

Organisation and function of the European Court of Justice (Court of Justice of the European Union)

With special emphasis on the procedure concerning preliminary rulings

Rudolf THIENEL *

I. Some preliminary remarks: Nature and Construction of the European Union

“Nihil ergo aliquid restat, quam ut dicamus Unionem Europeam esse irregulare aliquod corpus et monstro simile, siquidem ad regulas scientiae civilis exigatur.”¹⁾

The famous verdict by Samuel Pufendorf about the structure of the German Empire in the 17th century²⁾—*monstro simile*—has repeatedly been applied to the European Union in its current state, as I have done here too. In fact, the nature and organisation of the European Union—the EU—differs in many ways from traditional international organisations, having reached a highly integrated status; although the members still are sovereign states, they have transferred many of their powers to the EU.

This high degree of integration is shown especially by the role of the European Court of Justice (further on: ECJ). In order to understand its importance we should first take a look at the main features of the EU, its legal system and the special form of co-operation between national and EU institutions in implementing EU law.

1. Main features of the European Union

The EU today has 27 member states with approximately 500 million inhabitants. During its history it was not only enlarged by new members but also restructured and renamed, endowed with new tasks and amended with new institutions. These changes are far from being complete; having overcome some difficulties and two referenda in Ireland, the Lisbon Treaty—which will bring substantial changes to the EU—will be implemented in short time. I will therefore deal both with the current legal system of the EU and the changes which the Lisbon Treaty will bring. However, as far as the ECJ is concerned,

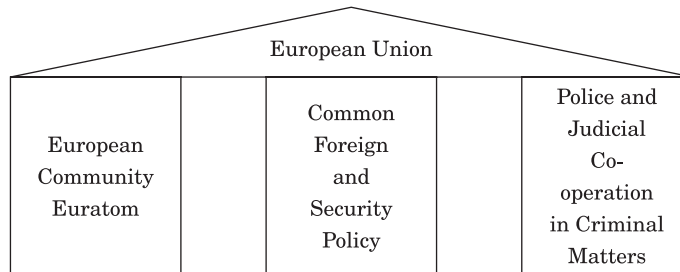
* Univ.- Prof. Dr. Rudolf Thienel, Vice President of the Administrative Court, Vienna, Austria. The article is based on a lecture held in May 2009 and has been finished in November 2009.

1) Nothing else stays for us to say than that the European Union is an entity not conforming to the rules and in a way similar to a monster, as far as you judge it from the rules of social science.

2) *De statu imperii germanici*, 1667, published under the pseudonym “Severinus de Monzambano”: Nihil ergo aliquid restat, quam ut dicamus Germaniam esse irregulare aliquod corpus et monstro simile, siquidem ad regulas scientiae civilis exigatur.

those changes will be no substantial.

The description of the current construction of the EU usually refers to the structure of a Greco-Roman temple consisting of three “pillars” under a common roof:³⁾



The *first pillar* comprises two supranational organisations, the *EC* and the *Euratom*; the legal system of this first pillar has a special supranational character which means, that the legal rules of this system have direct effect within the members states and therefore directly constitute rights and duties of the citizens of the member states. The central EC-Treaty comprises inter alia the rules on economic freedoms, economic co-operation, foreign trade, asylum and migration, the rules on the legal system and the regulations on the community institutions.

The *second* and the *third pillar* remain apart from this special legal structure and constitute traditional intergovernmental co-operation. Within the framework of the *Common Foreign and Security policy* and the *Police and Judicial Co-operation in Criminal Matters* the possible legal instruments do not have supranational effect.

The “roof” of this temple consists of common regulations about the Union, for instance about the main principles of Union law, like the rule of law, democracy and the respect of Human Rights. This roof also comprises the principle of the common institutional frame, which means that the EC-institutions also act within the second and the third pillar.

The main task of the ECJ is located in the first pillar, the Community Law, although also within the third pillar the possibility of preliminary decisions exists. As the decisions of the EJC in most cases concern community law, I will concentrate on the legal system of the EC. The legal system of the Euratom is similar to the EC so I will not deal with it separately.

The *Lisbon Treaty* — which will come into force on December 1st 2009 — will change this structure: According to it there exist two Treaties; the former EU Treaty is changed in many points and contains the fundamental rules of the EU and is called *Treaty on the European Union* (further on: TEU new). The former EC Treaty is also changed in many aspects and is now called *Treaty on the Functioning of the European Union* (further on:

3) Compare for instance *Craig/de Búrca*, EU Law³ (2003) 30 ff.

