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Ascertaining the Substance of Community Rights

*"Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and of its institutions, a detailed knowledge of the Treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. ...where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational court is equipped to carry out the task in a way that no national judge whatever his linguistic skills could rival....the choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community may require"*¹

*"I do not consider that it is appropriate, or indeed possible, for the Court to continue to respond fully to all references which, through the creativity of lawyers and judges, are couched in terms of interpretation, even though the reference might in a particular case be better characterised as concerning the application of the law rather than its interpretation.... the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court."*²

Ascertaining the substance of Community rights

This chapter discusses the role of Article 234 EC in the enforcement of Community law. The respective roles of ECJ and of the referring court, and practice in the UK courts will also be considered.

3.1 A step in the domestic proceedings

UK courts have shown willingness to adapt to Community methods of interpretation³, yet, like other national courts, they have in applying Community law, inevitably encountered problems concerning its interpretation and validity⁴.

The reference procedure enables a national court or tribunal, when confronted with questions about the meaning of a provision of Community law or questions relating to Community requirements concerning the effective protection of Community rights, to stay its own proceedings and refer these questions to the ECJ in order to obtain an authoritative ruling on the law to be applied or on how to apply it. The reference is an intermediate step in proceedings which *begin* and *end* in the national court. Accordingly, the success of the procedure depends primarily on national courts.

The procedure is based on a distinct separation of functions between national courts on the one hand, and the ECJ on the other. It does not give the ECJ jurisdiction to take cognisance of the facts of the case, or to criticise the reasons for reference⁵; its jurisdiction is limited to the interpretation of the

rules of Community law. The facts and the relevant rules of national law must be established by the referring court which will decide the case by applying, to the extent necessary, the interpretation of the relevant rules of Community law provided by the ECJ. In practice, this clear division of roles is difficult to observe.

An illustration of the difficulties involved is provided by the case of *Arsenal Football Club plc v M. Reed*⁶. In that case Laddie J considered he was not bound to follow the ruling of the ECJ⁷, as in his view the ECJ has exceeded its jurisdiction. Laddie J felt the need to remind the ECJ that it was not exercising a normal appellate function and so could not determine or reverse issues of fact. On appeal, the Court of Appeal⁸ confirmed that under the division of functions foreseen by Article 234 it is for the national court alone to find the facts⁹. In the end the ECJ was not found by the Court of Appeal to have overstepped its jurisdiction although it had made findings of fact. Accordingly, the ECJ ruling was applied by the Court of Appeal. Laddie J was overruled, because he had failed to consider the facts from the perspective of what constitutes the essential function of a trademark right¹⁰.

3.2 The different functions served by Article 234

3.2.1 Helping the development of the Community legal order

Article 234 EC serves various functions. It has allowed the Community legal order to develop, as the scope and substance of Community obligations is often explained and expanded upon in the enforcement process¹¹. Thus, on the occasion of a request for a preliminary ruling by the Chairman of the Industrial Tribunal of Truro, it was established that the Equal Treatment Directive was no longer "confined simply to discrimination based on sex"¹². The procedure has also been instrumental in defining the outer limits of Article 28 EC, as the Sunday-trading saga and *Keck and Mithouard*¹³ illustrated. The importance of the procedure and the role played by national courts in the development of Community law can hardly be overstated. The twin pillars of Community Constitutional law, direct effect and primacy, were laid down in Article 234 EC references in the context of small-claims disputes; and so were leading judgments regarding general principles of law.

Article 234 EC also guarantees the independence and autonomy of Community law in so far as it prevents varying interpretations of the same provisions in the different national courts, leading to different applications of the Treaties in the Member States. To ensure uniformity in the interpretation and application of Community law, establishing the ECJ as a supreme court of appeal would have been desirable, but this was not politically acceptable as the Member States did not want a court that could overrule their own supreme courts. The solution was to provide for a system of co-operation between equals, the national judici-

aries and the ECJ⁴. Uniform interpretation and application of Community law are fundamental requirements in the Community. The establishment of a Court of First Instance, in respect of actions requiring close examination of complex facts, was intended to improve the judicial protection of individual interests, but it was equally meant "to enable the Court of Justice to concentrate its activities on its fundamental task of ensuring the uniform interpretation of Community law" and thereby "maintain the quality and effectiveness of judicial review in the Community legal order⁵."

3.2.2 Ensuring effective protection of Community based claims

The procedure does not merely serve Community interests. Through Article 234 EC, individuals have gained access to direct legal protection of their Community based claims, even if such protection is limited by the procedural and material scope of the Article. However, if the wishes of the parties may occasionally play a role in persuading the national judge to refer, and if in the UK the parties themselves are encouraged to agree upon the form of the questions and the material to be placed before the ECJ, litigants have *no* Community right to have their case referred to the ECJ;

*"Article 177 does not constitute a means of redress available to the parties to a case pending before a national court"*⁶.

The procedure allows individuals to control and prevent possible violations of Community law by the Member States. More fundamentally, Article 234 EC allows some obstacles to the enforcement of Community obligations to be challenged. In the words of the Court:

*"whilst it thus aims to avoid divergences in the interpretation of Community law which national courts have to apply, it likewise tends to ensure this application by making available to the national judge A MEANS OF ELIMINATING DIFFICULTIES WHICH MAY BE OCCASIONED BY THE REQUIREMENT OF GIVING COMMUNITY LAW ITS FULL EFFECT within the framework of the judicial systems of the Member States."*⁷

The *Factortame* litigation provides an illustration of the different functions served by Article 234 EC. The challenge of the Merchant Shipping Act 1988 gave rise to three separate sets of questions. One involved determining the scope of Article 52⁸, another concerned the extent of the obligations of a national court to protect the interim position of litigants trying to ascertain putative Community rights⁹, and the last one concerned the award of a remedy in damages²⁰.

3.2.3 The private enforcement model is not subordinate to infringement proceedings

Besides ensuring a correct and uniform interpretation and application of Community law by national courts, Article 234 EC has strengthened the mechanisms designed to secure Member States' compliance with their Community obligations:

"The vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States²¹".

The preliminary ruling procedure allows individuals to control and prevent possible violations of Community Law by the Member States. A direct action enables the Commission to force Member States to comply with their Community obligations. Nonetheless, there remains differences in what can be achieved in the context of a preliminary reference as opposed to a direct action²², and it does not always appear to be objectively justifiable.

3.2.3.1 Two different remedies

The two actions may co-exist, but they do not achieve the same results. Actions brought by individuals in national courts and those brought by the Commission under Article 226 are not mutually exclusive and the Court has been dealing, at the same time, under the two procedures with the same course of action by a Member State²³. However, under Article 234 EC the Court has no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article 226²⁴. The ECJ cannot rule on issues of national law²⁵, and it cannot rule on the compatibility of national law with Community law²⁶. This disclaimer of jurisdiction is at times one of form rather than substance. By contrast, in Article 226 proceedings, the target is often the national rule.

3.2.3.2 The national court remains free to make a reference

Another set of issues raised by the availability of the two actions concerns the effect to be attached by a national court to a decision by the Commission to discontinue infringement proceedings when the dispute before it involves the same piece of Community legislation²⁷. Should the decision of the Commission not to proceed beyond the administrative phase of an infringement procedure have any bearing on the decision of the national court to make a reference?

The fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has no effect on the obligation upon a court of last instance of that Member State to refer to the

Court of Justice a question of Community law in relation to the legislation concerned.

A Commission decision to pursue or not to pursue infringement proceedings has no bearings on litigation before a national court. This is because the Commission does not have the power to determine conclusively, either by reasoned opinion or by other statements of its attitude under that procedure, the rights and duties of a Member State, or to give it guarantees concerning the compatibility of a given line of conduct with the Treaty. As the ECJ recalled, only it can determine the rights and duties of Member States and only it can appraise their conduct. This reading of Articles 226 EC, 227 EC and 228 EC is welcome. First, that is because it is clear that it is for the Court rather than for the Commission to state authoritatively what the law is. Secondly, it offers the advantage of allowing breaches of Community law to be unveiled even where the Commission has decided not to proceed to the judicial phase, as indeed the way in which the Commission exercises its discretion under Article 226 EC is not beyond criticism.

