Prejudiciālo nolēmumu procedūra

13

PRELIMINARY RULINGS

1 CENTRAL ISSUES

Article 267 TFEU, which contains the preliminary ruling procedure, is one of the most interesting provisions of the Treaty.[1] There would have been few, at the inception of the Treaty, who would have guessed its importance in shaping EU law, and the relationship between the national and EU legal systems. Article 267 TFEU[2] is very much the 'jewel in the Crown' of the ECJ's jurisdiction. Prior to the Nice Treaty only the ECJ could give preliminary rulings. This was changed by the Nice Treaty, and this change has been carried over to the Lisbon Treaty. Article 256(3) TFEU accords the General Court jurisdiction to give such rulings in specific areas laid down by the Statute of the Court of Justice, subject to certain qualifications that will be considered below. The power to accord the General Court jurisdiction to give preliminary rulings has not, however, been acted on thus far. The ECJ therefore currently hears all Article 267 TFEU cases.

The relationship between national courts and the ECJ is reference-based. It is not an appeal system. No individual has a right of appeal to the ECJ. It is for the national court to make the decision to refer. The ECJ will rule on the issues referred to it, and the case will then be sent back to the national courts, which will apply the Union law to the case at hand.

Article 267 has been of seminal importance for the development of EU law. It is through preliminary rulings that the ECJ has developed concepts such as direct effect and supremacy.[3] Individuals assert in national courts that the Member State has broken a Union provision, which gives them rights that they can enforce in their national courts. The national court seeks a ruling from the ECJ whether the particular EU provision has direct effect, and the ECJ is thereby able to develop the concept. Article 267 has been the mechanism through which national courts and the ECJ have engaged in a discourse on the appropriate reach of EU law when it has come into conflict with national legal norms.

Article 267 is also an indirect way of testing the validity of EU action for conformity with Union law.[4] An individual can contest the legality of EU law directly before the General Court under

[1] Prior to the Lisbon Treaty two variants of the preliminary ruling procedure were applicable to the Area of Freedom, Security and Justice (AFSJ), which were found in Art 35 EU and Art 68 EC. These variants are no longer applicable, because the AFSJ is now subject to the normal Treaty rules concerning preliminary rulings. There are, however, transitional provisions that limit the legal impact of the Lisbon Treaty on measures concerning Police and Judicial Cooperation in Criminal Matters adopted before its entry into force: Protocol (No 36) On Transitional Provisions, Arts 9–10.

[2] Ex Art 234 EC, Art 177 EEC.

[3] F Mancini and D Keeling, 'From *CILFIT* to *ERT*: The Constitutional Challenge Facing the European Court' (1991) 11 YBEL 1, 2–3.

[4] Sec 000.

Article 263 TFEU, but, as will be seen in the next chapter, the rules concerning access to court under Article 263 are restrictive, and therefore raising the validity of EU law before a national court under Article 267 TFEU may be the only way to challenge such a measure.

v. Article 267 has been the principal vehicle through which the relationship between the national and EU legal systems has been fashioned. The original conception of the relationship was *horizontal* and *bilateral*. It was horizontal in that the ECJ and the national courts were separate but equal. They had differing functions, which each performed within its appointed sphere. It was for the national court to decide whether to refer a matter to the ECJ, which the ECJ would then interpret. It was bilateral in the sense that, in principle, the ECJ's rulings were delivered to the particular national court that made the request. In this sense, there was a series of bilateral relationships between the ECJ and each of the national courts.

vi. The relationship has become steadily more *vertical* and *multilateral*. It has become more vertical in that developments have emphasized that the ECJ sits in a superior position to that of the national courts. The verticality of the relationship also manifests itself in a less obvious, but equally important, manner. The ECJ has, in effect, enrolled the national courts as enforcers and appliers of EU law. They are perceived as a central part of an EU-wide judicial hierarchy,[5] with the ECJ sitting at its apex. The relationship has become more multilateral, in that judgments given in response to the request for a ruling from one Member State are increasingly held to have either a *de facto* or *de jure* impact on all other national courts.

vii. There has been much discussion about reform of the EU judicial system. This discourse has been driven by the increased workload on the ECJ and General Court, and by the enlargement of the EU.

2 FOUNDATIONS: ARTICLE 267

1. 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;

2. 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.

3. 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.

4. 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.

(A) QUESTIONS THAT CAN BE REFERRED

A preliminary reference can be made in two types of case, the first of which concerns *the interpretation of the Treaty*: Article 267(1)(a). It is through Article 267(1)(a) that the Court has

[5] Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (1995), [11]–[15].

given many of its seminal judgments concerning direct effect and supremacy. The ECJ does not, however, pass judgment on the validity as such of a national law. It interprets the Treaty. A consequence of this interpretation may be that a provision of national law is incompatible with EU law, and the supremacy of EU law will mean that there is an obligation on the national court to redress the situation. The ECJ itself is nonetheless not directly making any judgment on the validity of national law.[6]

Article 267(1)(b) also allows for preliminary references to be made which relate *to the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the EU.* Preliminary references concerning the validity[7] of acts of the institutions, bodies, etc covers cases such as *ICC*[8] and *Foto-Frost*[9] in which the validity of an EU regulation, directive, or decision is contested before a national court. Preliminary references concerning the interpretation of acts of the institutions, bodies, etc covers cases where an individual argues that, for example, an EU regulation gives rise to rights that can be enforced in national courts. References can however be made under Article 267(1)(b) irrespective of whether or not the EU provision is directly effective, in order, for example, to clarify the interpretation of the relevant provision. References may also be made in relation to non-binding acts such as recommendations,[10] and certain agreements with non-Member States.[11] The ECJ has also held that a preliminary reference may be made where a provision of national law is based on or makes some reference to EU law, even if the consequence is that the ambit of EU law is extended by the national provisions.[12]

(3) COURTS OR TRIBUNALS WHICH CAN REFER

Article 267(2) and (3) is framed in terms of courts or tribunals of a Member State, which may or must make a reference. It is for the ECJ to decide whether a body is a court or tribunal for these purposes, and the categorization under national law is not conclusive.[13] The ECJ will take a number of factors into account when making this determination, including: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.[14] The application of these criteria has

[6] Case C-167/94 R *Grau Gomis* [1995] ECR I-1023; Cases C-37 and 38/96 *Sodiprem SARL v Direction Générale des Douanes* [1998] ECR I-2039; Cases C-10 and 22/97 *Ministero delle Finanze v IN CO GE '90 Srl* [1998] ECR I-6307; Information Note on References from National Courts for a Preliminary Ruling, [2005] OJ C143/1.

[7] This is subject to Art 276 TFEU, which prevents the ECJ 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.

[8] Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECR 1191.

[9] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

[10] Case 322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407.

[11] Case 181/73 *Haegeman v Belgium* [1974] ECR 449; Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] ECR I-3603; Cases C-300 and 392/98 *Parfums Christian Dior v Tuk Consultancy BV* [2000] ECR I-11307.

[12] Cases C-297/88 and 197/89 *Dzodzi v Belgium* [1990] ECR I-3763; Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161; Case C-217/05 *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA* [2006] ECR I-11987; S Lefevre, 'The Interpretation of Community law by the Court of Justice in Areas of National Competence' (2004) 29 ELRev 501.

[13] Case 43/71 *Politi v Italy* [1971] ECR 1039; Case C-24/92 *Corbiau v Administration des Contributions* [1993] ECR I-1277.

[14] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961; Cases C-9 and 118/97 *Proceedings brought by Jokela and Pitkaranta* [1998] ECR I-6267; Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539; Case C-195/98 *Österreicher Gewerkschaftsbund, Gewerkschaft Offentlicher Dienst v Republik Österreich* [2000] ECR I-10497; Case C-178/99 *Salzmann* [2001] ECR I-4421; Case C-53/03 *Syfait v GlaxoSmithKline plc* [2005] ECR I-4609; Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613.

not always been straightforward.[15] Thus, for example, it is clear from *Cartesio*[16] that although Article 267 TFEU does not make reference to the ECJ dependent on the proceedings being *inter partes*, such a reference could only be made if there were a case pending before the national court, which led to a decision of a judicial nature A reference could not, by way of contrast, be made where a court made what was in essence an administrative decision that did not resolve a legal dispute, since the national court could not be regarded as exercising a judicial function in this instance. The *Broekmeulen* case provides a good example of the ECJ's general reasoning in this area.

Case 246/80 C Broekmeulen v Huisarts Registratie Commissie [1981] ECR 2311

[Note Lisbon Treaty renumbering: Art 177 is now Art 267 TFEU.]

The case concerned a Dutch body called the Appeals Committee for General Medicine. It heard appeals from another body, which was responsible for registering those who wished to practise medicine in the Netherlands. Both bodies were established under the auspices of the Royal Netherlands Society for the Promotion of Medicine. Although this was a private association, it was indirectly recognized in other parts of Dutch law, and it was not possible to practise without registration. The Appeals Committee was not a court or tribunal under Dutch law, but it did follow an adversarial procedure and allow legal representation. Broekmeulen was of Dutch nationality, but had qualified in Belgium. He sought to establish himself as a doctor in the Netherlands and his application to be registered was refused. The question arose whether the Appeals Committee was a court or tribunal for the purposes of Article 177.

THE ECJ

14 A study of the Netherlands legislation and of the statutes and internal rules of the Society shows that a doctor who intends to establish himself in the Netherlands may not in fact practise either as a specialist or as an expert in social medicine, or as a general practitioner, without being recognised and registered by the organs of the Society...

15 It is thus clear that...the Netherlands system of public health operates on the basis of the status accorded to doctors by the Society and that registration as a general practitioner is essential to every doctor wishing to establish himself in the Netherlands as a general practitioner.

16 Therefore a general practitioner who avails himself of the right of establishment and the freedom to provide services conferred upon him by Community law is faced with the necessity of applying to the Registration Committee established by the Society, and, in the event of his application's being refused, must appeal to the Appeals Committee. The Netherlands Government expressed the opinion that a doctor who is not a member of the Society would have the right to appeal against such a refusal to the ordinary courts, but stated that the point had never been decided by the Netherlands courts. Indeed all doctors, whether members of the Society or not, whose application to be registered as a general practitioner is refused, appeal to the Appeals Committee, whose decisions to the knowledge of the Netherlands Government have never been challenged in the ordinary courts.

