EVALUATION OF THE REFERRAL PROCEDURE OF THE EUROPEAN COURT OF JUSTICE IN THE LAST DECADES

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Abstract

Present work analyses the changes of referral procedure of the European Court of Justice in virtue of Article 234 of the Treaty on the European Union in the last decades. According to this special proceeding the Member States' courts and tribunals if they consider that a case before them raises a problem concerning the interpretation or validity of community law, refer the question arisen to the European Court of Justice for preliminary ruling. The Court of Justice plays an important role in the community law as it gives interpretation on the referred community law question and the national court or tribunal passes its judgment according to the provided interpretation. The present paper focuses on the evaluation of this procedure, how its development has changed the community law and vice versus, and how the structure and procedure of the Court of Justice have improved, to give answer to the constantly increasing number of cases overburdening the community judicial system threatening the unity and the coherence of the community law by both analyzing the case law and the structural changes of the Court of Justice.

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Introduction

The topic of my Thesis covers the presentation of the changes in the preliminary ruling procedure of the European Court of Justice that serves as the essential procedure having the principal purpose to maintain the uniform interpretation and the validity of the community law.

Throughout my Thesis I will answer my research question: how the development of the referral procedure has changed the community law and vice versus, and how the structure and procedure of the Court of Justice have improved, to give answer to the constantly increasing number of cases that has overburdened the community judicial system threatening the unity and the coherence of the community law.

In the first chapter I will focus on the structural changes in the constitution of the Court of Justice showing the initial intention of the establishment of the Court of First Instance with the purpose to eliminate the slowed down procedure of the Court, and will also deal with the question how it gained more and more autonomy and competence and what other types of judicial changes were made to establish a more efficient legal community system.

Second chapter is essential dealing with the case law concerning the referral procedure, focusing on its specific, task sharing nature, and its established legal terminology emphasizing the main developments through the most important cases (also focusing on the historical background). This chapter is also dealing with the various aspects and developments attached to such important terminologies of Article 234 EC. Treaty as the 'national court or tribunal' or how the Court of Justice took position in questions whether how much discretional rights the Member States courts have to decide over the necessity of the referral.

1. Structural Changes in the Procedure of the Court of Justice in connection to the reference for preliminary ruling

In this chapter I am going to focus on the historical development of the judicial system of the European Union, trying to point out how and why the Court of First Instance and other judicial bodies were formulated and how the First Instance Court gained more and more autonomy to the present situation that now it can decide on preliminary references (although so far only in limited cases).

1.1. Historical background of the referral procedure of the European Court of Justice

The proceeding of the referral for preliminary ruling is a sui generis procedure what was inspired directly by the procedure traceable in the internal law of some Member States of the European Union. The basic idea of the referral procedure can be found in the German, Italian and French law, in a form that the ordinary courts can request a constitutional question to their Constitutional Courts if they doubt whether the internal statues applied in the given case are in conformity with the Constitution. A similar method of referral questions can also be found in the British Law Ascertainment Act 1859[1]. In the Federal States of the United States of America, most State's law contains provisions for the State courts that these are eligible to refer a question to the Highest Court of the Federal State in case they are not certain of the content of the State law applied in their procedure[2].

1.2 Evaluation of the structural changes in the judicial system

The Treaties Establishing the European Communities direct the establishing of a judicial forum in order to make the execution of the obligations given by the membership and the community acts enforceable in a judicial way. However, the European Court of Justice

[1] British Law Ascertainment Act 1859 (c.63) "Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a court in any other part thereof."

[2] Az Európai Unió Joga, Várnay Ernő-Papp Mónika Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft. Budapest, 2006 page

overstepped this level, since it is an active player in forming the community law unlike other international judicial forums.

Each Treaty establishing the three Communities directs the establishment of an independent judicial body, which supervises the adherence and the enforcement of the rules. With this in mind the European Court of Justice having headquarter in Luxembourg was established. As the Court got more and more overburdened, in 1998 part of the job of the European Court of Justice was overtaken by the Court of First Instance also centered in Luxembourg[3].

To summarize we can state that the European Court of Justice stands at the top of an organization, which includes the Court of First Instance and the judicial panels. It is within its competence to establish whether a particular Member State violated its contractual obligation. Its constitution and its competence is a question of constant debate, which I would like to present in the followings.

The Single European Act signed on 17 and 18 February 1986 and put into force on 1 July 1987 is considered as one of the most significant modification of the Treaties so far.

The modification of the Treaty has authorized the Council to establish the Court of First Instance for to unburden the Court of Justice, so that the Court might solve a huge number of cases and thereby provide for better legal protections.

The Court of First Instance is competent for making decisions in certain actions, particularly in cases of individuals, companies, undertakings and in cases of competition law.

The Court of First Instance amplified the institution of the community jurisdiction, since from the time on of its establishment these two independent courts constituted the Court of the European Communities. Gradually with the enforcement of the Treaty of Maastricht which established the European Union and was signed on 7 February1992, then by the Treaty of Amsterdam signed on 2 October 1997, and finally with the Treaty of Nice signed on 26 February

[3] established by the Council Decision 88/591/ECSC

2001 part of the economic cases priory under the competence of the Court of Justice was delegated to the Court of First Instance. Today the Court of Justice and the Court of First Instance is provided with a precisely determined competence.

One task of the Intergovernmental Conference preparing the Treaty of Nice was to reform the judicial system. The reforms became necessary because of the upcoming admission of new Member States.

As the numbers of the Member States increased, so did the number of cases and due to it the burden of tasks and the time consumed by a case which did damage the interest of legal security.

The community law covered more and more area of jurisdiction which also increased the number of the cases, and forced the judges to be occupied with cases which required solutions only in technical kind of questions.

This is why the above described development of the overburdened European judicial system led to compulsion to increase the number of judges, the occasional specialization, and to the claim to establish regional courts.

The establishment of new judicial bodies can always be a threat to the collegial decision making of the judicial authorities and to the common interpretation of the community law. The transformation of the judicial system therefore always means changes in the competence as well.

