

KNOCKING ON HEAVEN'S DOOR: FRAGMENTATION, EFFICIENCY AND DEFIANCE IN THE PRELIMINARY REFERENCE PROCEDURE

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1. Introduction

In the process towards European constitutional rediscovery, set in motion by the Treaty of Rome, Article 234 (ex 177) has been by far the most important instrument of change. By providing the meeting point for the Community and the national legal orders, it has enabled the ECJ, more than any other jurisdictional provision, to define its mandate, establish the “new legal order”, and develop constitutional doctrine. The legal and political aspects of the preliminary reference (albeit not the economic ones)¹ have been the subject of voluminous commentary.² This article discusses the evolution of the preliminary reference procedure and its adjustment to the constitutional pluralism of the Union; it examines selectively the case law on Article 234 in the period between 1998 and the first half of 2002; and assesses trends in the use of preliminary references by national courts. It is divided as follows. Section 2 traces the development of the preliminary reference procedure. Sec-

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1. For an economic analysis, see G. Tridimas and T. Tridimas, “National courts and the ECJ: A Public Choice Analysis of the Preliminary Reference Procedure”, paper presented in the 2002 European Public Choice Society Meeting, Belgirate, Italy and also in the 15th Law and Economics Workshop, Erfurt, Germany, 2002.

2. For recent bibliography, see among others: Anderson and Demetriou, *References to the European Court*, 2nd ed. (Sweet & Maxwell, 2002); Edward, “Reform of Article 234 procedure: The limits of the possible”, in O’Keeffe and Bavasso (Eds.), *Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn* (Kluwer, 2000), pp. 119–142; Allott, “Preliminary rulings – Another infant disease”, 25 *EL Rev.*, (2000) 538; de la Mare, “Article 177 in social and political context”, in Craig and de Burca (Eds.), “The Evolution of EU Law” (OUP, 1999), pp. 215–260 (with references to earlier works); Slaughter, Stone Sweet and Weiler (Eds.), *The European Courts and National Courts, Doctrine and Jurisprudence* (Hart, 1998); Barnard and Sharpston, “The changing face of Article 177 references” 34 *CML Rev.*, 1113. See also the recent discourse on the ECJ: de Burca and Weiler (Eds.), *The European Court of Justice* (OUP, 2001); and Stone Sweet, *Governing with Judges, Constitutional Politics in Europe* (OUP, 2000).

tion 3 discusses demand and supply for references and the measures chosen to address the mounting increase in the Court's case law. The article then turns to examine recent case law in three areas: the control of admissibility of references; the definition of court or tribunal; and the jurisdiction of the ECJ to interpret Community measures where they apply by virtue of national law. The next section discusses varying perceptions of the preliminary reference procedure by national courts. The final part contains concluding remarks.

2. The evolution of the preliminary reference procedure

The preliminary reference system, in combination with the principles of primacy and direct effect, has redefined constitutionalism at European level and facilitated a re-allocation of powers at three levels: (a) at supranational level, from the governments of the Member States to the institutions of the Community; (b) at national level, from the executive and the legislative branches of government to the judiciary; and (c) within the national judiciary itself, from the national courts of last instance to lower national courts. Whilst a reading of *Van Gend en Loos* and *Costa v. ENEL* makes the first point self-evident,³ the other two require a short explanation. Simply stated, the second point is this. By requiring national courts to grant direct effect and provide full and effective protection to Community rights, the ECJ has enabled the national judiciary to question governmental action on grounds and in areas not previously recognized by national law. The powers of the national judiciary have been further enhanced by the indirect effect of Community law. Legal concepts, methodology, grounds of review, and remedies introduced in relation to Community rights, spillover to areas of national law and pervade the fabric of the legal system, often strengthening the judicial accountability of public authorities.⁴ The third transfer of powers mentioned above has taken place within the national judiciary. The preliminary reference procedure has projected the ECJ as an alternative source of legal authority *vis-à-vis* the national courts of final instance thus emancipating lower courts from the

3. See Case 26/62, *Van Gend en Loos*, [1963] ECR 1 and Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

4. This is illustrated by the aftermath of Case C-213/89, *Factortame*, [1990] ECR I-2433. Prior to the judgment, English courts did not have power to issue an injunction against the crown. Following the judgment, in *M v. Home Office* [1994] 1 AC 377, the House of Lords extended such power to domestic courts as a matter of English law even for the protection of rights deriving purely from English law. The same extension of interim relief occurred in the case law of the Danish Supreme Court following *Factortame*: see UfR 1994, p. 823 and UfR 1995, p. 634. For an example of such "spill-over effect" in Italian law, see the judgment of the Italian Constitutional Court no 443 of 30 Dec. 1997, in *Foro Italiano* 1998, I, 697.

obligation, or at least the pressure, to follow the rulings of higher courts.⁵ All in all, Article 234 has been, more than any other jurisdictional clause, the procedural facilitator of constitutional change. The judicial dialogue which takes effect through the preliminary reference procedure has enabled the ECJ to lay down the fundamental principles of the Community legal system and set in motion a process towards the constitutionalization of the Treaties.⁶

Since 1961, when the first reference was made,⁷ the preliminary reference procedure has undergone profound changes both in quantitative and qualitative terms. In its case law, the ECJ has articulated the terms of the judicial dialogue in a way which mirrors the constitutional development of the Communities. At an early stage, in an effort to encourage the propensity of national courts “to think federal”, it adopted a wide definition of the term “court or tribunal”⁸ and welcomed references even where the questions were formulated inappropriately.⁹ At the same time, it understood its own jurisdiction broadly defining it on a functional basis as the jurisdiction conferred upon it “to ensure the uniform interpretation of Community law.”¹⁰ It also sought to safeguard the freedom of the national court to decide whether to make a

5. See the cases mentioned below, notes 23 and 26 and accompanying text.

6. The term “constitutionalization” is used here to signify the process by which the EC Treaties have asserted their normative independence *vis-à-vis* the Member States, who created them in the first place, and evolved into the founding charter of a *supranational* system of government. Under this process, Community law and national law are no longer viewed as separate legal orders but as tiers of the same order operating under an overarching system of principles and values. Timmermans identifies the following key developments in this process: (a) the characterization of the Community as an autonomous legal system which is integrated into the national legal systems but retains its own distinct features (see *Van Gend & Loos*) (b) the establishment of primacy and direct effect; (c) the extrapolation from national laws of general principles of law and fundamental rights which govern both Community and Member State action; and (d) the elaboration of principles and rules governing remedies for the protection of Community rights in the national legal systems. See Timmermans, “The Constitutionalisation of the European Union”, 21 (2002) YEL 1.

7. See Case 13/61, *Bosch v. Van Rijn*, [1962] ECR 45.

8. See Case 61/65, *Vaassen v. Beambtenfonds Mijnbedrijf*, [1966] ECR 261 and, for a detailed discussion, below, notes 73 et seq. and accompanying text.

9. See e.g. Case 16/65, *Schwarze*, [1965] ECR 877 (the ECJ delivered a judgment on the validity of a Community act although the question referred pertained to interpretation); Joined Cases 98, 162, 258/85, *Bertini*, [1986] ECR 1885 (the ECJ answered the question referred although it could not see how it would be relevant to the proceedings).

10. See Joined Cases 267–9/81, *SPI*, [1983] ECR 801, para 15. In that case, the Court held that it had jurisdiction to interpret the GATT 1947 even though the Community was not formally party to it. More recently, the ECJ has accepted references in relation to WTO agreements, see e.g. Case C-53/96, *Hermes*, [1998] ECR I-3603, Joined Cases C-300–302/98, *Parfums Christian Dior SA, v. Tuk Consultancy BV*, [2000] ECR I-11307. The ECJ may also interpret under Art. 234 binding norms of customary international law, see Case C-162/96, *Racke v. Hauptzollamt Mainz*, [1998] ECR I-3655.

reference from any interference from the litigants¹¹ or constraints imposed by national law.¹²

Subsequently, *CILFIT* marked an important stage in the evolution of the relationship between the ECJ and national courts by introducing the *acte clair* doctrine.¹³ The doctrine promoted the process of federalization of the judicial system. By liberating national courts of last instance from the obligation to make a reference where the case law already made the solution clear, the ECJ firmly established the normative value of its rulings.¹⁴ Further, it recognized that national courts have a creative role to play in upholding and shaping Community law. They could now intervene not merely as facilitators but as primary actors. At the same time, by entrusting the adjudication of Community law points to national courts, it promoted the “internalization” of Community law and enhanced rather than reduced its resonance. *Acte clair* is an indication of maturity in the development of the Community legal order.

In the 1990s, as the number of references increased, the Court undertook a more assertive role in reviewing the admissibility of references, introducing in effect a docket control system.¹⁵ At the same time, it extended its jurisdiction by responding to requests from national courts to interpret provisions of Community law applicable by virtue of national law.¹⁶ Both these trends are examined in more detail below.

11. In Case 126/80, *Salonia v. Poidomani and Giglio*, [1981] ECR 1563, para 7, it was held that a national court must be free to make a reference on its own motion even contrary to the wishes of the parties. Also, the national court alone has power to determine the questions to be referred, the parties to the main action being unable to change their content or scope: see Case 44/65, *Hessische Knappschaft*, [1965] ECR 965; Joined Cases C-34–135/91, *Kerafina*, [1992] ECR I-5699.

12. The ECJ has emphasized that the discretion of the national court to make a reference cannot be compromised by rules of national law, e.g. a rule that the referring court is bound by the decisions of a superior court. See Case 166/73, *Rheinmühlen v. Einfuhr- und Vorratsstelle Getreide*, [1974] ECR 33, paras. 3–4, and Case 146/73, *Rheinmühlen- Düsseldorf v. Einfuhr- und Vorratsstelle Getreide*, [1974] ECR 139.

13. Case 283/81, *CILFIT v. Ministry of Health*, [1982] ECR 3415. Under *acte clair*, a national court covered by Art. 234(3) is under no obligation to make a reference where the correct application of Community law is “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved”. The ECJ gave detailed guidelines so as to circumscribe the scope of the doctrine stressing, *inter alia*, the multilingual character of Community law and the need to follow a teleological interpretation. See paras. 16–20 of the judgment.

14. Already in Joined Cases 28–30/62, *Da Costa*, [1963] ECR 31 the Court had held that a national court of last instance was not under an obligation to make a reference where the question raised was materially identical with a question which had already been the subject of a reference.

15. See Case C-343/90, *Lourenco Dias*, [1992] ECR I-4673; Joined Cases C-320–322/90, *Telemarsicabruzzo*, [1993] ECR I-393.

16. This trend began with Joined Cases C-297/88 & C-197/89, *Dzodzi v. Belgian State*, [1990] ECR I-3763.

The preliminary reference jurisdiction of the Court has traditionally been all-embracing, mandatory, and exclusive. It has been all-embracing in that the possibility of making a reference has been open to all national courts and tribunals irrespective of their position in the national judicial hierarchy. This has enabled the ECJ to converse not only with senior courts but also with the lower ones thus making possible the assertion of Community rights at the citizen's first point of contact with the judicial system. This "ground level access" has significantly assisted the resonance and immediacy of Community law. The Court's jurisdiction has also been mandatory in the sense that it is binding on Member States and, under Article 234(3), courts of last instance are under an obligation to make a reference. The final feature, namely exclusivity, derives from the division of jurisdictions between the ECJ and the CFI when the latter was established. Whilst the CFI was granted jurisdiction to hear direct actions, preliminary references were reserved for the ECJ. Indeed, the rationale behind the establishment of the CFI was to alleviate the ECJ's mounting case law and ensure that the latter could concentrate in ensuring the uniform interpretation of Community law.¹⁷

The universal, mandatory, and exclusive character of the preliminary reference procedure are now less prominent as a result of the changes made by the Treaty of Amsterdam and the Treaty of Nice. The Treaty of Amsterdam introduced new preliminary reference mechanisms under new Title IV of the EC Treaty and the Third Pillar. The new provisions marked a qualitative change in the Court's jurisdiction. The preliminary reference procedure ceased to be uniform throughout the EC Treaty since, in relation to matters falling within Title IV (Visas, Asylum, Immigration and others policies related to free movement of persons), the jurisdiction of the Court can be activated only by national courts of last instance.¹⁸ Also, under the Third Pillar the jurisdiction of the ECJ became optional.¹⁹ Thus, the first two features of

17. See the Preamble to the Council Decision 88/591 establishing a Court of First Instance of the European Communities, O.J. 1988, L 319/1 as amended.

18. See Art. 68(1) EC. Note that, under this provision, national courts of last instance remain under an obligation to make a reference if they consider that a decision by the ECJ is necessary to enable them to give judgment.