17 It should be noted that it is incumbent upon Member States to take the necessary steps to ensure that within their own territory the provisions adopted by the Community institutions are implemented in their entirety. If, under the legal system of a Member State, the task of implementing such provisions is assigned to a professional body acting under a degree of governmental supervision,

[15] T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling Procedure' (2003) 40 CMLRev 9, 27–34.

[16] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, [56]–[57].

and if that body, in conjunction with the public authorities concerned, creates appeal procedures which may affect the exercise of rights granted by Community law, it is imperative, in order to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings.

18. As a result of all the foregoing considerations and in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are recognised as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty. Therefore, the Court has jurisdiction to reply to the question asked.

It is necessary that the body making the reference be a court or tribunal of a Member State.[17] This can be problematic in, for example, the context of arbitration. Whether an arbitral court or tribunal can be regarded as an emanation of a Member State will depend on the nature of the arbitration. The fact that the arbitral body gives a judgment according to law, and that the award is binding between the parties, will not, however, be sufficient. There must be a closer link between the arbitration procedure and the ordinary court system in order for the former to be considered as a court or tribunal of a Member State.[18]

(c) COURTS OR TRIBUNALS WHICH MUST REFER

Article 267 TFEU draws a distinction between courts or tribunals with a discretion to refer to the ECJ, Article 267(2), and courts or tribunals 'against whose decisions there is no judicial remedy under national law', Article 267(3), which have an obligation to refer, provided that a decision on a question is necessary to enable judgment to be given. The rationale for the duty to refer in Article 267(3) is to prevent a body of national case law that is not in accordance with EU law from being established in any Member State.[19]

There are two views about the type of bodies covered by Article 267(3). According to the abstract theory, the only bodies that come within this Article are those whose decisions are never subject to appeal. According to the concrete theory, the real test is whether the court or tribunal's decision is subject to appeal in the type of case in question.[20]

Costa[21] suggested that the ECJ favoured the concrete theory. In that case the *giudice conciliatore* (magistrate) made a reference to the ECJ. Although his decisions were capable of being appealed in some instances, there was no such right of appeal in the particular case, because the sum involved was relatively small. The ECJ therefore treated the national court as one against whose decision there was no judicial remedy in the actual case at hand.

[17] Case C-355/89 *DHSS (Isle of Man) v Barr and Montrose Holdings Ltd* [1991] ECR I-3479; Case C-100/89 *Kaefer and Procacci v France* [1990] ECR I-4647.

[18] Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG and Co KG* [1982] ECR 1095; Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055; Case C-125/04 *Denuit and Cordenier v Transorient-Mosaïque Voyages and Culture SA* [2005] ECR I-923.

[19] Case C-393/98 *Ministerio Publico and Gomes Valente v Fazenda Publica* [2001] ECR I-1327, [17]; Case C-99/00 *Criminal Proceedings against Lyckeskog* [2002] ECR I-4839, [14]-[15]; Case C-458/06 *Skatterverket v Gourmet Classic Ltd* [2008] ECR I-4207, [23].

[20] Difficulties may also arise in circumstances where the judgment in question can be reconsidered in other proceedings: Case 107/76 *Hoffmann-La Roche v Centrafarm* [1977] ECR 957.

[21] Case 6/64 [1964] ECR 585, 592.

The concrete theory was affirmed in *Lyckeskog*,[22] although it may still be difficult to decide whether a court's decision is truly final in the particular type of case. The ECJ held that decisions of a national appeal court that could be challenged before a national Supreme Court did not come within Article 267(3), and this was so notwithstanding the fact that the appeal court decision was subject to a prior declaration of admissibility before it could be appealed to the Supreme Court. If a question concerning the interpretation of EU law arose before the Supreme Court it would be under an obligation to refer pursuant to Article 267(3), either when examining admissibility or at a later stage.[23]

This approach was confirmed and applied in *Cartesio*.[24] The ECJ held that a court whose decisions could be appealed on points of law could not be classified as a court or tribunal against whose decisions there was no judicial remedy under national law for the purposes of Article 267 (3) TFEU, even though the procedural system under which the dispute was to be decided imposed restrictions with regard to the arguments that could be advanced on appeal. In the instant case the existence of an appeal did not, moreover, suspend the judgment of the court appealed against. This did not, said the ECJ, render the judgment of such a court final for the purposes of Article 267(3), since the lack of suspensory effect did not deprive the parties of the possibility of exercising effectively their right to appeal that decision.

(D) RELATIONSHIP BETWEEN NATIONAL COURTS

The preceding discussion leaves open the relationship between national courts under the preliminary ruling procedure, and more especially the legal tenability of a reference made by a lower national court that is then reversed on appeal by a higher national court. This important issue was considered in *Cartesio*, where the ECJ supported the ability of lower courts to refer to the ECJ, even in the face of a negative decision by a higher national court.

Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9641

Under Hungarian law it was possible for a lower court decision referring a case to the ECJ to be set aside on appeal, and the lower court could be ordered to resume the domestic law proceedings.

THE ECJ

96. In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

97. It follows that, in a situation such as that in the case before the referring court, the Court must—also in the interests of clarity and legal certainty—abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the

[22] Case C-99/00 (n 19).
[23] For discussion within the UK see *Chiron Corporation v Murex Diagnostics Ltd* [1995] All ER (EC) 88, 93–94; Arnull, 'Which Courts and Tribunals are Bound to Refer to the European Court?' (1977) 2 ELRev 119.
[24] Case C-210/06 *Cartesio* (n 16) [77]–[78].

referring court, such revocation or amendment being matters on which that court alone is able to take a decision.

98. In the light of the foregoing, the answer to the third question must be that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

2 NATIONAL COURT RAISING EU LAW OF ITS OWN VOLITION

The issue of whether national courts can be limited by national procedural rules as to whether they can raise a matter of EU law of their own volition is as follows. In *Peterbroeck* the ECJ held that a national procedural rule which prevented a national court from raising a matter of EU law of its own motion concerning the compatibility of a national law with EU law, even where it had not been raised by the person concerned within the specified time, was itself contrary to EU law. It was held that the domestic rule could not be justified on the ground of legal certainty or the proper conduct of procedure.[25] This case was distinguished in *Van Schijndel*.[26] The ECJ held that there was no such obligation on national courts if it would oblige the national court to abandon the passive role assigned to it by the domestic procedural rules by going beyond the ambit of the dispute as defined by the parties themselves.

It is nonetheless clear from *Asturcom*[27] that the ECJ may impose a duty to raise a point of EU law provided that the court has discretion to raise such a point in analogous domestic actions. Thus it held that the Directive on Unfair Contracts should be interpreted to mean that a national court hearing an action for enforcement of an arbitration award that had become final and was made in the absence of the consumer was required to assess of its own motion whether the arbitration clause in a consumer contract was unfair, in so far as under national rules of procedure it could carry out such an assessment in similar actions of a domestic nature.

3 THE EXISTENCE OF A QUESTION: DEVELOPMENT OF PRECEDENT

It is for the national court to decide whether to make a reference. The mere fact that a party before the national court contends that the dispute gives rise to a question concerning the validity of EU law does not mean that the court is compelled to consider that a question has been raised within the meaning of Article 267 TFEU.[28] The national court may conclude that a reference is not required

[25] Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgium* [1995] ECR I-4599.

[26] Cases C-430-431/93 *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; Cases C-222-225/05 *van der Weerd v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233; Case C-227/08 *Eva Martín Martín v EDP Editores SL*, 17 Dec 2009, [19]-[20].

[27] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, 6 Oct 2009; Case C-227/08 *Martín* (n 26); Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECR I-411, [45].

[28] Case C-344/04 *R on the application of IATA and ELFAA v Department of Transport* [2006] ECR I-403, [27]-[28]; Case T-47/02 *Danzer and Danzer v Council* [2006] ECR II-1779, [36]-[37].

because the Union Courts have already resolved the issue, because there is no doubt as to the validity of the EU measure, or because a decision on the question is not necessary for the case before the national court.

(A) NATIONAL LAW IN BREACH OF EU LAW AND PRIOR ECJ RULINGS

It is clear that Article 267 TFEU is designed to be used only if there is a question to be answered which falls into one of the categories mentioned in Article 267(1). There may be a number of reasons why a question' posed by the national court does not necessitate a ruling, the most obvious being that the ECJ has already ruled on the matter.

Cases 28–30/62 Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie [1963] ECR 31

[Note Lisbon Treaty renumbering: Arts 12 and 177 are now Arts 30 and 267 TFEU.]

The facts in the case were materially identical to those in Case 26/62 *Van Gend en Loos*. The questions asked were also materially identical to those posed in the *Van Gend* case.

THE ECJ

The regularity of the procedure followed by the Tariefcommissie in requesting the Court for a preliminary ruling under Article 177 of the EEC Treaty has not been disputed and there is no ground for the Court to raise the matter of its own motion.

The Commission . . . urges that the request be dismissed for lack of substance, since the questions on which an interpretation is requested from the Court in the present cases have already been decided . . . in Case 26/62, which covered identical questions raised in a similar case.

This contention is not justified. A distinction should be made between the obligation imposed by the third paragraph of Article 177 upon national courts or tribunals of last instance and the power granted by the second paragraph of Article 177 to every national court or tribunal to refer to the Court of the Communities a question on the interpretation of the Treaty. Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law—like the Tariefcommissie—to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.

When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted. Such an attitude conforms with the function assigned to the Court of ensuring unity of interpretation of Community law within the six Member States. . . .

It is no less true that Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again. This follows from Article 20 of the Statute of the Court of Justice, under which the procedure laid down for the settlement of preliminary questions is automatically set in motion as soon as such a question is referred by a national court.

The Court must, therefore, give a judgment on the present application.

The interpretation of Article 12 of the EEC Treaty, which is here requested, was given in the Court's judgment . . . in Case 26/62.

[*The Court then repeated the judgment it had given in the case of* Van Gend en Loos. *It continued as follows.*]

The questions of interpretation posed in this case are identical with those settled as above and no new factor has been presented to the Court.

In these circumstances the Tariefcommissie must be referred to the previous judgment.