3.3 What can go wrong

The ECJ still has an open-door policy: it encourages references and reformulates inadequate questions. Still, it now takes special care to ensure that the procedure is not employed for purposes not intended by the Treaties. The ECJ may declare a reference inadmissible, either because the referring body lacks power to refer, or because the question cannot be considered as acceptable.

Can one identify a type of court from which questions are accepted? Are there particular types of questions which are refused?

3.3.1 Some bodies do not have jurisdiction to refer

Article 234 confers jurisdiction on any 'court' or 'tribunal'. The concept does not refer to the internal law of the Member States. The fact that national law does not recognise a body as a 'court' or 'tribunal' within the meaning of Article 234 is irrelevant²⁸. Conversely, the fact that national law does so recognise is not conclusive²⁹. The ECJ has defined the terms court or tribunal for the purpose of Article 234 by specifying the criteria a qualifying forum must satisfy. The body must be established by law, have a permanent jurisdiction, be bound by rules of adversary procedure and be required to give a ruling, in complete independence, in proceedings intended to result in a judicial decision. The requirement of independence seems of particular importance, although it "should be interpreted more rigorously"³⁰ – a comment made *à propos* the admissibility of preliminary rulings from administrative authorities³¹.

Administrative³² or disciplinary³³ tribunals, a professional body appeals committee³⁴ and a board supervising the procedures for the award of public

contracts³⁵ have been held to constitute a court or tribunal; but a public prosecutor or a private arbitrator³⁶ do not qualify and neither does a Director of Direct Taxes and Excise Duties³⁷:

"The concept of a Court or tribunal within the meaning of Article 177 of the Treaty is a concept of Community law which, by its very nature can only mean an authority acting as a third party in relation to the authority adopting the decision under appeal."

In Member States where, in the resolution of taxation matters, an administrative stage precedes the judicial phase, this delays the possibility for tax payers to have a preliminary question referred to the ECJ³⁸.

Likewise, the decision not to allow private arbitrators to refer questions to the ECJ³⁹ creates additional delay for litigants. National courts in their role of supervisors of arbitration proceedings have a duty to ensure the observance of Community law and to refer. In England, the Court of Appeal was prepared to adopt a different approach when dealing with an application for leave to appeal against an arbitration award in *Bulk Oil v. Sun*⁴⁰. This can in fact be seen as an application in anticipation of the ECJ position as now established in *Eco Suisse*. This judgment established that as a result of the arbitrator's inability to request preliminary rulings on questions of Community law, it is up to the national courts exercising their powers of supervision and review over arbitral proceedings and awards to examine questions of Community law and if necessary to make reference to the ECJ. Thus, in *Eco Suisse*, while the ECJ recalled that:

"an arbitration tribunal constituted pursuant to an agreement between the parties is not a 'court or tribunal of a Member State' within the meaning of Article 177 of the Treaty since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator."

The ECJ also considered that, given that arbitrators, unlike national courts and tribunals, are not in a position to request a preliminary ruling on questions of interpretation of Community law, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied. Accordingly, questions concerning the interpretation of the prohibition laid down in Article 81(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award, and it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

3.3.2 Some questions are inadmissible

National courts alone have a direct knowledge of the facts of the case, hence they are in the best position to appreciate, with full knowledge of the matter before them, the necessity for preliminary rulings to enable them to give judgment⁴¹. So, where the referring court has duly translated a Community law point into a question of interpretation, the Court is in principle bound to give a ruling. There are a number of limits to this principle:

- 1) the Court cannot answer questions relating to the validity of national law, although it has often extracted from questions imperfectly formulated those which alone pertain to the interpretation of the Treaty;
- 2) the Court refuses to answer 'hypothetical questions'⁴², or entertain 'fictive litigation', although in the context of questions regarding the validity of Community legislation it has entertained actions which have been considered as being hypothetical in nature, since the Community legislation involved was not yet in force⁴³.

In addition, the Court has shown a greater willingness to examine the relevance of questions submitted to it⁴⁴, particularly when submitted by inferior national courts⁴⁵. So, whilst in theory, the ECJ has no jurisdiction relating to the facts of the case, in practice, closer examination of the conditions in which cases are referred to it, has, on occasion, appeared necessary in the light of some abuse of the procedure.

The Court's willingness to co-operate with national courts remains the rule as evidenced by *Enderby*⁴⁶:

"Article 177 provides the framework for close cooperation between national courts and the Court of Justice, based on a division of responsibilities between them. Within that framework, it is SOLELY FOR THE NATIONAL COURT before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both THE NEED FOR A PRELIMINARY RULING in order to enable it to deliver judgment and the RELEVANCE OF THE QUESTION which it submits to the Court. Accordingly, where the national court's request concerns the interpretation of a provision of Community law, the Court is bound to reply to it, unless it is being asked to rule on a purely hypothetical general problem without having available the information as to fact or law necessary to enable it to give a useful reply to the questions referred. In this case, the Court of Appeal, like the tribunals which heard the case below, decided in accordance with the British legislation and with the agreement of the parties to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which may require more complex investigation. It is for that reason that the preliminary questions were based on the assumption that those jobs were of equal value. [...] Where, as here, the Court receives a request for interpretation of Community law which is NOT MANIFESTLY UNRELATED TO THE REALITY OR THE

SUBJECT-MATTER OF THE MAIN PROCEEDINGS, *it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to verify subsequently if that should prove to be necessary*⁴⁷."

*Leclerc Siplec*⁴⁸ also clarified the Court's jurisdiction and role under Article 234. Since it has no jurisdiction to give an advisory opinion on general or hypothetical questions of law, examination of the conditions in which the case had been referred may in certain circumstances be necessary in order to determine whether the reference is admissible. Requests for preliminary rulings have been declared inadmissible where Article 234 was used as a 'procedural device'⁴⁹ or an 'artificial expedient'⁵⁰ by parties who engage in contrived litigation in order to obtain a finding that some provisions of national legislation are contrary to Community law⁵¹. Still, the fact that the parties to the main proceedings are in agreement as to the result to be obtained makes the dispute no less real.

The ECJ has also declined jurisdiction to give a preliminary ruling on a question raised before a national court where *the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings*⁵².

3.3.2.1 The viability of the system commands some restraints

So, the Court has demonstrated a willingness to determine the limits of its jurisdiction. Some control over the many requests for a preliminary ruling submitted is at any rate required to secure the viability of the procedure. The ECJ itself⁵³ acknowledged the practical problems which beset the present system, namely its increasing workload and the time which can elapse before a ruling is obtained. In May 1999 it published a report on "The future of the Judicial System of the EU" where it highlighted the "dangerous trend towards a structural imbalance between the volume of incoming cases⁵⁴ and the capacity of the instruction to dispose of them." It warned clearly that without adoption of measures, "the new areas of jurisdiction⁵⁵ will inevitably result in delays on a scale which cannot be reconciled with an acceptable level of judicial protection in the Union". It also warned that "it would no longer be able to apply to cases the thorough consideration necessary for it to give a useful reply to the questions referred."

Therefore it is suggested that the insignificant percentage of cases where the ECJ declined jurisdiction should be treated as "a small price to pay for optimising the Court's resources"⁵⁶. Furthermore, from a UK perspective, the ECJ capacity to limit the use of Article 234 EC is unimportant. Only one reference from the UK courts has, to date, been declared inadmissible⁵⁷, being a case where the ECJ was invited to construe Community law outside its Community field of application. The applicant bank had started an action in England for the repayment of sums paid to the City of Glasgow pursuant to a contract subsequently rescinded. A statute broadly taking over the solutions adopted in the Brussels Convention governs conflicts of jurisdiction between the courts of

England and Scotland. Glasgow City Council considered that the Scottish courts had jurisdiction, and the Court of Appeal sought preliminary rulings on the interpretation of the statute from the ECJ to determine restitution actions in the context of the Brussels Convention. The ECJ declared the reference inadmissible as the Brussels Convention itself was not applicable in the circumstances of the case, even if conflicts of jurisdiction between the English and Scottish courts were governed by rules inspired by it. Regardless, the House of Lords held that full regard should be had to decisions of the ECJ interpreting the Conventions⁵⁸.

