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The Role and Mechanism of the Preliminary Ruling Procedure

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Carl Otto Lenz

Abstract

This Article examines the preliminary ruling procedure, by far the most important procedure for legal practitioners and courts. Because Community law, by reason of its supremacy and direct effect, impacts relationships between individuals, Member State courts are asking the Court to decide Community law questions more frequently. Although the law to be applied in these cases is the same in all Member States, there is a potential danger to the functioning of the EC legal system as a whole if the law is not applied uniformly in the Member States. The founding fathers of the Community averted this situation by conferring upon the Court of Justice a monopoly of interpretation on questions of Community law.

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*Carl Otto Lenz**

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INTRODUCTION

Under the founding treaties of the European Communities,¹ the Court of Justice (the "Court") was entrusted with the task of ensuring observance of the law through its interpretation and application of the three constitutive treaties.² Under the institutional structure of the European Community ("EC" or "Community") legal system, the Court has been given a monopoly of interpretation. The Court under Article 173 of the EC Treaty may be called upon by any Member State, the Council, or the Commission to review the legality of Community acts.³ All natural and legal persons who are directly and individually affected by such acts are also entitled to bring an action for annulment.⁴

Because Community law, by reason of its supremacy and direct effect, impacts relationships between individuals, Member State courts are asking the Court to decide Community law questions more frequently. Although the law to be applied in these cases is the same in all Member States, there is a potential danger to the functioning of the EC legal system as a whole if the law is not applied uniformly in the Member States. The founding fathers of the Community averted this situation by conferring upon the Court of Justice a *monopoly of interpretation* on questions of Community law. This transfer of competence would have been incomplete if Member State courts were not permitted to refer disputes arising under Community law to the Court of Jus-

1. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, *as amended in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987) [hereinafter EAEC Treaty]; Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, *as amended in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987) [hereinafter ECSC Treaty]; Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7 1992, O.J. C 224/01 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (1992) [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

2. EC Treaty, *supra* note 1, art. 164. "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." *Id.*; EAEC Treaty, *supra* note 1, art. 136; ECSC Treaty, *supra* note 1, art. 31.

3. EC Treaty, *supra* note 1, art. 173, ¶ 2.

4. *Id.* art. 173, ¶ 4.

tice. This Article examines the preliminary ruling procedure, by far the most important procedure for legal practitioners and courts.

I. *CONTENT AND PURPOSE OF THE PRELIMINARY RULING PROCEDURE*

In the preliminary ruling procedure, cooperation between the courts of the Member States and the Court of Justice in the interpretation of Community law is enshrined in the EC Treaty ("Treaty"). This is a key concept of the Treaty, because apart from a few exceptions, most notably competition law, the enforcement of Community law is a matter for the authorities and courts of the Member States. Therefore, Member States are primarily responsible for the application of Community law.

A. *Interpretation of the EC Treaty*

The preliminary reference procedure fosters cooperation between the courts of the Member States and the Court of Justice.⁵ Article 177 of the EC Treaty states that the Court of Justice is to have "jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."⁶ Thus, the subject matter of preliminary references consists of the entire area of Community law, including the founding treaties, general principles of law, and so-called secondary legislation passed by EC institutions.

When deciding a case, a national court may refer questions on the interpretation and validity of Community law to the Court of Justice for a binding determination. If a question of Community law needs to be answered in order to determine a case before a *court of last instance*, that court is obliged to submit a reference for a preliminary ruling.⁷ The establishment of the

5. The European court system is two-tiered, consisting of the Court of Justice of the European Communities and below it the Court of First Instance. The Court of Justice, the senior of the two courts, has a broader jurisdiction and is solely responsible for giving preliminary rulings on questions referred by the Member State courts.

6. EC Treaty, *supra* note 1, art. 177, ¶ 1.

7. *Id.* art. 177, ¶ 3. "Where any such question is raised in a case pending before a court or tribunal of a member-State against whose decisions there is no judicial remedy

preliminary ruling procedure gives a far-reaching guarantee that Community law will remain uniform in all Member States.

A centralized court is particularly necessary because broad areas of the Community legal order are decentralized. Community legal provisions adopted by the Council and the Commission are usually applied by the authorities of Member States. The Common Customs Tariff and the various individual customs regulations, for example, are applied by the customs authorities of the individual Member States. The regulations for implementing the Community's agricultural policy are put into effect by the authorities and intervention agencies of the Member States. Furthermore, in the area of the freedom of movement for workers, the provisions of Regulation No. 1408/71 of the Council on the application of social security systems to employed persons moving within the Community⁸ are frequently the subject of references for preliminary rulings.

