

# *Fordham International Law Journal*

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*Volume 19, Issue 3*

1995

*Article 2*

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## The Preliminary Ruling Procedure and the United Kingdom

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Carl Otto Lenz and Gerhard Grill

## **Abstract**

The agenda I propose for tonight's talk is both more specific and limited. I intend to look at the preliminary ruling procedure under Article 177 of the EC Treaty and how it is used by the legal community in the United Kingdom. In so doing, I shall draw comparisons to the practice in other major Member States in the Community. My views are of course based on the experience I have gained in my function as a member of the Court in Luxembourg. I would, therefore, be very much interested to learn whether they are shared by the legal community of the United Kingdom, particularly in view of the fact that some of its most eminent members are present tonight.

## ADDRESS

# THE PRELIMINARY RULING PROCEDURE AND THE UNITED KINGDOM

*Carl Otto Lenz and Gerhard Grill\**

### INTRODUCTION

Ladies and gentlemen,

It is both a pleasure and an honor to speak to such an illustrious gathering here in London tonight. The Court of Justice of the European Communities, of which I am a member, has been the subject of great attention over the last couple of months, and particularly so in the United Kingdom. It will be sufficient to mention just two contributions to this debate. Earlier this year, Sir Patrick Neill, QC, the Warden of All Souls College, Oxford, submitted a *Case Study* on the European Court of Justice in which he expresses a very critical and unflattering view of the activity of the Court. In August, Mr. Redwood, MP, gave us his views on Europe in an article published by *The Times*.<sup>1</sup> Mr. Redwood suggested that Member States should have the right to object to judgments of the Court which were "redefining, stretching or altering" the law.<sup>2</sup> In such cases, the Council should then uphold the objection or proceed to amend European law in the way recommended by the Court.

I do not propose to contribute to this general debate tonight. My colleagues at the Court, Judge David Edward and Advocate General Francis Jacobs, have previously commented on some of these criticisms. I should also like to refer those of you who are more particularly interested in this matter to the excellent paper submitted by Lord Howe of Aberavon to the 1995 Bar Conference on September 30, 1995.

The agenda I propose for tonight's talk is both more spe-

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\* Mr. Lenz is an Advocate General at the European Court of Justice. Mr. Grill is one of his Legal Secretaries. This Address was originally given by Mr. Lenz at London on November 1, 1995. The Authors would like to thank William Robinson for helpful comments.

1. John Redwood, *A Superstate Set Up By Stealth*, THE TIMES, Aug. 21, 1995, at 14.

2. *Id.*

cific and limited. I intend to look at the preliminary ruling procedure under Article 177 of the EC Treaty<sup>3</sup> and how it is used by the legal community in the United Kingdom. In so doing, I shall draw comparisons to the practice in other major Member States in the Community. My views are of course based on the experience I have gained in my function as a member of the Court in Luxembourg. I would, therefore, be very much interested to learn whether they are shared by the legal community of the United Kingdom, particularly in view of the fact that some of its most eminent members are present tonight.

### I. THE PRELIMINARY RULING PROCEDURE UNDER ARTICLE 177

As you are all well aware, the Court of Justice of the European Communities ("Court of Justice" or "Court") has jurisdiction to give preliminary rulings on the interpretation of the EC Treaty and on the validity and interpretation of secondary Community law. The basis for this jurisdiction is Article 177 of the EC Treaty. Corresponding provisions are to be found in the Treaty Establishing the European Coal and Steel Community<sup>4</sup> and the Treaty Establishing the European Atomic Energy Community.<sup>5</sup> It should also be mentioned that a Protocol to the Convention of 27 September, 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, the "Brussels

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3. 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 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [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). Article 177 sets forth the details of the preliminary ruling procedure. *Id.* art. 177, [1992] 1 C.M.L.R. at 689.

4. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987). Article 41 provides the European Court of Justice with sole jurisdiction to give preliminary rulings on issues that arise under the Treaty Establishing the European Coal and Steel Community ("ECSC"). *Id.* art. 41, 261 U.N.T.S. at 171.

5. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter Euratom Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987). Article 150 sets forth the preliminary ruling procedure for issues arising under the Treaty Establishing the European Atomic Energy Community ("Euratom Treaty"). *Id.* art. 150, 298 U.N.T.S. at 215-16.

Convention," allows or obliges specific courts in the Member States to refer questions to the Court of Justice in Luxembourg on the interpretation of the Convention.<sup>6</sup> In my speech tonight, I shall focus on Article 177 of the EC Treaty.

The Court has held that the "acts of the institutions of the Community," which according to this Article may be the subject-matter of a preliminary ruling, also include the acts whereby the Community ratifies international agreements.<sup>7</sup> The Court has also decided that it has jurisdiction under Article 177 to rule on the interpretation of the GATT<sup>8</sup> in so far as the Community is concerned.<sup>9</sup>

Where such questions regarding European Community law are raised in proceedings before a national court, that court "may," according to Article 177(2) of the EC Treaty, ask the Court of Justice for a preliminary ruling.<sup>10</sup> The national court may do so if it "considers that a decision on the question is necessary to enable it to give judgment."<sup>11</sup> If, however, such a question is raised before a court of last instance in a Member State, that court "shall," according to Article 177(3), refer the matter to Luxembourg.<sup>12</sup> Such courts are, therefore, under an obligation to ask for a preliminary judgment of the Court of Justice. All the other courts enjoy a discretion as to whether they want to submit the relevant question to the European Court.