The ECJ has issued a note for guidance on references by national courts for preliminary rulings⁵⁹ which openly invites them to exercise a greater measure of self-restraint. It contains "practical information which, in the light of experience in applying the preliminary ruling procedure, may help prevent the kind of difficulties the Court has sometimes encountered." It might be helpful if the ECJ or the Commission could ascertain whether litigants or national courts have found these guidelines useful and whether they have had any impact in curbing the number of unnecessary references.

The success of the procedure rests largely on the willingness of national courts to co-operate. National courts must make the reference and accept and apply the judgment of the Court. Even so, the victory can be a Pyrrhic one when interim relief was not forthcoming⁶⁰.

3.4 The national courts as main players

National courts too may be tempted to limit recourse to Article 234. One must distinguish between courts with a *power* and those with a *duty* to refer. But, before examining how UK courts have exercised their discretion or discharged their obligation, let us briefly examine the distinction.

Reference to the ECJ is mandatory if the court is one "against whose decisions there is no judicial remedy under national law". This appears straightforward. Still, the question of which courts are required to ask for a preliminary ruling and which have the option has in fact been the subject of some controversy in the UK. This is rather odd given that the text of Article 234 EC is unequivocal. It suggests that the obligation extends not only to those courts which are never subject to appeal, but also to those courts whose decisions in the cases in question are no longer subject to appeal. In other words, not only are the highest courts of each Member State under an obligation to refer, but so are any courts in a case from which no appeal lies. This raises an issue of particular relevance in the UK⁶¹, where there is no systematic right of appeal, but rather a system by which an appeal court may be asked for and may grant or refuse 'leave to appeal' against not only interlocutory but also final judgments. Should a court with a power to grant or refuse leave to appeal be treated as a final court? In *Pharmaceutical Society*⁶² the Court of Appeal – although it did make a reference – did not think so:

"a court or tribunal below the House of Lords can only fall within the last paragraph where there is no possibility of any further appeal from it. There is a judicial remedy against a decision of this court by applying for leave to this court and then to the House of Lords itself if necessary."

In *Chiron v. Murex*⁶³ the appellant argued that the Court of Appeal fell within Article 234(3) EC on the ground that leave to appeal to the House of Lords had been refused and that, therefore, the Court of Appeal was the court of last resort. The Court of Appeal declined to refer, first, on the ground that, as it had already given judgment, it was no longer acting in a capacity which enabled it to resolve the dispute. Moreover, it stated that the right to petition the House of Lords for leave to appeal was a judicial remedy, which entailed that it, the Court of Appeal, could never fall within Article 234(3) EC. This reasoning was explicitly confirmed in *Trent Taverns v. Sykes*⁶⁴.

In England, in criminal matters, there can be no appeal to the House of Lords unless a point of law is certified for consideration by the House of Lords. Further, there is no appeal against the refusal of the Court to certify a point of law. Although in *Magnavision*⁶⁵ it was accepted that "[...] by refusing to certify a point of law we have turned ourselves into a court of final decision", the Divisional Court refused to make a reference. Likewise, in *Hagen v. Moretti*⁶⁶, Buckley L.J. accepted that the ultimate court of appeal "is either this court if leave to appeal to the House of Lords is not obtainable, or the House of Lords."

Accordingly, "parties seeking a reference in these circumstances must ensure that the court be asked during argument to proceed on the basis that if it is minded to refuse leave to appeal to the House of Lords, it must approach the question of a preliminary ruling on the basis that it is already a final court⁶⁷", or that it should give leave, which in practice would be done⁶⁸.

This advice holds true notwithstanding the judgment of the ECJ in *Lyckeskog*⁶⁹. In *Lyckeskog*, the ECJ had to consider whether a national court or tribunal whose decisions may be the subject of appeal only after a declaration of admissibility has been issued must be considered to be a court or tribunal against whose decisions there is no judicial remedy under national law within the meaning of Article 234 (3) EC. The ECJ established through an inquiry with the referring court that, should a question arise as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage. Accordingly, the ECJ ruled that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 234 EC.

3.4.1 Discretionary jurisdiction

The attitude of inferior courts is particularly important. They can avoid the costly and cumbersome procedure involved in pursuing an action through to the final court⁷⁰:

"the Court of Justice in Luxembourg is in a far better position to reach a decision which is COMMUNAUTAIRE than this court, ... an immediate reference will obviously save considerable time and costs".

Yet, inferior courts may be disinclined to make references; alternatively their decision to refer may be the subject of an appeal to a superior court.

3.4.1.1 A matter for the court hearing the case

The discretion to refer is a matter for the national court alone: "a court has an unfettered discretion to refer if it considers that a decision on the question is necessary in order to enable it to give judgement"⁷¹. The Court of Appeal has indicated that discretion means it is for it to decide whether a preliminary ruling is necessary to enable it to give judgment; and not that a ruling from the ECJ is necessary to enable it to reach a decision on the question.

In *Bulmer v. Bollinger*⁷² Lord Denning set out guidelines. In his view, a reference was only "necessary" if: the point of reference was conclusive for the outcome of the case; the ECJ had not already given judgment on the question; the matter was not considered to be reasonably clear and free from doubt and the facts had been decided. Further, the court contemplating a reference was to exercise its discretion only after considering: the delay in obtaining a ruling⁷³, the need to avoid overloading the ECJ, the wishes of the parties and the expenses of obtaining a ruling. Finally, he reminded English courts that it would be preferable if English judges decided the point themselves, but that if a reference was to be made, they should formulate questions clearly – another reason for ascertaining the facts first.

Denning's guidelines had some influence: they seemed to discourage the use of the procedure. They were reviewed in *Samex*⁷⁴ and from then on a more *communautaire* approach prevailed. The "aberrant interpretation"⁷⁵ of the notion of quantitative restrictions and the ensuing results might also explain the change in the attitude of, at least, the English judiciary. Lord Diplock in *Henn and Darby*⁷⁶ observed:

"it serves as a TIMELY WARNING to English judges not to be too ready to hold that because the meaning of the English text (which is one of six of equal authority⁷⁷) seems plain to them no question of interpretation can be involved."

The national court has also complete discretion as to the timing of the reference and the ECJ confirmed that the considerations of procedural organisation and efficiency dictating timing had to be weighed by the national courts⁷⁸. Such timing has varied.

In England, requests for a preliminary ruling have been made in interlocutory proceedings⁷⁹, and on the grant of leave to apply for judicial review⁸⁰. However, Lord Denning's requirement that the relevant facts be established has generally been observed. In *Lord Bethell v. Sabena*⁸¹ it was held that:

"until all the facts have been investigated, it is impossible to frame a question which will ensure that the court is provided with real assistance."

and in *Hagen v. Moretti*⁸²:

"for a court to know which are the right questions to formulate, it is most important that all the relevant facts be established".

In Scotland, guidelines were given by Lord Cameron⁸³:

"a reference to the European Court can competently be made when it appears it may be necessary to do so at any appropriate stage of a litigation. Having regard, however, to our Scottish system of pleading, I would not normally be persuaded that such a necessity, with whatever degree of urgency that word may be interpreted, should be held to arise until the pleadings have been adjusted and the real question in dispute focused on the pleadings. I am fortified in this view of the matter by reference to the judgment of Lord Denning in the case of BULMER v. BOLLINGER. In particular, I should find it difficult to make such a reference where preliminary issues of title, competency and relevancy remain unresolved".