The community jurisdiction became –as for the time being- three-leveled after the Treaty of Nice came into force. Though primarily there was only the European Court of Justice, in 1989 the Court of First Instance was established for a determined group of cases. According to the anonymous decision of the Council judicial panels of first instance may be established beside the Court of First Instance for specified cases and these decisions may be appealed to the Court of First Instance.

1.3. The changes affecting the preliminary referral procedure

In European Community legal system the procedure of preliminary ruling is an essential instrument to support the unified application of the community law, which means the cooperation of the community courts and the national courts for the purpose of the unified application of the community law.

According to the general rule, the Court of Justice was not authorized to make a preliminary decision. However, pursuant to the above mentioned developments, since the coming into force of the Treaty of Nice and in virtue of Article 225 of the EC Treaty, and Article 140 of the Euratom Treaty, the Court of First Instance became also authorized to decide on references for preliminary ruling.

Court of First gained competence in preliminary references in limited cases and with the safeguard mechanism of the Court to review the Court of First's decision in case it 'affects the unity and consistency of Community law' in order to maintain the uniform interpretation of Community law. This means an essential change, particularly is respect to the preliminary ruling procedure as it is the main procedure having the essential purpose to maintain the uniform interpretation of the community law. If in the future the interpretation of community law is going to be fulfilled by even more judicial bodies, this could cause a danger of the possible formation of distinct judicial practice. Maybe this is the reason why the Court of First Instance gained only limited competence in the subject matter.

The creators of the Treaty of Nice were also aware of the above mentioned threat of distinct judicial practice, so the third Paragraph of Article 225 EC assures further rights for both the Court of First Instance and the Court of Justice in order to preserve the unity of the judicial practice. Therefore the Court of First Instance can delegate the given case for decision to the Court of Justice, if it presumes that the particular case needs such decision that can influence the unity and the coherence of the community law. On the other hand the Court of Justice –under conditions determined in the Covenant- can exceptionally review the decisions of the Court of

First Instance, as stated above: if there is a well-grounded threat that the unity and the coherence of the community law is violated.

So in respect of the European Court of Justice we can conclude that there is a clear hierarchical relation between the two Courts, since the two bodies belong to the same organizational system. The system of remedy provides the parties with a direct permeability. The Court of Justice as a court of second instance can review the decision of the case of the first instance, and in case of redelegation, its orders are binding on the Court of First Instance.

1.4. The establishment of the European Union Civil Service Tribunal

Due to the ever-increasing tasks of the Court of First Instance the Treaty of Nice, which empowered the Court of Justice to ask for the establishment of judicial panels, a plan emerged that part of the lawsuits relating to civil service should be transferred from the Court of First Instance. This led finally to the establishment of a new judicial body: European Union Civil Service Tribunal.

With the enforcement of the Treaty of Nice the Council established the European Union Civil Service Tribunal with its 2 November 2004 decision.

The Civil Service Tribunal proceeds on first instance in legal disputes arising between the Community and its employees according to Article 236 EC, which means around 150 cases per year for the community institutions with approximately 35000 employees. These legal disputes concern not only the strictly interpreted labor lawsuits (remuneration, promotion etc.) but also the social security system (illness, elderly, disability etc.).

The Civil Service Tribunal is competent in legal disputes concerning particular employees such as the employees of the Eurojust, Europok, European Central Bank and the OHIM however the it does not act in legal disputes between national governmental organs and its employees.

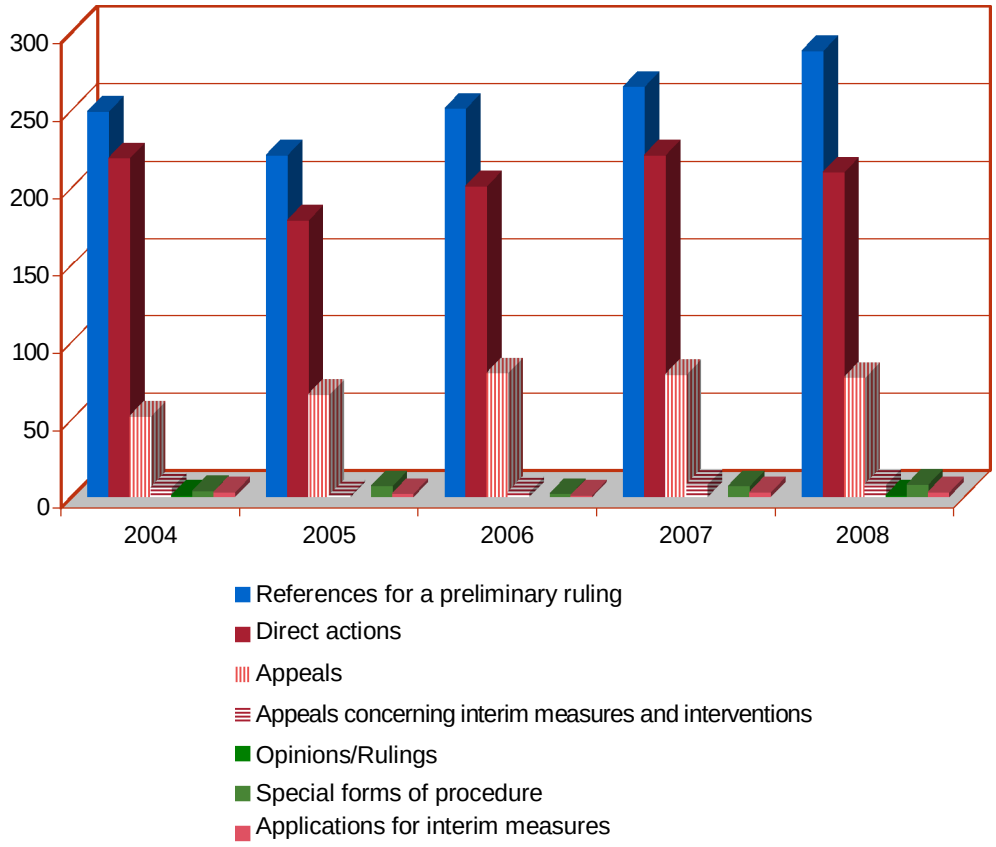
The decision made by the Civil Service Tribunal can be appealed to the Court of First Instance within two months from the decision only considering questions of law. The

establishment of the above specialized court made the disengaging of the Court of First Instance possible regarding the legal disputes between the institutions and its employees.