19. See Article 35 TEU. Under Art. 35(2), a Member State may accept the jurisdiction of the ECJ to give preliminary rulings by making a declaration to that effect at any time after the Treaty of Amsterdam comes into force. Under Art. 35(3), a Member State has the option to extend the preliminary reference procedure to any domestic court or tribunal or restrict it to courts or tribunals of last instance, i.e. those against whose decisions there is no judicial remedy under national law. Under either option, a final instance court has the option and not the obligation to make a reference to the Court of Justice. In declarations made under Art. 35(2), Spain has accepted the jurisdiction of the ECJ for courts of last instance only; Belgium, the Netherlands, Luxembourg, Germany, Austria, Italy, Portugal, Greece, Finland and Sweden have accepted the jurisdiction of the ECJ for all national courts. Some Member States have also reserved the right to make provision in their national law that, when a question is raised

the preliminary reference system mentioned above, namely universality and mandatory character, were breached. Furthermore, the third feature, namely the exclusive jurisdiction of the ECJ, is no longer sacrosanct, following the Treaty of Nice.²⁰ All in all, the constitutional changes of the 1990s have led to the fragmentation of preliminary references.

The detailed examination of the changes made by the Treaty of Amsterdam is beyond the scope of this paper.²¹ Suffice to make here some brief comments in relation to Article 68(1). As already stated, under this provision, a preliminary reference may be made only by a national court against whose decision there is no judicial remedy. This limitation is to be regretted for the following reasons. First, it restricts access to justice. The Court of Justice itself has stated that limiting access to courts of final instance “would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case law”. It has thus concluded that “the possibility of referring a question to the Court of Justice must therefore remain open to all ... courts and tribunals”.²² Secondly, there is much to be said about the enforcement value of the power of lower courts to make a reference. Such power mitigates the adverse effects that would ensue if a court of last instance failed to make a reference in circumstances where it was under an obligation to do so. In another case where the same legal issue arose, a lower court would be able to make a reference thus provoking a ruling by the Court of Justice. A recent example is provided from Germany. A female medical officer of the German army applied to join the driving school of the combat divisions. In its decision of 20 May 1999, the Federal Administrative Court (*Bundesverwaltungsgericht*) held that she did not have the right to do so.²³ Without making a reference, the court rejected her application on the ground that Article 12a(4) of the *Grundgesetz* precluded women from bearing arms and restricted them to the medical and musical military services. It held that the German law was compatible with Community law since Article 2(2) of the Equal Treatment Directive²⁴ excluded the armed forces from its

before a national court of last instance, that court has an obligation and not merely a discretion to make a reference. See O.J. 1999, L 114/56.

20. See below notes 48 et seq. and accompanying text.

21. For a discussion of these, see, among others, Arnall, “Taming the Beast? The Treaty of Amsterdam and the Court of Justice”, in O’Keeffe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (Hart, 1999), pp. 109–121; Tridimas, “The European Court of Justice under the Treaty of Amsterdam” in Lynch, Neuwahl, and Rees (Eds.), *Reforming the European Union: From Maastricht to Amsterdam* (Longman Press, 2000), pp. 74–84.

22. See Report of the ECJ on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, reproduced in Court of Justice, *Annual Report 1995*, pp. 19–30 at 25.

23. See (1999) *Neue Zeitschrift für Verwaltungsrecht*, 1343.

24. Council Directive 76/207, O.J. 1976, L 39/40.

scope. The issue however did reach the ECJ because, on 13 July 1998, the Hannover Administrative Court had made a reference to the ECJ on the compatibility with the directive of the German provisions on the military service of women. The ECJ responded to the reference after the Federal Administrative Court delivered its judgment. It found, contrary to the latter, that the Equal Treatment Directive precludes the application of German law which imposes a general exclusion of women from military posts involving the use of arms and which allows them access only to the medical and military-music services.²⁵ The case vividly illustrates that the ability of lower national courts to make a reference is the most potent remedy against the refusal of a court of last instance to refer.²⁶

A further problem associated with Article 68(1) is this: the preclusion of lower national courts from making references on matters falling within Title IV may have a spillover effect. In some cases the same dispute, and indeed the same question referred, may give rise to issues pertaining both to the interpretation of Articles 61 to 69 and other articles of the EC Treaty. The temptation of the national court will then be to leave the possibility of a reference to a higher court rather than make an incomplete reference. Article 68(1) is liable to make access to the ECJ more difficult and less certain even in relation to provisions of the Treaty which fall outside the scope of Title IV.²⁷

The changes made by the Treaty of Amsterdam reflect the extension of constitutional pluralism in the jurisdictional field. The limitations imposed on the Court's powers were the *quid pro quo* for bringing politically sensitive areas, traditionally reserved to the nation State, under the auspices of supranational institutions. The model of differentiated integration, which has formally been espoused since the Treaty of Maastricht, will inevitably lead to variable jurisprudence applicable only to certain Member States. One of the key challenges faced by the Court is to preserve the integrity and coherence of

25. Case C-285/98, *Kreil*, [2000] ECR I-69.

26. For further examples of the enforcement power of lower court references, see Case 8/81, *Becker*, [1982] ECR 53 and, more recently, C-412/97, *ED v. Italo Fenocchio*, [1999] ECR I-3845, para 6. In both cases, references were made on issues in relation to which higher courts had held that Community law was not applicable. For *Becker*, see the earlier judgment of the Federal Financial Court of 16 July 1981, [1982] 1 CMLR 528 where it had refused to accept that a Community directive may produce direct effect.

27. Title IV limits the jurisdiction of the ECJ also in another way. Art. 68(2) states that the Court does not have jurisdiction to rule on any measure or decision taken pursuant to Art. 62(1) relating the maintenance of law and order and the safeguarding of internal security. This provision leads to the denial of the right to judicial protection and, to that extent, one may question its compatibility with the European Convention on Human Rights and the Charter on Fundamental Rights. See also the restriction on the Court's jurisdiction by Art. 35(5) TEU.

the Community legal order in an era where diversity is the prevailing political model.

3. Demand and supply for preliminary references

Over the years, the work load of the ECJ has increased considerably both with regard to preliminary references and with regard to direct actions. This increase has been well-documented.²⁸ Suffice it to say here that, although there have been fluctuations from year to year, the annual average growth rate of preliminary references in the period between 1961 and 1998 was 16%. In the period between 1992 and 1998, preliminary references increased by an impressive 85%.²⁹ The share of preliminary references in the total number of cases brought before the ECJ has also seen a dramatic increase from below 4% in 1961 to more than 64% in 1998.³⁰ Although, as tables 2 and 4 at the end of this article demonstrate, the demand for preliminary rulings in the last five years does not establish an upward trend, further increases may be expected as a result of the EC acquiring new competences and the accession of new Member States. The ECJ has not been able to keep up with this increase in demand. The number of cases introduced in the Court on an annual basis exceeds the number of cases dealt with. This has led to an increase in the backlog of cases³¹ and, additionally, to an increase in the length of proceedings. Indeed, despite the immense efforts made by the Court, as table 3 demonstrates, the duration of proceedings continues to be a problem. In 2001, the average length of proceedings in preliminary references continued its upward trend although the average length in relation to appeals was reduced considerably.

Notably, in *Pafitis v. Greece*³² the European Court of Human Rights gave the ECJ a clean bill of health. In assessing whether the length of civil proceedings

28. See Turner and Munoz, "Revising the Judicial Architecture of the European Union", (1999–2000) 19 YEL 1, where extensive statistical data are given for the period between 1953 and 1998.

29. Turner and Munoz, cited *supra*, at 26. Note that only 162 new references were made in 1992 compared to 264 in 1998.

30. This increase in the case law may be attributed to the following factors: (a) the growth in the size of economic activity subject to EC legislation (including the accession of new Member States); (b) the increase in Community competence and legislation; (c) the expansion of the case law of the ECJ itself; (d) the increase in the awareness of Community law. For a detailed discussion, see Tridimas and Tridimas, *op. cit. supra* note 1.

31. See Table 1 annexed to this article. As of the end of 2001, there were 839 cases pending before the ECJ, 400 of which were references for a preliminary ruling. This accounts for 48% of the total pending cases. See Annual Report of the European Court of Justice for the year 2001.

32. *Pafitis v. Greece*, judgment of the ECtHR of 26 Feb. 1998.

before the Greek courts was contrary to Article 6(1) of the Convention, the Strasbourg Court did not take into account the time during which the proceedings were stayed pending a reference for a preliminary ruling. As a result of the reference, the proceedings were prolonged by 2 years and 7 months.³³ The Court of Human Rights held however that it could not take this period into consideration. Even though it might at first sight appear relatively long, to take it into account “would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article”.³⁴ Despite this favourable response from Strasbourg, there is evidence to suggest that national courts increasingly view the length of proceedings in Luxembourg as an argument against making a reference.³⁵

To redress the balance between supply and demand for preliminary references, the Court itself and the political authorities (i.e. the Member States and the Community institutions) have chosen to concentrate on increasing supply rather than taking active measures to restrict demand. The only demand control mechanism introduced by the ECJ has been the *acte clair* doctrine. There are good pragmatic reasons why the incremental increase in supply is a more acceptable solution than curbing demand. Any system for the active reduction of demand would be politically controversial because it would entail a shift in the balance of powers between supranational and national agencies. Thus, if the national courts were given more freedom as to whether or not to make a reference that would reduce the involvement of the Court of Justice and risk diversity in the application of Community law contrary to the underlying rationale of Article 234. Also, for the reasons stated above, restricting the possibility of a reference to national courts of final instance would severely reduce access to justice and the immediacy of Community law. Similarly, if the costs of preliminary reference were increased by imposing court fees, that would be considered as running counter to fundamental notions of access to justice and the right to judicial protection. For these reasons, reform has concentrated on the supply side. Here too, reforms which would bring a major overhaul of the existing system have been avoided. Thus, to match supply and demand, the ECJ could be given a power of *certiorari* similar to that of the

33. Case C-441/93, *Pafitis v. Trapeza Kentrikis Ellados AE*, [1996] ECR I-1347. The decision to make a reference was taken on 3 Aug. 1993 and the ECJ delivered its judgment on 12 March 1996.

34. Judgment cited *supra* note 32, at para 90.

35. This appears to be the case in relation to English and also Danish courts. On the latter, see Due, “Danish Preliminary References” in O’Keeffe and Bavasso op. cit. *supra* note 2, pp. 363–375. Note also that in a judgment delivered on 20 May 1998, the French *Conseil d’Etat* followed the opinion of the *commissaire du Gouvernement* who recommended that, although the issue was unclear, a reference should not be made in relation to Art. 6 of Directive 92/50 on the award of public service contracts, on the ground that it would cause a delay incompatible with interlocutory proceedings in public procurement cases at the *Conseil d’Etat*.

US Supreme Court, choosing which references to hear and thus concentrating on those which it considers to be more critical for the Community legal order. Such a power, however, would make the ECJ liable to the accusation that it controls its own agenda and turns the dialogue into a monologue. It would risk a crisis of legitimacy and the alienation of national courts, the governments, and the public. The political authorities have thus sought to re-balance demand and supply by fine-tuning the current structures, seeking to increase judicial efficiency, and favouring incremental reform. Two mechanisms which seek to re-balance supply and demand have been introduced: (i) measures which seek to increase judicial efficiency, in particular, new Article 104(3) of the Rules of Procedure; (ii) the possibility of sharing the preliminary reference system between the ECJ and the CFI.

3.1. *Efficiency and house-keeping*

At the instigation of the ECJ itself, changes have been made to its Rules of Procedure to enable it to manage its case law better. An important amendment was made to Article 104(3) in July 2000.³⁶ The amended provision introduces an expedited procedure under which the Court may dispose of a reference by means of an order in the following cases: (a) where the question referred is identical to a question on which the Court has already ruled; (b) where the answer may be clearly deduced from existing case law; and (c) where the answer admits of no reasonable doubt. In such instances, the case does not proceed to judgment. The Court replies by way of an order without the parties presenting oral argument and without the Advocate General delivering an opinion. Prior to its amendment, Article 104(3) enabled the ECJ to dispose of a reference by order only where a question was “manifestly identical” to a question on which the Court had already ruled.