Individual citizens of the European Union⁹ are often affected by administrative acts passed by Member State authorities on the basis of Community law. The individual may defend against such administrative acts only before the national courts. If a question arises regarding the application and interpretation of the provisions of Community law,¹⁰ the national court can stay the proceedings and refer the matter to the Court of Justice for a decision. The importance of preserving the uniformity of the EC legal order, which the preliminary reference procedure is designed to uphold, has been expressly emphasized by the Court of Justice on many occasions.¹¹

under national law, that court or tribunal shall bring the matter before the Court of Justice." *Id.*

8. Regulation No. 1408/71, O.J. L 149/2 (1971). This regulation, which lays down binding provisions in welfare law, is applied by insurance institutions and social security courts in the Member States and is therefore frequently referred to the Court for preliminary rulings.

9. EC Treaty, *supra* note 1, art. 8. "Every person holding the nationality of a member-State shall be a citizen of the Union." *Id.*

10. Community law is contained in the three constitutive treaties, in the legal acts of the institutions (i.e., regulations, directives, and decisions), in international agreements concluded by the Community with non-Member States or external organizations, and in certain general principles of law that the Court of Justice has deduced from the treaties and the legal systems of the Member States.

11. *See, e.g.*, Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 166/73, [1974] E.C.R. 33, [1974] 1 C.M.L.R. 523; Foglia v. Novello (II), Case 244/80, [1981] E.C.R. 3045, [1982] 1 C.M.L.R. 585; Firma C.

B. *Exclusive Jurisdiction to Declare Community Acts Invalid*

The Court of Justice not only has jurisdiction to give binding interpretations on Community law, but also has *exclusive jurisdiction to declare Community acts invalid*. The annulment procedure in Article 173 of the EC Treaty enables the Court to review the legality of Community acts and set such acts aside.¹² The founding treaties, however, do not give an immediate indication of whether Member State courts may review the validity of Community acts or decide not to apply Community law. While the distribution of competence between the national courts and the Court of Justice suggests that the jurisdiction to declare Community acts invalid rests exclusively with the Court of Justice, that legal question long went unanswered both in Community legislation and in the Court's case law.

This question, however, was settled by the Court of Justice in *Firma Foto Frost v. Hauptzollamt Lübeck-Ost*,¹³ decided on 22 October 1987. This case originated as a preliminary ruling question raised by the Finanzgericht (Finance Court) of Hamburg. In that judgment, the Court of Justice developed, *inter alia*, several principles. First,

[national] courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action [the Member State courts] are not calling . . . the existence of the Community measure in question.¹⁴

In contrast, national courts do not have the power to declare acts of the Community institutions invalid.¹⁵

Article 177 [of the EC Treaty] is [designed] to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the member-States as to the validity of Community acts would be liable to place in jeopardy the very unity

Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 16/65, [1965] E.C.R. 877, [1966] C.M.L.R. 172.

12. EC Treaty, *supra* note 1, art. 173, ¶ 1.

13. Case 314/85, [1987] E.C.R. 4199, [1988] 3 C.M.L.R. 57.

14. *Id.* at 4230, ¶ 14, [1988] 3 C.M.L.R. at 79.

15. *Id.* at 4231, ¶ 15, [1988] 3 C.M.L.R. at 79.

of the Community legal order and detract from the fundamental requirements of legal certainty.¹⁶

Because Article 173 gives the Court exclusive jurisdiction to declare an act of a Community institution void, the coherence of the system requires that the power to declare the act invalid must also be reserved to the Court of Justice.¹⁷ Finally, the Court in *Foto-Frost* states that exceptions to the rule may be allowed in the case of proceedings that relate to an application for interim measures.¹⁸

C. Power and Duty to Refer

The only bodies that have the power to make a preliminary reference to the Court of Justice are courts and tribunals.¹⁹ The concept of a court or tribunal has a uniform definition under Community law, which states that courts and tribunals are independent, permanent bodies, charged with the settlement of disputes in accordance with the law and constituted on a statutory basis. The jurisdiction in question must be compulsory.²⁰

Problems of demarcation have arisen between judicial and administrative procedures. In a purely administrative proceeding, such as an objection made to a public authority concerning an administrative act (*Widerspruchsverfahren*), a reference for a preliminary ruling is not allowed. Even if a question of Community law needs to be answered in order to determine such proceedings, the Court of Justice will not answer it. In such a case, proceedings must be brought before an administrative court for adjudication. Neither state authorities nor other bodies may make a reference to the Court for a preliminary ruling, even if, in some cases, it may appear desirable from the point of view of procedural economy to do so.