TFEU). The new EU — which is established by this new framework — is the successor of the EC; the Second and the Third Pillar are integrated into the structures of the new EU; however, some institutional features of the old structure remain, especially as far as law-making and judicial control are concerned. Only Euratom stays outside of these new structure and remains as a distinct international organisation.

2. The legal system of the EC (new EU)

Community Law differs in many ways from traditional International Law; this is shown by the rules for creating “Secondary” Community law, which in most cases is created by majority decision; further, the special character of Community Law is shown by the following facts:⁴⁾

- Community Law is directly valid within the Member States, not needing any additional national legal act to “incorporate” it into national law;
- EC rules can be directly applicable, if they are clear, precise and unconditional enough to be considered justiciable; this is usually called “direct effect”;
- *Supremacy*: National Courts as well as national administrative authorities are required to give immediate effect to the provisions of directly effective EC law in cases which arise before them and have to ignore any national law which could impede the application of EC law. This supremacy applies to all EC law irrespective of its rank, has to be obeyed by all national institutions — not only the courts — and concerns all national law, even Constitutional Law.

These principles will not be changed by the Lisbon Treaty; this is especially true for the principle of *supremacy*: This principle is not explicitly included into the new Treaties; the Declaration N° 17 however explicitly states, that the principle of supremacy — in this declaration it is called “primacy” — in the interpretation of the ECJ will also be valid for the new Treaties and the legal acts created on their basis. The main difference is, that these principles now apply to the Union law.

As far as the sources of EC law are concerned, we can distinguish two spheres of legal rules, namely *Primary Community law and Secondary Community law*.

Primary Law is the supreme source of law in the EC. Many rules of Primary law are directly effective, especially the main economic freedoms. Primary Law consists

- of the Treaties establishing the EC and the Euratom and all the amendments made to these treaties; after the Lisbon Treaty, there exists the TEU new and the TFEU (and of course the Euratom Treaty). The new Charter on Fundamental Rights is not incorporated into the new Treaties, but — according to Art 6 TEU new — it has “the same legal value as the Treaties”, which means, that it is also part of Primary Law.
- Unwritten rules which have been developed by the jurisdiction of the ECJ and

4) Compare for instance *Craig/de Búrca*, EU Law 178 ff, 275 ff.

comprise the general principles, eg fundamental rights and general principles of administration like the principles of proportionality, legitimate expectation, non-discrimination and transparency. Many of those unwritten rules are now (also) explicitly included into the written law, especially in the Charter on Fundamental Rights.

Secondary Law comprises all acts created by the EC institutions on the basis of Primary Law. The main sources of Secondary Law are listed in Art 249 EC, but this list is not comprehensive as there are also other "unlisted" sources of Secondary Law. The most important types are:

- *Regulations*, which are directly binding upon all Member States and have direct effect within the Member States (Art 249 § 2 EC).
- *Directives*, which are binding for the Member States as to the ends to be achieved while leaving open form and method of implementation to the Member States (Art 249 § 3 EC).
- Individual *Decisions* are binding to those to whom they are addressed (Art 249 § 4 EC)
- Other unilateral acts, like recommendations and opinions.
- *International Agreements*: The EC has in many fields the competence to conclude international treaties binding for the Member States; in these cases the Member States have conferred their Treaty-making power to the EC.

The Lisbon Treaty does not change this system substantially; the former Art 249 EC is now Art 288 TFEU; as its predecessor, the list in this Article not exhaustive. The character of these legal acts will not be changed in comparison to the old Treaties. The only big change consists in the fact, that the legal acts of the second and the third pillar (which are not dealt with here) are abolished according to their integration into the new EU.

3. The Application of EC Law

The immediate application of EC Law by EC institutions mainly concerns internal agenda, like organisation, Human Resources or budget. The immediate application of EC Law in the external sphere — in relation to citizens — is restricted to few areas, namely competition law and the common currency.

In all other fields Community law has to be implemented and applied by the institutions of the Member States. The EC does not have an administrative or jurisdictional organisation within the Member States; implementation and application of EC Law is the task of the Member State institutions.⁵⁾

5) This is explicitly regulated in Art 10 EC (formerly Art 5 EEC): "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall

This means, that general EC rules without direct effect have to be implemented by the national legislation in a clear way that every citizen is able to invoke those rules before the national courts and administrative authorities.

In individual cases national courts and administrative authorities have to apply either directly applicable Community law or national law implementing Community law.