Article 104(3) is the procedural expression of the precedent value of the Court’s rulings. The ECJ may refuse to engage in a dialogue because precedent exists and the matter can be considered as closed or because the answer to the question is so obvious that it is not necessary for the Court to hear further extensive legal argument. Although on its face the provision appears to be an uncontroversial house-keeping measure, conceivably, it has considerable potential to operate as a quasi-filtering mechanism since it enables the Court to decide which precedents to revisit. This is not to say that the Court has a free hand. Before deciding to dispose of the case by order, it must hear any observations submitted by the national governments and any Community

36. For a codified version of the Rules of Procedure, see O.J. 2001, C 34/1, and see further the amendments of 3 April 2001 (O.J. 2001, L 119/1). For the most up-to-date version of the rules, see the website of the ECJ: europa.eu.int/cj/en/index.htm

institutions which have an interest in the case, pursuant to Article 20 of the Statute of the ECJ. It must also hear the views of the advocate general. The fact, however, that a government disagrees with disposing of the reference by order does not mean that the Court will not do so.³⁷ Also, the fact that the referring court disagrees with the previous case law of the ECJ is not a sufficient reason for the Court not to use the expedited procedure.³⁸ Article 103(4) puts the ECJ in control of the reference. The net result is that, where precedent exists, the onus is on the referring court to persuade the ECJ that the case in issue must be distinguished or that it must re-open its case law.

So far, the Court has made use of the expedited procedure in a number of cases. Twelve cases were completed by means of the Article 104(3) procedure in 2000 and 15 cases in 2001. By contrast, under the previous version of Article 104(3), 2 cases were dealt with in 1999 and 2 in 1998. In some cases, the ECJ has used the expedited procedure to dispose of the reference on the ground that the answer to the question may be clearly deduced from existing case law. In rejecting such cases, the Court has not engaged in creative application of precedent but remained squarely within the confines of its previous rulings.³⁹ The procedure has also been used to dispose speedily of cases which have been stayed pending the outcome of a test case once the latter is decided.⁴⁰ Even by using the expedited procedure, however, the ECJ may not be able to answer the national court in less than a year.⁴¹

A further welcome change made to the Rules of Procedure in 2000 is that, under Article 104(5), after receiving the order for reference, the ECJ may ask the national court for clarification. The Court has made “regular, albeit

37. See Case C-264/00 *Gründerzentrum-Betriebs-GmbH v. Land Baden-Württemberg*, Order of 21 March 2002, where the Court disposed of the reference by Order despite the fact that the German Government objected to it.

38. Ibid.

39. See e.g. *Gründerzentrum-Betriebs-GmbH v. Land Baden-Württemberg*, cited *supra* note 37 (interpretation of Directive 69/335 on taxes on the raising of capital); Case C-307/99, *OGT Fruchthandelsgesellschaft*, [2001] ECR I-3159 (the ECJ reiterated that the WTO agreements do not produce direct effect and held that, since it had previously found that the TRIPS agreement did not have direct effect, the same applied to the provisions of GATT 1994); Case C-59/00, *Bent Moustén Vestergaard v. Spøttrup Boligselskab*, Order of 3 Dec. 2001, [2001] ECR I-9505 (confirmation of Case 45/87, *Commission v. Ireland*, [1988] ECR 4929 and Case C-359/93 *Commission v. Netherlands* [1995] ECR I-157).

40. See Case C-256/99, *Hung*, (not published in the ECR) which was disposed by order once Case C-192/99, *Kaur*, [2001] ECR I-1237 was decided. See ECJ Annual Report 2001, para A3.

41. See e.g. *Gründerzentrum-Betriebs-GmbH v. Land Baden-Württemberg*, cited *supra* note 37, reference received by the ECJ on 29 June 2000, Order given on 21 March 2002; Case C-175/00, *Marie-Josée Verwayen-Boelen v. Rijksdienst voor Arbeidsvoorziening*, reference received on 10 May 2000, order issued on 4 March 2002. In some cases, the order has been given more speedily: See Case C-9-12/01, *Monnier* (not published in the ECR) where the order was given five months after the reference: See ECJ Annual Report 2001, para A3.

relatively restrained” use of this possibility.⁴² Its drawback is that, inevitably, it lengthens the procedure but it is valuable because it enables the Court to ventilate the issues involved and the background to the case. When the Court seeks clarification from the national court, it ensures that the parties to the main proceedings and the other interested parties are given the opportunity to submit observations.⁴³ In some cases, the ECJ seeks clarifications before deciding whether to dispose of the case by means of an Article 104(3) Order.⁴⁴

In 2001, the ECJ had recourse for the first time to Article 104a of the Rules of Procedure. Under this provision, at the request of the national court, the ECJ may give priority to a preliminary reference and hear it under an accelerated procedure derogating from the Rules of Procedure. The accelerated procedure was used in *Jippes and Others*,⁴⁵ a reference made by a Dutch court concerning the Community policy on the eradication of foot-and-mouth disease. Notably, the Court views Article 104a, and its sister provision in relation to direct actions,⁴⁶ as exceptional procedures to be used only in cases of particular urgency so as to avoid excessive disruptions to the other cases. They are means for sensible case management and not tickets for a two-speed judicial system.⁴⁷

3.2. *Preliminary references and the CFI*

Article 225(3) EC, as amended by the Treaty of Nice, grants the CFI jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 in specific areas laid down by the Statute.⁴⁸ This article marks a departure from the traditional approach, under which preliminary references were reserved for the ECJ. Although the sharing of preliminary references with the CFI has been criticized, it is submitted that it is a welcome development. Preliminary references do not intrinsically raise issues which

42. See ECJ 2001 Annual Report, para A3.

43. Ibid.

44. See e.g. *Marie-Josée Verwayen-Boelen*, cited *supra* note 41.

45. Case C-189/01, [2001] ECR I-5689. The reference was received by the Court on 27 April and judgment was given promptly on 12 July 2001.

46. Art. 62a of the Rules of Procedure of the ECJ. A fast-track procedure has also been introduced in relation to actions before the CFI: see Art. 76a of the Rules of Procedure of the CFI.

47. In 2001, in addition to *Jippes*, the accelerated procedure was sought in another 5 preliminary references and 2 appeals, but the request was rejected. See ECJ 2001 Annual Report, para A3.

48. For a detailed analysis, see, among others, Johnston, “Judicial Reform and the Treaty of Nice”, 38 CML Rev., 499; Dashwood and Johnston, “Part Two: The outcome at Nice”, in Dashwood and Johnston (Eds.), *The Future of the Judicial System of the European Union* (Hart, 2001), pp. 217–268; Eeckhout, “The European Courts after Nice”, in Andenas and Usher (Eds.), *Legal Issues of the Nice Treaty* (Hart, 2002, forthcoming).

are more difficult or more important for the Community legal order than direct actions. In fact, one can easily identify categories of references, such as customs classification cases, jurisdiction over which ought to be transferred to a lower court. There is no reason why all references should be entrusted to a single court other than the need to ensure the coherence of jurisprudence and the uniformity of Community law. Article 225(3) addresses those needs. To enable the ECJ to maintain its unifying role, it provides for two safeguard mechanisms. Where the CFI considers that a case requires a decision of principle likely to affect the unity and consistency of Community law, it may refer the case to the ECJ for a ruling.⁴⁹ In addition, decisions given by the CFI on references for a preliminary ruling may exceptionally be subject to review by the ECJ, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.⁵⁰ The precise way in which these principles will be implemented remains to be seen.⁵¹ In general, however, the changes made by the Treaty of Nice appear to establish an acceptable balance between competing demands. They reflect a general recognition that the ECJ will not be able to cope with its mounting case law unless the number of preliminary references is somehow reduced. The sharing of jurisdiction with the CFI appears preferable over alternative reforms since it avoids an increase in the number of judges of the ECJ, which would be unworkable, and at the same time ensures that the ECJ retains residual power to ensure the coherence of the case law. These changes in fact bring the ECJ closer to assuming the role of a Supreme Court of the Union.

4. Control of admissibility

It is well established that, whilst in the early years the Court was keen to encourage the use of the preliminary reference procedure, and thus cultivate a proclivity on the part of national courts to engage in dialogue, in the 1990s it assumed a more interventionist role in reviewing the admissibility

49. Art. 225(3), second sub-paragraph.

50. Art. 225(3), third sub-paragraph. Art. 62 of the Statute of the ECJ, as amended by the Treaty of Nice, provides that, where the First Advocate General considers that there is a serious risk of the unity or consistency of Community law being affected, he may propose that the Court of Justice review the decision of the CFI.

51. See Declarations 13, 14 and 15 adopted by the IGC and attached to the Treaty of Nice. The most important of those is Declaration 13, which states that the essential provisions for the review procedure should be defined by the Statute of the ECJ and should, in particular, specify: the role of the parties to the proceedings before the ECJ in order to safeguard their rights; the effect of the review procedure on the enforceability of the decision of the CFI; and the effect of the ECJ's decision on the dispute between the parties.

of references.⁵² The starting point remains that it is for the national court to determine the need for a preliminary reference and the questions to be referred. The ECJ however may decline jurisdiction in the following cases:⁵³ (a) where the referring court has failed to define adequately the legal and factual background to the dispute; (b) where the question referred is general or hypothetical or (c) where it bears no relation to the actual nature of the case or the subject matter of the main action. In fact, the case law does not distinguish clearly between the second and the third category. The hypothetical nature of the questions referred includes the case where the proceedings are contrived.⁵⁴ By contrast, the ECJ firmly follows its stance that it will not examine whether the referring court lacks jurisdiction according to the procedural rules of national law.⁵⁵ Nor will it investigate whether the factual findings of the referring court are correct.⁵⁶

Despite fears to the contrary, the ECJ has not used its power to control the admissibility of references as a means of introducing *certiorari* by the back door. In the period between 1998 and 2001, references were rejected as inadmissible only in few cases, mostly on the ground that the referring court did not adequately define the factual and legal background.⁵⁷ In none of them did the Court refuse to answer on the ground that the dispute was contrived. *Foglia v. Novello* remains an aberration in the history of a highly deferential

52. For a critical account, see O’Keeffe, “Is the spirit of Article 177 under attack? Preliminary references and admissibility”, 23 EL Rev. (1998), 509.

53. *Telemarsicabruzzo*, cited *supra* note 15. For recent confirmations, see Case C-379/98, *PreussenElektra*, [2001] ECR I-2099, para 39; Case C-36/99, *Idéal Tourisme v. Belgian State*, [2000] ECR I-6049, para 20; Case C-322/98, *Kachelmann v. Lampe*, [2000] ECR I-7505, para 17.

54. See Case 244/80, *Foglia v. Novello*, [1981] ECR 3045, para 18; *Lourenco Dias*, cited *supra* note 15, para 17.

55. For a recent confirmation of this principle with regard to the Austrian Constitutional Court (Verfassungsgerichtshof), see Case C-143/99, *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion*, [2001] ECR I-8365.

56. See e.g. Case C-435/97, *World Wildlife Fund v. Autonome Provinz Bozen*, [1999] ECR I-5613, para 32; *PreussenElektra*, cited *supra* note 53, para 40.

57. See e.g. Joined Cases C-128 & 137/97, *Testa and Modesti*, [1998] ECR I-2181; Case C-9/98, *Agostini*, [1998] ECR I-4261; Case C-116/96 REV, *Reisebüro Binder GmbH*, [1998] ECR I-1889; Joined Cases C-28 & 29/98, *Charreire and Hirtsmann v. Directeur des Services Fiscaux de la Moselle*, [1999] ECR I-1963; Case C-325/98, *Anssens v. Directeur des Services Fiscaux du Nord*, [1999] ECR I-2969; Case C-422/98, *Colonia Versicherung and Others v. Belgian State*, [1999] ECR I-1279; Case C-116/00, *Laguillaumie*, [2000] ECR I-4979. In some cases, the Court found some of the questions referred irrelevant and thus refused to answer them, but accepted others: see e.g. *Idéal Tourisme*, cited *supra* note 53; C-421/97, *Tarantik*, [1999] ECR I-3633. In Case C-314/96, *Djabali v. Caisse d’Allocations*, [1998] ECR I-1149 it was held that, even where the referring court has no power to withdraw the reference under the national rules of procedure, the Court may refuse to answer the questions referred if the case pending before the national court has lost its purpose because the claim of the applicant has been satisfied in full.

and welcoming court.⁵⁸ Also, the Court is reluctant to reject a reference on the ground that the questions referred bear no relation to the actual nature of the case or the subject-matter of the main action. Such irrelevance must be “quite obvious”⁵⁹ or “apparent”⁶⁰ and, in the absence of such evidence, the Court will proceed to answer the reference. This approach is undoubtedly correct. Admissibility control must be exercised to filter out the cases where the ECJ cannot give a meaningful reply and not as a mechanism to reduce the case law. What is interesting is that national governments frequently raise a plea of inadmissibility against references.⁶¹ This may be taken as an indication of mistrust towards the ECJ, their fear being that the Court is more likely to find against State interests.