By contrast, all courts and tribunals of the Member States

16. *Id.*

17. *Id.* at 4231, ¶ 17, [1988] 3 C.M.L.R. at 80.

18. *Id.* at 4232, ¶ 19, [1988] 3 C.M.L.R. at 80.

19. EC Treaty, *supra* note 1, art. 177, ¶ 2. "Where such a question is raised before any court or tribunal of a member-State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." *Id.*

20. See *G. Vaassen v. Management of the Beambtenfonds voor het Mijnbedrijf*, Case 61/65, [1966] E.C.R. 261, [1966] C.M.L.R. 508.

are entitled to make references,²¹ so that a decision at the European level may take place even at first instance. The court or tribunal decides independently whether to make a reference. The parties do not need to bring their dispute before a higher court in order to refer a question to the Court.

The *duty* to refer applies only to courts of last instance.²² Parties to the litigation, therefore, will sometimes have to lodge appeals until a reference to the Court of Justice is made by the Member State court. The parties are not able to *compel* a reference, as there is no formal remedy available to them. Under existing law, the parties to the main proceedings in any given case can do no more than urge the court, by implications and suggestions, to make a reference.

A gap in legal protection arguably exists when a national court does not share a party's conviction that a preliminary reference on a question of Community law is necessary to reach a decision. Discussions on legal policy, primarily among practicing lawyers, increasingly have focused on whether a right to bring a matter before the Court of Justice should not be conferred upon individuals on the grounds of effective legal protection. The Court has not yet reached the decision that this right has been granted by Community law to the citizens of the European Union.

Nonetheless, failure to comply with the duty to refer is not only detrimental to the Community's interest in the observance of its legal order, but also constitutes an infringement of the individual legal protection accorded under Community law. In a number of Member States, including Germany for example, it is also an objective breach of internal (administrative) law. Unfortunately, the only sanction is the setting aside of the decision if the reference has been omitted deliberately.

It has not been determined which courts or tribunals are under a duty to make a reference to the Court of Justice. Article 177 refers to those courts or tribunals of individual states "against whose decisions there is no judicial remedy under national law."²³ Under this formulation, there are two approaches for looking at this situation. First, under the abstract (institu-

21. EC Treaty, *supra* note 1, art. 177, ¶ 2.

22. *Id.* art. 177, ¶ 3; see *supra* note 7 (quoting text of Article 177, paragraph three).

23. EC Treaty, *supra* note 1, art. 177, ¶ 3.

tional) theory, inspired by the notion of preserving the legal system, only the highest courts are under a duty to refer.

The concrete (functional) approach, on the other hand, states that all courts or tribunals are under a duty to make a reference when there is no remedy against their decisions. In so far as the parties' ability to appeal is conditional on leave (i.e., an appeal is only possible if the court allows the party to lodge an appeal), the concrete approach provides the adequate solution. It follows that, if an appeal exists as of right, there is no *duty* to refer. If there is no right of appeal, courts of first instance and intermediate courts may also be under a duty to refer.

The concrete theory is better geared toward giving comprehensive legal protection to the individual. The latter may be permanently disadvantaged when a judicial decision is no longer subject to appeal. The Court of Justice has not hitherto declared whether it favors the abstract or the concrete theory, although an *obiter dictum* in the judgment in *Costa v. Ente Nazionale Per L'Energia Elettrica*²⁴ suggests that the Court favors the concrete approach. The overwhelming opinion in legal literature also favors the application of the concrete theory, and it is therefore advisable in practice to proceed on that basis. As far as practice is concerned, however, it is important to stress once again that *every* court is entitled to make a reference to the Court of Justice for a preliminary ruling. The conflict between the theories is relevant only to the *duty* to refer.

II. CONTENT AND SCOPE OF THE DUTY TO REFER

When a court or tribunal that has a duty to refer under the abstract or concrete theory is faced with a question of Community law that it cannot answer, it is obliged in principle to refer the matter to the Court of Justice. Under Article 177, a reference must be made unless the Court has recognized a reason for not doing so. The Court of Justice discussed this issue in *Srl C.I.L.F.I.T. v. Ministry of Health*,²⁵ which originated as a reference from the Corte Suprema di Cassazione (Supreme Court of Cassation) in Italy. The Court stated that a court or tribunal against whose decisions there is no judicial remedy under national law is

24. Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425.

