

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

References for preliminary rulings
under Article 177 of the EEC Treaty
and cooperation between
the Court and national courts

by

Pierre Pescatore
Judge at the Court



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Preface

Among the various types of proceedings provided for in the Treaties establishing the European Communities, requests for preliminary rulings are those which are, quite rightly, of greatest interest to the national courts and to practitioners of law in the various Member States. Of all the proceedings which may be brought before the Court, those under Article 177 are the most frequently resorted to: it need only be stated, without giving precise statistics, that half of the cases before the Court are requests for preliminary rulings. Not only because of their frequency, but also because of their particular characteristics, such proceedings have over the years made a major contribution to the clarification and development of Community law. I shall deal with the preliminary-ruling procedure in three parts: first, I shall make a number of basic points regarding its *raison d'être* and function; I shall then consider how it operates in practice; and finally, I shall consider the problems and difficulties which have arisen in practice from recourse to this procedure.

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Part 1: The *raison d'être* and function of the preliminary-ruling procedure

Historical background

Although the reference for a preliminary ruling has been an extraordinarily successful procedure within the European Communities, it was not invented by the authors of the European Treaties. Similar judicial procedures exist in the internal law of various Member States, for example in relations between civil, criminal and administrative courts. Indeed the reference for a preliminary ruling occupies a particularly important place in the organization of constitutional courts. Thus, it is often resorted to in constitutional cases in Germany and Italy, where the courts are entitled, or even obliged, to refer to the constitutional court questions of constitutionality arising in proceedings before them; Spain has adopted the same system in its new constitution.¹

In the European Treaties, the reference for a preliminary ruling appears for the first time in Article 41 of the ECSC Treaty, which provides that 'The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal'. Apart from one recent case, that Article has remained a dead letter within the system of the ECSC Treaty.² That should cause no surprise: management of the common market in coal and steel is concentrated in the hands of the Community (more precisely, of the Commission, which took over from the old High Authority), so that the national authorities rarely have occasion to take any action in that connection. However, that provision is important from the historical point of view because it served as a model for the preliminary-ruling procedure provided for by the EEC and Euratom Treaties.

When the Treaties of Rome were being negotiated, it was decided to extend the procedure for preliminary rulings on questions of validity to questions of interpretation. Under Article 177 of the EEC Treaty, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community. Every national court before which such a question arises is entitled, and supreme courts are under an obligation, to seek a preliminary ruling from the Court of Justice if they consider that a decision on the question raised is necessary to enable them to give judgment. It was as a result of that extension of its scope that the procedure for preliminary rulings became a veritable living institution within the European legal system. That is particularly true in so far as the general common market is based on a largely decentralized system and extensive powers of management are vested in the authorities of the Member States.

It should be noted that the procedure for preliminary rulings was subsequently extended to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of the Protocol of 3 June 1971. There too, the preliminary-ruling procedure is actively used.³

The application of Community law in the Member States as a precondition for references for preliminary rulings

In order to understand the preliminary-ruling procedure it is necessary first to consider the effect of Community law in the Member States. Numerous rules of Community law are applicable in one way or another within the Member States. That is the case with the substantial number of Treaty provisions which the Court has held to have direct effect, such as the rules on the free movement of goods, non-discrimination in tax matters, equality of treatment for nationals of the Member States as regards freedom of establishment and the right to work and provide services. Then there are all the Community regulations, since under Article 189 of the EEC Treaty regulations are not only binding in their entirety but are also 'directly applicable' in all Member States. Moreover, whilst it is true that Community directives and decisions are, primarily, addressed to the States and not to private individuals, even they can, on occasions, be relied upon by private individuals, for example with a view to the interpretation of harmonized national law or where a Member State has not fulfilled its obligations deriving from Community measures of that kind within the prescribed period.⁴

Thus, national courts of all categories find that, of the legal rules which they are called upon to apply, an increasingly large proportion are provisions emanating from the European Communities. It is also possible, and indeed frequent, for them to be faced with conflicts between their national law and the provisions of Community law. Finally, since all the Member States recognize the principle that the acts of public administrative authorities are reviewable for their legality, there are occasions when disputes are brought before the national courts relating to the validity of measures of secondary Community law, for example regulations, directives or decisions. Since the national Courts have the task of applying the rules of Community law, within the limits of their jurisdiction, and of resolving any disputes and conflicts which may arise from the application thereof, they encounter problems relating to the interpretation of rules of Community law or the validity of measures adopted by Community institutions. It is to assist them in resolving such problems and at the same time to ensure that Community law is interpreted and applied in a uniform manner throughout the Community that the procedure for preliminary rulings was specifically created.

It should be noted that problems of this kind may arise in all kinds of legal proceedings, and sometimes very unexpectedly. They are encountered above all in commercial, administrative, financial and social cases. However, questions concerning the interpretation of Community law also arise, and arise more often than would be thought, in criminal proceedings. Numerous economic and tax laws incorporate criminal provisions involving penalties which are sometimes severe. More and more frequently, traders being prosecuted for the infringement of such provisions seek to defeat national law by reliance upon the rules of Community law, for example those concerning the marketing of products, the provision of services, transfers of funds, the prohibition of tax discrimination, and so forth. Thus, problems of Community law can emerge in an area which does not at first sight appear to fall within its purview.⁵

Purpose of the preliminary-ruling procedure

Article 177 indicates that requests for a preliminary ruling may have two purposes: First, interpretation of the Treaty and of measures of secondary law; and, secondly, questions concerning the validity of measures adopted by institutions. Both call for more detailed discussion.

(a) In most cases, requests for a preliminary ruling concern the interpretation of clearly identified provisions either of the Treaty itself or of a measure of secondary law, that is to say a regulation, a directive, a decision or any other Community measure producing legal effects. However, requests for interpretation have not, in practice, been confined solely to those areas.

In the first place, the question has arisen whether international agreements concluded by the Community may be the subject of requests for interpretation. The Court's reply to that question was that they may. The Community is vested with powers in the sphere of external relations and is entitled to conclude international agreements, both bilateral and multilateral, on matters falling within those powers. Such agreements fall within the category of 'acts of the institutions of the Community' within the meaning of Article 177.⁶ Such acts are contractual in nature and are governed by international law, which entails certain consequences regarding their interpretation and the effects of the interpretation given by the Court. Of course, the Court can only interpret international agreements on behalf of the Community and with respect to the Community; it is obvious that such interpretations could not be binding on non-member countries which are parties to those agreements. The Court has adopted the same approach in the case of agreements in which the Community was substituted for the original parties, the Member States, as a result of the transfer of powers within the area of commercial and customs policy. The Court has interpreted Article 177 in this way in order to ensure that all agreements binding the Community are interpreted and applied in exactly the same way throughout the Community.⁷

Another practical problem which has emerged lies in the question whether the preliminary-ruling procedure provided for by Article 177 can be used by the national court with a view to obtaining a ruling from the Court of Justice on unwritten principles inherent in Community law or on how to supply *lacunae* in the Treaties or measures of secondary law. The question has arisen above all in connection with the safeguards for fundamental rights laid down by Community law and the application of certain general principles of public administration. It is of course well known that an interpretation does not consist only in the clarification of the meaning of the written terms of the law; a legal system is a living system involving intimate interaction between the written word of legislation and certain legal concepts which are so well established that they have not been embodied in any legal instrument. The Court has therefore always accepted questions seeking a preliminary ruling clarifying general principles inherent in the Community legal order or supplying *lacunae* in the system.⁸

(b) As regards questions of validity, which of course may relate only to secondary legislation, certain practical problems have presented themselves.

In the first place, a close link has emerged between interpretation and validity. Indeed it is possible that a piece of Community legislation, interpreted in a certain way, can

be 'purged' of the defects which it would display if interpreted otherwise. For that reason national courts sometimes submit the same question simultaneously in terms of interpretation and in terms of validity; on more than one occasion, the Court has interpreted disputed legislation in such a way that it was possible to uphold its validity.⁹

In the second place, it is important to note the connection which exists between the questions of validity raised under Article 177 and the action for annulment provided for in Article 173 of the Treaty. The Court of Justice recently had occasion to emphasize that the examination of question of validity under Article 177 is, in reality, nothing more than a transposition of the concepts associated with the action for annulment to the preliminary-ruling procedure. Because of that interconnectedness, the Court was able to apply the second paragraph of Article 174 of the Treaty to the preliminary-ruling procedure, thus enabling it to limit in time the effects of a declaration of invalidity, so as not to affect rights and obligations existing by virtue of a regulation that has been declared invalid.¹⁰

The third practical problem which has arisen lies in identifying the criteria which the Court may use in appraising the validity of a Community measure. Can it declare that a measure of secondary law is invalid because it is contrary to certain general principles of law? Or can it do so because it is contrary to a rule of international law? On that point, the Court has always adopted a broad view of 'Community legality' such as is to be found in Article 164 of the Treaty and in the first sentence of Article 173. A Community measure can therefore be declared invalid for not conforming to any legal rule which must be complied with within the framework of Community law, whatever the nature and origin thereof, including therefore considerations drawn, for example, from general principles of law or rules of international law.¹¹

Finally, attention should be drawn to the prudent approach which the Court adopts whenever it considers that it must reject the doubts raised regarding the validity of a measure adopted by a Community institution, which in practice is what happens most frequently. In such circumstances, it refrains from affirming that the measure in question is 'valid'; it confines itself to saying, using a hallowed form of words, that: 'Consideration of the question submitted has not disclosed any factor of such a kind as to affect the validity of the measure in question'. It is indeed perfectly conceivable that a fresh objection may be made subsequently, on other grounds, leading to a declaration that the measure is invalid. The position is different, however, where the Court decides that the measure must be declared invalid: such a finding is irrevocable. In such a case the preliminary ruling may truly be said to take effect *erga omnes*. I shall return to this subject later.

The spirit of the preliminary-ruling procedure

The preliminary-ruling procedure is based on a division of tasks between the national court and the Community Court, on a partnership between them in the discharge of a function which is in the common interest, namely the proper application of Community law throughout the Community. Without establishing any hierarchy between the national courts and the Court of Justice, this procedure makes it possible, by the interaction of question and answer, to guarantee the uniformity of Community law throughout the Community as regards its interpretation and the appraisal of the

questions of validity which may arise in its application. The Court has always endeavoured to ensure that this dialogue can be undertaken and pursued in a spirit of cooperation, this being possible only if the cooperation is mutual, that is to say, if the national court on the one hand and the Community court on the other are aware of their respective functions in the accomplishment of a task which is in the common interest of the European Community as a whole.

The spirit of this cooperation was clearly brought out by the Court in its judgment of 1 December 1965 in *Schwarze*. In that case, the French Government had strongly criticized the questions submitted by the *Hessisches Finanzgericht* and asked the Court to declare them to be inadmissible. The Court replied that it was necessary to reject strict adherence to formal requirements in 'the special field of judicial cooperation under Article 177 which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision'.¹²

The procedure cannot produce its best results unless the national courts are alert to the problems of Community law which arise within their jurisdiction and are ready to recognize that the unity of that law in a Community in which there are so many different legal systems can be guaranteed only if there is a central court — the Court of Justice — which is responsible for ensuring the observance of common rules which are acceptable to everybody. The Court, for its part, has always been concerned to achieve a precise understanding of the problems faced by the national courts and to carry out its tasks so as to help them to solve the contentious problems with which they are confronted and to discharge the sometimes heavy responsibilities which they must assume. By virtue of the effective functioning of this procedure over the years, it has been possible gradually to perceive the outlines of what may be called without exaggeration a 'European judicial authority', which is decentralized and yet also centralized, in so far as, by joined efforts channelled through the preliminary-ruling procedure, the Court of Justice and the national courts guarantee the unity of Community law and its efficacy within the various national legal systems.

Over and above the need for unity, which is a dominant theme both in the requests for preliminary rulings from national courts and in the rulings of the Court, the preliminary-ruling procedure has made a great contribution to the growth of Community law. Every lawyer, whether he concerns himself with the law as a judge, or as a practitioner or for the purposes of research, knows that judicial interpretation, quite apart from its contentious function, is at the same time an eminently creative process in so far as it enables the law to be consolidated in those areas where it is unstable, to be clarified where it is uncertain, and to be developed where it is inappropriate or incomplete. It is not therefore by chance that the decisions of the Court which have made the most conspicuous contribution to the development of Community law have been delivered as part of the preliminary-ruling procedure, a procedure concerned first and foremost with interpretation: the direct effect of Community law, its primacy over national law, the protection of fundamental rights, the principles relating to the common market and the law of competition, the social dimension of the Community, and so forth, have been defined in preliminary rulings to a much greater extent than in direct actions.¹³

Part 2: The Article 177 procedure in practice

In this part, I shall endeavour to present the preliminary-ruling procedure by following its various stages in the order in which they occur: the emergence of the problem before the national court and the formulation of the request for a ruling, the course of the procedure before the Court and, finally, the preliminary ruling and its effects.

