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Policy Department C.: Citizens' Rights and Constitutional Affairs Unit

THE RELATION BETWEEN NATIONAL COURTS AND THE EUROPEAN COURT OF JUSTICE IN THE EUROPEAN UNION JUDICIAL SYSTEM

PRELIMINARY RULING REGIMES ACCORDING TO ARTICLES 234 EC, 68 EC, AND 35 EU

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Directorate-General Internal Policies

Policy Department C
Citizens Rights and Constitutional Affairs

The relation between national courts and the European Court of Justice in the European Union judicial system − preliminary ruling regimes according to Articles 234 EC, 68 EC, and 35 EU

BACKGROUND NOTE

Summary:
The Treaties set up an integrated judicial system between national courts and the European Court of Justice (ECJ), in which national judges are at the forefront of the application of Community law in the Member States. The co-operation between national courts and the ECJ is organised by the procedure of reference of national cases to the ECJ for preliminary ruling on the interpretation and on the validity of EC rules, provided for in art. 234 EC.
The note analyses the scope of this provision, the conditions of its use by national courts and the consequence of the preliminary reference on national law.
The note further investigates the question of liability of national judges for failing to request a preliminary ruling by the Court of justice.
The Treaty of Amsterdam introduced in art. 68 EC a variant of the preliminary reference procedure in the area of Title IV of the EC Treaty, which is limited to national courts of last instance and with the exclusion of certain areas of competence.
The Treaty on the European Union has also established a procedure of preliminary ruling in its art. 35 EU, although submitted to a declaration of opt-in by the Member States, a limitation in the national jurisdictions entitled to make reference and an exclusion of certain areas of competence.
The European Commission and the Court of Justice recently proposed to the Council to abolish the specific regime of art. 68 EC to fully submit Title IV of the EC Treaty to the regular reference procedure of art. 234 EC.
The note also gives a survey of the effective use of the reference procedure by national jurisdictions.

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1. Introduction: scope of research

The EU judicial system may be seen as split into two main branches − national courts and the European Court of Justice (ECJ).

National courts apply Community law on a daily basis and must **uphold Community law when it contravenes with national laws.** In this sense**,** the national judge is traditionally seen as the **first judge of European law**, to whom parties may refer litigations and requests based on EU law.

However the authors of the Treaties have not left the national judge on its own to decide on issues related to EU law.

The Treaties also organise a system of preliminary ruling procedure as a main communication channel between national judges and the ECJ, by which national courts may refer contested questions of interpretation or validity of Community law to the European Court of justice (ECJ).

As a judicial body, the ECJ acts independently of national governments and of the other EU Institutions. **The Court is responsible for giving the right interpretation of Community law and assuring its uniform application throughout the Member States**.

Indeed, in their daily practice, national courts might deal with cases where the validity of Community legislation is contentious but, in such cases, national courts are not entitled to declare Community legislation invalid themselves.

There are now 3 **preliminary ruling regimes in EU law**. The first and most important is the general procedure according to **Article 234 of the EC Treaty**. The initiators of this procedure may only be national courts (both lower courts and courts of last instance) requesting the ECJ to rule on the interpretation or the validity of Community law.

The second preliminary ruling regime under the EC Treaty is organised in the area of freedom, security and justice by **Article 68**. In comparison to Article 234 EC, it introduces stricter conditions on the scope of referred questions and courts entitled to make a referral. Unlike Article 234 EC allowing both lower national courts and courts of last instance to make a reference, Article 68 EU empowers only courts of last instance. Article 68 EC also prohibits the Court of justice to give preliminary ruling on questions relating to the maintenance of law and order and the safeguarding of internal security[1].

A third preliminary ruling regime is provided in the area of policy and judicial cooperation in criminal matters by **Article 35 of the EU Treaty**. This provision allows the Member States to opt for a preliminary reference procedure and to choose whether all of their national courts or merely their courts of last instance will be entitled to make this referral. A limitation

[1] See section 10 for a deeper analysis

similar to the one of art. 68 EC applies to questions related to "*the maintenance of law and order and the safeguarding of internal security*".

Irrespective of the type of preliminary ruling regime, national judges always act as gatekeepers of the preliminary reference process. Their intervention is crucial because the authority to make a reference is vested with them. Therefore, the demand for a ruling becomes operative only when national courts request the ECJ to deliver a judgment on the matter of Community law.

The cooperation of national courts is a *sine qua non* for the success of the preliminary reference procedure and, consequently, the very development of the Community legal order. As a matter of fact, legal integration and the implementation of ECJ case law also rely on the willingness of national courts to refer cases to the ECJ.

In the light of these considerations, this background note will analyse the preliminary ruling regimes according to Article 234 EC, Article 68 EC, and Article 35 EU. It begins with examining the Acquis communautaire on preliminary reference. The discussion then follows with analysing the role of national courts and the ECJ in the EU judicial system. After examining the prerequisites to refer questions of Community law to the ECJ, it presents a case law on preliminary references developed by the ECJ on the basis of the EC Treaty and EU Treaty. It further analyses the conditions for the liability of the authorities in the Member Sates for a wrong application of Community law, including the non use of the preliminary reference procedure. Special sections are also dedicated to the specific regimes of preliminary ruling under art. 68 EC and art. 35 EU. The background note ends with global considerations on the preliminary reference procedure as such and its use by the different national courts. It concludes on summoning the importance of the preliminary ruling mechanisms in the EU legal system and the necessary evolutions to maintain its crucial role in the development of EU law.

2. Principles of applying Community law by national courts

The relation between national laws of the Member States and Community law is based on three key principles: the **doctrine of supremacy, direct effect (applicability), and enforceability** of Community law in the Member States. According to the supremacy principle, recognized by the famous ruling in *Costa v ENEL*[2], **national laws of the Member States are subordinated to Community law**.

The supremacy of Community law over national laws is not enshrined in the Treaties. In fact, none of them contain provisions stating that Community law takes precedence over national laws. Similarly, the principle has not been endorsed in any subsequent revisions of the Treaties.

[2] C-6/64, Flaminio Costa v. E.N.E.L., [1964] ECR 585.

According to the **direct effect principle**, established by the famous ruling in *Van Gend en Loos*[3], rights conferred on individuals by Community legislation should be enforceable by those individuals in national courts. Courts (potentially tribunals) of the Member States are obliged to apply and interpret national laws. **Due to the differing nature of national laws and the means of interpretation, however, there is a risk that Community law might be interpreted in markedly divergent ways**. Since the Treaties remain silent on the issue of potential conflict between national laws and Community law (including means how to solve such a conflict), there was a need to develop a set of rules indicating which legal norm is prevalent in case a clash arises.

In this sense, the ECJ has created a system, in which **Community law precedes conflicting laws of the Member States**. For the sake of conflict prevention, national courts in the Member States shall interpret the law in a way that does not contravene with Community provisions. This procedure, however, can be quite demanding in terms of constructive and/or narrow interpretation of national laws. Due to this shortcoming, potential conflicts may arise. If they arise, then **national courts of the Member States are obliged to uphold Community law**.

While this is quite simple in theory, practical connotations might involve some obstacles. The governments might try to keep the incompatible legislation, which delays or even obstructs implementing Community law (directives). National courts in the Member States might be hesitant or reluctant to set aside laws they deem important despite the fact that they encroach upon Community legislation. A potential problem, therefore, is not only of obstruction but, to a certain extent, also of "ignorance" to apply laws (Community law) that the courts in the Member States are less acquainted with. In practice there has been and still is an ongoing struggle to secure a full and proper application of Community law.