The advice that the facts should always be decided first before any question of a preliminary ruling arises has not always been found entirely sound, on the ground that a national court may not be able to evaluate the relevance of a particular fact until the point of Community law has been resolved⁸⁴. Besides, in practice, when the referring national court had not determined all the relevant findings in fact, the Court tended to offer a very general interpretation leaving the national court to deal with further procedure⁸⁵. Further, where the interpretation required depended upon determination of facts as well as law, and although the fact finding powers lies principally with the national courts making the reference, the ECJ has on occasion shown itself willing to admit or call for evidence⁸⁶ to explain the background or complete the facts as stated in the order for reference so as to enable it to understand the question better.

At present, given the Court's emphasis on its need to have a clear understanding of the factual and legal context⁸⁷ of the proceedings, ascertainment of the facts seems advisable. It also seems prudent given that the Court has,

albeit on recent and rare occasions, declared the reference inadmissible when the description of the legal and factual background of the case has been found inadequate⁸⁸. Finally, one must be aware that the preliminary ruling procedure is ill-suited to the process of fact finding⁸⁹.

3.4.1.2 Appeal against a decision to refer

As a matter of Community law, the national court's discretion to refer cannot be fettered by decisions of superior courts⁹⁰. In this way, Article 234 EC can alter the powers and rules of procedure of national courts⁹¹. It was observed that

*"there can be no doubt that any court or tribunal has the right at all times to refer a question of interpretation to the Court of Justice under Article 177. But it is much more difficult to decide whether a national court which, by virtue of its national law, is no longer able to give a ruling on a question, is given back the right to do so by Article 177 of the EEC Treaty"*⁹².

Such analysis overlooks the fact that, when giving effect to Community law, national judges act as Community judges. Accordingly national judicial procedures, conventions codes or practices may have to be set aside, an area which nowadays ought to be free from difficulty⁹³, but is not⁹⁴.

Rheinmühlen also establishes that inferior courts in a Member State cannot be bound on a question of Community law by any decision of their superior courts, unless the higher court has itself obtained a ruling from the ECJ on this very issue. A UK court therefore must remain free to refer notwithstanding the existence of what would ordinarily be the binding authority of a superior UK court on the point.

Given that it was established that, as a matter of Community law, the discretion of national courts should not be interfered with, some Member States took steps to prevent appeals against decisions by lower courts to refer⁹⁵. By contrast, in other Member States decisions to refer have been questioned⁹⁶. In the UK, this has been rare. In England, the Court of Appeal has set aside an order of the Divisional Court making a reference⁹⁷, but only because it was completely satisfied that it could resolve the Community law issue involved.

"I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear, if the facts have been found and the Community law issue is critical to the Courts' final decision, the appropriate course is to refer unless the national court can with complete confidence resolve the issue itself. In considering whether it can with COMPLETE CONFIDENCE resolve the issue itself, the national court must be mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community

*and of the great advantages enjoyed by the Court of Justice in construing Community instruments.*⁹⁸

This is a welcome decision. National judges have been invited and encouraged for years to become and behave like Community judges. It is therefore hardly surprising that their familiarity with Community matters would grow and that, as a result, their confidence should increase⁹⁹. As a matter of fact, reliance on the increased and increasing maturity of national courts is essential to the Community legal system. National courts must not only act as Community courts, they must be able to fulfil that role for the most part on their own. This judgment is helpful in providing guidance as to when a national court should feel confident it can resolve Community law issues itself.

The Court of Appeal also gave judgment¹⁰⁰ on an appeal against a decision to make a reference for a preliminary ruling. In a case concerning parallel imports of pharmaceutical products, the High Court considered it necessary to refer a series of questions to the Court of Justice for a preliminary ruling. That Court had already rejected the application by a number of the parties for leave to appeal against the decision making the reference. Those parties subsequently applied to the Court of Appeal for leave to appeal. The Court of Appeal, while accepting that the appellants' arguments on the interpretation of the law at issue in the main case might be correct, rejected the appeal, stating that the High Court was right to consider that the questions arising in the case before it were not clear and that the matter should be referred to the Court of Justice, either through the High Court itself or through another court. Furthermore, the Court of Appeal took the view that, even if leave to appeal had been given, it was most unlikely that that court would conclude that the reply to the questions raised was so obvious that no reference for a preliminary ruling was necessary. Lastly, it added that a decision to make a reference to the Court of Justice should not be adopted until the national procedure had reached a stage enabling the national court to specify the factual and legal framework of the questions to be submitted. The Court of Appeal considered that that stage had been reached after the High Court had given judgment after setting out the facts of the case. The Court of Appeal declared that it was not bound to intervene in the High Court's exercise of its discretion unless that court had failed to take account of a matter of which it should have taken account, or else it took into account matters that were not material or unless its decision was manifestly wrong. That was not the case with the judgment of the High Court at issue. The Court of Appeal therefore rejected the appeal. In other words, the Court of Appeal would not, save exceptional circumstances, interfere with a decision to refer. It is suggested that from a Community perspective the exceptional circumstances envisaged by the Court of Appeal are not problematic.

In Scotland, the High Court¹⁰¹ was satisfied it had jurisdiction¹⁰² to hear an appeal against a decision of a judge of first instance to seek a preliminary ruling, but decided it would not be justified in interfering with the exercise of the Sheriff's discretion to refer unless it were thought that the decision of the Sheriff was plainly wrong. Generally the court only ensures that questions are properly framed rather than interfering with the decision to refer. Where an Article 234 reference is pending in another case, the outcome of which may be relevant to other domestic proceedings, it may then be possible to obtain a stay of proceedings until it has been heard¹⁰³.

Finally it is important to note that Article 68(1) EC has removed the right of appellate courts to refer cases on the interpretation of any act adopted under Title IV EC. This has been held to constitute an unfortunate loss of judicial protection for people domiciled in Member States bound by the Brussels I Regulation¹⁰⁴.

3.4.2 Courts with an obligation to refer

The particular objective of the obligation to refer for courts against whose decisions there is no judicial remedy under national law is to prevent a body of national case law not in accord with the rules of Community law from coming into existence in any Member State¹⁰⁵. This too is an area which nowadays should be free from difficulty, but is not. The ECJ has recently explained again¹⁰⁶ why the obligation to refer should be complied with.

According to case-law that is well established, that obligation to refer is based on co-operation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice; and it is particularly *designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State* (emphasis added)

3.4.2.1 Is *Cilfit* still good law?

The obligation laid down in Article 234(3) is not absolute. The authority of an interpretation under Article 234 already given by the ECJ, especially on a materially identical question, may relieve a national court against whose decisions there is no judicial remedy from its obligation to make a reference¹⁰⁷. In addition, *Cilfit*¹⁰⁸ established that there is no obligation to refer,

"where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions,

even though the questions at issue are not strictly identical ... or where 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".

At the same time, however, the ECJ reminded national courts that they should consider *carefully* before deciding points of Community law on their own, given

"..the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community".

Accordingly *Cilfit* appears a rather ambiguous limitation of the obligation to refer¹⁰⁹:

"the real strategy of CILFIT was not to incorporate an ACTE CLAIR concept into Community law. It is to call the national judiciaries to circumspection when they are faced with problems of interpretation and application of Community law."

Today, the strict requirements laid down in *Cilfit* need reconsidered. Advocate General Jacobs remarked that they were designed at a time when national supreme courts were defiant of the authority of the ECJ, a situation which has changed. If today, occasionally, final courts still fail to refer, and even adopt a wrong interpretation of Community law, this reality is insufficient to warrant a strict interpretation of the obligation to refer.