The emergence of the problem from the point of view of the national court

With the constant growth of Community action, in terms of its content, intensity and scope, problems of Community law arise more and more frequently in proceedings before national courts. They arise, for example, in proceedings brought by individuals against the administration, the revenue authorities and the social security institutions; or where a person is defending himself against criminal charges; or where private individuals are involved in proceedings before a commercial court or proceedings relating to competition.

(a) Let us first see who takes the initiative in raising a question. Normally, it is the parties who seek to rely upon Community law to defend their interests and ask the court to request a preliminary ruling. It is also possible, and indeed not exceptional, for the court itself to be the first to perceive the problem of Community law and to question the parties about it. And sometimes, although this is not always the most appropriate procedure, the court raises a question requiring a preliminary ruling without even advising the parties. All these possibilities fall within the scope of Article 177, which allows a reference to be made to the Court where a question involving Community law 'is raised before any court or tribunal of a Member State'. The Court has always construed that provision as having an objective meaning, in the sense that a request for a preliminary ruling becomes possible as soon as a question concerning Community law arises before a national court, and it is of little importance whether it came first to the mind of one of the parties or first to the mind of the judge.¹⁴ It is at this first stage that an appraisal — of which the importance will be examined shortly — is made by the national court: it is for the court to determine whether the solution to the question raised is, as Article 177 states, 'necessary to enable it to give judgment'. This is what is normally known as the question of 'relevance'. Consideration and appraisal of this question is a matter for the national court and for the national court alone.¹⁵ It will be seen that this fact has important consequences regarding the division of tasks, in this area, between the national court and the Court of Justice.

(b) Once the intention has been formed to have recourse to the preliminary-ruling procedure, it is necessary to formulate the appropriate question or questions. In most cases, one of the parties to the dispute takes it upon himself to suggest a question to the court; it is also possible for the parties to come to an agreement between themselves on the questions to be submitted to the Court of Justice. What will be the

attitude of the national court to such initiatives? Certain judges merely pass on to the Court of Justice, without amendment, the questions suggested to them and they usually mention this fact explicitly in the order for reference. This attitude is found above all in the United Kingdom courts, which are accustomed to allowing the parties to take the initiative in the manner in which the proceedings are conducted. The question may be asked whether that is a good method. It has been seen, in fact, that the parties have a tendency all too easily to word their questions in a manner which entraps the Community Court in their own particular logic. It is therefore certainly preferable for the national court to adopt a critical approach to the questions submitted by the parties, even if the parties agree amongst themselves, and, if necessary, to reformulate them from the standpoint of the person whose responsibility it is to determine the dispute in a spirit of neutrality and objectivity.

In fact, there is very considerable diversity in the manner in which questions are formulated and it must be stated at the outset that, in principle, all the methods of formulation are good. The attitude of the Court has always been to accept the questions as the national court sees fit to put them, to endeavour to understand them and to give a helpful reply to them. Nevertheless, it should be pointed out that there are ways of formulating questions which facilitate the task of the Community Court and there are other ways which make its task more difficult. Without doubt, specific, simple and direct questions constitute the best starting point for useful replies from the Court.¹⁶ Conversely, care should be taken to avoid two extremes which are encountered in practice. On the one hand, there are courts which confine themselves to passing the file on a case to the Court and asking it to resolve the problems of Community law found in it.¹⁷ At the other extreme, there are highly abstract and complicated questions, with an abundance of hypotheses and alternatives.¹⁸ In yet other cases, the Court is drowned in a flood of questions which cannot all be relevant at the same time.¹⁹ In a word, the national court ought to be aware that by submitting its question or questions in simple and comprehensible terms, close to the reality of the facts of the case and also to the rules which are to be interpreted, it will create the best starting point for a useful reply from the Court.

(c) The questions themselves will be incorporated in a judicial pronouncement which simultaneously stays the national proceedings and refers the matter to the Court. The form of that pronouncement is of little importance: that is a question governed by the rules and customs of national procedure. Most courts in the Community make an order, others deliver a judgment or an interlocutory decision, and others use a document issued by the Registrar or another officer of the court, to which the questions and accompanying comments are annexed. The grounds upon which the request for the ruling is based are of great importance for the Court and, in this area, there are profound differences between the various national legal systems. Certain courts do no more than attach to the questions submitted the minimum procedural information necessary to identify the nature and the origin of the case. Others take the trouble, and it is a practice greatly to be recommended, to set out the background and the facts of the case and also the arguments of the parties, in order to show how the request for a preliminary ruling arose, and they explain the legal problem involved more extensively. Where a question is submitted by a superior court, it is important for the Court of Justice to be informed of the decisions taken by the courts which gave judgment in the same case at first instance and, where

appropriate, on appeal. Certain courts, in particular German and Italian courts, are even concerned to make known their opinion on how the question should be resolved, in order to enable the court either to confirm their position or to give its reasons for taking a different view.²⁰ All these precautions facilitate the task of the Court of Justice, which is alert to the benefit of being well informed as to the facts and background, the views of the parties and the opinion of the judges who have dealt with the case. In order to complete this information, the referring courts are asked to send their file on the case to the Court of Justice; the file is returned to them with the judgment containing the preliminary ruling.

(d) At what stage in legal proceedings must a request for a preliminary ruling be made? More precisely, should the court submit a question before establishing the facts? The choice of the time, in the same way as the wording of the questions, is of course a matter within the discretion of the national court; it has the responsibility of determining the most appropriate moment. But it should be pointed out that the Court of Justice prefers to give its ruling at a stage where the facts have already been established and the area of national law involved has been defined, rather than at a stage where it is compelled to reply on the basis of hypotheses and alternatives, which certainly does not facilitate determination of the law.²¹ Is it preferable to raise questions at first instance or is it better to wait for the appeal? Of course, it is highly desirable to have reciprocal contacts, as wide-ranging as possible, between the Court and the superior courts of the Member States; but it has been seen in practice that misunderstandings involving Community law can persist, moving laboriously from one court to another, and a considerable time can thus be wasted before the Court of Justice has an opportunity to clarify them.²² In other words, a court of first instance or court of appeal should not hesitate to approach the Court of Justice where a sufficiently clearly defined question of Community law presents itself in the proceedings before it.

(e) Finally, a last, but not unimportant, practical remark is called for. Once the decision to seek a preliminary ruling is taken by the national court, how is it to be transmitted to the Court? The answer is to be found in Article 20 of the Statute of the Court: 'The decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified by the court or tribunal concerned'. In other words, the documents are sent direct from court to court or, more specifically, from registry to registry. National courts should be strongly advised against going through the intermediary of any administrative or diplomatic channels. Such a procedure involves not only the risk of delays and oversights but also the possibility that the political authorities might be tempted to intercept questions which they find inconvenient.

Optional references and compulsory references

Article 41 of the ECSC Treaty makes it obligatory for every national court to seek a preliminary ruling from the Court of Justice where the validity of any measure adopted by an institution is in issue in proceedings before it. When Article 177 of the EEC Treaty was drafted, it was decided not to keep the wording in such general terms, so as to prevent the Court disappearing beneath a flood of requests for preliminary rulings. Article 177 therefore draws a distinction:

- (i) where a question of interpretation or of validity is raised before a court or tribunal of a Member State, it may, if it considers that a decision on that point is necessary to enable it to give judgment, ask the Court of Justice to give a ruling thereon;
- (ii) where such a question is raised in proceedings pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to seek a ruling from the Court of Justice.

In other words, all courts may seek a preliminary ruling. Supreme courts must do so. The application of this system has given rise to various problems.

(a) In the first place, it is necessary to determine what is to be understood by the words 'a national court or tribunal against whose decisions there is no judicial remedy under national law'. Two theories have been expounded on this subject, one of which may be called the 'organic' theory and the other the theory of the 'specific case'. According to the first theory, the obligation contained in the third paragraph of Article 177 attaches only to courts which, within the judicial system, are at the top of the hierarchy. According to the second theory, it is necessary to look not at the hierarchical position of the court but rather at whether, in a given dispute, a court gives its decision at last instance. Thus, in certain Member States, even a lower court may give judgment at first and last instance in disputes where the interests involved are limited. In certain Member States, such as the United Kingdom, an appeal is not possible unless the court grants leave to appeal, so that the court itself decides whether or not there is any judicial remedy against its decision. This question could give rise to endless discussion. I personally consider that, having regard to the rationale of the third paragraph of Article 177, preference should be given to the 'organic' theory. This view will be better illustrated by the observations which follow.

(b) The question to be answered is what is the *raison d'être* of the obligation imposed by the third paragraph of Article 177 upon courts and tribunals against whose decision there is no judicial remedy? By using that expression, the Treaty is referring to supreme courts whose jurisdiction extends throughout the territory of a given Member State. It is they which, ultimately, lay down the case-law applicable to all matters which fall within their jurisdiction.²³ It is necessary to ensure — and this is the thinking which inspires the system provided for in Article 177 — that, in matters of Community law, case-law does not develop in the supreme courts which differs as between the various Member States. Moreover, it is necessary to ensure that in this way case-law does not become established which would give rise to conflicts with Community law that would be difficult to resolve, since there would be no way of dealing with them otherwise than by bringing an action before the Court for the failure of a State to fulfil its obligations. It is therefore specifically with respect to the supreme courts that the preliminary-ruling procedure must be able to play, in every case, its preventive role. These considerations militate in favour of the 'organic' theory, rather than the theory of the 'specific case'.

(c) Difficult problems have arisen regarding determination of the scope of the obligation imposed upon supreme courts by the third paragraph of Article 177.

There is one point which is easy to resolve since it concerns a shortcoming in the drafting of Article 177. The second paragraph of that Article grants courts and

tribunals a margin of discretion in so far as it provides that they may request a ruling if they consider 'that a decision on the question [that is to say, the question of Community law] is necessary to enable [them] to give judgment'; that, as I have said, is the assessment of the 'relevance' of the settlement of the dispute. However, the same wording does not re-appear in the third paragraph of Article 177. But it is reasonable to think — and the Court has always taken this approach — that supreme courts have the same margin of discretion as any other court regarding the relevance of a question. It is not therefore sufficient for a question to be raised by the parties; the Court — and this applies also to supreme courts — must also consider the question to be relevant to settlement of the dispute.²⁴

A second problem was likewise settled long ago. In one of its very early decisions, the Court recognized that there was a limit to the obligation of supreme courts to request a ruling in cases where a provision of Community law had already been the subject of interpretation in earlier proceedings. This is the effect of the judgment of 27 March 1963 in *Da Costa en Schaake*, which was similar to the well-known case of *Van Gend & Loos*, in which judgment had been given not long earlier: where a question of law has already been dealt with in a previous decision of the Court, the obligation imposed on supreme courts by the third paragraph of Article 177 ceases to have any purpose.²⁵ But, of course, a supreme court is always entitled to seek a ruling from the Court of Justice, even if the point of law with which it is concerned has already been previously dealt with. In other words, the aforesaid judgment provides national courts of last instance with a choice in cases where a question of law has already been resolved by the Court: either it follows the decision already adopted and, in that case, its obligation to seek a ruling ceases to have any purpose; or else it expresses reservations and, in such a case, like every court it is entitled to seek a further ruling from the Court of Justice.

