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### *“The role of national courts and presentation of the preliminary reference procedure”*

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*(The opinions expressed in this presentation are those of the author and cannot be ascribed to the institution to which he belongs.)*

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1. *General introduction* – Without doubt, the preliminary reference represents the best-known and most-debated legal institution<sup>1</sup> in the entire panoply of judicial remedies provided by the legal order of the European Union (“EU”). It is no matter of chance that it has been described as the most effective and widely-used instrument for the protection of the rights derived by individuals vis-à-vis the institutions of both the EU and the Member States. Moreover, it is through the way in which the Court of Justice of the European Union (“the Court”) has used the preliminary-reference procedure that it has contributed significantly to building up the legal order firstly of the European Community and today of the European Union<sup>2</sup>.

Put extremely simply, the preliminary reference is an incidental and non-contentious procedure, [now governed by Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) and formerly by 234 TEC]<sup>3</sup> through which the national court or tribunal can or must (depending on circumstances) refer questions regarding either the interpretation or the validity of legal provisions of the European Union to the Court in Luxembourg, provided the solution to those questions is decisive for adjudicating the case it has before it.

On this point, it is worth recalling that, on average, preliminary questions represent approximately half the total case load pending before the Court of Justice<sup>4</sup>. Besides, it is not difficult to sense the reason for the success met by this original institution (essentially culled from national models for reviewing the constitutionality of domestic laws<sup>5</sup>), considering its nature as an instrument for the correct and uniform interpretation of EU law through a system of active, two-way cooperation between the national courts and the courts of the European Union in exercising what the Italians, in particular, refer to as the “nomofilactic function”<sup>6</sup> (i.e. acting as the guarantors of the meticulous observance of EU law and its uniform implementation).

Given the primacy of EU law, any national court (civil, criminal, administrative or fiscal), has the obligation to apply it in its entirety and to protect the rights which are assured to private individuals, disapplying any provisions of domestic legislation that are precluded by EU law, no matter whether they pre-dated or post-dated the EU legislation, without having to call for or wait for their prior removal through legislative channels or through any other constitutional procedure<sup>7</sup>. Nevertheless, it is the Court of Justice<sup>8</sup> that has the competence to furnish the correct interpretation of the EU legal provision and thus to guarantee its uniform application throughout the territory of the Member States, through a review mechanism, which is triggered upon the request of a national judicial authority seized of solving a specific dispute pending before it.

Article 267 of the Treaty on the Functioning of the European Union (“TFEU”)<sup>9</sup> thus stands out as a legal provision based on clear-cut demarcations between the jurisdictions of the Court of Justice and the national courts. Whereas the Court of Justice alone has the exclusive competence to supply the hermeneutical answer to questions referred by the national court or tribunal, it is the latter that have the exclusive competence to appreciate its pertinence as regards the specific solutions to the disputes pending before them.

Having obtained the ruling<sup>10</sup>, it is always up to the adjudicating (or *a quo*) court or tribunal to give judgment in the main proceedings, respecting what has been ruled by the Court of Justice, so that the ruling given by that Court of Justice is preliminary in both the temporal sense, since it precedes the judgment by the national court or tribunal, and in the functional sense, since it is instrumental as regards how the latter is moulded.

The object of the reference for a preliminary ruling is thus defined by the national court or tribunal through the way in which it formulates the questions referred to the Court of Justice, even if the latter has at times not hesitated to intervene directly in the wording of questions with a view to ensuring maximum cooperation with the courts of the Member States and with the declared aim of producing a ruling that is helpful for adjudicating in the main proceedings.

The reference for a preliminary ruling thus bears the stamp of a spirit of authentic cooperation by virtue of which the Court of Justice and the national courts work together on arriving at the decision, their ultimate aim being to satisfy the requirement of guaranteeing the uniform application of EU law, and, in doing so, they transcend any rigorous formalism, each respecting the jurisdiction held by the other.

In concluding this introduction, the preliminary-reference mechanism can be summed up as aiming to achieve a range of objectives: i) first and foremost, it guarantees uniformity in the application of EU law through the courts; ii) secondly, it exists in addition to the instruments of direct action for reviewing the legality of community acts, thereby providing legal protection for those who have limited standing to institute actions for annulment themselves; and iii) thirdly

and finally, it assures a form, albeit an indirect one, of reviewing the compatibility of domestic acts with EU law<sup>11</sup>.

**2. Object of preliminary references** – The Court of Justice of the European Union holds jurisdiction to decide on questions referred to it for preliminary rulings on the interpretation of EU law and on the validity of the acts adopted by the institutions, bodies, offices or entities of the Union. This general jurisdiction is bestowed on it by Article 19(3)(b) TEU and Article 267 TFEU.

National courts can be pictured as the devolved jurisdictions of EU law (or as “ordinary courts” or even “natural courts”, if that term is preferred), in the sense that they both can and must apply EU law within their jurisdiction and must guarantee the rights which private individuals derive from EU law, and it is the mechanism of the preliminary reference that the EU’s legal order offers them as the guarantee that it will be possible to resolve any reasonable doubt that may exist as regards the precise interpretation or validity of the EU’s legal provisions.

The essential prerequisite is, however, the existence of a genuine disagreement (i.e. not a fabricated one) over either interpretation or validity (which must also be of relevance for the decision to be taken in the main proceedings), since it is the Court of Justice that holds jurisdiction to resolve such matters by delivering preliminary rulings.

Having established that the *question* is well founded and having had it referred to the Court of Justice, what starts next is a particular form of procedure, which is frequently defined as “*judge to judge*”<sup>12</sup>. In the course of this procedure, the parties to the main proceedings have the opportunity of submitting their written and oral statements in an *inter partes* hearing, which is enlarged to include interventions by the institutions and by those Member States that want to take part in it. At the end of this the Court of Justice gives its ruling. This will not assure the definitive adjudication sought by the parties to the main proceedings, but it will furnish the national court or tribunal with the hermeneutic principle for solving the question in a way that will allow it to decide on the dispute in a definitive manner.

It is the same Article 267 TFEU that makes the distinction between “questions of interpretation” and “questions of validity”. The first of these deal with so-called primary law, in other words the Treaty provisions (including acts amending them). On a par with these are the protocols annexed to the accession treaties of other states as well as the general principles of EU law and the fundamental rights guaranteed at EU level, including the provisions of the Charter of Fundamental Rights of the European Union, which has acquired the “same legal standing as the Treaties”<sup>13</sup> with the entry into force of the Treaty of Lisbon. As far as so-called derived law is concerned, it too can be the object of questions referred for a preliminary ruling dealing with interpretation of the acts adopted by the institutions, including the international agreements entered into by the European Union<sup>14</sup>. With the entry into force of the Treaty of Lisbon, the acts of the institutions, bodies, offices and entities of the EU have now been added. The mention of the acts of the institutions, within the meaning of Article 13(1) of the TEU, must be understood as covering the acts of the European Parliament, the European Council, the Council, the European Commission, the European Central Bank and the Court of Auditors. The Court’s own judgments and orders can also be the objects of questions referred for interpretative preliminary rulings<sup>15</sup>.

The Court’s jurisdiction must include all the acts likely to have an impact on the decision in the main proceedings: first of all so-called “typical acts”, listed in Art. 288 TFEU (regulations,

directives and decisions), quite apart from the direct applicability of the provisions contained in them<sup>16</sup>, and secondly, more generally, any act of the institutions, including atypical ones, such as so-called *soft-law* acts, like recommendations, opinions and communications<sup>17</sup>.

The Court's interpretative competence, on the other hand, does not extend to national acts in ways that are not connected to the application of EU law, since the interpretation of national legal provisions is, as has been said, a matter for the national courts and not for the Court of Justice of the European Union<sup>18</sup>. On the other hand, in cases in which national law refers to the contents of an EU legal provision in order to determine the provisions to apply to a purely domestic situation in that country, the Court of Justice has recognised that it does hold jurisdiction<sup>19</sup>.

In relation to questions concerning the validity of acts, it might again be the acts mentioned above that are concerned (but not on the provisions of the Treaties which, on the contrary, function as “yardsticks” for evaluating the validity of the other acts). On this point it must be remembered that the TFEU makes provision for an efficient instrument for having the legality of such acts reviewed by the Court of Justice or the General Court (depending on the quality of the applicant) through actions for annulment, *ex Art. 263 TFEU*<sup>20</sup>.

The effectiveness of the safeguard available through by direct action for annulment, the acceptance of which involves the act being declared void *ex tunc*, is, nonetheless, limited by the requirement for such an action to be launched within a time limit<sup>21</sup>. It is felt, however, that the preliminary reference in matters of validity has assumed a role of considerable relevance in protecting the rights of private individuals, since it has in practice progressively taken on the function of an instrument of widespread review of the legality of EU acts, enlarging its scope in a manner analogous to that provided for direct actions<sup>22</sup>, but without, however, suffering from the constraints inherent in the legal standing of private individuals.

3. *Concept of “national jurisdiction” as established in the Court’s case-law – Article 267 TFEU* lays down that the competence to refer matters for preliminary rulings can only be used by bodies that satisfy the concept of holding jurisdiction in one of the Member States (i.e. of being a “court or tribunal”). It is thus necessary to determine the parameters for correctly delimiting such a concept. The main difficulties encountered are due to the fact that there are different organisational forms in the various national legal orders and differing ideas in each of them as to which jurisdictions should be eligible to refer questions.

The Court of Justice, in an operation to overcome the particularisms of the individual legal orders, given the needs for uniformity, has managed to work out a “generic” concept of “jurisdiction” for the purposes of EU law (for which Art. 267 TFEU now uses the term “court or tribunal” in its English version and “*organo giurisdizionale*” in its Italian version)<sup>23</sup>. In this it includes all the bodies that satisfy the following requirements<sup>24</sup>: i) they are established by law; ii) they are permanent or they exercise judicial functions more than just occasionally; iii) their jurisdiction is compulsory; iv) their procedure is inter-partes; v) they apply rules of law rather than ruling in equity; vi) they are independent and impartial vis-à-vis the parties in the case<sup>25</sup>. On the basis of such principles, interpreted in an elastic manner, the Court of Justice has ruled admissible questions referred to it by bodies forming part of the national judicial order in the course of interim, summary, winding-up and enforcement proceedings. The expression of “legal proceedings” must be understood in a broad sense, but in such a way as to exclude those proceedings that are purely procedural in the exercise of administrative functions even though performed by a judicial body (for example appointments or nominations), as well as those

proceedings in which the referring body performs a function that is not typically judicial, but merely advisory. Applying this yardstick, the right to submit preliminary references has been denied to bodies of private origin or, to be more precise, bodies set up by autonomous professional organisations<sup>26</sup>. Arbitration committees have likewise been excluded from the above-mentioned concept<sup>27</sup>, given the possibility of applying for a preliminary reference in the juridical phase that may come after the arbitration award and of having a review performed of it then<sup>28</sup>. The Court has adopted a different attitude, however, in the case of “quasi-arbitral” boards operating in the social, professional or commercial sector, when they have been established by law and endowed with compulsory jurisdiction<sup>29</sup>. In the case of public authorities, the Court has come down in favour of the admissibility of preliminary references, but with a series of distinctions. It has considered as admissible the preliminary references made to it by particular appeals bodies in matters of public contracts<sup>30</sup> and by the Spanish competition authority<sup>31</sup>, but has declared inadmissible the references from the Greek competition authority<sup>32</sup> and the Austrian supervisory body for the telecommunications sector<sup>33</sup>.

It must finally be pointed out that the body wishing to refer a question must possess jurisdictional quality not only in the institutional sense of the term but in the functional sense too, which means that, in dealing with the facts of cases, it must genuinely exercise the function of a court and not that of an administrative authority<sup>34</sup>.

In analysing, by way of example, the preliminary questions originating from Italy, the salient points are that the Court has felt that the concept of jurisdiction as it has established it does include certain functions that no longer exist, such as “guidice conciliatore”<sup>35</sup>, “pretore”<sup>36</sup>, “guidice per le indagini preliminari”<sup>37</sup>, “guidice del pace”<sup>38</sup>, “giudice cautelare” and “giudice del processo monitorio”<sup>39</sup> as well as the Council of State in the context of extraordinary petitions to the Head of State<sup>40</sup>. By way of contrast with this, the Court has considered that no judicial powers were held by the “procuratore della Repubblica” (public prosecutor) when acting as an examining magistrate<sup>41</sup>, the president of a district court when hearing non-contentious proceedings<sup>42</sup> (but the case is different again if the referring court is sitting to hear a complaint against the denial of an entry in a register or the refusal to approval company statutes)<sup>43</sup> and the Italian Court of Auditors when carrying out an ex-post review of the acts of the government or performing administrative functions<sup>44</sup>. The Italian Constitutional Court, which for a long time considered itself to be excluded from being considered as a “court or tribunal” for the purposes of Art. 267 TFEU<sup>45</sup>, recently changed direction, observing that, notwithstanding its unique position as the supreme constitutional-guarantee body of the internal legal order, it does act in the capacity of a court ruling on disputes by giving judgments in actions brought before it, such as those regarding disputes over the attribution of powers. Considering itself therefore to be a national court or tribunal against whose decisions there is no judicial remedy under national law, it thus proceeded to lodge its first preliminary reference<sup>46</sup>, to which the Court of Justice has now replied with its judgment of 17 November 2009, *Presidente del Consiglio dei Ministri v. Regione Sardegna* (C-169/08, ECR p. I-10821)<sup>47</sup>.