25. Case 283/81, [1982] E.C.R. 3415, [1983] 1 C.M.L.R. 472.

required to bring questions of Community law before the Court, unless the court or tribunal has established that

the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.²⁶

A. *The Role of the National Court in the Preliminary Ruling Procedure*

It is the duty of the Member State courts to determine, in accordance with their discretion, whether a question of Community law needs to be answered in order to reach a decision. It is for these courts to decide both *whether* a reference to the Court of Justice is necessary and the *timing* of this reference. The Court is not permitted to review the appropriateness of the reference. Nor, in principle,²⁷ does the Court review the jurisdiction or the observance of other national rules of procedure. Even if an appeal is lodged against the reference for a preliminary ruling, the Court can only stay or discontinue the proceedings if requested to do so.

Therefore, the Member State courts have broad discretion except where the purpose of the preliminary ruling procedure is at stake. The Court determines the limits of the Member State courts when reviewing the purpose of the preliminary ruling procedure.

An admissible reference for a preliminary ruling must fulfill the following requirements. The national court must demonstrate a question of Community law that is the proper subject of a reference—i.e., it must concern a dispute to which Community law is applicable. Questions on the interpretation of national law or on how to reconcile national law with Community law are not answered by the Court of Justice in the preliminary ruling

26. *Id.* at 3431, ¶ 21, [1983] 1 C.M.L.R. at 491.

27. *But see* Monin Automobiles - Maison du Deux-Roues, Case C-428/93, [1994] E.C.R. I-1707.

procedure. In certain cases, however, the Court may reinterpret the question.

In addition, there must be a *genuine dispute*, and not a patently manufactured case. The function of the Court of Justice in the preliminary ruling procedure is not to give advisory opinions. The Court, however, has rarely dismissed a reference for a preliminary ruling for lack of a genuine dispute.²⁸ In a few isolated cases, the Court was unable to give a meaningful answer due to insufficient factual and legal information.²⁹

B. *Failure to Comply With the Duty to Refer*

Member State courts that are not courts of last instance decide freely whether to refer a question to the Court. The parties to a case may not compel or prevent a reference by a Member State court to the Court of Justice. If a Member State court fails to make a reference, the parties concerned have no alternative but to lodge an appeal on other grounds, and then propose a reference in the higher court. If the motion to refer is unsuccessful in the highest court, the parties have no recourse, even if that court were under a legal obligation to refer to the Court of Justice.

Incorrect application of the law by courts of last instance may not be corrected. Criticism of the court's decision, however, is possible and justified. Nonetheless, the judgment is legally binding. The determinations of the highest courts of the Member States that erroneously apply the law are irrevocable and accepted with disapproval by the legal system.

Consequently, the question arises whether infringements of Community law by national courts of last instance warrant different treatment. For instance, the Community could introduce a form of review of such a judgment by another level of jurisdiction. This possibility, however, represents a fundamental interference in the Member States' legal system. The decisions of courts of last instance would no longer be final, but would be subject to review by another jurisdiction.

Such an interference would be justifiable only if empirical

28. See, e.g., *Foglia v. Novello (I)*, Case 104/79, [1980] E.C.R. 745, 759, ¶¶ 10-12, [1981] 1 C.M.L.R. 45, 58.

29. See, e.g., *Telemarsicabruzzo SpA v. Circostel*, Joined Cases 320-22/90, [1993] E.C.R. I-393; *Monin Automobiles*, [1994] E.C.R. at I-1707.

findings were presented to support the conclusion that Member State courts systematically failed to comply with the obligation to make a reference. This Author is not aware of any such findings. On the contrary, the day-to-day practice of the Court of Justice shows that the Member State courts are increasingly applying Community law and no interference appears necessary.

Nonetheless, the Commission should be informed of the cases of actual or alleged failure by courts of last instance to make references. These cases may then be included in the Commission's annual report on the application of Community law³⁰ and be made the subject of public and parliamentary discussion. In addition, the failure by courts to comply with the obligation to make references under the third paragraph of Article 177 constitutes an infringement of the EC Treaty. The Commission could initiate legal proceedings under Article 169 for failure to fulfill EC Treaty obligations.³¹ If the Community determines that it cannot put up with such non-compliance in the long term, the Commission may adopt this approach.

The *In Re Application of Wünsche Handelsgesellschaft*³² ("So-lange II") decision of the Bundesverfassungsgericht (Federal Constitutional Court) created the possibility in Germany of overruling a failure to make a reference under certain circumstances. Under the second sentence of Article 101(1) of the German Basic Law,³³ the Court of Justice has been recognized as a "lawful judge." Thus, an individual may apply to the Bundesverfassungsgericht on the ground that the principle of Article 101(1) has been infringed.