There is a third question, however, which is much more difficult. Under Article 177, a point of Community law must constitute a 'question' for the Court. However, it is possible that the court considers that the solution to it is so obvious that, as far as it is concerned, there is no 'question' and that, accordingly, a reference for a ruling would serve no practical purpose. This is referred to in some quarters as 'absence of all reasonable doubt' or as the 'doctrine of the clear meaning of provisions'. The question had for a long time been a matter of discussion, until the Italian Corte di Cassazione brought the problem before the Court of Justice, in the *Cilfit* case, which gave rise to the judgment of 6 October 1982, to which I have already referred on several occasions.²⁶ In response to that request for a ruling, the Court adopted a flexible attitude which was inspired by the spirit of trust and cooperation which must exist between it and the superior courts of the Member States. It recognized that situations may exist in which a question of Community law put to a national court does not give rise to any reasonable doubt and that, in such circumstances, that court may itself assume the responsibility of giving an answer, without having recourse to the preliminary-ruling procedure. However, the Court accompanied that decision by several warnings. It drew attention to the fact that a court, even a supreme court, is not alone in the Community and that, in resolving a point of law which seems to it to be clear, it cannot be satisfied with its subjective conviction but must seek to establish 'inter-subjective' certainty, that is to say to ensure that any other court in the Community and the Community Court itself would decide the same question in the

same way; in other words, it is important for the national court to be aware of the Community responsibility which it assumes in such circumstances. In that connection, the Court drew attention to the fact that the Community is a multi-lingual grouping, made up of Member States with different legal systems, and that Community law is also different from the national systems. In other words, the national court must be aware of the relativity of its system of reasoning. It cannot therefore take for granted that what seems clear according to its own criteria will also be clear according to the criteria of the other Member States and the criteria of the Community.

The course of the procedure before the Court

The arrival at the Court Registry of the decision seeking a ruling sets in motion a procedure whose scope is significantly greater than that of the procedure before the national court. However, it is not an independent procedure: all those who take part in it must be aware that the Community phase is only a step in the proceedings which, having commenced before the national court, will also finish before that court. It is the national court which, as the Court of Justice has so often emphasized, will at the end of the day assume responsibility for deciding the case before it, and the whole procedure is organized with that ultimate responsibility in mind.

The Court expressed that view in eloquent terms in its judgment of 29 November 1978 in the *Pigs Marketing Board* case, in which the Government of the United Kingdom had criticized rather strongly the questions submitted by the national court and asked the Court to indicate to it which of the questions raised seemed to it to be pertinent. The Court refused to comply with that request and stated that: 'As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment'. It added however that 'in the event of questions' having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 177, the Court is free to extract from all the factors provided by the national court, and in particular from the statement of grounds contained in the reference, the elements of Community law requiring an interpretation — or, as the case may be, an assessment of validity — having regard to the subject-matter of the dispute.²⁷ These words are repeated in numerous subsequent judgments.

(a) Under Article 177, the preliminary ruling procedure is a procedure 'from court to court'. Of course, the parties will have an opportunity to express their opinion but, basically, the procedure operates between the national court and the Community Court. A number of practical consequences flow from this.

Thus, it is not possible for third parties to intervene in preliminary ruling proceedings; apart from the governments of the Member States and the institutions of the Community, only the parties to the proceedings before the national court are entitled

to express their views. The Court does not allow any initiatives by the parties which go beyond the scope of the national court's request; in particular, the parties are not entitled to modify the questions submitted by it.²⁸

What is the position where an appeal is lodged against a decision to seek a ruling? Certain writers, and indeed certain courts, consider that the second paragraph of Article 177 confers an inalienable right upon the national court; according to that view, an appeal cannot, by its very nature, lie against a decision to seek a ruling. For its part, the Court has adopted a more liberal approach. It considers that a decision to seek a ruling, adopted within the sphere of national law, remains subject, as regards its validity, to the national rules of procedure. It is not therefore possible to rule out an appeal against a decision to seek a ruling. However, attention must be drawn to the difficulties to which an appeal may lead in this type of procedure; those difficulties depend on whether or not the appeal has a 'remitting' effect, that is to say whether it leaves the matter to proceed before the lower court or remits it to the superior court. In order to escape such complications and to avoid becoming involved in assessments which are a matter of national law, the Court has adopted the following very simple approach: once a request for a preliminary ruling has been lodged, the Court considers that it is to proceed until such time as it receives notification to the effect that the case has been withdrawn or suspended, emanating either from the referring court or from a superior court. In no case has the Court relied upon information of that kind originating either from a private party or from the government of a Member State. It therefore treats the request as subsisting and follows the procedure in the normal way unless and until it receives notice of a judicial pronouncement to the contrary.²⁹

Finally, there is a last detail which shows clearly that the preliminary-ruling procedure is merely a step in the action before the national court: the Court of Justice does not, under this procedure, take any decision regarding costs, that being a matter which is left to the national court to deal with in the judgment bringing the proceedings to an end. It is to be noted however that, by virtue of Article 104 (3) of its Rules of Procedure, the Court may grant out of its own budget, as legal aid, assistance for the purpose of facilitating the representation or attendance of a party.

(b) Let us now examine the preparatory stage of the proceedings before the Court. As soon as it is received, the decision seeking a ruling is translated into all the official languages of the Community and, in accordance with the first paragraph of Article 20 of the Statute, is sent, in the appropriate languages, to the parties to the main proceedings, to the governments of the Member States, to the Commission, and to the Council where a question casts doubt on the validity or interpretation of an act of that institution. All those parties are entitled to submit written observations to the Court within a period of two months as from notification, plus extensions on account of distance, which adds several extra weeks. At the same time, a summary of the reference is published in the *Official Journal of the European Communities*. As will be seen, the European Parliament is not automatically notified but, by virtue of Article 21 of the Statute, the Court is entitled to seek 'information' from it, which it does where any proceedings involve the prerogatives of that institution (for example where the validity of a regulation is contested on the ground that the Parliament has not been properly consulted).

When the written procedure is completed, the judge-rapporteur submits to the Court a preliminary report, at the end of which he must indicate two things: whether any further information is required and whether the case should be dealt with by the full Court or should be assigned to one of the chambers. It should be pointed out, that in preliminary-ruling proceedings, the Court cannot carry out inquiries in the strict sense of the term, since that is a matter for the national court. Nevertheless, in a substantial proportion of cases it considers that further information is required. Since an approach to the national court (which would give rise to a fresh and protracted phase of the procedure) is not possible, it endeavours to procure the information from the parties to the main proceedings, from the Commission and, sometimes, from the government of the Member State concerned. Such information is intended to provide better knowledge of the facts of the case, of the relevant national legislation or of the technical matters involved in certain cases. In most cases, the parties are asked to reply in writing, before the hearing; on occasion, it is merely suggested that they should deal in detail with certain questions at the hearing.

When the preparatory phase is concluded, the case is called for hearing and all the parties who are entitled under the Statute to submit written observations have the right to present oral argument. On occasion the Court specifically asks a party to attend the hearing and explain certain matters, if that party has not lodged observations. Normally, the parties to the main proceedings are represented by the lawyers acting for them before the national court. The Court finds their contribution very valuable, since they are well acquainted with the background of the case and it is they who will ultimately be able to clarify matters for the national court, in the final stage of the proceedings. In that connection, there is a special provision in Article 104 (2) of the Rules of Procedure, by virtue of which the Court is to take account of the rules of procedure of the national court or tribunal which made the reference as regards the representation and attendance of the parties to the main proceedings. Although in other proceedings a party can be represented only by a lawyer entitled to practice before a court of a Member State, in preliminary-ruling proceedings the Court accepts other representatives and even allows the parties to represent themselves where that is permitted before the national courts, as is the case for example in commercial or social matters.

In this context special mention should be made of the participation in the proceedings of the governments of the Member States and the Commission. The extent to which governments take part varies, but experience has shown that in the more important cases several governments always show their interest by putting forward their views. This applies particularly to the government of the Member State to which the court requesting a ruling belongs. Often, the government participates jointly with the national administration concerned (for example, the revenue or customs authorities, the agricultural intervention agency, and so forth) but there is no requirement for this; frequently, the administrations in question submit observations in their own name, and the same applies to the regional authorities, such as the German *Länder*, the French *departements* and the municipal administrations. The Commission submits written and oral observations as a matter of course in all preliminary-ruling proceedings, through its Legal Department, assisted by the Directorate-General within whose area of responsibility the matter falls. It must be acknowledged that the Commission's participation is of inestimable value to the Court, since it ensures that

objective views are expressed on the case, often supported by research into comparative law and the opinions of experts. Consequently, in that respect the Court of Justice in general has much better access to information than the national courts. Thus, by virtue of the preliminary-ruling procedure, the national courts obtain information which would otherwise not be available to them.

A comment is called for at this stage on the languages used in proceedings before the Court. The national courts submit their references to the Court of Justice in their own national language; that language is also the language of the case. The proceedings are then conducted in the language of the national court and it is the version of the Court's judgment in that language which will be the authentic version. However, the governments of the Member States may present their observations and submissions in their own languages; it is then Court's responsibility to arrange for all the documents and oral statements to be translated into the language of the case, so that they can be understood by the parties to the main proceedings.

The latter remark calls for an observation on the duration of preliminary-ruling proceedings, which is an essential factor in the proper conduct thereof. Even disregarding the sometimes long period which elapses before the national courts send their orders for reference to the Court, the duration of the proceedings before the Court is determined by the following: the time required for translation of the order for reference; the time allowed for the submission of written observations, for which a mandatory time-limit is laid down in the Statute; preparation of the file by the judge-rapporteur and discussion at an administrative meeting; the time required for any information to be obtained; the period which elapses before the case can be heard and the time required by the advocate-general to prepare and deliver his opinion; and, finally, the time required for deliberation. The Court is aware that, as long as the preliminary-ruling proceedings go on, the proceedings before the national court are at a standstill. It therefore constantly endeavours to expedite the procedure as far as possible. In the past, it was usually able to avoid taking longer than nine months; at present, as a result of an excessive work load and the growing complexity of cases, a period of one year is a more realistic forecast.

(c) The Court gives its decision on the questions submitted to it in the form of a judgment. In other words, it is a definitive judicial pronouncement which becomes part of the proceedings before the national court; its consequences will be considered shortly.

I should first like to illustrate the typical structure of a judgment in preliminary-ruling proceedings. The judgment is in two major parts: the first part, which is entitled 'facts and issues', describes the subject-matter of the dispute and the procedural background, with a fairly precise synthesis of the arguments put forward by the various parties. National courts should bear in mind that that part of the judgment, which has not been the subject of deliberation, is purely descriptive and cannot therefore be regarded as expressing the views of the Court. The Court's reasoning is contained in the second part of the judgment, entitled 'decision'. In that part, the Court usually briefly outlines the subject-matter of the case; then it describes the relevant legal provisions and the background to the proceedings in order to indicate the scope of the question or questions submitted for a preliminary ruling. The present

practice is to set out the questions *in extenso*. There then follows the actual reasoning of the judgment, where the Court analyses the legal problems raised and finally reaches specific conclusions as to how the question or questions submitted are to be answered. Those answers are set out again in the operative part of the judgment.

In practice, however, the position is much less straightforward.

On occasion the Court finds it difficult to understand questions which have not been properly expressed. Some questions are too complicated or too numerous or too theoretical, whilst others relate to the application or validity of national legislation rather than the interpretation of Community law. What ought to be done in such situations? When faced with such difficulties, the Court invariably adopts a friendly and constructive approach. The aim of the procedure is to provide the national court with a reply which will enable it to give a useful and fair judgment in the proceedings before it; at the same time, the Court must be careful not to exceed its jurisdiction, even if it is invited to do so, by ruling on questions concerning the application of national law. So far, it has always been possible to deal satisfactorily with such situations. In such cases the Court, allowing itself a degree of freedom, endeavours to re-formulate questions which are poorly expressed, to group excessively numerous questions by reference to the basic ideas which underlie them, to establish an order of priority as between the questions if the national court has not done so itself, and to change that order where to do so seems helpful in formulating the answers.

If, despite such efforts, the Court were still unable to understand what was asked of it, a remedy would still be available: if the national court is not satisfied with the answer given, it is always entitled to seek a further ruling from the Court. This of course involves a certain delay, but there are examples where courts have successfully followed that procedure.³⁰

On the other hand, what the Court has never tolerated are efforts by private parties, and sometimes certain governments, to persuade the Court to disregard certain questions or change them in a manner contrary to the intentions of the national court.³¹ Of course, certain questions raised by courts may be embarrassing for one or other of the parties or even for certain Member States, particularly the State in which the court is situated. However, the Court of Justice has never concurred in any manoeuvres intended to suppress embarrassing questions; it has always ensured that there is respect for the fundamental characteristic of the preliminary-ruling procedure, which is, as I have said, a procedure between courts designed to permit free discussion of all the problems of Community law which the national court considers relevant to the decision to be given in the proceedings before it.

Effects of preliminary rulings

As soon as the preliminary ruling has been given, the judgment containing it is notified to the national court; copies are sent to the parties to the main proceedings. The operative part is published in the Official Journal and the complete judgment will appear subsequently in the Reports of Cases before the Court. What is the effect of the judgment? Let us first consider the procedural context in which it is delivered, before addressing ourselves to the question of its effect *vis-a-vis* third parties.