4. *Option and obligation to refer a question* – Within the system of referring questions for preliminary rulings, the position in which the national courts find themselves varies depending on whether or not a judicial remedy is available under national law against the judgments they deliver. If so, the court has an option of referring a question<sup>48</sup> (Art. 267(2)); if not, there is a genuine obligation for it to make a preliminary reference (Art. 267(3)).

On this point, the Court has made it clear that what counts for the purposes of identifying the obligation to submit a question for a preliminary ruling is not the formal position at the top of the

hierarchy, and thus a question of rank occupied by the court in the national judicial order<sup>49</sup>, but rather by the genuine possibilities that the judgments of that court would have of being subjected to an ordinary form of appeal<sup>50</sup>.

Moreover, it is not possible to exclude the possibility that there may be certain real cases of litigation in which it happens there is no court that is obliged to lodge a preliminary reference. This will happen every time that the party concerned does not take the matter as far as the court against whose decisions there is no judicial remedy under national law, by failing to exhaust all the available judicial remedies, and it may also happen that the lower court has given its ruling without having made use of the option of referring a question. In substance, should a court or tribunal not feel bound to make a reference, its decisions, on the other hand, must always be open in a specific case for parties to attempt a remedy, capable of having direct repercussions on the relevant aspects of EU law<sup>51</sup>.

**5. Exceptions to the obligation to refer a question for a preliminary ruling as they concern courts against whose decisions there is no judicial remedy under national law** – In interpreting the scope of the obligation to refer a question as it affects courts against whose decisions there is no judicial remedy under national law, the Court of Justice has, nonetheless, introduced a number of elements of flexibility, thereby making the distinction between them and other courts less clear-cut. It is not necessary, in particular, to refer a question to the Court of Justice when: i) the question raised regarding EU law has no influence on the case being heard; ii) the answer is to be found in settled case-law, independently of the nature of the proceedings in which the question has arisen (the so-called theory of “*acte éclairé*”); or iii) the correct application of EU law is so obvious as to admit no scope for any reasonable doubt as regards the solution to be given to the question raised (co-called theory of “*acte clair*” derived from the well-known principle of “*in claris non fit interpretatio*”)<sup>52</sup>. Appraising the possible configuration of such an ultimate eventuality has to be done as a function of the inherent characteristics of EU law, the particular difficulties in interpreting it, especially as regards language differences, and the risk of divergences in judgments within the Union. In the final analysis, the court or tribunal deciding not to refer a question must be convinced that the conclusion that seems obvious it would have to be equally obvious to the courts and tribunals of the other Member States and to the Court of Justice itself<sup>53</sup>. The presence of one of the three conditions mentioned above obviously does not prevent the court or tribunal concerned from seizing the Court of Justice, although it might not be strictly obliged to do so<sup>54</sup>.

Finally, as regards the existence of a precedent from the Court of Justice on a question concerning the validity of an act, it is necessary to distinguish between two hypotheses: i) if the precedent concerns a judgment declaring the EU act to be valid in its entirety, the court or tribunal against whose decisions there is no judicial remedy under national law has no reason not to stick to that ruling and to draw the immediate consequences from it for its own judgment in the main proceedings (nonetheless maintaining the discretion of referring a new question to the Court of Justice); ii) if the precedent concerns a judgment declaring the invalidity of the act, there is no obligation to make a reference, neither by courts or tribunals against whose decisions there is no judicial remedy under national law nor, even less so, by lower instances.

**6. Preliminary references in questions of validity** – Despite the fact that Art. 267 TFEU does not impose the obligation on courts or tribunals against whose decisions there is a judicial remedy under national law to make preliminary references, the Court of Justice has ruled that they are not permitted to declare a community act to be invalid, but must ask the Court to rule on its validity<sup>55</sup>. In support of this interpretation, the Court has stated that “differences between

courts of the Member States as to the validity of [Union] acts would be liable to jeopardise the essential unity of the [Union's] legal order and undermine the fundamental requirement of legal certainty”<sup>56</sup>.

In the final analysis, although a domestic court or tribunal against whose decisions there *is* a judicial remedy under national law may abstain from submitting a question of interpretation to the Court of Justice, in cases in which it is, however, confronted with a question of validity, it has two possibilities: i) it must refer the question if it has any doubt whatsoever as regards the validity of the Union act; ii) it is not forced to do so if it has well-founded grounds for believing that the Union act is valid (nor, moreover, is it forced to refer the question in cases in which the Court has already declared the invalidity of the EU act concerned<sup>57</sup>).

The Court has, however, accepted that any national court holding serious doubts concerning the validity of an EU act may either suspend the implementation of the national act based on the EU act, provided it refers the question of the validity of the latter to the Court<sup>58</sup> and provided that applications have been made for the national court to order interim relief<sup>59</sup> or suspend the application of said EU act<sup>60</sup>. In this potentially awkward situation, the Court of Justice has again shown that it is particularly sensitive to the need to look after the rights of private individuals, who would suffer a clear prejudice if the national court or tribunal were not able to grant them interim relief either, having to wait for the definitive ruling of the Court of Justice as regards validity. Considering the time needed to process a case (17 months on average in the recent past), this would otherwise mean the substantial negation of the possibility of effectively invoking interim relief.

6.1 *Relationship between ascertaining validity through a reference for a preliminary ruling and actions for annulment* – As regards the relationship between preliminary references on the subject of validity and actions for annulment, the Court has made it clear that any applicant who had failed to make use of the latter remedy against an act, despite clearly having had the opportunity of using it, having been duly informed of that possibility, would, after the end of the period for instituting an action for annulment, be excluded by the principle of legal certainty from being able to challenge the self-same act via the route of a preliminary question to ascertain its validity<sup>61</sup>. Such exclusion, however, is only effective in practice if it can also be shown that an action for annulment would manifestly be admissible<sup>62</sup>.

7. *“Sanctions” for failure to comply with the obligation to refer a question for a preliminary ruling* – It is an infringement of Art. 267 TFEU for the national court or tribunal, although satisfying the conditions that establish the obligation to submit a preliminary reference, to fail to do so. Such an infringement is likely to entail the liability of the Member State concerned, against which it is possible to institute an action for infringement as provided for in Art. 258 TFEU<sup>63</sup>. A failure to fulfil the obligation to lodge a preliminary reference may also give rise to actions for compensation against the Member State concerned on the grounds of the extra-contractual liability of the latter<sup>64</sup>. As the Court itself has clearly said, “the principle that Member States are obliged to make good damage caused to individuals by infringements of [EU] law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance”<sup>65</sup>. As far as Italy is concerned, it must be remembered that the Court of Justice has made it clear that EU law, on the one hand, precludes national legislation that generally excludes the liability of the Member State for damage caused to private individuals as a result of an infringement of EU law due to a court adjudicating at last instance (in the case in point the Supreme Court of Cassation) and, on the other hand, also

precludes any national legislation limiting the existence of liability solely to cases of intentional fault and serious misconduct on the part of the national court or tribunal<sup>66</sup>.

8. *Clear-cut “division of labour” and cooperation between national courts and the Court of Justice* – As already stated, the Court of Justice does not rule on whether a national law apparently in conflict with EU law is indeed precluded by it. Its competence here is limited solely to providing the domestic court with the elements of interpretation to be drawn from EU law and helping to put it in a position to rule on such compatibility by giving its judgment in the main proceedings.

In going further than abstractly begging the question, the Court has, however, rather circumvented the problem, but has managed to arrive at a result substantially identical by using formulae along the lines of: “*provision x of the Treaty (or regulation or directive) precludes a provision of national law that lays down that...*”. It thereby transforms an abstract hypothetical question into a problem of a conflict between two legal orders, which it is the national court’s job to settle. It is thus possible to use the preliminary reference to obtain (as has already been said) a ruling, albeit an indirect one, on the compatibility of the domestic legal provision with EU law, and the effects of this are not very different from those resulting from a judgment based on Art. 258 TFEU, as the outcome of infringement proceedings instituted by the Commission.

On the one hand, the Court of Justice provides the adjudicating court with a binding interpretation of EU law and also has the monopoly of reviewing the validity of the acts of the Union, but, on the other hand, it uses such functions in a way that fully respects the jurisdiction of the adjudicating court or tribunal. It is only the latter that has the jurisdiction to decide whether or not to refer the question<sup>67</sup>, compile the case file and state the facts of the case and thus to interpret and apply national law as well as EU law to the case before it.

The adjudicating national court or tribunal is also free to decide at what stage in its proceedings to refer a question to the Court of Justice<sup>68</sup>, even though the latter has stated that it is preferable to wait to have all the necessary elements of fact and law available to the national court or tribunal, so that it is able to present a picture of the main proceedings to the Court of Justice that will put it in a position to give a helpful ruling<sup>69</sup> and also to have conducted the *inter partes* hearing<sup>70</sup>.

In the absence of rules stating in advance what type of mechanism is to be used for referring questions for a preliminary ruling to the Court of Justice, there is an absolute freedom of form as to how this is to be done<sup>71</sup>, and the national court is likewise free to decide on its contents.

In the dialogue, which comes into being in this way between the national court or tribunal and the Court of Justice, it is thus the prerogative of the former, which is the only court to have full knowledge of the facts of the case, to be in the more suitable position to assess the pertinence of the questions of law that have been raised and the need to have a preliminary ruling before it can adjudicate<sup>72</sup>. It follows from this, according to the Court of Justice, that, provided the questions raised by the referring court or tribunal do deal with the interpretation of EU law, it is required, as a matter of principle, to give a ruling<sup>73</sup>.

Such a strict definition of roles would, however, prevent the Court of Justice from checking the wording of the question referred by the national court or tribunal, from assessing the truthfulness and exactitude of the reconstruction made in the order for reference and, consequently, from judging on the actual relevance of the question referred. It is a matter of fact that for a long

period of time the Court of Justice used indeed to be reluctant to examine the pertinence of the questions submitted to it for preliminary rulings.

Despite that, the competence of the national court or tribunal cannot be considered exclusive and must be reconciled with the need to preserve the function assigned to the Court of Justice, which is that of contributing to the administration of justice in the Member States and not of expressing consultative views on general or hypothetical questions<sup>74</sup>. The Court of Justice has thus progressively established a series of requirements which it also uses to evaluate the relevance of the questions referred and, if appropriate, to declare them inadmissible.

8.1 *The “inadmissibility” of questions referred for a preliminary ruling* – Although it is far from easy to categorise the various types of inadmissibility orders issued by the Court, there are, however, various recurrent motifs in those rulings<sup>75</sup>. First of all, the Court has declared that questions referred for a preliminary ruling are inadmissible if they are manifestly irrelevant for the solution to the main proceedings. On that point, it may be true that assessing the relevance of the questions (the assumption being that they are relevant) is a matter for the court or tribunal making the reference, but it is equally true, however, that, in respect of the spirit of reciprocal cooperation, the Court of Justice does check that the referring court has not exceeded the limit of the discretionary power accorded to it by law<sup>76</sup>. In this way, preliminary questions have been declared inadmissible if they have no bearing on the actual circumstances or the subject-matter of the main proceedings<sup>77</sup>, if they concern proceedings already terminated<sup>78</sup>, if they are general and merely hypothetical in nature<sup>79</sup>, if they deal with questions of interpretation the solution of which is not necessary for adjudicating the main proceedings<sup>80</sup> and, finally, if they relate to situations in cases that do not fall within the ambit of EU law<sup>81</sup>.

Secondly, the Court of Justice has ruled as inadmissible those preliminary questions which figure in the reference document but from which the referring court or tribunal has omitted to include the necessary elements of fact and law for it to be able to provide a helpful answer<sup>82</sup> or at least to explain the *de facto* hypothesis on which such questions were based. In the absence of such elements, the Court is indeed not in a position to assure the rights of interested persons entitled to submit observations or to supply the national court with an answer that is helpful to it<sup>83</sup>.

Thirdly, the Court has ruled as inadmissible questions arising in the context of fabricated or friendly litigation<sup>84</sup>. It has, however, displayed extreme caution in this respect, hesitating to consider pleas as inadmissible on the grounds of the artificial nature of the national dispute<sup>85</sup>. The admissibility of the preliminary reference has thus not been ruled out, even in cases in which the parties were in agreement as regards the result to be obtained, provided that the question *per se* dealt with an objective need inherent in finding the solution in the main proceedings<sup>86</sup>.

The declaration of inadmissibility thus basically remains the *extrema ratio*, with the result that, still viewed from the point of view of the full cooperation inspiring the dialogue between the Court of Justice and the national court or tribunal, it is possible for the former to ask the latter to provide clarifications, so as to dispel any doubt as regards the admissibility of the question<sup>87</sup> (see, on this point, Art. 104(5) of the Rules of Procedure). In the same way, the Court has not been backward in intervening in the questions referred to it, rewording those asked in an inappropriate manner, merging those that are too numerous or repetitive, or placing them in a meaningful hierarchical order or in a different logical order. The Court has, moreover, felt, when faced with badly worded questions or those exceeding the limits of the competence laid down in Art. 267 that it ought nonetheless to deal with those aspects of EU law that warranted interpretation (or a ruling on validity).