As far as organisation, competence and procedure of the national courts and administrative authorities are concerned, Community law contains various and differing rules for several matters, but not a comprehensive set of rules. As far as Community law does not provide otherwise, the application of Community law has to take place according to national organisational and procedural law. This is called the “Organisational and Procedural Autonomy of the Member States”; however, the ECJ has developed several general principles which have to be observed while applying Community Law:⁶⁾

- national law on organisation and procedure must not be construed or applied in a way that it is virtually impossible to implement Community law;
- national legislation must not be construed or applied in discriminatory way compared to procedures in similar but purely national cases;
- there must exist an effective application to a court;
- the general principles of Community law — for instance foreseeability, legal certainty, giving reasons for decisions — have to be respected in all cases where Community law is applied.

The Lisbon Treaty does not change this system substantially; however, Art 19 § 2 TEU now explicitly codifies the duty of the Member States to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Art 47 of the Charter on Fundamental Rights constitutes “the right to an effective remedy before a tribunal”, so the duty to guarantee the access to a court or tribunal is now provided for in written law.

facilitate the achievement of the Community’s tasks.”

After the Lisbon Treaty a similar provision can be found in Art 4 § 3 TEU new: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

6) Compare for instance ECJ *Deutsche Milch-Kontor GmbH*, ECR 1983, 2633, §§ 17 and 19; *Verholen*, ECR 1991, I-3757 § 24; *Peter*, ECR 1993, I-2981 § 8.

II. Organisation of the judicial institutions

According to Art 7 EC one of the institutions of the EC is the “Court”. This institutions consists of three jurisdictional bodies:

- the ECJ
- the European Court of First Instance (CFI)
- Judicial panels, that can be created by a decision of the Council

The Lisbon Treaty does not change this organisation but uses new names: The judicial institution as a whole is now called “Court of Justice of the European Union”; the ECJ will be called “Court of Justice”, the CFI “General Court” an the panels are named “specialised courts” (Art 19 TEU new). Those specialised courts will be established by the European Parliament and the Council in the ordinary legislative procedure (Art 257 § 1 TFEU).

1. Composition and Organisation of the ECJ (Court of Justice)

The ECJ is the highest court of the EU and is based in Luxemburg. It has the ultimate say on matters of EU law in order to ensure its equal application across all EU member states.

The ECJ is composed of *one judge per member state*; it currently consists of 27 members. The ECJ is assisted by *eight Advocates-General*. The Judges and Advocates-General are appointed by *common accord of the governments* of the member states and hold office for a term of six years. This term is renewable. Appointment and reappointment of the judges is staggered so that there is a partial replacement every three years. In practice, each member state nominates a judge whose nomination is then agreed upon by all the other member states. The Member States usually select their own nationals, although this is not explicitly provided for. In the same way the replacement of the Advocates-General is staggered so there is a partial replacement of four Advocates-General every three years.

The judges and Advocates-General must be chosen from legal experts whose *independence is “beyond doubt”* and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are of *recognised competence*.

Art 223 EC further provides for the appointment of a Registrar of the ECJ for a term of six years, whose task concerns organisational and procedural questions.

The *President of the ECJ* is elected from and by the judges for a term of three years, which is renewable. He presides over hearings and deliberations of the full Court or the Grand Chamber, directing both judicial business and administration. He also assigns cases to the chambers for examination and appoints judges as rapporteurs.

The ECJ sits in Chambers consisting of three or five judges; on request by a Member State or an EU institution, the decision falls to a Grand Chamber composed of 13 judges. In certain cases enumerated in the Statute of the ECJ it decides in plenary session. Decisions are reached with simple majority.

The *Advocates-General* are full members of the Court. Their most important task is to prepare “*reasoned submissions*”, that is a written opinion on the case, before the ECJ reaches its decision; however they need not be involved in every case before the ECJ, so the Statute of the ECJ provides in which cases they are involved.

The reasoned submission by the Advocate General sets out his understanding of the case and recommends to the ECJ how to decide it. This opinion does not bind the ECJ, although in most cases it is followed by the ECJ.

The procedure for the ECJ is regulated in the Treaties, in the Statute of the ECJ and in its “rules of procedure”, which it has given itself according to Art 223 EC.

The Lisbon Treaty does not change this organisation; one difference is that Art 255 TFEU provides for the establishment of a panel of seven members (consisting inter alia of former members of the Court of Justice, the General Court or national courts) which has to give an opinion on the suitability of the candidates for membership in the Courts. The Statute of the Court of Justice of the European Union is contained in Protocol No. 3 to the Treaties.