(a) As far as the national court and the parties to the main proceedings are concerned, the judgment of the Court of Justice is a legal pronouncement. The preliminary ruling binds the national court; contrary to a view which is still sometimes encountered, it is not merely an opinion. Under Article 177 the Court gives a 'ruling' on a question of Community law, for which it has exclusive jurisdiction; its decision therefore has the force of *res judicata*.³²

Sometimes, the Court nevertheless leaves certain questions open so that they may be considered and resolved by the national court. Thus, where certain facts or articles are to be classified in accordance with Community law, the Court usually states that the specific assessments involved in such a classification are a matter for the national court.³³ Sometimes, as a result of inadequate information on the substance of the case, the Court is able to reply only by way of hypotheses or alternatives; in such cases, it is for the national court to choose between the possible solutions. Where the validity of a national law or regulation depends upon the interpretation of Community law, it is once again the responsibility of the national court to draw the necessary conclusions; the Court of Justice may provide the national court with the criteria for its decision, but it is not entitled to rule on a question falling within the province of national law. Thus, the answer given by the Court of Justice may allow the national court a varying degree of latitude, within which it must give its decision in accordance with the spirit of cooperation which is at the heart of the preliminary-ruling procedure.

Of course, the Court has a very great interest in being informed of the consequences of the preliminary rulings which it has given. It is important for the Court to ascertain that its decision has been understood and correctly implemented; it is also important for the Court to be aware of the difficulties which the 'follow-up' of its judgments may entail. That is why, when it sends its judgment to the national court, it asks that court to inform it of its final decision as soon as it is given. That decision is carefully studied and the Court prepares a note on it which is distributed to all the Members of the Court. On the basis of the information thus received, it may be said that in general the judgments of the Court are properly understood by the national courts and that the national courts endeavour to implement them faithfully, sometimes in the face of objections raised by one of the parties or by the public administration, who may be dissatisfied with the decision given by the Court. In those cases where the Court has allowed the national court a margin of discretion, it has been seen that that discretion is in general exercised in a reasonable manner. Only in wholly exceptional cases have national courts misunderstood the rulings or showed reluctance to implement them.³⁴

A special problem arises where a preliminary ruling has been sought at first instance or on appeal and where the case subsequently continues on its way through the hierarchy of national courts. Is an appeal court or other review court bound by a preliminary ruling given at an earlier stage in the same proceedings? The answer must be yes, since the purpose of a preliminary ruling is to determine a question of law as between the parties. But, of course, the superior court is always entitled to seek a further ruling from the Court if it considers that the question is to be seen in a new light, after being discussed in greater detail in the course of the progress of the case from one court to another.

(b) As a judicial decision which is closely linked to the particular facts of the case, a preliminary ruling is subject to the principle known as 'the relative effects of judgments' or the effect *inter partes*. However, at the same time it must not be forgotten that every preliminary ruling constitutes a precedent by virtue of the fact that the proceedings are concerned with purely legal questions and involve extremely wide-ranging discussion; as has been seen, in addition to the parties to the main proceedings, the governments of Member States, the Commission and, in some cases, the Council take part in them. It is scarcely conceivable that a decision of the Court, adopted on the basis of such extensive information and designed, specifically, to ensure unity of the law within the Community, could be easily challenged. That applies particularly to judgments in which the Court has declared a measure adopted by an institution to be void, since it is hardly conceivable that a measure, having once been declared void, could subsequently be reinstated.³⁵ But there is always a possibility that decisions taken in the past may subsequently be questioned with a view to obtaining clarifications and adjustments. That is, indeed, the essence of the process of development of case-law, which is added to progressively and reshaped successively. It may therefore be said, without thereby detracting from the authority which preliminary rulings given have as precedents, that they are not effective *erga omnes* in the formal sense of the term. However, by virtue of considerations of legal certainty, the preliminary rulings of the Court enjoy great stability.

We have already seen one consequence of this authority as a precedent, namely that concerning the scope of the obligation imposed by the third paragraph of Article 177 upon supreme courts. The Court has acknowledged that where a question concerning a point of law which is identical or similar to one which has already been dealt with by the Court arises in proceedings before a supreme court, it is released from its obligation to request a ruling, in the sense that it is faced with a choice: it either considers that the problem raised has already been resolved by the Court and that all it need do is to follow an existing decision; in that case, it is released from its obligation to seek a ruling. Or else it considers that the question, in the form in which it has arisen, involves new aspects or calls for reconsideration; in such a case, like any other court, it is always entitled to seek a ruling from the Court of Justice.

Part 3: Problems and difficulties of the preliminary-ruling procedure

Whilst it is true that the functioning of the preliminary-ruling procedure and its results may be regarded as highly satisfactory, the fact nevertheless remains that the Court of Justice and the national courts have encountered all sorts of problems and difficulties along the way. There have been and still are misunderstandings, there have been attempts to misuse the procedure, there have been and still are conflicts, sometimes below the surface and sometimes out in the open, particularly with regard to the obligation imposed on courts of last instance by the third paragraph of Article 177. In other words, there is a pathological aspect of the preliminary-ruling procedure, in addition to its normal physiology. It will be described here in part three, but not merely for the sake of the description. In fact, the judgments which the Court has been called upon to give over the years in this context may not perhaps always have had the same scope as other judgments given on the same subject, in so far as the Court, having been, so to speak, driven into a corner by certain ill-conceived initiatives, has had to react to situations involving varying degrees of embarrassment. For that reason, it is wrong to be too hasty in drawing peremptory conclusions from decisions adopted in unusual circumstances of that kind. This preliminary comment will be better understood when the details given below are considered.

Who can seek a preliminary ruling from the Court?

Article 177 confers the right to seek a ruling upon the 'courts and tribunals of the Member States'. Normally, that description does not arouse any doubts, but there have been borderline cases capable of giving rise to dissension.

(a) There are, in the first place, judges or courts which carry out functions which are not strictly judicial in nature. That is so, for example, in the case of an Italian judge, who in certain circumstances can issue injunctions against the administration even before the procedure has reached the actual litigation stage; there is also the more general case of judges sitting in interlocutory proceedings, who have authority to adopt provisional measures but cannot deal with the substance of the case; there are judges whose functions may be described as those of judicial administration, such as judges who supervise the keeping of certain registers and judges who supervise the liquidation of insolvent companies; the same applies to examining magistrates, who are responsible for investigating cases and not for adjudicating upon them. In cases of that kind, the Court has invariably taken what may be referred to as an 'organic' approach: if the person or body in question has a public mandate and gives judgment by virtue of jurisdiction conferred upon it by law in the general interest, that person or body is a court or tribunal of a Member State within the meaning of Article 177. It is each Member State which must determine the manner in which its courts are to operate and organize the performance of judicial functions in successive phases, some of which may be provisional or preparatory rather than leading to a definitive judicial pronouncement. Where a problem of Community law arises at one of those preliminary procedural stages, there is no reason why a reference should not be made to the Court.³⁶

(b) A second problem, which is more difficult than the first one, is that of quasi-judicial or arbitration bodies which operate in the social, professional and commercial fields. Here, the following principle clearly emerges from the Court's decision: where an arbitral body is set up by law, has a public mandate and has jurisdiction to which parties must submit, it is a court or tribunal within the meaning of Article 177. That applies in particular to the many judicial bodies which operate, in the employment and social-security fields, on a joint basis, that is to say under the responsibility of the State, but with the assistance of judges or arbitrators representing the various professional spheres.³⁷

On the other hand, bodies constituted within independent professions, such as governing councils of lawyers, doctors or other professional people, do not have the standing of a court or tribunal.³⁸ The same applies to private arbitration, since even if an arbitration award is binding upon the parties, the appointment of the arbitrators is a matter of contractual autonomy between private parties.³⁹ The preliminary-ruling procedure could only come into play at the stage where the decisions of professional bodies or private arbitrators are submitted for review by a public court or tribunal.

National law and Community law; 'application' and 'interpretation'

Behind these two twofold expressions lie rather difficult problems of delimitation which have been encountered in practice.

(a) Often, questions of Community law are raised by national courts to enable them to determine the meaning or assess the scope or validity of a national law. Thus, for example, cases may concern the interpretation of a national law harmonized pursuant to a Community directive, or resolution of a conflict between a tax law and the rules of the Treaty on the free movement of goods, or consideration of the compatibility of a law on the control of aliens with the freedom of entry and residence guaranteed to Community nationals. In such situations, national courts sometimes ask the Court of Justice to indicate how a national law must be interpreted or to pronounce upon the validity of a law which appears to be contrary to Community law. When confronted with such questions, the Court has always responded by saying that it is not the Court's role to rule on the interpretation, scope or validity of national legislation. Its role is to provide the national court with criteria for interpretation based on Community law, enabling it to resolve problems of interpretation or validity arising in the application of its domestic law.

Despite this cautious approach by the Court, it must be acknowledged that a significant proportion of requests for preliminary rulings are very closely related to actions for a declaration that a State has failed to fulfil its obligations. This comparison was indeed drawn by certain governments which, in the well-known case of *Van Gend & Loos*, contended that the questions submitted for a preliminary-ruling by the national court to enable it to appraise the validity of a national legal provision were inadmissible; according to those governments, only the procedure provided for by Articles 169 and 170 of the EEC Treaty could be used for that purpose. In reply to that argument, the Court emphasized that the fact that such an action against a Member State is pending certainly does not prevent a private individual from

claiming before a national court that a Member State has failed to fulfil its obligations under Community law. It follows that the national court is entitled to submit to the Court of Justice any questions which it regards as relevant where there may be a conflict between Community law and national law.⁴⁰ That position has not been questioned since and thus the preliminary-ruling procedure has come to be, *inter alia*, the ‘individual’s remedy for a State’s failure to fulfil its obligations’; it is not unusual for the Court to have before it, at the same time, actions for failure by a Member State to fulfil its obligations and requests for preliminary rulings relating to the same subject-matter.

(b) More difficult to grasp is the distinction drawn between the ‘application’ and the ‘interpretation’ of Community law. It is a distinction drawn by the Treaty, which empowers the Court only to resolve questions of ‘interpretation’ of Community law; that which remains is therefore a matter for the national court — but what in fact does remain? It is difficult methodically to separate these two closely-linked phases whereby the law is put into effect. In the past, an attempt was made to deal with the problem by saying that all the Court needed to do was to give ‘abstract’ interpretations on questions of law, expressed in general terms. However it was long since acknowledged that reasoning of that kind produces no useful result. In the light of experience, the view has developed that interpretation marks an intermediate, but nevertheless decisive, stage in the process whereby Community law is applied by the national courts. To say that it is an intermediate stage implies that there is something ‘before’ and something ‘afterwards’. This requires further examination.

Before: I have already stated that it is of the utmost benefit to the Court to have the fullest possible knowledge of the specific circumstances of the case referred to it, to enable it to appreciate the background of fact and of national law against which its interpretation is to be given. The quality of the answers given by the Court is directly influenced by the care taken by the national court in preparing the file to be sent to the Court.

Afterwards: once the interpretation has been given, an important task still remains for the national court. Often the answer may be rather nuanced, and on occasion it may leave open questions of qualification or of appreciation to be solved by the national court. The duty remaining to be discharged by the national court is far removed from the mere activation of an automatic mechanism.

It will be seen therefore that the concepts of application and interpretation, rather than defining areas of jurisdiction, refer to successive stages in a process of implementing the law in which two courts — the national court and the Community Court — take part one after the other, each responsible for discharging its specific function: it is for one of them to decide the dispute and it is for the other to ensure that in the decision disposing of the dispute Community law is duly observed.⁴¹

Failure by the national court in its duty to request a ruling

It is apparent from the foregoing that the Court has acknowledged that national courts which are subject to the obligation laid down in the third paragraph of Article

177 have a reasonable margin of discretion with respect to the need to seek a preliminary ruling from the Court. Like any other court, a supreme court is free to assess the pertinence of the question. It is also responsible for deciding whether the question raised has already been resolved in existing decisions of the Court of Justice. It may even, if it considers that every other court in the Community would act in like fashion, decide that it is not required to submit to the Court a question which, in its view, does not, according to objective criteria, raise any reasonable doubt. It has been seen that the Court has based its views in this matter on the principle of sincere and forthright cooperation with the national courts, with a view to safeguarding the unity of Community law.