The ECJ's approach appears clearly in this extract. The national court is still able, in formal terms, to refer a matter to the ECJ, even where the ECJ has ruled on the issue. However, it is clear that such an application must raise some new factor or argument. If it does not do so, then the ECJ will be strongly inclined to restate the substance of the earlier case. The existence of an earlier ruling can deprive the national court's obligation to refer 'of its purpose and thus empty it of its substance'. The *Da Costa* case, therefore, initiated what is in effect a system of precedent. These seeds have been developed by the ECJ in later cases.[29]

Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415

[Note Lisbon Treaty renumbering: Art 177 is now Art 267 TFEU]

The plaintiffs alleged that certain duties imposed by Italian law were in breach of Regulation 827/68. The Italian Ministry of Health urged the Italian Court of Cassation, against whose decisions there was no judicial remedy under national law, not to refer the matter to the ECJ, because the answer to the question was so obvious as to remove the need for a reference. The Court of Cassation decided that this contention was itself an issue of Community law. It therefore requested a ruling from the ECJ on whether the obligation to refer imposed in Article 177(3), was unconditional, or whether it was premised on the existence of reasonable interpretive doubt about the answer which should be given to a question. The ECJ's response to the *acte clair* point will be examined in detail below. The ECJ also gave guidance on the relevance of its prior decisions.

THE ECJ

8. In this connection, it is necessary to define the meaning for the purposes of Community law of the expression 'where any such question is raised' in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.

9. In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that

[29] D Edward, '*CILFIT* and *Foto-Frost* in their Historical and Procedural Context' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010) 173–184; P Craig, 'The Classics of EU Law Revisited: *CILFIT* and *Foto-Frost*' in ibid, 185–191; D Sarmiento, '*CILFIT* and *Foto-Frost*: Constructing and Deconstructing Judicial Authority in Europe' in ibid, 192–200.

a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

10 Secondly, it follows from the relationship between paragraphs (2) and (3) of Article 177 that the courts or tribunals referred to in paragraph (3) have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

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

12 The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by paragraph (3) of Article 177 might none the less be subject to certain restrictions.

13 It must be remembered in this connection that in ... *Da Costa* the Court ruled that: 'Although paragraph (3) of Article 177 unreservedly requires courts or tribunals of a Member State against whose decision there is no judicial remedy under national law ... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'

14 The same effect, as regards the limits set to the obligation laid down by paragraph (3) of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

15 However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in paragraph (3) of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

A previous ruling can therefore be relied on even if it did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical. Provided that the point of law has already been determined by the ECJ, it can be relied on by a national court in a later case, thereby obviating the need for a reference. The national courts were encouraged to rely on the ECJ's prior rulings where the substance of the legal point had already been adjudicated.[30] Those earlier ECJ rulings became, in that sense, precedents for the national courts. This is subject to the qualification in paragraph 15: the national court can still refer if it so wishes, and the application will not be deemed inadmissible, but the ECJ is likely to give its decision by reasoned order, in which reference is made to its previous judgment or to the relevant case law.[31]

(B) THE VALIDITY OF EU LEGISLATION AND PRIOR ECJ RULINGS

The cases discussed thus far concerned the impact of an earlier ECJ ruling when Member State action has been alleged to violate the Treaty. The ECJ has been even more forceful when the impact

[30] Cases C-428 and 434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) v Juntas Generales del Territorio Histórico de Vizcaya* [2008] ECR I-6747, [42]-[43].

[31] Case C-260/07 *Pedro IV Servicios SL v Total España SA*, 2 Apr 2009, [31].

of its previous decisions on the validity of EU legislation has been in issue. This is exemplified by the *ICC* case:

Case 66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato [1981] ECR 1191

Council Regulation 563/76 was designed to reduce stocks of skimmed-milk powder. It made the grant of Community aid dependent on proof that the recipient had purchased a certain quantity of such skimmed milk held by an intervention agency. Compliance with this obligation was secured by the payment of security that was forfeited if the skimmed milk was not bought. The plaintiff received the Community aid and paid the security, but did not buy the skimmed-milk powder, and hence the national intervention agency did not release the security. In an earlier case the ECJ had found that Regulation 563/76 was invalid, because the price at which the milk powder was to be bought was regarded as disproportionately high.[32] The plaintiff, therefore, took the view that the security could not be forfeited since it only served to ensure compliance with an obligation (to buy the milk powder), which was invalid. The Italian court requested a ruling on whether the earlier judgment holding the regulation to be null and void was effective in any subsequent litigation, or whether such a finding was only of relevance in relation to the court which had originally sought the ruling.

THE ECJ

11. The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which is to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.

12. When the Court is moved under Article 177 to declare an act of one of the institutions to be void, there are particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of Community law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the Community law applicable.

13. It follows therefrom that although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.

14. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 . . . and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need in particular if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier.

15. If that is not the case national courts are entirely justified in determining the effect on the cases brought before them of a judgment declaring an act void given by the Court in an action between other parties.

16. It should further be observed, as the Court acknowledged in its judgments . . . in Joined Cases 117/76 and 16/77, *Ruckdeschel and Diamalt*,[33] and Joined Cases 124/76 and 20/77, *Moulins de*

[32] See Case 116/76 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten* [1977] ECR 1247.
[33] [1977] ECR 1753.

Pont-à-Mousson and Providence Agricole,[34] that as those responsible for drafting regulations declared to be void the Council or the Commission are bound to determine from the Court's judgment the effect of that judgment.

17 In the light of the foregoing considerations and in view of the fact that by its second question the national court has asked, as it was free to do, whether Regulation 563/76 was void, the answer should be that that is in fact the case for the reasons already stated in the judgments of 5 July 1977.

The *ICC* case provides further evidence of the ECJ's approach to precedent. The national court has discretion to refer a matter to the Court, even if the latter has already given judgment. However, the ECJ makes it patently clear that, although such a judgment is addressed primarily to the court which requested the original ruling, it should be relied on by other national courts before which the matter arises. The original ruling will, in this sense, have a multilateral and not merely a bilateral effect. A decision of the ECJ will, therefore, have a precedential impact on all national courts within the EU. The Court has, however, made it clear that national courts cannot themselves find that an EU norm is invalid.

Case 314/85 Firma Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199[35]

A national court inquired whether it had the power to declare invalid a Commission decision on the ground that it was in breach of a Community regulation on a certain issue.

THE ECJ

13 In enabling national courts against whose decisions there is a judicial remedy under national law to refer to the Court for a preliminary ruling questions on interpretation or validity, Article 177 did not settle the question whether those courts themselves may declare that acts of Community institutions are invalid.

14 Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling the existence of the Community measure into question.

15 On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasised in the judgment... (Case 66/80, *International Chemical Corporation*...), the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

17 Since Article 177 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

18 It must also be emphasised that the Court of Justice is in the best position to decide on the validity of Community acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC,

[34] [1977] ECR 1795.

[35] Case C-27/95 *Woodspring DC v Bakers of Nailsea Ltd* [1997] ECR I-1847; Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwalitiet* [2005] ECR I-10513, [15]-[25]; Case C-344/04 *IATA* (n 28) [27]-[32].

Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purpose of the case before it....

19. It should be added that the rule that national courts may not themselves declare Community acts to be invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question.

20. The answer to the first question must therefore be that national courts have no jurisdiction to declare that acts of Community institutions are invalid.

The ECJ, in *Atlanta*,[36] provided guidance on the issue of interim relief raised in paragraph 19. Where a national measure is challenged because of the alleged invalidity of the EU regulation on which it was based, the national court can grant interim relief. Certain conditions must however be met. The national court must have serious doubts about the validity of the EU measure, and must have referred the measure to the ECJ for a ruling. The interim relief must be necessary to prevent serious and irreparable damage to the applicant. The national court must take due account of the Union interest.[37] It must, moreover, respect any decision of the ECJ or General Court already given on the substance of the disputed measure.

(c) ECJ RULINGS AND LEGAL CERTAINTY

The discussion thus far has been concerned with the effect of a prior ruling of the EU Courts for national courts. It is, as we have seen, for the national court to apply that prior ruling. The ECJ does not, however, delve into the national legal system and determine the validity of national law. It gives an interpretation of the compatibility of national law with EU law, and it is then for the national court to apply that interpretation within its legal system. The general principle is that the ECJ's ruling establishes the law from the time that it entered into force, and should therefore be applied to legal relationships before the ruling was given.[38] This can lead to difficulties concerning legal certainty.[39]

Case C-453/00 Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren [2004] ECR I-837

The applicants were exporters of poultry meat to non-member countries. The product was originally classified under one heading of the common customs tariff, on the basis of which the applicants were paid certain export refunds. The Dutch customs authorities then decided that the product should fall under a different classification and demanded reimbursement of the export refunds. The applicants appealed that decision to a Dutch court, which dismissed the appeal. The applicants did not request a preliminary ruling on the matter. In a subsequent decision involving different parties the ECJ made

[36] Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761; Cases C-143/88 and 92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1991] ECR I-415; Case C-334/95 *Kruger GmbH & Co KG v Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517.

[37] By considering whether, eg, the EU measure would be deprived of all effectiveness if it were not implemented immediately.

[38] Case C-455/08 *Commission v Ireland*, 23 Dec 2009, [39].

[39] J Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal System' (2005) 42 CMLRev 9; R Caranta, Note (2005) 42 CMLRev 179.

it clear that the re-classification of the product by the Dutch customs authorities was erroneous. The applicants then sought reimbursement of the refunds that they would have received if the Dutch authorities had classified the goods correctly. Under Dutch law administrative bodies could, in principle, reopen a final decision, and could in certain circumstances withdraw the decision. However under Dutch law the finality of an administrative decision would not normally be affected by subsequent judicial decisions, since that could seriously impair legal certainty and give rise to administrative chaos. The ECJ reiterated the general principle that a ruling under Article 267 established the law as it should be understood from the time it entered into force, and that therefore this should be applied by an administrative body to legal relationships before the ruling was given. The issue was whether this should be applied even where the administrative decision had become final.

THE ECJ

24. Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision . . . contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle to reopen an administrative decision which has become final in that way.

[*The ECJ then noted that under Dutch law administrative decisions could, subject to certain conditions, be reopened.*]

26. [T]he circumstances of the main case are the following. First, national law confers on the administrative body competence to reopen the decision . . . which has become final. Second, that decision became final only as a result of a judgment of a national court against whose decisions there is no judicial remedy. Third, that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in the third paragraph of Article 234 EC. Fourth, the person concerned complained to the administrative body immediately after becoming aware of that judgment of the Court.