2. Composition and Organisation of the CFI (General Court)

The composition and organisation of the CFI is similar to the ECJ; one difference is, that it consists of *at least* one judge per Member State, so there could be more judges than Member States. Currently it is also composed of 27 judges. The EC-Treaty does not provide for Advocates-General, however judges of the CFI can be appointed as ad-hoc Advocates-General. The CFI also sits in chambers.

The procedure is regulated in the EC-Treaty, the Statute of the ECJ and rules of procedure the CFI has adopted.

The CFI works as second level instance in regard of the EU Civil Service Tribunal. Its competencies as first instance are regulated partly in the EC, further competencies can be established by the Statute of the ECJ. The competencies of the CFI comprise for instance

- actions for annulment (against acts of the EC institutions)
- actions for failure to act (against inaction by the EC institutions)
- actions for damages (for the reparation of damage caused by unlawful conduct on the part of a EC institution)

The EC also allows for the establishment of a competence of the CFI for preliminary decisions in specific areas laid down in the Statute of the EJC. Until now no such competence has been established.

The Lisbon Treaty contains similar organisational rules (Art 256 TFEU and Protocol

No. 3).

3. The EU Civil Service Tribunal

The EC further provides for the establishment of judicial panels to determine at first instance certain classes of actions or proceedings brought in specific areas. The only such panel now existing is the *EU Civil Service Tribunal*. It decides on disputes between the Communities and their civil servants concerning working relations. The Lisbon Treaty does not change this system, only renaming those panels “specialised courts”; provisions concerning the Civil Service Tribunal are contained in Protocol No. 3 on the Statute of the Court of Justice of the EU.

III. The competencies of the ECJ

1. “Ensure that the law is observed”

The fundamental rule on the competence of the Court is contained in Art 220 EC, which provides:

“The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed. . . .”

This provision is not complete, because the courts do not only have to ensure the correct interpretation and application of “*this treaty*”, but of all Community law, including Secondary law and unwritten general principles. Anyway, the competencies of the courts (ECJ, CFI, panels) are limited to *Community law*. The ECJ has no power to rule on the interpretation or validity of national law of the Member States. Concerning EU-law outside the first pillar, the courts have only very limited competencies.

The phrase used in Art 220 EC, according to which the courts have to ensure the observance of “*the law*” has been interpreted in the way that the courts have to close lacunae of the written law; further, according to the ECJ provisions of Community law have to be interpreted teleologically, having regard to the aims of the Community; the interpretation has to give Community law full effect. Relying on these methods of interpretation the ECJ has developed new principles that are not contained in the written texts and thus has added many unwritten principles of Community law to the written sources. Due to this evolutive jurisdiction the ECJ has sometimes been characterised as a “motor of integration”.

In fact, many of the main principles of Community law are not explicitly based in written law but have been developed by the jurisdiction of the ECJ, eg:

- direct effect of Community law;⁷⁾

7) ECJ *van Gend and Loos*, ECR 1963, 1.

- supremacy of Community law;⁸⁾
- fundamental rights as part of Community law;⁹⁾
- state liability for infringement of Community law by the legislation and national High Courts.¹⁰⁾

After the Lisbon Treaty, Art 19 § 1 TEU new contains a similar regulation like the former Art 220 EC. The competencies of the courts now refer to the (new) Treaties, which means to the law of the EU. Due to the abolishment of the second and third pillar, the competencies of the court now also comprise the agenda of the former third pillar (police and judicial cooperation), which are now regulated in Part III Title V of the TFEU (Area of Freedom, Security and Justice). With the regard to Common foreign and Security Policy, however, the Courts still do not have jurisdiction (with some small exemptions): Art 24 § 1 TEU new, Art 275 § 1 TFEU.

2. Outline of the competencies of the ECJ

If we take a look at the competencies conferred on the ECJ we see that there are very different actions. As already mentioned before, in some of these cases the competence for first instance decisions has been transferred to the CFI (General Court) or the EU Civil Service Tribunal, so the ECJ only acts as an appeals court. The Lisbon Treaty will not change those competencies. The most important competencies of these courts can be summarised as follows:

Actions for failure to fulfil obligations: The ECJ can determine whether a Member State has fulfilled its obligations under Community law (Art 226, 227 EC).¹¹⁾ If the ECJ finds that an obligation has been infringed, the Member State concerned must terminate the breach without delay. If it does not, this again constitutes a new infringement. If the ECJ finds that the Member State concerned has not complied with its judgment, it may impose a financial penalty on the Member State (Art 228 EC).¹²⁾ This has already happened several times; for instance when this procedure has

8) ECJ *Costa/ENEL*, ECR 1964, 1251.