3. The European Court of Justice (ECJ)

The ECJ cannot be considered as the "Supreme Court" of the EU. Although certain similarities with the U.S. judicial system are apparent, the European judicial system also features notable differences.

The U.S. court system is divided into two administratively separate systems − the federal (13 federal courts of appeals) and **the state** (95 federal district courts). As in most countries the judicial order has three levels: trial, appeal, and the Supreme Court. **The judicial branch is headed by the US Supreme Court**, the only court specifically created by the Constitution. The federal courts hear cases arising out of the Constitution, federal laws, and treaties. With minor exceptions, cases come to the Supreme Court on appeal from lower courts.

In comparison**, the European judicial system comprises national courts and the ECJ**. An official institution empowered to hear appeals against decisions of national courts and to

[3] C-26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1.

strike down inconsistent laws does not exist in the EU. In this sense, **no equivalent to a system of American federal courts with such a competency really exists in Europe**.[4] Although the establishment of regional, devolved Community courts has been discussed they have not been introduced. Neither is there any right of direct appeal from national courts to the ECJ.

In other words, an individual who is concerned by an act of one of the institutions of the European Union can challenge that act in a lower court, called the Court of First Instance (CFI). An appeal on points of law lies against the decisions of the CFI to the ECJ.

Nevertheless, **most of court application of Community law is in the hands of national courts in the Member States**.

The ECJ is the Court of the European Union adjudicating in all matters over which it has a competency granted by the Treaties. **As each Member State has its own sovereign and different legal and jurisprudence systems, EU Member States' supreme courts (potentially their equivalents) are the highest courts in their respective jurisdictions in all other matters**.

Although the drafters of the Treaties did not establish a "European system of federal courts" they found important to establish a mechanism ensuring a **uniform application of Community law throughout the Member States**. Such a mechanism is necessary to secure the rule of law and promote equal treatment among the citizens of Europe. In addition, uniform interpretation of law reduces distortions of competition and promotes economic efficiency. The competence to secure control of the interpretation and judicial development of Community law is not left to the national courts in the Member States. Rather, the unifying jurisdiction is confined to the ECJ.

4. The preliminary reference procedure according to Article 234 of the EC Treaty

The underpinnings of the preliminary reference procedure are laid down in Article 234 EC (formerly Article 177) according to which the ECJ provides, upon the request of national courts, rulings on the interpretation and validity of Community law.

It states the following:

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

(a) the interpretation of this Treaty,

[4] This does not seem surprising since the Community is not a federation but rather a sui-generis supranational entity.

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB [European Central Bank],

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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

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

The scope of jurisdiction to refer the case for a preliminary procedure is defined in the first two paragraphs of Article 234. There is a number of jurisdictional requirements that need to be fulfilled so that the ECJ can deliver a preliminary ruling.

These are:

1) the judicial body has to be "a *court or tribunal of a Member State*";

2) the referred question has to concern the "*validity and interpretation of Community law*";

3) the referring judicial body has to consider in its decision on preliminary ruling the "*necessity to deliver a judgment*".

4.1. Jurisdiction to refer: Court or tribunal of a Member State

As a rule, a judicial body is regarded as a court or tribunal if it possesses an official status and is entitled to exercise judicial functions. The ECJ has laid down criteria for determining whether it faced "a court or a tribunal" through a number of cases. In ***Dorsch Consult* case**[5] it viewed a judicial body as exercising judicial functions when it is established by law, it is a permanent institution, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law, and it is independent of other power branches (namely executive and legislative). All these elements, however, are not absolute. In fact, other criteria, such as the *res judicata* effect of court's decisions upon the referring body, proceeding in an adversarial way in handling subject matters, and delivering a binding judgment also come into question.

[5] Case C-54/96, Dorsch Consult Ingenieursgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, [1997] ECR I-4961.

The ECJ has followed the *Dorsch Consult* reasoning in ***Garofalo* case**[6] where **Consiglio di Stato** (the Italian Council of State) sought the opinion of whether it satisfies the conditions of being treated as a "court or tribunal" when it rules in second and final instance on appeals against judgments of regional administrative courts in proceedings concerning administrative acts. In particular, it sought an opinion of whether it satisfies these criteria when it issues an opinion in relation to an extraordinary petition.

The ECJ has considered the conditions governing the function of Consiglio di Stato when it acts in the context of the procedure annulling Italian administrative acts and the nature of extraordinary petitions as a legal remedy for annulling such acts.

The ECJ has recognized that Consiglio di Stato is a permanent, impartial, and independent body whose members must satisfy the legal requirements of independence and impartiality, whether they are part of the advisory section or of the judicial section, and may not belong to both sections at the same time. Furthermore, the procedures relating to both extraordinary petitions and ordinary applications to the administrative court are conducted *inter partes* and require the principles of impartiality and equality between the parties to be observed.

As for the extraordinary petition itself, it appeared from the file that reference to Consiglio di Stato is compulsory and that its opinion, based solely on the application of rules of law, forms the basis for a decision which will be formally adopted by the President of the Italian Republic. Such an opinion, which comprises both reasoning and an operative part, is an integral part of a procedure, which is the only one capable of resolving a dispute between private individuals and the administration. On the basis of these arguments, the ECJ has ruled that Consiglio di Stato satisfies the conditions for being treated as a "court or tribunal" for the purposes of Article 234 of the Treaty.

Based on similar principles, the ECJ has recognized **Tribunal Económico-Administrativ**o Central (Central Economic-Administrative Court) as a "court or tribunal" in ***Cabalfrisa* case**.[7]

On the contrary, in the *Corbiau* case[8] the ECJ has dismissed the request for preliminary ruling from the Director of Taxation of Luxembourg, a governmental department in charge of rendering administrative decisions, on the grounds of its dependence on tax-imposing authorities. Arbitrators, as a rule, do not possess the jurisdiction to refer a question of Community law to a preliminary reference. However, in order to prevent parties from resorting to arbitration clauses to exclude application of Community law, national courts can reconsider arbitrator's incapability to submit a preliminary reference in deciding on a leave to appeal against arbitral award.

Appellate committees of professional associations (e.g. Bar Associations or Notary Chambers) can be treated as courts or tribunals only when they deliver a decision

[6] Case C-69-79/96, Maria Antonella Garofalo v Ministero della Sanità, [1997] ECR I-5603.
[7] Case C-110-147/98, Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT), [2000] ECR I-1577.
[8] Case C-24/92, Corbiau v Administration des Contributions, [1993] ECR I-1277.

affecting the exercise of rights under Community law. Among the institutions whose position to make a preliminary reference is uncertain are investigative agencies, ad hoc, permanent governmental tribunals exercising both administrative and judicial functions, self-regulatory financial institutions, and ombudsmen.

In this context, the ECJ has admitted references coming from authorities responsible for reviewing procedures for the award of public contracts in ***Köllensperger* case**[9] and administrative tribunals with the jurisdiction to hear and decide fiscal complaints in the mentioned *Cabalfrista* case.[10]

As regards **authorities of quasi-judicial nature**, the ECJ has admitted their references on the condition of their independence of the administrator, potentially separation of powers, enabling the former to assume the character of a third party in relation to the latter (***Schmid* case**).[11]

4.2. Validity and interpretation of Community law

The questions of Community law on which the ECJ has a jurisdiction to give preliminary ruling are defined in the first paragraph of Article 234 cited above. The jurisdiction covers essentially all acts of Community institutions including the European Central Bank. **Historically, the ECJ has received more preliminary references concerning the interpretation of Community law than those concerning its validity.**

Notwithstanding the extent given in this provision, the ECJ has also ruled on the **interpretation/validity of international agreements** made by or adopted by the Community (for example, in *Administrazione delle Finanze dello Stato* case or *Kziber* case)[12], the **general principles of law**, **and Community law incorporated by reference into the domestic laws of the Member States**.