*"It seems to me however disproportionate to base a general theory of Article 177 on isolated instances of what might amount to its improper application. Such a theory will in any event not resolve the problem if the national court is deliberately taking a different view. That theory would require the application of a sledge hammer without cracking the nut."*¹¹⁰

3.4.2.2 No defiance in the UK courts

In the UK, in spite of some refusals to refer, there has never been an established pattern of defiance of the authority of the ECJ unlike the situation with the French Conseil d'Etat¹¹¹. The UK courts' reasons for a refusal to refer have varied. Sometimes they explained that no referral was made to seek interpretation as none was required. Thus, in *Finnegan*¹¹², the House of Lords found that since UK, rather than EC law governed the case, the court best placed to provide an interpretation was a UK court and not the ECJ. In *R v. London Boroughs Transport Council ex parte Freight Transport Associations Ltd*, the House of Lords held that "no plausible grounds were advanced for a reference to the ECJ"¹¹³. In a criminal matter, the High Court found that it was not under any obligation to refer, because it did not require an interpretation¹¹⁴. Indeed, in the light of the

fact that final judgment had already been given, the court was *functus officio* and the case was no longer 'pending' within the meaning of Article 234 (4).¹¹⁵ Finally no question of interpretation can arise where the meaning of a Community provision is clear. In spite of isolated resorts¹¹⁶ to the doctrine of *acte clair*, both in Scotland and in England, overall¹¹⁷, the UK courts seem to be aware they should hesitate before reaching the conclusion that the matter is clear¹¹⁸ and seem to be fully aware of the full implications of *Cilfit*, since they have stated that there is an obligation to refer where there is a reasonable doubt as to the interpretation of the provision¹¹⁹.

In the UK, a deliberate refusal by a court of final appeal to comply with its obligation to refer could potentially be open to a challenge. With the entry into force of the Human Rights Act 1998, it is now open to a party to argue that a refusal to refer violates the right to effective judicial protection and that accordingly a remedy be provided under national law. An analogy could be drawn with the German experience where a refusal to comply with an obligation to refer has been treated as arbitrary and as constituting a violation of a fundamental right. The German Constitutional Court provided a remedy under national law when a German court unreasonably refused to refer a case to the ECJ. It held that no one should be removed from the jurisdiction of their lawful judge¹²⁰, who in matters of Community law is the ECJ.

3.4.3 Interpreting and Applying the Court's ruling

The ruling of the ECJ is binding on the referring court¹²¹ and the operative part of the judgment should always be interpreted in the light of the reasoning that precedes it.¹²²

Occasionally, the temporal effect of preliminary rulings has given rise to difficulties. The basic rule is that the interpretation which the ECJ gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule

*"as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied."*¹²³

Exceptionally¹²⁴, the ECJ may,

"in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to

restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships”.

Therefore the ECJ *only* has the power to limit the temporal effect of a ruling¹²⁵, although it may be – and has been – asked to reconsider the question of a temporal effect. Thus, in *Barber*, given “overriding considerations of legal certainty” and the need not to “upset retroactively the financial balance of many contracted-out pension schemes”, the ECJ decided that the direct effect of Article 141 EC

*“may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.”*¹²⁶

The ways in which national rules governing time limits for lodging a claim may also limit the temporal effect of a preliminary ruling will be explored later¹²⁷.

If interpretation and application can theoretically be distinguished, and if the ECJ has been careful to redraft questions relating to the validity of national law, national courts often have little choice in applying the Court’s ruling. As both the major and minor premises are already fixed, national courts have only to pull the trigger, for the aim has already been taken¹²⁸. The blurring of the line between interpretation and application has been typified as just one of the manifestation of the transformation of the relationship between equals into the judicial hierarchy characteristic of judicial systems in federal systems¹²⁹.

3.5 The practice

3.5.1 Some figures

Annexes to the Annual Reports on Monitoring the Application of Community Law contain comments on the Application of Community Law by national courts¹³⁰. The following tables are extracted from the 18th Annual Report which highlights that preliminary rulings for that year represented 44.5% of all cases brought before the ECJ.

Number of references in the UK 1990-2000

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
12	13	15	12	24	20	21	18	24	22	26

In 1996¹³¹ UK courts made 21 references, 3 of which originated in the House of Lords. In 2000 4 emanated from the Court of Appeal treated as court of last instance, a pattern consistent with that observed in other Member States and

consistent with practice in recent years as evidenced by the breakdown of all UK references by year and type of court¹³². Research carried out by the Research and Documentation Department of the ECJ did not show any cases in the UK where decisions against which there was no appeal were taken without a reference for a preliminary ruling even though they turned on a point of Community law whose interpretation was less than perfectly obvious¹³³. No indication was given as to whether these statistics took account of the leave of appeal issue.

The research appears to be carried out by the Commission on the basis of data compiled by the Research and Documentation Directorate and Computing Division of the Court of Justice. The Research concentrated on the following questions:

1. (i) Were there cases where decisions against which there was no appeal were taken without a reference for a preliminary ruling even though they turned on a point of Community law whose interpretation was less than perfectly obvious?
(ii) Were there any other decisions regarding preliminary rulings that merit attention?
2. Were there cases where courts, contrary to the rule in Case 314/85 *Foto-Frost*, declared an act of a Community institution to be invalid?
3. Were there any decisions that were noteworthy as setting good or bad examples?
4. Were there any decisions that applied the rulings given in *Francovich*, *Factortame* and *Brasserie du Pêcheur*?

The criteria used in the selection of these topics are not explained. Furthermore, the responses to question 3 – noteworthy decisions setting good or bad examples – are given without any indication of the category in which they fall, nor any indication of the reasons why the Commission considers these decisions ought to be regarded as good or bad examples. Accordingly, the usefulness of such research remains unclear. It is suggested that the ECJ and the Commission together with national courts and academia should reflect on the types of information which should be gathered and analysed.

The breakdown by jurisdiction is as follows. In England, towards the end of 1995, the Court of Appeal had referred an aggregate of thirty cases, whilst the House of Lords had only made seventeen referrals, 34% of referrals from the UK emanate from the High Court of Justice (seventy nine referrals)¹³⁴. Scotland has one of the lowest number of references *per capita* of any jurisdiction in the Union, and made no reference in the first ten years of UK membership. The subject matter of cases referred by UK courts break down as follows: questions concerning labour law come first, mainly from the area of equal pay and equal treatment, then agriculture and fisheries, then questions relating to free movement of goods and questions on Social Security. On one view therefore, UK courts make reference in order to ascertain the requirements of Community law principally in areas where it applies to purely internal matters.

3.5.2 Conflicting views on the success of the procedure in the UK.

In the context of preliminary rulings, both Member States – including third party Member States – and Community institutions have the option of intervening and making observations to the ECJ. The UK Government intervened in nearly 80% of cases coming from UK courts, a figure which no other Government matches, an indication that “not only the courts of the UK but also its Government takes a strong interest in European Law”³⁵. Extra-judicial comments view from Luxembourg judges have been very positive. They included the facts that Courts in the UK have been very willing to make references and have loyally complied with preliminary judgments; that references from UK courts make good reading and are nearly always well-reasoned; that the case-law of the ECJ appears ascertained and the problems clearly identified, and that they nearly always raised substantial points of interpretation.

This view is to be contrasted with that of a counsel to the Equal Opportunities Commission who, after 12 years of UK membership, wrote: “we see Community law through a glass, darkly”. In his view, the experience of the parties – especially applicant employees – at first sight a success story³⁶, as all but one of the applicants had succeeded in their claims, could upon closer analysis give cause for concern. Substantial legal costs had been incurred without establishing clear and coherent principles of Community law; interpreting and applying the Court’s decisions had been difficult; there had been very long delays in obtaining a reference or a decision under Article 234; and parties and national courts had become more reluctant to seek or to order references.

Years later the same mixed conclusions could be drawn: if English courts have referred many important cases for the development of Community Constitutional law, *inter alia*, *van Duyn*³⁷, *Johnston*³⁸, *Marshall I* and *IP*³⁹, the litigant’s perspective is rather more disappointing. Typically, an important case such as *Johnston* was also a Pyrrhic victory for Mrs Johnston for “her continuing loss and damage had, by the date of the reference, exceeded the maximum amount of compensation which was – then⁴⁰ – recoverable under national law.” Without the assistance of the Equal Opportunities Commission, the *Marshall* saga could not have been financed.