The genuine character of the dispute was contested in *PreussenElektra*.⁶² German law required electricity supply undertakings to purchase electricity produced locally from renewable energy sources but provided that, in cases of hardship, the supplier was obliged to reimburse partially the purchaser by means of a compensatory payment. The Landgericht Kiel referred a number of questions concerning the compatibility of the purchasing scheme with the Treaty rules on State aid and the free movement of goods. The reference was made in proceedings brought by *PreussenElektra*, an electricity supply company, against Schleswig, a regional electricity supplier. It was argued that the dispute was spurious because both parties agreed that the German law was contrary to the Treaty, and *PreussenElektra* was the main shareholder in Schleswig and therefore had a dominant influence on the decisions and legal position of the latter. The Court accepted that both parties to the proceedings had an interest in the German law being regarded as State aid but pointed out that the obligation to purchase electricity and the reciprocal obligation on the supplier to compensate the purchaser flowed directly from German law. The dispute therefore could not be regarded as a procedural device arranged by the parties in order to induce the Court to deliver a ruling. This conclusion was supported by the fact that the referring court had allowed other interested parties to intervene in the main proceedings arguing that the German law was lawful.⁶³ In a similar vein, the Advocate General pointed out two decisive

58. Case 104/79, *Foglia v. Novello*, [1980] ECR 745 and Case 244/80, *Foglia v. Novello*, *supra* note 54. Cf. Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179.

59. *PreussenElektra*, *supra* note 53, para 39.

60. See e.g. Case C-318/98, *Formasar and Others*, [2000] ECR I-4785, para 28.

61. There is a plethora of unsuccessful pleas of inadmissibility. See e.g. Case C-275/98, *Unitron Scandinavia and 3-S*, [1999] ECR I-8291; *Kachelmann*, cited *supra* note 53; C-423/98, *Albore*, [2000] ECR I-5965; Case C-340/99, *TNT Traco*, [2001] ECR I-4109, para 31; Case C-390/99, *Canal Satélite Digital SL v. Distribuidora de Televisión Digital SA*, [2002] ECR I-607; Case C-35/99, *Arduino*, [2002] ECR I-1529.

62. *PreussenElektra*, *supra* note 53.

63. *Id.*, paras. 44–45.

differences between the case in issue and *Foglia v. Novello*. PreussenElektra and Schleswag contested the validity of a German law before a German court, unlike the situation in *Foglia* where an Italian court was asked to pass judgment on the compatibility of a French law with Community rules. Also, unlike the situation in *Foglia v. Novello*, the conflict of interests between the PreussenElektra and Schleswag was not the result of the parties' elaborate contractual arrangements but the automatic consequence of the application of the statutory obligation laid down by German law. Unsuccessful reliance on *Foglia* has been made in other cases.⁶⁴

The Court has stressed that the national court must define the factual and legislative context of the question referred or at least to explain the factual hypotheses on which they are based.⁶⁵ This requirement serves a twofold purpose. First, it is necessary to enable the ECJ to arrive at an interpretation of Community law which is useful for the national court. Unless the ECJ has some knowledge of the factual and legislative background to the dispute, it risks supplying a ruling which may not only be unhelpful to the referring court but positively misleading. The need to explain the background to the dispute is particularly important in certain fields, such as competition law, which is characterized by complex factual and legal situations. By contrast, the Court will answer the questions where, because of their nature and the subject-matter to which they relate, it is possible to give a useful reply even where the national court has not given an exhaustive description of the legal and factual background.⁶⁶

Secondly, the information provided in the order for reference gives the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice.⁶⁷ The Court places particular emphasis on this provision, which

64. See e.g. Case C-451/99, *Cura Anlagen GmbH v. Auto Service Leasing GmbH (ASL)*, [2002] ECR I-3193. In that case the reference was made in the context of a contractual dispute. The Court stated that, even if some of the information on the file might give a suspicion that the proceedings were contrived, it could not be denied that there was a genuine contract the performance or annulment of which undeniably depended on a question of Community law. See also *Arduino*, cited *supra* note 61; *Idéal Tourisme*, cited *supra* note 53. In that case, although the Court was not persuaded that the proceedings were contrived, it found the second question referred irrelevant and refused to answer it. But note that, in Case C-153/00, *Criminal Proceedings against Paul der Weduwe*, where a Belgian court sought a ruling on the compatibility of Luxembourg law with Community law, A.G. Léger AG opined that the reference should be rejected as inadmissible (see Opinion of 23 April 2002). The Court has not yet delivered judgment at the time of writing.

65. See *Telemarsicabruzzo*, cited *supra* note 15, para 6; See further e.g. Case C-157/92, *Banchero*, [1993] ECR I-1085; Case C-378/93, *La Pyramide*, [1994] ECR I-3999; Case C-458/93, *Saddik*, [1995] ECR I-511.

66. See e.g. Case C-316/93, *Vaneetveld v. Le Foyer*, [1994] ECR I-763; Case C-125/94, *Aprile v. Amministrazione delle Finanze dello Stato*, [1995] ECR I-2919.

67. *Saddik*, cited *supra* note 65, para 13.

is designed to protect the rights of defence of the Member States and the Community institutions which have an interest in the proceedings. In effect, compliance with Article 20 is a necessary condition for the legitimacy of the Court's rulings.

In determining whether the order for reference contains adequate information, the Court takes into account all the circumstances of the case. An assessment can be made only on a case-by-case basis. In *Lehtonen and Castors Braine*⁶⁸ a reference was made by the Brussels Court of First Instance concerning the compatibility of certain rules of the Belgian basketball federation with Articles 6, 48, 85 and 86 EC (now Articles 12, 39, 81 and 82 respectively). The rules in question prohibited a basketball club from fielding players from other Member States in matches for the national championship if they had been transferred to the club after a specified date. The Italian Government and the Commission contested the admissibility of the action on the ground that the order for reference did not contain a sufficient account of the legal and factual background to the case. The ECJ stated that, as appeared from the observations made by the parties, the governments of the Member States, and the Commission, the information submitted in the order for reference enabled them properly to state their position on the question referred insofar as it concerned the Treaty rules on the freedom of movement for workers. Also, the order for reference was supplemented by the material in the case-file forwarded by the national court and the written observations submitted to the Court. All that material, which was included in the Report for the Hearing, was brought to the notice of the governments and the other interested parties for the purposes of the hearing, at which they had the opportunity to amplify their observations.

By contrast, the Court found that insofar as the question referred concerned the competition rules of the Treaty, it did not have adequate information to enable it to give guidance as to the definition of the market or markets at issue in the main proceedings. The order for reference did not show clearly the character and number of undertakings operating on the relevant market, nor did it enable the Court to make meaningful findings as to the existence and volume of trade between Member States or as to the possibility of that trade being affected by the rules on transfers of players. On that basis, it considered that it was able to answer the question insofar as it pertained to the free movement of persons but not insofar as it concerned the rules on competition law.⁶⁹

68. Case C-176/96, [2000] ECR I-2681.

69. The same view was taken in Joined Cases C-51/96 & C-191/97, *Deliège*, [2000] ECR I-2549: the ECJ answered the question insofar as it pertained to the freedom to provide services but not insofar as it pertained to competition law.

A stricter approach was followed in *Laguillaumie*.⁷⁰ The Paris Court of Appeal questioned the compatibility of the French statutory scheme for the disposal of waste with the provisions of the Treaty on competition law, Article 28 EC, and several directives on technical regulations, waste, and packaging, in the context of criminal proceedings brought against a producer. The Court rejected the reference as inadmissible on the ground that the national court had not explained the connection between the provisions of Community law and the factual situation or the applicable national legislation.

The national court had also sent to the ECJ the defence statement of the accused and the file of the case in the national proceedings. The ECJ held that, although those documents might explain the context in which the questions had been put, they were not able to remedy the deficiencies of the order for reference. This is because, in the context of Article 234, the dialogue is a judicial one: it is conducted between the national court, which is alone capable of deciding the purpose and scope of the reference, and the ECJ. The parties are requested to submit observations only within the legal framework established by the court making the reference. Also, only the order for reference is notified to the Member States and the Community institutions under Article 20 of the Statute. The referring court must explain in the order for reference itself the factual and legislative context of the case, the reasons for the reference, and the connection between the provisions of Community law referred and the national law applicable to the case.⁷¹

The strict approach followed in *Laguillaumie* may at first sight appear to contrast with the Court's willingness in *Lehtonen* and other cases⁷² to accept that the order for reference can be supplemented by the case-file and the observations of the parties submitted to the Court. The cases however can be distinguished on the facts. The ECJ is keen to ensure that the order for reference is self-standing so as to comply with the requirements of Article 20 of the Statute and also ensure the role of national courts as "gate-keepers" in the demand for rulings. In *Laguillaumie* the order for reference did not contain the minimum information necessary to enable the Member States and other interested parties to get a sufficiently accurate picture of the issues involved.

70. *Laguillaumie*, cited *supra* note 57.

71. *Laguillaumie*, cited *supra* note 57, paras. 23–25; Case C-422/98, *Colonia Versicherung and Others v. Belgian State*, [1999] ECR I-1279, para 8; see also *Charreire and Hirtsmann*, cited *supra* note 57.

72. See *Deliège*, cited *supra* note 69, para 34; *Arduino*, cited *supra* note 61 para 29; Case C-67/96 *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 39; Joined Cases C-115–117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, [1999] ECR I-6025, para 38.

5. The definition of court or tribunal: functionalism or substantive standards of justice?

How does the ECJ choose which bodies to converse with? The definition of court or tribunal is an area where the case law has not provided consistency and which is characterized by an unusually high number of disagreements between the court and the advocates general.⁷³ In a strong aphorism, Colomer AG described the case law as “casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted”.⁷⁴ According to settled case law, the issue whether a body is a court or tribunal is a matter to be determined exclusively by Community law. In making its determination, the Court takes into account the following criteria:⁷⁵ whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent. This list is not exhaustive and not all of the above criteria bear the same importance.⁷⁶

It is well-established that the referring body must act in a judicial capacity. This excludes two types of reference: (a) references made by national bodies which, although independent from the administration, do not have the power of *jus dicere*; and (b) references made by national courts in the context of non-contentious proceedings. An example of the first case is provided by *Victoria Film*.⁷⁷ Under Swedish law, a taxable person may request the Revenue Board (Skatterättsnämnden) to give a preliminary decision on matters of taxation. The preliminary decision has binding effect in that it provides the basis for the assessment to tax if the person concerned decides to carry on with the action envisaged in the application. The Revenue Board is composed of persons appointed by the Government for a maximum period of four years. It has two divisions, presided by persons who are trained as judges. The Court held that, although the Revenue Board was independent and delivered decisions of a

73. See e.g. Case C-54/96, *Dorsch Consult Ingenieurgesellschaft v. Bundesbaugesellschaft Berlin*, [1997] ECR I-4961; Case C-134/97, *Victoria Film*, [1998] ECR I-7023; Case C-103/97, *Köllensperger and Atzwanger*, [1999] ECR I-551; Case C-195/98, *Österreichischer Gewerkschaftsbund*, [2000] ECR I-10497; Joined Cases C-110–147/98, *Gabalfria and Others*, [2000] ECR I-1577; Case C-407/98, *Abrahamsson and Anderson*, [2000] ECR I-5539.

74. See Case C-17/00, *De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*, [2001] ECR I-9445, per Colomer A.G. at para 14 of the Opinion, referring to Cervantes, *El ingenioso caballero Don Quijote de La Mancha*.

75. See e.g. *Dorsch Consult*, cited *supra* note 73, para 23; *Köllensperger and Atzwanger*, cited *supra* note 73, para 17.

76. Thus, the ECJ has emphasized that the criterion that the procedure must be *inter partes* is not an absolute requirement: see e.g. *Dorsch Consult*, cited *supra* note 73, para 31; *Gabalfria*, cited *supra* note 73, para 37.

77. Cited *supra* note 73.

binding nature, it performed essentially an administrative rather than a judicial function. It did not review the legality of decisions taken by the tax authorities but provided, for the first time, a tax assessment of a specific transaction. The Court also noted that the function which it performed was entrusted in other Member States to the tax authorities themselves. It concluded that the Revenue Board was not a court or tribunal capable of making a reference.⁷⁸

Similarly, the Court rejects references made by national courts in the exercise of non-contentious jurisdiction (*giurisdizione volontaria*). Such jurisdiction is common in many civil law systems in a variety of matters, such as registration of corporate entities, guardianship, adoption and succession. The standard approach of the Court since *Job Centre*⁷⁹ is to refuse to hear references on the ground that, in the context of such proceedings, the referring court is not called upon to settle a dispute and does not therefore perform a judicial function.⁸⁰ In such cases a reference may be made only by the court which hears an appeal against the decision made by the court in the first instance.⁸¹

A pivotal criterion which has given rise to difficulties is the requirement that the referring body must be independent. In *Corbiau*, the ECJ understood independence as meaning that the referring body must act “as a third party” in relation to the authority which adopted the decision forming the subject-matter of the proceedings.⁸² This is however an imprecise and vague criterion. In fact, in assessing the status of a body under Article 234, the Court is less preoccupied with substantive standards of justice, i.e. whether the body in issue fulfils the requisite standards of fairness and independence, and more with a functional criterion, namely to make the preliminary reference procedure available to all judicial bodies responsible for dealing with questions of Community law.