27. In such circumstances, the administrative body concerned is, in accordance with the principle of cooperation arising under Article 10 EC, under an obligation to review that decision in order to take account of the interpretation of the relevant provisions of Community law given in the meantime by the Court. The administrative body will have to determine on the basis of the outcome of that review to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question.

Later cases have fine-tuned the requirements laid down in the preceding case.[40] Thus it is clear from *Kempter*[41] that the third condition in *Kühne & Heitz* does not require the parties to have raised the point of EU law before the national court. It suffices in this respect if either the point of EU law, the interpretation of which proved to be incorrect in light of a subsequent ECJ judgment, was considered by the national court ruling at final instance or could have been raised by the latter of its own motion.

(D) CONCLUSION

The development of precedent charted above has implications for the relationship between national courts and the ECJ. It modifies the original conception of a horizontal and bilateral relationship. In so far as ECJ rulings have precedential value, they place the Court in a superior position to the national

[40] Case C-234/04 *Kapferer v Schlanck & Schick GmbH* [2006] ECR I-2585; Cases C-392 and 422/04 *i-21 Germany GmbH and Arcor & Co KG v Germany* [2006] ECR I-8559.

[41] Case C-2/06 *Kempter* (n 27) [44].

courts. The very existence of a system of precedent is indicative of a shift to a vertical hierarchy between the ECJ and national courts: the ECJ will lay down the legally authoritative interpretation which will then be adopted by national courts. The creation of precedent serves also to render the relationship less bilateral, and more multilateral, since an earlier ECJ ruling can be relied on by any national court dealing with the point of law that has already been decided by the ECJ.

The importance attached to earlier rulings is both reflected in and reinforced by Article 104(3) of the Rules of Procedure,[42] which allows the ECJ to give its decision by reasoned order referring to a previous decision or earlier case law where a question referred is identical to one that has already been answered, or where the answer to the question can be clearly deduced from prior case law. Thus if the national court does refer where there is an existing precedent the ECJ may well give judgment by reasoned order that reiterates its previous ruling.

THE EXISTENCE OF A QUESTION: THE 'ACTE CLAIR' DOCTRINE

A national court may feel that the answer to the issue is so clear that no reference to the ECJ is required. National courts have, in the past, refused to make a reference for this reason.[43] The conditions in which this is legitimate were considered in *CILFIT*:

Case 283/81 **Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health**
[1982] ECR 3415

[Note Lisbon Treaty renumbering: Art 177(3) is now Art 267(3) TFEU]

The facts were set out above. Where a precedent exists, then the relationship between the ECJ and the national court is as set out in the preceding section. The *acte clair* doctrine may however apply where there is no prior ECJ decision on the point. The extract follows on immediately from that given above.

THE ECJ

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

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

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

19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must

[42] Rules of Procedure of the Court of Justice, 1 Dec 2005, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-04/rp.en.pdf.

[43] See, eg, *Re Société des Pétroles Shell-Berre* [1964] CMLR 462.

be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

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

21. In the light of all those considerations, the answer to the question submitted... must be that paragraph (3) of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

The implications of *CILFIT* were considered by a number of commentators. References to Article 177 should now be read as to Article 267 TFEU.

GF Mancini and DT Keeling, From CILFIT to ERT: The Constitutional Challenge Facing the European Court[44]

The correct analysis of *CILFIT* was given by a Danish scholar, Professor Hjalte Rasmussen,[45] who maintains that the judgment was based on an astute strategy of 'give and take'. The Court, recognizing that it could not in any case coerce the national courts into accepting its jurisdiction, concedes something—a great deal in fact, nothing less than the right not to refer if the Community measure is clear—to the professional or national pride of the municipal judge, but then... restricts the circumstances in which the clarity of the provision may legitimately be sustained to cases so rare that the nucleus of its own authority is preserved intact (or rather consolidated because it voluntarily divested itself of a part of its exclusive jurisdiction). The objective of the Court is plain: by granting supreme courts the power to do lawfully that which they could in any case do unlawfully, but by subjecting that power to stringent conditions, the Court hoped to induce the supreme courts to use willingly the 'mechanism for judicial cooperation' provided by the Treaty. The result is to eliminate sterile and damaging conflicts and to reduce the risk that Community law might be the subject of divergent interpretations.

Mancini and Keeling therefore saw *CILFIT* as a dialogue between the ECJ and the national courts, with the intent being to rein in the latter. The 'give and take' of *CILFIT* involved the ECJ accepting the *acte clair* doctrine in principle, but placing significant constraints on its exercise in the hope that national courts would play the game and only refuse to refer when matters really were unequivocally clear.

Some writers were, however, more sceptical as to whether the conditions laid down in *CILFIT* really did curb the discretion of national courts.

[44] Mancini and Keeling (n 3) 4.

[45] H Rasmussen, 'The European Court's *Acte Clair* Strategy in *CILFIT*' (1984) 9 ELRev 242.

A Arnull, The Use and Abuse of Article 177[46]

The effect of the *CILFIT* decision, it was argued,[47] would be to enable national judges to justify any reluctance they might feel to ask for a preliminary ruling by reference to a decision of the European Court. Of the factors to be borne in mind by national courts before they concluded that the meaning of a provision of Community law was clear, only the requirement that the different language versions be compared, it was submitted, had any teeth. However, even this requirement was less onerous than it seemed, as comparison of the different language versions would usually be carried out by reference to the version in the judge's own tongue.

[*Arnull examined the practice of the United Kingdom courts that had cited the* CILFIT *decision. He concluded in the following vein.*[48]]

The English cases in which *CILFIT* has been cited and a reference made seem to support Rasmussen's view that the effect of that decision, despite appearances to the contrary, would be to make national courts wary of deciding points of Community law for themselves. However, the English cases where *CILFIT* was mentioned but no reference made show that sometimes the outcome of that ruling has been far less beneficial. They illustrate how it can be used to justify refusing to make a reference where the national court has formed a view as to how the points of Community law at issue should be resolved. Courts in the United Kingdom make far fewer references than courts in other Member States of comparable size... It is therefore a serious matter when a decision of the European Court is used by the English Courts as a reason for failing to take a step which it might otherwise have been more difficult to avoid.

Others have, however, argued that the conditions in *CILFIT* are too restrictive, and that more discretion should be left to national courts. Thus Advocate General Jacobs argued that national judges should not have to consider all the official language versions of EU acts.[49] This view has been echoed by the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, which contended that the conditions in *CILFIT* should be relaxed, that they should be applied in a 'commonsense' way, and that comparing all the language versions was no longer realistic or feasible. It argued that *CILFIT* should be applied so that the national court would determine whether the case was worth the burden of a preliminary reference.[50] Rasmussen put an analogous argument.

H Rasmussen, Remedying the Crumbling EC Judicial System[51]

The thrust of a *CILFIT II* should be to give the initiative back to the judges of the Member States, trusting them to solve on their own far more questions of interpretation of Community law, including those which are not straightforward. In technical terms, a *CILFIT II* should operate so as to enlarge considerably the scope of the Community acts which are deemed to be *actes clairs*. The job to pin down on paper the demarcation line between those cases which will deserve EC judicial attention... and those classes of cases which the national judges ought to decide on their own responsibility will not be an easy one, but it is as indispensable as difficult.

[46] (1989) 52 MLR 622, 626. See also A Arnull, 'The Law Lords and the European Union: Swimming with the Incoming Tide' (2010) 35 ELRev 57, 75–79.

[47] Arnull is referring to an earlier piece, 'Reflections on Judicial Attitudes at the European Court' (1985) 34 ICLQ 168, 172.

[48] Arnull (n 46) 636–637.

[49] Case C–338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I–6495.

[50] Report of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, June 2008, 7, available at www.juradmin.eu/en/newsletter/pdf/Hr_20-EN.pdf; D Sarmiento, 'Amending the Preliminary Reference Procedure for the Administrative Judge' (2009) 2 Review of European Administrative Law 29.

[51] (2000) 37 CMLRev 1071, 1109.

Current indications are however that the ECJ is content with the formulation in *CILFIT* and shows no inclination to modify the ruling to any significant degree.[52] It is true that in *Intermodal*[53] the ECJ declined to extend the *CILFIT* conditions, holding that a national court was not required to ensure that the matter was equally obvious to bodies of a non-judicial nature, such as administrative authorities. Subject to that caveat, the ECJ reaffirmed the *CILFIT* condition that before declining to refer a national court must be convinced that the matter was so obvious that there was no scope for any reasonable doubt as to the way in which the question should be resolved, and more especially that the matter was equally obvious to other national courts and to the ECJ.[54] The reality in the UK is that the Supreme Court does not generally consider the *CILFIT* criteria separately, but asks if the answer is 'clear beyond the bounds of reasonable argument'.[55]

SUMMARY

i. The relationship between national courts and the ECJ has been transformed by the development of precedent, *acte clair*, and sectoral delegation of responsibility.

ii. These developments have made national courts EU courts in their own right. They can dispose of cases without the need for a further reference to the ECJ. They can do so where there is an EU precedent on the point, where the matter is so clear as to obviate the need for a reference, or where more general responsibility has been delegated to them in a particular area.

iii. The combined effect has been to render the relationship more vertical and multilateral than it was at the inception of the EU.

5 THE DECISION TO REFER: THE NATIONAL COURT'S PERSPECTIVE

The discussion thus far has touched on factors which can influence the national court's decision whether to refer: the existence of an ECJ judgment and the *acte clair* doctrine. We now consider the more general factors that a national court may take into account when making the decision whether to refer. There are two criteria that must be satisfied before a reference may be made.

The first is that the question must be raised before the court or tribunal of the Member State. However, it has been seen that the *CILFIT* case held that a national court may raise a matter of its own motion, even if this has not been done by the parties.[56] The second general criterion is that the national court must consider that a decision on the question is necessary to enable it to give judgment. *CILFIT* makes it clear that even a national court of last resort must believe that this is so before it is obliged to make a reference. It should also be noted that Article 267 does not provide that the reference must be necessary, but that a decision on the question be necessary to enable the national court to give judgment. The danger of confusing these two issues is brought out in the *Bulmer* case.

The *Bulmer* case shows the 'early approach' of the UK courts to the exercise of the discretion accorded to them.