Traditionally, the ECJ has been quite scrupulous in rejecting to decide on the matters of interpretation or validity. Such a disclaimer of jurisdiction has been more of a form rather than a substance. Since ECJ rulings have a binding effect upon the referring court, many rulings on the interpretation of overriding Community law require that a national law be declared unlawful by the referring court. **In preserving the relation of co-operation (partnership) with the referring court the ECJ, apart from deciding on the question of**

[9] Case C-103/97, Josef Köllensperger GmbH & CO KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz, [1999] E.C.R. I-551.
[10] Cases C-110/98 to 147/98 Gabalfrisa SL v Administrator de la Adminstración de Ensache-Cerda de la Agencia Estatal de Administración Tributaria (AEAT), [2000] E.C.R. I-1577.
[11] Cases C-110/98 to 147/98 Gabalfrisa SL v Administrator de la Adminstración de Ensache-Cerda de la Agencia Estatal de Administración Tributaria (AEAT), [2000] E.C.R. I-1577; Case C-516/99, Walter Schmid v Finanzamt für den 9, 18 und 19 Bezirk in Wien, [2002] E.C.R. I-4573.
[12] Case 267-269/81, Administrazione delle Finanze dello Stato v SPI SpA, [1983] ECR 801; Case C-18/90, Office national de l'emploi v Kziber, [1991] ECR I-199.

interpretation, often rules also on its validity. This practice was apparent in a number of cases like *GB-INNO-BM* case or *Verband Socialer Wettbewerb eV* case.[13]

Questions referred for a preliminary procedure are those of law not the facts. However, the questions of Community law may involve rather complex factual issues. These comprised, for example, in *Nölle* case[14] Sri Lanka's appropriateness as a reference country for the purposes of deciding whether to impose an anti-dumping duty on paintbrushes exported from China. The ECJ itself has found the preliminary reference procedure unsuitable for the purposes of fact-finding. It prefers that the facts are found before a reference is filed (*Extramet Industrie* case).[15]

In general, the ECJ considers itself bound by these findings even when they are based more on an agreement between the parties (*Torfaen Borough Council* case).[16]

4.3. Decision necessary to give a judgment

The provisions of Article 234 EC enable every national court or tribunal without distinction to refer a case to the ECJ for a preliminary ruling when it considers that a decision on the question (ie. a resolution of the relevant issues of Community law) is necessary to enable it to give a judgment. From the rulings of the ECJ (for instance *Rheinmühlen-Düsseldorf* case or *Pardini Fratelli* case)[17] it can be inferred that this requirement comprises essentially all matters that can potentially affect the outcome of the case. **In other words, the referred question does not have to exclusively concern the matter of Community law determinative of the case.**

To illustrate this point, the ECJ has admitted to decide questions regarded by national courts as **"substantially determinative"** (*Commissioners of Customs and Excise v SpA Samex*)[18] as well as those "required to do justice" (*R v Plymouth Justices ex parte Rogers*).[19] On the contrary, the ECJ can dismiss the submission on preliminary reference if it has not been established that the issue of Community law arises on the facts on the case. This assumption can be best demonstrated by *Meilicke* case.[20] In this case, a national court has raised the issue of the compatibility of the German Aktiengesetz (paragraphs 131 and 132) concerning shareholders' rights to receive information from a company management with the Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the

[13] Case C-362/88, GB-INNO-BM v Confédération du commerce luxembourgeois, [1990] ECR I-667; Case C-315/92, Verband Socialer Wettbewerb eV v Clinique Laboratoires SNC and others, [1994] ECR I-317.
[14] Case C-16/90, Nölle v Hauptzollamt Bremen-Freihafen, [1991] ECR I-5163.
[15] Case C-358/89, Extramet SA v Council, [1991] ECR I-2501.
[16] Case 145/88, Torfaen Borough Council v B&Q plc, [1989] ECR 3851 at 3867.
[17] Case 166/73, Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1974] ECR 33; Case 338/85, Pardini Fratelli SpA v Ministero del Commercio con l'Estero, [1988] ECR 2041.
[18] Commissioners of Customs and Excise v SpA Samex [1983] 3 CMLR 266.
[19] R v Plymouth Justices ex parte Rogers [1982] 3 CMLR 221.
[20] Case C-83/91, Wienard Meilicke v ADV/ORGA FA Meyer AG, [1992] ECR I-4871.

second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (the Second Directive). In particular, it concerned the issue of whether or not German law treating certain cash contribution preceded or followed by a transaction whereby the company in question pays to the subscriber a sum which enables it to discharge a debt it owed to the latter ("*disguised contributions in kind*") violates Community law.

The submitted documentation did not establish that the conditions for the application of that doctrine of disguised contributions in kind have been satisfied in the main proceedings. Rather, it showed that the problem of the compatibility of the doctrine of contributions in kind with the Second Directive is a hypothetical one. **The Court is thus being asked to give a ruling on a hypothetical problem, without obtaining the matters of fact or law necessary to give a useful answer to the questions submitted to it.**

The ECJ found inappropriate to answer the questions submitted by the referring court (Landgericht Hannover) because it would be exceeding the limits of the function entrusted by the Treaties.

4.4. Grounds for refusing jurisdiction

The ECJ has developed a number of grounds additional to those appearing on the face of Article 234 for declining jurisdiction to rule on a preliminary reference. In the ***Foglia Novello*** **case[21], the ECJ declined jurisdiction to rule on preliminary reference because it regarded the proceedings as having been manufactured for the purposes of testing foreign law**. In *Van Eycke* case[22], the ECJ established a milestone to decline jurisdiction only if it is "*manifestly apparent from the facts set out in the order for reference that the* ***dispute is fictitious***." This test has not been satisfied so far although it came close to be in *Meilicke* case.[23]

As a rule, the ECJ will not refuse jurisdiction over a question referred by a national court for the sole reason that the ruling was requested by the referring court in order to determine the validity of a law of another Member State.[24]

In some of its following decisions, the ECJ has signalled a new determination to **refuse jurisdiction over preliminary references which are not supported by adequate findings of facts or national laws**. By taking this position, the ECJ had diverged from its earlier practice (manifested in *Costa v. ENEL* case) of addressing all questions of national courts irrespective of the degree of their briefness and/or inadequacy.

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[21] Case 104/79, Pasquale Foglia v Mariella Novello (1), [1980] ECR 745; Case 244/80, Pasquale Foglia v Mariella Novello (2), [1981] ECR 3045.
[22] Case 267/86, Pascal Van Eycke v ASPA NV, [1988] ECR 4769.
[23] Case C-83/91, Wienard Meilicke v ADV/ORGA FA Meyer AG, [1992] ECR 585.
[24] Case C-150/88, Kommanditgesellschaft in Firma Eau de Cologne & Parfümerie-Fabrik Glockengasse No 4711 v Provide Srl, [1989] ECR I-3891.

To illustrate this point, in ***Telemarsicabruzzo* case**[25], for instance, the District Court of Frascati referred two questions of Community law relating to the compatibility with the EC competition rules of Italian state monopoly over certain other TV channels. The ECJ viewed the submission as well as the written and oral observations of the parties as fragmentary. It argued that the referring court failed in its obligation to precisely explain why it requires the ECJ to rule on preliminary reference. As a result, the ECJ declined the jurisdiction on the basis that the reference was imprecise as regards matters of facts and national law.