78. Cf. the Opinion of A.G. Fennelly, who took the view that the Revenue Board acted as a judicial body distinguishing the case from Case C-111/94, *Job Centre*, [1995] ECR I-3361.

79. Cited *supra* note 78.

80. See Case C-178/99, *Salzmann*, [2001] ECR I-4421; (Austrian land registry tribunal is not a “court or tribunal” within the meaning of Article 234 EC); Case C-86/00, *HSB-Wohnbau GmbH*, [2001] ECR I-5353; Case C-182/00, *Lutz GmbH*, [2002] ECR I-547 (references made by national courts in their capacity as authorities responsible for keeping the commercial register are not admissible).

81. *Job Centre*, cited *supra* note 78, *HSB-Wohnbau*, cited *supra* note 80, para 13. The Court has also refused to hear references made by the Italian *Corte dei Conti* (Court of Auditors) when it carries out ex post review, on the ground that when it exercises such power it performs an administrative function, consisting in the evaluation and verification of the results of administrative action. See Case C-192/98, *ANAS*, [1999] ECR I-8583; Case C-440/98, *RAI*, [1999] ECR I-8597.

82. Case C-24/92, *Corbiau*, [1993] ECR I-1277, para 15. See also Joined Cases C-74 & 129/95, *Criminal proceedings against X*, [1996] ECR I-6609; Case C-393/92, *Almelo and Others*, [1994] ECR I-1477, para 21.

A prime example is provided by *Dorsch Consult*,⁸³ where the Court found that the Federal Supervisory Board established by German law was capable of making a reference. The Board had been set up by law pursuant to the requirements of Directive 89/665 concerning review procedures applicable to the award of public supply and public works contracts⁸⁴ with the task of reviewing the decisions of review bodies concerning public procurement awards. The Advocate General came to the conclusion that the board was not a court or tribunal.⁸⁵ In his view, it did not comply with sufficient procedural safeguards. Also, the Board was functionally part of the Federal Cartel Office, which was an administrative authority, and its members did not enjoy the requisite degree of independence. Furthermore, the legislation under which the Board was set up did not provide that its decisions would be enforceable. The Court's approach was less exacting. It stated that the Board was the only body for reviewing the legality of determinations made by review bodies and its decisions were binding. The Board was required to apply rules of law and was bound to respect general procedural requirements, such as the duty to hear the parties, decide by majority, and give reasons for its decisions. Finally, its members were subject with regard to their independence and removal from office to the provisions of the Law on the Judiciary which applied to them by analogy.

Since *Dorsch Consult* the ECJ has gradually relaxed further the requirement that the body must be independent from the administration. In *Köllensperger and Atzwanger*,⁸⁶ it was satisfied that the Procurement Office of the *Land of Tyrol* was independent, although the law which governed its composition and function provided only vague guarantees as regards the tenure of its members and their dismissal from office. The law did not contain any provision requiring members of the Procurement Office to withdraw or enabling the parties to challenge their participation in the event of a conflict of interests. The Court nonetheless pointed out that the Tyrol law setting up the Office expressly stated that the Austrian General Law on Administrative Procedure was to apply to review procedures concerning the award of contracts. The General Law contained specific provisions on the circumstances in which members of such bodies should withdraw. In addition, the Tyrol Law prohibited the giving of instructions to the Procurement Office.⁸⁷

83. Cited *supra* note 73.

84. Directive 89/665, O.J. 1989, L 395/33, as amended.

85. Cited *supra* note, 4975–8 per Tesauro AG.

86. Cited *supra* note 73.

87. Note also that in Case C-258/97, *HI v. Landeskrankenanstalten-Betriebsgesellschaft*, [1999] ECR I-1405 and *Unitron*, cited *supra* note 61, the ECJ accepted references by bodies responsible for reviewing procedures for the award of public contracts. Further, in *Abrahamsson and Anderson*, cited *supra* note 73, the ECJ accepted a reference from the Swedish universities

The relaxation of the requirement of independence reached its apex in *Gabalfrisa*⁸⁸ where the ECJ accepted a reference from the Regional Economic and Administrative Court of Catalonia. In the Spanish legal system, regional economic and administrative courts deal with fiscal disputes against the administration. According to Royal Decree No 391/1996, the members of those tribunals are drawn from the ranks of administrative officials and are removed from office by decision of the Minister for Economic Affairs. This would suggest that the terms of their tenure do not satisfy the requirements of judicial independence and impartiality. The Court stated however that Article 90 of the General Tax Law No 230/1963 provides for a separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery and, on the other hand, the economic and administrative tribunals which rule on complaints against decisions of those departments without receiving instructions from the tax authority. It followed that, unlike the position in *Corbiau*,⁸⁹ the tribunals were a third party in relation to the tax departments and therefore had the independence necessary for them to be regarded as courts or tribunals for the purposes of the preliminary reference procedure.

The above cases suggest that the ECJ applies a lax criterion of judicial independence. Why has it been so generous? The overriding concern is to make the preliminary reference procedure available as widely as possible, thus ensuring the uniform interpretation of Community law and the availability of a remedy for the protection of Community rights. The Court, behaving, in effect, as a rational decision-maker, widens the franchise of Community law: by making the preliminary reference procedure available to as wide a category of bodies as possible, it upholds Community rights at the lower level and increases their immediacy and resonance.

The Court's liberal approach came under attack in *De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*.⁹⁰ Mr De Coster had lodged a complaint with the *Collège juridictionnel de la Région de Bruxelles-Capitale* (Judicial Board of the Brussels-Capital region) arguing that the payment of the municipal tax on satellite dishes was contrary to Article 49 EC as a restriction on the freedom to receive television programmes from other Member States. The issue arose whether the *Collège juridictionnel* was capable of making a reference.

appeals board on the ground that it gave decisions in total impartiality and without receiving instructions. By contrast A.G. Saggio had proposed that the questions should be declared inadmissible since the requisite degree of independence was not guaranteed: there were no specific provisions governing the possibility of revocation of the appointment of its members.

88. Cited *supra* note 73.

89. Cited *supra* note 82.

90. *De Coster*, cited *supra* note 74.

In a powerful opinion, Colomer AG criticized the case law on the ground that it was too flexible, inconsistent, and contradictory, and proposed a new definition inspired by Article 6(1) ECHR.⁹¹ In his view, the concept of court or tribunal should encompass first and foremost all bodies which are part of the national judicial structure in each of the Member States. Such bodies must always be able to make a reference where they exercise judicial powers, i.e. act independently to settle a case in adversarial proceedings in accordance with legal rules. In addition, the definition should also include bodies, which although they do not form part of the national judicial structure, have the final word in the national legal order. This will ensure that situations which are governed by Community law do not remain outside the jurisdiction of the ECJ and, consequently, without a uniform interpretation of the applicable Community norms. The Advocate General stressed however that, according to the case law of the Strasbourg Court, the requirements of independence and adversarial proceedings are cardinal to ensuring the right to judicial protection. The ECJ therefore must accept references from bodies which are not recognized as part of the national judicial system by domestic law only where (a) no further legal remedy is available, and (b) the requirements of independence and adversarial proceedings are safeguarded.

Colomer AG criticized the case law of the ECJ for not being sufficiently rigorous in establishing the independence of the referring body. He stated that independence must be understood both at personal and functional level. The former requires that the office holders must enjoy tenure which means that they cannot be dismissed, suspended, moved or retired except on grounds and subject to the safeguards provided by law. The functional aspect means the absence of hierarchical links, i.e. freedom in relation to superiors in the hierarchy and government bodies, other national authorities, and social pressures. It also involves impartiality, namely equidistance from the parties to the case and from the subject-matter of the dispute.⁹²

The Opinion of Colomer AG links the power to make a reference with the observance of minimum substantive standards of justice. This ensures the judicial character of the dialogue under Article 234 and also brings the Human Rights Convention closer to the Community legal order since, in order to establish the admissibility of the reference, the ECJ will inevitably need to assess whether the referring body complies with the standards of Article 6(1) ECHR. This approach however is not without its drawbacks. First, the issue of whether the requirements of Article 6(1) ECHR have been met is best examined in the context of a claim that this provision has been infringed and injustice has occurred as a result. However, such a claim is not before

91. See paras 80 et seq. of the Opinion.

92. See para 93 of the Opinion.

the Court. Secondly, if the Court were to make a detailed examination of whether the referring body satisfied the requirements of Article 6(1) ECHR, it would need to immerse itself in, and pass judgment on, problems and issues of national law which are incidental to the litigation and on which it may not have heard full argument. Thirdly, it is uncertain whether the view of the Advocate General in fact succeeds in enhancing judicial protection for Community rights. If the ECJ were to decline jurisdiction, the referring court would have to resolve the issue of Community law itself and there is no guarantee that the opportunity for making a reference would arise at a subsequent stage.⁹³

This is not to say that the criticism of the case law advanced by Colomer AG was misplaced. It is true that the examination of the requirement of judicial independence by the Court is rudimentary and some decisions are difficult to reconcile. Indeed, although in its judgment in *De Coster* the ECJ did not endorse the definition of court or tribunal suggested by Colomer AG, there is evidence to suggest that his opinion bore at least an indirect influence in the judgment in that, in accepting the reference from the *Collège juridictionnel*, the ECJ was more careful to establish its independence than in previous judgments.⁹⁴

Further, in a more recent case, the ECJ appears to have tightened the requirement of judicial impartiality and independence. In *Schmid*,⁹⁵ a reference was made by the Fifth Appeal Chamber of the regional finance authority for Vienna. The Austrian Federal Code of Taxes provides for the establishment for each *Land* of appeal chambers to hear complaints against decisions taken by the tax authorities. Each chamber consists of the president of the regional finance authority or an official nominated by him, another finance official, and three members chosen from amongst persons delegated by statutory pro-

93. The Advocate General pointed out a further conundrum of the case law. By accepting references from bodies which are not recognized as judicial bodies by national law, the ECJ confers on them jurisdiction and grants them powers which they do not have under national law, and therefore undermines the constitutional systems of the Member States: see para 100 of the Opinion. It is doubtful however if this criticism is correct. The ECJ does not extend the powers of the referring bodies beyond those which are recognized by national law. A tribunal cannot make a reference unless it is validly seized of a dispute under national law and its power to refer remains subject to any right of appeal recognized thereby.

94. In accepting the reference, the Court established the impartiality and independence of the *Collège juridictionnel* on the following four grounds: (a) its members were appointed by the *Conseil de la Région de Bruxelles-Capitale* and not by the municipal authorities whose tax decisions it had jurisdiction to examine; (b) the possibility of conflicts of interests did not arise since its members were not allowed to be members of the staff of the municipal authority; (c) the appointment of the members of the *Collège juridictionnel* could be challenged on grounds essentially identical to those which applied in the case of members of the judiciary; (d) their appointment was for an unlimited period of time and could not be revoked.

95. Case C-516/99, [2002] ECR I-4573.

fessional representative bodies. The members of the appeal chamber are not bound by any directions in the exercise of their functions. They swear an oath to take impartial decisions and must withdraw where there is a well-founded suspicion of partiality. The Austrian Government submitted that, although the appeal chambers have an organizational link with the tax department, there is no conflict of interest because in practice the president of the regional finance authority does not himself assume the presidency of the appeal chamber and nominates a finance official to exercise that function. Also, the second member of the appeal chamber who comes from the tax authority intervenes in his capacity as an appeal chamber member outside the fields and procedures for which he is usually responsible as a tax official. The ECJ however did not consider that these safeguards were sufficient. Referring to *Corbiau*, it stressed that the requirement of independence is satisfied only where the referring body acts as a third party in relation to the authority which adopted the contested decision. Then, the Court drew the following distinction. It held that where an appeal body has an organizational link with the authority whose decision is contested, it cannot be regarded as a third party unless the national legal framework is such as to ensure a separation of functions between the two. By contrast, where there is an organizational and functional link between an appeal chamber and the regional finance authority, it is impossible to regard the chamber as a third party in relation to the latter. As regards the specific circumstances of the case, the Court found that the requisite degree of independence was not present on the following grounds. There was an organizational link since two of the members of the appeal chamber belonged to the tax authority. As regards the existence of a functional link, the Court pointed out that the official of the finance authority who was the second member of the appeal chamber continued, in addition, to pursue his activities within that authority and was, in that capacity, subject to the directions of his hierarchical superiors. The Court further pointed out that the president of the regional finance authority had ample discretion in nominating members of the appeal chambers. There was no legislative provision to prevent him from modifying the composition of an appeal chamber for the enquiry into each complaint, or even in the course of the enquiry into a complaint. In the absence of an express legislative provision determining the length of the mandate of appeal chamber members and specifying the conditions of removal, members could not be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive. Finally, the Court attributed particular importance to the fact that the president of the regional finance authority (who in this context was subject to possible directions from the Finance Minister) could bring an appeal against a decision of an appeal chamber and thus defend a point of view different from that adopted by the chamber of which he was president.

