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The role of national courts and the preliminary ruling procedure - *Draft*

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1. The reference of a matter to the European Court of Justice for a preliminary ruling is one of those subjects in the study and application of Community law which has kindled massive interest amongst theoreticians and practitioners. They

include those studying the Community phenomenon *per se* and those comparing the Community system with the national ones in both substantive aspects and the jurisdictional guarantees offered to individuals by Community law, on the one hand, and national law, on the other hand.

The jurisdictional machinery of the European Community and the European Union is spread over three courts: the European Court of Justice (ECJ), the European Court of First Instance (CFI) and the Civil Service Tribunal (CST). There is no hierarchical structure between the three of these; each court has its own specific jurisdictions laid down in the Treaties (European Community, Euratom and European Union), and these are coordinated with one another in the Statute of the Court of Justice, contained in a protocol (no. 6) annexed to the Treaties.

Right through to the present, the powers to deliver preliminary rulings (and the same holds true for the power to make references to obtain such rulings), as provided for in Art. 234 of the EC Treaty (as well as Art. 68 as regards a number of specific matters dealt with in Title IV, i.e. "visas, asylum, immigration and other policies related to free movement of persons") remain exclusive powers of the ECJ, even though the Treaty of Nice amended the wording of the corresponding provision (Art. 225).

In point of fact, Art. 225(3), first sub-paragraph, lays down that the CFI shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Art. 234 "in specific areas laid down by the Statute". Up now,

however, nothing has been done to make extensions to this jurisdiction (the only relevant provision gives the Council powers, subject to a unanimous decision in accordance with 245 of the EC Treaty, to amend the Statute). Even in exercising any jurisdiction granted to it in this way, the CFI has the right to refer matters to the ECJ whenever it "considers that the case requires a decision of principle likely to affect the unity or consistency of Community law". Moreover, a judgment delivered by the CFI can also be subjected to a review by the ECJ (on a proposal from the First Advocate General) where "there is a serious risk of the unity or consistency of Community law being affected" (Art. 225(2), first sub-paragraph, and (3); and Art. 62 of the Statute of the Court).

The essential and central function of the ECJ – interpreting Community law – has been confirmed in Art. 19 of the Treaty of Lisbon (i.e. the new Treaty on European Union), which defines its role ("It shall ensure that in the interpretation and application of the Treaties the law is observed.") and in the Treaty on the Functioning of the European Union (Art. 256), which confirms the division of jurisdiction between the ECJ and the CFI along the same lines as at present. Article 19(1) (second paragraph), on the other hand, upgrades the Community function of national courts, which are also Community courts, by stating that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

2. It falls within the jurisdiction of the ECJ to ensure compliance with the principle of legality or the rule of law. Article 220 of the EC Treaty lays down that it "shall ensure that in the interpretation and application of this Treaty the law is observed". As the ECJ itself has confirmed in its judgment of 23 April 1986 in the *Les Verts* case (i.e. Case 294/83 *Parti écologiste "Les Verts" versus European Parliament*, European Court reports, p. 1339, point 23), the European Community "is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". The national courts also participate in the function exercised by the ECJ and they are defined as "common courts" compared with the ECJ, which assumes a "constitutional" or para-constitutional function. They are bound, by virtue of the principle of loyal cooperation laid down in Art. 10 of the EC Treaty, to ensure fulfilment of Community obligations in performing their respective functions. The duty of loyal cooperation imposed on the Member States includes the duty entrusted to their courts to guarantee "the legal protection which subjects derive from the direct effect of the provisions of Community law" (judgment of 27 March 1980 in Case 61/79 *Denkavit*, European Court reports, p. 1205) and to "interpret national law in the light of the wording and the purpose of [acts such as] directives in order to achieve the result referred to in the third paragraph of Article [249] third paragraph" (judgment of 10 April 1984 in Case 14/83 *Von Colson*, European Court reports, p. 1891).

The jurisdiction concerning preliminary rulings is the typical expression of this cooperation. The ECJ has acted as the driving force behind Community law and has played a role – and indeed continues to do so – contributing in a significant way to the construction of the Community system, sometimes putting itself in the place of the institutions in the context of the Community's legislative process or, to be more precise, filling the gaps in them.

The "milestone" judgments in Community law have been delivered as reactions to references for preliminary rulings. The ECJ has consolidated the general principles which form an integral pat of Community law and are thus sources of it – hence its creative or praetorian function.