This new body has become an integral part of the institution and the Luxembourg Court both on an institutional and organizational level.

In this chapter I tried to point out the main developments in the Community's judicial system specially focusing on the changes affecting the referral procedure. To show how the numbers of cases have grown which could serve as a good reason for the overburdening of the Court of Justice, let me present the Annual Report of the European Court of Justice from 2008 in the followings.

New cases
2. Nature of proceedings (2004-08) (1) (2)[4]



	2004	2005	2006	2007	2008
References for a preliminary ruling	249	221	251	265	288
Direct actions	219	179	201	221	210
Appeals	52	66	80	79	77
Appeals concerning interim measures and interventions	6	1	3	8	8
Opinions/Rulings	1				1
Special forms of procedure	4	7	2	7	8
Tot	**531**	**474**	**537**	**580**	**592**
Applications for interim measures	3	2	1	3	3

[1] The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

[2] The following are considered to be 'special forms of procedure': taxation of costs (Article 74 of the Rules of Procedure); legal aid (Article 76 of the Rules of Procedure); application to set a judgment aside (Article 94 of the Rules of Procedure); third-party proceedings (Article 97 of the Rules of Procedure); interpretation of a judgment (Article 102 of the Rules of Procedure); revision of a judgment (Article 98 of the Rules of Procedure); rectification of a judgment (Article 66 of the Rules of Procedure);examination of a proposal by the First Advocate General to review a decision of the Court of First Instance (Article 62 of the Statute of the Court of Justice); attachment procedure (Protocol on Privileges and Immunities); cases concerning immunity (Protocol on Privileges and Immunities).

[4] Annual Report of the European Court of Justice, 2008. Statistics of judicial activity of the Court of Justice http://curia.europa.eu/en/instit/presentationfr/rapport/2008/ra08_en_cj_stat.pdf

20. General trend in the work of the Court (1952-2008) –
New references for a preliminary ruling (by Member State and by court or tribunal)[5]

			Total
Belgium	Cour constitutionnelle	71	
	Cour de cassation	12	
	Conseil d'État	43	
	Other courts or tribunals	453	579
Bulgaria	COCp14ACK14 epagCK14 ~bg TbpeOBCKO ~-rg~~~~14~	1	
	Other courts or tribunals		1
Czech Republic	Nejvyššího soudu		
	Nejvyšší správní soud	1	
	Ustavní soud		
	Other courts or tribunals	6	7
Denmark	Højesteret	22	
	Other courts or tribunals	100	122
Germany	Bundesgerichtshof	120	
	Bundesverwaltungsgericht	88	
	Bundesfinanzhof	250	
	Bundesarbeitsgericht	17	
	Bundessozialgericht	73	
	Staatsgerichtshof des Landes Hessen	1	
	Other courts or tribunals	1123	1672
Estonia	Riigikohus	1	
	Other courts or tribunals	3	4
Greece	~~~10~ ~dy0~	9	
	YUNI30UA10 Tnq ~Tr1~~~~~i~~	31	
	Other courts or tribunals	94	134
Spain	Tribunal Supremo	22	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	181	211
France	Cour de cassation	83	
	Conseil d'État	42	
	Other courts or tribunals	630	755
Ireland	Supreme Court	17	
	High Court	15	
	Other courts or tribunals	19	51
Italy	Corte suprema di Cassazione	101	
	Corte Costituzionale	1	
	Consiglio di Stato	62	
	Other courts or tribunals	814	978
Cyprus	Av(bMT0 ~1~~~~ j~10		
	Other courts or tribunals	1	1
Latvia	Augstaka tiesa		
	Satversmes tiesa		
	Other courts or tribunals	3	3
Lithuania	Konstitucinis Teismas	1	
	Lietuvos Aukš~iausiasis Teismas	1	
	Lietuvos vyriausiasis administracinis Teismas	2	
	Other courts or tribunals	1	5
Luxembourg	Cour supérieure de justice	10	
	Cour de cassation	2	
	Conseil d'État	13	

[5] Annual Report of the European Court of Justice, 2008. Statistics of judicial activity of the Court of Justice
http://curia.europa.eu/en/instit/presentationfr/rapport/2008/ra08_en_cj_stat.pdf

	Cour administrative	7	
	Other courts or tribunals	32	64
Hungary	Legfelsobb Bíróság	1	
	Fovárosi (télotábla	1	
	Szegedi Ítélötáblá	1	
	Other courts or tribunals	14	17
Malta	Constitutional Court		
	Qorti ta' l- Appel		
	Other courts or tribunals		
Netherlands	Raad van State	59	
	Hoge Raad der Nederlanden	177	
	Centrale Raad van Beroep	46	
	College van Beroep voor het Bedrijfsleven	137	
	Tariefcommissie	34	
	Other courts or tribunals	266	719
Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	71	
	Oberster Patent- und Markensenat	3	
	Bundesvergabeamt	24	
	Verwaltungsgerichtshof	57	
	Vergabekontrollsenat	4	
	Other courts or tribunals	170	333
Poland	Said Najwyiszy		
	Naczelny Said Administracyjny		
	Trybunal Konstytucyjny		
	Other courts or tribunals	14	14
Portugal	Supremo Tribunal de Justiça	1	
	Supremo Tribunal Administrativo	36	
	Other courts or tribunals	27	64
Romania	Tribunal Dâmbovita	1	
	Other courts or tribunals		1
Slovenia	Vrhovno sodišce		
	Ustavno sodišce		
	Other courts or tribunals		
Slovakia	Ústavný Súd		
	Najvyšší súd	1	
	Other courts or tribunals	1	2
Finland	Korkein hallinto-oikeus	23	
	Korkein oikeus	10	
	Other courts or tribunals	23	56
Sweden	Högsta Domstolen	12	
	Marknadsdomstolen	4	
	Regeringsrätten	21	
	Other courts or tribunals	39	76
United Kingdom	House of Lords	38	
	Court of Appeal	45	
	Other courts or tribunals	365	448
Benelux	Cour de justice/Gerechtshof [1]	1	1
Total			**6318**

[1] Case C-265/00 Campina Melkunie.