In an analogous way, when a question of interpretation is referred to the Court, it would be illogical to prohibit it from giving a ruling on invalidity where the legal prerequisites are met<sup>88</sup>. It is the principle of “*effet utile*” (effectiveness) that is always at stake, corroborated by the one of judicial economy, which make it legitimate for the Court to issue declaratory judgments on the invalidity an EU legal provision on grounds of a different primary provision of EU law from the one indicated by the referring court or tribunal<sup>89</sup>, which constitutes an evident departure from the well-known principle of that the ruling should correspond to the question asked.

8.2 *Food for thought on the cases in which questions referred from Italian judicial bodies for preliminary rulings have been rejected* – Those decisions by the Court of Justice in which it has refused to give an answer to preliminary questions lodged with it by Italian courts or tribunals may be subdivided into orders and judgments. In the case of the orders, the questions are rejected in their entirety,<sup>90</sup> whereas in the case of the judgments some of the questions asked are rejected, while answers are given to the others<sup>91</sup>. It is possible to trace a total of 64 such decisions handed down by the Court since its inception through to the present dealing with Italian questions (of which no fewer than 34 are orders)<sup>92</sup>, which is certainly more than marginal. Looking just at all the cases declared inadmissible *stricto sensu*, it emerges that, out of a total of 132, no fewer than 44 have been Italian<sup>93</sup>.

Turning next to the merits of the various decisions, it has to be observed that they substantially reflect what was said above in more general terms. It is possible, in point of fact, to pick out decisions in which the Court has declared the questions inadmissible (in whole or in part), others in which he has declared that it does not hold jurisdiction and yet others in which it has used the formula “not proceed to judgment”<sup>94</sup>.

As regards the subjects dealt with, by far and away the largest number of questions rejected by the Court have turned on the interpretation of the provisions concerning competition and/or aids, often in conjunction with or as an alternative to asking for interpretation of the provisions concerning free movement. What are rare, on the other hand, are the cases concerning the interpretation of specific provisions or those of a technical nature<sup>95</sup>.

The circumstance that the decision to refer a matter for a preliminary ruling is not made public, considering that there is virtually no reference to it in the Court’s order (or judgment), constitutes an impediment to any attempt at analysis from the outside. It must, however, be pointed out that, above all in more recent cases, some of the questions referred from Italy that were later declared inadmissible were not necessarily characterised by being too scanty (and, if anything, erred on occasions on the side of being too detailed), but by the fact that they have not succeeded in explaining the reasons underlying the submission of the questions for a preliminary ruling. The Court’s orders, as far as they are concerned, have also more recently demonstrated a greater effort to state their reasons, even if they appear similar to one another.

It also appears obvious that there are cases (even if not many in point of fact) in which the orders for reference bend over to accommodate the interests of the parties, who hope to overturn the national provision with the assistance of the Court of Justice by invoking generic provisions or principles of EU law. In such cases, in which the national court or tribunal has failed in its filter or mediation function between the parties to the case and the Court of Justice, it is the weakness of the arguments stated in the order for reference, although often concealed behind an impressive judicial and normative reconstruction, that constitutes the main reason for the Court’s rejection of the questions referred to it.

One final concept, on the other hand, concerns the lack of linearity pursued by the Court in its approach to tackling the subject of the admissibility of the questions submitted for a preliminary ruling. One case that springs to mind, for instance, is that of the two questions referred by the justice of the peace in Bitonto<sup>96</sup> concerning compensation for the losses suffered by consumers at the hands of insurance companies guilty of having purported to be part of an agreement endorsed by the Italian competition authority, allowing them to fix the premiums for third-party motor insurance policies. In that matter, despite the fact that the orders were substantially similar, the Court did not feel inclined to reject them a second time, notwithstanding the exceptions invoked by the parties<sup>97</sup>.

9. *Effects of preliminary rulings* – The effectiveness of preliminary rulings is not dependent on any particular enforcement mechanism. In the absence of any details in the Treaty as far as this is concerned, the question of effectiveness needs to be examined from two different points of view: i) inside the particular proceedings, i.e. with reference to the same proceedings as those in which the question was raised and possible higher instances dealing with the same matter later on; ii) beyond the particular proceedings, which means relative to all the other national proceedings in which the EU legislation examined by the Court is also applied. From the first of these points of view, it is obvious that the effect of the judgment is obtained through its being absolutely binding on the adjudicating court (as well as on the other jurisdictions that may possibly be called on to hear the same dispute in the event of it going on to appeal or even cassation) and indirectly on the parties too<sup>98</sup>. In such a case, the only possible action open to the adjudicating court or tribunal is to go before the Court of Justice again to ask for further clarifications<sup>99</sup>, to put a new question of law or new elements of appraisal to the Court, which might induce it to give a different solution to a question already raised. What it cannot do is challenge the validity of the judgment<sup>100</sup>.

It is evident that if ever the Court of Justice were to regard it as necessary to resolve more questions than those actually referred to it by the national court or tribunal, then the binding effect would not necessarily extend to such additional rulings, given that the adjudicating national court or tribunal might feel that these other rulings were not pertinent for the solution of the specific dispute. What the national court or tribunal does by this is to keep intact its own exclusive competence to check, according to its own wise judgment, the relevance of the question for the solution of the dispute brought before it<sup>101</sup>. The binding effect of the Court's ruling is absolute in its operative part. The same applies to the grounds for the decision, in all the passages linked to the conclusion expressed in the operative part, whereas the frequent *obiter dicta* passages essentially assume their relevance beyond the particular proceedings.

As far as the effects beyond the particular case are concerned, it is now an established principle that the existence of a precedent from the Court of Justice removes the obligation on the court or tribunal against whose decisions there is no judicial remedy under national law to refer the matter for a preliminary ruling<sup>102</sup>, even if it has also been established that it maintains the option of submitting the question to the Court's scrutiny in order to provoke it to "*overrule*" a precedent when it has doubt on what precisely the latter means. On the other hand, given the very nature of judgments and orders issued through the preliminary-reference procedure, which take the form of rulings on points of law, it is impossible to deny the substantially binding scope of the provisions interpreted by the Court and thus the fact that such judgments and orders do indeed produce *erga omnes* effects<sup>103</sup>. Moreover, the fundamental purpose of ensuring the uniform application of EU law at the very heart of the preliminary-reference procedure would be thwarted if the Court's interpretative rulings were to have an impact solely in the national dispute that was at the origin of the questions lodged with the Court.

As regards rulings in matters of validity in which the Court finds that an act of the Union is indeed valid, the effect is strictly limited to the case in point and the specific reasons for the action, despite which another court called on to tackle a similar question, will be able to make use of such a ruling<sup>104</sup>. Whenever the Court's ruling on the question of validity is issued with reference to a particular "legislative parameter", that will not prevent the national court or tribunal from bringing the question up again subsequently but linked to any other "legislative parameter" not considered the first time round. The other way round, however, whenever the Court's ruling is one of the invalidity of the challenged act, it must be impossible for the court or tribunal lodging the question, as well as any other court or tribunal, to be able to apply the act declared invalid. If it were to be otherwise, the decision taken by the latter would be irredeemably thwarted and would leave considerable latitude for abuses. It is, however, useful to point out that the incidental judgment of invalidity does not *de iure* produce that same *erga omnes* effects as does the judgment declaring an act void in an action for annulment. In other words it does not produce the constitutive effect *per se* of setting the act aside, although it is certainly of *de facto* relevance. This distinction is confirmed by the working of Art. 277 TFEU (dealing with the so-called objection of illegality), which makes it possible to disapply a regulation if it turns out to be invalid in the context of a pending dispute within the European Union. Assuming such a hypothesis, such a judgment of invalidity is like a mirror image of a preliminary ruling, and it has been established that its effects are limited to the court or tribunal to which it is addressed.

10. *Temporal effects of preliminary rulings* – Preliminary rulings have a retroactive or *ex tunc* effect, in the sense that the EU legal provision that was the object of the question referred will have to be interpreted in conformity with the Court's clarification going right back to the time when it entered into force. The basis of this is the underlying assumption that the Court of Justice does nothing other than to clarify and spell out the scope of the legal provision, which must or should have been understood and applied in that way by the referring court or tribunal to legal relationships established before the interpretative judgment<sup>105</sup>. By analogy, in the case in which it is ruled that the EU act is invalid, this invalidity will have effect from the moment of its adoption<sup>106</sup>. Such a principle does not allow for exceptions with regard to its effects inside of the particular proceedings. As regards the extent of the effects produced beyond the particular case, the retroactivity rule may be mitigated through certain conditions, such as the principle of legitimate expectations and the "innovation" in scope brought about by the preliminary ruling. In a number of cases, the Court of Justice has reserved the power for itself to set temporal limits for the application of its own judgments in both interpretative and validity questions<sup>107</sup> (by an analogous application of Art. 264(2) TFEU), in particular, when its rulings, if applied retroactively, would be the cause of considerable internal financial repercussions<sup>108</sup>. It is therefore only in exceptional circumstances that the Court, in consideration of the serious upheavals that its ruling could cause within established legal relationships entered into in good faith, has the option of limiting the possibility for the parties affected to invoke the provision interpreted with the aim of reopening the discussion of established situations. At the very most, the Court's interpretation might be effective for those who had already filed their claims before a court or tribunal before the preliminary ruling became known<sup>109</sup>.

The Court of Justice has exclusive competence to place temporal limits on the effects of a preliminary ruling, and any such limit must be stated as such in the judgment providing the interpretation requested or declaring invalid the act that had been challenged<sup>110</sup>. The national courts and tribunals, on the other hand, are not permitted to apply considerations of legal

certainty or protection of legitimate expectations with regard to the *ex tunc* effect of preliminary rulings<sup>111</sup>.

11. *Indications of procedural aspects* - The procedural rules governing references for preliminary rulings are fairly scanty (those concerned are, in particular, Articles 23 and 23a of the Statute of the Court of Justice and Articles 103, 104, 104a and 104b of the Court's Rules of Procedure)<sup>112</sup>. To begin with, once the order by the national court or tribunal has been received by the Registry and it has been attributed its serial registry number, it is communicated through the Registrar to the parties in the pending case as well as to the referring court or tribunal (and usually to the lawyers whose addresses are used by the parties), to the Member States and to the Commission and also to the Council and the Parliament, in those cases in which the act for which the interpretation has been sought originates from the latter. After communication of the order for reference, the interested persons have the possibility of submitting written statements (known as "observations" in Court jargon) within the strict and non-extendable deadline of two months (apart from an extra ten days on account of distance)<sup>113</sup>. The purpose of the observations is to suggest solutions to the Court of Justice for the questions raised by the national court or tribunal, explaining the theses proffered in support of the solutions proposed<sup>114</sup>.

On the basis of the new Art. 104(4) of its Rules of Procedure, the Court may decide to omit the oral stage if none of the parties and none of the interested persons entitled to submit observations actually submits a question (within one month of communication of the statements) indicating the reasons why it wishes to be heard. Once the hearing has been fixed (if there is to be one), its date is communicated to the other parties in the case and to the interested persons (who are allowed to participate even if they have not submitted any written observations beforehand). A (concise) report for the hearing<sup>115</sup> is sent to the parties at least three weeks before the date of the hearing to gather any observations there may be. The definitive text of the report (available only in the language of the case) is then made available to the public at the entrance to the courtroom in which the hearing is to be held.

It should be noted that the report for the hearing is preceded in the Court's internal organisation of its work<sup>116</sup> by a preliminary report ("*rapport préalable*") drawn up by the judge-rapporteur and discussed in the course of the periodic general meetings. This document, drawn up in French (the working language of the Court's judges), contains a brief summary of the facts, the applicable legislation and the arguments presented by the parties. In it, the judge-rapporteur proposes the organisational arrangements for the proceedings (length of the discussion, composition of the chamber, possible written questions to the parties, etc.) and put forward an initial personal appraisal of the case. The written phase of the proceedings is thus clearly of fundamental importance, given that it is extremely unlikely that any elements of interest to the Court are going to emerge in the course of the oral phase (all the more so in cases that are of no technical and/or economic relevance). The oral hearing is, however, of a certain value for the parties, in that they have the opportunity of replying to the observations made by the other parties involved in the case and the interested persons and of answering, if appropriate, any questions of clarification asked by the Court.

According to Articles 92 and 104(3) of its Rules of Procedure, it is permissible for the Court of Justice to decide by order on the inadmissibility of the preliminary question, either if the legal and factual context of the order for the reference is not sufficiently clear or if it has not been demonstrated that the solution of the questions raised is relevant for adjudicating the main proceedings. The Court of Justice can likewise decide by order in the cases mentioned in Art. 104(3) of its Rules of Procedure, which means (i) when the preliminary question is identical

to a question on which it has already ruled, (ii) when the solution to such a question can be clearly deduced from the existing case-law or (iii) when the solution to the question admits of no reasonable doubt. In the first two situations, the Court may, after hearing the Advocate General, give its decision by reasoned order, making reference to the earlier judgment or the relevant case-law, whereas in the third situation it may only give its decision by reasoned order after informing the adjudicating court or tribunal and having heard any observations from the interested persons and the Advocate General.

It is also worth pointing out that references for preliminary rulings are free-of-charge, and the Court takes no decision on costs, that being the competence of the national court or tribunal hearing the main proceedings from which the reference for a preliminary ruling arose.

In particular circumstances, characterised by genuine urgency, the President of the Court may, if so requested by the court lodging the question and after hearing the Advocate General, exceptionally decide to apply an accelerated procedure, (Art. 104a of its Rules of Procedure)<sup>117</sup>. In these cases, the date of the hearing is fixed immediately and communicated to the parties to the main proceedings and the other interested persons at the same time as communication of the order for reference. Written observations may be submitted by the parties to the main proceedings or the other interested persons within a reduced time limit, which may, however, not be less than 15 days and is fixed by the President.

