law (legislation drafted in several languages, new terminology, determination of context) are borne in mind. The central test is whether or not there is a risk that a court in another Member State or the Court of Justice may give a different decision.<sup>83</sup>

#### V. *THE LEGAL EFFECTS OF PRELIMINARY RULINGS*

The preliminary ruling takes the form of a judgment, which in its form and content reflects the nonadversarial nature of the preliminary reference procedure. The fact that the dispute of which the national court is seised merely defines the factual context in regard to which the Court makes an abstract statement of the law. The judgment contains the answer to the question referred, that is, a statement regarding the validity or interpretation of the rule of Community law in question.

##### A. *Effects in the Main Proceedings*

The preliminary ruling is clearly binding in its effect on the proceedings that prompted the national court to make the reference. It is binding not only on the court making the reference but also on any other court in the Member State concerned which is called upon to make a decision in the same case. It is therefore binding on the appellate court, when the reference for a preliminary ruling was made by a lower court in the exercise of its right under the second paragraph of Article 177. It may also be binding on a lower court to which the case is remitted for judgment by the appellate court, irrespective of whether the reference was made by the appellate court itself or by the lower court against whose decision an appeal was brought.

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83. Case 283/81, 1982 E.C.R. 3415, 3428-30, paras. 5-16, Comm. Mkt. Rep. (CCH) ¶ 8875.

The fact that the preliminary ruling is binding in the main proceedings means that the competent national courts must decide the dispute of which they are seised on the basis of the interpretation given by the Court of Justice. They may not depart from the Court's ruling. In short, they must apply the rule of Community law in question as interpreted by the Court, or must refrain from applying a rule of law held invalid. That does not mean, however, that the competent national courts are obliged to apply the Community rule in question as interpreted by the Court where they subsequently come to the conclusion (perhaps on the basis of the answer given by the Court itself) that the rule of law in question is not relevant to the case before them. Under the division of competence in the preliminary reference procedure, such questions of relevance fall within the exclusive jurisdiction of the national court.

In practice, problems can arise over the question whether the Court's ruling on a matter of Community law is also applicable to circumstances that arose prior to the date of the preliminary ruling. Generally, a preliminary ruling has effect *ex tunc*. However, for reasons of legal certainty, the Court has in exceptional cases held that its ruling should have effect *ex nunc*, both in cases of invalidity and (contrary to previous practice) with regard to the interpretation of Community regulations.

The limitation of the temporal validity of a ruling is only possible in the actual judgment giving the ruling. The fundamental need for a general and uniform application of Community law implies that it is for the Court alone to decide whether the interpretation which it lays down should be limited in time.<sup>84</sup>

Only in rare cases has the Court limited the application of preliminary rulings temporally. On each occasion the ruling concerned a regulation with important financial implications. The retroactive application of the ruling would in a multitude of individual cases have given rise to claims for the repayment of sums improperly charged and for the payment of sums unpaid. It also would have required the re-settlement of a great number of public law and private law transactions, some of

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84. Amministrazione delle Finanze v. S.r.l. Meridionale Industria Salumi, Fratelli Vasanelli & Fratelli Ultrocchi, Joined Cases 66, 127 & 128/79, 1980 E.C.R. 1237, 1261, para. 11, Comm. Mkt. Rep. (CCH) ¶ 8663.

them going far into the past. That would have had unjustifiable economic consequences for the economic operators concerned, and would have endangered the smooth functioning of the Common Market.

In *Defrenne v. Sabena*,<sup>85</sup> in which a ruling that the principle of equal pay for men and women (Article 119 of the EEC Treaty) had direct effect was held inapplicable to past circumstances, the Court justified the limitation of the temporal effect of its judgment:

As the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to re-open the question as regards the past. Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.<sup>86</sup>

In *Defrenne*, the Court made an exception to the general denial of retroactive effect in favor of the plaintiff in the main proceedings. That aspect of the judgment has not, however, been consistently followed. In a number of more recent decisions, the Court has held instead that its ruling that certain provisions of Community law (regarding the fixing of monetary compensatory amounts) were invalid should have no retroactive effect whatsoever, even with regard to the parties to the main proceedings.<sup>87</sup>

### B. *Effect as Precedents*

The generally accepted view is that a preliminary ruling is directly binding only with regard to the proceedings in which

85. *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 43/75, 1976 E.C.R. 455, Comm. Mkt. Rep. (CCH) ¶ 8346.

86. *Id.* at 481, para. 75.