A mere procedural error, however, does not constitute an infringement of the requirement of a "lawful judge." There must also be the element of "arbitrariness." The failure to make the reference must therefore, on a reasonable assessment, be inexplicable and manifestly untenable. The obligation to refer a matter under the third paragraph of Article 177, however, goes further than the arbitrariness standard under the German Basic Law. A reference under Article 177 must be made if the Court of Justice has not created an exception for not making the refer-

30. See, e.g., *Foglia v. Novello* (I), [1980] E.C.R. at 745, [1981] 1 C.M.L.R. at 45.

31. EC Treaty, *supra* note 1, art. 169.

32. Case 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225.

33. Basic Law for the Federal Republic of Germany, art. 101(1) (1949) (Ger.). "No one may be removed from the jurisdiction of his lawful judge." *Id.*

ence. If the Bundesverfassungsgericht were to apply this stricter test instead of the arbitrariness standard, the result would be a considerable improvement in the legal protection of the individual seeking justice in Germany.

IV. PRACTICAL POINTS ON MAKING A REFERENCE FOR A PRELIMINARY RULING

It is useful to know how a Member State court decides to request a preliminary ruling. Because Community law contains no special provisions, domestic procedural law applies, and Member State courts also have a free choice as to the form of the request. Therefore, a reference for a preliminary ruling can be made either by judgment or by order. In many courts, the decision to refer is made by an order staying the proceedings, the operative provisions of which contain the questions referred to the Court. The Court does not adhere rigidly to the formulation of these questions. If the questions do not allow for an answer, as, for example, a question on the incompatibility of national law with Community law, the Court of Justice will reformulate the questions accordingly. If the Court believes that another formulation of the question is appropriate, it will say so in its decision and then provide an answer.

In order to alleviate the Court's task, the reference should include a statement of the facts and the legal problems, although this is not obligatory. While it is not the task of the Court of Justice to consider the compatibility of national law with Community law, the national court nonetheless often relies on the assistance of the Court of Justice. The Court formulates its answers in an abstract way, while still enabling Member State courts to apply the answer to the facts without great difficulty. In order to do this, the Court of Justice needs to be acquainted with the facts. It is therefore advisable in practice to send the case files with the reference.

When making a decision to refer, the Member State courts may want to know how long the reference procedure before the Court will last. This enables the courts to predict the duration of the interruption in the procedure. In 1993, the average duration of a preliminary ruling procedure was 20.4 months. The duration of the interlocutory procedure is especially relevant to the decision of whether to make a reference. A dispute that goes

through the various stages of procedure to the highest courts usually remains unresolved for several years.

A. *The Procedure at the Court of Justice Prior to the Hearing*

If the national court decides to make a reference for a preliminary ruling, the court sends the decision and the files to the Court Registry.³⁴ The decision is translated into the official languages of the Community and then sent, in the original and in the relevant official language, to all Member States, to the Commission, to other institutions involved, if necessary, and to the parties to the main proceedings. These groups have two months to submit written observations,³⁵ and the parties to the main proceedings may make observations in the same manner as before the court making the reference.³⁶ Thus, individuals may represent themselves, if national procedure does not require legal counsel.

If the observations submitted are in other languages, they are translated into the language of the case and into French. There is a possibility of ten languages in each case.³⁷ Once the last set of written observations has been submitted the written procedure ends.³⁸ In some cases, the observations will have to be translated into the language of the case and into French before the proceedings continue.

At this point, the judge appointed as Judge-Rapporteur prepares the Report for the Hearing ("Report") and the preliminary report. The Report contains a concise and independent statement of the facts and issues. The Report is sent to the participants in the proceedings and is accessible to the public.³⁹ On the basis of the Report, the parties may determine whether the

34. There is no charge for the procedure before the Court of Justice. Exceptions are made for avoidable costs and for extraordinary translation costs. Costs incurred by the Community's institutions or by Member States are not recoverable. Costs incurred by the parties to the main proceedings are not a matter for the Court of Justice, but are for the Member State courts to determine in the context of the proceedings in which the reference for the preliminary ruling originated. *See* Rules of Procedure of the Court of Justice, art. 104(5), O.J. L 176/7, at 27 (1991) [hereinafter Rules of Procedure].

35. Protocol on the Statute of the Court of Justice of the European Economic Community, art. 20, 298 U.N.T.S. 147, 152 (1958) [hereinafter Protocol].

36. Rules of Procedure, *supra* note 34, art. 104(2), O.J. L 176/7, at 27 (1991).

37. *Id.* art. 29(1), O.J. L 176/7, at 13 (1991).

38. *See* Protocol, *supra* note 35, art. 18, 298 U.N.T.S. at 151.