2. Changes in the referral procedure in light of the community law

According to Article 234 of the Treaty on the European Union national courts and tribunals if they consider that the case before them raises a problem concerning the interpretation or validity of community law they may (or according to the third paragraph shall) refer a question to the European Court of Justice for preliminary ruling. The Court of Justice gives interpretation on the referred community law question and the national court or tribunal passes its judgment according to the provided interpretation. The essential character of the referral procedure can be found in its specific, task sharing nature whereby the Court of Justice gives an interpretation on a community law question for the national court and based on this interpretation the Member State's court decides on the case.

The community law has developed throughout the years based on these preliminary rulings of the European Court of Justice on community questions and these declaratory judgments have established essential legal terminologies such as the primacy and direct effect of the community law and the capital liberalizations establishments like the free movement of persons, services and capital.

The Court of Justice also serves as an important community body maintaining and guarding over the uniform interpretation of Community law. According to Frank Hoffman there can be established at least five different constitutional function of the European Court of Justice[6]. The referral procedure of the Court of Justice serves as one of the most important functions to maintain the uniform interpretation of Community law.

In this chapter I will discuss the characteristics of the referral procedure and certain questions of its mechanism. I will focus on the evolution of the relationship between the

[6] THE CONSTITUTIONAL FUNCTIONS OF THE EUROPEAN COURT OF JUSTICE Summary of the discussions on the first and second session by Frank Hoffmeister http://www.ecln.net/elements/conferences/book_berlin/hoffmeister.pdf

European Court of Justice and the Member State's courts by reviewing the community case law. The main source of law regulating the referral procedure is Article 234 of the Treaty on the European Union (or according to the former numeration 177.)[7]

In virtue of Article 234 the Treaty on the European Union:[8]

"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 and of the ECB;

(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."

2.1. National courts and tribunals according to the case law of the European Court of Justice

The Treaties provide for a legal protection in all Member States but do not create separate Community courts or tribunals in each and every different Member State. This establishment of the system "starts from the premise that the national courts are the bodies to which individuals may turn whenever action or failure to act on the part of national authorities or other individuals infringes rights conferred on them by Community law".[9] This means that

[7] other source of law regulating the referral procedure will not be discussed in this paper (other sources like: IV. Article 68. EC Treaty or Article 35, EU Treaty)

[8] Consolidated versions of the Treaty on European Union and of the Treats Establishing the European Community (consolidated text) *Official Journal C 321E of 29 December 2006*

[9] Procedural Law of the European Union , Koen Lenarts and Dirk Arts, London Sweet and Maxwell 1999. pg 3.

the Member States' courts shall also act as a community court interpreting the community law and in case community law questions arose before these national courts and they have any doubts in the interpretation of the community law necessary to settle the dispute, they may or shall (Article 234 last paragraph) refer questions to the European Court of Justice. This system created by Article 234 gives therefore a very important role for the national courts as they can be considered as connecting links between individuals and the European Court of Justice and play a very important role in the enforcement of the community law as they are the only eligible bodies to refer these questions that individuals directly are not entitled to do.

According to the wording of Article 234 if a question is referred to the European Court of Justice by a Member State court the Court of Justice is obliged to pass a preliminary ruling. What seems definite based on Article 234, have raised lot of question throughout the years in the procedure of the Court of Justice. The Court of Justice has determined[10] that it can refuse to answer a question referred for a preliminary ruling in case some major conditions lack, for instant: the body referring the question does not meet the requirements of national court (as it is established by Article 234), the question referred is too general, or it is simply not necessary for the settlement of the dispute.

In this section I will examine what types of general and special national bodies can be qualified 'as national court or tribunal' in virtue of Article 234, and how the features of these national bodies have changed in the last decades.

2.1.1. The establishment of the definition "national court or tribunal" through the cases of the Court of Justice

The European Court of Justice has determined the unique terms and conditions in relation to the definition of the Member State's court in deciding on the referral procedures of Article 234 in its case law.

[10] See for instant in Pasquale Foglia v. Mariella Novello case C-244/80 or Victoria Film case C-134/97

There are some landmark cases showing the evaluation of the conditions which were laid down by the Court of Justice to meet the requirements of "national court or tribunal" entitled to refer questions.

The *Vaassen*[11] *case* was the very first and significant case in connection with the community-level definition of the body entitled to refer. This is because it was the first case where the defendant asserted that „the Scheidsgericht, is not a court or tribunal within the meaning of Article 177[12] of the EEC Treaty, and is therefore not competent to submit to the Court of Justice a request in pursuance of that article for the interpretation of any of the matters therein specified." The Court of Justice refused the argumentation of the defendant and found that the 'Scheidsgericht'[13] meets the requirements of the „court or tribunal of a Member State" laid down by Article 234.

Another important ruling of the Court of Justice is in accordance with the independence of the body that refers the question. In the *Pretore di Salò v Persons unknown*[14] case the Court of Justice held the request for the preliminary ruling by the Italian 'pretore'[15] is in conformity with Article 234 "even though certain functions of that court or tribunal in the proceedings which gave rise to the reference (…) are not strictly speaking, of a judicial nature"[16].