However, experience has shown that that has not always been the attitude adopted by the courts of the Member States. Certain courts, dealing with problems which manifestly involve the interpretation of Community law and even the efficacy thereof, have 'forgotten' to request preliminary rulings on questions which, objectively, call for an answer. In certain cases, to justify their attitude, courts have had recourse to the *acte clair* doctrine, claiming that their views — which, in certain cases, related to notoriously obscure rules or which were in open conflict with previous decisions of the Court — followed, without the slightest doubt, either from the text of the Treaty or from the lack of express provisions. Recourse to such an approach is, in fact, merely a cloak for the resistance on the part of certain highly placed courts to the authority of Community law, or for their desire not to give the Court an opportunity to clarify certain problems.⁴²

Such attitudes are greatly to be regretted since they reflect a lack of confidence in the Court, a refusal to engage in dialogue and even, on some occasions, a refusal to acknowledge the consequences of the creation of the European Communities. There is no doubt that the taking of such liberties by national courts to evade the obligation imposed upon them by the third paragraph of Article 177 could be the subject of proceedings by the Commission for failure by a Member State to fulfil its obligations under the Treaty; it should be noted, however, that although it has considered this idea on certain occasions, the Commission has never so far chosen to react in that way.⁴³

On the other hand, attitudes of that kind on the part of national courts of last instance entail another risk, and a very real risk, for those courts themselves. It is possible and has indeed happened on more than one occasion that where a court of a Member State has neglected its duty to seek a ruling from the Court on questions which objectively required an answer, a court in another Member State or even an inferior court in the same State has taken it upon itself to seek a ruling on those questions.⁴⁴ Thus, the problem which it was sought to circumvent is nevertheless brought before the Court and resolved. Eventually, courts which refuse to cooperate with the Court of Justice are thus placed in an isolated position; it is unlikely that in the long-term they will be able to prevent themselves from being overtaken by the tide of legal cooperation extending throughout the European Community. Thus, the resistance just described will prove in reality to be no more than a rearguard action; progress in legal integration and the weathering of time will ultimately prevail. It would appear, therefore, unnecessary to be over-concerned about these isolated occurrences.

Abusive questions

From time to time, either through ignorance or intentionally, parties and even judges endeavour to abuse the preliminary-ruling procedure by making it serve ends other than those for which it was created. In certain cases, fictitious proceedings have been contrived solely for the purpose of obtaining a preliminary ruling from the Court.⁴⁵ Here, a distinction must however be drawn between entirely fictitious proceedings, that is to say those which are an entire fabrication and in which there is no real dispute, and those which constitute test cases, that is to say genuine proceedings, instituted in some cases with respect to a minor matter, so as to put a legal rule to the test and to obtain a ruling thereon.⁴⁶ That distinction having been drawn, it must be stated that the Court's attitude has, in general, been rather tolerant regarding procedural manoeuvres devoid of real substance and it has given answers even in cases where the genuineness of the dispute might appear dubious. It has been concerned not to discourage those courts which wish to refer serious problems to it.

Another case of error or abuse is represented by questions that bear no relation to Community law and therefore manifestly fall outside the competence of the Court, which, by virtue of Article 177, has jurisdiction to give preliminary rulings only on the interpretation of the Treaty or rules of secondary law. In certain cases, the Court has dismissed such requests as manifestly inadmissible; in other cases, it has taken the trouble to explain the scope and limits of Community law to the national court which made the inappropriate request, indicating that Community law does not cover matters which are purely internal to a Member State.⁴⁷

Finally, there have been instances where the Court has been asked to rule on questions of a political nature which, as such, are not a matter for legal proceedings.⁴⁸ Here also the problem arises as to whether such questions should be declared inadmissible or whether the trouble should be taken to explain to the referring court why the Court of Justice is unable to answer its question.

Initiatives of this kind are regrettable since, because of their ignorance or their cavalier approach, the national courts thereby place the Court of Justice in embarrassing situations, forcing it to react in one of two ways: either to give a semblance of replying seriously to questions with no real substance, which might detract from its moral authority; or to react defensively, thereby giving the impression that it wishes to restrict references from national courts. Thus, in one case which has become notorious because of the obstinacy of a national court, the Court emphasized that the proper functioning of the preliminary-ruling procedure calls for mutual respect and that the procedure cannot operate unless the national court, too, evinces at least some understanding of the responsibility which the Court must assume in such matters in the interests of the Community as a whole.⁴⁹

Notes

- 1 Article 100 (1) of the German Basic law of 23 May 1949 provides as follows: 'If a court considers unconstitutional a law, the validity of which is relevant to its decision, the proceedings shall be stayed ... and a decision shall be obtained from ... the Federal Constitutional Court'. Article 134 of the Italian Constitution of 27 December 1947 reserves to the Constitutional Court, *inter alia*, proceedings relating to the 'constitutionality' of the laws of the State. Article 1 of Constitutional Law No 1 of 9 February 1948 provides as follows: 'Any question regarding the 'constitutionality' of a law or a measure having the force of a law of the Republic which is raised of the court's own motion or by any party to proceedings and is not considered by the court to be manifestly without foundation shall be referred to the Constitutional Court for a decision'. Article 161 of the Spanish Constitution of 27 December 1978 confers jurisdiction upon the Constitutional Court (Tribunal Constitucional) to deal, *inter alia*, with 'actions to establish the unconstitutionality of laws and legislative provisions having force of law'. Articles 35 to 37 of the Organic Law of 3 October 1979 contain detailed provisions governing the procedure for requests for rulings by the courts. Article 35 (1) provides in that connection as follows: 'Where a court, of its own motion or in response to the submissions of a party, considers that a rule having the force of law which is applicable to the case and upon whose validity the decision depends may be contrary to the constitution, it shall refer the matter to the Constitutional Court, in accordance with the provisions of the present law. All these procedures are of a type involving an 'appraisal of validity'. Apparently, no example exists of preliminary requests for interpretation, which therefore would appear to be an invention of the authors of the EEC Treaty.
- 2 Judgment of 17 May 1983, Case 168/82, *European Coal and Steel Community Liquidator of Ferriere Sant'Anna SpA*, [1983] ECR 1681.
- 3 According to that Protocol, the right to request a preliminary ruling is available to appeal courts and courts superior thereto. In the case of supreme courts, a preliminary ruling must be requested. A similar protocol, dated 3 June 1971, was added to the Convention of 29 February 1968 on the mutual recognition of companies and legal persons.
- 4 Thus, the Court is often approached with regard to the interpretation of the Sixth Directive on harmonization of the laws on VAT, to enable the competent courts to ensure that their national legislation is in harmony with the directive. See, for example, the judgment of 4 July 1985 in Case 168/84 *Berkholz*. With respect to national measures not in conformity with the directive, see the judgment of 6 October 1970 in Case 9/70, *Grad v Finanzamt Traunstein*, [1970] ECR 825, on the interpretation and effect of a Council decision, and the judgment of 19 January 1982 in Case 8/81, *Ursula Becker v Finanzamt Münster*, [1982] ECR 53, on the interpretation and effect of a directive.
- 5 A particularly striking illustration is to be found in the judgment of 5 April 1979 in Case 148/78, *Tullio Ratti*, [1979] ECR 1629, concerning criminal proceedings in Italy against a manufacturer of solvents who had adapted the packaging of his goods to the requirements of a Community directive which the Italian State had not implemented within the prescribed period. The Court held that 'a Member State may not apply its internal law — even if it is provided with penal sanctions — which has not yet been adapted in compliance with the directive to a person who has complied with the requirement of the directive'.
- 6 The judgment of 30 April 1974 in Case 181/73, *Haegman*, [1974] ECR 449 contains a ruling to that effect.

- 7 This question was dealt with for the first time in the judgment of 12 December 1972 in Joined Cases 21 to 24/72, *International Fruit Company NV*, [1972] ECR 1219. That decision was confirmed by the judgments of 16 March 1983 in Case 266/81, *SIOT*, [1983] ECR 731, and *SPI and Michelin*, Joined Cases 267 to 269/81, [1983] ECR 801. In the latter judgment, regarding the application of GATT, the Court stated that ‘the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community’ (paragraph 14).
- 8 The safeguards regarding fundamental rights were laid down principally in two preliminary rulings: the judgment of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, in which the Court stated that ‘respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice’ (paragraph 4) and the judgment of 13 December 1979 in Case 44/79, *Lieselotte Hauer*, [1979] ECR 3727, in which the Court’s doctrine is fully developed. As regards the general principles applicable in administrative law, see the judgments of 27 September 1979 in Case 230/78, *Eridania*, [1979] ECR 2749 (respect for acquired rights), of 16 May 1979 in Case 84/78, *Tomadini*, [1979] ECR 1801 (protection of legitimate expectations), of 15 February 1978 in Case 96/77 *Bauche*, [1978] ECR 383 (principle of non-retroactivity), of 12 October 1978 in Case 10/78 *Tayeb Belbouab*, [1978] ECR 1915, of 25 January 1979, in Case 98/78, *Racke*, [1978] ECR 69, and Case 99/78, *Decker*, [1979] ECR 101 (legal certainty), and of 21 June 1979 in Case 240/78, *Atalanta*, [1979] ECR 2137 (principle of proportionality). In its judgment of 11 May 1983 in Case 87/82, *Rogers v Darthenay*, [1983] ECR 1579, the Court of Justice laid down guidelines for the national court as to how *lacunae* in the Community rules on technical measures for the conservation of fishery resources should be filled.
- 9 The following may be cited by way of example: the judgment of 8 October 1980 in Case 810/79 *Überschaer*, [1980] ECR 2747, in the operative part of which it is stated that consideration of the provisions of Regulation No 1408/71 on social security, as interpreted in the judgment, disclosed no factors of such a nature as to call in question the validity thereof; the judgment of 5 May 1982 in Case 15/81, *Schul*, [1982] ECR 1409, in the operative part of which it is stated that the contested provision of the Sixth VAT Directive is valid since it must be interpreted in a certain way; the judgment of 17 November 1983 in Case 292/82, *Merck*, [1983] ECR 3781, in which the Court stated in the grounds of the decision that, in view of the interpretation to be given to the contested provisions, the questions concerning the validity thereof had become devoid of purpose.
- 10 Following the discussions provoked by a previous judgment (of 15 October 1980 in Case 145/79, *Roquette frères*, [1980] ECR 2917), the Court expressly reaffirmed its position on this matter in its judgment of 27 February 1985 in Case 112/83, *Société des Produits de Mais*, emphasizing that determination of the effect in time of a finding of invalidity falls within the powers reserved to the Court in the interests of uniform application of Community law.
- 11 In its judgment of 20 February 1979 in Case 122/78, *Buitoni*, [1979] ECR 677, the Court held that conditions involving forfeiture of a security were invalid, because they were in breach of the principle of proportionality. In its judgment of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, the Court considered the validity of Community rules in relation to the safeguarding of fundamental rights. The judgment of 12 December 1972 in Joined Cases 21 to 24/72, *International Fruit Company NV*, [1972] ECR 1219 concerns review of the validity of measures adopted by the institutions in the light of certain provisions of international law.
- 12 Case 16/65, [1965] ECR 877. The same ideas are set out, with greater emphasis on the reciprocal nature of the obligations, in the judgment of 16 December 1981 in Case 244/80, *Foglia v. Novello (II)*, [1981] ECR 3045, to which I shall refer again in the third part.