87. "Société Coopérative" *Providence Agricole de la Champagne v. Office National Interprofessionnel des Céréales (ONIC)*, Case 4/79, 1980 E.C.R. 2823, 2853, Comm. Mkt. Rep. (CCH) ¶ 8716; *Sàrl Maïseries de Beauce v. Office National Interprofessionnel des Céréales (ONIC)*, Case 109/79, 1980 E.C.R. 2883, 2913, Comm. Mkt. Rep. (CCH) ¶ 8717; *SA Roquette Frères v. French State - Customs Administration*, Case 145/79, 1980 E.C.R. 2917, 2946, Comm. Mkt. Rep. (CCH) ¶ 8718. For the most recent case law on that position, see *Pietro Pinna v. Caisse d'Allocations Familiales de la Savoie*, Case 41/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ —.

the reference was made. That does not, however, preclude the possibility that recourse may be had to the solution set out in one preliminary ruling in other proceedings dealing with the same or similar questions of Community law. The preliminary ruling can then be said to function as a model or precedent.

That concept found expression as early as 1963 in the *Da Costa* case,<sup>88</sup> in which the Court of Justice simply referred the national court to the answer which it had given two months before in the *Van Gend & Loos* judgment,<sup>89</sup> because there were no new facts which might affect its decision.

Some commentators criticized this course of action, objecting that the Court of Justice should have repeated the answer it had given in the *Van Gend & Loos* judgment. Indeed, further examination of the case would have induced many other courts to refer the same question. Courts of last instance, obliged to refer questions under the third paragraph of Article 177, would certainly have considered it a formalistic and pettifogging attitude. To refer a question that has already been decided simply prolongs the proceedings unnecessarily and multiplies the costs. Finally, renewed consideration of the circumstances would have prejudiced the Court's role as the authoritative interpreter of Community law. At the same time, the *Da Costa* judgment does include an important clarification: nothing prevents national courts from referring for a second time *questions of interpretation* which have already been decided in a similar case.<sup>90</sup>

The Court reserves the right to depart from its previous judgments in appropriate circumstances. This accords not only with the dynamic nature of Community law, which implies that the Court cannot consider itself bound by its own judgments, but also with the cooperative function of the procedure, which requires that national courts always be able to refer to the Court new elements of fact or law. On the other hand, the principles of legal certainty and the uniformity of Community

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88. *Da Costa*, Joined Cases 28-30/62, 1963 E.C.R. 31, Comm. Mkt. Rep. (CCH) ¶ 8010.

89. N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos & Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration), Case 26/62, 1963 E.C.R. 1, Comm. Mkt. Rep. (CCH) ¶ 8008.

90. 1963 E.C.R. at 31. "Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again." *Id.*

Law require that the courts of the Member States, including those which are not obliged to make references under the third paragraph of Article 177, not independently depart from an earlier decision of the Court but make a new reference if they wish to base their decision on a different view of the law.

The value of preliminary rulings as precedents may thus be compared with the effect of decisions of the highest courts in national law. Aside from the special case of Anglo-American common law and the normative effect of certain judgments of constitutional courts, even leading decisions of the highest national courts are not directly binding outside the context of the dispute which gave rise to them. They are, however, a *de facto* source of law, since in practice their impact necessarily goes far beyond the specific case in hand.

The same is true of preliminary rulings made in proceedings to ascertain the validity of Community legal measures. It is clear from the difference in terminology between the term "void" used in connection with direct actions under Article 174 of the EEC Treaty and the term "validity" used in Article 177, that a declaration of validity or invalidity in the context of a preliminary ruling has no directly binding effect *erga omnes*. This is confirmed by the differing objectives of the action for nullity and the preliminary reference on questions of validity.

The limited legal effect of preliminary rulings declaring contested Community regulations valid may be seen in the careful wording of such decisions. The judgment is usually worded as follows: "Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Article . . . of Regulation (Directive, etc.) . . . ." In other words, in preliminary rulings the Court does not claim to have examined all possible objections that might be raised to the validity of the provision or measure in question. As a rule, it limits itself to consideration of the arguments made before it and of certain points that it must take into account *ex officio*. A decision of this kind does not preclude the possibility that the provision or measure in question may be invalid for reasons other than those already examined.

In theory the position is the same when a Community measure is declared invalid. In principle there is no reason why the Court should not reverse its previous decisions. It

would be difficult, however, to reconcile such a course of action with the principle of protection of legitimate expectations. From a practical point of view, it is therefore inconceivable that the Court, having once held a rule of law invalid, would subsequently declare it valid after further consideration.