The importance of the preliminary ruling procedure can hardly be overestimated. For obvious reasons, it is paramount that European law be interpreted in the same way throughout the whole Community. However, broad areas of the Community legal order are decentralized. In these areas, the relevant provisions of Community law are applied by the authorities of the

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6. Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, J.O. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 388/1 (1982), amended by O.J. L 285/1 (1989) [hereinafter Brussels Convention] (subsequent citations will be to full text, English version, at O.J. L 304/77 (1978), unless cited article has been substantially revised).

7. Haegeman v. Belgium, Case 181/73, [1974] E.C.R. 449, [1974] 1 C.M.L.R. 515.

8. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950).

9. Amministrazione delle Finanze dello Stato v. SPI and SAMI, Joined Cases 267-269/81, [1983] E.C.R. 801, [1984] 1 C.M.L.R. 354.

10. EC Treaty, *supra* note 3, art. 177(2), [1992] 1 C.M.L.R. at 689.

11. *Id.*

12. *Id.* art. 177(3), [1992] 1 C.M.L.R. at 689.

Member States. If controversies arise, it therefore falls to the courts of the Member States to ascertain whether these authorities have interpreted the relevant provisions of Community law correctly. It is obvious that the courts of, say, Lisbon, Helsinki, Dublin, and Athens may not necessarily reach the same conclusions with regard to similar controversies. In order to safeguard the coherence of Community law, it is, therefore, essential that there is an institution that is in a position to give authoritative and final rulings on the interpretation of these provisions. The EC Treaty entrusts this important task to the European Court in Luxembourg.<sup>13</sup> The method used in order to attain this objective is the preliminary ruling procedure under Article 177.

The importance of this procedure is underlined by the fact that some of the most important doctrines of European law were developed in preliminary ruling judgments. I need only mention the *Van Gend en Loos*<sup>14</sup> and the *Costa v. ENEL*<sup>15</sup> judgments, both rendered in 1963, in which the Court laid the foundations of Community law by holding that its provisions are capable of direct effect in the legal order of the Member States and that they take precedence over national law. It may be added that references for a preliminary ruling sometimes give rise to particularly spectacular proceedings. You will have heard that some weeks ago I was called upon to deliver my opinion in the *Bosman*<sup>16</sup> case. These proceedings concern the compatibility with Community law of rules applied by the football associations in the Community. In all my years at the Court, I have never come across a case where the media and the public took such a keen and vivid interest in the proceedings of the Court of Justice as they did in this case.

Requests for a preliminary ruling also account for a considerable part of the workload of the Court. Until the end of 1994, more than 2900 requests for preliminary rulings had been lodged at the Court.<sup>17</sup> The number of these requests is ever in-

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13. See *id.* art. 177, [1992] 1 C.M.L.R. at 689 (granting final jurisdiction over questions of European Community law to Court of Justice).

14. *Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Tariefcommissie*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

15. *Flaminio Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 105.

16. *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, Case C-415/93 (Eur. Ct. J. Dec. 15, 1995) (not yet reported).

17. This statistic and all statistics cited hereafter are internal statistics of the European Court of Justice.

creasing. This becomes particularly evident if one looks at longer periods. Between 1961 and 1970, the average number of preliminary references was around eleven per year. Between 1971 and 1980, this figure increased to some seventy-three, and to more than 130 for the period between 1981 and 1990. The yearly average for the years from 1991 to 1994, inclusive, was around 189. In 1993 and 1994 alone, 204 and 203 references, respectively, were made to the Court of Justice. In 1995, 196 references have been made so far.

The enlargement of the Community on January 1, 1995 will result in further increases. Experience with previous entries of new Member States has shown that some time usually elapsed before the courts of these Member States started to make references to the European Court. The first reference from Denmark, for example, was made in 1975, that is to say two years after Denmark's accession. The first reference from Portugal, which had joined the Community in 1986, was not made until 1989. In the case of Greece, a Member State since 1981, we even had to wait until 1986 before the Court of Justice was first asked for a preliminary ruling. It is interesting to note that there is no such "period of grace" — if I can call it that — as far as the Member States which joined in 1995 are concerned. As early as February of this year, a Swedish court submitted several requests for a preliminary ruling and the first reference from Austria arrived at the Court of Justice in September.

## II. ARTICLE 177 AND THE COURTS OF THE UNITED KINGDOM

How do the courts of the United Kingdom deal with Article 177 of the EC Treaty? This begs, of course, the more fundamental question as to how Community law is regarded in the United Kingdom. The *locus classicus* in this regard is the judgment of the Court of Appeal in *Bulmer v Bollinger*,<sup>18</sup> where Lord Denning, MR, gave his views on the subject. The passage is no doubt well-known to all of you, but the poetry of Lord Denning's language is such that it is well worth repeating. Lord Denning started by saying that Community law did not interfere with matters which solely concerned "the mainland of England and the people in

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18. [1974] Ch. 401 (Eng. C.A.).

it."<sup>19</sup> He then continued:

But when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the treaty is henceforward to be part of our law. It is equal in force to any statute.<sup>20</sup>

It is of course hardly a coincidence that a judge of a seafaring nation should choose a simile with a nautical flavor. The expression he uses is delightful — it is not difficult to imagine a flood of directives emanating from Brussels streaming up the Thames. I may not be the best person to do full justice to these words, living in a landlocked country as I do, but I cannot help feeling that there might be a far deeper meaning to Lord Denning's remarks than is immediately apparent. If one takes his words literally, European law would only reach as far as the tide in the United Kingdom — perhaps beyond Westminster, but certainly not as far as Windsor or even Oxford. It must also be remembered that according to the immutable law of nature, the tide will necessarily recede again, perhaps leaving some discarded objects on the beaches and riversides on its way back to the sea. It is possible, but not certain, that Lord Denning may also have thought of the possibility that European law might ebb away from the United Kingdom at some stage. There do indeed appear to be periods of ebb and flow in European law as Lord Denning's wise remarks imply.