[52] Case C-461/03 *Gaston Schul* (n 35) [16]; Case T-47/02 *Danzer* (n 28) [36]; Cases T-349, 371/06, 14, 15, and 332/07 *Germany v Commission* [2008] ECR II-2181, [67].

[53] Case 495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151, [39].

[54] Ibid [38]-[39].

[55] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2009] 1 AC 719, [31]; *O'Byrne v Aventis Pasteur* [2008] UKHL 34, [23]-[24].

[56] See also (nn 25, 26).

HP Bulmer Ltd v J Bollinger SA
[1974] 2 WLR 202

Bollinger made champagne and claimed that the use of the word champagne by makers of cider, in the form of champagne cider, should be prohibited. Bollinger alleged that the use of the word champagne to describe products other than those which came from the Champagne region in France was contrary to Community law. Bollinger asked that this question of Community law should be referred to the ECJ. The judge at first instance refused to make the reference, and Bollinger appealed to the Court of Appeal. Lord Denning emphasized that the discretion whether to refer was for the national court and that it should do so only where the decision on the question was necessary to enable it to give judgment. A reference might not be necessary where there was an existing ECJ judgment on the point or where the matter was *acte clair*.

COURT OF APPEAL: LORD DENNING MR

(2) Guidelines as to the exercise of discretion. Assuming that the condition about 'necessary' is fulfilled, there remains the matter of discretion....

(i) The time to get a ruling. The length of time... before a ruling can be obtained from the European Court. This may take months and months.... Meanwhile, the whole action in the English court is stayed until the ruling is obtained. This may be very unfortunate, especially in a case where an injunction is sought or there are other reasons for expedition....

(ii) Do not overload the Court. The importance of not overloading the European Court by references to it. If it were overloaded, it could not get through its work....

(iii) Formulate the question clearly. The need to formulate the question clearly. It must be a question of interpretation only of the Treaty. It must not be mixed up with the facts....

(iv) Difficulty and importance. The difficulty and importance of the point. Unless the point is really difficult and important, it would seem better for the English judge to decide it himself. For in so doing much delay and expense will be saved....

(v) Expense. The expense of getting a ruling from the European Court....

(vi) Wishes of the parties. The wishes of the parties. If both parties want the point referred, the English court should have regard to their wishes, but it should not give them undue weight. The English court should hesitate before making a reference against the wishes of one of the parties, seeing the expense and delay which it involves.

Lord Denning MR decided on the facts that a reference was not needed for a number of reasons.[57] The judgment was not uncontroversial and the guidelines were criticized. Thus Jacobs argued that there were many situations where time and costs would be saved by an early reference and that cases raising important points of EU law could arise where there was little at stake between the parties.[58]

The *Samex* case is more indicative of the 'current approach' of the UK courts, which are more ready to refer.

[57] The time and expense involved; the facts had not been fully found; and the point was not a difficult one, [1974] 1 WLR 202, 216–217.

[58] FG Jacobs, 'When to Refer to the European Court' (1974) 90 LQR 486, 492.

Customs and Excise Commissioners v ApS Samex (Hanil Fiber Industrial Co Ltd, third party) [1983] 1 All ER 1042

An EC regulation allowed Member States to impose quantitative limits on the import of textiles from certain countries outside the EC. The implementation of the import scheme was left to the Member States, who were to issue import licences up to the quota for each year. The defendant made a contract to buy goods from a non-member state, which stipulated that the goods had to be shipped by a certain date. The Customs authorities discovered that the goods had been shipped outside the relevant dates, and imposed penalties on the defendant. The latter responded by arguing that the Customs authorities were in breach of the Community regulation, and sought a reference to the ECJ. Bingham J considered the guidelines set out by Lord Denning MR in *Bulmer*. He then continued as follows.

HIGH COURT: BINGHAM J

Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Common Market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-Member States are in issue. Where the interests of Member States are affected they can intervene to make their views known....

Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court.

While United Kingdom courts sometimes still refer to the guidelines in *Bulmer* they also tend to be more ready to make a reference. Sir Thomas Bingham MR encapsulated the more modern approach.[59]

If the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can... the national court must be

[59] *R v International Stock Exchange, ex p Else* [1993] QB 534; *Polydor Ltd v Harlequin Record Shops Ltd* [1980] 2 CMLR 413; *R v Plymouth Justices, ex p Rogers* [1982] 3 WLR 1; *R v Pharmaceutical Society of Great Britain, ex p The Association of Pharmaceutical Importers* [1987] 3 CMLR 951; *R v HM Treasury, ex p Daily Mail and General Trust plc* [1987] 2 CMLR 1; *R v Secretary of State for the National Heritage, ex p Continental Television BV* [1993] 2 CMLR 333; *R v Ministry of Agriculture, Fisheries and Food, ex p Portman Agrochemicals Ltd* [1994] 3 CMLR 18; *Beckmann v Dynamco Whicheloe MacFarlane Ltd* [2000] Pens LR 269; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, [9]; *Commissioners of Customs and Excise and Another v Federation of Technological Industries* [2004] EWCA Civ 1020, [88]; *Royal Bank of Scotland Group plc v Commissioners for HM Revenue and Customs* [2007] CSIH 15, [23]–[25]; *The Number (UK) Limited, Conduit Enterprises Limited v Office of Communications, British Telecommunications Plc* [2008] CAT 33, [165]–[171].

fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should obviously refer.

6 ACCEPTANCE OF THE REFERENCE: THE ECJ'S PERSPECTIVE

We now turn to consider how the ECJ perceives its role when an issue is referred by a national court. The ECJ's approach has altered since the inception of the EEC.

(A) THE LIBERAL INITIAL APPROACH

The ECJ's initial approach was very liberal and it would, wherever possible, read the reference so as to preserve its ability to pass judgment on the case.

The ECJ was prepared to *correct improperly framed references*. Thus in *Costa* the ECJ stated that it had power to extract from a question imperfectly formulated by the national court those questions which really did pertain to the interpretation of the Treaty.[60] This is also exemplified by the *Schwarze* case.

Case 16/65 Firma C Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1965] ECR 877

[Article 177 Treaty renumbering: Arts 173 and 177 are now Arts 263 and 267 TFEU]

Schwarze obtained import licences from the EVSt to import barley. The EVSt fixed the rate of levy which should be paid, pursuant to a Council regulation. The rate of levy was fixed on the basis of a Commission decision. Schwarze argued that the levy rate was too high, and that the Commission decision was illegal. The Finanzgericht therefore submitted a number of detailed questions to the ECJ. France argued that the questions being asked were concerned not with the interpretation of the Treaty, but rather with the validity of Community acts; and that the proper way of challenging such acts was via Article 173, and not via Article 177.

THE ECJ

It appears from the wording of the questions submitted that the Hessisches Finanzgericht is concerned not so much with the interpretation of the Treaty or of an act of a Community institution, as with a preliminary ruling on the validity of such an act under Article 177(1)(b). . . .

In its comments, the government of the French Republic complains that several of the questions submitted call for more than just an interpretation of the Treaty. The Court of Justice would, in answering these alleged questions of interpretation, actually be ruling on points involving not the interpretation of the Treaty but the validity of acts of the EEC institutions.

---

[60] Case 6/64 *Costa v ENEL* [1964] ECR 585.

The contention of the French Republic that Article 177 cannot be used to obtain from the Court a ruling that such an act is null and void is pertinent. That provision does, however, expressly give the Court power to rule on the validity of such an act. Where it appears that the real object of the questions submitted by a national court is a review of the validity of Community acts rather than an interpretation thereof, the Court of Justice must nevertheless decide the questions immediately, instead of holding the referring court to a strict adherence to form which would only serve to prolong the Article 177 procedure and be incompatible with its true nature. Such a strict adherence to form is conceivable in actions between parties whose respective rights must be determined according to strict rules. It would not, however, be appropriate in the very special area of judicial cooperation provided for in Article 177 where the national court and the Court of Justice—each within its own jurisdiction and with the purpose of ensuring a uniform application of Community law—must together and directly contribute to the legal conclusions. Any other procedure would have the result of letting the national courts rule on the validity of acts of the Community.

The ECJ also *commonly rejected claims that a reference should not be accepted because of the reasons for making it, or the facts on which it was based.* The ECJ emphasized that these matters were the domain of the national court. Thus in *Costa* the ECJ stated that Article 267 'is based on a clear separation of functions between national courts and the Court of Justice'. The ECJ was not empowered to 'investigate the facts of the case or to criticise the grounds and purpose of the request for interpretation'.[61] Similarly in *Pierik*,[62] the ECJ reiterated that Article 267 was based on a clear division of function, which precluded it from judging the relevance of the questions asked, or from determining whether concepts of EU law really were applicable to the case before the national court. The ECJ stressed the point once again in *Simmenthal*,[63] stating that what is now Article 267 was based on a distinct separation of function between national courts and the ECJ, such that the latter did not have jurisdiction to take cognizance of the facts of the case or to criticize the reasons for the reference.

The ECJ's approach during the early years was therefore open and flexible. It clearly did not wish to discourage litigants from having recourse to Community law, more especially because it was through Article 267 TFEU that the ECJ developed doctrines such as direct effect and supremacy. Nor did the ECJ wish to place obstacles in the path of national judiciaries by refusing to answer questions unless they were perfectly framed. This would not have encouraged national judges to make use of novel legal machinery.

(B) THE ECJ ASSERTS AUTHORITY OVER CASES REFERRED

It is clear, notwithstanding the preceding cases, that the ECJ regards itself as having the ultimate authority to decide whether a reference is warranted or not. The seminal case in this respect is *Foglia*.

Case 104/79 Pasquale Foglia v Mariella Novello
[1980] ECR 745

[Note Lisbon Treaty renumbering: Arts 95 and 177 are now Arts 110 and 267 TFEU]

Foglia made a contract to sell wine to Novello, and the contract stated that Novello would not be liable for any taxes levied by the French or Italian authorities which were contrary to EC law. The goods were

[61] Ibid 593.
[62] Case 117/77 *Bestuur van het Algemeen Ziekenfonds, Drenthe-Platteland v G Pierik* [1978] ECR 825.
[63] Case 35/76 *Simmenthal SpA v Ministero delle Finanze* [1976] ECR 1871, [4].

carried by Danzas, a general transporter. The contract of carriage also contained a clause stipulating that Foglia would not be liable for charges which were contrary to EC law. Danzas in fact paid a French tax, and this was included in the bill submitted to Foglia, who paid the bill including the amount of the disputed tax, notwithstanding the clause in the contract of carriage which would have entitled him not to do so. Foglia then sought to recover this amount from Novello in an action before an Italian court. The latter refused to pay, relying on the clause in her contract with Foglia which stipulated that she would not be liable for any unlawful charge. Novello argued that the charge was contrary to Article 95. The Italian court sought a preliminary ruling whether the French tax was in fact contrary to Community law. The ECJ noted that the pleadings of Foglia and Novello concerning tax discrimination were essentially identical.