It is, finally, worth mentioning the so-called reference for a preliminary ruling under the urgent procedure (known in Court jargon as “PPU”)<sup>118</sup>. There is now an explicit reference in Art. 267(4) TFEU (introduced by the Treaty of Lisbon) to the need for the Court to give its ruling with the minimum of delay in cases in which a question of interpretation or validity is raised in proceedings concerning a person held in custody. The urgent procedure, which is applicable *ratione materiae* to questions inherent to the area of freedom, security and justice (Title V of the TFEU)<sup>119</sup>, is governed by Art. 104b of the Court’s Rules of Procedure. Such a procedure (which can also be decided on *ex officio*) may be requested, for example, in the case of a person held in custody or deprived of their liberty, if the solution given to the question raised is decisive for assessing the legal situation of such a person<sup>120</sup>, or in a dispute concerning parental authority and/or the custody of children, if the solution given to the preliminary question depends on whether or not, on the basis of EU law, jurisdiction is held by the referring court or tribunal<sup>121</sup>. The question referred to the Court of Justice must state the circumstances of law and fact that prove the urgency and, in particular, the risks that would be incurred if the question referred were to follow the normal rhythm. Within the limits of what is reasonably possible, the referring court or tribunal is called on to spell out its point of view succinctly on the solution to be given to the question or questions asked. Such a clarification makes things easier for the parties to the main proceedings and the other interested persons participating in the procedure as well as for the Court itself in arriving at its decision and thereby contributes to expediting the ruling.

12. *A number of practical considerations* – The European Union’s legal order does not contain any formal rules on how a question referred for a preliminary ruling is to be drawn up. What does exist, however, is an “Information note on references from national courts for a preliminary ruling”<sup>122</sup> produced by the Court itself, but, it is, as would be expected not in any way legally binding<sup>123</sup>. This note does provide a number of particulars on how the decision to refer the matter ought to be devised and worded with the aim of ensuring that it will result in a reply that will be useful to the adjudicating court.

One general point worth stressing is that the order for reference must include a succinct but complete motivation<sup>124</sup> and it must also contain all the relevant information for the Court and any interested persons entitled to submit comments to understand correctly the factual and legal context of the dispute within the national procedure<sup>125</sup>.

Ideally, the order for reference ought to be structured with the aid of titles and subtitles, and it is important to number the paragraphs (as the Court of Justice does in its own judgments and orders). Moreover, it ought not to exceed a maximum length of some 10-15 pages (and is it thus advisable to avoid dwelling at length on superfluous information that is not strictly indispensable for understanding the questions raised). The principal risk faced by an order for reference that is excessively long is that only part of it or only extracts from it will be translated.

The order for reference must also contain an exhaustive presentation of the facts<sup>126</sup>, an illustration of the elements of law that may be relevant, the reasons which induced the national court or tribunal to refer the question to the Court and, if appropriate, a reconstruction of the arguments put forward by the parties in the main proceedings and, of course the text of the actual question put to the Court<sup>127</sup>.

The relevant national legislation must also be clearly identified and it must be cited verbatim in the decision to make the reference (which means avoiding abbreviations or at least stating their full meaning if they are used) and references to the published sources must also be given, including websites where it is possible to retrieve it.

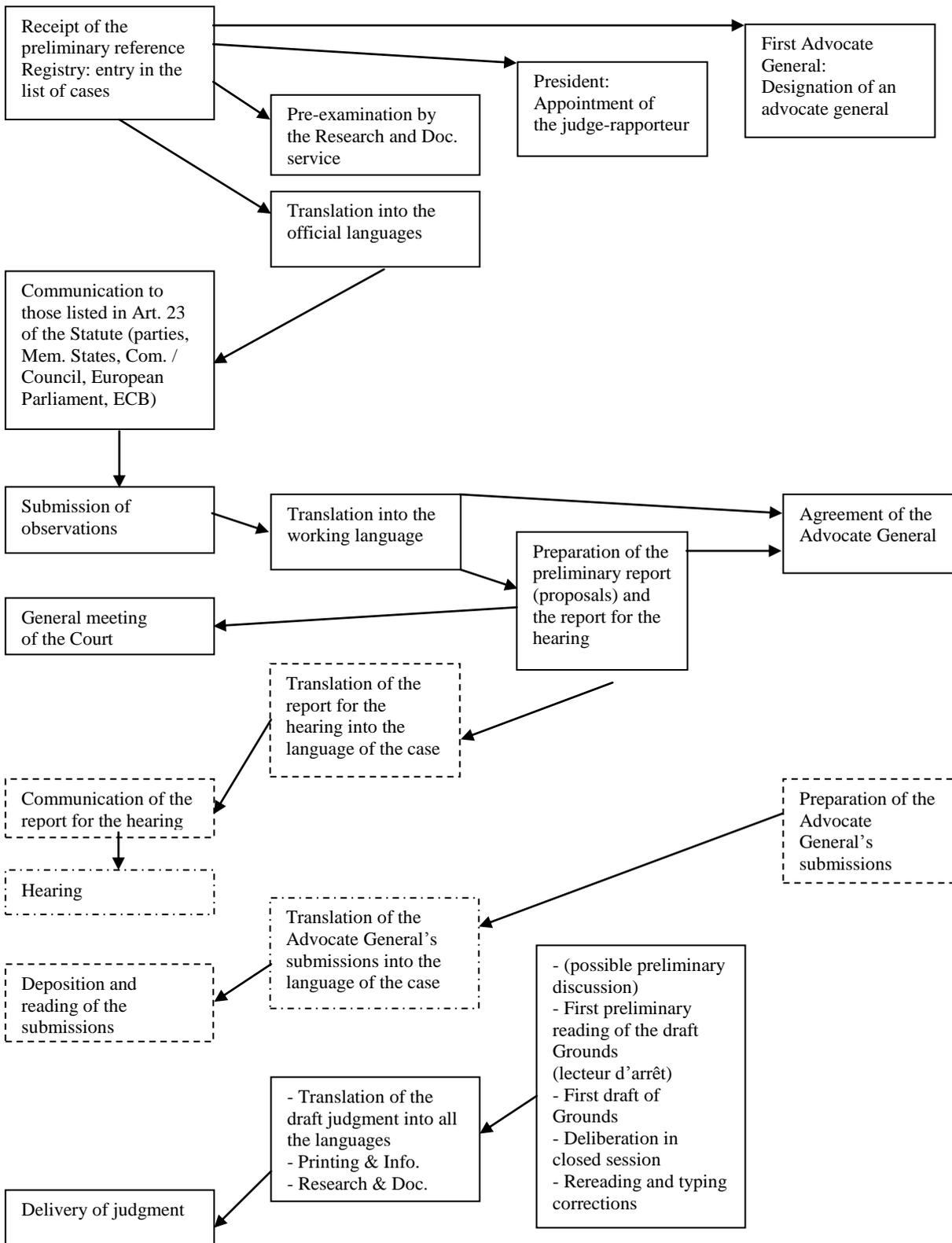
Appended to the decision to make the reference there must also be copies of the documents necessary for placing the dispute in context (i.e. the “case file”). It should not be forgotten that the appended documents are not translated and thus, where necessary, it is preferable to insert the salient extracts from them directly in the main text of the order for reference.

Finally, the referring court may also add a brief indication of its own point of view as to how the questions referred for a preliminary ruling could to be resolved (and indeed it is advisable to do so).

At the end of the day, it constitutes a good practice to communicate the final outcome of the main proceedings to the Court of Justice, which makes it possible for legal practitioners to have a complete picture of how the court or tribunal that submitted the question applied the interpretative suggestions with which the Court responded to it.

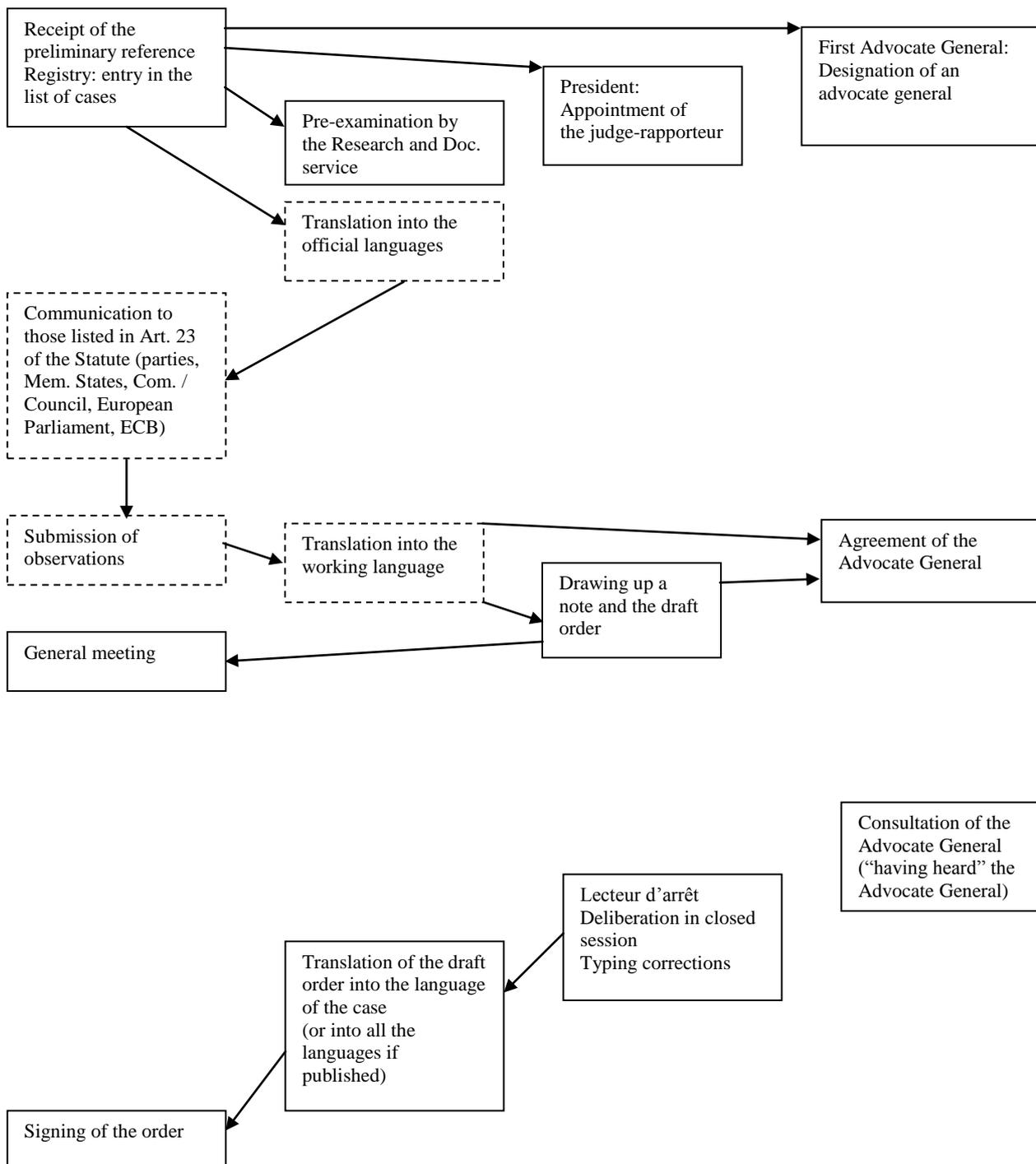
As a concluding remark, it must be emphasised that the preliminary-reference procedure remains without doubt an extremely useful instrument for the court or tribunal called on to resolve a dispute in which provisions of EU law are applicable. Despite that, however, it ought only to have recourse to it in those cases in which, having carefully considered the various profiles of European Union law (including the existing case-law of the Court of Justice itself, which often already supplies an exhaustive reply to doubts regarding interpretation), it still feels it cannot do without the interpretative assistance of the judges in Luxembourg.