Notably, in *Schmid* the Court placed much more emphasis on the requirement of independence than it had placed in previous cases such as *Cabalfrija* and carried out a more detailed examination of the composition and tenure of the referring body.

6. Jurisdiction by *renvoi*

The ECJ accepts that it has jurisdiction to interpret Community provisions applicable by virtue of national law. In *Dzodzi*⁹⁶ it accepted a reference from a Belgian court arising from a factual dispute which was subject only to Belgian law. Community law became relevant only because Belgian law provided, in order to avoid reverse discrimination, that the foreign spouse of a Belgian national was to be treated as if she was a Community national. The Court accepted the reference founding its jurisdiction primarily on the overriding concern to ensure uniformity. It stressed that it is in the interests of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.⁹⁷

Although in *Kleinwort Benson Ltd v. City of Glasgow District Council*⁹⁸ the Court took a narrower view of its jurisdiction, in subsequent cases it reverted to the *Dzodzi* approach.⁹⁹ This extension of the preliminary reference procedure has not been without its critics. This is, in fact, another area which is characterized by a high number of disagreements between the Court and its advocates general.¹⁰⁰ In his Opinion in *Leur-Bloem*, Jacobs AG made

96. *Dzodzi*, cited *supra* note 16. See further Case C-231/89, *Gmurzynska-Bscher*, [1990] ECR I-4003 and earlier Case 166/84, *Thomasdunger*, [1985] ECR 3001.

97. Cited *supra* note 16, paras 33–41. The Court used two further arguments. It held that neither the wording nor the aims of Art. 234 suggest that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling where the law of a Member State refers to a Community provision in order to determine the rules applicable to a situation which is purely internal to that State. Also, it pointed out that the division of jurisdiction between the Court and the national courts is governed by a spirit of cooperation according to which it is solely for the national court to determine, in the light of the special features of each case, the need for a preliminary ruling.

98. Case C-346/93, [1995] ECR I-615.

99. See Case C-28/95, *Leur-Bloem v. Inspecteur des Belastingdienst/Ondernemingen Amsterdam 2*, [1997] ECR I-4161; Case C-130/95, *Giloy v. Hauptzollamt Frankfurt am Main-Ost*, [1997] ECR I-4291; and further Case C-384/89, *Tomatis and Fulchiron*, [1991] ECR I-127; Case C-88/91, *Federconsorzi*, [1992] ECR I-4035; Case C-73/89, *Fournier v. van Werven*, [1992] ECR I-562.

100. See e.g. *Dzodzi*, cited *supra* note 16; *Gmurzynska-Bscher*, cited *supra* note 96; *Thomasdunger*, cited *supra* note 96; and the cases mentioned in the next two footnotes.

a powerful critique of the *Dzodzi* case law.¹⁰¹ In his view, the risks which might arise from possible divergencies in the interpretation of Community provisions are overstated. By contrast, accepting jurisdiction in *Dzodzi* terms has problems. The Advocate General pointed out that, where a Community rule applies by operation of national law, the Court is called upon to interpret it outside its proper context. Such interpretation risks being partial i.e. influenced by extraneous factors and not taking into account other relevant factors. Since the context in which the rule is applied may be different from the Community law context, there is no guarantee that the ruling provided for by the Court will be useful for the national court nor indeed that it will be binding.

Despite these reservations, the jurisdiction of the ECJ to interpret Community provisions where they apply by *renvoi* is now firmly established and recent case law suggests that it has even been extended. In *Adam v. Administration de l'enregistrement et des domaines*,¹⁰² the Court reiterated that where, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for a single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. The Court held that this reasoning applies *a fortiori* when the national legislation which uses a concept in a provision of Community law has been adopted with a view to the transposition into internal law of the directive of which the said provision forms part.¹⁰³

An interesting case is *Kofisa Italia*.¹⁰⁴ An Italian court sought the interpretation of Articles 243 to 245 of the Community Customs Code,¹⁰⁵ which establish a right of appeal against decisions taken by the customs authorities in disputes concerning the payment of VAT. The national court made the reference on the ground that the Presidential decree of 26 October 1972 on VAT provided that, with regard to disputes and penalties, the provisions of the customs legislation were applicable.¹⁰⁶ The distinct feature of this case is that the *renvoi* to the Community provisions made by the domestic statute was only indirect. The 1972 decree referred to the provisions of customs legisla-

101. See *Leur-Bloem*, cited *supra* note 99, at 4179 et seq. For a more recent criticism see the Opinion of A.G. Colomer in Case C-1/99, *Kofisa Italia*, [2001] ECR I-207, discussed below.

102. Case C-267/99, *Adam v. Administration de l'enregistrement et des domaines*, [2001] ECR I-7467. Cf the Opinion of A.G. Tizzano.

103. *Ibid.* para 28.

104. *Kofisa Italia*, cited *supra* note 101.

105. Council Regulation No 2913/92, O.J. 1992, L 302/1.

106. See Art. 70 of Presidential Decree No 633 of 26 Oct. 1972 on the introduction and regulation of value added tax (GURI No 292 of 11 Nov. 1972, Suppl. Ord. no 1).

tion but at that time there was no Community Customs Code. In fact, a look at various Italian statutes showed that the system governing the implementation of decisions in customs matters was inspired by the system applicable to VAT and not vice versa. The ECJ however did not consider this as being of material importance. It started by pointing out that the Customs Code replaced the relevant national legislation with effect from 1 January 1994. It then used a “negative” argument: the Italian Government had not relied on any provision of national law which stated that the national provisions on customs matters which were superseded by the Customs Code continued to apply to VAT levied on importation. The Court also found little value in the Commission’s argument that the competent authorities in customs matters and tax matters were not the same. It held that it could not be precluded that the two authorities had to apply the same rules of procedure. Also, the same judicial authority had jurisdiction in both areas and the questions referred concerned the appeal before the judicial authority.

This uncompromising approach in extending jurisdiction by *renvoi* shows that the ECJ sees itself as the Supreme Court of the Union and views the national and the Community legal orders as a unitary system. The ECJ extends its franchise, encouraging the application of Community norms to situations which fall outside their scope and the gradual emergence of a *jus communae europeum*. The Court is inevitably drawn into the interpretation of national law but does not appear to go at length to ensure that its judgment is binding. In *Kofisa* it merely stated that there was nothing in the file to indicate that the national court was empowered to depart from its interpretation of the Customs Code.¹⁰⁷ The Court’s ruling, however, lacks by its nature the binding force deriving from the primacy of EC law since the factual dispute is beyond the scope of application of Community law.

It is interesting to note that in most cases where references have been made in circumstances where Community law applies by way of *renvoi*, the national authorities or governments involved have argued that the ECJ should not have jurisdiction. They may do so for two reasons: they may not wish to see a further loss of sovereignty which results from the subjection of national law to the interpretative values of the ECJ or they may consider that the ECJ will take a view more favourable to the individual. This is however not necessarily so. In *Kofisa* the ECJ established its jurisdiction to hear the dispute only to leave the matter essentially to national law and the discretion of the national court.

A consequential issue which arises is the following. In cases where a Community norm applies by virtue of national law, is a national court covered by Article 234(3) required to make a reference or does it merely have the

107. Cited *supra* note 101, para 31.

power to do so? The ECJ has not so far answered this question. It is submitted however that the answer is the latter. First, an obligation to make a reference can only exist if there is an obligation to apply Community law. This is not the case here since the Community rule applies only by virtue of national law. Secondly, as shown in the *Kleinwort Benson* case, the circumstances in which the ECJ will accept a reference are not altogether clear. The imposition of an obligation to make a reference to national courts of last instance will inevitably give rise to uncertainties and further problems as to its scope of application. Thirdly, the very purpose of the *Dzodzi* case law is not to compel but to empower. The ECJ offers a helping hand and engages in judicial dialogue at the instigation of a national court. The imposition of an obligation to refer would exceed the Court's jurisdiction. In policy terms, it would be unwise because it might risk resentment by national courts and thus prove counter-productive.

7. The national reaction

The success of the ECJ in attaining the constitutionalization¹⁰⁸ of the Treaties owes much to the approval, encouragement, and cooperation of national courts. In fact, keeping national courts on board is essential to the ECJ maintaining its pivotal role in the Union and its cardinal contribution to the shaping of the Community legal order. The reason why the support of national courts is so essential is twofold. First, given the decentralized character of the EC judicial system, the ECJ relies largely on them for the enforcement of its rulings. Secondly, among all the mechanisms of control to which the ECJ is subject, the possibility of a rebellion by the national courts is the most powerful. The idea of the independence of the judiciary is so firmly embedded in our legal culture that, in the event that the ECJ is perceived to exceed its powers, the response of the political authorities is most likely to be subtle, indirect, prospective, and seek a change in judicial attitudes in the long-term. The reaction of the national judiciary by contrast can be firmer and more direct.¹⁰⁹ In this respect, the way national courts understand the function of the preliminary procedure and the way that they use it, or abstain from using it, may be viewed as a barometer of their support of the ECJ case law.

108. For the term "constitutionalization", see *supra* note 6.

109. Note e.g. the rebellion of the German courts following the judgment in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125. See, in particular, *Internationale Handelsgesellschaft* [1972] CMLR 177, *Solange I* [1974] 2 CMLR 540, and later *Solange II* [1987] 3 CMLR 225 and *Brunner* [1994] 1 CMLR 57.

There are important variations as regards the number of references,¹¹⁰ the areas of law which they concern and the level of courts from which they originate in the various Member States. Many factors account for those variations, including differences in the national judicial and procedural systems, the inclination of the national courts to think federal and their familiarity with Community law. English courts, for example, have traditionally been selective in the use of the preliminary reference procedure. The data suggest that there are fewer references by UK courts in comparison to courts of other Member States of equivalent or even smaller population, although in recent years references from UK courts have grown.¹¹¹ The traditional reluctance of English courts to make references may be attributed to a number of factors. First, at least in the early years of EC membership, the common law tradition led to a methodological alienation from Community law. Also, in a culture where the judge makes the law, passing the resolution of the dispute to another authority may be viewed as indecisiveness. English courts appear to subject any request for a reference to a rigorous cost-benefit analysis taking into account, among other things, the likelihood, in the light of the existing ECJ authorities, of the court getting the EC point wrong if it decided it without making a reference.¹¹² They also appear to attribute particular importance to considerations of judicial efficiency and the impact of the reference on the length of proceedings. In sum, English courts operate on the basis of the presumption “if in doubt, decide yourself” whilst some of their continental brethren subscribe to the view “if in doubt, refer”. Austrian courts for example have been particularly keen to embrace the preliminary reference procedure.¹¹³

110. See Table 4 annexed to this article.

111. See below, Table 4. Note e.g. that the number of references made each year by Italian courts is higher than the number of references made by UK courts. By contrast, although the overall number of references made by French courts is much higher than that made by UK courts, the number of references made by UK courts is higher since 1997. The Netherlands and Belgium account for a large number of references despite their small size. It is interesting to note however that, in the 1990s, the annual number of references made by UK courts has increased both in absolute terms and by comparison to some other Member States (e.g. France, Belgium and the Netherlands). It would be more accurate to relate the number of references made by each Member State not to its population but to the overall number of cases heard by its domestic judiciary. Such research would require a comparative analysis of data obtainable from the national ministries of justice.

112. Note however that there has been a gradual shift towards a more *communautaire* approach. Compare *Bulmer v. Bollinger SA* [1974] 2 ALL ER 1226, *Customs and Excise Commissioners v. ApS Samex* [1983] 1 All ER 1042; *R v. International Stock Exchange ex p Else* [1993] QB 534.

113. See below Table 4. The total number of references made by Austrian courts since its accession in 1995 is a staggering 203 in comparison to 89 made from Danish courts since 1973 and 338 made by UK courts since the same year.

Within the confines of the present article, any examination of the national reaction to the preliminary reference procedure can only be selective. We will here focus on the following topics: (a) the use of the preliminary reference to resolve disagreements between the national courts and the ECJ; (b) the use of the *acte clair* doctrine; and (c) the alternative conception of the preliminary reference procedure as illustrated in the *Danish Maastricht Ratification* case.