THE ECJ

10. It thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking's bill which included a sum paid in respect of that tax.

11. The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardise the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty.

The ECJ therefore declined to give a ruling, but the Italian judge was undaunted and referred further questions to the ECJ. He asked, in effect, whether the preceding decision was consistent with the principle that it was for the national judge to determine the facts and the need for a reference.

Case 244/80 Pasquale Foglia v Mariella Novello (No 2)
[1981] ECR 3045

THE ECJ

12. In his first question the Pretore requested clarification of the limits of the power of appraisal reserved by the Treaty to the national court on the one hand and the Court of Justice on the other with regard to the wording of references for a preliminary ruling and of the appraisal of the circumstances of fact and law in the main action, in particular where the national court is requested to give a declaratory judgment.

...

14. With regard to the first question it should be recalled, as the Court of Justice has had occasion to emphasise in very varied contexts, that Article 177 is based on cooperation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States.

15. With this in view it is for the national court—by reason of the fact that it is seised of the substance of the dispute and that it must bear the responsibility for the decision to be taken—to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment.

16. In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it maintains within the framework of Article 177 with the Court of Justice are governed exclusively by the provisions of Community law.

17. In order that the Court of Justice may perform its task in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their question is necessary to enable them to give judgment.

18. It must in fact be emphasised that the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its view on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.

19. Furthermore, it should be pointed out that, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted to it are essential, it must be in a position to make any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction. Thus the Court, taking into account the repercussions of its decisions in this matter, must have regard, in exercising the jurisdiction conferred upon it by Article 177, not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States. Accordingly it cannot, without disregarding the duties assigned to it, remain indifferent to the assessments made by the courts of the Member States in the exceptional cases in which such assessments may affect the proper working of the procedure laid down by Article 177.

21. The reply to the first question must accordingly be that whilst, according to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and law involved in the main action, is a matter for the national court it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court.

25. The reply to the fourth question must accordingly be that in the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the State whose legislation is called in question is a party, but that in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 is not employed for purposes which were not intended by the Treaty.

The important point of principle in *Foglia (No 2)* was that the ECJ would be the ultimate decider of its own jurisdiction. The reasoning is both subtle and dramatic. The judgment began in orthodox

fashion in demarcating the role of the national court and the ECJ. A few paragraphs later this was transformed: due regard was to be given to the view of the national court as to whether a reference was required to a question, but the ultimate decision rested with the ECJ. If, in order to resolve the issue, further and better particulars were required from the national courts, then these must be forthcoming.

Foglia was therefore not simply about hypothetical cases. It was about the primacy of control over the Article 267 procedure and the nature of the judicial hierarchy, involving Union and national courts, which operates through this Article. The original division of function between national courts and the ECJ may have been separate but equal, as manifested in the idea that the former decide whether to refer, while the latter gives the ruling on the matter placed before it. *Foglia* reshaped that conception. The ECJ was not simply to be a passive receptor, forced to adjudicate on whatever was placed before it. It would assert some control over the suitability of the reference. The decision in the case, concerning the allegedly hypothetical nature of the proceedings, was simply one manifestation of this assertion of jurisdictional control. The ECJ would, in the future, 'make any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction' (paragraph 19).

The *Foglia* case generated much comment. Bebr argued against the ruling. References to Article 177 should now be read as to Article 267.

G Bebr, The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC Treaty?[64]

> In its well-established case law the Court of Justice has always viewed Article 177 as establishing a method of co-operation between the national courts and the Court, based on jurisdictional exclusivity rather than on a hierarchical superiority. Moreover it has systematically refused to review the grounds for questions raised and their relevance to the pending litigation, being obviously anxious to demonstrate that its function is limited to an interpretation of Community rules or to a review of validity of Community acts....
>
> ...In this case it took note of several factors from which it inferred that the dispute was fabricated and that, therefore, it lacked jurisdiction ...
>
> The fabricated nature of a dispute as a precondition for the admissibility of a referral is a slippery concept, not without dangerous pitfalls. The French government which participated in the preliminary proceedings did not, it may be noted, even contest the jurisdiction of the Court. The Court did so of its own motion. Of course, there may be various shades and degrees to which litigation may appear fabricated. The situation may seldom be clear cut. Litigation in which a private party seeks to obtain a ruling in a test case in which it invokes a directly effective Community rule against a Member State before its own national courts may raise a similar problem; it may also lack the character of a genuine dispute. Who may say with any certainty that the plaintiff entertained the action seriously or whether he merely sought to obtain a decision in a test case which although of negligible interest to him, raised a question of principle?[65]

Not all were however opposed to the decision in *Foglia*. Wyatt argued in favour of the ruling, noting that enforcement actions brought by the Commission under Articles 258 and 259 TFEU are subject to preliminary objections concerning admissibility.

[64] (1980) 17 CMLRev 525, 530–532.

[65] Bebr also objected to the *Foglia* ruling because of the difficulties which it would thereby create for the judges in national courts and for the implications which it might have for the ambit of direct effect.

D Wyatt, Foglia (No 2): The Court Denies it has Jurisdiction to Give Advisory Opinions[66]

[A]t bottom the controversy over the Court's decision in *Foglia* v. *Novello*... turns on the simple question whether or not references to the European Court from national courts are subject, before the European Court, to the same preliminary objections as to admissibility as any other claim upon the part of private parties, Member States, or Community institutions, to invoke the Court's jurisdiction. If they are not, then the guardians of the European Court's judicial functions, indeed of its very jurisdiction, within the framework of Article 177 EEC, are national courts, rather than the Court itself. It is not impossible that the draftsmen of the Treaty should have ordained such a thing. Simply improbable, in view of the departure from principle which it would involve: superior courts are invariably entrusted with the competence to determine their own jurisdiction.

[*Wyatt demonstrated,* inter alia, *differing ways in which the ECJ determined various jurisdictional issues, such as whether the body making the reference was a court. Later he referred to the reasoning in* Foglia (No 2), *in which the ECJ emphasized that it had no jurisdiction to give advisory opinions.*]

While the Court must be able to place as much reliance as possible upon assessments by national courts of questions referred, it must, it insisted, be in a position to make *itself* any assessment inherent in the performance of its own duties, in particular in order to *check*, as all *courts* must, whether it had jurisdiction. In exercising its *jurisdiction* under Article 177, the Court was bound to consider, not only the interests of the parties to the proceedings, but also the interests of the Community, and of the Member States....

The Court's reasoning is convincing. It affirms its right to determine its own jurisdiction, and contrasts its own essentially judicial functions, with the delivery of advisory opinions. The distinction between a judgment and an advisory opinion is that the former affects the legal position of the parties to a dispute; the latter has no such effect. The capacity to give a *judgment* itself characterises the organ in question as a *court*. The capacity to give legal advice of course has no such corollary....

(c) CASES WHERE THE ECJ HAS DECLINED JURISDICTION

The principle in *Foglia* lay dormant for some time, and attempts to invoke it were unsuccessful.[67] This fuelled the belief that the case was a one-off, and that the principle therein was unlikely to be used. The ECJ however began to use the *Foglia* principle, particularly from the 1990s onwards. The cases fall into a number of categories.

(i) *Hypothetical Cases*

The hypothetical nature of the question provides one example.[68] There are a number of reasons for refusing to give such rulings. They are, in part, practical, since it would be a waste of judicial resources to give a ruling in a hypothetical case, because the problem may never in fact transpire.[69] There are also conceptual problems. If a case really is hypothetical it may be unclear precisely who should be

[66] (1982) 7 ELRev 186, 187–188, 190. Italics in the original.

[67] Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt Pvba* [1982] ECR 3961; Case 46/80 *Vinal SpA v Orbat SpA* [1981] ECR 77; Case C-150/88 *Eau de Cologne and Parfumerie-Fabrik Glockengasse No 4711 KG v Provide Srl* [1989] ECR 3891.

[68] Case C-467/04 *Criminal Proceedings against Gasparini and others* [2006] ECR I-9199.

[69] The wastage of resources argument will also be of relevance if the problem has become moot, in the sense that it has been resolved. Whether a problem has become moot can be contentious. Compare Cases C-422–424/93 *Zabala v Instituto Nacional de Empleo* [1995] ECR I-1567 with Case C-194/94 *CIA Security International SA v Signalson SA* [1996] ECR I-2201.

the appropriate parties to the action, and the relevant arguments may not be put. Moreover, if the hypothetical problem becomes 'concrete', it may not do so in exactly the form envisaged by the court's judgment, and hence the precise relevance of that judgment may be unclear.

While there may, therefore, be sound reasons for refusing to give opinions in hypothetical cases, there is also a fine line dividing that type of case from test cases.[70] A function of a legal system is to enable people to plan their lives with knowledge of the legal implications of the choices they make. Test cases enable individuals to gain such knowledge. That the line between advisory opinions/hypothetical judgments and test cases can be a fine one is exemplified by the facts of the *Foglia* case itself.[71] Moreover, it is clear that the mere fact that parties agree on the interpretation they wish to be accorded to EU law does not, in itself, mean that the dispute is not a real one.[72]

(ii) *The Questions Raised not Relevant to Resolution of the Dispute*

A second reason why the ECJ may not wish to give a ruling is that the questions raised are not relevant to the resolution of the substantive action in the national court.[73] Thus in *Meilicke*[74] the action was brought by a German lawyer, who challenged a theory of non-cash contributions of capital developed by the German courts on the ground that it was not compatible with the Second Banking Directive. The ECJ cited *Foglia (No 2)*, and declined to give a ruling, because it had not been shown that the issue of non-cash subscriptions was actually at stake in the main action.