**1. Ordinary procedure**



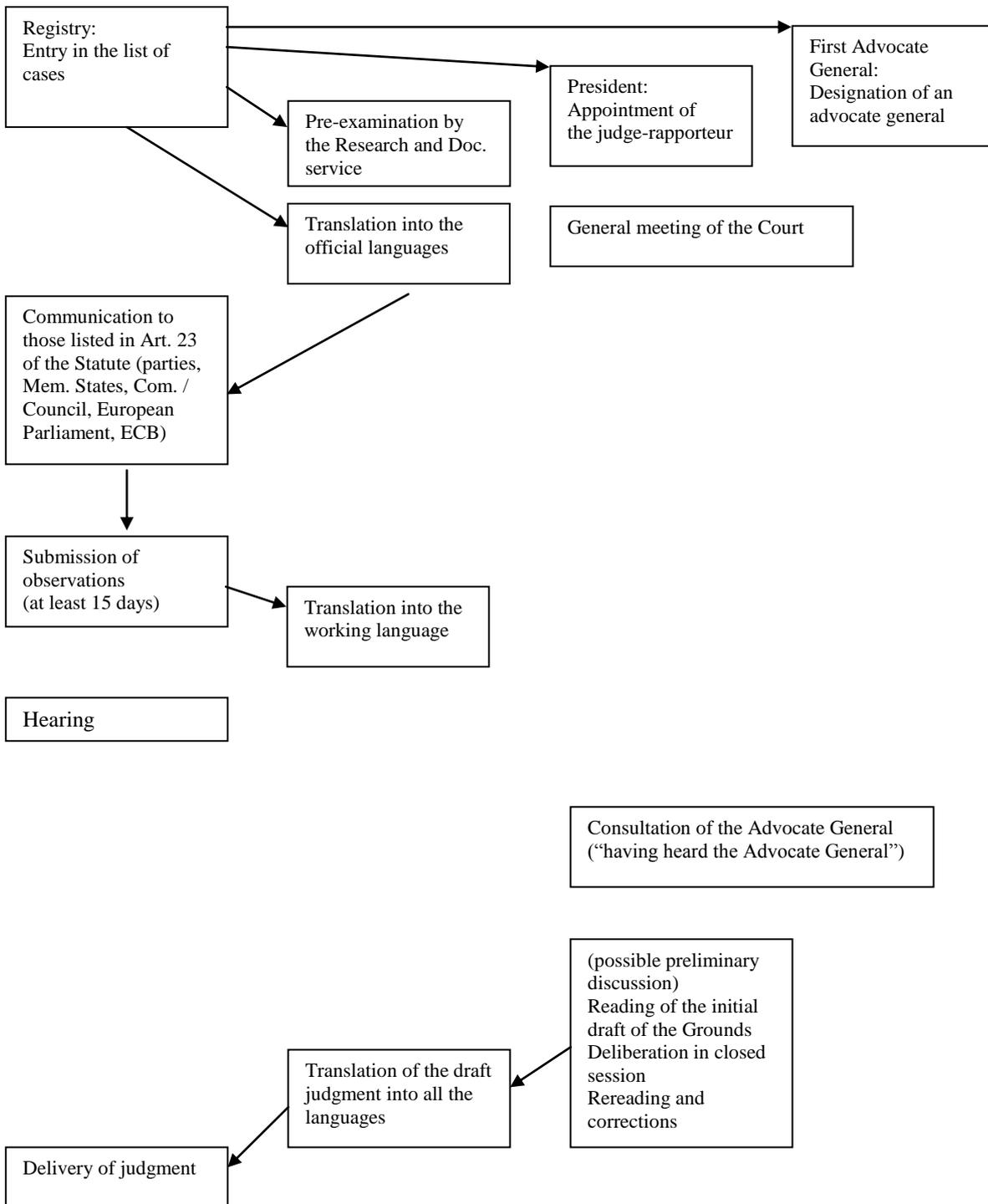
*Flowchart taken and adapted from Naomé, Le renvoi préjudiciel en droit européen. Guide pratique, 2nd edition. Brussels, 2010*

## 2. Simplified procedure



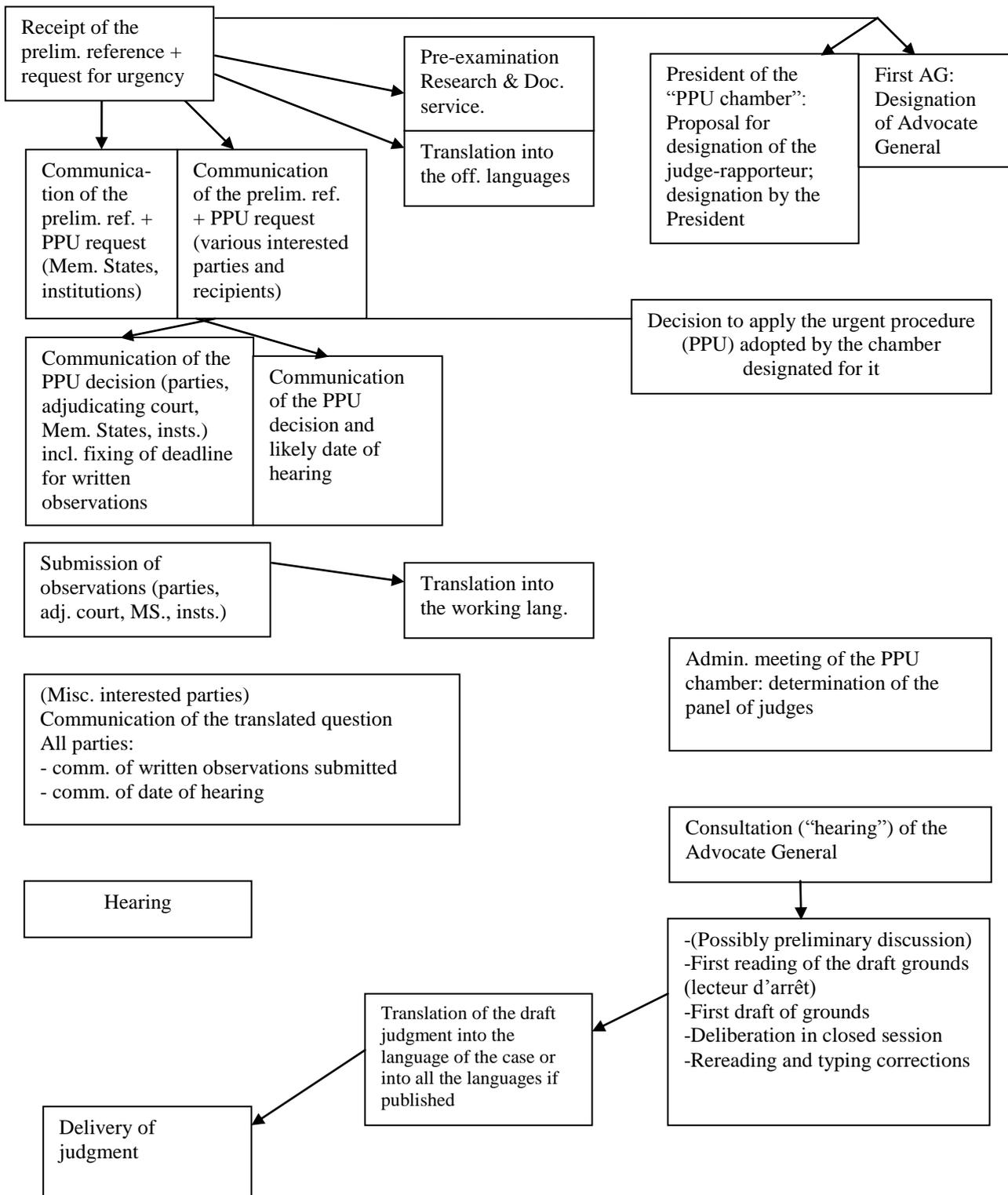
*Flowchart taken and adapted from Naomé, Le renvoi préjudiciel en droit européen. Guide pratique, 2nd edition. Brussels, 2010*

### 3. Accelerated procedure



*Flowchart taken and adapted from Naomé, Le renvoi préjudiciel en droit européen. Guide pratique, 2nd edition. Brussels, 2010*

#### 4. Urgent Procedure (“PPU”)



*Flowchart taken and adapted from Naomé, Le renvoi préjudiciel en droit européen. Guide pratique, 2nd edition. Brussels, 2010*

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<sup>1</sup> The preliminary-reference procedure has been dealt with by a very large number of authors. The reader is referred, *inter alia*, to: Briguglio A., *Pregiudiziale comunitaria e processo civile*, Padua, 1996; Adinolfi, *L'accertamento in via pregiudiziale della validità di atti comunitari*, Milan, 1997; Vandersanden, *La procédure préjudicielle: à la recherche d'une identité perdue*, in *Mélanges M. Waelbroeck*, Brussels, 1999, pp. 619 ff.; Lenartes K., Arts D., Maselis I., *Procedural Law of the European Union*, 2nd edition, London, 2006; Tizzano, Fortunato, *La tutela dei diritti*, in Tizzano (ed.), *Il diritto privato dell'Unione europea*, Turin, 2006, pp. 1271 ff.; Barav, *Déformations préjudicielles*, in *Mélanges en hommage à Georges Vandersanden*, Brussels, 2008, pp. 21 ff.; Tesauro, *Diritto comunitario*, 5th ed. Padua, 2008; Biavati, *Diritto processuale dell'Unione europea*, 4th ed., Milan, 2009; Condinanzi, Mastroianni, *Il contenzioso dell'Unione europea*, Turin, 2009. Reale M.C., Borraccetti M., *Da giudice a giudice. Il dialogo tra giudice italiano e Corte di giustizia delle Comunità europee*, Milan, 2008; Biavati P., *Diritto processuale dell'Unione europea*, 4th 4<sup>a</sup> ed., Milan, 2009; Condinanzi M., Mastroianni R., *Il contenzioso dell'Unione europea*, Turin, 2009; Nascimbene B., *Il giudice nazionale e il rinvio pregiudiziale alla Corte di giustizia*, in *Rivista italiana di diritto pubblico comunitario*, no. 6, 2009, pp. 1675 ff.; Broben M., Fenger N., *Preliminary references to the European Court of Justice*, Oxford, 2010; Condinanzi M., *I giudici italiani "avverso le cui decisioni non possa porsi un ricorso giurisdizionale di diritto interno" e il rinvio pregiudiziale*, in *Il Diritto dell'Unione europea*, no. 2, 2010, pp. 295 ff.; Naomé C., *Le renvoi préjudiciel en droit européen. Guide pratique*, 2nd ed., Brussels, 2010; Tesauro G., *Diritto comunitario*, 6th ed., Padua, 2010, pp. 309 ff.; Wathélet M., *Contentieux européen*, Brussels, 2010. The reader is also referred to the more general contribution by Cappuccio D., Grasso G. and Mundo A., *La Corte di giustizia vista da vicino: note, impressioni e spunti critici*, in *Contratto e Impresa/Europa*, no. 2, 2010, pp. 887 ff. As far as EU labour law and the role of the Court of Justice are concerned, the reader is referred to: Sciarra (ed.), *Labour Law in the Courts. National judges and the European Court of Justice*, Oxford-Portland, 2001; O'Leary, *Employment Law at the European Court of Justice*, Oxford-Portland, 2002; Rodière, *Droit social de l'Union européenne*, Paris, 2008.

<sup>2</sup> It is worth recalling, *inter alia*, those judgments in which the direct effect of EU law has been confirmed (ECJ, judgment of 5 February 1963, *van Gend & Loos*, 26/62, ECR, p. 1), the primacy (or supremacy) of the latter over national law (ECJ, judgment of 15 July 1964, *Costa v. ENEL*, 6/64, ECR, p. 1141; judgment of 9 March 1978, *Simmenthal*, 106/77, ECR, p. 629), or the non-contractual liability of the Member states for infringing community law (now: EU law) (ECJ, judgment of 19 November 1991, *Francovich et al.*, C-6/90 and C-9/90, ECR, p. I-5357; judgment of 5 March 1996, *Brasserie du pêcheur* and *Factortame*, C-46/93 and C-48/93, ECR, p. I-1029).

<sup>3</sup> Article 267 TFEU is worded as follows:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

"(a) the interpretation of the Treaties;

"(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

"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 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.

"If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

<sup>4</sup> The most recent statistics published on the Court's website ([www.curia.europa.eu](http://www.curia.europa.eu)) indicate that at the end of 2010, there were 799 cases pending, of which no fewer than 385 were questions for preliminary rulings, whereas out of a total of 574 cases dealt with in 2010, no fewer than 293 were questions for preliminary rulings. The absolute data for cases lodged between 1953 and 2010 shows that, out of a total of 16828, 7005 were questions referred for preliminary rulings, of which 1056 came from Italian courts (108 from the Court of Cassation, one from the Constitutional Court, 64 from the Council of State and 883 from other judicial bodies). By way of comparison, 1802 questions have been submitted by German courts, 816 by French courts, 767 by Dutch courts, 651 by Belgian courts, etc. For a more analytical picture, readers are referred to the statistics for 2010 published on the Court's website. An extremely detailed, analytical survey of the statistics of Italian cases for the period 1964-2005 is to be found in Reale, Borraccetti (op. cit., pp. 102-170).

<sup>5</sup> It is a matter of historical fact that the proposal to introduce the preliminary-reference mechanism into the Treaty of Rome came during the negotiations leading to that treaty from the Italian delegation, along the lines of the judgment of constitutionality provided for in the Italian constitution.

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<sup>6</sup> Article 19 of the Treaty of European Union (“TEU”) states that the Court of Justice “*shall ensure that in the interpretation and application of the Treaties the law is observed*”.

<sup>7</sup> The Court has recently recalled, in a case dealing precisely with Directive 2000/78, that “in those circumstances, it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle” (CJEU, judgment of 19 January 2010, *Küçükdeveci*, C-555/07, not yet published in the ECR, paragraph 51, author’s emphasis).

<sup>8</sup> On this point, it should also be noted that Art. 256(3) TFEU specifies that the General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Art. 267, in specific areas laid down by the Statute (in an amendment brought about by the Treaty of Nice). Up until the present, however, no such areas have as yet been specified for the General Court, and it does not seem likely that this issue is even going to be on the agenda for the foreseeable future. On this point, the reader is referred to the “Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto”, submitted by the Court to the Council in March 2011, on the basis of Art. 281(2) TFEU – to be found on the Court’s website.