In one respect, however, I think I have to correct the traditional view. Lord Denning's words have rightly become famous, but I do not think that he was the first member of the British judiciary to express his sentiments on European law. This distinction would appear to fall to a High Court judge, Justice Owle, whose name is not as well-known today as it deserves to be. In a famous case decided by himself and Justice Fish, he made the following memorable comments on the subject:

The legal profession, or those at least who practise at the Bar, will ever give thanks for the entry of the United Kingdom into the European Economic Community. But those of us who sit up here may well be driven from the Bench untimely, so alien, odious, and unanswerable are some of the problems

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19. *Bulmer*, [1974] Ch. at 418.

20. *Id.*

that the winds of Europe have blown upon our peaceful British shores.<sup>21</sup>

You will notice immediately that Justice Owle uses a metaphor here which is very similar to the one used by Lord Denning. I assume that Lord Denning was familiar with this judgment. The exasperation with European law, to which Justice Owle gives vent in this passage, is perhaps understandable when one considers the case before him. Two foreigners, a Signor Garibaldi and a Miss Bardot, had presented themselves at by-elections shortly after the United Kingdom had joined the Community. Both had been returned by their constituencies but the Attorney-General had challenged their election on the ground that no foreigner could be a member of the British parliament. Notwithstanding the fact that he had mixed feelings about European law, Justice Owle set out to discuss Article 48 of the EC Treaty,<sup>22</sup> to which he had been referred by counsel. He held that the expression "workers" used in this provision could be interpreted as including members of parliament. Justice Owle went on to conclude that the United Kingdom could not in this case rely on the exception laid down in Article 48(4),<sup>23</sup> since, in his view, members of the House of Commons were not "employed in the public administration" within the meaning of that provision.

You will of course know that the case I have just described is not to be found in the Law Reports but in a book of that delightful author of *Misleading Cases*, A.P. Herbert. Although it is therefore fiction, I still think that it provides a useful and vivid illustration of the problems which the arrival of European law posed for the legal community in the United Kingdom. A country so deservedly proud of its rich legal traditions had to adjust to a completely new legal system. One of the most fundamental differences resided in the different approaches to the interpretation of statutes. Lord Denning already drew attention to this in his judgment in *Bulmer v Bollinger*.<sup>24</sup> He noted there that, as far as European law was concerned, English judges were no longer

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21. A.P. HERBERT, *CLEAR FACTS — MUDDLED LAWS* 34 (1989).

22. EC Treaty, *supra* note 3, art. 48, [1992] 1 C.M.L.R. at 612. Article 48 sets forth the rules regarding workers' freedom of movement within the European Union. *Id.*

23. *Id.* art. 48(4), [1992] 1 C.M.L.R. at 612. Article 48(4) provides that freedom of movement does not apply to employment in the public service. *Id.*

24. *Bulmer*, [1974] Ch. 401.

allowed to “examine the words in meticulous detail” or to “argue about the precise grammatical sense” but had to look rather “to the purpose and intent” of the relevant provision and to take account of other language versions.<sup>25</sup>

It may safely be said that the judiciary and the other authorities of the United Kingdom have demonstrated that they are up to the task. European law is effectively applied throughout the United Kingdom. A very good yardstick — if this expression may still be used in metric Britain — in this respect is provided by the number of actions brought against a Member State by the Commission under Article 169 of the EC Treaty<sup>26</sup> or by other Member States under Article 170<sup>27</sup> for failure to comply with obligations under the Treaty.<sup>28</sup> Until the end of 1994, only forty-two such proceedings had been commenced against the United Kingdom. The figures for Germany and France are eighty-three and 141, respectively. Even taking into account the fact that these countries had been among the founding states of the Community, whereas the United Kingdom only joined in 1973, it is clear that the record of the United Kingdom is rather impressive and second only to Denmark’s twenty-four actions. The other extreme is Italy, with 333 actions during that period. It should also be pointed out that these figures include those cases which were later withdrawn by the plaintiff and those in which the action was unsuccessful, that is to say those in which the Court did not find that the Member State concerned had failed to fulfil its obligations under Community law.

To take a closer look at the preliminary ruling procedure itself, let us return for a moment to the case before Justice Owle. In this case, the judge had been about to rule in favour of Mr. Garibaldi and Ms. Bardot when his attention was drawn to Arti-

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25. *Id.* at 426.