In *Corsica Ferries*[75] the ECJ reiterated that it had no jurisdiction to rule on questions that had no relation to the facts or the subject matter of the main action, and decided that only four of the possible eight questions met this criterion. The same concern with relevance was evident in *Monin*,[76] where the ECJ held that it lacked jurisdiction to answer questions that did not involve an interpretation of EU law required for the decision by the national court. It therefore declined to answer questions placed before it by an insolvency judge, given that this judge would not have to deal with these issues in the insolvency itself. The *Dias* case exemplifies the same general point.

[70] Case C-412/93 *Leclerc-Siplec v TFI Publicité and M6 Publicite* [1995] ECR I-179, Jacobs AG; Case C-200/98 *X AB and Y AB v Rikssatteverket* [1999] ECR I-8261; Case C-458/06 *Skattervet v Gourmet Classic Ltd* [2008] ECR I-4207, [31]-[32].

[71] *Foglia* was not a hypothetical case in the normal sense of that term. It concerned an actual seller of wine whose business was being affected by a current French tax which he believed to be contrary to Community law. The ECJ's argument that the issue should have been resolved by a different route will not withstand examination. Danzas had no incentive to litigate in France, even though it initially paid the tax, since it was a general carrier, and it would make no commercial sense for it to start an expensive action which was of no specific concern to its business. Foglia's decision to pay Danzas, even though it could have resisted payment under the contract, is also readily explicable. If Foglia had resisted payment then either Danzas would have accepted this, swallowed the loss, and still not have pursued the claim in France because it would not have been worthwhile; and/or it would have accepted this, but increased the cost of carriage by the amount of the tax for subsequent journeys and passed it on to Foglia. In either eventuality the legality of the tax under Community law would not have been contested. Even if Danzas had resorted to formal litigation with Foglia this action would probably have been initiated in Italy, since it would have been an ordinary contract action the governing law of which would probably have been Italian. Compare *Foglia* to Case C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reufenkoge III GmbH and Land Schleswig-Holstein* [2001] ECR I-2099, [38]-[46].

[72] Case C-412/93 *Leclerc-Siplec* (n 70); Case C-341/01 *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH* [2004] ECR I-4883; Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

[73] Case C-134/95 *Unità Socio-Sanitaria Locale No 47 di Biella (USSL) v Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (INAIL)* [1997] ECR I-195; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155; Case C-314/01 *Siemens AG Österreich and another v Hauptverband der österreichischen Socialversicherungstrager* [2004] ECR I-2549; Case C-293/03 *Gregorio My v ONP* [2004] ECR I-12013; Case C-152/03 *Ritter-Coulais v Finanzamt Gemersheim* [2006] ECR I-1711; Case C-313/07 *Kirtruna SL and Elisa Vigano v Red Elite de Electrodomésticos SA* [2008] ECR I-7907.

[74] Case C-83/91 *Wienand Meilicke v ADV/ORGA F A Meyer AG* [1992] ECR I-4871.

[75] Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

[76] Case C-428/93 *Monin Automobiles-Maison du Deux-Roues* [1994] ECR I-1707.

Case C-343/90 Lourenço Dias v Director da Alfandega do Porto
[1992] ECR I-4673

[Note Lisbon Treaty renumbering: Art 95 is now Art 110 TFEU.]

Dias was a van driver who was prosecuted for modifying his imported vehicle in a manner which altered its categorization for tax purposes without having paid the extra tax. The ECJ was presented with eight detailed questions from the national court concerning the compatibility of the relevant national rules with Article 95. The Portuguese government argued that the sole basis of the dispute was a narrow question concerning its tax system and that none of the questions actually referred dealt with that issue. The ECJ accepted that national courts were *prima facie* in the best position to decide on the need for a reference, and that therefore, in principle, the ECJ was bound to give a ruling when asked. It then qualified this obligation.

THE ECJ

17. Nevertheless, in Case 244/80 *Foglia (No. 2)*... paragraph 21, the Court considered that, in order to determine whether it has jurisdiction, it is a matter for the Court of Justice to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions....

18. In view of that task, the Court considers that it cannot give a preliminary ruling... where, *inter alia*, the interpretation requested relates to measures not yet adopted by the Community institutions (see Case 93/78, *Mattheus*...), the procedure before the court making the reference... has already been terminated (see Case 338/85 *Pardini*...) or the interpretation of Community law sought by the national court bears no relation to the actual nature of the case or to the subject-matter of the main action (Case 126/80 *Salonia*...).

19. It should also be borne in mind that... it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle the questions of purely national law.... By the same token, it is essential for the national court to explain the reasons why it considers that a reply to its questions is necessary to enable it to give judgment....

20. With this information in its possession, the Court is in a position to ascertain whether the interpretation of Community law which is sought is related to the actual nature and subject-matter of the main proceedings. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment.

(iii) *Questions not Articulated Sufficiently Clearly*

A third rationale for refusing to take a case may be that the questions are not articulated clearly enough for the ECJ to be able to give any meaningful legal response.[77] This should be contrasted with the situation in which the ECJ does tease out the real question from a reference which has been imperfectly formulated.[78] The ECJ will not, however, alter the substance of the questions referred to it. Governments and the parties concerned are allowed to submit observations under Article 20 of the Statute of the Court. They are notified of the order of the referring court, and hence it would be wrong for the ECJ to alter the substance of the questions referred.[79]

[77] Case C-318/00 *Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Club* [2003] ECR I-905.
[78] Case C-88/99 *Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais* [2000] ECR I-10465.
[79] Case C-235/95 *AGS Assedic Pas-de-Calais v Dumon and Froment* [1998] ECR I-4531.

(iv) Facts are Insufficiently Clear

Closely allied to this third rationale is a fourth, where the facts are insufficiently clear for the Court to be able to apply the relevant legal rules. It is often thought that the ECJ merely responds in an abstract manner to very generally framed questions under Article 267. This is not so. The Court will normally be able to characterize the nature of the legal issue only if the reference has an adequate factual foundation. The ECJ established in *Telemarsicabruzzo* that a national court must provide sufficient factual and legal context in order that the ECJ can respond to the questions referred,[80] and the principle has been applied in subsequent cases.[81]

Case C-567/07 Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius
1 October 2009

[Note Lisbon Treaty renumbering: Art 87(1) is now Art 107(1) TFEU]

The national court asked whether, when a Member State provides financial resources to undertakings entrusted with the operation of services of general economic interest, the territorial scale of the activities of those undertakings should be limited in order to prevent those resources from constituting unlawful state aid and to prevent the undertakings, when employing those resources in another Member State, from distorting conditions of competition.

THE ECJ

49. [T]he presumption of relevance attaching to questions referred by the national courts for a preliminary ruling can be rebutted only in exceptional cases. Where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling.

50. It is clear from well-established case-law, however, that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Joined Cases C-320/90 to C-322/90 Telemarsicabruzzo ...).

51. It is also important that the national court should set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In that connection, it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings....

52. The information provided in the decision making the reference serves not only to enable the Court to give useful answers, but also to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice.

[80] Cases C-320-322/90 *Telemarsicabruzzo SpA v Circostel, Ministero delle Poste e Telecommunicazioni and Ministero della Difesa* [1993] ECR I-393.

[81] Case C-386/92 *Monin Automobiles v France* [1993] ECR I-2049; Case C-458/93 *Criminal Proceedings against Saddik* [1995] ECR I-511; Case C-316/93 *Vaneetveld v Le Foyer SA* [1994] ECR I-763; Case C-2/96 *Criminal Proceedings against Sunino and Data* [1996] ECR I-1543; Case C-257/95 *Bresle v Préfet de la Région Auvergne and Préfet du Puy-le-Dôme* [1996] ECR I-233; Case C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius*, 1 Oct 2009; Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*, 9 Mar 2010; Case C-384/08 *Attanasio Group Srl v Comune di Carbognano*, 11 Mar 2010.

> 53. It should also be added that the need for precision, in particular with regard to the factual and legislative context of the main proceedings, applies in particular in the area of competition, which is characterised by complex factual and legal situations...
>
> 54. In this instance, the seventh question is based on the premise that...if Servatius used public resources to implement a future project, that would constitute State aid within the meaning of Article 87(1) EC. Neither the decision making the reference nor the observations of the parties to the main proceedings contain any elements which might serve to establish that such an advantage would in fact have been granted in the context of the construction project at issue in the main proceedings – which in any event was not implemented as Servatius did not obtain the necessary prior authorisation.
>
> 55. Accordingly, the seventh question referred by the national court must be held to be inadmissible.

(D) INFORMATION NOTE ON PRELIMINARY REFERENCES

The ECJ has incorporated the results of its case law in its Information Note on References from National Courts for a Preliminary Ruling.[82] Paragraph 22 states that the order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court a clear understanding of the factual and legal context of the main action.

It should include, in particular, a statement setting out the subject matter of the dispute and the essential facts; the relevant national law; identify as accurately as possible the EU provisions relevant to the case; the reasons why the national court referred the matter and the relationship between the provisions of EU law and national provisions applicable to the action; and a summary of the parties' arguments where appropriate.

(E) LIMITS OF THE POWER TO DECLINE A CASE

The ECJ is exerting greater control over the admissibility of references than in the early years of the Community. It has, however, made it clear that it will decline to give a ruling only if the issue of EU law on which an interpretation is sought is manifestly inapplicable to the dispute before the national court or bears no relation to the subject matter of that action.[83] The standard formulation now used by the ECJ is that a reference will be deemed inadmissible only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[84]

[82] [2009] OJ C297/01.

[83] Case C-118/94 *Associazione Italiana per il World Wildlife Fund v Regione Veneto* [1996] ECR I-1223; Case C-129/94 *Criminal Proceedings against Bernaldez* [1996] ECR I-1829; Case C-264/96 *ICI Chemical Industries plc (ICI) v Colmer (HM Inspector of Taxes)* [1998] ECR I-4695; Cases C-215 and 216/96 *Bagnasco v BPN and Carige* [1999] ECR I-135; Case C-379/98 *PreussenElektra AG* (n 71) [38]–[39]; Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie v Minister van Landbouw, Natuur en Voedselkwaliktiet* [2006] ECR I-8339; Case C-295/05 *Asemfo v Transformacion Agraria SA* [2007] ECR I-2999.