<sup>9</sup> For the sake of completeness, it must be remembered that with the entry into force of the Treaty of Lisbon on 1 December 2009, the process of so-called “communitarisation” of matters belonging to the old “third pillar” was completed, thereby placing the whole of the area of freedom, security and justice within the preliminary-reference mechanism provided for in Art. 267 TFEU (with the qualification that Art. 35 TEU is, however, to remain applicable for a transitional period of five years in relation to the acts of the Union adopted prior to the entry into force of the Treaty of Lisbon. What this means in tangible terms is that during this period such acts may only constitute the subject-matter of preliminary references from the judicial bodies of those Member states that have accepted the jurisdiction of the Court of Justice). The Court of Justice’s jurisdiction over preliminary references concerning part of the area of freedom, security and justice (i.e. judicial cooperation in criminal matters and police cooperation) remains, however, subject to a limit (Art. 276 TFEU, introduced by the Treaty of Lisbon, in fact prevents the Court of Justice from reviewing “*the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*”).

<sup>10</sup> On this point, it is interesting to consider data on the time taken by the procedure before the Court. In 2002, the mean duration was 24.1 months, in 2003 25.5 months, in 2005 20.4 months, in 2006 19.8 months; in 2007 17.1 months, in 2009 17.1 months and in 2010 16.1 months. It is thus clear that, with the exception of 2003, there has been a continuous reduction in the mean duration from 2002 to the present and, moreover, that this has been particularly noticeable during the last three years. The reasons for the shortening of the mean length of procedures respond to a need already felt by the Court itself for some time to be able to conclude the cases pending before it within reasonably short periods of time. The undeniable success achieved in the course of the years mentioned in terms of cutting back the duration of cases is the outcome of several factors to produce improvements introduced from 2004 onwards, that being the year the EU was enlarged with ten new Member States (for a detailed description, the reader is referred to Naomé, *op. cit.* pp. 35 and 36). In order to have a better understanding of the time required for each of various phases making up a procedure it is useful to look into how each of these is handled. In 2009, the mean duration of each of the individual phases was: (i) written procedure: 3.9 months; (ii) translation of the observations: 2.4 months; (iii) preparation of the preliminary report (known to insiders as the “*rapport préalable*”): 2.9 months; (iv) general meeting: 0.6 months; (v) fixing the hearing: 1.5 months; (vi) fixing the date for announcement of the submissions of the Advocate General: 1. month; (vii) deliberations: 4.2 months; adding up to a total of 17.1 months (on this point, the reader is referred to. Naomé, *op. cit.*, page 206).

<sup>11</sup> Condinanzi, Mastroianni, *op. cit.*, pages 188-190.

<sup>12</sup> This particularly apposite expression, coined in French doctrine many decades ago, inspired the title of the interesting study by Reale M.C. and Borraccetti M., *op. cit.*, on the interactions between the Italian courts and the Court of Justice in the field of preliminary references.

<sup>13</sup> Cf. Art. 6(1) TEU. On this point, the reader is referred to ECJ judgment of 9 September 2010, *Schecke et al*, C-92/09 e C-93/09, not yet published in the ECR

<sup>14</sup> ECJ, judgments of 30 September 1987, *Demirel*, C-12/86, ECR p. 3719 and of 25 February 2010. *Britta* C-386-08, not yet published in the ECR

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<sup>15</sup> ECJ, order of 5 March 1986, *Wünsche*, 69/85, ECR p. 947; judgment of 14 December 1982, *Waterkeyn*, 314/81, ECR p. 4337; judgment of 9 January 2007, *Jia*, C-1/05, ECR p. I-1; judgment of 8 September 2009, *Budejovický Budvar*, C-478/07) not yet published in the ECR

<sup>16</sup> ECJ, judgment of 16 July 2009, *Futura Immobiliare*, C-254/08, not yet published in the ECR

<sup>17</sup> ECJ, judgment of 13 December 1989, *Grimaldi*, C-322/88, ECR p. I-4407; judgment of 2 April 2009, *Lodato*, C-415/07, not yet published in the ECR) [concerning the interpretation of the “Guidelines on aid to employment” (Official Journal 1995, C 334, p. 4)].

<sup>18</sup> *Ex multis*, ECJ, order of 17 March 2009, *Mariano/INAIL*, C-217/08, ECR p. I-35\*, concerning a reference for an interpretative preliminary ruling on Directive 2000/78 lodged by the Milan court.

<sup>19</sup> ECJ, judgment of 18 October 1990, *Dzodzi*, cases C-297/88 and C-197/89, ECR, p. I-3763

<sup>20</sup> This particular judicial remedy gives the judges in Luxemburg the opportunity of scrutinising the validity of the acts of the European Union in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of “lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application or misuse of powers” as well as actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives. As is known, such proceedings may also be instituted by any natural or legal person against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. (Art. 267(4) TFEU). This latest innovation, which is of considerable importance for having access to the Court of Justice of the European Union, was added by the Treaty of Lisbon.

<sup>21</sup> The period is two months from the date of publication of the act, its notification or, in their absence, the date on which it became known, to which a further ten days have to be added for distance.

<sup>22</sup> Incidentally, the reasons for which the Court may declare an act to be invalid are identical to those laid down in the Treaty for the hypotheses of setting acts aside. Thus the examination of the questions of validity is simply a transposition of the principle applied in an action for annulment to the context of the preliminary-reference procedure. Thus the legislative parameters are likewise identical in an examination of a question referred for a preliminary ruling on validity and the judgment in an action for the annulment of an act of the European Union.

<sup>23</sup> Which is to do with the substantially jurisdictional nature of the functions exercised by the body and not its *nomen iuris* nor its position in the national judicial system.

<sup>24</sup> ECJ, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, ECR p. 408; of 17 September 1997, *Dorsch Consult*, C-54/96, ECR p. I-4961; 31 May 2005, *Syfait et al.*, C-53/03, ECR p. I-4609; and of 10 December 2009, *Umweltanwalt von Kärnten*, C-205/08, not yet published in the ECR

<sup>25</sup> The existence of such a question is in fact examined with a certain degree of flexibility. It should be considered that the issue was not even raised in the case of a question lodged by the Consiglio di Giustizia Amministrativa for the Sicilian Region (ECJ, judgment of 13 March 2008, *Ispettorato Provinciale dell'Agricoltura di Enna et al.*, C-78/07, ECR p. I-1635), although the latter also included non-stipendiary members designated regionally (the constitutional legitimacy of the provisions governing the composition and functioning of the Consiglio di Giustizia Amministrativa Siciliano has, however, been confirmed in the judgment of the Italian Constitutional Court no. 316 of 2004).

<sup>26</sup> ECJ, order of 18 June 1980, *Borker*, C-138/80, ECR p. 1975; and judgment of 19 September 2006, *Wilson*, C-506/04, ECR p. I-8613

<sup>27</sup> ECJ, judgment of 23 March 1982, *Nordsee*, 102/81, ECR p. 1095

<sup>28</sup> ECJ, judgments of 27 April 1994, *Almelo*, C-393/92, ECR p. I-1477; of and 1 June 1999, *Eco Swiss*, C-126/97, ECR p. I-3055

<sup>29</sup> ECJ, judgments of 17 October 1989, *Danfoss*, 109/88, ECR p. 3199; and of 17 October 1989, *Handels-ug Kontorfunktionaernes Forbund i Danmark*, 109/88, ECR p. 3199.

<sup>30</sup> ECJ, judgments of 17 September 1997, *Dorsch Consult*, C-54/96, ECR p. I-4961; and of 14 November 2002, *Felix Swoboda*, C-411/00, ECR p. I-10567

<sup>31</sup> ECJ, judgment of 16 July 1992, *Asociación Española de Banca Privada et al.*, C-67/91, ECR p. I-4785

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- <sup>32</sup> ECJ, judgment of 31 May 2005, *Syfait*, C-53/03, ECR p. I-4609
- <sup>33</sup> ECJ, order of 6 October 2005, *Telekom Austria*, C-256/05, not yet published in the ECR
- <sup>34</sup> ECJ, order of 18 June 1980, *Borker*, 138/80, ECR p. 1975; judgment of 12 November 1998, *Victoria Film*, C-134/97, ECR p. I-7023; order of 12 January 2010, *Amiraike Berlin*, C-497/08 not yet published in the ECR
- <sup>35</sup> ECJ, judgment of 15 July 1964, *Costa/ENEL*, 6/64, ECR p. 1141
- <sup>36</sup> ECJ, judgment of 11 June 1987, *Pretore di Salò/X*, 14/86, ECR p. 2545
- <sup>37</sup> ECJ, order of 15 January 2004, *Saetti e Frediani*, C-235/02, ECR p. I-1005; and judgment of 28 June 2007, *Dell'Orto*, C-467/05, ECR p. I-5557
- <sup>38</sup> *Ex multis*, ECJ, judgments of 17 February 2005, *Viacom Outdoor*, C-154/03, ECR p. I-1167; 13 July 2006, *Manfredi et al.*, C-295/04 to C-298/04, ECR p. I-6619; and 17 July 2008, *Corporación Dermoestética*, C-500/06, ECR page I-5785
- <sup>39</sup> ECJ, judgment of 17 May 1994, *Corsica Ferries*, C-18/93, ECR p. I-1783, where it is nonetheless recommended to lodge the question only after the *inter-partes* hearing
- <sup>40</sup> ECJ judgments of 16 October 1997, *Garofalo et al.*, C-69/96 and 79/96, ECR, p. I-5603; and judgment of 23 December 2009, *CoNISMa*, C-305/08, not yet published in the ECR
- <sup>41</sup> ECJ, judgment of 12 December 1996, *Procura di Torino*, C-74/95 and C-129/95, ECR, p. I-6609
- <sup>42</sup> ECJ, judgment of 19 October 1995, *Job Centre*, C-111/94, ECR, p. I-3361
- <sup>43</sup> ECJ, judgment of 17 October 2002, *Payroll et al.*, C-79/01, ECR p. I-8923
- <sup>44</sup> ECJ, orders of 26 November 1999, *Anas*, C-192/98, and *RAI*, C-440/98, ECR, p. I-8597)
- <sup>45</sup> Italian Constitutional Court, order of 29 December 1995, no. 536
- <sup>46</sup> Italian Constitutional Court, order of 13 February 2008, no. 103/2008 (in the Italian Official Gazette, first special series, 16 April 2008, no. 1)
- <sup>47</sup> As reiterated by Advocate General Kokott in her submissions of 2 July 2009 in the case of *Presidente del Consiglio dei Ministri/Regione autonoma della Sardegna*, op. cit., other national constitutional courts too, not just the Italian one, have used the preliminary-reference procedure to lodge questions with the Court of Justice. In particular, the questions asked by the Austrian Constitutional Court led to the judgments of 8 November 2001, *Adria-Wien Pipeline & Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECR p. I-8365; of 8 May 2003, *Wählergruppe Gemeinsam*, C-171/01, ECR p. I-4301, as well as of 20 May 2003, *Österreichischer Rundfunk et al.*, C-465/00, C-138/01 e C-139/01, ECR p. I-4989. In reaction to the questions asked by the Belgian Constitutional Court, the court of Justice delivered its judgment of 16 July 1998, *Fédération belge des chambres syndicales de médecins*, C-93/97, ECR p. I-4837, its order of 1 October 2004, *Clerens*, C-480/03, not yet published in the ECR, as well as the judgments of 26 June 2007, *Ordre des barreaux francophones et germanophone et al.*, C-305/05, ECR p. I-5305, and of 1 April 2008, *Gouvernement de la Communauté française et Gouvernement wallon*, C-212/06, ECR p. I-1683. Most recently, there is its reply to a question asked by the Lithuanian constitutional court, cf. ECJ, judgment of 9 October 2008, *Sabatauskas et al.*, C-239/07, ECR p. I-7523
- <sup>48</sup> On this point, the Court has recently issued a reminder that the option recognised by Art. 267(2) TFEU of asking for interpretation through a preliminary ruling before disapplying the national provision that is incompatible for EU law cannot, however, be transformed into a duty on account of the fact that national law does not grant such a court or tribunal the powers to disapply a domestic provision that it feels to be contrary to the constitution, unless said provision has previously been declared unconstitutional by the constitutional court. In fact, given the principle of the primacy of EU law, which also includes the principle of non-discrimination on grounds of age, a national provision to the contrary, falling within the scope of application of EU law, must be disapplied (ECJ, judgment of 19 January 2010, *Küçükdeveci*, C-555/07, not yet published in the ECR, para. 54).
- <sup>49</sup> From the point of view of the Italian legal system this is a simple question to solve, given that the supreme jurisdiction tends generally to be the same as the court of last instance (the Court of Cassation, the Council of State and the Court of Auditors do have functions of a jurisdictional nature, as indeed does the Constitutional Court, being a “single instance” court in cases in which it hears the main proceedings).
- <sup>50</sup> ECJ, judgment of 4 June 2002, *Lyckeskog*, C-99/00, ECR p. I-4839; judgment of 15 September 2005, *Intermodal Transports*, C-495/03, ECR p. I-8151; and judgment of 16 December 2008, *Cartesio*, C-210/06, ECR p. I-9641

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<sup>51</sup> It seems hardly necessary to point out that the domestic judicial remedies do not include revision and third-party proceedings. As far as revision is concerned, the reason for the exclusion is simple and is based on ascertaining that such a remedy can be attained for precise reasons which are linked in some way to the possible object of the question referred for a preliminary ruling. Third-party proceedings, on the other hand, are no more than a possible instrument and dependent on the initiative of a subject who has not assumed the role of a party in the court action, so it is a clear conclusion that the qualification as a judicial body, as a body against whose decisions there is no judicial remedy under national law, with the duty to refer questions for preliminary rules, can most certainly not depend on an extraneous and purely hypothetical factor.