7.1. Protest through co-operation

In cases where national courts disagree with a ruling delivered by the Court of Justice, they may refer again the same or similar questions asking the Court to reconsider. This may be seen as protest through co-operation since the national court fulfils its part of the bargain under the cooperative mechanism of Article 234. As successive references are made, the referring courts may ventilate the legal and factual context in which the issues arise and refine their queries and, ultimately, may induce a more favourable reply from Luxembourg. Notable examples of successive references on the same issue are provided by the Greek company law cases.¹¹⁴ These put in issue the compatibility of a special regime introduced by the Greek Government in the 1980s for the rejuvenation of ailing companies with the Second Company law Directive.¹¹⁵ Under the regime, once a company was placed under the provisional administration of the OAE, a statutory body responsible for corporate restructuring, the board of directors and the general meeting ceased to exercise their normal powers. In *Karellas*,¹¹⁶ the Court held that Article 25(1) of the Second Company law Directive has direct effect and prohibits the increase in corporate capital without a decision of the general meeting even in cases where a company is under a special reorganization regime under the auspices of a statutory body. In subsequent cases, the Court reiterated firmly the same view despite protests by Greek courts.¹¹⁷ In *Pafi*

114. See notes 116 et seq. *infra*, and accompanying text. Another example is provided by the following line of cases on indirect sex discrimination: Case C-360/90, *Bötel*, [1992] ECR I-3589; Case C-278/93, *Freers and Speckmann v. Deutsche Bundespost*, [1996] ECR I-1165; Case C-457/93, *Kuratorium für Dialyse und Nierentransplantation v. Lewark*, [1996] ECR I-243. Notably, the courts of some Member States, e.g. Germany, are happy to engage in such “disagreement dialogue” with the ECJ. By contrast, Danish courts, for example, rarely make references on issues on which the ECJ has already adjudicated. See Biering, “The application of EU law in Denmark: 1986 to 2000”, 37 CMLRev. 925.

115. Council Directive 77/91/EEC of 13 Dec. 1976, O.J. 1977, L 26/1.

116. Joined Cases C-19 & 20/90, *Karellas*, [1991] ECR I-2691.

117. See Case C-381/89, *Syndesmos Melon tis Eleftheras Evangelikis Ekklesias and Others*, [1992] ECR I-2111; Joined Cases C-134 & 135/91, *Kerafina-Keramische und Finanz-Holding*

tis and subsequently in *Kefalas*¹¹⁸ the Court was not receptive to the argument that a company could rely on Article 281 of the Greek Civil Code, which prohibits the abuse of rights, to condition the right of a shareholder to rely on Article 25(1) of the directive. But in *Diamandis* it capitulated.¹¹⁹ After reiterating that Member States were not entitled to derogate from Article 25(1), it held that Community law cannot be relied on for abusive or fraudulent ends and that national courts may deny a person the benefit of the provisions of Community law on the basis of objective evidence of abuse. It stressed that the application of a national rule such as Article 281 must not detract from the full effect and uniform application of Community law but concluded that, in the circumstances, such danger did not exist.¹²⁰ *Diamandis* shows that doctrines of national law may limit the application of rights based on directly effective provisions of directives.¹²¹ For the purposes of the present discussion, the case vividly illustrates that the development of the law is the result of a dialectical process facilitated by the judicial dialogue of the preliminary reference procedure.¹²²

Another example of a case where the referring court prompted the ECJ to change its case law is provided by *Technische Universität München*.¹²³ There, the Court held that the importer of scientific apparatus from a third country who had been refused importation free of customs duty had the right to a hearing before the Commission. The judgment departed from previous case law which accepted that undertakings did not have the right to be heard in such circumstances.¹²⁴ The case arose as a result of a reference by the Federal Finance Court of Germany and brought to the fore a clash of conflicting philosophies of administrative law.¹²⁵ It is an example of protest through

and *Vioktimatiki*, [1992] ECR I-5699; *Pafitis*, cited *supra* note 33; Case C-367/96, *Kefalas and Others v. Greek State*, [1998] ECR I-2843.

118. See previous footnote.

119. C-373/97, *Diamandis v. Elliniko Domosio*, [2000] ECR I-1705.

120. *Ibid.*, paras. 33–34.

121. The case is notable because the Court accepted a limitation on the effects of directives on the basis of the doctrine of abuse of rights as it exists in Greek law rather than developing a general principle of abuse of rights at Community level. See annotation by Anagnostopoulou in 38 CML Rev., 767–780; and for a discussion of the case, see Tridimas, “Black, White and Shades of Grey: Horizontality of Directives Revisited”, (2002) 21 YEL (forthcoming).

122. Notably, A.G. Saggio took a strict view and, following the previous case law, considered that Art. 25(1) of the Second Directive prohibited reliance on Art. 281 of the Greek Civil Code.

123. Case C-269/90 [1991] ECR I-5469.

124. See Case 185/83, *University of Groningen v. Inspecteur der Invoerrechten en Accijnzen*, [1984] ECR 3623; Case 203/85, *Nicolet Instrument v. Hauptzollamt Frankfurt am Main-Flughafen*, [1986] ECR 2049; Case 303/87, *Universität Stuttgart v. Hauptzollamt Stuttgart-Ost*, [1989] ECR 715.

125. This clash was between the discretion-based concept of administrative powers followed in common law jurisdictions and endorsed by the ECJ and the duty-bound concept of administration followed by German law. In its judgment, the ECJ enhanced process rights as a response

cooperation: by making a reference in circumstances where it disagreed with the case law, the national court played (and won) by the rules of the game.

7.2. *Acte Clair*

Before entering into a discussion of *acte clair*, it is worth mentioning two recent judgments of the ECJ concerning national courts of last instance. The Court has confirmed that the obligation of a national court covered by Article 234(3) to make a reference remains unaffected by the Commission's conduct on an enforcement action. Thus the fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has no effect on the obligation of a court of last instance of that Member State to make a reference in relation to that legislation.¹²⁶ This is clearly correct since, under Article 226 EC, the Commission has no power to determine conclusively the rights or duties of Member States or the compatibility of national legislation with the Treaty.

More importantly, in *Kenny Roland Lyckeskog*,¹²⁷ the Court had the opportunity to provide guidance as to which courts are covered by the obligation to make a reference under Article 234(3). The ECJ held that a national court, whose decisions can be appealed to the national supreme court only if the latter declares the appeal to be admissible, is not a court against whose decision there is no judicial remedy. The Court examined the issue in the context of Swedish law, under which the parties' right to appeal against a decision of the court of appeal (hovrätt) is subject to admissibility control. It pointed out that the fact that the examination of the merits of an appeal is subject to a prior declaration of admissibility by the Supreme Court (Högsta domstol) does not deprive the parties of a judicial remedy. The ECJ stated however that, if a question arises as to the interpretation or validity of a rule of Community law, the *Högsta domstol* will be under an obligation pursuant to Article 234(3) to make a reference for a preliminary ruling either at the stage of the examination of the admissibility or at a later stage.

If one were to transpose these principles into the English legal system, it would mean that the Court of Appeal is not covered by Article 234(3) but that the House of Lords must make a reference either when it considers the case on its merits or when it decides whether to grant leave to appeal. The judgment in

to the referring court's concerns that the ECJ exercised only marginal review on substantive grounds. See further Tridimas, *The General Principles of EC Law* (OUP, 1999) at pp. 271–272, and Nolte, "General principles of German and European administrative law – A comparison in historical perspective", 57 MLR (1994), 191.

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

127. Case C-99/00, judgment of 4 June 2002, nyr.

Lyckeskog should be considered as correct. The opposite view would extend unnecessarily the obligation to make a reference to a large number of national courts which cannot properly be described as courts of last instance.

We turn now to the *acte clair* doctrine. Although in *CILFIT* the ECJ took care to circumscribe the cases where national courts of last instance need not make a reference, there is no doubt that, under the *acte clair* doctrine, they enjoy some discretion. A recent example of the application of the doctrine in England is provided by the judgment of the House of Lords in *Three Rivers District Council v. Governor of the Bank of England*.¹²⁸ The plaintiffs were depositors of the UK branch of the BCCI Bank who, following its collapse, sought to recover damages from the Bank of England alleging that it had failed in its supervisory duties. They argued that the Bank had granted to BCCI authorization in breach of the First Banking Directive.¹²⁹ Applying the framework of analysis established in *Francovich* and *Dillenkofer*,¹³⁰ the House of Lords examined whether the Directive intended to grant rights to individual depositors the contents of which were identifiable in its provisions and gave a negative reply. It held that the directive was no more than a first step towards the mutual recognition of authorizations issued by each Member State to credit institutions. The protection of individual depositors was not, as such, an objective of the directive but a necessary condition to achieve the freedoms of establishment and services. Lord Hope pointed out that the Directive did not contain a definition of depositor and therefore, unlike the Directive in issue in *Dillenkofer*, it did not define the class of persons in whose favour the Directive might be said to have created rights. The House of Lords relied on two further arguments. It held that by virtue of the transitional provisions of the Directive, Article 3(1), which imposes on Member States the obligation to require credit institutions to obtain authorization before commencing their activities, did not apply to BCCI because it had already commenced its activities before the implementation of the Directive. Further, in contrast to the views expressed by Auld LJ at the Court of Appeal, the House of Lords rejected the argument that Articles 6 and 7 of the Directive imposed any duties of supervision on the national competent authorities.

Three Rivers District Council illustrates a liberal, albeit reasonable, application of the *acte clair* doctrine. The decision not to refer withstands a cost-benefit analysis. Having had “the benefit of very full and helpful submissions”, the House of Lords examined the Directive, took a certain view as to its interpretation and concluded that the likelihood of its interpreting it wrongly

128. [2000] 2 WLR 1220; [2000] 3 CMLR 205.

129. Directive 77/780, O.J. 1977, L 322/30.

130. See Joined Cases C-6 & 9/90, *Francovich and others*, [1991] ECR I-5357; Joined Cases C-178, 179, 188–190/94, *Dillenkofer and others v. Germany*, [1996] ECR I-4845.

was so small as to outweigh the disadvantages, in terms of delay and extra costs, of making a reference.¹³¹

An example of the misuse of the *acte clair* doctrine is provided by *Katsarou v. Greek State*,¹³² a judgment of the Greek Conseil d'Etat sitting in plenum. A Greek national had acquired a *maitrise* in law from the University of Lille II, having completed the first two years of her studies in a branch of that university situated in Greece. She applied for judicial review of the decision of the Greek authorities refusing to recognize her diploma as equivalent to a Greek law degree. The Conseil d'Etat rejected her application by a majority decision. It held that, under Article 16 of the Greek Constitution, higher education is provided exclusively by self-governing institutions operating under the aegis of the State and the establishment of private universities is prohibited.

The Conseil d'Etat took the view that the provisions of the Treaty on free movement and the case law on mutual recognition were neutralized by Article 126 EC on which it placed particular emphasis. It pointed out that, under Article 126(1), the Community is required to respect fully the responsibility of the Member States for the content of teaching and the organization of education systems, and their cultural and linguistic diversity. By reserving competence on matters of education to the Member States, Article 126 elevates respect for cultural and linguistic diversity to a value of overriding importance and accepts that there may be resulting restrictions on free movement. The Conseil d'Etat also held that Directive 89/48,¹³³ being a measure of secondary law, should be interpreted in the light of Article 126. It concluded that the interpretation of Community law was *acte clair* and there was no need to make a preliminary reference.

The view that Article 126 provides a wholesale derogation from the provisions on the fundamental freedoms is not supported by the Court's case law on mutual recognition and appears to be incorrect. In any event, given that a substantial number of the Conseil d'Etat members dissented, it must be accepted, at the very least, that the issue was not *acte clair*. The Conseil d'Etat clearly exceeded its *CILFIT* mandate.

The judgment in *Katsarou* contrasts with the judgment of the Belgian *Cour de Cassation* in *Dreessen* where the *Cour de Cassation*, in an effort to take Community law fully into account and paying due respect to *Vlassopoulou*,¹³⁴

131. Note that the *Bundesgerichtshof* (3rd senat) has now made a reference to the ECJ on issues similar to those raised in *Three Rivers*.