39. *Id.* art. 18(4), 298 U.N.T.S. at 151.

Judge-Rapporteur has fully and faithfully reproduced their arguments. In appropriate cases, the parties may make observations on that point at the hearing.

In addition, the Judge-Rapporteur prepares a preliminary report.⁴⁰ This report contains recommendations as to whether a preparatory inquiry or any other preparatory measure should be undertaken, and as to whether the case should be referred to a Chamber to which the Judge-Rapporteur belongs.⁴¹ After hearing the Advocate General and the recommendations of the Judge-Rapporteur, the court decides what action to take.⁴²

B. The Role of the Advocate General in the Preliminary Reference Procedure

This is perhaps the place to say a few words about the function of the Advocate General, because this institution does not exist in a number of Member States. In each case, the President of the Court assigns a Judge-Rapporteur and the First Advocate General appoints an Advocate General. Unlike the Judge-Rapporteur, the Advocate General does not have to make any reports, but does have to express a view on the recommendations of the Judge-Rapporteur in the preliminary report. Thus, an opinion may be expressed as to whether a preparatory inquiry or any other preparatory measures are necessary. In addition, the opinion may indicate the Chamber to which the case should be assigned. The Advocate General may, of course, fulfill this function only because he, like the Judge-Rapporteur, has a detailed knowledge of the case.

The opinion of the Advocate General is also taken in connection with other decisions of the Court of Justice where the Rules of Procedure so provide. Like the President, the Judge-Rapporteur, and the other Members of the Court, the Advocate General has the opportunity at the hearing to ask questions of the participants in the proceedings. The Advocate General's main task, however, is to act with complete impartiality and independence, while making, in open court, reasoned submissions on cases brought before the Court of Justice. This assists the Court in carrying out its duty of ensuring observance of the law

40. Rules of Procedure, *supra* note 34, art. 44(1), 176/7, at 16 (1991).

41. *Id.* art. 44(1), ¶ 1, 176/7, at 16 (1991).

42. *Id.* art. 44(1), ¶ 2, 176/7, at 16 (1991).

in the interpretation and application of the EC Treaty. In principle, once the Advocate General delivers his Opinion, his role in the proceedings is over. He plays no part in the subsequent deliberations of the judges. His task is analogous to that of an individual judge charged with the preparation of the case, whose activity comes to an end with the delivery of an advisory opinion and who remains separate from the judges deciding the case.

C. *The Oral Procedure*

At the hearing, the timing of which is determined by the judge presiding over the bench hearing the case, all the participants mentioned above may make observations, including those who have not made observations in writing.⁴³ For the parties to the main proceedings, this is an opportunity to express an opinion on the observations of the other participants, of which they were not yet aware when they submitted their own observations. While there is no limit to the scope of the written observations, a time limit is set for the oral argument. In addition, the judges and the Advocate General may ask the participants questions during the oral argument.

At the close of the oral procedure, the Advocate General reads his Opinion aloud in open court.⁴⁴ The operative part of the Opinion is read at a sitting of the Court or of one of its Chambers by the author of the Opinion or by one of his colleagues. The participants in the case are invited to the sitting, but are no longer allowed to address the Court. The Opinion is sent to the participants in the language of the case, although also available in French and in the language used by the Advocate General.

After the Opinion, the Court begins its deliberations. The proceedings end with the delivery of the judgment in open court. The operative part of the judgment is read out in the language of the case. The judgment is also available in all of the other official languages of the Community. The court making the reference and the parties referred to in Article 20 of the Protocol on the Statute of the Court of Justice are then notified of the judgment. In addition, the judgment is published in the Of-

43. Protocol, *supra* note 35, art. 20(2), 298 U.N.T.S. at 152.

44. EC Treaty, *supra* note 1, art. 166(2).

ficial Journal⁴⁵ and in the European Court Reports.⁴⁶ A short summary appears in the "Proceedings" of the Court of Justice, which is sent free of charge to interested persons on request.

D. *Withdrawal of a Reference for a Preliminary Ruling*

Once a reference for a preliminary ruling has been submitted, the Court will render a judgment unless the court making the reference withdraws it or the decision containing the reference is set aside on appeal before the national courts. The Court will answer the question even if the higher national court does not consider the answer to the question referred to be necessary in reaching its decision.⁴⁷

IV. *THE EFFECT OF THE JUDGMENT IN THE PRELIMINARY RULING PROCEDURE*

When the Court of Justice finally delivers judgment on a reference for a preliminary ruling, the court that made the reference and all other courts that are to rule on the same matter are bound by the operative part of the judgment. The judgment must be viewed in the light of the reasons set forth in its text. If a Member State court doubts the judgment, the referring court may make a further reference to the Court of Justice.