3.6 Conclusion

The opportunity of a dialogue between the ECJ and the national courts is important for a number of reasons, not least because in a number of circumstances, Article 234 provides the only possibility of a remedy for victims of breaches of Community law. Yet, the procedure suffers weaknesses. Some are identifiable at the ECJ level⁴¹, others are the responsibility of national courts, and others, like delays in obtaining a reference, can be attributed to both sides. The ECJ is the victim of its own success⁴². In the UK, the significant delays in making refer-

ences have been caused by a variety of contributory factors. These included the refusal of an inferior court to refer, the time needed by the parties to agree the relevant facts or questions of interpretation, and the delays involved where leave to appeal was sought against a decision to refer.

Methods need to be devised to limit the Court's jurisdiction and various practical suggestions have been floated¹⁴³. Some are directed at the ECJ and others at national courts. Some are quite radical and would involve a reform of the Treaty; others are most cosmetic. The proposals include confining the power to refer to national courts of higher level, codifying the ECJ case law regarding admissibility of preliminary rulings, encouraging national courts to propose their own answers to the questions they pose, reminding national courts of the need to set out clearly the factual and legal context, simplifying the ECJ procedure so as to allow the ECJ to give its ruling by reasoned order only where the question submitted is manifestly identical to a question on which the court has already ruled, introducing a filtering system to enable the ECJ to decide which of the questions referred really need to be answered because they are questions which are fundamental to the uniformity and development of the case law and creating in each Member State decentralised judicial bodies responsible for dealing with references for preliminary rulings from courts within their jurisdiction, together with a power for these bodies to make reference to the ECJ. As has been shown, some of the practical solutions already apply *de facto* in the UK, where the courts have exercised with definite maturity their functions as Community courts of general jurisdiction.

At Nice, while Article 234 EC was left untouched, it is worth noting that Article 225(3) EC was changed to provide that the CFI shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 EC in specific areas to be determined at a later stage in the Statute of the Court of Justice. It is important to note that the CFI where it considers that the case requires a decision of principle likely to affect the unity or consistency of Community law may refer the case to the ECJ. Declaration 14 on Article 225 of the EC Treaty further provides that the practical application of these new provisions be reviewed. More importantly the ECJ will be allowed to establish its own rules of procedure which will only require approval by the Council by qualified majority. The ECJ has also been granted additional resources, although these are not thought to be commensurate to the task at hand.

There is a serious weakness of the preliminary ruling, however, which needs to be addressed by the ECJ itself rather than through Treaty reform. The procedure has become 'diluted'. Examples of such dilution can be found in many areas, from free movement of goods – where the ECJ ended up blaming the traders! to sex discrimination or the case law on remedies. With regard to the latter, it is clear that more and more specific questions are being sent by the national courts. In turn the ECJ is subjecting national rules to a close and detailed scrutiny. This is bad for two reasons. First, this is the function of the national court under the division of labour organised by the Treaty. Secondly, it does not

in any way serve the purpose of the procedure in so far as the ruling can only be understood in the light of the specific circumstances of that case. This in turn generates more case law. It is important that the review in abstract is done by the ECJ while specific review is for the national court.

The procedure might work better if the ECJ was "able to decide questions referred under Article 234 in a manner which enables Community law to develop on the basis of intelligible and rational principles"¹⁴⁴. Redrafting of the questions by the ECJ has sometimes led the Court to apply Community law to the facts of the case, and even in some instances to facts treated as peripheral by all parties involved. Since the main function of Article 234 is the uniform interpretation and application of Community law, the main task for the ECJ is "not so much the administration of justice in individual cases, but the function of overseeing the development of Community law in important principled cases"¹⁴⁵. These remarks are echoed by the call¹⁴⁶ for a reappraisal of the current division of tasks between the ECJ and national courts. Advocate General Jacobs pointed out that it is necessary to address the question whether or not it is appropriate for the Court to be asked to rule in every case where a question of interpretation of Community law arises. Article 234, like other provisions of Community law, should be interpreted in an evolutionary way. As he argued, excessive resort to preliminary rulings seems increasingly likely to prejudice the quality, coherence and even accessibility¹⁴⁷, of the case-law, and may therefore be counterproductive to the ultimate aim of ensuring the uniform application of the law throughout the Community¹⁴⁸. In many fields, a body of case law developed by the ECJ exists to which national courts can resort in resolving new questions of Community law and, in a number of technical matters, national courts are able to extrapolate from the principles developed in this case law. He suggested that the appropriateness of a reference should be assessed in the light of the objective of Article 234. The Court's function under Article 234 is not merely to give the national court the correct answer in a given case, but to give rulings of general significance¹⁴⁹.

Certainly if only references raising a point of general importance are accepted, a more principled and balanced case law is likely to result. In turn this might lead to less references being sent by national courts and ultimately the Court of Justice's workload would be alleviated.

The function of Article 234 is not to see that justice is done between the parties, but to ensure that Community law is uniformly interpreted and applied throughout the Community. If this view is accepted, by national courts as well as the ECJ, it is a strong argument for a principled rather than a case by case approach. This ultimately will ensure a better protection of litigants, as well as making the task of national courts easier.

Endnotes

- ¹ Bingham J in *Customs & Excise Commissioners v. Samex* [1983] 3 CMLR 194.
- ² Advocate-General Jacobs' opinion in Case C-338/95 *Wiener S.I. GmbH v. Hauptzollamt Emmerich*, [1997] I-6495, paras 17 & 18.
- ³ These have been explored before.
- ⁴ This chapter will only be concerned with questions of interpretation; for questions of validity see Chapter 7.
- ⁵ Case 13/68 *Salgoil* [1968] ECR 661.
- ⁶ (2003) 1 All ER 137.
- ⁷ Case C-206/01 [2002] ECR I-10273.
- ⁸ (2003) 3 All ER 865.
- ⁹ At para. 25.
- ¹⁰ At para. 47.
- ¹¹ K. Lenaerts, "The interaction between judges and politicians" (1992) 12 YEL 1 at 11.
- ¹² Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143, para. 14.
- ¹³ Case C-267-8/91 [1993] ECR I-6097.
- ¹⁴ Brinkhorst & Schermers, *Judicial Remedies in the European Communities*, (2nd ed.) Kluwer 1977, p. 250.
- ¹⁵ Council Decision 93/350, OJ 1994, L144/21, amending Decision 88/591, OJ 1988, L319/1 establishing the Court of First Instance.
- ¹⁶ Case 283/81 *Cilfit v. Ministero della Sanità* [1982] ECR 3415 at 3428, para. 9.
- ¹⁷ Case 146 & 166/73 *Rheinmühlen* [1974] ECR 33.
- ¹⁸ Case C-221/89, *R v. Secretary of State for Transport ex parte Factortame* [1991] ECR I-3905.
- ¹⁹ Case C-213/89 [1990] ECR I-2433.
- ²⁰ Case C-48/93 [1996] ECR I-1029.
- ²¹ Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen op. cit.*; *Emerald Meats* [1993] ECR I-209 para. 40.
- ²² Case C-365/97, *Commission v. Italy* [1999] ECR I-7773.
- ²³ Case C-221/89, *R v. Secretary of State for Transport ex parte Factortame* [1991] ECR I-3905, and Case C-246/89 *Commission v. U.K* [1991] ECR I-; but also Case C-288/89, *Gouda* [1991] ECR I-3905, and Case C-288/89 *Commission v. Netherlands* [1991] ECR I-000; *R. v. Pharmaceutical Society* [1987] 3 CMLR 951.
- ²⁴ Case 6-64 *Costa v. ENEL* [1964] ECR 585.
- ²⁵ Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I.
- ²⁶ Although it did in Case 261/81 *Walter Rau v. De Smedt* [1982] ECR 3961.
- ²⁷ Case C-393/98, *Ministério Público, António Gomes Valente v. Fazenda Pública* [2001] ECR I-1327.
- ²⁸ Case 61/65 *Vaassen-Gobbels* [1966] ECR 261; Case 246/80 *Broeckmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311 and A. Barav, "Aspects of the Preliminary Ruling Procedure in EC law" (1977) 2 ELR 3.
- ²⁹ In Case C-23/92 *Corbiau* [1993] ECR I-1277 *Corbiau*, Advocate General Darmon pointed to the domestic recognition of the body in question as a court.
- ³⁰ Advocate General Ruiz-Jarabo Colomer in Case 74 & 129/95 [1996] ECR I-6609 point 10 of his opinion.
- ³¹ A.G. Ruiz-Jarabo Colomer *op. cit.* citing Cases C-260/91 and C-261/91 *Diversinté and Iberlactan* [1993] ECR I-1885.
- ³² The Dutch Tariefcommissie in Case 26/62 *van Gend en Loos*.
- ³³ Case 61/65 *Vaassen-Goebbels v. Bestuur van het Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261.