This case has been followed by others where the reference has been declared **manifestly inadmissible** (*Pretore di Genova* case and *Monin Automobiles* case).[26] All these have been distinguished in *Vaneetveld v SA Le Foyer* case[27], a reference from Belgian tribunal de commerce concerning the effects of Article 5 of Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (the second motor insurance directive).[28] **The ECJ argued that the need of national court to precisely define factual and legal background of the referring question** (or at least the factual assumptions on which it is based) is less significant in cases where the question relates to technical issues. In such case, the ECJ can give a useful answer on matters of Community law even without detailed knowledge of the case.

5. Effects of Article 234 EC

Article 234 is one of the most important procedural provision of the Treaty. It facilitates the **dialogue between national courts and the ECJ** and provides the meeting point between national and Community law.

It serves there main functions:

1) It ensures **uniform application of Community law** by providing ruling on the interpretation of Community law.

2) It ensures the **unity of the Community legal order** and the **coherence of the system of judicial remedies** established by the Treaty, by entrusting to the ECJ the power to rule on the validity of Community acts that is disputed in national proceedings.

3) It **facilitates an access to Justice** by making clear that Community law is to be applied not only by the ECJ but first at national courts level, thus enabling citizens to enforce their Community rights in national jurisdictions.

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[25] Case C-320/90, Telemarsicabruzzo and others -v- Circostel and others, [1993].
[26] Case C-157/92, Pretore di Genova v Banchero, [1993] ECR I-1085; Case C-386/92, Monin Automobiles, [1993] ECR I-2049.
[27] Case C-316/93, Nicole Vaneetveld v SA Le Foyer and Le Foyer SA v Fédération des Mutualités Socialistes et Syndicales de la Province de Liège, [1994] ECR I-763.
[28] Council Directive (EEC) 84/5 OJ L8 11.1.84 p. 17.

The preliminary reference system has led, in effect, to a transfer of powers at three levels, namely:

(a) from the governments of the Member States to the institutions of the Community;

(b) from the executive and the legislative to the judiciary and;

(c) from higher national courts to lower national courts.

Combining the mechanism of preliminary references with the doctrines of primacy and direct effect enables individuals and companies to assert Community rights in national courts. Thus, individuals may use Community law both as a "shield" (to defend themselves from action by national authorities which infringes Community rights) and as a “sword” (to challenge national measures on the grounds of incompatibility with Community laws). Consequently, **the preliminary ruling procedure provides an opportunity for individuals and, indeed, national courts to question governmental actions**.

Given that Article 234 EC puts the ECJ in a weaker position than a supreme court in a federation, it is perhaps an irony that the preliminary reference procedure has proved to be the main procedural route through which the process of "constitutionalising" of the Community has taken place. In a number of leading preliminary reference rulings, the ECJ has had the opportunity to establish the principles of primacy, direct effect, and state liability in damages, and to lay down the fundamentals of the internal market.

6. National courts v. the ECJ

The relationship between national courts and the ECJ is not hierarchical. **The preliminary ruling system is based entirely on a cooperation and dialogue between national courts and the ECJ**, which is not an appellate court but rather a "special tribunal" delivering a judgment when it is requested to do so. A reference for a preliminary ruling is, in essence, a dialogue between the national court hearing the "principal action", which is the only court fully familiar with the case, and a Community court - the ECJ, which is the only one capable of securing a uniform interpretation of Community law.

The objective is that national courts refer new, delicate questions of European law to the ECJ for a preliminary ruling. The ECJ then develops a centralized case law that will serve as a guideline for judges and legal practitioners throughout the European Union. One particular feature of the preliminary reference procedure is that **the ECJ is entirely dependent on the goodwill and "European mindedness" of national courts**. The ECJ cannot force national courts to refer questions of European law for a preliminary reference. Even though the ECJ does not possess the competency to order a submission for a preliminary reference from national courts, article 234 EC in some cases enables and in others obliges national courts to suspend a case and to make a reference to the ECJ.

It draws a distinction between lower national courts, which possess discretion to make a reference, and national courts of final instance, which are under an obligation to refer the question of interpretation/validity of Community law to a preliminary reference procedure. **Lower national courts, from which the overwhelming majority of references originate**, **therefore, enjoy discretion whether to make a reference or not.** Also, even courts of last instance which are in principle under an obligation to refer, in fact enjoy some degree of discretion although there are certain exceptions from this obligation (see section 7 on the theory of "*Acte clair*").

It should be noted that **it is a national court, and not the parties, which decides if a reference should be made or not.** Thus, the reference procedure is to be distinguished from an appeal procedure. It is never possible for a party to appeal to the ECJ from a national court. If the national court decides to make a reference to ECJ, proceedings are stayed in the national court until the ECJ gives its ruling.

In the sense of Article 234 EC, few important rules are applicable for national judges. If a national judge encounters a case in which a validity of European legislation is contested or determines that European legislation is unlawful, he is obliged to refer such a question to the ECJ. **National judges themselves do not have a competence to declare European legislation invalid.** The *rationale* is that unlawful European legislation needs to be declared invalid for the whole EU. It would be unacceptable if it became illegal in one Member State while remaining valid and applicable in another one.

The obligation to refer a question of validity of European law was established by the ECJ in ***Foto-Frost* case.**[29] According to this judgment, national courts may consider the validity of a Community act. However, national courts themselves have no jurisdiction to declare that a Community act is invalid (in this case, a Commission's decision). Only the ECJ, responsible for ensuring that Community law is applied uniformly in all Member States, has the jurisdiction to declare an act of a Community institution void.

In few recent cases, namely ***Gaston Schul Douane-expediteur***[30] and ***International Air Transport Association***[31] the ECJ upheld the obligation of national courts to seek preliminary reference. The *Gaston Schul Douane-expediteur* case is of particular importance. In this case the ECJ was not deciding merely on the matter of obligation to submit a question of Community law to a preliminary ruling but whether this reference needs to be made by a national court even when the ECJ has, by an earlier ruling, already declared analogous provision of a comparable legislation invalid.

The ECJ has argued that the existence of such a judgment does not prevent national courts from having to make a new reference. It gave few reasons for it. First, even in cases which at first sight are similar, careful examination may show that a provision whose validity is in question not comparable to a provision which has already been declared invalid because, for instance, it has a different legal or factual context. Second, the possibility of a national court ruling on the invalidity of a Community act is likewise incompatible with the necessary coherence of the system of judicial protection instituted by the EC Treaty. It is important to note in that regard that references for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. Third, it must also be emphasised that the ECJ is in the best position to rule on the validity of Community acts. Indeed, differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty. The possibility of a national court ruling on the invalidity of a Community act is likewise incompatible with the necessary coherence of the system of judicial protection instituted by the EC Treaty.

It follows from all the foregoing considerations that **a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law has to seek a ruling from the ECJ on a question relating to the validity of the provisions of a regulation, even where the ECJ has already declared invalid analogous provisions of another comparable regulation**.

[29] Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost, [1987].]
[30] Case C-461/03, Gaston Schul Douane-expediteur BV. v. Minister van Landbouw, Natuur en Voedselkwaliteit, [2005].
[31] Case C-344/04, R (International Air Transport Association and European Low Fares Airline Association) v Department for Transport, [2006].