26. EC Treaty, *supra* note 3, art. 169, [1992] 1 C.M.L.R. at 686. Article 169 allows the Commission to bring an action against a Member State to the Court of Justice, but requires that the Commission first deliver a reasoned opinion on the matter at issue and allow the subject state an opportunity to submit observations. *Id.*

27. *Id.* art. 170, [1992] 1 C.M.L.R. at 686-87. Article 170 allows Member States to bring an action against other Member States before the Court of Justice if the other Member State fails to meet obligations under the EC Treaty or infringes on the rights of the first Member State. *Id.*

28. The figures quoted include actions brought under the ECSC Treaty and the Euratom Treaty.

cle 177(3) of the EC Treaty.<sup>29</sup> Mr. Justice Owle, albeit reluctantly, came to the conclusion that in that particular case there would be no appeal against his decision and that Article 177(3) therefore applied. On this basis, he decided to refer the matter to the European Court, not without grumbling about the final decision that might be taken at some future date by "somebody in Brussels."<sup>30</sup>

It is certainly understandable that Justice Owle erroneously thought that the European Court has its seat in Brussels — even today some newspapers and commentators have trouble locating the Court and regularly transfer it to Brussels, Strasbourg, or even the Hague. What is more important is the readiness shown by Justice Owle to accept the obligations which Article 177 puts on national courts. In this he is representative of the attitude taken by British courts. It is no secret that at least in two Member States, Germany and France, supreme courts have on occasions failed to comply with their obligation to refer questions on Community law to the European Court. These cases have admittedly been rare, but the fact nevertheless remains that courts of last instance tried to avoid honoring the obligation to consult the Court of Justice that the Treaty puts on them.<sup>31</sup> As far as the United Kingdom is concerned, there would seem to be cases where the House of Lords should have made a reference but did not.<sup>32</sup> On the whole, however, the highest courts in the United Kingdom have faithfully and loyally cooperated with the European Court even when doing so required a radical departure from long-established traditions. It will be sufficient to recall the *Factortame I*<sup>33</sup> case, where the House of Lords was led to take the unprecedented step of granting an injunction against the Crown and suspending UK legislation until the Court of Justice had

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29. EC Treaty, *supra* note 3, art. 177(3), [1992] 1 C.M.L.R. at 689. This section states that if a question is within the jurisdiction of the Court of Justice and it comes before a court of final instance in a Member State, that the court of final instance should refer the matter to the Court of Justice. *Id.*

30. See HERBERT, *supra* note 21.

31. See EC Treaty, *supra* note 3, art. 177, [1992] 1 C.M.L.R. at 689 (stating that "courts against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the Court of Justice").

32. See, e.g., *Kirklees v. Wickes*, [1993] App. Cas. 227 (appeal taken from Eng.); *ex parte Freight Transport Association* (H.L. Eng. 1991).

33. *Regina v. Secretary of State for Transport ex part Factortame Limited*, [1990] 2 App. Cas. 85 (1989) (appeal taken from Eng.) (hereinafter *Factortame I*).

given its final ruling on the matter.<sup>34</sup>

More important still is the attitude adopted by the lower courts. As I have already explained, these courts *may* make a reference under Article 177, but are not obliged to do so.<sup>35</sup> However, it goes without saying that the effectiveness of European law is undoubtedly greatly improved if these courts make use of the possibilities afforded them by Article 177. In view of the often very cumbersome and costly procedure involved in pursuing an action through to the supreme courts of the relevant Member State, if lower courts took the view that references should only be made by higher courts, or even only by last instance courts, it is likely that many issues would not reach the Court of Justice.

In *Bulmer v Bollinger*,<sup>36</sup> Lord Denning discussed the question as to how lower courts should exercise their discretion to ask the Court of Justice for a preliminary ruling.<sup>37</sup> He also discussed the preliminary question as to when a reference was necessary.<sup>38</sup> As to the latter, he made four points.

First, the question on European law had to be conclusive for the case to be decided by the national court.<sup>39</sup> This is obvious. If the answer to the relevant question does not have any impact on the result of the national proceedings, it is superfluous to make a reference to Luxembourg.

Second, if the same or substantially the same question had already been considered by the Court of Justice, the national court could just simply follow the decision of the Court of Justice.<sup>40</sup> However, Lord Denning correctly pointed out that the European Court is not bound by its previous decisions.<sup>41</sup> There is no doctrine of *stare decisis* in European law.<sup>42</sup> Nothing, therefore, prevents a national court from submitting the same question to the European Court again if it thinks that the answer first provided was unsatisfactory. Two current cases may suffice to

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34. *Factortame I*, [1990] 2 App. Cas. at 152-53.

35. See *supra* note 10 and accompanying text (discussing preliminary hearing procedure).

36. [1974] Ch. 401 (Eng. C.A.).

37. *Bulmer*, [1974] Ch. at 423-25.

38. *Id.* at 422-23.

39. *Id.* at 422.

40. *Id.*

41. *Id.*

42. *Id.* at 420.

illustrate this. In 1992, the Court of Justice gave judgment in two cases referred to it by German courts which concerned the areas of social security and of equality between men and women respectively. These judgments, known as the *Paletta* judgment<sup>43</sup> and the *Bötel* judgment,<sup>44</sup> turned out to be extremely unpopular in Germany. There are now before the Court of Justice two references for a preliminary ruling that, in essence, raise the same issues as these previous cases and in which the Court is asked to reconsider these judgments.<sup>45</sup> In one case, Advocate General Francis Jacobs invited the Court to modify its decision.<sup>46</sup>

The third and fourth comments of Lord Denning in this context are more controversial. He points out that a reference may not be necessary where a point is "reasonably clear and free from doubt."<sup>47</sup> This *acte clair* doctrine has proved to be very attractive to courts of last instance that are unwilling to refer questions to Luxembourg. I recall a judgment of the second chamber of the German Supreme Financial Court rendered in 1990. One of the parties had argued that the relevant provision of German tax law contravened Article 48 of the EC Treaty.<sup>48</sup> In a rather short judgment, the German court categorically stated four or five times that it was absurd to think that Article 48 could have anything to do with tax law.<sup>49</sup> The question has since been referred to the European Court which — as you will know — ruled that Article 48 was indeed applicable.<sup>50</sup> The Court of Justice has also made plain that the *acte clair* doctrine has a very limited scope of application. In its *C.I.L.F.I.T.* judgment,<sup>51</sup> rendered in 1982, it pointed out that a ruling from the European Court was only superfluous if the national judge — who had to consider all the different language versions of the relevant provision and both its context and objective — came to the conclu-

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43. *Paletta v. Brennet*, Case C-45/90, [1992] E.C.R. I-3423.