3. The form of jurisdiction analysed in this presentation is called "preliminary ruling". The first reason for this is because the ECJ's judgment comes before that of the national court (preliminary in terms of time), and the second reason is because it is instrumental as regards the substance of the national judgment (preliminary in terms of function). From the material point of view, it is the "judiciary of one of the Member States" that has the powers to submit a question regarding the interpretation or validity of a Community legal provision. This involves a Community concept which does not necessarily coincide with the definitions inherent in national systems. So it depends on the jurisdictional function exercised by the body in question, called upon (as reaffirmed by the ECJ

in its judgment of 19 October 1995 in Case C-111/94 *Job Centre I*, European Court reports, p. I-3361) "to give judgment in proceedings intended to lead to a decision of a judicial nature". From this it follows that if the function exercised by a court or tribunal in a Member State is of an administrative nature, it has no powers to submit references for preliminary rulings to the ECJ. This also applies in the case of non-contentious proceedings, where the court's function, for instance, is one of verifying an approval request submitted by a company with a view to inclusion in a register of businesses. The same court would, however, be exercising a judicial function – and not an administrative one – if it were to hear a case brought against the granting of such an approval (judgment of 11 December 1997 in Case C-55/96 *Job Centre II*, European Court reports, p. I-7119). The ECJ's case-law has established a number of criteria, defined (in particular) as regards references made by arbitrators or administrative authorities, which have the effect of excluding such bodies from being of a jurisdictional nature. These are criteria that have become relevant in a number of national systems, like the Italian one, where it is only recently that the Constitutional Court considered itself as "judging" a controversy and referred the matter, for the first time ever, to the ECJ (by order dated 15 February 2008 in the case of *Presidenza del Consiglio* versus *Regione Sardegna*). The Constructional Court observes that "it is thus in its unique position as the supreme constitutional-guarantee body within the national legal order" in being called on to judge a dispute of constitutional legality expressed primarily as a conflict of the attribution of the state's sovereign powers

between central government and the regions and that it too is thus "a court or tribunal of a Member State" within the meaning of Art. 234 "and, moreover, a court of single instance".

On the subject of arbitrators, the ECJ emphasises that when it considers the characteristics of a court of law it "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" (judgment of 27 January 2005 in C-125/04 *Denuit*, European Court reports, p. I-923 and in its first judgment of 17 September 1997 in Case C-54/96 *Dorsch Consult*, European Court reports, p. I-4961). Arbitration set up by the parties ("arbitral colleges"), does not possess such characteristics (since "the parties are under no obligation, in law or in fact, to refer their disputes to arbitration"). Nor are those characteristics possessed by an administrative authority, such as the competition authority in Greece, nor the one in Italy either – in the absence of both the exercise of a jurisdictional function and full autonomy vis-à-vis the executive power (judgment of 31 May 2005 in Case C-53/03 *Syfait*, European Court reports, p. I-4609; and judgment of 9 September 2003 in Case C-198/01 *C.I.F.*, European Court reports, p. I-8055).

4. Moving on now to the object of a question referred for a preliminary ruling, this is (no more and no less than) either *(a)* the interpretation of the Treaty (primary

law) and of Community acts (secondary law) or *(b)* the validity (or legality) of Community acts.

The national court may ascertain the existence of a question of interpretation or validity, but it is the ECJ that must deliver the solution for the specific case. The ECJ interprets Community law, and the national court applies it, as interpreted by the ECJ. Any Community act may be the object of interpretation. This includes both binding acts and non-binding ones, such as recommendations (judgment of 13 December 1980 in Case C-322/88 *Grimaldi*, European Court reports, p. 4407), international agreements (including hybrid ones, judgment of 14 December 2000 in Joined cases C-300/98 and C-392/98 *Christian Dior and others*, European Court reports, p. I-11307) and also the judgments delivered previously by the ECJ itself on questions referred to it for preliminary rulings, where the referring national court may find itself encountering "difficulties in understanding or applying the judgment" (order of 5 March 1986 in Case 69/85 *Wünsche Handelsgesellschaft GmbH*, European Court reports, p. 947).

The only acts that can be subject to a validity (or legality) review by the ECJ, where there are various analogies with judgments declaring acts to be void as provided for in Art. 230, are those that can be declared void – in other words those that produce binding legal effects. This excludes recommendations and opinions as well as the ECJ's own judgments (whose validity can only be called

into doubt in the event of an imperative need to revise a judgment as provided for in Art. 44 of the Statute of the Court).