7. CILFIT principle and the notion of "*Acte Clair*"

It follows from the wording of Article 234 par. 3 EC that a court of final instance shall always bring a case concerning the interpretation of the EC Treaty before the ECJ for a preliminary ruling.

In *CILFIT* case[32] the ECJ has explained how this obligation should be interpreted. In deciding this case, the ECJ paid a particular attention to the fact that a strict and literal application of Article 234 could have a number of negative consequences. Lawyers in the Member States could start raising questions of Community law before courts of last instance whenever it suits them (e.g. for the sole reason of having the case prolonged) knowing that national courts would have to refer the question to the ECJ. Such tactics would abuse the preliminary reference system.

For this reason, the ECJ has ruled that national courts against whose decision there is no judicial remedy must not request the preliminary reference ruling if: 1) the question of Community law is irrelevant, or 2) has already been answered by the ECJ in an earlier judgment, or 3) the correct application of Community law is apparent, raising no reasonable doubt.

The ECJ has developed the *CILFIT* reasoning in the following way.

The ECJ commenced by stating that "*the correct application of Community law may be **so obvious as to leave no scope for any reasonable doubt** as to the manner in which the question raised is to be resolved.*" This notion became known as "***Acte clair***."

However, the ECJ hedged its notion of certainty around with very far-reaching qualifications. It ruled: *"before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility of resolving it*."

The ECJ went on to list a number of characteristics for a Community rule to be considered as an *acte clair*. These include the characteristic features of Community law and the particular difficulties to which its interpretation gives rise, the drafting in different languages, all equally binding, the use of terminology peculiar to Community law, the special meaning of legal concepts in Community law, and the fact that every provision must be placed in context and read in the light of Community law as a whole. Overall, the *CILFIT* case law allows little or no room for national courts of final instance to judge whether a question must be referred.

As it is well known, ***CILFIT* has been a subject of criticism over the years. A major criticism concerns the fact that it has not been properly followed in all Member States**. After many enlargements to the EU and new languages given official status, it is virtually impossible for a court in a Member State to access the meaning of the Treaty and statutory

[32] Case C-283/81, CILFIT v Ministero della Sanità, [1982] ECJ 3415.

texts in all other official languages. Obviously, the ECJ would have no capacity to decide all the referrals for preliminary ruling it would receive if *CILFIT* was to be followed properly.

Suggestions have been raised to reword Article 234 EC, so that it enables less restrictive interpretation. According to this proposal, national courts of final appeal should be obliged to refer to the ECJ "*provided that the question is of sufficient importance to Community law and that there is reasonable doubt as to the answer to that question*". However, at the Nice Intergovernmental Conference on Treaty revision in 2000 an agreement on changing Article 234 was not reached. A major reason for dropping this proposal was the criterion of "*sufficient importance to Community law*", which seemed quite vague. It could be understood in different ways and might have been considered to give national courts of final instance too much leeway to decide for themselves.

Recently, the ECJ has confirmed the *CILFIT* principle by referring to it in several new cases. It made a clear reference to what has been pronounced in *CILFIT* in *Intermodal Transports*[33] and *Lyckeskog* case.[34] Even more firmly, the ECJ has stated the validity of the *CILFIT* principle in the *Köbler* case, which will be discussed on the point of Member State liability. In *Köbler*, the Court pronounced, without indicating any exceptions:

"*Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice*."

8. Effects of preliminary ruling on national law

Although the obligation of national courts to make a preliminary reference is enshrined in the Treaties, it might happen that national courts do not comply with these rules. As a matter of fact, a national court or tribunal may declare European legislation invalid without consulting the ECJ. Similarly, supreme courts of the Member States may fail to request a preliminary ruling in cases involving relevant or new questions of Community law. In all these cases, the **ECJ cannot intervene ordering national courts to make a submission**. **A national court should also never set aside its judgment although it contravenes to Community law**.

This assumption has been confirmed by a judgment in ***Kapferer*** case.[35]

In that case a referring court, Landesgericht Innsbruck, asked the ECJ essentially whether, and, where relevant, in what conditions, the principle of cooperation arising from Article 10 EC imposes on a national court an obligation to review and set aside a final judicial decision of another Austrian court if that decision should infringe upon Community law (namely Regulation 44/2001). The ECJ argued that **the principle of co-operation under Article 10**

[33] Case C-495/03, Intermodal Transports BV v Staatssecretaris van Financiën [2005].
[34] Case C-99/00, Lyckeskog [2002].
[35] Case C-234/04, Rosmarie Kapferer v Schlank & Schick GmbH, [2006].

EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision, if that decision is contrary to Community law. In other words, the ECJ emphasized that *legal certainty* and *res judicata* principles require that final judgments, even though they violate Community law, cannot be set aside for the sake of assuring *legal certainty* and the principle of *res iudicata*.

Even though the ruling delivered by the ECJ is binding on the national courts, it is upon national courts to apply it on the merits of the case. One of the most crucial facts perhaps is that it is the national court, and not the ECJ, which renders the final judgment. **Although the judgment does not form a binding precedent, as in the Common law system, it has a normative value in settling a point of interpretation/validity.** A national court before which the same point of Community law arises in the future may follow the Court's ruling or make another reference to the ECJ. In any case, however, it may not ignore the ruling.

Of course **the binding effect on the national judge applies to all preliminary rulings of the ECJ**, whatsoever was the originating Member State of the case referred to the Court, and not only to previous preliminary referrals of jurisdictions of the same Member State[36].

The binding nature of a preliminary ruling upon a national judge who referred the case, as well as its effect as a binding case law for every other judge or public authority in the EU, has been confirmed in the ***Joustra*** case.[37]

The case concerned a preliminary reference made in the course of proceedings between the *Staatssecretaris van Financiën* (Dutch State Secretary for Finances) and Mr Joustra concerning the charging in the Netherlands of excise duty on wine acquired by Mr Joustra in France, for his own use and that of other private individuals, and transported to the Netherlands on his behalf by a transport company established in the Netherlands. The Supreme Court of Netherlands, which referred the question to the ECJ, was seeking the interpretation of a European directive on excise duty and on the holding, movement, and monitoring of such products. While interpreting this directive, the ECJ ruled that a product imported from one Member State into another for private use is only exempted from excise duty in the other Member State if it has been transported personally by the purchaser.

Although Joustra was a small administrative case involving a little of fundamental principles of European law and no article in the EC Treaty, it illustrated well that the interpretation given by the ECJ can be relevant for a great number of imports and transactions in the internal market. For that reason, it is crucial that the Court's new judgment is from now on applied by all administrative authorities and judges in the EU, so that an equal application of European law is assured at the EU level.

[36] It seems that the European Commission has recently initiated an infringement proceeding against Germany on this point, together with the obligation of incorporating measures of ECJ preliminary judgements in national law.
[37] Case C-5/05, Staatssecretaris van Financiën v B.F. Joustra, [1987].

Therefore, the binding effect of preliminary rulings is also not compatible with the imposition by a Member State of administrative measures as a prerequisite for the application of preliminary rulings of the ECJ in national law.

9. The Member States liability for infringement to Community law and the Köbler case

As it has been pointed out, **national courts may fail in requesting a preliminary ruling, which can cause a significant damage to the parties of the case.** However, a potentially powerful instrument lies in their hands − a right to claim damages. The framework of the Member State liability for damages caused by the breach of EU law was established by the ECJ in *Francovich* case[38] and *Factortame* case[39]. The *Francovich* case arouse from Italy's failure to implement the directive 80/987/EEC, on the approximation of the laws of the Member States relating to the protection of employees in the event of their employers' insolvency. Since Italy had failed to implement this directive guaranteeing payments of wages to Mr. Francovich, Bonifaci, and other claimants in the main procedure, they sued the Italian Republic claiming that Italian state is responsible for paying their arrears of wages.