44. *Arbeiterwohlfahrt der Stadt Berlin v. Bötel*, Case C-360/90, [1992] E.C.R. I-3589, [1992] 3 C.M.L.R. 446.

45. *Lewark*, Case C-457/93 (Eur. Ct. J. Feb. 6, 1996) (not yet reported); *Brennet v. Paletta*, Case C-206/94 (Eur. Ct. J.) (not yet decided).

46. *Lewark*, Case C-457/93.

47. *Bulmer*, [1974] Ch. at 423.

48. See *supra* note 22 and accompanying text (discussing Article 48 of EC Treaty).

49. Judgment of October 31, 1990, BFH, Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofs [BFHE] 162, at 374 (F.R.G.).

50. *Finanzamt Koeln-Altstadt v. Schumacker*, Case C-279/93, [1995] E.C.R. I-225.

51. *SrL C.I.L.F.I.T. v. Ministry of Health*, Case 238/81, [1982] E.C.R. 3415, [1983] 1 C.M.L.R. 472.

sion that neither for him, nor for courts in other Member States, or for the European Court itself, could there be a serious doubt as to the interpretation of the relevant provision.<sup>52</sup> A tall order indeed!

Last, Lord Denning took the view that a reference should "in general" only be made once the facts of the case before the national court had been established.<sup>53</sup> It is true that in many cases it will not be possible to decide whether a particular point of European law will be relevant before all the facts have been ascertained. However, in other cases a reference to the European Court and the answer provided by that court may greatly simplify national proceedings, for instance when it becomes clear that some facts are irrelevant and do not, therefore, have to be established. The courts of the United Kingdom have, therefore, quite rightly opted for a pragmatic approach. In a recently decided case in which I was the Advocate General, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical Ltd.*,<sup>54</sup> the Queen's Bench Division of the High Court had referred questions on the compatibility of the British rules on the importation of narcotic drugs with Community law at an early stage of the proceedings. The national court stressed in its reference that it had not yet established all the facts since it was of the opinion — correctly, as the judgment showed — that it might not be necessary to ascertain all of them.

Let me now turn to Lord Denning's remarks on the exercise of the national courts' discretion with regard to referrals. He mentioned six points in this context of which four appear to me to remain important. They concern the following headings: the importance of not overwhelming the European Court of Justice, the need to formulate the question clearly, the cost of the procedure, and, lastly, the time it would take to get a ruling from the European Court.<sup>55</sup>

The need to avoid overburdening the Court of Justice is even more urgent today than it was twenty years ago when Lord

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52. C.I.L.F.I.T., [1982] E.C.R. at 3430, ¶¶ 16-21, [1983] 1 C.M.L.R. at 491.

53. *Bulmer*, [1974] Ch. at 423.

54. Case C-324/93, [1995] E.C.R. I-563.

55. *Bulmer*, [1974] Ch. at 423-425. The other two points, which will not be discussed here, were: (1) that a reference should only be made if the relevant point is "really difficult and important;" and (2) that a national court should hesitate to refer a question if both parties oppose the reference. *Id.* at 424-25.

Denning expressed his views. In 1974, there were thirty-nine requests for a preliminary ruling. In 1994, the number was more than fivefold. Among these cases are quite a few that could arguably be regarded as unnecessary. It is not unusual to find a preliminary reference on a point that has already been clarified by the Court of Justice, but where the national court is not aware of the case-law.

It is not at all easy for the Court of Justice to dispose of these cases in a speedy way. If it is fairly obvious that a previous judgment of the Court of Justice, of which the national court is not aware, could answer the questions submitted by that court, the registrar of the Court of Justice sends a copy of this judgment to the national judge and asks him or her whether, in the light of this judgment, the request for a preliminary ruling is to be maintained. Where a preliminary question is "manifestly" identical with a question that the Court of Justice has already answered, the Court may also make a reasoned order in which it simply refers to its previous decision.<sup>56</sup> However, neither of these possibilities is used very often. The problem is aggravated by the fact that in proceedings for a preliminary ruling an oral hearing has to be held if any of the parties so requests.<sup>57</sup> Even straightforward cases may, therefore, take up a lot of time and Court resources.

What I have just said would not appear to be of any relevance to the courts of the United Kingdom. I am of course making a subjective comment, but I think it can fairly be said that references from British courts nearly always raise substantial points concerning the interpretation of European law. As a rule, British judges also appear to ascertain the case-law of the Court of Justice before making a reference and they set out clearly the problem to which they need an answer.

This leads me to the second of Lord Denning's points to be discussed here: the need to formulate the question clearly.<sup>58</sup> The European Court is only competent to rule on European law; it has no jurisdiction to interpret national law or to decide on factual issues. However, it is obvious that in most cases a mean-

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56. See Rules of Procedure of the Court of Justice, art. 104 § 3, O.J. L 176/7, at 27 (1991).