5. The national court must make sure that it puts the ECJ into a position in which it is able to arrive at a decision and it must thus furnish it with all the elements of law and fact that may be of use to it. In the absence of sufficient information, the ECJ has the right not to answer the questions and to declare them inadmissible. On the other hand, it does not have the powers to express a view on whether or not the national court holds jurisdiction in the matter on which the questions have been referred to it nor on the regularity of the national judgment, since these are aspects of national law (judgments of 16 September 1999 in Case C-435/97 *World Wildlife Fund*, European Court reports, p. I-5613 and of 7 December 1995 in Case C-472/93 *Spano*, European Court reports, p. I-4321). The ECJ, however, does maintain the right to verify whether or not the questions are relevant and thus admissible. In short, the national court must "define the factual and legislative context of the questions it is asking" and, at the very least, must "explain the factual circumstances on which those questions are based" for the ECJ to be able to give a ruling "which will be of use to the national court" (judgment of 26 January 1993 in Joined cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo*, European Court reports, p. I-393).

It is the prerogative of the national court, "which alone has direct knowledge of the facts of the case", to decide on whether or not to submit a reference for a preliminary ruling, since it "is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment" (judgment of 16 July 1992 in Case C-83/91 *Meilicke*, European Court reports, p. I-4871). However, in instances in which "the interpretation of Community law sought by the national court bears no relation to the facts or purpose of the main action", the question would be inadmissible (judgment of 9 October 1997 in Case C-291/96 *Grado and Bashir*, European Court reports, p. I-5531). Abuse or improper use of a reference for a preliminary ruling may occur in various possible situations:

a) when the national litigation is fictitious or artificial (judgments of 11 March 1980 in Case 104/79 and of 16 December 1981 in Case C-244/80 *Foglia versus Novello*, European Court reports, pp. 745 and 3045). In the second of these judgments the ECJ states that "the duty assigned to [it] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States");

b) when the Community provision is manifestly not applicable to the facts of the case (judgment of 19 December 1968 in Case 13/68 *Salgoil*, European Court reports, p. 602);

c) when the questions referred are purely hypothetical (*Meilicke*, cit.).

The rejection of a question, in the context of the general principle of cooperation between the ECJ and the national courts, would thus appear to be limited to the situation in which "it is quite obvious that the interpretation of Community law or the consideration of the validity of a Community rule [...] bears no relation to the facts of the main action or its purpose" (judgment of 25 April 2002 in Case C-183/00 *González Sanchez*, European Court reports, p. I-3901).

6. The possibility of referring a question to the ECJ for a preliminary ruling or the duty to do so, as laid down in the second and third paragraphs of Art. 234, depend on how the national court is qualified – i.e. on whether or not it is a court of last instance. If it is a court "against whose decisions there is no judicial remedy under national law" (third paragraph) it must bring the matter before the ECJ. Otherwise (second paragraph) it simply may do so. The reason for this is that if a court in the first category happens to make a mistake it is impossible to rectify it (the use of the term "judicial remedy under national law" is to be understood as meaning ordinary remedies, not ones that, of themselves, already constitute extraordinary situations). Moreover the view expressed by a court belonging to this category (in the case of Italy that would be the *Corte di Cassazione* or the *Consiglio di Stato*) carries a particular authority. The duty to bring matters before it, the ECJ states, is intended, in particular, "to prevent a body of national case-law not in accordance

with the rules of Community law from coming into existence in any Member State" (judgment of 4 June 2002 in Case C-99/00 *Lyckeskog*, European Court reports, p. I-4839). It also caters for the need not to prejudice the legal protection of the rights of individuals who would otherwise be deprived of redress through the courts (judgment of 30 September 2003 in Case 224/01 *Köbler*, European Court reports, p. I-10239). However, this is a duty from which some form of derogation is possible. The ECJ, has established various criteria to allow some flexibility, by stating that even a court of last instance "may" (rather than "must") make a reference to it when the question before it is one of interpretation (as opposed to a question of validity) and provided that question also satisfies certain characteristics. The ECJ's case-law has thus created the hypothesis of the optional nature of the reference for a preliminary ruling when the question raised before a national court "is materially identical with a question which has already been the subject of a preliminary ruling in a similar case". It further clarifies that this applies when the reply is evident from the ECJ's settled case-law, which has "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". Moreover, the application of the Community provision must be "so obvious that it leaves no scope for any reasonable doubt" on the solution to give to the question raised (the first of the above quotations is taken from the ECJ's judgment of 27 March 1963 in Joined cases 28-30/62 *Da Costa*, European Court reports, p. 59; while the others are taken from its judgment of

