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SPIRIT, ARE YOU THERE?
–
REINFORCED JUDICIAL DIALOGUE
AND
THE PRELIMINARY RULING PROCEDURE

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Abstract
In the Nineties, the existence of a *"spirit of cooperation"* between the Court of Justice and the national courts was thoroughly discussed by the doctrine in the light of the preliminary ruling procedure and the requirements of admissibility. But what is the situation nowadays? Is the spirit still there? Is it still the same? And if yes, is it stronger? This article examines the extent of this cooperation having in mind the Lisbon Treaty, the resolution of the European Parliament on the role of the national courts in the European judicial system (July 2008) and the recent Court of Justice case law. Also, it has the ambition to put the issue into the theoretical and more general context of *discursive legal pluralism*

Keywords
European law - judicial dialogue - European Court of Justice - national courts - uniformity - preliminary ruling procedure - Article 234 EC - Article 35 TEU - new urgent procedure and green light procedure

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Spirit, Are You There? - Reinforced Judicial Dialogue and the Preliminary Ruling Procedure

Xavier Groussot*

I. Introduction

National courts are Community courts and as such they should do everything needed to make sure that the preliminary rulings procedure functions as efficiently as possible. The effectiveness of this system is obviously based on a healthy dialogue (discourse) between the two main protagonists: the Court of Justice and the national court. Notably in the Nineties, the existence of a *"spirit of cooperation"* between the Court of Justice and the national courts was thoroughly discussed by the doctrine in the light of the preliminary ruling procedure and the requirements of admissibility.[1] But what is the situation nowadays? Is the spirit still there? Is it still the same? And if yes, is it stronger? This article examines the extent of this cooperation having in mind the Lisbon Treaty, the resolution of the European Parliament on the role of the national courts in the European judicial system (July 2008) and the recent Court of Justice case law - particularly the preliminary references made by Swedish courts in *Unibet, Laval* and *Gourmet Classic*. Also, it has the ambition to put the issue into the theoretical and more general context of *discursive legal pluralism*.

II. On Reinforced Judicial Dialogue

The preliminary rulings procedure provides for a form of dialogue or direct cooperation between national courts and the Court of Justice and serves a crucial function, particularly in ensuring the uniform interpretation of Community law and promoting its harmonious development throughout the European Union.[2] As put recently by the Resolution of the European Parliament of 9 July 2008, the preliminary ruling procedure is an essential guarantee of the coherence of the Community legal order.[3] The national judges play a major role in ensuring respect for Community law, for example through the principles of the primacy of Community law, direct effect, consistency of interpretation and state liability for breaches of Community law.[4] Therefore, they constitute the keystone of the European

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[1] See D. O'Keeffe, "Is the Spirit of Article 177 Under Attack? Preliminary Reference and Admissibility", 23 ELRev. (1998), 509; and C. Barnard and E. Sharpston, "The Changing Face of Article 177 References", 34 CMLRev. (1997), 1113.

[2] See e.g., Case 62/72 *Bollmann* [1973] ECR 269, para. 4; Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 31; and Case C-2/06 *Kempter* [2008] n.y.r., paras. 41-42. The *Kempter* case in paragraph 42, relying on A.G. Bot, made for the very first time an explicit reference to a dialogue with the national courts.

[3] European Parliament resolution of 9 July 2008 *on the role of the national judge in the European judicial system* (2007/2027 (INI)), point 24.

[4] Ibid., point 2.

Union judicial system. Interestingly, the resolution called for an empowerment of the national judges, i.e. to involve them more actively in, and accord them greater responsibility for the implementation of Community law.[5]

It should be noted, in that respect, that the European Parliament resolution stressed explicitly the need of a *reinforced dialogue* and urges consideration of a "green light" procedure whereby the national judges could include their proposed answers to the questions. This system would obviously enhance the dialogue between courts and allow the national courts to play a greater role. Yet, it necessitates a rather good knowledge of EU law.[6] Also, it results from the report of the committee of legal affairs that an important number of judges wanted to see closer involvement of the referring judge in all stages of the procedure. That can be done, for instance, by raising points of Community law *ex officio* or by closer cooperation in the reformulation of the question. In a similar vein, the resolution of the European Parliament considered that the national judges cannot adopt a passive attitude to Community law.[7] And it called on the Court of Justice to consider all possible improvements to the preliminary ruling procedure which would involve the referring judge more closely in its proceedings, including enhanced possibilities for clarifying the reference and participating in the oral procedure.[8]