57. *Id.* art. 104 § 4, O.J. L 176/7, at 27 (1991).

58. See *Bulmer*, [1974] Ch. at 424 (advising that questions to European Court of Justice be clearly formulated).

ingful interpretation of Community law can only be given if the Court knows exactly why the national court needs such answer. It is, therefore, very important that the reference of the national court sets out the facts and the legal context of the national proceedings.

This necessity is now greater than ever. The Court of Justice has shown that it is willing to reformulate questions in order to help the national court. The standard example is where a court asks whether a particular law of Member State A is compatible with European law. Since the European Court has no jurisdiction under Article 177 to rule on national law, it can only provide an answer to the national court if the question is reformulated so that it refers to European law alone. In many cases where the reference was unclear or tersely worded, the Court also made a considerable effort to try and establish the factual and legal background.

However, in recent years the attitude of the Court has become less forthcoming. In a growing number of cases, requests for preliminary rulings have been rejected on the ground that the national judge had failed to provide the European Court with the relevant information it needed in order to give a useful interpretation of Community law.

It is remarkable that none of these cases concerned a reference from a British court. I do not think that this is mere coincidence. If I were to describe the attitude of the Court of Justice towards references from the United Kingdom, I would do best to revert, once again, to Justice Owle and his tricky case concerning *Ms. Bardot*. Upon discovering that he had to make a reference to Luxembourg Justice Owle turned — with some emotion, one may assume — to the Attorney-General who had brought the point to his attention and asked him: “You mean that the Court has been wasting its time?” The Attorney-General obligingly replied: “No, my lord. The European Court, I am sure, will read your judgment with interest and advantage.”<sup>59</sup> And this, I dare say, is indeed the case. References from courts in the United Kingdom are nearly always well-reasoned and they make good reading, too. The transcript of the hearing in which the referral was ordered, usually included in the bundle for the European Court, is often particularly interesting.

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59. HERBERT, *supra* note 21, at 42.

Lord Denning also mentions that the national court should consider the expense likely to be incurred by referring a case to Luxembourg.<sup>60</sup> However, this point would appear to be of less importance. The European Court does not levy any charges for its work in Article 177 cases, but reserves the decision as to costs for the national court. There will inevitably be costs, for example, for lawyers and for travelling to Luxembourg. The European Court does, however, dispose of some funds in order to provide legal aid where necessary. Only a few months ago, for example, the Court granted a substantial sum of money to a plaintiff in a social security case referred to Luxembourg by a British court in order to allow him to present his case.<sup>61</sup> The question of costs should, therefore, not be a decisive factor when it comes to deciding whether or not to refer a case to the European Court.

Different considerations apply to the last of Lord Denning's points which I want to discuss here: the matter of time.<sup>62</sup> The length of the preliminary ruling procedure is of course of fundamental importance when a national court considers the question as to whether a reference should be made. The procedure before the European Court represents, after all, only an intermediate stage in the litigation and the national court has to continue its proceedings after the Court in Luxembourg has given its ruling. Lord Denning mentions in his judgment that the average length of time of Article 177 proceedings "at present seems to be between six and nine months."<sup>63</sup> Happy days, one is tempted to comment now! At present, the average duration of such proceedings is more than eighteen months.<sup>64</sup> A court not obliged to refer preliminary questions to the Court of Justice may think: this is too long. The Court of Justice has tried — and is still trying — to accelerate these proceedings, but so far there has been only limited success. If the preliminary ruling procedure is to continue to play its vital role, it is essential that na-

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60. *Bulmer*, [1974] Ch. at 424-25.

61. O'Flynn, Case C-237/94 (Eur. Ct. J. ) (not yet decided).

62. *Bulmer*, [1974] Ch. at 423-24.

63. *Id.*

64. The average was 20.4 months in 1993 and 18.0 months in 1994. The improvement which these figures seem to suggest is probably due to special circumstances and hardly of a lasting nature. See *supra* note 17.

tional courts can expect a judgment from the European Court within a reasonable period of time.

Let us now look at how — or whether — the courts of the United Kingdom have followed Lord Denning's guidelines. One of the important aspects of Lord Denning's approach was the preference he expressed for referrals to be made by higher courts rather than lower courts. If one looks at the numbers of cases referred by individual courts, it becomes apparent that, in this respect, Lord Denning has not been followed. For example, when the House of Lords referred its first case to Luxembourg in 1979, there had already been fourteen other references from courts in the United Kingdom. The aggregate figures are unambiguous, too. Towards the end of October 1995,<sup>65</sup> the Court of Appeal had referred thirty cases whilst the House of Lords had made seventeen referrals. By far the most important source of references is, however, the High Court of Justice, with seventy-nine references. In other words, more than thirty-four percent of the referrals from courts in the United Kingdom emanate from the High Court.

The attitude of High Court judges is perhaps best reflected by the judgment of Justice Bingham — as he then was — in *Customs and Excise Commissioners v. ApS Samex*.<sup>66</sup> The following remarks are particularly noteworthy:

Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the European Court of Justice. It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are at issue. Where the interests of member states are affected they can intervene to make their views known.<sup>67</sup>

Whilst insisting that a court of first instance need not necessarily

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65. Figures are as of October 20, 1995.

66. [1983] 1 All E.R. 1042.

67. *ApS Samex*, [1983] 1 All E.R. at 1055.

make a reference to the European Court, Justice Bingham proceeded nevertheless to submit questions to the European Court in that case.