This case is surely of particular interest not only because the Court of Justice clearly establishes the premise that the national authorities entitled to refer questions for preliminary

[11] 61/65. G. Vaassen-Göbbels v. Management of the Beamtenfonds voor het Mijnbedrijf. (1966) ECR 261
[12] former numeration of the Treaty, according to the new numeration Article 234.
[13] the full name was "The Scheidensgericht van het Beambtenfonds voor het Mijnbedrijf" and it was a Dutch Tribunal which funckioned as the arbitration tribunal for miners.

[14] Judgment of the Court (Fifth Chamber) of 11 June 1987. Pretore di Salò v Persons unknown. Reference for a preliminary ruling: Pretura di Salò - Italy. Preliminary ruling - Damage to the environment. Case 14/86. 1987 ECR 02545; 1987 ECJ EUR-Lex LEXIS 358
[15] investigating magistrate
[16] [16] Judgment of the Court (Fifth Chamber) of 11 June 1987. Pretore di Salò v Persons unknown. Reference for a preliminary ruling: Pretura di Salò - Italy. Preliminary ruling - Damage to the environment. Case 14/86. 1987 ECR 02545; 1987 ECJ EUR-Lex LEXIS 358 par. 7.

rulings have to be independent, but also makes certain that it considers the Italian investigating magistrate that has double function (the 'pretore' acts not only as a judicial body but as fulfills investigational tasks as well) as an eligible Member state' body for the referral.

As I have outlined above, the *Vaassen case* was the first in which important requirements, such as permanence, application of rules of law, inter partes proceeding to meet to be considered as 'national court or tribunal' were set out by the Court already in 1966. That is why the novel aspect of the *Pretore di Salò v Persons unknown case* in terms of establishing the *requirement of independence* of the national court or tribunal more than twenty years, at the end of the 1980's may seem surprising as this is one of the most important features of every courts or tribunals.

However so far most comprehensive features of the national court were laid down and summarized in the *Dorsch Consult* case[17]: "In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177[18] of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent."[19] As a consequence of the development of the community law in this field and the above quoted part of the judgment the national court has to be established by law, must be permanent, independent, bound by rules governing 'inter partes' proceedings and must have compulsory jurisdiction.

[17] Judgment of the Court of 17 September 1997. Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH. Case C-54/96. 1997 ECJ CELEX LEXIS 549; 1997 ECR I-4961

[18] former Article 177, now Article 234

[19] Judgment of the Court of 17 September 1997. Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH. Case C-54/96. 1997 ECJ CELEX LEXIS 549; 1997 ECR I-4961, para. 23.

2.1.2 Special Member State bodies eligible for referring questions to the Court of Justice

The chapter so far has considered the evaluation of the main features of the national courts and tribunals in relations to the case law of the Court of Justice showing how the procedure of the Court has changed, and how these changes became part of the procedural law of the Court.

In order to attempt to give a full picture of the above defined criterions in the Courts case law in this section I will to deal with some cases showing that the Court of Justice interpreted differently the above "rules" discussed by the former section. Although the idea of Advocate General Ruiz-Jarabo Colomer may sound surprising, who described the case-law in relation to the definition of the national courts as it "is too flexible and not sufficiently consistent, (…) the path is badly signposted and there is therefore a risk of getting lost"[20] his opinion clearly indicates that the procedure of the Court of Justice is everything but unambiguous in this field.

A good example showing the fading away of the laid down criteria was drew up in the *Broekmeulen case*[21]. The plaintiff of Dutch nationality, Mr. Broekmeulen requested the Dutch 'General Practitioners Registration Committee' to register him as a general practitioner which was the precondition to be able to work in the Netherlands as physician. The Registration Committee refused to do so because Mr. Broekmeulen graduated at Leuven University in Belgium and not in the Netherlands. Mr. Broekmeulen lodged an appeal to the Appeals Committee for General Medicine, which referred the question to the European Court of Justice asking whether Mr. Broekmeulen has right to be registered and work in the

[20] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 28 June 2001. European Court reports 2001 Page I-09445, *2001 ECJ CELEX LEXIS 178;* 2001 ECR I-9445. Mr. Advocate General Ruiz-Jarabo Colomer continues with the following: " The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted"

[21] Judgment of the Court of 6 October 1981. C. Broekmeulen v Huisarts Registratie Commissie Case 246/80. 1981 ECR 02311; 1981 ECJ EUR-Lex LEXIS 212

Netherlands according to the Council Directives 75/362/EEC and 75/363/EEC relating to the mutual recognition of diplomas and certificates and other evidence of formal qualifications as doctor.

The Court of Justice first examined whether the Appeals Committee for General Medicine can be considered as a national court according to Article 234. In virtue of the Dutch legal system the Appeals Committee for General Medicine was not regarded as a court or tribunal. The Court of Justice verified that the Appeals Committee was not established by rule of law but was rather a private association and its decisions could have been appealed before ordinary courts although that had never happened before.

The Court of Justice considered the Appeals Committee as national court and thereby expressly deviated from the criteria that the national authority eligible to refer for preliminary ruling must be established by rule of law, what was already earlier required in the Vaassen case.

According to Mr Advocate General Ruiz-Jarabo Colomer[22] while the adversarial nature and the independence as basic requirements laid down by the Vaassen and Pretore di Salò cases have lost of their importance, the judicial nature of the national body referring for preliminary ruling was never really strictly examined by the Court of Justice.

This idea is supported by the numerous cases where the Court of Justice considered national administrative[23] and economic[24] authorities as admissible bodies referring for preliminary rulings.

[22] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 28 June 2001. European Court reports 2001 Page I-09445, *2001 ECJ CELEX LEXIS 178;* 2001 ECR I-9445.

[23]According to the Katarina Abrahamson case the University's Appellate Committee meets the requirements of the national body eligible to make reference for preliminary ruling „(….)The Swedish Overklagandenamnden for Hogskolan, which has jurisdiction to examine appeals against certain decisions taken in relation to higher education, satisfies those requirements." Judgment of the Court (Fifth Chamber) of 6 July 2000. Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, 2000 ECJ CELEX LEXIS 377; 2000 ECR I-5539

In conclusion, thanks to the evaluation of the proceeding of the European Court of Justice in connection to the classification of the admissible national authorities eligible for requesting preliminary ruling, the Court of Justice decides on a mutual system of preconditions based on its case law.