The matter was brought to the ECJ by Italian courts (the Pretura di Vicenza and the Pretura di Bassano del Grappa) that requested a preliminary ruling on the existence and extent of Member State liability for damages. The ECJ held that the Italian government had breached its obligations and was liable to compensate the workers' loss resulting from the breach. **The ECJ established the Member States liability on three conditions**. The first of those conditions is that **the result prescribed by the directive should entail the grant of rights to individuals**. The second condition is that it should be possible to **identify the content of those rights on the basis of the provisions of the directive**. Finally, the third condition is the existence of a **causal link between the breach of the Member State's obligation and the loss and damage suffered by the injured parties**.

While *Francovich* established the Member State liability as a general principle of Community law, it left many issues unresolved. The doctrine of state liability for damages was later modified in *Factortame* case. This case was a landmark constitutional case in the UK, which confirmed the supremacy of EU law and the state liability for damages caused by the breach of EU law. The case first came to prominence when a Spanish fishing company called Factortame appealed to the UK courts against restrictions imposed on them by the UK government under the Merchant Shipping Act. According to this law, companies using foreign ships registered as British vessels were prohibited from fishing in UK waters. Since a Spanish fishing company considered this measure as depriving of the right to engage in fishing under EU law, it challenged the compatibility of the Act with Community law.

The case reached the High Court of Justice of England and Wales, which obtained an injunction from the ECJ to temporarily suspend the governmental authority (Secretary of

[38] Case C-9/90, Frankovich and others [1991], ECR I-5357.
[39] Case C- 213/89, Factortame Ltd & Ors V Secretary Of State For Transport, [1991].

State for Transport) from enforcing the particular part of the Act. However, this was later overturned by the Court of Appeal of England and Wales on the basis that the constitution did not give any court the right to suspend Acts of Parliament, which was confirmed by the House of Lords, the highest court in the UK. This ruling of the House of Lords was then referred to the ECJ.

Apart from upholding the principle of supremacy of Community law, the ECJ has further recognized that the UK government breached Community law by imposing legislative conditions on nationality, domicile, and residence through the Merchant Shipping Act. Such a breach was found sufficiently serious to give rise to liability for any damage that might subsequently be shown to have been caused to trawler owners and managers precluded from registering to fish in UK waters.

Similarly as in *Francovich* case, the ECJ defined the **criteria for establishing Member State liability** for damages as follows. First, **the law infringed** (the breached EU law) must have been **intended to confer rights on individuals**, second, the **breach must be sufficiently serious**, and third, there must be a direct **causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured parties**. The most ambiguous criterion for establishing Member State liability for damages was the required level of seriousness. The ECJ has refined the criteria of sufficient seriousness in a number of cases (e.g. *Dillenkofer* case[40]) arguing that a failure of Member State to implement a directive is a sufficiently serious breach of Community law.

Since the famous *Francovich*, *Factortame,* and *Brasserie du Pêcheur*[41] cases it is well-established that the Member States are liable for damages caused to individuals by serious infringements of European law.

In ***Köbler* case**[42], the ECJ has recognized the principle of a state liability for damages caused by breach of EC law by a national court.

This case deals with the issue whether an individual, the Austrian professor Gerhard Köbler, employed by an Austrian state university, could claim damages from the Austrian state because the Austrian Supreme Administrative Court had decided wrongly that the years he had been working in Germany could not be included when calculating whether he was entitled to a length-of service increment for professors. This decision was in clear breach of Community law provisions on the freedom of movement and freedom to work in other Member States. The fundamental legal problem was that the decision not to award the increment was taken by a supreme court.

The ECJ argued, based on its earlier judgments in *Brasserie du pêcheur and Factortame* cases that the principle of state liability applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was

[40] Cases C--178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Dillenkofer and others v Federal Republic of Germany, 1996] ECR I-4845.
[41] Case C-46/93 and C-48/93, Brasserie du pêcheur and Factortame, [1996] ECR I-1029.
[42] Case C-224/01, Gerhard Köbler v Republik Österreich, [2003].

responsible for the breach. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the ECJ did not find it possible to exempt courts of last instance. The ECJ has considered different counter-arguments. In particular, it heard arguments based on the independence and authority of the judiciary, but found they could not be upheld. The ECJ stated i.a.: "*the possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question*."

The principle that a Member State is to be taken as a single entity is taken from international law. The ECJ argued: "*in international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive*". However, on the issue whether there was a "*sufficiently serious breach*" committed, the ECJ limited the responsibility for national courts to cases in which the breach of Community law is "*manifest*".

The link between the *CILFIT* principle and *Köbler* case is obvious. As the ECJ underlines in its Köbler judgment, a supreme court in a Member State can always avoid the risk of taking decisions in breach of Community law by asking the ECJ for a preliminary ruling. Thus, the *Köbler* judgment will most likely have the effect of fortifying the *CILFIT* principle.

In a recent judgment in the case *Traghetti del Mediterraneo*[43] the ECJ further developed the *Köbler* case law with respect to the issue of non-compliance with the obligation to request a preliminary ruling. Traghetti del Mediterraneo, a maritime transport undertaking in liquidation, brought an action against the Italian Republic before the tribunal of Genova claiming a compensation of the damage suffered as a result of misinterpreting aid rules by the Italian Supreme Court of the European State and its refusal to refer the case to the ECJ.

The interesting point here was that **Italian legislation excluded state liability for a damage caused by infringements of European law committed by national courts, except for cases of intentional fault or serious misconduct on the part of those courts**.

The Italian Government defended this legislation saying that it created a fair balance between the need to preserve the independence of the judiciary, on the one hand, and the judicial protection of individuals in the most flagrant cases of infringement of European law by the judiciary, on the other hand. Interrogated on this situation by the tribunal of Genova, the ECJ ruled that the Italian legislation was inadequate, and that **State liability should not be limited to intentional faults or serious misconduct of the courts in the Member States**.

This assumption completes the picture of what the preliminary ruling procedure is about, when it can be and when it must be used, and what the consequences of a non-compliance with given rules are.

[43] Case C-173/03 Traghetti del Mediterraneo SpA, in liquidation v Repubblica Italiana [2006]

10. The preliminary ruling procedure according to Article 68 of the EC Treaty

Since the Treaty of Amsterdam entered into force, the EU has been running a major legislative programme, launched by the Tampere European Council and reaffirmed in the Hague programme, in the areas of cooperation in civil matters, asylum, and immigration. An impressive body of law has been emerging in response to the expectations of European citizens (potentially residents) wishing to live in the area of freedom, security, and justice. As this body of law expands, not only in terms of quantity but also in terms of the importance of rights that it confers, it is vital to ensure that it is applied and interpreted uniformly throughout the Union. While built on similar principles as the preliminary reference procedure under Article 234 EC, Article 68 EC introduces a few important derogations.

It states the following:

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

In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

The Council, the Commission, or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res iudicata.

Under Article 68 only national courts of last instance are allowed to request a preliminary ruling, which reduces the scope of the preliminary rulings procedure. During the negotiations on the wording of Article 68, some Member States expressed concerns that, if all national courts would be able to refer cases to the ECJ, many applicants (especially in immigration and asylum cases) would abuse this system in order to prolong proceedings. For this reason, it was agreed that only the highest national courts would be allowed to refer cases to the ECJ. This restriction is derogatory not only to the general rule provided by art. 234 EC, but also diverging from the regime of preliminary reference set by art. 35 EU in the area of police and judicial co-operation in criminal matters.