It is hardly a coincidence that seventy-three out of the seventy-nine references of the High Court were made by the Queen's Bench Division and only six by the Chancery Division. However, it should not be forgotten that the very first reference from a court in the United Kingdom was made by the Chancery Court: the *Van Duyn* case,<sup>68</sup> which will be known to all of you.

All this bears out the remarks made by Lord Slynn of Hadley, formerly Advocate General and later Judge at the European Court of Justice, at a seminar a few weeks ago. He pointed out that the courts of the United Kingdom have fully accepted the dialogue with and the role of the European Court. They have been very willing to submit questions for a preliminary ruling and have loyally complied with the judgments rendered in Luxembourg.

Let me now return to the statistical data.<sup>69</sup> There is still more information to be gleaned from these figures for references. If one looks at the period up to the end of 1993, there is a total of 162 references from United Kingdom courts. This is, of course, a far cry from the 857 references from Germany and the 462 referrals from France. It is, however, not too far from the 319 references made by Italian courts. If one takes into account the fact that the United Kingdom only joined the Community in 1973, and if one also considers that the number of courts is lower in the United Kingdom than in some of the other Member States, the number of referrals is rather significant. This is confirmed if one looks at the period between 1991 and 1993 alone: while German courts take first place with 173 references, Italy accounts for eighty-two, France for sixty-six, and the United Kingdom takes sixth place with forty-four referrals.

The figures for the United Kingdom over the years also confirm the general trend. Between 1974 — the year when the first reference was made — and 1987, the number of referrals rose gradually from one to nine a year. The average yearly number of

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68. *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 347.

69. See *supra* note 17 (stating that all statistics in Address come from internal statistics of European Court of Justice).

referrals between 1988 and 1993 was around fourteen. In 1994, there were twenty-four references from courts in the United Kingdom, and sixteen referrals have already been made in 1995.

Let us now look more particularly at the subject-matter of the 162 cases referred by courts from the United Kingdom. If one breaks down the referrals made so far, questions concerning "social law" are most important with thirty-six cases. This category is of course mainly made up of references in the area of equality between women and men. The number of these cases is not to be explained, as some cynics would have it, by the fact that there is more discrimination in the United Kingdom than elsewhere. Rather, it is evidence of the fact that this issue is perhaps taken very seriously in the United Kingdom. Lord Slynn of Hadley has argued that the number of these cases proves that the Equal Opportunities Commission and the relevant legislation have worked satisfactorily. It has to be admitted, however, that the issue of equality between the sexes has long preoccupied eminent persons in the Kingdom, even before this legislation came into force. It will be remembered, for example, that Henry V took exception to that notorious passage of the *Lex Salica* which provides "ne mulieres succedant in terram Salicam."<sup>70</sup> A blatant discrimination indeed! The king consulted the archbishops of Canterbury and York on the subject. If the monarch had lived in our age he might have referred the case to the European Court in Luxembourg — although it is not certain whether the European Court could have found better arguments than the two archbishops.

The second most important subject-matter of referrals is agriculture with twenty-nine cases, to which may suitably be added the twelve references on questions concerning fisheries. It is obvious that the milk-quota regime of the Community has presented judges in the United Kingdom with at least as many questions of interpretation as courts in other Member States. References which asked for an interpretation of Article 30<sup>71</sup> (twenty-eight cases) and social security cases (twenty-one) come next. Questions on tax law and on the free movement of work-

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70. Translation: "Women shall not be allowed to inherit Salic land."

71. EC Treaty, *supra* note 3, art. 30, [1992] 1 C.M.L.R. at 602. Article 30 prohibits quantitative restrictions on imports and all measures having equivalent effect. *Id.*

ers gave rise to a fairly similar number of cases (sixteen and fourteen cases respectively).

Mention should also be made of the references on problems regarding the Brussels Convention.<sup>72</sup> The number of these references is not very big — so far there have been ten of them. However, this area of the law is particularly well-suited to demonstrate the interaction and cooperation between the European Court of Justice and the courts of the United Kingdom. I will only mention one specific but highly important issue. Under the Brussels Convention, an action in a given case may quite often be brought in the courts of different Member States. For example, the court where the defendant has his residence and the courts which have jurisdiction under Article 5 will not necessarily be in the same country.<sup>73</sup> If more than one court is seised, the risk of conflicting judgments arises. Articles 21 to 23 of the Convention deal with this problem.<sup>74</sup> I do not need to go into details here. Suffice it to say that, generally speaking, the Convention resolves the problem in favour of the court “first seised.”<sup>75</sup> However, the Convention does not explain what this means. In 1984, the European Court held that the “court first seised” was the court “before which the requirements for proceedings to become definitively pending are first fulfilled.”<sup>76</sup> It added that these requirements were to be determined “in accordance with the national law of each of the courts concerned.”<sup>77</sup>

However, these national laws differ. In Germany, an action is not normally regarded as pending before the document in which the plaintiff sets out his claim has been served on the defendant. A different approach prevailed in England. I shall be carrying coals to Newcastle, but I think I have to mention that, in actions starting with a writ, the originating document (the writ) is issued by the courts. It is then up to the plaintiff to serve it on the defendant. There was strong authority for the proposition that an action was pending as soon as the writ had been issued.

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72. Brussels Convention, *supra* note 6, O.J. L 304/77 (1978).

73. *Id.* art. 5, O.J. L 304/77, at 79 (1978).

74. *Id.* arts. 21-23, O.J. 304/77, at 83 (1978).