Generally we can also state that the Court of Justice examines every case independently of the other if the national bodies' judicial characteristic is questioned.

It is also important to draw attention to the fact that in respect of Article 234, the Court of Justice does not necessarily considers as a guiding principle whether or not the Member State law regards the referring national authority as court or tribunal.

Generally the Court of Justice does not question the national authorities' classification if these are categorized by the national law as courts or tribunals as well.[25] It is more likely the case that what is not considered as court or tribunal according to the internal law is accepted by the Court of Justice as eligible body for the reference.

To make a conclusion in connection to the main features of the 'national court or tribunal' discussed in this chapter, it has to be pointed out that these features were laid down by the case law of the Court of Justice, and were so far best summarized in the Dorsch Consult case, but the characteristic of these premises have to be constantly interpreted by the Court of Justice to be able to develop a single community law and preclude any differences attributable to the existing distinctions between the Member States' internal laws.

[24] In the Giant case the Court of Justice accepted the local tax authority as eligible for the referral. Judgment of the Court (Fourth Chamber) of 19 March 1991. NV Giant v Gemeente Overijse, 1991 ECJ EUR-Lex LEXIS 400;1991 ECR I-01385

[25] Exceptions are here of course the national arbitral tribunals unless they possess some compulsory jurisdiction as it was established in the Vaassen and Almelo cases. Judgment of the Court of 27 April 1994. Municipality of Almelo and others v NV Energiebedrijf Ijsselmij. 1994 ECJ CELEX LEXIS 154

2.2 'To refer or not to refer': obligation or a discretional right?

In this section I will focus on the obligation imposed by the third paragraph of Article 234 on the national courts and tribunals of last resort to refer question to the Court of Justice for preliminary ruling and will also demonstrate the difference interpretation of the second and third paragraph of Article 234 and the evolution of the community case law in this field.

The second and third paragraphs of Article 234 make a distinction between two types of national courts or tribunals in regard whether these bodies have an obligation to refer or they have certain discretion to do so.

According to the wording of the second paragraph: the "*….court or tribunal* ***may, if it considers*** *that a decision on the question is* ***necessary*** *to enable it to give judgment,….*", while due to the third paragraph: "*….against whose decisions there is no judicial remedy under national law, that court or tribunal* ***shall*** *bring the matter before the Court of Justice.*"[26]

According to the second paragraph the national court or tribunal of first instance has full discretion to decide on the referral while the superior bodies are obliged to refer. The first significant decision in the *SpA Salgoil case*[27] of the Court in connection to the discretional right of the national court or tribunal of lower instance gives a clear interpretation of the above paragraph: „Article 177 (…) does not give the Court jurisdiction to take cognizance of the facts of the case, or criticize the reasons for the reference. (…) it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action".

[26] Consolidated versions of the Treaty on European Union and of the Treats Establishing the European Community (consolidated text) *Official Journal C 321E of 29 December 2006*

[27] Judgment of the Court of 19 December 1968. SpA Salgoil v Italian Ministry of Foreign Trade, Rome. 1968 ECJ EUR-Lex LEXIS 48

Furthermore the Court of Justice also made it clear that if the national court or tribunal of lower instance is bound by a decision of a superior national court, this does not bar the lower court from referring the given question for preliminary ruling because otherwise the application of the community law would be infringed.[28]

These rather liberal approaches trying to give as much discretion as possible for the national courts of lower instances in the subject matter are due to the intention of the Court of Justice to minimize the possible obstacle to the reference for preliminary ruling that can be faced by the national courts.

This early attitude of the Court to encourage the national courts to make referral procedure served as a means to reflect to the problems of the community law arising in the national level and also trying to fill up the holes left in the community legal system due to possible lack of political consensus. This kind of encouragement from the part of the Court of Justice was in the early times of the history of the application of the community law more than reasonable because there were some opinions denying not only the necessity of the reference for procedure but reluctant to accept the supremacy and direct effect of community law.[29]

In England especially Lord Denning articulated in the *Bulmer v. Boilinger case*[30] that national courts should not refer questions to the Court of Justice because they are capable to decide on these questions themselves. Only more than two decades later was the importance of the referral emphasized by the decision of Sir Thomas Bingham in the *R v. International*

[28] Judgment of the Court of 16 January 1974. Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 166-73. 1974 ECJ EUR-Lex LEXIS 60

[29] As we can see it in Case Frontini v. Ministro delle Finanze (1974) 2 CLMR 372, Case C-280/93., Germany v. Council (1994) ECR I-4973.

[30] Bulmer v. Boilinger 1974 CA

Stock Exchange case[31] by stating that the referral for preliminary ruling to the Court of Justice is not necessary only if the national court has "complete confidence to resolve the issue itself".

2.2.1 Third paragraph of Article 234 EC: evaluating the Courts interpretation

If we read carefully the third paragraph of Article 234 the question could arise whether what is exactly meant by a national court or tribunal "against whose decisions there is no judicial remedy under national law"[32]

The legal literature is divided into two possible interpretation of the above quoted phrase.[33]

The first theory supports the idea that the text of the third paragraph only refers literally to the highest court or tribunal of the Member State (abstract or objective theory) while the other interpretation (concrete or subjective theory) considers also the type of the proceeding decisive and examines not only the precise position of the court or tribunal. This means that the latter theory considers all national courts or tribunals as the 'highest' if there is no other forum to apply to, after the case was decided by the court, and does not contemplate critical whether it is really the highest court or tribunal of the given country or not.[34]

The Costa v. ENEL case was the very first case where the Court of Justice examined the question and took the position that the 'concrete interpretation theory' should be adequate according to the third paragraph of Article 234[35].