<sup>52</sup> ECJ, judgment of 6 October 1982, *Cilfit*, 283/81, ECR p. 3415; judgment of 15 September 2005, *Intermodal Transports*, C-495/03, ECR p. I-8151

<sup>53</sup> This does not, however, dispel the difficulty of applying such a criterion in practice (formulated by the Court at a time when the Community still had only ten Member States) today, when the European Union has 27 Member States (with 23 official languages). This aspect has been considered by the working party set up to study the preliminary-reference procedure by the “General Assembly of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union” on 14 May 2007, within the context of which it has emerged that the national courts often tend towards a reductionist interpretation of the criteria indicated in the *Cilfit* judgment, leading to the wish to be expressed that, in a new decision, the Court of Justice would redraw the boundaries of the necessary action for a reference for a preliminary ruling (cf. conclusions of the working party at [www.juradmin.eu](http://www.juradmin.eu)).

<sup>54</sup> ECJ, judgment of 11 September 2008, *UGT-Rioja*, cases C-428/06 to C-434/06, ECR p. I-6747; judgment of 2 April 2009, *Pedro IV*, C-260/07, ECR p. I-2437

<sup>55</sup> ECJ, judgment of 22 October 1987, *Foto-Frost*, C-314/85, ECR, p. 4199

<sup>56</sup> On this point, cf. ECJ, judgment of 6 December 2005, C-461/03, *Gaston Schul*, ECR p. I-10513 and judgment of 10 January 2006 in C-344/04, *IATA and ELFAA*, ECR p. I-403

<sup>57</sup> Cf. ECJ, judgment of 13 May 1981, *International Chemical Corporation*, 66/80, ECR p. 1191; and order of 8 November 2007, *Fratelli Martini and Cargill*, C-421/06, ECR p. I-152\*, summary publication

<sup>58</sup> On this point it might be useful to mention that the Italian legislator has included a provision in the law of 6 June 2008, no. 101 (published in the Italian Official Gazette no. 132 of 7 June 2008) whereby, in civil proceedings concerning the acts and procedures intended to recover state aids by executing a recovery decision adopted by the Commission, the national court is allowed to grant suspension of the administrative or judicial payment title whenever: i) there are serious grounds for doubting the legality of the recovery decision, there is an evident error in the identification of the subject required to repay the aid or in the calculation of the sum to be recovered; and ii) there is a risk of an imminent and irreparable prejudice (cf. in particular, Articles 1(1) and 2(1)). On this point, see Nascimbene B., *Giudice nazionale, recupero di aiuti di Stato e rinvio pregiudiziale d'urgenza alla Corte di giustizia*, in *Corriere Giuridico*, 2009, pp. 858 ff. In cases in which the suspension is based on motives to do with the illegality of the recovery decision, the national court is to stay the case and to lodge an immediate preliminary reference of the question to the Court of Justice, with the request to handle it through its urgent procedure (on this specific point, see below), if the question of the validity of said act has not already been referred. In conformity with the direction taken consistently by the Court of Justice, the legislator furthermore specifies that the application for suspension cannot be accepted in a case in which the applicant has not lodged an appeal against the recovery decision as provided for by Art. 263 TFEU.

<sup>59</sup> ECJ, judgment of 21 February 1991, *Zuckerfabrick*, cases C-143/88 and C-92/89, ECR, p. I-415

<sup>60</sup> ECJ, judgment of 9 November 1995, *Atlanta Fruchthandelsgesellschaft et al.*, C-465/93, ECR, p. I-3761

<sup>61</sup> ECJ, judgment of 9 March 1994, *TWD*, C-188/92, ECR, p. I-833 and judgment of 15 February 2001, *Nachi Europe*, C-239/99, ECR, p. I-1197; as far as the Member States are concerned, cf. ECJ, judgment of 22 October 2002, *National Farmers Union*, C-241/01, ECR, p. I-9079

<sup>62</sup> ECJ, judgments of 12 December 1996, *Accrington Beef Co. Ltd et al.*, C-241/95, ECR, p. I-6699 and 23 February 2006, *Atzeni et al.*, C-346/03 and C-529/03, ECR, p. I-1875

<sup>63</sup> Although in the past the Commission has taken the first steps in various infringement proceedings on the basis of Art. 258 TFEU on grounds of failure to comply with the duty to make a preliminary reference (essentially in cases of abuse of the theory of *acte claire*) by national courts and tribunals against whose decisions there is no judicial remedy under national law, none of these has to date given rise to action before the Court of Justice. On this point, reference is made, inter alia, to ECJ, judgment of 12 November 2009, *Commission v. Pagna*, C-154/08, ECR p.

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I-187\*. For a detailed examination of the blatant cases of failures to make a reference by Italian courts, reference is made to Condinanzi M., *I giudici italiani «avverso le cui decisioni non possa porsi un ricorso giurisdizionale di diritto interno» e il rinvio pregiudiziale*, op. cit. above, pp. 323-333.

<sup>64</sup> For an exhaustive analysis of this point, reference is made to Ferraro F., *La responsabilità risarcitoria degli Stati membri per violazione del diritto comunitario*, Milan, 2008

<sup>65</sup> ECJ, judgment of 30 September 2003, *Köbler*, C-224/01, ECR p. I-10239

<sup>66</sup> ECJ, judgment of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, ECR p. I-5177. It seems hardly necessary to state, on this point, that the Court's judgment in this case was followed up by action before the national court from which the reference for a preliminary ruling came in the first place, the court in Genoa, which lodged a new question for an interpretative type of preliminary ruling, this time to ask the Court if the national legislation which had permitted the granting of the disputed aid to the business in competition with the company that was the plaintiff in the main proceedings was compatible or not with the Treaty rules regarding state aid, cf. ECJ, judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C-140/09, not yet published in the ECR

<sup>67</sup> It is thus, in technical terms, impossible to speak of a "request for a preliminary ruling" from the parties to the case.

<sup>68</sup> ECJ, judgment of 17 April 2007, *A.G.M.-COS.MET*, C-470/03, ECR p. I-2749. For one case (dealing, on the other hand, with Directive 2000/78) in which the Court decided to reply to the questions for preliminary rulings raised in the context of a preliminary hearing, reference is made to ECJ, judgment of 17 July 2008, *Coleman*, C-303/06, ECR p. I-5603). In a recent judgment (ECJ, judgment of 22 June 2010, *Melki & Abdeli*, C-188/10 and C-189/10, not yet published in the ECR), the Court of Justice has, moreover, reaffirmed, in giving its view on the compatibility with EU law of the procedural mechanism known as "priority question of constitutionality", recently introduced in France, that the national court is free at any phase of the proceedings that it regards as appropriate, and thus also at the end of incidental proceedings of constitutionality, to submit any question for a preliminary ruling that it considers necessary to the Court of Justice. In this way, it has found that Art. 267 TFEU does not preclude national legislation establishing an incidental procedure for scrutinising the constitutionality of the national laws, provided that the other national courts and tribunals remain free: i) to call on the Court at any stage in the proceedings that they feel appropriate, and thus also at the end of incidental proceedings of constitutionality; ii) to adopt any necessary measure to guarantee interim judicial protection of the rights bestowed by the legal order of the European Union; and iii) to disapply at the end of the above-mentioned incidental procedure, the national legal provision concerned if it were to find it incompatible with EU law.

<sup>69</sup> ECJ, judgment of 11 June 1987, *Pretore di Salò v. X*, C-14/86, ECR p. 2545

<sup>70</sup> ECJ, judgments of 3 March 1994, *Eurico Italia et al.*, C-332/92, ECR p. I-711; and 17 May 1994, *Corsica Ferries*, C-18/93, ECR p. I-1783. As regards the situations in which, under Italian law, the court is offered the possibility of submitting a question for a preliminary ruling to the Court of Justice and of a judgment on constitutionality, see Italian Constitutional Court, order no. 1 of 21 March 2002, no. 85, Italian Official Gazette no. 13 of 27 March 2002, in which the Italian Constitutional Court declared a question of constitutionality to be inadmissible, feeling that the judgment of constitutionality would depend on the reply from the Court of Justice concerning the applicability of the provisions of domestic law concerned.

<sup>71</sup> Italy's system of judicial procedure lays down that suspension must be in the form of a court order, as laid down in Art. 3 of the Italian law of 13 March 1958, no. 204 (which states that "*the ordinary and special judicial bodies shall issue an order, by means of which, with reference to the dates and grounds of the application which gave rise to the question, they determine the immediate transmission of the files of the case to the Court of Justice and stay the proceedings pending before them. The court registry shall transmit a copy of said order on unstamped paper, accompanied by the files of the case, to the Registry of the Court of Justice by means of registered letter with confirmation of delivery*").

<sup>72</sup> ECJ, judgment of 16 July 1992, C-83/91, *Meilicke*, ECR p. I-4871

<sup>73</sup> *ex multis*, ECJ, judgment of 21 January 2003, C-318/00, *Bacardi-Martini and Cellier des Dauphins*, ECR p. I-905

<sup>74</sup> For a case dealing in particular with the application of Directive 2000/78, see ECJ, judgment of 22 November 2005, *Mangold*, C-144/04, ECR p. I-9981. See also ECJ judgment of 8 September 2009, *Budejovický Budvar*, C-478/07, ECR p. I-7721

<sup>75</sup> ECJ, judgment of 28 June 2007, *Dell'Orto*, C-467/05, ECR p. I-5557

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- <sup>76</sup> ECJ, judgment of 31 January 2008, *Centro Europa 7*, C-380/05, ECR p. I-349
- <sup>77</sup> ECJ order of 26 January 1990, *Falciola*, C-286/88, ECR p. I-191
- <sup>78</sup> ECJ, judgment of 21 April 1988, *Pardini*, 338/85, ECR p. 2041
- <sup>79</sup> ECJ, judgment of 16 July 1992, *Lourenço Dias*, C-343/90, ECR p. I-4673. On this point, it is worth pointing out that the Italian Constitutional Court's case-law too considers hypothetical or theoretical questions to be inadmissible.
- <sup>80</sup> ECJ, judgment of 4 December 2003, *EVN and Wienstrom*, C-448/01, ECR p. I-14527.
- <sup>81</sup> Cf. ECJ, judgment of 29 May 1997, *Kremzow*, C-299/95, ECR p. I-2629, in which the Court of Justice found no connecting factor with EU law, and judgment of 10 January 2006, *Ynos*, C-302/04, ECR p. I-371, dealing with a case of the inapplicability of EU law *ratione temporis*
- <sup>82</sup> ECJ, judgment of 19 April 2007, C-295/05, *Asemfo*, ECR p. II-2999
- <sup>83</sup> ECJ, judgments 26.1.1993, *Telemarsicabruzzo*, C-320/90, ECR p. I-393; 17.2.2005, *Viacom Outdoor*, C-134/03, ECR p. I-1167; 8.9.2009, *Liga Portuguesa de Futebol Profissional*, C-42/07, not yet published in the ECR
- <sup>84</sup> ECJ, judgments of 11 March 1980, *Foglia v. Novello I*, 104/79, ECR p. 745; and 16 December 1981, *Foglia v. Novello II*, 244/80, ECR p. 3085
- <sup>85</sup> ECJ, judgments of 21 September 1988, *Van Eyscke*, 267/86, ECR p. 4769; and 22 November 2005, *Mangold*, C-144/04, ECR p. I-9981
- <sup>86</sup> ECJ, judgment of 9 February 1995, *Leclerc-Siplec*, C-412/93, ECR p. I-179
- <sup>87</sup> ECJ, order of 11 March 2008, *Consel Gi. Emme*, C-467/06, ECR p. I-44\*; and judgment of 8 November, *Schwibbert*, C-20/05, ECR p. I-9447. Most recently: ECJ, judgment of 11 March 2010, *Attanasio Group*, C-384/08, not yet published in the ECR
- <sup>88</sup> On this point, see ECJ, judgment of 1 December 1965, *Schwarze*, 16/65, ECR p. 1081; for the opposite hypothesis, see ECJ, judgment of 12 November 1969, *Stauder*, 29/69, ECR p. 419
- <sup>89</sup> *Ex multis*, ECJ, judgment of 3 February 1977, *Strehl*, 62/76, ECR p. 211.
- <sup>90</sup> It must, however, be observed that in some cases, albeit isolated ones, *Foglia Novello I* and *Telemarsicabruzzo*, the Court has rejected the questions submitted for a preliminary ruling in their entirety in a judgment.
- <sup>91</sup> But see, however, ECJ, judgment 1 July 2010, *Sbarigia*, C-393/08, not yet published in the ECR
- <sup>92</sup> Data updated mid-2010
- <sup>93</sup> By way of example and to mention just some, there are 20 French, 16 German, 15 Austrian, 9 Belgian, 7 Spanish, 3 Dutch and no Swedish at all (data updated mid-2010). As far as the history of Italian cases is concerned, the rejection record is held by preliminary references from tribunals, no few than 17 of them. Eleven cases concern questions referred by the former “*preture*”, two from the Court of Cassation (of which one was an order and one a judgment declaring only some of the questions to be inadmissible). On the other hand, there is only one case concerning the courts of appeals, five cases only from the justices of the peace and three from the regional administrative courts, whereas the rest concern the Court of Auditors and various types of tax commission. The majority of these fall within the time span of 1993-2010. They are spread out reasonably regularly over the various years, without any noteworthy peaks (which is due in part to the fact that some of the questions form “series”).
- <sup>94</sup> There are, however, differences in cases in which the Court of Justice refuses to reply to questions asked by the adjudicating court, when those EU provisions for which interpretation is sought are not applicable to the facts of the case, when it is a “purely domestic” situation (the latter, however, being a context in which it is difficult to draw the dividing line between admissible and inadmissible questions and which goes beyond the subject dealt with here. See, for one example of an ECJ judgment that of 1 July 2010, *Sbarigia*, C-393/08, not yet published in the ECR.
- <sup>95</sup> Perhaps this is because, in cases in which the question really does turn on specific or technical matters, the court performs an in-depth study and, at the point in time at which it decides to submit the question for a preliminary ruling, it already has a very precise knowledge of the facts of the case and the legal questions arising.
- <sup>96</sup> On this point, the reader is referred first and foremost to ECJ, order of 11 February 2004 in the joined cases C-438/03, C-439/03, C-509/03 and C-2/04, *Cannito et al.*, ECR p. I-1605 and then to ECJ, judgment of 13 July 2006 *Manfredi et al.*, C-295/04 to C-298/04, *op. cit.*

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<sup>97</sup> In actual fact, on the occasion of the second reference, the background to the situation had changed, since the Commission had already launched a series of initiatives regarding the possibility of legislative intervention in the field of *private enforcement* of *antitrust* law. The questions submitted for preliminary rulings by the Bitonto justice of the peace thus turned out to be particularly propitious, since they offered the Court of Justice the opportunity of ruling on a number of aspects concerning *private enforcement*.