6 October 1982 in Case 283/81 *CILFIT*, European Court reports, p. 3415). When working on the basis of this latter hypothesis, which is derived from the theory of *acte clair* or the principle of *in claris non fit interpretatio,* the national court must proceed with caution, since it must make sure (i.e. "it must be convinced") that "the matter is equally obvious to the courts of the other Member States and to the European Court of Justice". The national court must also give due consideration to possible divergences between the various language versions and carry out a "comparison" of them. Even if it finds that the "different language versions are entirely in accord with one another", it must go on to consider that the "contents" will not necessarily be understood in the same way, given that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States". The final aspect the national court must consider is that "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" (*CILFIT* judgment, cit.).

The relaxation of the duty to make a reference remains subordinated to specified conditions, reconciling the role of the national court and the fundamental role of the ECJ. On the one hand, it appears opportune for the national court to be granted a certain degree of flexibility, both as regards the power to submit a question for a preliminary ruling of its own motion – i.e. regardless of whether such a request is made by the parties and regardless of the content of the reference

itself (judgment of 16 June 1981 in Case 126/80 *Salonia*, European Court reports, p. 1563; and *CILFIT*, cit.) – and as regards the point in time for submitting the reference. The question of timing, the ECJ affirms, "must be dictated by considerations of procedural organisation and efficiency to be weighed by that court", even though "it might be convenient in certain circumstances for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice" (judgment of 10 March 1981 in Joined cases 36/80 and 71/80 *Irish Creamery*, European Court reports, p. 735).

7. There is always a duty to submit a question for a preliminary ruling when the issue at stake is one of validity. That is not stated in the Treaty, but in the ECJ's own case-law. Moreover, it is a duty imposed on any court, not just a court of last instance. There must be a guarantee of legal certainty, and this would be jeopardised if a national court (any national court) were able, on each individual occasion, to declare an act to be legal or not. It is possible for the national courts to confirm the validity of an act "if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded" and thus "they may reject those arguments, concluding that the measure is completely valid". Such a ruling does not challenge the existence of the Community act. The other way round, however, they do not have the power to declare its invalidity, given

that the powers defined in Art. 234 essentially have the aim of guaranteeing the uniform application of Community law by the courts of the Member States. This need for uniformity is particularity pressing when it is the validity of a Community act that is at stake.

It is not possible to accept "divergences between courts in the Member States as to the validity of Community acts", because that "would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty" (judgments of 22 October 1987 in Case 314/85 *Foto-Frost*, European Court reports, p. 4199 and of 18 July 2007 in Case C-119/05 *Lucchini*, European Court reports, p. I-6199).

8. Safeguarding the rights of the parties whenever a national court, suspecting the invalidity of an act, stays its hearing and refers the matter to the ECJ, may require the adoption of protective measures, if there is a need for urgency and the risk of a serious and irreparable prejudice.

Any national court having doubts about the validity of a Community provision, may, while waiting for the ECJ's ruling, suspend the execution of the administrative measure based on said provision. The right of individuals to "obtain a decision granting suspension of enforcement, which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them" would otherwise be likely to be prejudiced or

"compromised" (judgment of 21 February 1991in Joined cases C-143/88 and C-92/89 *Zuckerfabrik*, European Court reports, p. I-415). The reason is that the interim protection that has been recognised by the ECJ must also be guaranteed in cases in which it is the compatibility of a national law with Community law that is in doubt (judgment of 16 September 1990 in Case C-213/89 *Factortame*, European Court reports, p. I-2433; the ECJ has recognised that the national court does have the power to suspend the application of the challenged national law until the point in time when it delivers its ruling on the question referred to it).

The national court must check not only the existence of urgency and the risk of serious and irreparable damage if the Community act were not to be suspended, but also the possible existence of a Community interest. Indeed, it must give consideration to the financial risk that the Community would face through suspension (the national court may impose guarantees, such as the deposit of a sum of money or seizure for security).