Indeed, art. 35 par. 3 EU leaves open the possibility for a Member State to use its opt-in to enlarge the preliminary reference procedure to all jurisdiction levels. This can never be the case under art. 68 EC. This opt-in has been used by 14 Member States, among which 11 have chosen to allow all courts to ask for a preliminary ruling, what is not foreseen by art. 68 EC regime.

This restriction in the application of the preliminary reference procedure may also have paradoxical effects: for years courts of appeal have been allowed to refer cases to the ECJ under the Brussels I Convention of 1968. The incorporation of this convention in Community law by Regulation (EC) 44/2001 makes it fall under the restricted regime of reference defined in art. 68 EC and prevents preliminary ruling referrals by Courts of appeal.

However, Article 68 also provides an extra source of preliminary rulings, which is not available under the general regime of Article 234 EC: the Council, the Commission, and the Member States may request to the Court of justice the interpretation of Articles 61 to 69 of the Treaty and of acts based on one of those articles, such as, for example, Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Regulation).

Art. 68 EC however prohibits ECJ to rule on measures or decisions relating to the maintenance of law and order and the safeguarding if internal security. Although the same limitation is applied by art. 35 EU to the preliminary ruling competence of the Court of Justice, the limitation of art. 68 EC refers to measures or decisions pursuant to art. 62(1) EC, which relates to measures adopted by the EC legislator, whereas art. 35 EU refers to measures adopted by Member States outside the scope of Community law.

The European Commission recently issued a communication on the adaptation of art. 68 EC[44], with a view of ensuring a more effective judicial protection and a more complete uniformity in the application of Community law "*in policy areas which are particularly sensitive in terms of fundamental rights and concern the protection of especially vulnerable people*".

In this Communication, and in consideration of the positive evolution of the area of freedom, security and justice, **the Commission suggests to bring provisions of art. 68 EC into line with the standard rules on preliminary reference of the EC Treaty, in all fields covered by Title IV.**

As part of the process leading to the revision of art.68 EC proposed by the European Commission and in view of the correlative enlargement of its jurisdiction on preliminary ruling, the Court has recently submitted to the Council a *discussion paper on the treatment of questions referred for a preliminary ruling concerning the area of freedom, security and justice*[45] .

Considering the various constraints of this very sensitive area, and in particular the reduced time for ruling imposed on the national judge, either by Community acts or in national laws, the Court suggests to set up a new "***emergency preliminary ruling procedure*".**

[44] COM(2006)346 final of 28th June 2006

[45] This document is available on the website of the Court of justice: http://curia.europa.eu/en/instit/txtdocfr/index_projet.htm

In this new procedure, the references for preliminary ruling in the area of freedom, security and justice would be treated by a special new Chamber either without the participation of all the Member Sates and the Institutions as in the regular procedure, or keeping all traditional parties associated, but with stricter practical rules to reduce the time of the procedure.

Case law

The ECJ has delivered few judgments on requests made on the basis of Article 68 EC. The ***Leffler*** case[46], for example, concerned the service of judicial and extrajudicial documents, in particular the question whether service of a document in the wrong language can be remedied by sending appropriate translation. The case relates to a dispute between Mr Leffler and Berlin Chemie during which the latter refused to accept a writ because it had not been translated into German, a language in which it was to be served.

The Dutch Supreme Court then requested the ECJ to clarify legal effects of language rules contained in the Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the Regulation on services) establishing rules for transmitting judicial and extrajudicial documents in these matters for a service between Member States. The ECJ ruled that a refusal to accept a document on the grounds that the language requirements of the Regulation on services have not been satisfied does not render the service inoperative in its entirety. The sender may remedy the situation by sending a translation of the document in due time in accordance with the procedure laid down by the Regulation on services.

In ***Plumex*** case[47] the reference for a preliminary ruling was raised by the Belgian Cour de cassation requesting a proper interpretation of Articles 4 to 11 of the Regulation on services. Plumex (a Portuguese company) had been served with Belgian court proceedings under the Regulation on services in two methods, once through the receiving agencies in Portugal, and once by post. Plumex appealed a judgment claiming that procedural time limits should only run from the date of service under Articles 4 to 11, and not the date of service by post which had occurred earlier.

In *Plumex* judgment, the ECJ ruled that there is no hierarchy between the different methods of transmission of judicial and extrajudicial documents between the Member States. In addition, the ECJ has also argued that if a document is served twice according to two different methods provided for by the Regulation on services, then the point from which time starts to run for the purposes of a procedural time-limit is the date of the first service validly effected.

As regards, Regulation 1346/2000 on insolvency proceedings (the Regulation on insolvency), the ECJ has delivered a ruling that came to be known as the ***Eurofood*** judgment. The case concerned Eurofood, an Irish company with a registered office in Dublin, a whole-owned subsidiary of the Italian Parmalat. In 2003, with the view of industrial restructuring, Parmalat was placed under the extraordinary administration.

[46] Case C-443/03, Götz Leffler v Berlin Chemie AG
[47] Case C- C-473/04, Plumex v Young Sports NV.

At the request of Bank of America seeking the liquidation of Eurofood the High Court of Ireland appointed a liquidator. In 2004, the Eurofood was placed under the extraordinary administration in Italy.

Shortly afterwards the High Court held that the insolvency proceedings against Eurofood had been opened in Ireland on the day of the application by the Bank of America and that these proceedings are "main" because the centre of Eurofood interests is in Ireland. The High Court of Ireland also held that the conduct of proceedings before Italian court in Parma justified the refusal of the Irish court to recognize its decision. Finding Eurofood insolvent, it ordered its liquidation.

In these circumstances, the Supreme Court of Ireland referred several questions to the ECJ for a preliminary ruling. These questions concerned the interpretation of the Regulation on insolvency, in particular, which court has a jurisdiction to liquidate Eurofood. In its judgment the ECJ has confirmed that a company's "main" interests should be presumed to be located in the Member State in which it is incorporated unless there are factors *"which are both objective and ascertainable by third parties"* to rebut these presumptions. The ECJ has stated that *"the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption."* The ECJ, therefore, affirmed the insolvency proceedings opened against Eurofood in Ireland as main and the High Court of Ireland as a legitimate court carrying out these proceedings.

Finally, Brussels I Regulation has been examined by the ECJ in ***Reisch Montage*** case[48]. The case concerned the issue of multiple defendants, one domiciled in Austria, another in Germany, and both of them sued in Austria. Article 6 of the Brussels I Regulation allows that multiple defendants be sued together in the courts of the State where any of them is domiciled provided the claims are closely connected. In this case the Austrian court (Oberster Gerichtshof) had to declare the action brought against the Austrian defendant inadmissible because of the bankruptcy proceedings that were pending with regard to that defendant. The German defendant argued that, since the action brought against the Austrian co-defendant was inadmissible, it should also be declared inadmissible against him. This argument was referred to the ECJ.

The ECJ argued that Article 6 of the Brussels I Regulation must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

11. The preliminary ruling procedure according to Article 35 of the EU Treaty

[48] Case C- C-103/05, Reisch Montage AG v Kiesel Baumaschinen Handels GmbH.