9) ECJ *Nold*, ECR 1974, 491.

10) ECJ *Francovich*, ECR 1991, I-5357; ECJ *Köbler*, ECR 2003, I-10239. In the case of *Francovich* — which gives a good example — the ECJ held as follows:

“32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.”

11) After the Lisbon Treaty: Art 258, 259 TFEU.

12) After the Lisbon Treaty: Art 260 TFEU.

been applied for the first time, the ECJ imposed on Greece a penalty of 20.000 Euro per day for the time during Greece would not comply with the ECJ-judgment.

Actions for annulment: By an action for annulment, the applicant seeks the annulment of a measure (regulation, directive or decision) adopted by an EC-institution because it violates the EC-Treaty. If a violation is established, the measure has to be declared void (Art 230, 231 EC).¹³⁾

Actions for failure to act allow the review of a failure to act on the part of an EC institution (Art 232 EC).¹⁴⁾

Application for compensation based on non-contractual liability: The EC also allows for an action concerning claims for compensation based on non-contractual liability for damage caused by the institutions or civil servants of the EC in the performance of their duties (Art 235, Art 288 § 2).¹⁵⁾

Appeals and Reviews: Against judgments and orders of the CFI appeals may be brought before the ECJ, but only on points of law. If the appeal is well founded, the ECJ sets aside the judgment of the CFI. Decisions of the CFI on appeals against decisions of the EU Civil Service Tribunal can only in exceptional circumstances be reviewed by the ECJ.

Preliminary decisions will be dealt with further on in greater detail.

3. The procedure before the ECJ

All procedures before the ECJ consist of a written stage and usually an oral stage in open court. However, there are some differences between references for preliminary rulings and other actions (“direct actions”).

A special problem arises from the fact that there is not one common language for proceedings before the ECJ. Direct actions can be brought in any of the 23 official languages of the EU; in procedures concerning preliminary rulings, the language used in the procedure is that of the national court which made the reference to the ECJ. Oral proceedings at hearings are interpreted simultaneously. The deliberations of the judges are held in French without interpreters.

In all cases a *Judge-Rapporteur* and an *Advocate-General*, responsible for monitoring the progress of the case, are appointed by the President and the First Advocate General respectively.

Once the written procedure is closed, the parties are asked to state whether and why they wish a hearing to be held. The ECJ decides, after having read the report of the Judge-Rapporteur and having heard the views of the Advocate-General, whether preparatory inquiries are needed, what type of formation the case should be assigned to,

13) After the Lisbon Treaty: Art 263, 264 TFEU.

14) After the Lisbon Treaty: Art 265 TFEU.

15) After the Lisbon Treaty: Art 268, Art 340 §§ 3 and 4 TFEU.

and whether a hearing should be held.

If there is a hearing, the case is argued publicly. After the hearing, the Advocate-General delivers his opinion before the ECJ in open court. In cases where the ECJ holds that they do not raise new question of law, the ECJ can decide to give judgment without an opinion.

The judges deliberate on the basis of a draft judgment by the Judge-Rapporteur. Each judge of the formation concerned may propose changes. Decisions of the ECJ are taken by majority and there is no possibility of dissenting opinions.

Judgments and the opinions of the Advocates General are made available on the Court's Internet site on the day they are pronounced or delivered. Usually they are later on published in the European Court Reports.

Apart from this usual procedure there are some special procedures:

- If a request for a preliminary ruling concerns a question on which the ECJ has already ruled or if there is no reasonable doubt on how to solve the question or where the solution may be deduced from existing case-law, the ECJ may give its decision by reasoned order, citing in particular a previous judgment relating to that question or the relevant case-law.
- In expedited procedure the ECJ can give its rulings quickly in very urgent cases by reducing time-limits and omitting certain steps during the procedure. Such a procedure can also be used for references for preliminary rulings.
- Actions before the ECJ do not have automatic suspensive effect; however through applications for interim measures the parties may seek suspension of the operation of measures or other interim orders necessary to prevent serious and irreparable damage.

The procedure before the CFI and the EU Civil Service Tribunal are in most aspects similar to that of the ECJ; an important difference is that there are no Advocates-General.