132. Judgment 3457/1998 of 25 Sept. 1998, *Armenopoulos* 1999, 125.

133. Council Directive on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, O.J. 1989, L 19/16.

134. Case C-340/89, [1991] ECR I-2357.

made a second reference on a separate issue arising from the same factual dispute concerning the right of the applicant to practise in Belgium as an architect on the strength of an engineering diploma obtained in Germany.¹³⁵

Liberal recourse to the *acte clair* doctrine was also made by the Swedish Supreme Administrative Court (Regeringsrätten) in its judgment of 16 June 1999.¹³⁶ The applicants had challenged a decision revoking a licence to operate a nuclear power station following the entry into force of a Swedish statute seeking to phase out nuclear energy. The applicants argued that the revocation was contrary to several rules of Community law, including Directive 85/337 on environmental impact assessment,¹³⁷ Directive 96/92 concerning common rules for the internal market in electricity,¹³⁸ and the Treaty provisions on free movement and competition. Despite the complexity of the issues raised, the Swedish court did not consider it necessary to make a reference. After referring to the case law of the ECJ under Article 86(1) (ex Art. 90(1)), it considered that there was no breach of the principle of proportionality and held that there was no conflict with Community law.

A further example of a refusal to make a reference is provided by the judgment of the Spanish *Tribunale Supremo* of 27 April 1998.¹³⁹ In a case concerning a challenge to public docking services on grounds of incompatibility with EC competition law, the *Tribunale Supremo* stated, somewhat perplexingly, that it was not for the Court of Justice to rule on the compatibility of national legislation with Community law. It took the view that Articles 85, 86, 90 and 94 (now 81, 82, 86, 89 respectively) EC were sufficiently clear and dismissed the challenge without seeking a reference.

The above cases show that national courts have different perceptions of their duties under the *acte clair* doctrine and, at least in some cases, exceed their *CILFIT* mandate.

135. Judgment of the Cour de Cassation of 21 Jan. 2000 available at the National Decisions on European law (NADEL) database www.fd.unl.pt/je/nadel.htm. The reference led to the judgment of the Court in Case C-31/00, *Conseil National de l'Ordre des Architectes v. Dreessen*, [2002] ECR I-663. The first reference had been made by the Appeals Committee of the Belgian Architects Association: see Case C-447/93, *Dreessen*, [1994] ECR I-4087.

136. The judgment is discussed in EC Commission, 18th annual report on monitoring the application of Community law, COM(2000)92 final, 23/6/2000, available at europa.eu.int/comm/secretariat_general/sgb/infringements/report99_en.htm

137. O.J. 1985, L 175/40.

138. O.J. 1997, L 27/20.

139. *Tribunal Supremo, Sala Tercera de lo Contencioso-Administrativo*, 27 April 1998, *Asociación de Empresas Frigoríficas de la Ría de Vigo v. Administración General del Estado*, Repertorio Aranzadi de Jurisprudencia, 1998, No 3328. The case is discussed in EC Commission, 17th Annual Report on Monitoring the Application of Community law, O.J. 1999, C 354.

7.3. *The Danish Maastricht Ratification case*

A somewhat different conception of the preliminary reference procedure was suggested by the Danish Supreme Court in the celebrated *Maastricht Treaty Ratification case*.¹⁴⁰ The Supreme Court found that the ratification of the Maastricht Treaty did not violate the Danish Constitution. It held that the EC Treaty meets the requirement laid down in Article 20 of the Constitution that powers vested in the authorities of the realm may be delegated to an international organization only to “an extent specified by statute”. It inserted however two provisos. First, the Community may not be delegated power to adopt measures contrary to the Constitution. Secondly, the requirement of Article 20 that the powers delegated must be specified means that Danish courts cannot be deprived of their right to determine whether a Community act exceeds the limits for the surrender of sovereignty made by the Act of Accession. The Supreme Court acknowledged that domestic courts cannot declare a Community measure inapplicable in Denmark without the question of its compatibility with the Treaty having first been tried by the ECJ. It also accepted that Danish courts can generally base their decision on decisions by the Court of Justice. It held however that they have jurisdiction to declare a Community act inapplicable in the extraordinary situation where it can be established “with the required certainty” that a Community act which has been upheld by the ECJ lies beyond the surrender of sovereignty made by the Act of Accession.¹⁴¹

The Danish *Maastricht Ratification case*, as earlier the German *Maastricht decision*,¹⁴² endorses the “State sovereignty friendly theory” of supremacy¹⁴³ and postulates that the Community derives its authority from the national constitutions. In this constitutional set-up, the mandate of the ECJ is derivative and pregnable since the national courts, as guardians of the constitution, have ultimate authority. The judgment of the Danish supreme court views the preliminary reference procedure in a different light. The authority of the ECJ is respected but in effect, the duty of cooperation envisaged in Article 234 is reversed. A Danish court must give to the ECJ the opportunity to rule on the validity of a community act but *in extremis* it retains power to declare the act invalid despite a contrary pronouncement by the ECJ. Thus, in some cases, the reference may be seen as an invitation to the ECJ to respect the standards

140. *Hanne Norup Carlsen and others v. Prime Minister Poul Nyrup Rasmussen* [1999] 3 CMLR 854. Judgment delivered on 6 April 1998, UfR 1998.800. For a discussion, see among others, Rasmussen, “Confrontation or Peaceful Coexistence? On the Danish Supreme Court’s Maastricht Ratification Judgment” in O’Keeffe and Bavasso, op. cit. *supra* note 2, 377–390; Høegh, “The Danish Maastricht Judgment”, 24 EL Rev. (1999), 80.

141. [1999] 3 CMLR 854, at para 33 of the judgment.

142. See *Brunner*, cited *supra* note 109.

143. See Rasmussen, op. cit. *supra* note 140, at 380.

of the Danish constitution rather than a request for assistance. In any event, the ruling of the ECJ is not viewed as conclusive.

The Danish Supreme Court is not the only one which reserves itself ultimate authority to review the compatibility of Community legislation with the national constitution.¹⁴⁴ The German Constitutional court takes the same view¹⁴⁵ as does the Italian Constitutional court. Notably, in its judgment No 509/95,¹⁴⁶ the Italian Constitutional court had taken a similar approach to that subsequently endorsed in the Danish *Maastricht* case. While it reiterated that it reserves itself jurisdiction to intervene where a Community measure conflicts with the Constitution or fundamental rights, it took the view that, where an Italian court considers that a Community measure may violate human rights, it must first make a reference to the ECJ given that respect for fundamental rights is an integral part of the Community legal order. Curiously, however, in one case the Italian Constitutional Court took the view that it is not a court or tribunal within the meaning of Article 234 capable of making a reference.¹⁴⁷ This view has been criticized on the ground that the concept of court or tribunal is a Community concept to be interpreted by the ECJ and the Constitutional court certainly fulfils the relevant criteria.¹⁴⁸ It is also damaging because it excludes direct dialogue between the two courts.

8. Conclusion

The preliminary reference procedure has been a major facilitator of constitutional change, providing the jurisdictional basis for redistribution of powers between organs of government at various levels. The mandate of the ECJ under Article 234 has traditionally been all-embracing mandatory, and exclusive. These are no longer the defining features of preliminary references as the changes introduced by the Treaty of Amsterdam and the Treaty of Nice make for a more fragmented procedure. The key challenge faced by the Court is how to preserve the integrity and coherence of the Community legal order in an era of constitutional pluralism and diversity.

144. See further Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" 36 CML Rev., 351.

145. See however the judgments of the *Bundesverfassungsgericht* in *Alcan*, 17 Feb. 2000 (2000) EuZW 445 and in the *Bananas case*, 7 June 2000 (2000), EuZW 702. The effect of these judgments is that, although the Constitutional court retains residual control to examine the compatibility of Community law with human rights, it is in fact extremely reluctant to exercise it. See the annotation by Hoffmeister in 38 CML Rev., 791.

146. See *Giurisprudenza Costituzionale* [1995] 1.

147. Order n. 536/95 of 29 Dec. 1995, (1996) *Foro Italiano*, I, 783.

148. See Tesaro, "Community Law and National Courts – An Italian Perspective" in O'Keefe and Bavasso, op. cit. *supra* note 2, pp. 391–405, at 398–9.

The most pressing problem in recent years has been the increase in the Court's case law. To redress the imbalance between supply and demand for preliminary references, the ECJ and the political authorities have opted for incremental reform by increasing gradually supply for rulings and streamlining the procedure. There are obvious political advantages in seeking incremental reform rather than wholesale change but it is highly uncertain whether drip-feeding supply will provide a long-term solution. The most far-reaching change is effected by the Treaty of Nice which opens the way for the CFI to acquire jurisdiction over preliminary references. This is a welcome change. Although it will inevitably add to the fragmentation of the preliminary reference mechanism, provided sufficient safeguards are introduced, the ECJ can maintain its unifying influence.

It is notable that, although the ECJ has done much to alert the political authorities to the dangers arising from the increase in case law, in exercising its functions, it has not allowed considerations of workload to influence its notion of justice. The Court's residual power to control the admissibility of references has been used in a cautious and measured way. This is correct as control of admissibility can be no substitute for the absence of a power of *certiorari*. Similarly, the Court has used its new powers under Article 104(3) of the Rules of Procedure with prudence rather than imagination. Ironically, the ECJ continues to contribute to the increase in demand for rulings, first, by interpreting the notion of court or tribunal broadly and, secondly, by reasserting its jurisdiction to interpret Community provisions even where they become applicable by virtue of national law. The former has the effect of expanding the resonance of the Court, enabling it to converse with lower jurisdictions and by-passing the national higher courts. The latter contributes to the emergence of a *jus communae europeum*. These two areas are clearly points of tension between the court and its advocates general. The cases from the various national jurisdictions examined above illustrate different perceptions of the preliminary reference procedure and the *acte clair* doctrine. *Three Rivers District Council* shows the decision to make (or not to make) a reference as the outcome of a cost-benefit analysis taking into account, among other considerations, the wishes of the parties and the likelihood of the national court getting it wrong. *Katsarou* illustrates the application of *acte clair* as an act of defiance, whilst the Danish constitutional court views references on validity as an opportunity for reconciliation and not as unconditional surrender of sovereignty. Although in a number of cases national courts of last instance have failed to make references, one should be cautious in attempting to establish a general pattern of disobedience. There is no concerted effort to disobey but judicial pluralism. National supreme courts however pose two types of challenges to the ECJ. First, they do not necessarily take Community law as "given" but seem to apply their own

internalized notion of it, sometimes through a misuse of the *acte clair* doctrine as in *Katsarou*. Further, irrespective of the use of the preliminary reference procedure, a number of national courts do not share the ECJ's view that Community law reigns supreme over the national constitutions and that "ECJ locuta is res finita". Although this will only be tested *in extremis*, supremacy is conditional and reversible.

9. Tables¹⁴⁹*Table 1.* Cases introduced and completed at the ECJ¹⁵⁰

Year	New cases	Cases completed	Pending cases
1998	485	374 (420)	664 (748)
1999	543	378 (395)	801 (896)
2000	503	463 (526)	803 (873)
2001	504	398 (434)	839 (943)

Table 2. References made and completed

Year	References made	References completed
1998	264	204 (246)
1999	255	180 (192)
2000	224	211 (268)
2001	237	153 (182)

Table 3. Average length of proceedings¹⁵¹

Year	Preliminary references	Direct actions	Appeals
1991	18.2	24.2	15.4
1992	18.8	25.8	17.5
1993	20.4	22.9	19.2
1994	18	20.8	21.2
1995	20.5	17.1	18.5
1996	20.8	19.6	14
1997	21.4	19.7	17.4
1998	21.4	21	20.3
1999	21.2	23	23
2000	21.6	23.9	19
2001	22.7	23.1	16.3

149. All data have been taken from the annual reports of the ECJ.

150. The figures in brackets are gross, i.e. they represent the total number of cases without account being taken of the joinder of cases on grounds of similarity. The figures outside brackets are net, i.e. have taken into account any joinder of cases. It is more accurate to compare the number of cases introduced to the Court every year with the gross number of cases completed.

151. The length of proceedings is expressed in months and tenths of a month.

Table 4. Number of references per Member States since 1991

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
B	19	16	22	19	14	30	19	12	13	15	10
DK	2	3	7	4	8	4	7	7	3	3	5
D	54	62	57	44	51	66	46	49	49	47	53
EL	3	1	5	–	10	4	2	5	3	3	4
E	5	5	7	13	10	6	9	55	4	5	4
F	29	15	22	36	43	24	10	16	17	12	15
IRL	2	–	1	2	3	–	1	3	2	2	1
I	36	22	24	46	58	70	50	39	43	50	40
L	2	1	1	1	2	2	3	2	4	–	2
NL	17	18	43	13	19	10	24	21	23	12	14
A					2	6	35	16	56	31	57
P	3	1	3	1	5	6	2	7	7	8	4
FIN					–	3	6	2	4	5	3
S					6	4	7	6	5	4	4
UK	14	18	12	24	20	21	18	24	22	26	21
TOTAL:	186	162	204	203	251	256	239	264	255	224 ¹⁵²	237

152. An additional references was made by the Benelux Court, see Case C-265/00 *Campina Melkunie*, not yet decided at the time of writing.