In the third pillar, now called the Police and Judicial cooperation in criminal matters (formerly Justice and Home Affairs" before the Treaty of Amsterdam "), a preliminary ruling procedure **is applicable under the strict conditions provided for in Article 35 EU.**.

It states the following:

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

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or

b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever

such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).

The preliminary reference under Article 35 is optional. It enables every Member State to make a declaration saying that it accepts jurisdiction of the ECJ to give preliminary rulings on the interpretation and validity of certain acts adopted on the basis of the EU Treaty (especially framework decisions and decisions). In such a declaration, the Member State can either opt for a system in which all of its courts can request for a preliminary ruling or for a system in which only courts of last instance will do so.

It is worth noticing that, despite the initial hesitations to attribute the ECJ a competence to rule on preliminary questions in the field of the third pillar, the overall response of the Member States has been rather positive: the majority (14) of the Member States have made a declaration accepting the ECJ's competence to give preliminary rulings in this area and most of them (11) have chosen the regime in which all national courts (not only courts of last instance) may request a preliminary ruling.

Case law

A number of judgments have already been rendered by the ECJ on the basis of its competence attributed by Article 35 EU, in particular with respect to the *ne bis in idem* principle ensuring that no one is prosecuted on the same facts in several Member States. The ***Gözütok and Brügge*** judgments[49] concerned the *ne bis in idem* principle laid down in the Convention implementing the Schengen Agreement. The ECJ has ruled that the *ne bis in idem* principle also applies when the Public Prosecutor of a Member State has discontinued proceedings without the involvement of a court. The ECJ has developed this argument in its ***Gasparini*** judgment. The ECJ clarified that the principle also applies in respect of a court decision by which the accused is acquitted because prosecution of the offence is time-barred.

More precise information on the preliminary rulings procedure in the area of cooperation in criminal matters is given by the ECJ in its ***Pupino*** judgment[50]. In this case, the ECJ ruled that the binding character of framework decisions places on national courts an obligation to interpret national law in conformity, at least when such interpretation would not be *contra legem* and would not infringe the principles of legal certainty and non-retroactivity.

12. The preliminary ruling procedure as such

Since the preliminary ruling procedure is of pivotal importance for a proper and uniform application of EU law, the ECJ can be quite scrupulous in formulating its response to a question raised by a national judge. This procedure in fact can be quite protracted. In 2003,

[49] Joined Cases C-187/01 and C-385/01, Hüseyin Gözütok v Klaus Brügge.
[50] Case C-105/03, Maria Pupino.

the average duration of proceedings was 25,5 months. In 2005, it has been reduced to 20,4 months and currently trends to 19 months to have the case decided by the ECJ. The number of cases that have been referred for a preliminary procedure has been steadily growing. Since the creation of the European Communities the ECJ has received altogether approximately 5000 preliminary ruling questions, which constitute around 50 percent of the total ECJ workload. In 1998, for example, 485 cases were commenced before the ECJ and 238 before the CFI.

Among the Member States, German courts are the most active with 1364 referrals since 1952. They are followed by France, Denmark, Italy, the Netherlands, and Belgium. On the contrary, Ireland and Luxembourg have so far referred very few cases to the preliminary reference. Finnish courts are by far the least active with 34 references since the country entered the EU in 1995. UK courts very rarely make referrals. The European Commission also initiated infringement proceedings against Sweden for non-use of 234 EC, which lead to a revision of the Swedish legislation.

A characteristic of the procedure of reference for preliminary ruling is to associate the Institutions and the Member States, which are entitled to submit observations to the Court on the cases referred.

This makes the preliminary ruling procedure not only a way of co-operation between the national judge and the Court but also a way to reinforce the uniform application of Community law. Indeed, it should be here recalled that the Court's reply to the request for preliminary ruling will be in the end binding all over the Union to the Member Sates and the European Institutions.

In particular, the European Commission always submits observations to the Court. Among the Member States, some are never represented in the procedure, like the Scandinavian countries; on the contrary, the UK is very active.

Most of the questions have come from administrative courts, labour courts, and commercial courts.

In order to lighten the ECJ's workload, the Court of First Instance (CFI) was set up in 1989 with a jurisdiction to hear certain direct actions. The rationale behind the establishment of the CFI was to set up a court which would be better placed to hear complicated cases in technical areas of law, such as competition and anti-dumping. Together with the creation of the Civil service Tribunal[51], which is competent for litigations between the Communities and its servants, this should enable the ECJ to concentrate on exercising its unifying jurisdiction under the preliminary reference procedure.

Furthermore, the new art. 225 EC as revised by the Treaty of Nice, has lifted the prohibition for the CFI to hear questions referred for a preliminary ruling under art. 234 EC, with a limitation to "*specific matters determined by the statute*" of the Court of justice. This possibility has not yet been used by the Court.

[51] Council decision of 2nd November 2004, OJ L 333 of 9th November 2004, p. 7-11

13. Conclusions and future perspectives

Preliminary references have provided the ECJ with around half of its cases and with the avenue for the development of important doctrines of Community law such as the direct effect and supremacy of EC law.

As a forum for judicial cooperation between national judges and the ECJ involving national courts in the formulation of questions to the ECJ and in the application of the ECJ statement of Community law, it has proved to be a particularly efficient mechanism. What has been achieved through such co-operation could hardly be achieved by the political decision-making and legislative process.

On the other hand, the preliminary reference system can also be quite vulnerable. It relies on national courts referring questions of Community law to the ECJ, and on their loyal and competent application of Community law both in their judgments and decisions whether or not to make a reference.

Therefore, the relationship between the ECJ and the national courts should not be regarded only as a form of dialogue or partnership. For the EU, it is essential to secure that Community law is observed in the Member States and applied uniformly. To achieve this objective, i.e. uniformity and harmonization in the application of Community law in all the Member States, it is of fundamental importance that the preliminary reference system is functioning well.

This goal is not easy to achieve. The ECJ has for long pointed to a dangerous trend towards the structural imbalance between the volume of incoming cases and the capacity of the institution to deal with them. The risk is that the impact of ECJ decisions will diminish as their number increase and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned. This would undermine those functions that have become characteristic of its role within the Community legal order, namely to guarantee a respect for the distribution of powers between the Community and its Member States and between the Community institutions, the uniformity and consistency of EU law, and to contribute to the harmonious development of the law within the European Union.

With regard to the last institutional developments in the Community, it is particularly important to find suitable solutions in order to avoid a negative impact on the current state of the Community judicial system. The ECJ is faced with an intensification of its judicial tasks under the Treaties of Amsterdam and Nice. Additionally, various Conventions adopted by the Council under the third pillar of the EU have further extended the jurisdiction of the ECJ. The process of EU enlargement also forms a part of the framework for this discussion.

In this context, the ECJ expects an increase of preliminary references in the following areas:

- Title IV of the EC Treaty (visas, asylum, immigration, and other policies relating to the free movement of persons);
- Title VI of the Treaty on European Union (police and judicial cooperation in criminal matters);
- Some conventions concluded between the Member States on the basis of Article 31 of the Treaty on European Union.

To face an increased number of requests for preliminary ruling, various measures have been envisaged.

With a view reducing the time for the delivery of ruling on preliminary reference, the Rules of Procedure of the Court of Justice have been revised to allow an accelerated procedure for the treatment of more urgent cases. As regards the references for a preliminary ruling, this accelerated procedure is laid down in art.104bis of the Rules of Procedure.

The recent proposal of the Court to set up a new "**emergency preliminary ruling procedure**"[52] constitutes a further step in this quest for a renewed efficiency.

[52] See section 10