IV. The procedure on preliminary rulings

As Community law is primarily applied by the national authorities and courts, it is of crucial importance that a uniform interpretation and application of Community law is assured. A direct appeal against national decisions to an EC-court is not feasible because it would diminish the status of national High Courts. The EC-Treaty solves this problem through the institution of "*preliminary rulings*" thus creating a system of close co-operation between national courts and the ECJ: The decision on the national level still lies exclusively with the national courts, no appeal against decisions of the High Courts to the ECJ being possible. However, if the question of validity or interpretation of Community law arises in a procedure before a national court, it may and in some cases is obliged to refer a question to the ECJ; the answer given by the ECJ is binding for national courts. Through this intermediate procedure the exclusive right to rule on the interpretation and

validity of Community law is preserved to the ECJ, while on the other hand the decision of the case still lies with the national courts. In this system national courts can today be perceived as enforcers of Community law and part of a Europe-wide judicial hierarchy with the ECJ sitting at the apex.¹⁶⁾ This system is not changed within the new EU; on the contrary Art 19 § 2 TEU new highlights the necessity of an effective protection of the Rights granted by Union law on the national level.

This system is also one of the reasons why the ECJ (and now Art 19 § 2 TEU new) demands an effective “*judicial protection*” in all matters of Community law: This means that an access to a court has to be provided which has the possibility or is even obliged to ask the ECJ for a preliminary decision. Thus the effective judicial control is the “*interface*” between national implementation of Community law and European Jurisdiction.

The main provision concerning preliminary rulings is Art 234 EC, which reads as follows:¹⁷⁾

“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.”

Apart from this central provision there are special provisions concerning preliminary rulings in certain areas, namely concerning “Visas, Asylum, Immigration and Other Policies concerning the Free Movement of Persons” (Art 68 EC) and Art 35 TEU concerning the third pillar; I will concentrate here only on Art 234 EC as the problems raised by this provision also arise in these special procedures. The Treaty of Lisbon eliminates those special provisions giving the Court of Justice of the EU full Jurisdiction concerning the Area of Freedom, Security and Justice.

16) Compare for instance *Craig/de Búrca*, EU Law 433.

17) After the Lisbon Treaty the corresponding provision can be found in Art 267 TFEU. There are only small differences: The new provision takes reference to the new Treaties; preliminary rulings can be requested with regard to “acts of the institutions, bodies, offices or agencies of the Union”; if a preliminary ruling is requested in a pending case with regard to a person in custody, the Court of Justice of the EU will deal with it with a minimum delay.

1. The questions that can be referred

As we can see from the text of Art 234 EC (Art 267 TFEU) there are two types of questions that can be referred to the ECJ:

1.1. Interpretation of Community law (after the Lisbon Treaty: Union Law)

Requests on interpretation can be made in relation to the *Treaties* as well as all *acts of the institutions of the EC*, like Regulations, Directives or International Treaties concluded by the EC. However, judgments and decisions of the ECJ cannot be the object of a referral; for the interpretation of judgments a special procedure is provided for in Art 43 of the Statute of the ECJ.

In connection with the interpretation of written law also questions about the existence and content of unwritten law can be referred.

Questions of interpretation of *national law* cannot be referred to the ECJ, neither questions on the compatibility of national law with EC-law. The ECJ only has the power to rule on the interpretation of Community law. However, this distinction is often hard to draw: For a national court often the question arises if national law is in accordance with Community law, and if the national court has to ignore it according to the rule of supremacy of Community law. Therefore at the core of a question of interpretation of Community law often lies the problem if a certain national regulation is compatible with Community law.

For this problem the ECJ has chosen a pragmatic solution: When he holds a questions for interpretation as inadmissible because it concerns national law, he sees himself fit to reformulate the question put to him on the basis of the facts submitted to him; in this way the ECJ gives the national court a useful answer enabling it to judge on the compatibility of national law with Community law.¹⁸⁾

This practice has two effects: *First*, as the ECJ does not see itself bound by the wording of the question by the national court and therefore feels fit to reformulate it, a national court may get an answer to a question that it has not referred to the ECJ but that has been reformulated by the ECJ. *Second*, rulings of the ECJ on the interpretation of Community law are often formulated in a way that they say that Community law is to be interpreted in a way as to prohibit — or not to prohibit — a certain national regulation; hidden behind the complicated wording is the clear message that a certain regulation complies or does not comply with Community law.¹⁹⁾

18) See for instance ECJ *Schöning-Kougebetopoulou*, ECR 1998, I-47, § 9; *Sodiprem*, ECR 1998, I-2039, § 22.

19) Compare for instance ECJ *Michaniki*, December 16th 2008, C-213/07: “. . . 2. Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of

1.2. Validity of acts of institutions of the EC

The question which has to be decided in cases concerning the *validity* of an act of an EC-institution is whether it is in accordance with the material or formal rules of Primary and Secondary Community law; if this is not the case, the act has to be declared invalid.