It concluded that the Italian court (Giudice Conciliatore di Milano) which was a first instance and sole tribunal and therefore its judgment could not be appealed shall be

[31] In *R* v *International Stock Exchange of the UK and the Republic of Ireland Ltd ex parte Else (1982) Ltd and Others* [1993] QB 534
[32] Article 234 of the Consolidated versions of the Treaty on European Union and of the Treats Establishing the European Community (consolidated text) *Official Journal C 321E of 29 December 2006*
[33] Henry G. Schermers-Denis F. Waelbroeck Judicial protection in the European Union. 6th. edition Kluwer Law International 2001
[34] Az Európai Unió Joga, Várnay Ernő-Papp Mónika Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft. Budapest, 2006 page 354.
[35] Then Article 177 EC

considered as a 'national court or tribunal' defined by the third paragraph and thus it was obliged to refer for preliminary ruling.

After the *Costa case* in the development of the case law, the next important judgment of the Court of Justice on the subject matter appeared in the *Hoffmann La Roche case.*[36] In this case the German court referred the question for preliminary ruling whether the German Court itself as superior court is obliged to refer a question dealing with community law according to the third paragraph of Article 177[37] in the interlocutory proceedings before it, which is decided at the end by interim order.

According to the German rules of law there were no judicial remedies against the court's interim order under the interlocutory proceedings, this however did not prevent the parties to file an ordinary action having the same area under discussion.

The Court of Justice made it clear that in case of interlocutory proceeding having interim measures whereby the possibility of judicial remedy is ensured before ordinary courts as it was clearly established in the Hoffmann La Roche case, the specific German court that referred the above question should not be regarded as a national court or tribunal against whose ruling there is no judicial remedy under the Member State's law and therefore it is not obliged to refer for preliminary ruling according to the third paragraph of Article 177 (now 234 EC).

Moving forward in the examination of the changes in the community law in this field I will outline the novel aspects of one of the most significant case, (the *CLIFIT case*) in relation to the discretional right of the national Court, but first in order to give the latest relevant case concerning the third paragraph of Article 234, I would like to discuss the

[36] Judgment of the Court of 13 February 1979. Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76. 1979 ECR 00461; 1979 ECJ EUR-Lex LEXIS 7

[37] Now Article 234 EC

following case dated 2002 whereby the Court gave a very clear and definite answer and voted in favor of the above discussed 'concrete interpretation theory'.

In the *Lyckeskog case*[38] the Swedish criminal court of second instance referred the question whether a Swedish national court that is practically the last body to decide on a question can be considered as a 'national court or tribunal' by virtue of the third paragraph of Article 234 EC.

The Swedish Court laid special emphasis on the fact that according to the Swedish Code of Procedure (Rattegangsbalk) there were only two possible ways to challenge the judicial decision.

Firstly this was ensured by Paragraph 10 (2) of the Code of Procedure in case new evidence or new facts were revealed that most likely would have changed the original decision of the court if they had been known prior the judgment was passed, secondly an other option for the challenge was provided under Paragraph 11 of Chapter 54 of the Code in existence of a specific aspect where the reconsideration of that specific aspect is of peculiar significance for the uniform application of the Swedish law. It is the Swedish Supreme Court who qualifies the above defined two aspects if they were requested whether they are eligible for challenging the decision of the lower court. As the Swedish Government pointed out generally out of 24 000 judgments about 5000 are challenged, and only about 150 to 200 out of these are granted a leave to appeal, which means 3% to 4% of them.

The Court of Justice decided in conformity with the Finnish, Danish and British Governments' argumentations and refused to examine the case. As Mr. Advocate General Tizzano outlined "the national court or tribunal whose decisions may be challenged subject to

[38] Opinion of Mr Advocate General Tizzano delivered on 21 February 2002. Criminal proceedings against Kenny Roland Lyckeskog 2002 ECJ CELEX LEXIS 131; 2002 ECR I-4839

examination of a request for leave to appeal is not in principle a court of last instance within the meaning of the third paragraph of Article 234 EC."[39]

2.2.2 Exceptions to the rule of mandatory reference for preliminary ruling – the CILFIT case[40]

On the basis of the above discussed Lyckeskog case using a consequent interpretation it could be definite what to rely on in determining which judicial body is obliged to initiate reference for preliminary ruling before the European Court of Justice.

In this section I will to examine the discretional rights of the national courts and tribunals in connection to the possible exceptions of the rule of mandatory reference for the preliminary ruling based on the case law of the Court of Justice.

Before a detailed interpretation of the second and third paragraph of Article 234 EC was elaborated by the Court of Justice in its case law, numerous Member States' courts (first of all the Dutch courts) took the position that the different wording of the second paragraph (ensuring for the national court of lower instance to decide whether it considers necessary to refer a question or not) and the third paragraph (obliging the superior courts that they shall refer the matter before the Court of Justice) indicates that the national superior courts and tribunals shall automatically refer the question in connection to community law that arose before them, while other national judicial bodies took the position (for example the French courts) that based on the doctrine "acte clair" the questions that do not cast any doubt shall not be referred to the Court of Justice for preliminary ruling.[41]

[39] Id. para 48.
[40] Ide SZÉLE IRODALOM FELSOROLÁSA
[41] Az előzetes döntéshozatali eljárás legfontosabb elméleti és gyakorlati kérdései, Osztovits András, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, Budapest, 2005.

The Court of Justice established its position in the subject matter the first time in the *Da Costa case*[42] in which the Dutch Court of last instance (Tariefcommissie) referred a materially same question in a case having identical statement of facts, that it had already referred a year earlier for preliminary ruling.

Presumably the Dutch Supreme Court interpreted the obligation imposed by the third paragraph of Article 234 EC literally and that is why it referred secondly the same question.