The prerequisites reiterated above are also stated by the ECJ for situations in which the parties do not yet request suspension but petition the court to order interim measures. In a case like this, interim protection consists in "the making of a positive order provisionally disapplying" the act in question. "The interim legal protection", the ECJ spells out, "must be the same, whether [individuals] seek suspension of enforcement of a national administrative measure adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit."

(judgment of 9 November 1995 in Case C-465/93 *Atlanta*, European Court reports, p. I-3761).

9. References to the ECJ for preliminary rulings are also possible in particular situations provided for in Art. 68 of the EC Treaty and in Art. 35 of the EU Treaty.

The first of these deals with the matters already mentioned of "visas, asylum, immigration and other policies related to free movement of persons" or to judicial cooperation in civil matters, where the power to make the reference to the ECJ (on questions of both interpretation and validity) resides solely with the court of last instance. The conditions applicable to it are those provided for in Art. 234 (Art. 68(1) actually states that "Article 234 shall apply to this title under the following circumstances and conditions..."). It follows from this that the national court ought to feel it has a duty to submit a reference to the ECJ, even if some doubt has been expressed as regards referring matters of interpretation (in the absence in Art. 68 of the explicit duty to make that sort of reference by way of contrast to the duty clearly expressed in Art. 234). However, paragraph 2 of that same article goes on to state that "in any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision [...] relating to the maintenance of law and order and the safeguarding of internal security".

Article 35(1) of the EU Treaty bestows jurisdiction on the ECJ to give preliminary rulings on acts adopted under the third pillar (Title VI, Provisions on police and judicial cooperation in criminal matters). It is thus possible to refer questions of either the validity or the interpretation of framework decisions and decisions and also questions concerning the interpretation of the conventions referred to in Title VI as well as questions concerning the validity and interpretation of the measures adopted in applying such conventions. The ECJ (in its judgment of 27 February 2007 in Case C-355/04 P, *Segi*, European Court reports, p. I-1657, point 53) has reaffirmed that the preliminary ruling procedure, considered in the light of the purpose of Art. 35(1), has to be applied extensively and that it must therefore include "all measures adopted by the Council and intended to produce legal effects in relation to third parties [...] whatever their nature or form". This thus also includes "common positions", although they are not mentioned in Art. 35. The extensive interpretation and the acceptance by the Member States of the ECJ's jurisdiction to deliver preliminary rulings leads to a significant alignment between the preliminary ruling jurisdiction granted to it by the EU Treaty and that granted to it by the EC Treaty. Some differences do, however, still persist, given that not all the Member States have made a declaration accepting the ECJ's jurisdiction and not all of them have made a declaration accepting that any court may submit such a reference. Spain, for instance, has declared that such a reference may only be made by a court of last instance, in which respect it differs from Italy (in making their declaration,

Member States may specify that the court of last instance has the duty to make a reference, in accordance with the wording of Declaration 10 annexed to the Final Act of the Intergovernmental Conference of Amsterdam).

Despite the provision (in Art. 67(2)) for the possible "adaptation" of the provisions relating to the powers of the Court of Justice after the transitional period of five years following the entry into force of the Treaty of Amsterdam (on 1 May 1999), no modification has been made to Art. 68. So this remains an exclusive power of the court of last instance. An extensive interpretation (as mentioned above) had been proposed for acts coming under the third pillar. Moreover, the aims underlying both the first and the third pillar are the same, and the ECJ has put framework decisions and directives on a comparable footing (Art. 34 of the EU Treaty and Art. 249 of the EC Treaty). In this way, it has underlined that the duty to interpret national law in conformity with Community law is binding on national authorities as regards both Union and Community acts and that it is impossible for the principle of loyal cooperation, as provided for in Art. 10 of the EC Treaty, not to be compulsory too as regards Title VI of the Treaty of European Union, considering the aims of the two Treaties: "It would [otherwise] be difficult for the Union to carry out its task effectively", given that police and judicial cooperation in criminal matters is "moreover entirely based on cooperation between the Member States and the institutions" (judgment of 16 June 2005 in Case C-105/03 *Pupino*, European Court reports, p. I-5285, points 34-42 as well as points 19 and 28 concerning preliminary ruling jurisdiction).

Despite the fact that the ECJ has no jurisdiction regarding the provisions contained in the second pillar (common foreign and security policy), at least not as a general rule, it has been confirmed, albeit indirectly, that it does have jurisdiction to deliver preliminary rulings.