Moreover, the judgment constitutes a precedent, which the Court of Justice will follow in similar cases. If the Court declares a Community measure invalid, the question arises whether the declaration of invalidity is effective from the adoption of the measure or only from the delivery of the judgment. In such cases, the Court can, by an analogous application of the second paragraph of Article 174 of the EC Treaty, state which of the effects of the measure are to be regarded as continuing in force.⁴⁸

45. Instructions to the Registrar, art. 25, O.J. L 350/33, at 38 (1974).

46. *Id.* art. 24, O.J. L 350/33, at 38 (1974).

47. *Pretore di Salò v. Persons Unknown*, Case 14/86, [1987] E.C.R. 2545, 2568-69, [1989] 1 C.M.L.R. 71, 91-92.

48. EC Treaty, *supra* note 1, art. 174(2). "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive." *Id.*

V. PARTICULARITIES OF THE PRELIMINARY RULING
PROCEDURE IN CONNECTION WITH PROCEEDINGS
FOR INTERIM RELIEF

A number of preliminary references have involved consideration of particularities in connection with proceedings for interim relief. *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd.*⁴⁹ ("*Factortame I*") case, decided on 19 June 1990, concerned provisions of the Merchant Shipping Act 1988 on the registration of fishing vessels. The new regulations introduced by the British statute made the entry of fishing vessels in the British shipping register dependent, first, upon certain nationality requirements and, second, upon the fishing vessels being managed and controlled from the United Kingdom. The intent of the regulations was to halt the activities of Spanish companies that had bought British fishing vessels or had their vessels newly registered in the United Kingdom.

Those companies, whose right to fish had been removed by the new regulations, applied to the High Court of Justice (the "High Court") for judicial review and for a grant of interim relief until a decision in the main proceedings was rendered. The High Court referred a number of questions of interpretation to the Court of Justice for clarification as to the compatibility of the new British provisions with Community law. In addition, the High Court decided, by interim order, to suspend the application of the statute in relation to the applicants. An appeal was made against the interim order to the Court of Appeal, which held that, under the British Constitution, the courts had no authority to refuse to apply acts of the British Parliament on a temporary basis.

The dispute finally reached the House of Lords, which referred the following question to the Court of Justice:

In circumstances where, in the absence of interim measures, the applicants will suffer irreparable damage even if a preliminary ruling is ultimately made in their favor, is the national court obliged, or at any rate empowered, under Community law to grant interim protection of the rights claimed?

In the *Factortame I* decision, the Court of Justice held that "a national court which, in a case before it concerning Community

49. Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1.

law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."⁵⁰ The Court based that conclusion on Article 177 of the EC Treaty,

whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.⁵¹

In *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe*,⁵² decided on 21 February 1991, the applicants were not complaining about *national* legal provisions, but about a *Community* regulation that required them to pay a special levy to eliminate losses that the Community had sustained in the course of a sugar marketing year. A German Finance Court asked, noting the *Foto-Frost* judgment, in which the Court of Justice had reserved for itself the power to declare Community acts invalid, whether, in circumstances where it had an action pending against a national administrative measure adopted in implementation of a Community regulation whose validity was doubtful, it had the power to suspend temporarily the enforcement of the national administrative measure, namely the determination of the levy.

On that point, the Court stated in its judgment:

In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling.

That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid (see judgment in Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck Ost*, [1987] E.C.R. 4199, at paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make

50. *Factortame I*, [1990] E.C.R. at I-2474, ¶ 23, [1990] 3 C.M.L.R. at 30.

51. *Id.* at I-2474, ¶ 22, [1990] 3 C.M.L.R. at 30.

52. *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe*, Joined Cases C-143/88 & C-92/89, [1991] E.C.R. I-534.

it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.⁵³

On the basis of Article 177, the Court of Justice concluded that a national court, to which application for interim relief has been made, may temporarily suspend the enforcement of the national administrative measure. In coming to that conclusion, the Court based its reasoning on two arguments.

The first relies on the need for coherence in the system of interim legal protection.

In the context of actions for annulment, Article 185 of the EEC Treaty enables applicants to request suspension of the enforcement of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested.⁵⁴

Although a measure of Community law was contested in the *Zuckerfabrik* case, the Court, incorporating the *Factortame I* judgment, unequivocally held:

The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.⁵⁵

The Court attached the following strict conditions to the exercise of that power:

[I]nterim measures suspending enforcement of a contested measure may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures.⁵⁶

53. *Id.* at I-540, ¶ 16-17.