- ³⁴ Case 246/80 *Broeckmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311.
- ³⁵ Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin* [1997] ECR I-1709.
- ³⁶ Case 102/81 *Nordsee v. Reederei Mond* [1982] ECR 1095 confirmed in Case C-126/97 *Eco Suisse* [1999] ECR I-3055.
- ³⁷ Case C-24/92 *Corbiau* [1993] ECR I-1277.
- ³⁸ J. Wouters, "The case law of the ECJ on direct taxation: variations upon a theme", (1994) 1 MJECL pp. 179-220 at 208.
- ³⁹ Case 102/81 *Nordsee v. Reederei Mond* [1982] ECR 1095 and see J. Murray, "Arbitrability in the EU" in *Essays in Honour to Lord Mackenzie Stuart, Campbell & Voyatzis* (eds) (Trenton, 1996).
- ⁴⁰ [1984] 1 ALLER 386.
- ⁴¹ Case 83/78 *Pigs Marketing Board v. Redmond* [1978] ECR 2347.
- ⁴² Case 104/79 *Foglia v. Novello* [1980] 745.
- ⁴³ See further Chapter 7.
- ⁴⁴ Case C-343/90 *Lourenco Dias* [1992] ECR I-4673; Case C-83/91 *Meilicke* [1992] ECR I-4871.
- ⁴⁵ D. Anderson, *References to the European Court* (Sweet & Maxwell, 1996).
- ⁴⁶ Case C-127/92 *Enderby and Frenchay Health Authority* [1993] ECR I-5535.
- ⁴⁷ *Ibid.*
- ⁴⁸ Case C-412/93 *Société d'importation Edouard Leclerc Siplec v. TF1 Publicité SA & M6 Publicité SA* [1995] ECR I-179.
- ⁴⁹ Case 244/80 *Foglia v. Novello* (No.2) [1981] ECR 3045.
- ⁵⁰ Case 104/79 *Foglia v. Novello* (No.1) [1980] ECR 745.
- ⁵¹ Advocate General Jacobs in Case C-412/93, point 6 of his opinion.
- ⁵² Case C-412/93, para 13 emphasis added.
- ⁵³ Report of the Court of Justice on certain aspects of the application of the TEU May 1995.
- ⁵⁴ Brought about by *inter alia* the perspective of enlargement, the *communautarisation* of Brussels I and II, EMU and decisions of the ECB, and intellectual property cases.
- ⁵⁵ Under Article 68 EC only courts or tribunals against which decisions there is no judicial remedy under national law have a discretion to refer. Under Article 35 EU the jurisdiction of the Court is akin to that of an international tribunal inasmuch as Member States must make a declaration that they accept the jurisdiction of the ECJ. At the time of writing, the UK still has not made such a declaration, and therefore UK courts cannot make any reference for preliminary rulings on the validity and interpretation of framework decisions and decisions and conventions established under the third pillar.
- ⁵⁶ K. Lenaerts, "Form and substance of the preliminary ruling procedure" in D.Curtin and T.Heukels (Eds) *Essays in Honour of H.G. Schermers* (Martinus Nijhoff, 1994) p 357.
- ⁵⁷ Case C-346/93 *Kleinwort Benson Ltd v. City of Glasgow* [1995] ECR I-615.
- ⁵⁸ [1997] 3WLR 923.
- ⁵⁹ Proceedings of the Court No 34/96, and also (1997) 34 CMLRev 1319.
- ⁶⁰ *Regina v. Secretary of State for the Environment ex parte Royal Society for the Protection of Birds* Order of the House of Lords 13 March 1997 (unreported).
- ⁶¹ C. Haguenau, *L'Application effective du Droit Communautaire en Droit Interne* (Bruxelles: Bruylant, 1995).
- ⁶² L. Collins, *European Community Law in the United Kingdom* (London: 4th edition Butterworths, 1990).
- ⁶³ *R v. Pharmaceutical Society* [1987] 3 CMLR 951 at 969 per Kerr LJ.
- ⁶³ [1995] All ER 88.

- ⁶⁴ *Trent Taverns v. Sykes* (CA), Judgement of 22 January 1999.
- ⁶⁵ *Magnavision v. General Optical Council* [1987] 2 CMLR 262.
- ⁶⁶ [1980] 3 CMLR 253 at 255.
- ⁶⁷ D. Anderson, *References to the European Court*, (Sweet & Maxwell 1995) at p. 161.
- ⁶⁸ L. Collins, *op. cit.* p. 154.
- ⁶⁹ Case C-99/00 [2002] ECR I-4839.
- ⁷⁰ *R. v. Pharmaceutical Society* [1987] 3 CMLR 951 at 972.
- ⁷¹ Cases 28-30/62 *Da Costa en Schakke NV v. Nederlandse Belastingadministratie* [1963] ECR 31.
- ⁷² [1974] 3 WLR 202.
- ⁷³ The very delays now involved in references do encourage judges to decide points on their own, see Bingham in Andenas (eds) *op. cit.* Chap. 5.
- ⁷⁴ *Customs & Excise Commissioners v. Samex* [1983] 3 CMLR 194.
- ⁷⁵ L. Gormley, "The Application of Community law in the UK" (1986) 23 CMLRev 287.
- ⁷⁶ [1980] 2 CMLR 229 at 234, emphasis added.
- ⁷⁷ One of 12 in the case of Treaty provisions and one of 11 for Community legislation.
- ⁷⁸ Case 36/80 *Irish Creamery Milk Suppliers Association v. Ireland* [1981] ECR 735 para 8.
- ⁷⁹ Case 107/76 *Hofmann la Roche v. Centrafarm* [1977] ECR 957.
- ⁸⁰ *R v. Minister Of Agriculture, Fisheries and Foods ex parte FEDESA* [1988] 3 CMLR 207.
- ⁸¹ [1983] 3 CMLR 9 per Parker J.
- ⁸² *Hagen v. Moretti* [1980] 3 CMLR 253.
- ⁸³ *Prince v. Secretary of State for Scotland*, [1985] SLT 74 at 78.
- ⁸⁴ J.W. Bridge, "Community law and English Courts and Tribunals: General Principles and Preliminary rulings (1975-76)" 1 ELR pp. 13-21 at 20.
- ⁸⁵ Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651; Case C-127/92 *Enderby v. Frenchay Health Authority* [1993] ECR I-5535.
- ⁸⁶ *Webb v. EMO Air Cargo* [1994] QBD 718 at 728-36.
- ⁸⁷ Notes for Guidance for Preliminary Rulings.
- ⁸⁸ Case C-320-322/90 *Telemarsicabruzzo* [1993] ECR I-393.
- ⁸⁹ Anderson *op. cit.* at pp. 75-6.
- ⁹⁰ Case 146 & 166/73 *Rheinmühlen -Dusseldorf v. Einfuhr- und Vorratsselle fur Getriede und Futtermittel* [1974] ECR 33.
- ⁹¹ See *supra* Chapter 2.
- ⁹² F. Dumon, "The Case law of the Court of Justice- A Critical Examination on the Methods of Interpretation" (Judicial and Academic Conference 27-28 September 1976; Court of Justice of the European Communities Luxembourg 1976) at III-160.
- ⁹³ Case C-213/89 *R v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433.
- ⁹⁴ See further Chapter 5, and see Case C-312/93 *Peterbroeck* [1995] ECR I-4599.
- ⁹⁵ In France, the Cour de Cassation has prohibited appeals against reference in interlocutory judgments; see GazPal 1988 vol. 108 pp. 7-8. The Irish do not recognise the possibility of an appeal from the exercise by a lower court of its discretion to refer, *Campus Oil*, (Irish SC) [1983] IR 82 and *SPUC Grogan* [1990] ILRM 350.
- ⁹⁶ D. O'Keeffe appeals against an Order to refer under Article 177 (1984) 9 ELR 87.
- ⁹⁷ *R v. International Stock Exchange of the United Kingdom and the Republic of Ireland*, ex parte Else [1993] 1 All ER 420. D. Wash "the Appeal of an article 177 referral (1993) 56 MLR 881.