The ECJ has actually accepted the reviewability of acts, such as common positions which produce legal effects in relation to third parties and whose legal base is, in part, a provision coming under the second pillar (Art. 15 of the EU Treaty) along with a provision of the third pillar (Art. 34(2)(a) of the EU Treaty). It states that "it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act" (judgment in *Segi*, cit., point 54, with regards to a common position on the application of specific measures for combating terrorism).

The aspects just discussed are going to be substantially modified with the entry into force of the Treaty of Lisbon, which is going to unify the pillars as regards both Art. 68 and Art. 35, thereby making it possible to exercise the jurisdiction provided for in Art. 35 for a transitory period of five years relative to the acts adopted before the entry into force of the Treaty of Lisbon (precisely in matters of police and judicial cooperation in criminal matters). Article 267 of the Treaty on the Functioning of the European Union is going to replace Art. 234 (Art. 10 of Protocol 36 to the Treaty of Lisbon contains transitional provisions) and, in foreseeing an increase in the number of questions referred for preliminary

rulings, it makes express provision (in paragraph 4) for a faster procedure when the person concerned is being held in custody).

10. The ECJ's judgments given in preliminary ruling cases are binding on the court that submitted the question. However, if doubts regarding interpretation still persist and if the national court feels it to be necessary, it is permissible for it to submit a new question to the ECJ (order in the *Wünsche* case, cit., point 15). However, the ECJ does not go any further than interpreting Community law, since it is not able to interpret national law. It can only do the latter indirectly in cases where a national provision makes reference to a Community provision in order to determine its own content or does not repeat the same content (judgment of 18 October 1990 in Joined cases C-297/88 and C-197/89 *Dzodzi*, European Court reports, p. I-3763):

a) In the light of the objective value of the jurisdiction exercised by the ECJ, its judgment assumes general applicability and it also has its effects beyond the specific case, giving its rulings on points of law (re.: conclusive nature of an ECJ judgment, see its order in the *Wünsche* case, cit., point 13). Its effectiveness is thus *erga omnes.* If the ECJ states specifically as regards a question of validity of an act of one of the institutions that, although its judgment "is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the

purposes of a judgment which it has to give" (judgment of 5 July 1977 in Joined cases 114/76, 116/76 and 119-120/76 *Behla Mühle*, European Court reports, p. 1211; and judgment of 13 May 1981 in Case 66/80 *ICC*, European Court reports, p. 1191). If the national court deems it necessary, after receiving one preliminary ruling on validity, it is permissible for it to submit a further question regarding validity, for example on the consequences of a ruling of invalidity (*ICC* judgment, cit.) or if the question does not deal with the same act but one with analogous provisions (judgment of 6 December 2005 in Case C-461/03 *Schul*, European Court reports, p. I-10513).

The idea of submitting a new reference on the same question or a similar one is possible in theory. It would, however, turn out to be superfluous (even for a court of last instance), and the ECJ would settle the matter by issuing an order of inadmissibility. It is always the case that a ruling of invalidity imposes the duties on the institutions to revoke or amend the act declared invalid (*ICC* judgment, cit.).

b) As regards its temporal effect, the judgment in a preliminary ruling case is retroactive or *ex tunc*. This therefore indicates that the provision concerned ought to have been understood and applied in accordance with the judgment from its time of coming into force. This effect extends to legal relationships arising before the judgment, provided they do not fall under a statute of limitation or can still be subjected to judgment. If that is not the case, the requirements of legal certainty would preclude such retroactive effects. The ECJ states, namely, that the

provision that has been the object of its interpretation "may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied," (judgment of 27 March 1980 in Case 61/79 *Denkavit*, European Court reports, p. 1205).

By way of analogy with the provisions of Art. 231 of the EC Treaty, in the event of an act being declared void, the ECJ does have the discretion to limit the temporal (*ex nunc*) effect of its judgments, taking into account precisely the requirements of legal certainty and legitimate expectations, the need for legal relationships established in good faith on the basis of a national legal provision up until a certain point in time to be considered valid as well as the uncertainty ascertained in Community provisions and their interpretation (judgment of 26 April 1994 in Case C-228/92 *Roquette Frères*, European Court reports, p. I-1445; as well as its early judgment of 15 January 1986 in Case 41/84 *Pinna*, European Court reports, p. 1). An *ex nunc* interpretative judgment must not, however, be permitted "to affect unduly the judicial protection of the rights which individuals derive from Community law", so "it is appropriate to make an exception to that limitation of the effects of this judgment for the benefit of those persons who, before the date of delivery hereof, initiated proceedings or made an equivalent claim" (judgment of 4 May 1999 in Case C-262/96 *Sürül*, European Court reports, p. I-2685). The same criteria (and even more so, considering the

parallelism already ascertained) apply in a case in which an act has been declared invalid (*ex nunc*), since an individual who would have taken legal action within the national system or who would have made an equivalent claim (as already stated) cannot "be deprived of [their] right to effective judicial protection in the event of a breach of Community law by the institutions" (*Roquette Frères* judgment, cit.).