The Court of Justice refused to decide on the case arguing that "the question raised is materially identical with a question which has already been the subject of preliminary ruling in a similar case".[43] According to the practice of the Court of Justice if the national court or tribunal of last instance refers an essentially identical question what had already been answered by the Court, it refuses to give a ruling on the substance and responds to the question by referring to the case where the repeated questions of the national body have already been answered. This solution can also be called by the French term as "acte éclairé"[44] referring to that fact that the question was already cleared up-'*éclaire*-d'.

The above discussed question was further developed and detailed by the Court of Justice in the *CILFIT* case.[45] The Court of Justice defined the delimitation of the obligation of the national courts and tribunals in connection with the reference for preliminary ruling.

The Italian Supreme Court of Cassation (Corte Suprema di Cassazione) referred the question asking the Court of Justice (as the exact wording of the question is of particular

[42] Judgment of the Court of 27 March 1963**.** Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. Joined cases 28 to 30-62. 1963 ECJ EUR-Lex LEXIS 17

[43] Judgment of the Court of 27 March 1963**.** Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. Joined cases 28 to 30-62. 1963 ECJ EUR-Lex LEXIS 17 par. 3

[44] EU-Jog a tárgyalóteremben, előzetes döntéshozatal, Blutman László, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, Budapest, 2003. page 324.

[45] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365

importance for the understanding of the established case law by the judgment of the Court I quote the whole question): "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 that obligation conditional on the prior finding of a reasonable interpretative doubt?"[46]

Never before did a question summarize so precisely all the problems concerning the so far discussed interpretation of Article 234 of the EC. Most likely this is the reason why the Court decided to pass a decision trying to concretize the subject matter.

As I discussed previously in this section the unsettled area of interpretation until the Cilfit decision was for the Member States' courts and tribunals, what the Court of Justice expected them in the field of their discretional rights according to the third paragraph of 234 EC.

It was really doubtful what the connection between the second and the third paragraphs was and whether the latter should have been interpreted restrictively (what could have led to an almost mechanic-type of referral attitude) or extendible (that would have left more discretional rights for the national courts to decide on the necessity of referring) by the superior national courts and tribunals.

The Court of Justice took the position of the latter solution and ensured discretional rights not only to the courts and tribunals of higher instance (named by the third paragraph of 234 EC) but to all lower national courts as well.

[46] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365 par 4.

The Court pointed out that the national courts of higher instance are not obliged to refer a question "concerning the interpretation of community law raised before them if that question is not relevant"…and if the question "can in no way affect the outcome of the case."[47] With the above quoted interpretation, the Court of Justice drew up its first exception to the rule of mandatory reference for preliminary ruling imposed by the third paragraph of Article 234 on the courts and tribunals of last instance.

A second exception to the mandatory referral rule of the third paragraph was also established by the Court of Justice with an enlarged scope to interpret the 'res judicata excuse' (if the national court faces a case where the facts are materially identical with an other case in that the same question had already been referred) already established by the above discussed Da Costa case. The Court of Justice hereby made it clear that there is no need to refer a question concerning community law if the Court already has an established judicial practice related to it, even if these questions are not fully identical[48] with the ones decided by the Court earlier.

Based on the judgment, a third exception can also be established in case the national court or tribunal deems that there is "no reasonable doubt"[49] in connection with the settlement of the arisen question because the application of the community law is so evident.

What may sound very permissive turns out to not to be at all, as the Court of Justice continues to make demands that if the national court comes to the conclusion to meet the above defined conditions (that there is no reasonable doubt in the application of the community law in connection to the question arisen), it "must be convinced that the matter is

[47] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365 par. 10.

[48] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365 par. 13.

[49] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365 par. 16.

equally obvious to the courts of the other Member States and to the Court of Justice. (…) and so may the national court or tribunal refrain from submitting the question (…) and take upon itself the responsibility for resolving it."[50]

These former conditions make the national court's situation difficult to be assured that not only the Court of Justice but the national courts and tribunals of the other Member Sates should have the same judicial practice and that they would deem it equally obvious that 'there is no reasonable doubt'.

It can be qualified as impossible to meet these requirements if we consider that the legal rules were put into words in various languages of the different Member States. Even in case the given national court does not come up against language difficulties it must be reconsidered that the community law has a particular terminology with a single meaning.

Also important to note, that the legal definitions could have very different meanings in the community law and in a Member State's national law. That is why this third exception to the mandatory reference can also be considered as a condition not enlightening the national court's position but making it even harder and letting it no other choice but referring the question to the European Court of Justice for preliminary ruling. This is the reason why these requirements were heavily criticized by Advocate General Jacobs in the *Wiener S.I.* case[51] as extravagantly overburdening to meet by the national courts.

So far the Court of Justice have not reinterpreted these conditions laid down by the CILFIT decision although the above reasoning by Advocate General Jacobs seems to be even more well-founded in considering the increasing language barriers after the enlargement of the European Union in 2004 and 2007.

[50] Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81. 1982 ECJ CELEX LEXIS 365 par. 16.

[51] Judgment of the Court (First Chamber) of 20 November 1997. Wiener S.I. GmbH v Hauptzollamt Emmerich. Case C-338/95. 1997 ECJ CELEX LEXIS 298; 1997 ECR I-6495

Conclusion

The referral procedure has formulated and developed the community law and played a very important role in the safeguarding of the uniform interpretation of the European 'acquis communitaire'. Throughout the years both the procedural and substantive community law in connection to the preliminary ruling procedure got more and more complex.

As the national courts and tribunals have been increasingly inclined to refer question to the Court of Justice for preliminary ruling and owing to the enlargement of the European Union in 2004 and 2007, the number of referred questions have grown significantly and by now the Court have become overburdened. With the establishment of the Court of First Instance and the Special Judicial Panel this situation could not have radically been changed.

The overburdened community judicial system with its extended decision-making proceeding has even endangered the maintenance of the unity of the community law to some extent. One possible answer to this problem could be the newly introduced urgent preliminary ruling procedure firstly applied with success in the Rinau[52] decision.

However the urgent preliminary ruling procedure can not be regarded as an ultimate and final solution in the constantly more and more overburdened community legal system.

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