75. *Id.*

76. *Zelger v Salinitri*, Case 129/83, [1984] E.C.R. 2397, 2408 ¶ 16, [1985] 3 C.M.L.R. 366, 379 ¶ 16.

77. *Zelger*, [1984] E.C.R. at 2408 ¶ 16, [1985] 3 C.M.L.R. at 379 ¶ 16.

Justice Hirst, for example, so held in *Kloekner & Co. AG v. Gatoil Overseas Inc.*<sup>78</sup> From a historical point of view this is correct. The expression *lis pendens* owes its origin to the fact that the writ was hung in the court's filing cabinet. I assume that this technique was also applied by the Chancery which has given its name to Chancery Lane where we are tonight.

This is of course a rather inconvenient solution as far as the Brussels Convention is concerned. It is only necessary to recall that there is no obligation on a plaintiff to serve the writ. He may, therefore, wait until the very end of the period of validity of the writ before serving it on the defendant. Assuming that the relevant moment were the day when he filed his action at the court, any other action brought by the defendant himself could, therefore, easily be frustrated.

This unsatisfactory state of things was much deplored by continental scholars. The solution came, not with a judgment of the European Court, but from within the United Kingdom. In 1992, the Court of Appeal held, in *Dresser UK Ltd. and others v. Falcongate Freight Management Ltd. and others*,<sup>79</sup> that, for the purposes of the Brussels Convention, it was service of proceedings and not issue of the writ which was decisive.<sup>80</sup> The essential reasoning is to be found in the judgment of Lord Justice Bingham.

Lord Justice Bingham agreed with the view expressed by counsel that English procedure should not be forced into "a strait-jacket of European design."<sup>81</sup> He continued, however, as follows:

But procedural idiosyncrasy is not (like national costume or regional cuisine) to be nurtured for its own sake and in answering the question before us we must have regard to the realities of litigation in this country and the purpose of the convention, not to tradition, nomenclature or rules developed for other purposes.<sup>82</sup>

He continued to declare that, in his judgment, it was "artificial, far-fetched and wrong" to hold that an action became pending upon mere issue of proceedings.<sup>83</sup> He allowed an exception,

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78. [1990] 1 Lloyd's Rep. 177, 204.

79. [1992] Q.B. 502 (Eng. C.A.).

80. *Dresser*, [1992] Q.B. at 523.

81. *Id.* at 522.

82. *Id.*

83. *Id.* at 523.

however, in cases where the relevant court had actually exercised jurisdiction before the writ had been served.<sup>84</sup> This approach has been confirmed by the Court of Appeal in *Neste Chemicals SA v DK Line SA and another [The Sargasso]*.<sup>85</sup> The courts of the United Kingdom have thus made a valuable and important contribution towards the proper functioning of the Brussels Convention and of Community law in general.

Finally, I would like to draw attention to an important aspect of the procedure under Article 177, namely the possibility for Member States and institutions of the Community to make their views known.<sup>86</sup> It goes without saying that the submissions of Member States are very important for the Court. A ruling of the Court may, for example, have repercussions on other sectors, and it is often very difficult to ascertain these further consequences without the assistance of Member States. Member States are also in the best position to provide the Court with vital factual and legal background information. Needless to say that well-reasoned submissions can exercise a considerable influence on the decision-making process. It is clear, therefore, that this is a very important possibility for Member States to influence the outcome of cases.

As the figures show, the United Kingdom makes good use of this possibility. These figures are based on the judgments the Court of Justice has rendered in Article 177 cases so far. They do not, therefore, correspond to the figures for references I have mentioned before.

Towards the end of October 1995, the Court of Justice had rendered 2038 judgments in proceedings under Article 177 of the Treaty. More than a third of these — 732 — were referrals from Germany. Two hundred eighty-eight judgments were rendered upon referrals from France. Referrals from Italian courts so far have led to 211 judgments. Requests for a preliminary ruling from the United Kingdom have resulted in 139 judgments so far. It is interesting to compare how often the Member States concerned have intervened in these proceedings. The French

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84. *Id.*

85. [1994] 3 All E.R. 180 (Eng. C.A.). In this judgment, the Court of Appeal gave up the reservation made by Bingham, LJ, in *Falcongate*. *Neste Chemicals*, [1994] 3 All E.R. at 181.

86. See, e.g., *supra* note 66-67 (setting forth comments by Justice Bingham in *Customs and Excise Commissioners v. ApS Samex*).

Government has made submissions in 172 of the 288 cases referred by French courts. The Italian Government has intervened in 159 of the 211 references from Italy. That is to say, these governments took an active part in approximately sixty-one percent and seventy-five percent, respectively, of the references emanating from courts in their territory. The German Government made submissions in 231 of the 732 cases referred by German courts — less than thirty-two percent of all referrals. The Government of the United Kingdom, on the other hand, intervened in 123 of the 139 cases coming from courts in the United Kingdom — that is to say, in nearly eighty-eight percent of these cases. I think that these figures speak for themselves.

Even more impressive is the overall record. The Member State that has lodged submissions in more cases than any other country in the Community is the United Kingdom. The Government of the United Kingdom has intervened in 407 cases so far. Germany with 395, Italy with 383 and France with 342 cases follow. This clearly shows that not only the courts of the United Kingdom, but also its government, take a strong interest in European law.

#### CONCLUSION

By participating in the Article 177 procedure the United Kingdom courts and the United Kingdom Government have rendered a contribution highly appreciated by all participants to the interpretation of Community law. The Community would be much poorer without these contributions.