c) The ECJ judgments also have an effect on divergent national judgments. A national judgment that has become *res judicata* following national court action (and all the national forms of legal redress thus having been exhausted) may be revised, provided that revision, generally speaking, is provided for in the national legal system, if it is indeed contrary to a subsequent ECJ judgment. This is, however, also subject to the condition that, where it would have been possible to make a reference for a preliminary ruling, the national court had failed so to do and had misinterpreted Community law" (judgments of 13 January 2005 in Case 453/00 *Kühne and Heitz,* European Court reports, p. I-837 and of 12 February 2008 in Case C-2/06 *Kempter,* European Court reports, p. I-411).

d) A general remark confirming the close ties between preliminary ruling proceedings regarding validity or legality and actions to have an act declared void concerns the possibility for natural and legal persons to use a reference for a preliminary ruling to obtain judgments on those acts, which, although they do not concern them directly (regulations and directives), they would not be able to challenge on the basis of Art. 230, fourth paragraph. The protection of individuals

is, however, limited by the needs for legal certainty. It is not possible to use a reference for a preliminary ruling as a means for obtaining a review of an act against which a natural or legal person would have been able to institute proceedings within a period of two months (Art. 230, fourth paragraph). The reference for a preliminary ruling, which it is, however, not possible to submit *ex officio* either, would otherwise be the "equivalent" of recognising that it was possible for "the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired" (judgment of 9 March 1994 in Case C-188/92 *TWD*, European Court reports, p. I-833).

11. It is worth making a number of comments on the urgent procedure as applicable to references for preliminary rulings, which came into effect recently (1 March 2008) and which is applicable to references concerning the Area of Freedom, Security and Justice.

This procedure is not the same as the expedited or accelerated procedures concerning both direct cases and preliminary references (Arts. 62a and 104a of the Rules of Procedure of the Court of Justice). It is governed by Art. 23a of the Statute of the Court of Justice and Art. 104b of its Rules of Procedure. Just like the expedited or accelerated procedure, the urgent procedure is based on the need

to handle the case quickly and represents an alternative to the ordinary procedure, subject to *ratione materiae.*

As is stated in the "Information note on references from national courts for a preliminary ruling" (OJEC C 64 of 8 March 2008 and the earlier note published in OJEC C 143 of 11 June 2005), the urgent procedure ought therefore only to be requested "where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible". The information note mentions certain situations as examples (cited below), but also states that it is not possible to provide an exhaustive list of such situations, particularly "because of the varied and evolving nature of Community rules governing the Area of Freedom, Security and Justice". The ECJ may decide to apply the urgent procedure either upon request from the national court or of its own motion, by a decision of the President of the Court, in the absence of such a request. It would, however, appear *prima facie* that the urgent procedure ought "to be applied in the following situations: "in the case of a person detained or deprived of their liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under Community law depends on the answer to the question referred for a preliminary ruling".

The court making the reference must briefly explain the reasons for urgency and, "in particular, the risks involved in following the normal preliminary ruling procedure". This (simplified) procedure must, above all, guarantee speed.

In a case of extreme urgency it is even possible to omit the written phase, and the time-limits for submitting statements or observations are shortened (but, at all events, are not less than ten days). Further, it is possible for the President to state the points of law to be dealt with, and it is also possible for the ECJ to impose a maximum length on written submissions. Another aspect contributing to simplifying and speeding up the procedure is that the Advocate General does not make any submissions, but is merely heard. A "balance" is, nonetheless, struck between speed and the rights of the individual, since, if that were not the case, the fundamental principle of effectiveness, which characterises the whole Community process, would be compromised, especially in a case in which the rights at stake are those of the personal liberty of the individual, which are accorded special protection precisely because they are fundamental individual rights.