According to Art 234 EC, a referral concerning the validity can be made only in relation to acts of the institutions of the EC and the European Central Bank (ECB), that is the *Secondary Community law*. No such referral can be made in relation to Primary law and in relation to the validity of judgments and decisions of the ECJ. The Lisbon Treaty changes this competence insofar as now the validity *acts of the institutions, bodies, offices or agencies of the Union* can be put in question (Art 267 § 1 lit b TFEU); Primary Law still cannot be object of such a referral.

2. Courts and Tribunals with the competence to make a referral

Art 234 EC (after the Lisbon Treaty: Art 267 TFEU) and the jurisdiction of the ECJ distinguish between the *power* to refer a question to the ECJ and the *duty* to do so.

The *power* to refer a question lies with every *court or tribunal*. This term has an autonomous meaning and cannot be interpreted in the light of a national legal order of a particular Member State. The ECJ has developed a series of criteria upon which it decides whether a national institution can be qualified as a *court or tribunal*; generally speaking, the ECJ uses a broad concept of this term that also includes institutions that are no courts according to the national legal system, but for instance only *independent* panels.

The criteria for the qualification as a *court or tribunal* used by the ECJ can be summarised as follows:²⁰⁾

- the body must be established by law
- it should have permanent character
- its jurisdiction should be compulsory
- the procedure should be adversarial
- it must apply legal rules
- it must be independent

Other national institutions, especially administrative authorities, do not have the power to refer a case to the ECJ.

The power of a *court or tribunal* to refer a question concerning interpretation or validity to the ECJ, however, depends on some conditions:

The question put to the ECJ must be *relevant to the case* pending before the national

owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.”

20) Compare for instance ECJ *Cartesio*, December 16th 2008, C-210/06 § 55.

court; the assessment whether this is the case lies with the competent court or tribunal. According to the ECJ there is a presumption of relevance; the rejection of a referral is only possible, when it is obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action pending before the national court or to its purpose, where the problem is hypothetical, or where the ECJ does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. In order to be able to verify these conditions, to give the national court a useful answer and to enable the other participants of the procedure to give their statements, the ECJ consistently holds, that in the decision of the national court for referral the scope of the case and the factual and legal questions have to be exposed.²¹⁾

The referral can be made at any stage of the national proceedings as long as the case is pending before the national court or tribunal.

The parties to the national proceedings have the possibility to suggest a referral of a question to the ECJ, but they not have a right to it; national procedural rules must not bind the court or tribunal to the attitude of the parties.

An obligation to refer a case to the ECJ exists in two situations:

According to the ECJ, *all courts* — including the lower courts — are bound to make a referral if they think that a legal act of an institution (Secondary Community law) is *invalid* and for this reason do not want to apply it in a pending case. This is the consequence of the fact that national courts do not have the power to declare acts of EC-institutions void. The second obligation for referral concerns questions of interpretation arising before *a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law (last instance courts)*.

The assessment if a court is a last instance has to be made with a view to the particular procedure. Therefore not only High Courts are courts of last instance within the meaning of Art 234 EC (Art 267 TFEU), but all courts as far as there is no *judicial remedy* against their decision in a particular procedure. A remedy within the meaning of Art 234 EC (Art 267 TFEU) is only such an instrument that allows a decision on the merits;²²⁾ so for

21) Compare ECJ *Cartesio* December 16th 2008, C-210/06 § 67.

22) Compare for instance ECJ *Cartesio*, December 16th 2008, C-210/06: “76. The Court has already held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ within the meaning of Article 234 EC. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy . . .

77. That is true a fortiori in the case of a procedural system such as that under which the case before the referring court must be decided, since that system makes no provision for a preliminary declaration by the supreme court that the appeal is admissible and, instead, merely imposes restrictions with regard, in particular, to the nature of the pleas which may be raised before such a court, which must allege a breach of law.”

instance a constitutional complaint — upon which only the constitutionality of a decision can be reviewed — is no remedy in the sense of Art 234 EC (Art 267 TFEU). However, if an appeal is made to a constitutional court and a question of interpretation of Community law arises in his case, the constitutional court is a court of last instance and therefore obliged to refer questions of interpretation to the ECJ.