<sup>98</sup> ECJ, judgment of 3 February 1977, *Benedetti*, 52/76, ECR p. 163; judgment of 14 December 2000, *Fazenda Pública*, C-446/98, ECR p. I-11435. As is almost certainly known, in conforming with the interpretation supplied by the Court of Justice, the adjudicating court or tribunal must, if necessary, not be bound to the legal rulings of other national courts and tribunals, even higher instances, cf. ECJ, judgment of 5 October 2010, *Elchinov*, C-173/09, not yet published in the ECR

<sup>99</sup> As stated by the Court of Justice itself in the *Pretore di Salò/X* judgment mentioned elsewhere, the new reference for a preliminary ruling may be justified whenever the national court or tribunal is faced with difficulties in understanding and applying the ruling.

<sup>100</sup> ECJ, order of 5 March 1986, *Wünsche*, C-69/85, ECR p. 947; judgment of 11 June 1987, *Pretore di Salò v. X*, C-14/86, ECR p. 2545.

<sup>101</sup> ECJ, judgment of 28 March 1979, *ICAP*, C-222/78, ECR p. 1963

<sup>102</sup> The possibility of staying national proceedings while waiting for a ruling from the Court of Justice in reply to a question submitted to it by another court or tribunal and turning on the same issue, is, on the other hand, governed by the national procedural order. In the Italian case, there was initially some reluctance as regards the possibility of stay proceedings on the basis of Art. 295 of the Code of Civil Procedure, but the Court of Cassation has now ruled that it is admissible for the court adjudicating at last instance to stay its proceedings. Cf. Court of Cassation, judgment of 9 October 2006, no. 21635 (*amplius*, see Condinanzi, Mastroianni, *Il contenzioso dell'Unione europea*, op. cit. supra, pp. 253-255).

<sup>103</sup> The substantially binding nature of the precedent on all the national courts and tribunals, whether adjudicating at first or last instance, is, on the other hand, indirectly confirmed by Art. 104(3) of the Rules of Procedure of the Court of Justice, which make provision for changing the procedure before the Court itself in the event of a question being referred that is “manifestly identical” to one on which the Court has already ruled. In such a case, the Court, having heard any observations by the interested parties and after informing the court or tribunal making the reference, will actually be able to “give its decision by reasoned order, in which reference is made to its previous judgment or to the relevant case-law” (it is also possible to follow this same procedure “where the answer to the question (...) admits of no reasonable doubt”). On this point, it is worth recalling that both the Italian Constitutional Court and the Court of Cassation have recognised a substantial *erga omnes* effect to preliminary rulings, which have precedence over incompatible national law, cf. Italian Constitutional Court, judgments of 19 April 1985, no. 113 and of 11 July 1989, no. 389; and Court of Cassation, judgments of 28 March 1997, no. 2787, and of 3 October 1997, no. 9653.

<sup>104</sup> ECJ, judgment in *Foto-Frost*, op. cit. supra.

<sup>105</sup> ECJ, judgments of 27 March 1980, *Denkavit italiana*, 61/79, ECR p. 1205; 3 October 2002, *Barreira Pérez*, C-347/00, ECR p. I-8191.

<sup>106</sup> ECJ, judgment of 28 February 1989, *Cargill*, 201/87, ECR p. 489. In such cases, the institution from which the act declared void originated is, however, required to take the necessary measures to comply with the judgment in accordance with Art. 266 TFEU.

<sup>107</sup> For instance, by temporarily keeping alive certain effects of the act declared void, cf. ECJ, judgments of 10 March 1992, *Lomas et al.*, C-38/90 and C-151/90, ECR p. I-1781; 9.11.2010, *Schecke et al.*, C-92/09 and C-93/09, not yet published in the ECR.

<sup>108</sup> ECJ, judgment of 27 February 1985, *Société des produits de maïs*, C-112/83, ECR p. 719.

<sup>109</sup> *Ex multis*, ECJ, judgment of 4 May 1999, *Sürül*, C-262/96, ECR p. I-2685.

<sup>110</sup> ECJ, judgments of 6 March 2007, *Meilicke*, C-292/04, ECR p. I-1835 and of 3 October 2006, *Banca popolare di Cremona*, C-475/03, ECR p. I-9373.

<sup>111</sup> ECJ, judgment of 8 September 2010, *Winner Wetten*, C-409/06, not yet published in the ECR.

<sup>112</sup> The various procedures are illustrated in the flowcharts of the end of this document.

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<sup>113</sup> It ought, however, to be pointed out that the Court of Justice has recently proposed the abolition of the extension to the time-limits “on account of distance” (v. “*Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto*”, op. cit. supra).

<sup>114</sup> Contrary to what happens in direct actions, none of the parties is allowed to react in writing to the observations presented by the others (and only communicated at the end of the written phase. Any rejoinder is thus put off until the oral phase of the procedure.

<sup>115</sup> The purpose of a report like this, which has, however, been lost in preliminary-reference cases, is, on the one hand, to allow the parties to check that the deduced reasons and arguments have been correctly understood and, on the other hand, to make study of the whole case file easier for the other judges in the chamber. Again, the Draft Amendments to the Statute proposed by the Court of Justice include the outright abolition of the report for the hearing.

<sup>116</sup> For an idea of the internal functioning of the Court of Justice and its services, the reader is referred to Grass R., *Les ressources humaines à la Cour de justice des Communautés européennes*, in *European Union Law*, 4/06, pages 853-864.

<sup>117</sup> For two recent cases in which the Court of Justice has rejected the request for accelerated procedure for questions referred for a preliminary ruling by the courts of Rossano and Trani, reference is made to the orders by the President of the Court of 1 October 2010 in *Affatato*, C-3/10, not yet published in the ECR, and of 16 March 2010 in *Vino*, C-20/10, not yet published in the ECR (but both accessible on the Court’s website). In both cases and with identical reasoning, the Court of Justice concludes that the court making the reference has not demonstrated that there is urgency in settling the dispute. On this point, the Court’s case-law had already made it clear that neither the risk of economic losses (cf. orders by the President of the Court of 18 March 2005 in *Friesland Coberco Dairy Foods*, C-11/05; of 23 January 2007 in *Consel Gi. Emme*, C-467/06; of 3 July 2008 in *Plantanol*, C-201/08 and of 4 December 2008 in *Attanasio Group*, C-384/08), nor the economic or social character of the main proceedings (cf. orders by the President of the Court of 24 September 2004 in *IATA and ELFAA*, C-344/04; of 15 November 2005 in *Laval un Partneri*, C-341/05; of 8 November 2007 in *Mihal*, C-456/07; and of 19 October 2009 in *Accor*, C-310/09) were adequate to demonstrate the existence of extraordinary urgency within the meaning of 104a(1) of the Rules of Procedure. Nor can the large number of individuals or legal situations potentially affected by the judgment that the court making the reference will have to issue after calling on the Court of Justice through the medium of a question for a preliminary ruling constitute, *per se*, an exceptional circumstance such as to justify the application of an accelerated procedure (cf., in particular, the orders by the President of the Court of 21 September 2006 in *KÖGAZ et al.*, C-283/06 and C-312/06; of 3 December 2008 in *Football Association Premier League et al. and Murphy*, C-403/08 and C-429/08, as well as of 23 October 2009 in *Lesoochranárske zoskupenie*, C-240/09).

<sup>118</sup> On this point, cf. Tizzano A. and Gencarelli B., *La procédure préjudicielle d’urgence devant la Cour de justice de l’Union européenne*, in *European Union Law* no. 2, 2010, pp. 923 ff.

<sup>119</sup> That makes it all the stranger that the Italian legislator should have expressly imposed the duty on a national court intending to suspend the “decision to recover” aid if it suspects that that decision is illegal (see footnote 58 above), the duty of referring the question to the Court of Justice “with a request for urgent procedure within the meaning of Article 104b [of the Rules of Procedure],” (see Articles 1 and 2 of law no. 101/2008). This final provision, in particular, not only reveals a (surprisingly) scanty knowledge of the purpose underlying the “PPU” but even of the actual wording of the article, which expressly limits its scope. Incredibly, it does not even consider the fact that the decision to be taken by the Court of Justice (or, depending on the case, by its President) to accept the urgent procedure (or even the accelerated procedure in accordance with Article 104a of the Rules of Procedure) presupposes the existence of circumstances justifying the extraordinary urgency in having the question decided on, which is certainly not something that can be fixed in advance by means of a general-purpose and abstract act, such as a national law.

<sup>120</sup> See, for instance, ECJ, judgments of 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU, ECR p. I-6307, and of 30 November 2009, *Kadzoev*, C-357/09 PPU, ECR p. I-11189.

<sup>121</sup> The first ECJ judgment handed down in this matter was that of 11 July 2008, *Rinau*, C-195/08 PPU, ECR p. I-5271.

<sup>122</sup> Official Journal C 297 of 5 December 2009, page 1.

<sup>123</sup> On this point, cf. ECJ, order of 13 January 2010, *Calestani et al.*, C-292/09 and C-293/09, not yet published in ECR, para. 28, in which the Court of Justice referred for the first time to the “informative note”, effectively reprimanding the Italian court from which the reference came for not having consulted it with a view to ensuring the

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correct wording of the question it wanted to refer. In point of fact, the question for a preliminary ruling as received did not make it possible to distinguish with certainty which precisely were the provisions of EU law for which the requesting court was asking for interpretation.

<sup>124</sup> The amount of detail in the description of the national dispute depends, of course, on its complexity. To take, for example, cases dealing with competition law, the Court of Justice has stipulated that it is crucial for the order for reference to be worded particularly accurately and that it must include, *inter alia*, a description of the relevant market, etc. (ECJ, judgments of 17 February 2005, *Viacom Outdoor*, C-134/03, ECR p. I-1167; and of 31 January 2008, *Centro Europa 7*, C-380/05, ECR p. I-349).

<sup>125</sup> The Court of Justice has had to opportunity more than once to point out that, since the information provided in the decisions to make a reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice, it is thus the Court's duty "to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties. Thus (...) it is essential that the national court should give at the very least some explanation of the reasons for the choice of the [EU] provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute" (*ex multis*, ECJ, judgment of 8 November 2007, *Schwibbert*, C-20/05, ECR p. I-9447).

<sup>126</sup> On this point, it must be understood that the Court of Justice remains seized of the case until such time as the question submitted for a preliminary ruling is withdrawn by the adjudicating court or tribunal (cf., for example, the removal order of 23 March 2006 in *Impresa portuale di Cagliari*, C-174/03, issued by the Court of Justice after having been informed by the Sardinian regional administrative tribunal that it was anyway intending itself to withdraw its question, probably in the light of the submissions presented by Advocate General Jacobs on 21 April 2005) or in cases in which the effect of a legal remedy is the court that originally submitted the question no longer holds jurisdiction for the case (ECJ, order of 24 March 2009, *De Nationale Loterij*, C-525/06, ECR p. I-2197).

<sup>127</sup> On this point, it must be pointed out, as the Court of Justice has done itself, that the presentation of the actual question is a relatively minor component of the order for reference (cf. ECJ, judgement of 25 February 2010 in *Pontina Ambiente*, C-172/08, in which it states that, although the court making the reference had not expressly formulated any questions, it had, nonetheless, supplied sufficient indications regarding both the elements of fact and the elements of law characterising the main proceedings to allow the Court of Justice to understand the object of the question referred to it and to provide an interpretation of the pertinent provisions of EU law, which could be helpful to the adjudicating court or tribunal in resolving such a dispute). Even though the wording of the question may not be decisive (whereas a clearly worded decision to make a reference is), the Court is not forced to reword it, and so it is still advisable to avoid the mistake of asking the Court of Justice if a provision of national law is compatible with a provision of EU law (since, as has been stated clearly, the Court of Justice has no powers at all to perform such a scrutiny) and rather to ask if provision X of EU law is to be interpreted as precluding a national provision, such as the one at stake in the main proceedings, which lays down that (...).