- 13 The well-known judgments of 5 February 1963 in Case 26/62, *Van Gend & Loos*, [1963] ECR 1; of 14 July 1964 in Case 6/64, *Costa v Enel* [1964] ECR 614; of 9 March 1978 in Case 106/77, *Simmenthal*, [1978] ECR 629, on the direct effect and primacy of Community law, are all preliminary rulings. So is the judgment of 17 December 1970 in *Internationale Handelsgesellschaft*, *supra*, which laid down the bases for the protection of fundamental rights under Community law; the judgment of 20 February 1979 in Case 120/78, *Rewe*, [1979] ECR 649, better known as the ‘Cassis de Dijon’ case, which removed considerable barriers to the free movement of goods.
- 14 In its judgment of 6 October 1982 in Case 283/81 *Cilfit*, [1982], ECR 3415, the Court expressly recognized that questions may be submitted on the referring court’s own initiative (paragraph 9 of the decision).
- 15 The Court has repeatedly placed emphasis on this freedom of the national courts. Particularly expressive statements to that effect are to be found in the judgments of 16 January 1974 in Case 166/73, *Rheinmühlen*, [1974] ECR 33, regarding the freedom of appraisal of a court giving judgment in a case sent back to it by a superior court; of 29 November 1978 in Case 83/78, *Pigs Marketing Board*, [1978] ECR 2347; of 16 December 1981 in *Foglia v Novello* (II), *supra*. I shall come back to these decisions later.
- 16 In its very first preliminary ruling, on 6 April 1962 in Case 13/61, *Bosch*, [1962] ECR 45, of 6 April 1962, the Court ruled that the Treaty does not lay down the form in which the national court must submit its request for a ruling and added that the ‘national court is free to put its request in a simple and direct form’, leaving it to the Court of Justice to rule on that request within the limits of its jurisdiction.
- 17 That is more or less what the Tribunal d’Arrondissement, Luxembourg, asked the Court to do in the so-called ‘Port de Mertert’ case. In its judgment of 14 July 1971 in Case 10/71, *Ministere Public v Madeleine Muller*, [1971] ECR 723, the Court first identified the subject-matter of the question — the interpretation of Article 90 of the EEC Treaty — and then replied to the question thus framed.
- 18 See, for example, the questions submitted by the Italian Corte di Cassazione in the *SIOT* case (Case 266/81, [1983] ECR 731), with which the Court struggled in its judgment of 16 March 1983.
- 19 In the *Adoui and Cornouaille* case, concerning the expulsion of two prostitutes from Belgium, the President of the Tribunal de Premiere Instance, Liege, submitted two sets of 14 and 15 questions, several of which were double or multiple, giving a total of some 40 questions. In its judgment of 18 May 1982 in Joined Cases 115 and 116/82, [1982] ECR 1665, the Court endeavours to deal with them in an orderly fashion.
- 20 Thus, in its abovementioned judgment of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, the Court took care to describe the position adopted by the national court, the Verwaltungsgericht Frankfurt, which in that case was of particular importance to resolution of the problem raised.
- 21 In its judgment of 10 March 1981 in Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers’ Association*, [1981] ECR 735, the Court stated in that connection: ‘The need to provide an interpretation ... which will be of use to the national court makes it essential ... to define the legal context in which the interpretation requested should be placed. From that aspect it might be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give’ (paragraph 6 of the decision).

- 22 A typical example of such a situation is provided by Case 218/83, *Les Rapides Savoyards*, in which a customs case went laboriously from court to court over a period of six years before reaching the Cour de Cassation, which finally took the view that a preliminary ruling should be sought from the Court. The Commission then showed, in its observations, that all the courts, including the supreme court, had been discussing the wrong problem. The judgment of the Court of 12 July 1984 places the problem — which concerned the interpretation of the EEC/Swiss free trade agreement — in its proper context and adopts a solution which falls entirely outside the terms of reference within which it had previously been discussed. A reference at first instance could have avoided this long-lasting misunderstanding.
- 23 This does not necessarily mean a single court. A division of jurisdiction between the 'ordinary' courts and the administrative courts is fairly widespread. The Federal Republic of Germany even has, in addition to the Bundesgerichtshof, four other supreme courts for administrative cases, financial cases, employment cases and social security cases. In *Van Gend & Loos* the Court was asked for a ruling by a Netherlands customs court which is a court of first and last instance, the Tariefcommissie.
- 24 The Court expressly so ruled in its judgment of 6 October 1982 in *Cilfit*, *supra* (paragraph 10).
- 25 Joined Cases 28 to 30/62, [1963] ECR 31. It should be noted that, whilst the *Da Costa en Schaake* judgment requires the question already dealt with to be 'materially identical', the *Cilfit* judgment adopts a wider criterion: it is sufficient if 'previous decisions of the Court have already dealt with the point of law in question ... even though the questions at issue are not strictly identical' (paragraph 14).
- 26 Since this judgment summarizes the Court's doctrine on the interpretation of Article 177 itself, I have included the essential passages in an annex.
- 27 Case 83/78, [1978] ECR 2347, paragraphs 25 and 26.
- 28 Rulings to this effect are to be found in the following decisions: judgment of 14 December 1962 in Joined Cases 31 and 33/62, *Wöhrman*, [1962] ECR 501; order of 3 June 1964 in Case 6/64, *Costa v Enel*, [1964] ECR 614; judgment of 9 December 1965 in Case 44/65, *Hessische Knappschaft*, [1965] ECR 965.
- 29 See on this subject the judgments of 30 January 1974 in Case 127/73, *Sabam*, [1974] ECR 51 ('the procedure ... continues as long as the request of the national court has neither been withdrawn nor become devoid of object') and of 6 October 1983, in Joined Cases 2 to 4/82 *Delhaize*, [1983] ECR 2973 (refusal to take account of an appeal lodged by the Belgian Government). In several cases, superior courts have refused to entertain an appeal of this kind. Particularly significant in that respect is the attitude adopted by the *Pigs Marketing Board* case. Having received an appeal against the decision of the Resident Magistrate of Armagh, the Belfast court took the view 'that it was within the Magistrate's discretion to clarify the legal questions relating to the exercise of his own jurisdiction' (judgment of 29 November 1978, paragraphs 16 and 17).
- 30 See, for example, the judgment of 24 June 1969 in Case 29/68, *Milch-, Fett- und Eierkontor* [1969] ECR 165. In that case, the Court held that interpretations given by it are binding on the national court which submitted the question, but that it is for that court to decide whether it has been sufficiently enlightened by the preliminary ruling given or whether it is necessary to approach the Court again.
- 31 See, for example, the singular vagaries of the *Pigs Marketing Board* case, already cited on several occasions, which is typical in that respect. When the case had been considered, it became apparent that the Resident Magistrate of Armagh, from whom it originated, had submitted perfectly relevant questions.

- 32 The Court clearly so held in its judgment of 3 February 1977 in Case 52/76, *Benedetti*, [1977] ECR 163, where it stated that ‘Under Article 177 the Court of Justice has jurisdiction to ‘give (...) rulings’ concerning the interpretation ‘of this Treaty’ and that ‘of acts of the institutions of the Community’. It follows that the purpose of a preliminary ruling is to decide a question of law and that that ruling is binding on the national court as to interpretation of the Community provisions and acts in question’ (paragraph 26).
- 33 See for example, the judgment of 31 January 1984 in Joined Cases 286/82 and 26/83, *Luisi and Carbone*, [1984] ECR 377, in which the Court stated that it was for the national court to determine whether the controls on transfers of foreign currency were in conformity with the limit indicated in the Court’s judgment; the judgment of 28 March 1984 in Joined Cases 47 and 48/83, *Pluimveeslachterij*, [1984] ECR 1721, in which the Court states that it is for the national court to determine whether the quality and marketing rules laid down in national rules are compatible with the common organization of the market in poultry; and the judgment of 9 July 1985 in Case 179/84, *Bozzetti*, in which determination of the fiscal or non-fiscal nature of an agricultural levy is necessary in order to enable the national court to decide whether it has jurisdiction.
- 34 Thus, in its judgment of 15 July 1981, (*Dalloz*, 1982, p. 9), the Tribunal d’Instance, Lille, refused to accept the judgment of the Court of 15 October 1980 (Case 145/79, *Roquette Freres*, [1980] ECR 2917). The Tribunal took the view that the Court had exceeded its power by limiting in time the effect of a finding that a regulation was invalid. The epilogue to that case is to be found in the judgment of 27 February 1985, *Société des Produits de Mais*, *supra*.
- 35 This question was examined in the judgment of 13 May 1981 in Case 66/80, *International Chemical Corp. BV*, [1981] ECR 1191.
- 36 See the following decisions: on ‘non-contentious’ jurisdiction, the judgment of 12 November 1974 in Case 32/74, *Haaga*, [1974] ECR 1201; on questions submitted by an examining magistrate, the judgment of 24 April 1980 in Case 65/79, *Chatain*, [1980] ECR 1345; on the question of the Italian injunction procedure, the judgment of 9 November 1983 in Case 199/82, *San Giorgio*, [1983] ECR 3595, which contains references to the previous cases; on interlocutory proceedings, the judgments of 24 May 1977 in Case 107/76, *Hofmann-La Roche*, [1977] ECR 957, and of 27 October 1982 in Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723.
- 37 This is apparent from the judgment of 30 June 1966 in Case 61/65, *Vaasen (née Göbbels)*, [1966] ECR 261, which defines the essential criteria: a body constituted in accordance with law, members appointed by the public authority, permanent body bound by rules of procedure similar to those applicable to ordinary courts of law, an obligation for the parties to submit to its jurisdiction and an obligation to give judgment in accordance with rules of law.
- 38 In its order of 18 June 1980 in Case 138/80, *Borker*, [1980] ECR 1975, the Court stated that it had no jurisdiction to rule upon a reference from the *Conseil de l’Ordre des Avocats de la Cour de Paris*. Conversely, in the judgment of 6 October 1981 in Case 246/80, *Broekmeulen*, [1981] ECR 2311, it accepted a question submitted by the *Commissie van Beroep Huisartsgeneeskunde*, an appeal committee operating within the Netherlands Royal Association for the Promotion of Medicine. That was certainly a marginal case, but the Court found that the appeals committee in question exercised its functions with the consent and cooperation of the public authorities, observing the *audi alteram partem* principle, and that no other remedy was available. It therefore held that the appeals committee was a ‘court or tribunal’ within the meaning of Article 177.
- 39 Judgment of 23 March 1982 in Case 102/81, *Nordsee*, [1982] ECR 1095. According to that judgment, the test to determine whether a body is a court or tribunal concerns the responsibility which a Member State must assume, as regards the performance of obligations arising from Community law under Articles 5 and 169 to 171 of the Treaty, for the decisions of the persons whom it has vested with judicial authority. An arbitrator appointed under a private contract does not satisfy that test.

- 40 Judgment of 5 February 1963 in Case 26/62, *Van Gend & Loos*, [1963] ECR 1; see in particular the final part of the discussion of the first question, in which the Court states that: 'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'.
- 41 The Court defined at a very early stage the division of functions between itself and national courts. In two judgments of 15 July 1964 in Case 6/64, *Costa v Enel*, [1964] ECR 585, and of 4 February 1965 in Case 20/64, *Albatros*, [1965] ECR 29, it stated that it had no jurisdiction to apply Community law to a specific case or to rule upon the validity of provisions of domestic law in relation to Community law, but only to interpret the provisions of Community law having regard to the legal information provided by the national court.
- 42 The French Conseil d'Etat has followed this procedure in several of its judgments over a considerable period: in its judgment of 19 June 1964 (*Société des Pétroles Shell-Berre and Others*, Recueil Lebon, p. 344), it interpreted Article 37 of the EEC Treaty itself, and took the view that there was no need to seek an interpretation of a measure which constituted an *acte clair*. In its judgment of 1 March 1968 (*Syndicat des Fabricants de Semoule*, Recueil Lebon, p. 149), it held that a Community regulation must give way to a subsequent conflicting legislative provision, without endeavouring to clarify the legal situation by recourse to the preliminary-ruling procedure. In its judgment of 12 December 1978 (*Cohn-Bendit*, Recueil Lebon, p. 524), it interpreted Article 189 of the EEC Treaty itself and disregarded the case-law of the Court as to the internal effect of directives, without seeking from the Court any confirmation or clarification of that case-law. In its judgment of 23 December 1981 (*Cattenom*, Recueil Lebon, p. 484), on the construction of a nuclear power station near the frontier of two other Member States, it applied the doctrine of the *acte clair* to justify its refusal to refer to the Court a question of interpretation relating to the Euratom Treaty. In a decision of 16 July 1981 (Europarecht 1979, p. 442), explicitly inspired by the *Cohn-Bendit* decision, the Bundesfinanzhof refused to seek a preliminary ruling from the Court, considering that there was no reasonable doubt as to whether or not directives were directly applicable. In its decision of 25 April 1985 (Europarecht 1985, p. 191), the Bundesfinanzhof, hearing a case in which the Court had already given a preliminary ruling in response to a reference from a court of first instance (judgment of 22 February 1984 in Case 70/83, *Kloppenburger*, [1984] ECR 1075, refused to accept the decision of the Court, which had recognized a taxpayer's right to rely upon a Community directive to defeat a national law which had not been adapted within the prescribed period.
- 43 The Commission brought to the notice of the German Government its grave concern regarding the order of 29 May 1974 of the Federal Constitutional Court, known as the 'Solange-Beschluß' (NJW 1974, p. 1697). The Commission stated that 'By claiming the power to verify the compatibility of Community secondary legislation with the fundamental rights in the Basic Law, the Constitutional Court is impugning the exclusive jurisdiction of the Court of Justice to ensure that in the interpretation and application of the Treaties the law is observed' (Eighth General Report, p. 297 *et seq.*). Similarly, the Commission informed the French Government of its profound concern regarding the decision of the Conseil d'Etat of 12 December 1978 in the *Cohn-Bendit* case (13th General Report, p. 315).
- 44 The following are two illustrations taken from the case-law of the Court. The judgment of 26 February 1975 in Case 67/74, *Bonignore*, [1975] ECR 297, and the Opinion delivered on that occasion by Mr Advocate-General Mayras showed that the Bundesverwaltungsgericht had, without resorting to the preliminary-ruling procedure, delivered judgments restricting the freedom of residence of Community nationals on grounds of public policy and public security. The Verwaltungsgericht Köln, which entertained doubts as to whether, under Community law, those decisions were well founded, requested the Court for a preliminary ruling and obtained a decision favouring its more liberal view. The judgment of 27 May 1981 in Joined Cases 142 and 143/80, *Essevi and Salengo* [1981] ECR 1413, shows that, on

the basis of a Commission decision authorizing Italy to maintain a system of taxing alcohol which was manifestly contrary to the principles of Community law, the Italian Corte di Cassazione had adopted a series of decisions which were no less dubious from the point of view of Community law, without resorting to the preliminary-ruling procedure. It was a request for a preliminary ruling by the Milan court of appeal which eventually gave the Court of Justice an opportunity to give a ruling on the tax system in question.