The obligation for referral of questions of interpretation by courts of last instance however is not absolute, there are several exceptions, which have been developed in the case of *CILFIT*.²³⁾ According to this judgment, no obligation to refer a case exists, when

- a similar case has been decided by the ECJ or where a consistent jurisdiction of the ECJ has solved this question (“acte éclairé”)
- or when the solution of the question is so obvious that there is no place for a

23) ECJ *CILFIT*, ‘ECR 1982, 3415: “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 [now Art 234 respectively Art 267 TFEU] 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 [now Art 234 respectively Art 267 TFEU] 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 [now Art 234 respectively Art 267 TFEU], 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 [now Art 234 respectively Art 267 TFEU], 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.”

reasonable doubt (“acte claire”). This exception is applied however rather restrictively by the ECJ.

Where an obligation to refer a question to the ECJ exists we must ask for the consequences of a violation of this obligation. Two such consequences are possible:

The violation of this obligation is a *failure to fulfil a treaty obligation* by the respondent Member State; therefore an action concerning this failure can be brought by the Commission or by another Member State.

Besides this a violation of the obligation to make a referral can result in *state liability* according to the principles established by the jurisdiction of the ECJ. State liability includes liability for all acts or failures to act contrary to Community law committed by any institution of a Member State including the legislature as well as courts and even High Courts.

Nevertheless, the conditions for state liability are rather strict:²⁴⁾

- the rule that has been violated must intend to confer rights to the individual
- there must be a serious breach of the law
- there must be a direct causal link between the breach of Community law and the damage sustained by the individual

These conditions also apply when the damage might have been caused by a national court of last instance. However, as far as the second condition is concerned—the serious breach of Community law—the ECJ holds that regard has to be taken to the specific functions of courts adjudicating at last instance, especially the need for legal certainty; reparation for damage allegedly caused by the decision of a court of last instance can be allowed only in exceptional cases, where the court has manifestly violated Community law. The ECJ has developed several criteria to assess a manifest violation in the case of *Köbler*, ECR 2003, I-10.239; one of those criteria is whether there has been a violation of the obligation of reference according to Art 234 § 3 EC.²⁵⁾

24) Compare for instance ECJ *Köbler*, ECR 2003, I-10. 239 § 51.

25) “52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of

Although the claim for reparation in case of an infringement is founded in Community law, the decision on the reparation has to be taken by national courts according to national law, which must be construed and applied according to the principle of equivalence and efficacy.

Of course this means that by giving a decision on the reparation the competent court also can decide about the failure of the High Court that therefore can be subject to the control of another judicial institution. Because of this it is important which national court has to rule on reparation founded on a violation of Community law by a High Court. In Austria it is the Constitutional Court that decides about actions on state liability caused by decisions of the Supreme Court and the Administrative Court. Until now there have been several such actions, none of which however has been successful.

3. Consequences of the referral of a question on the national procedure

A reference for a preliminary ruling in general calls for the national proceedings to be stayed until the ECJ has given its ruling. However, the national court may order protective measures which do not decide the material case.

4. The decision of the ECJ and its effects

The ECJ gives its preliminary rulings usually by a judgment, in exceptional cases — when a reference to previous judgments is possible — by a simple decision.

A preliminary ruling is binding for the national court having made the reference and for all other national institutions concerned with this case in the ongoing national proceedings.

As far as decisions declaring an act of an institution void are concerned, the ECJ further held that other courts also can consider this act void, which means in practice that such a ruling has a general binding effect. However, if the act is not declared invalid, this does not impede new procedures on the validity of this act which could lead to its quashing.

Concerning preliminary rulings on *interpretation* legal scholars usually hold that a “de-facto” binding effect exists and that especially courts of last instance are bound according to the jurisdiction of acte *eclairé* and the principles of state liability: If they want to depart

Article 234 EC.

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur and Factortame*, cited above, paragraph 57).

57. The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, cited above, paragraph 66).”

These principles have also been applied in the Case of *Traghetti del Mediterraneo*, ECR 2006, I-5177.

from a consistent jurisprudence of the ECJ they have to refer the question first to the ECJ, otherwise they risk liability.

Preliminary rulings have in principle retrospective effect; however having regard to the principle of legal certainty the ECJ may limit the temporal effect of his preliminary ruling to the time after the publication of his judgment.

V. Some statistics

At the end I want to give some statistical information based on the last published report on statistics by the ECJ for the year of 2008:

Until the end of the 2008 a total of more than 6300 requests for preliminary rulings have been made to the ECJ; Austrian courts have made 333 such requests since Austria joined the EU in 1995. The Administrative Court has made 57 such referrals, the average now being four cases a year.

In 2008 288 new requests for preliminary rulings have been made out of a total 583 newly initiated procedures.

The average duration for a preliminary ruling in 2008 was a little bit less than 17 month.