A declaration that a rule of Community law is invalid must therefore be followed by all national courts, even though the judgment in question is not directly binding on them. Naturally, a new reference may also be made in such a case. For reasons of procedural economy, however, such action should be considered only in exceptional cases, for instance, when further information is desired regarding the reasons for the declaration of invalidity, its scope or its legal effects.

### CONCLUSION

The essence of the preliminary ruling procedure lies in the spirit of mutual trust and cooperation which exists between the national courts and the Court of Justice. It is reflected in the frank and vigorous dialogue that takes place between the Court and the national courts, in the appreciation that both sides show for each other's problems and difficulties, and in their respect for the different jurisdictions. In that connection, the role of the national courts cannot be overemphasized. The effectiveness of the procedure and thus the permanent uniformity and coherence of the Community legal order depends on the responsible collaboration of the national courts.

Of course, conflicts regarding jurisdiction and disagreements cannot always be avoided. They are not peculiar to the procedure, however. Such disagreements also arise within national legal orders, particularly when several judicial branches co-exist independently. Any differences of opinion between the Court and the national courts are all the more understandable because Community law has developed concepts which do not exist in all the legal orders of the Member States or at least are not given the same meaning and weight. Some examples of this are the general principles of Community law that the Court has developed, such as the principles of the protection of legitimate expectations, of legal certainty and of proportionality, or certain aspects of the jurisprudence on civil rights ("fundamental rights") in the context of the Community.



Although those concepts are also recognized in one form or another as a component of the democratic and legal society existing in all the Member States, there are often significant differences in the scope and weight attached to them in the individual national legal orders. In particular, supreme courts that work on the basis of settled legal traditions and principles need time to adjust to the new methods which they are required to adopt in dealing with Community law.

The Court is still occasionally seen as a body that threatens the jurisdiction of the national courts and not as one that provides support and assistance in the fulfillment of their duties. This is seen in national courts' reliance on the *acte clair* doctrine, in the form that questions take, and in the length of the procedure.

Courts of last instance, deliberately or unconsciously, shelter behind the useful *acte clair* doctrine to evade their duty to make references to the Court. Other courts justify their inclination to decide cases on their own by citing the optional nature of references in relation to proceedings pending before them. In addition, the tendency of many courts to avoid, where possible, a procedure in which they do not have sufficient confidence, is often encouraged by the attitude of the parties to the proceedings. For these parties, the intermediate procedure before the Court represents an unnecessary prolongation of the proceedings or an additional element of uncertainty. These parties often rely on Community law without giving proper thought to the matter and without providing the national court with a sound basis for its decision.

Misunderstandings and therefore conflicts can also arise from the inadequate formulation of the questions submitted to the Court. These questions either do not respect the limits placed on the Court's jurisdiction in preliminary ruling proceedings or do not bring out the true legal problem arising from the case sufficiently clearly. Thus the Court is repeatedly faced with questions from courts with insufficient knowledge of Community law which, because they are formulated in terms which are too specific, fall under the sphere of the application, rather than that the interpretation, of Community law. On the other hand, the courts occasionally strive so hard to be abstract that in the absence of sufficiently clear references to the facts in

the main proceedings, the question is incomprehensible, and it is impossible to give a reply that may help to settle the dispute.

The length of the procedure obstructs fruitful cooperation between the national courts and the Court of Justice. Although the average length of the preliminary ruling procedure—approximately one year from the registration of the request for a preliminary ruling and the judgment—is clearly shorter than the periods required by national supreme courts in appeal or cassation proceedings, it can, particularly in connection with small cases, deter a court that is in principle willing to make a reference.

The Court has made every effort with all the means at its disposal to keep the length of the procedure as short as possible. A frequent source of delay, the notorious overburdening of the full Court, was removed at least in part by the amendment to the Rules of Procedure in 1979. That amendment provided for easier assignment of cases to Chambers.<sup>91</sup> There are, however, certain technical obstacles to introducing further measures to reduce the length of the procedure. Because the main working language and the language of deliberation of the Court is traditionally French, if necessary all the relevant documents must be translated into that language, irrespective of the language of the case. Additionally, it does not appear possible to reduce the two-month period for the submission of written observations<sup>92</sup> in view of the fact that the parties often submit very extensive observations. Finally, the complex administrative apparatus of the Member States and the Community institutions requires a certain amount of time to reach the political decision of principle on which their observations are based.

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91. Rules of Procedure, art. 95, O.J. 1979, No. L 238/1, 3-4, Comm. Mkt. Rep. (CCH) ¶ 4845.

92. Protocol on the Statute of the Court of Justice of the EEC, art. 20, *reprinted in* Comm. Mkt. Rep. (CCH) ¶ 4731.