- 45 The judgment of 12 July 1979 in Case 244/78, *Union Laitiere Normande*, [1979] ECR 2663, deals with a case in which a French group of agricultural cooperatives brought an action in France against its own United Kingdom subsidiary seeking a ruling by the French court that the United Kingdom rules on the sale of milk were incompatible with Community law. The Court of Justice responded by saying that the Treaty did not allow it to 'evaluate the grounds for making the reference' and gave an answer to the questions submitted which was evasive but showed that, on one point at least, the United Kingdom legislation was not without justification. The judgment of 11 March 1980 in Case 104/79, *Foglia v Novello* (I), [1980] ECR 745, delivered in response to a request by the Pretore di Bra, concerned the following facts: Two private individuals (a wine merchant established in Italy and his customer) agreed to send several cases of Italian wine to France. The contract provided that any taxes levied by the French authorities contrary to the rules on the free movement of goods would not be charged to the purchaser. On entering France, the carrier was obliged to pay excise duties to the French administration. The parties then engaged in proceedings before an Italian court concerning the compatibility of the French tax with the rules of the common market, making it known that they concurred in the view that the tax was unlawful; the judge submitted a question to the Court under Article 177. The idea was thus that the Community Court should evaluate the French tax system in connection with proceedings before an Italian court, in a case where the parties themselves were in agreement as to the result. The Court reacted by stating that to give a ruling in such circumstances would jeopardize the whole system of legal remedies and fell outside the framework of its duties.
- 46 Case 112/80 *Dürbeck*, which gave rise to the judgment of 5 May 1981, [1981] ECR 1095, may be cited as an example. The dispute arose in connection with the importation by air into Germany of two boxes of apples originating from Chile; the object was to test the validity of Community rules which restricted imports of apples originating in non-member countries with a view to the performance of a bigger contract.
- 47 In its judgment of 17 December 1975 in Case 93/75, *Adlerblum*, [18975] ECR 2147, the Court considered that it had no jurisdiction to answer a question which fell solely within the scope of national law. In its judgments of 28 March 1979 in Case 175/78, *Saunders*, [1979] ECR 1129 of 27 October 1982 in Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723, and of 28 June 1984 in Case 180/83, *Moser*, it stated that Community law does not apply to purely internal situations in which there is no factor linking them to Community law. Mention must be made of the orders by which the Court, on the ground of its manifest lack of jurisdiction, refused requests for a preliminary ruling submitted by the Tribunal d'Instance, Hayange, on purely internal questions (order of 27 June 1979 in Case 105/79, [1979] ECR 2257 and of 12 March 1980, Case 68/80, [1980] ECR 771).
- 48 A strange case merits mention in this connection: judgment of 22 November 1978 in Case 93/78, *Mattheus v Doego*, [1978] ECR 2203, in which the parties were a fruit dealer and a fruit importer, respectively. Mattheus had concluded with Doego a contract relating to market surveys in Spain and Portugal. The contract contained a clause providing for cancellation in the event of the accession of those two States to the Community proving to be practically or legally impossible, and that the question was to be dealt with by the Court of Justice. Doego sought to rely upon that clause and proceedings were commenced before the Amtsgericht Essen, which decided to ask the Court whether the conditions for the accession of those two States to the Community were fulfilled. The Court refused to reply, pointing out that the question was a political one which was still open and was a matter for the competent political institutions and not a court.

49 The Pretore di Bra, apparently sure of his legal ground, refused to accept the view of the Court expressed in the judgment of 11 March 1980, and this led to the judgment of 16 December 1981 in Case 244/80 *Foglia v Novello* (II), [1981] ECR 3045. On this occasion, the questions submitted by the national court related to the interpretation of Article 177 and were irrefutably admissible. In reply, the Court endeavoured to explain the philosophy of Article 177 and the reciprocal nature of the duties which it involves. For the rest, it confirmed its refusal to consider the questions submitted in the first case of the same name.

Among the recent publications on the subject of preliminary rulings, the following may be recommended

F. G. JACOBS and A. DURAND: *References to the European Court: Practice and Procedure*, Butterworths, London 1975.

G. VANDERSANDEN, A. BARAV: *Contentieux Communautaire*, Brussels 1977.

G. BEBR: *Development of Judicial Control of the European Communities*, The Hague 1981.

R.M. CHEVALLIER and D. MAIDANI: Luxembourg 1982, *Guide Pratique, Article 177 CEE*, Office for Official Publications of the European Communities, No CB-32-81-431-FR-C.

H. SCHERMERS: *Judicial protection in the European Communities*, 3rd Edition, Deventer, 1983.

ANNEX I

Text of the Articles cited

ECSC TREATY

Article 41

The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal.

EEC TREATY

Article 164

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 169

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned Opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the Opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 173

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or Opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against

a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 174

If the action is well founded, the Court of Justice shall declare the act concerned to be void.

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.

Article 177

The Court of Justice shall 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;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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

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

ANNEX II

The Cilfit Judgment

Is wool an agricultural product within the meaning of the EEC Treaty? That was the question which the Italian Corte Suprema di Cassazione had to consider. Rather than submitting that question, to which the answer seemed to it to be obvious, the Corte Suprema di Cassazione asked a question on the interpretation of the third paragraph of Article 177 in the following terms:

‘Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that Article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make the obligation conditional on the prior finding of a reasonable interpretative doubt?’

Here is the Court’s answer:

5. ‘In order to answer that question it is necessary to take account of the system established by Article 177, which confers jurisdiction on the Court of Justice to give preliminary rulings on, *inter alia*, the interpretation of the Treaty and the measures adopted by the institutions of the Community.
6. The second paragraph of that Article provides that any court or tribunal of a Member State *may*, if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court of Justice.
7. That obligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177.
8. In this connection, it is necessary to define the meaning for the purposes of Community law of the expression ‘where any such question is raised’ in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.
9. In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.
10. Secondly, it follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tri-

bunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

11. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

12. The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by the third paragraph of Article 177 might none the less be subject to certain restrictions.

13. It must be remembered in this connection that in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 (*Da Costa v Nederlandse Belastingadministratie* [1963] ECR 31) the Court ruled that: 'Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law ... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'

14. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

15. However, it must not be forgotten that in all such circumstances national courts and

tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

18. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

20. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

21. In the light of all those considerations, the answer to the question submitted by the

Corte Suprema di Cassazione must be that the third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it 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.' (Judgment of 6 October 1982 in Case 283/81 [1982] V ECR 3415).

There is an epilogue to this case. After receiving the above judgment, the Corte di Cassazione dealt with the substance of the problem and discovered that even the classification of something as simple as wool gives rise to difficulties. It therefore submitted a question of interpretation to the Court, which gave rise to the second *Cilfit* judgment, on 29 February 1984, in Case 77/83, [1984] ECR 1257, which shows that the first *Cilfit* case was, after all, a pointless exercise.

ANNEX III

Chronological list of decisions of the Court

Unless otherwise stated, the decisions cited are judgments. The decisions which have made a particularly significant contribution to the interpretation of Article 177 are marked with an asterisk

* 6 April 1962, Case 13/61, *Bosch v Van Rijn*, [1962] ECR 45. First reference for a preliminary ruling. Appeal in cassation against the reference to the Court is inoperative. Freedom of the national Court to submit its question in a 'simple and direct' form.

14 December 1962, Joined Cases 31 and 33/62, *Wöhrmann and Lütticke*, [1962] ECR 501. In addition to bringing an action before the national court, the applicants applied to the Court of Justice for a decision on a disputed Community measure. The Court ruled, *inter alia*, that only a national court is entitled to refer a question to the Court of Justice for such an appraisal, under Article 177.

* 15 February 1963, Case 26/62, *Van Gend & Loos*, [1963] ECR 1. This judgment, which is fundamental to the legal structure of the Community, was given under the preliminary-ruling procedure, at the request of a Netherlands court. It deals at the same time with the relationship between references for preliminary rulings and actions for the failure of a State to fulfil its obligations: the fact that such an action is brought does not exclude a parallel action by individuals.

* 27 March 1963, Joined Cases 28 to 30/62, *Da Costa v Nederlandse Belastingadministratie*, [1963] ECR 31. Where the Court has already given a ruling on a question of interpretation, the obligation under the third paragraph of Article 177 becomes devoid of purpose.

Order of 3 June 1964, Case 6/64, *Costa v Enel*, [1964] ECR 614. The intervention of a third party in proceedings for preliminary ruling is inadmissible.

15 July 1964, Case 6/64, *Costa v Enel*, [1964] ECR 585. Another fundamental judgment, given in proceedings for a preliminary ruling in response to a request by an Italian court, in relation to a possible conflict between an internal law and Community law. Distinction between 'application' and 'interpretation' within the meaning of Article 177.

4 February 1965, Case 20/64, *Albatros*, [1965] ECR 29. Distinction between 'application' and 'interpretation' within the meaning of Article 177.

* 1 December 1965, Case 16/65, *Schwarze*, [1965] ECR 877. On the spirit of cooperation which must underlie the preliminary-ruling procedure.

* 9 December 1965, Case 44/65, *Hessische Knappschaft*, [1965] ECR 965. A party to the main proceedings is not entitled to raise a question which the national court has not submitted.

* 30 June 1966, Case 61/65, *Vaasen (née Göbbels)*, [1966] ECR 261. With respect to a social security arbitration tribunal, the Court defined the criteria applicable to the concept of 'court or tribunal' within the meaning of Article 177.

* 24 June 1969, Case 29/68, *Milch-, Fett- und Eierkontor*, [1969] ECR 165. An interpretation given by the Court binds the national court but leaves it free to make a further reference to the Court if it considers itself insufficiently enlightened.

6 October 1970, Case 9/70, *Grad v Finanzamt Traunstein*, [1970] ECR 825. Judgment on the

effect in the Member States of a Council decision relied upon by an individual to resist payment of a national tax on transport (known as the 'Leberpfennig' case).

* 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125. A remarkable judgment in several respects. The Court deals in detail with the position of the national court. It states that the protection of fundamental rights is one of the 'general principles of law' which it must uphold.

14 July 1971, Case 10/71, *Ministere Public, Luxembourg v Madeleine Muller*, [1971] ECR 723. Example of a question submitted in imprecise terms. The Court defines the question in the light of the documents before it.

* 12 December 1972, Joined Cases 21 to 24/72, *International Fruit Company NV*, [1972] ECR 1219. The validity of measures adopted by institutions may be appraised, under Article 177, from the standpoint of their conformity with the rules of international law.

16 January 1974, Case 166/73, *Rheinmühlen*, [1974] ECR 33. The right to submit a request for a preliminary ruling is conferred also upon a court giving judgment on a case sent back to it by an appellate court.

* 30 January 1974, Case 127/73, [1974] ECR 51. Preliminary-ruling proceedings continue until such time as the question submitted by the national court has been withdrawn or has become devoid of purpose.

* 30 April 1974, Case 181/73, *Haegeman*, [1974] ECR 449. An international agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty is a measure adopted by one of the institutions of the Community, within the meaning of Article 177. It forms an integral part of Community law and accordingly the Court has jurisdiction for the interpretation thereof.