- ⁹⁸ [1993] 1 All ER 420 at 426.
- ⁹⁹ Anderson *op. cit.*
- ¹⁰⁰ Court of Appeal (England and Wales) Civil Division, 29 March 2000, *Glaxo Group Ltd and Others v. Dowelhurst Ltd and Swingward Ltd*.
- ¹⁰¹ *Wither v. Cowie* [1991] SLT 401.
- ¹⁰² The Lord Justice-Clerk (Ross) referred to Act of Adjournal (Consolidation) 1988 which permits an appeal to the High Court against a decision of a single judge to seek a preliminary ruling from the ECJ, [1991] SLT 401 at 405.
- ¹⁰³ C-394/96 *Brown v. Rentokil* [1998] ECR I-4185.
- ¹⁰⁴ A problem which could have been avoided if the Brussels Convention had been revamped under Article 293 EC as opposed to Article 65 EC. P. Beaumont in lecture at ERA conference Edinburgh May 2001.
- ¹⁰⁵ Case 107/76 *Hoffmann la Roche v. Centrafarm* [1977] ECR 957 at para. 5.
- ¹⁰⁶ Case C-393/98, *Ministério Público, António Gomes Valente v. Fazenda Pública* [2001] ECR 1327.
- ¹⁰⁷ Cases 28-30/62 *Da Costa en Schaake NV & others v. Nederlandse Belastingadministratie* [1963] ECR 31.
- ¹⁰⁸ Case 283/81 *Cilfit* [1982] ECR 3415.
- ¹⁰⁹ Rasmussen, "The European Court's *Acte Clair* strategy in *Cilfit*" (1984) 9 ELR 242.
- ¹¹⁰ Case C-338/95 *op. cit.* para. 63.
- ¹¹¹ *Haguenau op. cit.* at 149.
- ¹¹² [1990] 2 CMLR 859.
- ¹¹³ [1992] 1 CMLR 5 at 21.
- ¹¹⁴ *Magnavision v. General Optical Council* [1987] 2 CMLR 262 para 15.
- ¹¹⁵ *ibid* para. 16.
- ¹¹⁶ For example in Scotland, the High Court of Justiciary: *Westwater v. Thomson* [1993] SLT 703; in England *R v. L BT C ex parte Freight Transport Associations Ltd op. cit.*, and comments by Weatherill in (1992) 17 ELR 299-322 *R v. Secretary of Social Services ex parte Bomore* [1986] 1 CMLR 228. *Feehan v. CCE* [1995] 1 CMLR 193. *British Fuels v. Baxendale* 29 October 1998.
- ¹¹⁷ But see, A. Arnall, "The Use and Abuse of Article 177" (1989) 52 MLR 622.
- ¹¹⁸ *Bingham J in Customs & Excise Commissioners v. Samex* [1983] 3 CMLR 194. Or *R. v. HM Treasury ex parte Daily Mail and General Trust plc* [1987] 2 CMLR 1 para. 23, or. *R. v. Pharmaceutical Society* [1987] 3 CMLR 951 para. 34.
- ¹¹⁹ *ICI v. Colmer* [1997] 3 CMLR 1204.
- ¹²⁰ *Re Wünsche Handelgesellschaft (Solange II)*, [1987] 3 CMLR 225, and Article 101 of the Basic Law of the FRG.
- ¹²¹ And has wider implications see Chapter 1.
- ¹²² Advocate General Warner in Case 135/77 *Bosch GmbH v. Hauptzollamt Hildesheim* [1978] ECR 855 at 861.
- ¹²³ Case 61/79 *Amministrazione delle Finanze dello Stato v. Denavit Italiana* [1980] ECR 1205.
- ¹²⁴ As in Case 43/75 *Defrenne v. Sabena* [1976] ECR 455.
- ¹²⁵ For an attempt by the Member States to do so see Protocol to the Maastricht Treaty.
- ¹²⁶ Case C-262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889 para. 44.
- ¹²⁷ Chapter 5.
- ¹²⁸ R. Caranta, "Judicial Protection against Member States: the indirect effects of Articles 173, 175 and 177" in Micklitz & Reich (eds) *Public interest litigation before European Courts* (Nomos 1996) p. 102.
- ¹²⁹ P. Craig and G. de Burca *EC Law: Text, Cases and Materials* (Oxford 1995) at 445.

- ¹³⁰ COM (97) 299 final Annex VI pp. 460-477. COM (2001) 0309 http://europa.eu.int/eur-lex/en/com/rpt/2001/com2001_0309en01.html.
- ¹³¹ COM (97) 299 final Annex VI pp. 460-477.
- ¹³² *Article 177 References to the European Court, Policy and Practice* Andenas (ed.) (1994) pp. 34-36.
- ¹³³ Although such cases were reported in the Netherlands, Germany, France, Italy and Sweden.
- ¹³⁴ All the figures are taken from Lenz & Grill "The Preliminary Ruling and the UK", *Fordham International Law Journal*, 1996, pp. 844-865.
- ¹³⁵ Lenz & Grill, *op. cit.*
- ¹³⁶ A. Lester: *op. cit.* at p. 1.
- ¹³⁷ Case 41/74 *van Duyn v. Home Office* [1974] ECR 1337.
- ¹³⁸ Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.
- ¹³⁹ Case 152/84 *Marshall v. Southampton and South West Hampshire Area Health Authority Marshall I* [1986] ECR 723, and Case C-271/91 *Marshall II* [1993] ECR I-4367.
- ¹⁴⁰ This indeed was changed following *Marshall II*.
- ¹⁴¹ Some solutions must be found for the ever-increasing case-load of the Court; for some useful reflections on this issue and more generally the reform of the Community judicial system see Kennedy, "First step towards a European Certiorari" in (1993) 18 ELRev. 121, A.G. Jacobs' opinion in Case C-338/95 cited fn. 2; Mancini & Keeling "From CILFIT to ERT: the Constitutional Challenges facing the European Court" (1991) 10 YEL 1.
- ¹⁴² J. Weiler, The 'paradox of success' in "The European Court, National Courts and References for Preliminary Rulings-The paradox of success: A revisionist view of Article 177." in *Art.177: Experiences and Problems* (TMC Asser Instituut, 1987) pp. 366-378.
- ¹⁴³ For a comprehensive review see A. Johnston, "Judicial Reform and the Treaty of Nice" (2001) 38 CMLRev 449.
- ¹⁴⁴ A. Lester, *op. cit.* at 29, and his discussion of Case 69/80 *Worringham & Humphreys v. Lloyds Bank Ltd* [1981] ECR 767 and other references in the field of occupational pension schemes, or that of *Macarthys Ltd v. Smith* [1979] 3 CMLR 44.
- ¹⁴⁵ Weiler *op. cit.* at 368.
- ¹⁴⁶ Advocate General Jacobs in Case C-338/95 *op. cit.*
- ¹⁴⁷ Advocate General Ruiz Jarabo Colomer in Case C-394/96 *Brown v. Rentokil* [1998] ECR I-4185.
- ¹⁴⁸ *Ibid* para. 60.
- ¹⁴⁹ Case C-338/95 *op. cit.* para. 50.