54. *Id.* at I-541, ¶ 18.

55. *Id.* at I-541, ¶ 20.

56. *Id.* at I-542, ¶ 23.

Additionally,

suspension of enforcement must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore grant a suspension only until such time as the Court has delivered its ruling on the question of validity. Consequently, it is for the national court, should the question not yet have been referred to the Court of Justice, to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid.⁵⁷

CONCLUSION

By the end of 1993, approximately 2700 references had been made to the Court for a preliminary ruling under Article 177 of the EC Treaty. The number of references continues to grow regularly. Between 1961 and 1970, approximately eleven references for preliminary rulings were made to the Court each year. Between 1971 and 1980 that figure climbed to about 73, and between 1981 and 1990 it climbed to approximately 130. Over the last three years, 1991 to 1993, the yearly average has been about 183 references.

The statistics show that the German courts take first place with 857 references, followed by France (462), the Netherlands (401), Italy (319), and Belgium (310). The last three years, examined separately, demonstrate a different picture. While the German courts take first place (173 references), Italy places second (82), followed by the Netherlands (77), France (66), Belgium (57), and the United Kingdom (44). If one considers the population and the number of courts in the states in question, it is evident, first, that some of the smaller Member States, in particular Luxembourg, the Netherlands, and Belgium, consult the Court very often. Second, the United Kingdom makes a very significant contribution.

Not surprisingly, it takes time for new Member States to make references to the Court of Justice or for their references to become significant in number. For example, the first reference from a Portuguese court did not reach the Court until 1989. More significantly, the 857 references from Germany were made

57. *Id.* at I-542, ¶ 24.

by a total of 115 courts.⁵⁸ The 319 references from Italy were made by almost the same number of courts (108). The 310 references from Belgium came from 65 courts.

The 462 references from France, from a total of 158 courts, merit particular attention. Although the average number of cases referred by each individual court is relatively low, it is noteworthy that the courts making the references include as many as 90 first instance civil courts of various types (Tribunal d'Instance, Tribunal de Grande Instance, and Tribunal de Commerce). They also include courts from overseas departments such as the islands of Réunion and Polynesia. This fact demonstrates strikingly the extent to which concern with Community law permeates the entire French jurisdiction.

There are, however, states that do not use the preliminary reference procedure as often. Portugal,⁵⁹ whose courts have so far (until the end of 1993) submitted only seven cases to the Court of Justice, is one example. In addition, only 28 references from Spain⁶⁰ have reached the Court of Justice to date, four of which came from that country's highest court (Tribunal Supremo). Although Ireland joined the Community in 1973, it has, with 28 references, submitted fewer cases to the Court than Greece (37), which did not join the Community until 1981. In all, the 2688 references were made by 583 courts.

These observations demonstrate the extent to which the preliminary ruling procedure is used, especially by the lower courts, from which over two-thirds of the cases have come. The willingness of the lower courts to make references may be influenced by the length of the procedure, the average of which is currently slightly more than twenty months. A court faced with

58. The term "courts" includes all references, including those made by bodies that the Court of Justice does not regard as "courts or tribunals" within the meaning of Article 177 (and that the Court has therefore dismissed as inadmissible). The number of such cases, however, is not particularly large.

59. Portugal acceded to the Community in 1986. *See* Treaty (signed on 12 June 1985) Between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Communities) and the Kingdom of Spain and the Portuguese Republic Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, O.J. L 302/9 (1985) [hereinafter Accession Treaty].

60. Spain acceded to the Community in 1986. *See* Accession Treaty, *supra* note 59.

the decision whether to hand down a judgment that correctly applies Community law eighteen months to two years later than one handed down, without consulting the Court, may choose the latter alternative without infringing Community law as currently understood. Remedial measures must therefore be considered. One possibility, as has occasionally been considered, would be to take the right to make direct references to the Court of Justice away from lower courts and reserve that right for the higher courts only. This modification would lead to a considerable decline in the number of references. Of the 2485 references made up to the end of 1992, 1784 were from lower courts.

Abolishing the right of lower courts to make references to the Court of Justice, however, would not only limit the options open to the courts of the Member States, but would also severely curtail the opportunities for the Court of Justice to ensure that Community law is observed. The opportunities for litigants and their lawyers would also be diminished. The road to the European Court of Justice would then be open only to those parties able and willing to exhaust all legal remedies. The incentive for involvement in the study and practice of Community law would also be dampened. Therefore, those responsible should consider carefully whether they wish to take those ideas further.