12 November 1974, Case 32/74, *Haaga*, [1974] ECR 1201. Request for a preliminary ruling submitted in connection with non-contentious proceedings, regarding registration of a company in the commercial register.

26 February 1975, Case 67/74, *Bonsignore*, [1975] ECR 297. By means of a request for a preliminary ruling, a German administrative court cast doubt upon the case-law of the Bundesverwaltungsgericht on the interpretation of a Community directive concerning the residence of foreign nationals.

* 17 December 1975, Case 93/75, *Adlerblum*, [1975] ECR 2147. Lack of jurisdiction of the Court to rule on purely internal legal situations.

* 3 February 1977, Case 52/76, *Benedetti*, [1977] ECR 163. A preliminary ruling is binding upon the national court which requests it.

* 24 May 1977, Case 107/76, *Hoffmann-La Roche*, [1977] ECR 957. Admissibility of requests for preliminary rulings in interlocutory proceedings.

15 February 1978, Case 96/77, *Bauche*, [1978] ECR 383. This judgment, which concerns a question of validity, applies a general principle of law, namely the principle that legislation must not be retroactive (paragraph 48 et seq.).

9 March 1978, Case 106/77, *Simmenthal*, [1978] ECR 629. An appeal to a constitutional court regarding a reference to the Court of Justice is inoperative. Consequences of the direct effect of Community law and its primacy over national law. Duty of the national court not to apply a law which is contrary to Community law.

12 October 1978, Case 10/78, *Tayeb Belbouab*, [1978] ECR 1915. In interpreting the regulation on social security (No 1408/71), the Court applies the 'principle of legal certainty' and that of the protection of 'acquired rights' in order to resolve a problem of how the law is to be applied where various periods of time are involved.

22 November 1978, Case 93/78, *Mattheus v Doego*, [1978] ECR 2203. A political question, for which the Court had no jurisdiction.

* 29 November 1978, Case 83/78, *Pigs Marketing Board v Redmond*, [1978] ECR 2347.

An interesting judgment in several respects. It emphasizes the discretion and responsibility of the national court as regards taking the initiative in submitting requests for preliminary rulings and formulating the questions. It also shows how the Court deals with multiple questions.

25 January 1979, Case 98/78, *Racke*, [1979] ECR 69, and Case 99/78, *Decker*, [1979] ECR 101. Principles to be observed regarding publication and certainty in relation to the entry into force of Community regulations.

20 February 1979, Case 120/78, *Rewe*, [1979] ECR 649 ('Cassis de Dijon'). This judgment, which was given in response to questions submitted by a German court, had the effect of ensuring the free movement of goods by removing non-tariff barriers to intra-Community trade.

20 February 1979, Case 122/78, *Buitoni*, [1979] ECR 677. The loss of a security merely by reason of delay in producing proof of an operation which was properly carried out is disproportionate in relation to the infringement penalized. The relevant provision of the regulation is invalid.

28 March 1979, Case 175/78, *Saunders*, [1979] ECR 1129. Lack of jurisdiction of the Court to rule on purely internal situations.

* 5 April 1979, Case 148/78, *Tullio Ratti*, [1979] ECR 1629. This judgment shows how problems of Community law may arise in criminal proceedings.

16 May 1979, Case 84/78, *Angelo Tomadini*, [1979] ECR 1801. This judgment, which is concerned with a question of validity, refers to the protection of the 'legitimate expectations' of traders subject to administrative rules in the event of changes in legislation (paragraph 20 *et seq.*).

21 June 1979, Case 240/78, *Atalanta Amsterdam*, [1979] ECR 2137. The excessively strict nature of a forfeiture clause laid down in a Commission regulation and applied automatically is contrary to the 'principle of proportionality'.

Order of 27 June 1979, in Case 105/79, on the request for a preliminary ruling by the Tribunal d'Instance, Hayange, [1979] ECR 2257. Lack of jurisdiction of the Court to rule on a purely internal situation.

12 July 1979, Case 244/78, *Union Laitière Normande*, [1979] ECR 2663. Example of artificial proceedings instituted before a French court with a view to obtaining, with the aid of the Court of Justice, an order condemning United Kingdom legislation on milk distribution. The Court replied to the question, but did so evasively.

27 September 1979, Case 230/78, *Eridania*, [1979] ECR 2749. Question as to the validity and interpretation of a regulation. The Court ruled, *inter alia*, that an economic advantage does not constitute an 'acquired right'.

* 13 December 1979, Case 44/79, *Lieselotte Hauer*, [1979] ECR 3727. This preliminary ruling completes the Court's doctrine on the protection of fundamental rights in the Community legal order. It mentions as sources: general principles of law; constitutional traditions common to the Member States; international instruments including, primarily, the European Convention on Human Rights.

11 March 1980, Case 104/79, *Foglia v Novello (I)*, [1980] ECR 745. Example of artificial proceedings instituted before an Italian court in order to obtain, with the aid of the Court of Justice, an order condemning French legislation relating to the taxation of wine. The Court refused to reply.

Order of the Court of 12 March 1980 in Case 68/80, on a request for a preliminary ruling by the Tribunal d'Instance, Hayange, [1980] ECR 771. Lack of jurisdiction of the Court to rule on a purely internal situation.

24 April 1980, Case 65/79, *Chatain*, [1980] ECR 1345. Questions submitted by an examining magistrate for a preliminary ruling.

Order of 18 June 1980, Case 138/80, *Borker*, [1980] ECR 1975. A Conseil de l'Ordre des Avocats [Bar Council] is not a 'court or tribunal' within the meaning of Article 177.

8 October 1980, Case 810/79, *Überschaer*, [1980] ECR 2747. Interpretation and validity. In this case, certain provisions of Regulation No 1408/71 were held to be valid by virtue of the interpretation given to them.

* 15 October 1980, Case 145/79, *Roquette Frères*, [1980], ECR 2917. In this judgment, given in response to a question submitted by the Tribunal d'Instance, Lille, the Court held that a provision of a regulation on monetary compensatory amounts was invalid, but limited the effect in time of that finding by applying, by analogy, the second paragraph of Article 174 of the EEC Treaty.

* 10 March 1981, Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers Association and Others*, [1981] ECR 735. Freedom of the national court to determine the stage at which reference should be made; advantage of establishing the facts before submitting a question to the Court.

5 May 1981, Case 112/80, *Dürbeck*, [1981] ECR 1095. Example of a 'test case' brought before the competent national court in order to obtain a decision, by way of preliminary ruling, on the validity of a Community measure on commercial policy.

* 13 May 1981, Case 66/80, International Chemical Corporation, [1981] ECR 1191. Effect *vis-a-vis* third parties of a preliminary ruling that a Community measure is invalid.

27 May 1981, Joined Cases 142 and 143/80, *Essevi and Salengo*, [1981] ECR 1413. By means of a request for a preliminary ruling, an Italian appeal court challenged decisions of the Corte Suprema di Cassazione given following a Commission decision which was incompatible with Community law.

6 October 1981, Case 246/80, *Broekmeulen*, [1981] ECR 2311. An appeals committee of a doctors association, which is recognized by the State and operates with the consent and cooperation of the public authorities, may be recognized as a 'court or tribunal' within the meaning of Article 177.

* 16 December 1981, Case 244/80, *Foglia v Novello* (II), [1981] ECR 3045. This judgment

draws the dividing line between the prerogatives of the national court and those of the Court of Justice in the preliminary-ruling procedure. Reciprocal duty of cooperation.

19 January 1982, Case 8/81, *Ursula Becker v Finanzamt Münster*, [1982] ECR 53. Effect of directives within the Member States. An individual may rely upon a directive to defeat a tax law which has not been adapted within the prescribed period.

* 23 March 1982, Case 102/81, *Nordsee* [1982] ECR 1095. An arbitrator voluntarily appointed by parties to a private contract is not a 'court or tribunal' within the meaning of Article 177.

5 May 1982, Case 15/81, *Schul*, [1982] ECR 1409. Interpretation and validity: certain provisions of the Sixth VAT Directive were held to be valid by virtue of the interpretation given to them.

18 May 1982, Joined Cases 115 and 116/81, *Adoui et Cornouaille*, [1982] ECR 1665. Example of an excessive number of questions submitted for a preliminary ruling.

* 6 October 1982, Case 283/81, *Cilfit (I)*, [1982] ECR 3415. This judgment deals with the power of appraisal of national courts of last instance with regard to the obligation contained in the third paragraph of Article 177.

27 October 1982, Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723. Admissibility of a reference to the Court in interlocutory proceedings. Lack of jurisdiction of the Court to rule upon purely internal situations.

* 16 March 1983, Case 266/81, *SIOT*, [1983] ECR 731, and Joined Cases 267 to 269/81, *SPI and Michelin*, [1983] ECR 801. It is important for all agreements binding the Community, both those concluded by the Community and those in which the Community is substituted for the Member States (such as GATT), to be applied in the same way throughout the Community, in the interests of unity of commercial policy and the

normal conduct of intra-Community trade. For that reason, the Court has jurisdiction under Article 177 to interpret all such agreements.

11 May 1983, Case 87/82, *Rogers v Darthenay*, [1983] ECR 1579. Question of interpretation intended to supply a *lacuna* in the Community rules.

17 May 1983, Case 168/82, *European Coal and Steel Community v Liquidator of Ferriere Sant'Anna SpA*, [1983] ECR 1681. The only reference for a preliminary ruling under the ECSC Treaty. Concept of 'acts' within the meaning of Article 41.

6 October 1983, Joined Cases 2 to 4/82, *Delhaize* [1983] ECR 2973. Refusal of the Court to have regard to an appeal by a government against the decision to seek a preliminary ruling.

* 9 November 1983, Case 199/82, *San Giorgio* [1983] ECR 3595. Reference to the well-established case-law whereby 'every court or tribunal of a Member State is entitled to ask the Court for a preliminary ruling under Article 177, regardless moreover of the stage reached in the proceedings pending before it and regardless of the nature of the decision which it is called upon to give'. Application to the case of Italian 'injunction' proceedings.

17 November 1983, Case 292/82, *Merck*, [1983] ECR 3781. Interpretation and validity: the interpretation given to certain provisions on the common organization of the market in sugar rendered devoid of purpose the question submitted as to the validity of those provisions.

31 January 1984, Joined Cases 286/82 and 26/83 *Luisi and Carbone*, [1984] ECR 377. Ruling that it is for the national court to determine whether controls on transfers of foreign currency are in conformity with the limits defined by the Court.

22 February 1984, Case 70/83, *Kloppenburg*, [1984] ECR 1075. Judgment given in response to a request by the Finanzgericht Niedersachsen, which is identical in substance to the

Ursula Becker judgment. The Bundesfinanzhof, on appeal from the judgment delivered by the Finanzgericht, refused to accept the ruling of the Court of Justice as to the internal effect of directives in the event of non-implementation by a Member State.

29 February 1984, Case 77/83, *Cilfit (II)*, [1984] ECR 1257. Following the first *Cilfit* judgment, the Italian Corte Suprema di Cassazione submitted to the Court a question on the legal classification of wool; when that question arose in the first case, the answer appeared so obvious that the question was not submitted.

28 March 1984, Joined Cases 47 and 48/83, *Pluimveeslachterij*, [1984] ECR 1721. Ruling that it is for the national court to consider whether quality and marketing rules laid down in national regulations are compatible with the common organization of the market in poultry.

28 June 1984, Case 180/83, *Moser*. Lack of jurisdiction of the Court to rule on purely internal situations.

12 July 1984, Case 218/83, *Les Rapides Savoyards*. Reference by the French Cour de Cassation relating to the EEC/Switzerland free trade agreement. The observations submitted by the Commission to the Court show that the entire previous procedure, which had lasted for six years, was based on a misapprehension.

* 27 February 1985, Case 112/83, *Société de Mais*. The Court reaffirmed, giving further reasons for its ruling, that the second paragraph of Article 174, which enables it to limit in time the effect of a finding that a regulation is invalid, applies to preliminary rulings.

4 July 1985, Case 168/84, *Berkholz*. Typical example of a question submitted by a national court for a preliminary ruling on the interpretation of a directive, to enable it to ensure that the national law adopted to implement the directive is interpreted correctly.

9 July 1985, Case 179/84, *Bozzetti*. Ruling that it is for the national court to determine whether it has jurisdiction regarding classification of an agricultural levy.



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