[84] Case C-210/06 *Cartesio* (n 16) [67]; Case C-544/07 *Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I-3389, [38]; Case C-314/08 *Filipiak v Dyrektor Izby Skarbowej w Poznaniu*, 19 Nov 2009, [42]; Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, 3 Jun 2010, [19] ; Case C-440/08 *Gielen v Staatssecretaris van Financiën*, 18 Mar 2010, [29].

Case C-314/08 Filipiak v Dyrektor Izby Skarbowej w Poznaniu
19 November 2009

The reference concerned the refusal of the Polish tax authorities to grant Filipiak entitlement to tax advantages in respect of the payment of social security and health insurance contributions in the tax year, in the case where the contributions were paid in a Member State other than the state of taxation even though such tax advantages are granted to taxpayers whose contributions are paid in the Member State of taxation.

THE ECJ

40. According to settled case-law, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling...

41. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (... Case 244/80 Foglia... paragraph 21; PreussenElektra , paragraph 39; and Rüffler , paragraph 37).

42. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it...

43. In that regard, it is clear from the order for reference that, irrespective of the question of the constitutionality of the provisions at issue in the main proceedings, the dispute in the main proceedings and the first question in the reference relate to the compatibility with Community law of legislation under which the right to a tax reduction on the basis of payment of health insurance contributions and the right to deduct from the basis of assessment social security contributions which have been paid are refused where those contributions have been paid in another Member State.

44. The second question follows on from the first...The national court seeks to ascertain, in essence, whether, in the event that Article 43 EC precludes provisions such as those at issue in the main proceedings, the primacy of Community law obliges the national courts to apply Community law and not to apply the national provisions at issue, and to do so even before the judgment of 7 November 2007 of the Trybunał Konstytucyjny, in which that court held that those provisions were incompatible with certain provisions of the Polish Constitution, comes into effect.

45. In light of the foregoing, it is not manifestly obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, that the problem is hypothetical, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

(F) SUMMARY

i. The ECJ will decline to take a case under Article 267 in a number of situations. These are where the question referred is hypothetical, where it is not relevant to the substance of the dispute, where the question is not sufficiently clear for any meaningful legal response, and where the facts are insufficiently clear for the application of the legal rules.

ii. It will, however, decline to give a ruling only if it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

iii. The rhetoric in Article 267 cases will often be phrased in traditional terms: the judgment will speak of the cooperation between national courts and the ECJ and of the fact that it is for the national court to decide whether to refer or not.[85] This language is still meaningful. The relationship under Article 267 is cooperative.

iv. It is, however, now common for the traditional formula to be supplemented by appropriately drawn caveats which make it clear that the ECJ will not adjudicate if the questions are not relevant, or if they are hypothetical, etc.[86]

v. With changes in the rhetoric have come changes in reality. The cooperation between national courts and the ECJ still exists, but the latter is no longer the passive receptor of anything thrust before it. It has exercised more positive control over its own jurisdiction in the manner redolent of most superior courts.

7 THE DECISION ON THE REFERENCE: INTERPRETATION VERSUS APPLICATION

The preceding discussion has considered whether a reference should be made from the perspective of the national court, and whether the reference should be accepted from the perspective of the ECJ. We now consider the effect of the ECJ's decision when it rules on a reference.

Article 267 gives the ECJ power to interpret the Treaty, but does not specifically empower it to apply the Treaty to the facts of a particular case. The very distinction between interpretation and application is said to characterize the division of authority between the ECJ and national courts: the former interprets the Treaty, the latter apply that interpretation to the facts of a particular case. This distinction is said to differentiate the relationship between national courts and the ECJ from that in a more truly federal appellate system, where the superior court may well decide the actual case.

Theory and reality have not, however, always marched hand in hand. The dividing line between interpretation and application can be perilously thin, more especially because many of the questions submitted to the Court are, by their nature, very detailed, and are capable of being answered only by a specific response. The more detailed is the interpretation provided by the ECJ, the closer it approximates to application. It is moreover common for the ECJ to give 'guidance' to the national court as to how the point of law should be applied in the instant case, and this further diminishes the line between interpretation and application.

Litigants have often argued that the Court should decline to give a ruling because the question posed was not seeking an interpretation, but rather an application, of the Treaty. The ECJ has not been deterred by such objections. Thus in *Van Gend en Loos*[87] it was argued that the question presented concerning the tariff classification of urea-formaldehyde required, not an interpretation of the Treaty, but rather an application of the relevant Dutch customs legislation. The Court rejected the argument, saying that the question related to interpretation: the meaning to be attributed to the notion of duties existing before the coming into force of the Treaty.

[85] See eg Case C-435/97 *World Wildlife Fund (WWF) v Autonome Provinz Bozen* [1999] ECR I-5613.

[86] See eg Cases C-332, 333, and 335/92 *Eurico Italia Srl v Ente Nazionale Risi* [1994] ECR I-711.

[87] Case 26/62 [1963] ECR 1.

A willingness to respond in detail can be perceived in other cases. *Cristini*[88] was concerned with the meaning of Article 7(2) of Regulation 1612/68, which provides that a Community worker who is working in another Member State should be entitled to the same 'social advantages' as workers of that state. The question put by the French court was whether this meant that a provision which allowed large French families to have reduced rail fares was a social advantage within the ambit of Article 7(2). The ECJ denied that it had power to determine the actual case, but in reality it did just that, and responded to the question by stating that the concept of a social advantage included this fare reduction.

Marleasing[89] provides another example of the detailed nature of the ECJ's rulings. The ECJ produced a detailed response to the question whether Article 11 of Directive 68/151 was exhaustive of the types of case in which the annulment of the registration of a company could be ordered. The judgment furnished the national court with a very specific answer, which simply required the Spanish court to execute the ECJ's ruling.

The ECJ's willingness to provide very specific answers to questions serves to blur the line between interpretation and application. It also renders the idea of the ECJ and the national courts being separate but equal, each with their own assigned roles, more illusory. The more detailed the ECJ's ruling, the less there is for the national court to do, other than execute the ruling in the instant case.

The ECJ will be particularly motivated to provide 'the answer' where it wishes to maintain maximum control over development of an area of the law, as exemplified by cases concerning damages liability of Member States. Thus the ECJ has furnished 'guidance' to the national court on whether there has been a serious breach for the purposes of the test.[90] It has also gone further, and stated that it has sufficient information to dispose of this aspect of the case in its entirety.[91] Tridimas has, in more general terms, discerned three approaches in the ECJ's case law.

T Tridimas, Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction, forthcoming[92]

One may distinguish three categories of cases depending on the specificity of the ruling. The ECJ may give an answer so specific that it leaves the referring court no margin for manoeuvre and provides it with a ready-made solution to the dispute (*outcome cases*); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (*guidance cases*); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (*deference cases*).

...

The outcome approach presents some clear advantages. The ECJ ruling concludes the Community law-related aspects of the dispute and avoids further delays and costs ... But it is not without disadvantages. Used inappropriately, it may bring the ECJ close to applying the law on the facts thus exceeding its function under the preliminary reference procedure. National courts may resent what they perceive as the usurpation of their own jurisdiction although it appears that, in practice, this is rarely a problem. More importantly, over-zealous specificity may lead the court to be pre-occupied with the facts of the case, encourage over-centralisation, and detract from the Court's fundamental function which is to promote uniform interpretation of the law and oversee the Community's judicial universe. Although it may be favoured by the parties to the dispute, excessive recourse to the outcome approach might in fact reduce rather than help legal certainty. The more specific the ruling, the more difficult it becomes to derive the elements of principle in the judgment and the less the precedential value of its rulings.

[88] Case 32/75 *Cristini v SNCF* [1975] ECR 1085, [19].
[89] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.
[90] Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029.
[91] Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631.
[92] Italics in the original.

The guidance approach, on the other hand, has its own mix of merits and drawbacks. The referring court, and the litigants, may be left with a feeling of incompleteness. The more general and vague the ruling, the higher the risk that national courts will hesitate to make references patriating instead concepts of Community law and thus prejudicing its uniform interpretation. Such drawbacks are extenuated in the case of deference. On the positive side, guidance offers the national courts a stake not only in the application of Community law, which in many cases they will be best equipped to do, but also in the shaping of the Community legal order. In constitutional terms, guidance is a means of inviting the national courts to partake in the construction of the EU edifice and giving them a stake in the articulation of the rule of law. The national judiciaries have the opportunity to mould EU principles to the particularities and sensitivities of their legal system... It should be noted, in this context, that a reference is not a dialogue between the ECJ and the referring court but a conversation with all national polities. A case referred from a court of one Member State may have equally, or even more, profound repercussions in other States. Guidance accommodates experimentation at national level and seems more in keeping with the model of cooperative federalism.

8 DEVELOPMENT OF AN EU JUDICIAL SYSTEM: NATIONAL COURTS AND THE ECJ

The discussion thus far has considered the different aspects of the preliminary reference system. It is, however, important to stand back and consider in more general terms the implications of the development of precedent, the *acte clair* concept, and sectoral delegation of functions to national courts for the EU judicial system.

(A) PRECEDENT

Let us begin by considering precedent. The *Da Costa* decision was a rational step for the ECJ to have taken. Rasmussen correctly pointed out that the authority of the Court's decisions was thereby enhanced, since they became authoritative rulings for national courts.[93] The relationship between national courts and the ECJ was altered. It was no longer bilateral, where rulings were of relevance only to the national court that requested them. It became multilateral, in the sense that ECJ rulings had an impact on all national courts. The decision in *CILFIT* to reinforce precedent was similarly significant: the ECJ's rulings were to be authoritative in situations where the point of law was the same, even though the questions posed in earlier cases were different, and even though the types of legal proceeding in which the issue arose differed.

This development of precedent was largely inevitable. The original bilateral conception of the relationship between the ECJ and national courts, whereby the ECJ's rulings were relevant only for the national court that requested them, was unrealistic. Taken literally it would have meant that a ruling would have to be given even if the inquiry sought by a national court replicated that in an earlier case that had already been decided by the ECJ. The Court would be 'forced' solemnly to hear the matter, only to reach the same conclusion as it had done previously. A judicial system could not be supposed to exist on such terms. The ECJ would quickly tire of the waste of time and resources. The national courts would not see the sense of a system which placed pressure on them to allow issues to be litigated again where the ECJ had already given a considered judgment.

[93] Rasmussen (n 45).