An apparent majority of the judges (54%) regarded themselves as familiar with the procedure.[9] Denmark, Austria and Sweden are the countries where the largest proportion of judges considered themselves to be very familiar with the procedure. In Sweden, from 1995 to January 2008, 69 preliminary rulings were made to the Court of Justice (10 of the *Högsta Domstolen* and 20 of the *Regeringsrätten*).

A. The Length of the Procedure

Is the preliminary ruling becoming victim of its own success? [10] The average duration of preliminary ruling proceedings had risen from 12.6 to 23.5 months between 1983 and 2004. The 2007 Annual Report of the Court of Justice noted that the average time taken to deal with references for a preliminary ruling (19.3 months) was at its shortest since 1995.[11]

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[5] Ibid., point 1.

[6] See Report of the Committee on Legal Affairs, *The Role of the National Judge in the European Judicial System*, (A6-0224/2008), 6 March 2008. This report was written by Diana Wellis and was based on a questionnaire sent to national judges. The judges mainly called for more training and better access to information on the procedure (42%).

[7] Cited *supra* note 3, point 22.

[8] Ibid., point 30.

[9] Report of the Committee on Legal Affairs, cited *supra* note 6. 32% of the respondents were unfamiliar with the procedure. 14% were very familiar. There are huge differences between the different Member States. In Bulgaria, Belgium and France for instance, the vast majority of respondents (84%, 87% and 94% respectively) considered themselves unfamiliar with the preliminary ruling procedure. Austrian, Czech and German respondents considered themselves the least unfamiliar with the procedure (12%, 13% and 18% of "unfamiliar" responses respectively). The judges specialised in tax law were more aware of the procedure (52% very familiar - 48% familiar - 0% unfamiliar).

[10] See T. Koopmans, "La procédure préjudicielle victime de son succès", in Liber Amicorum P. Pescatore (1987), 347.

[11] Annual Report of the Court of Justice (2007), www.curia.europa.eu..

However, it pinpoints that the number of references for a preliminary ruling is rising steadily. 580 (265 preliminary rulings) cases were brought in 2007. This is the highest number of the history of the Court of Justice.[12] If this tendency continues, it will clearly have an influence on the duration of the preliminary ruling procedure. Taking into account, the recent enlargement of the European Union, the integration of the third pillar (with the Lisbon Treaty) and the new urgent procedure, the prospects are not pointing towards a reduction of the length of the 234 procedure.

The length of the preliminary ruling procedure is a recurrent matter of concern. And it is a truism to say that a protracted procedure is counterproductive to the establishment of a healthy and attractive dialogue between the national courts and the Court of Justice. This was made clear both in the report of the Committee of legal affairs and in the resolution of the European Parliament of 2008.[13] It is also worth emphasising that the Lisbon Treaty will add to Article 234 EC that when a preliminary 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" (new Art. 267(4) TFEU).

2. How to Reduce the Length of the Procedure?

Many (vain?) efforts have been realised in the recent years in order to reduce the length of the procedure. [14] In that sense, Article 20 of the Statute of the Court of Justice has been amended and allows the Court, where it considers that a case raises no new point of law and after hearing the Advocate General, to decide that the case will be determined without an Opinion from the Advocate General. The use of this new procedure is significant in the recent years: 35% in 2005, 33% in 2006 and 43% in 2007. The amendment of Article 104(3) of the Rules of Procedure - to expand the scope for use of the *simplified procedure* to cover cases in which the answer to the question can be clearly deduced from existing case law or admits of no reasonable doubt- has not been so successful (21 cases in 2006). Even less successful is the introduction of *accelerated procedure* under Article 104a of the Rules

[12] By comparison, the number of direct actions and appeals is rising or at least remains steady. 2007 is the year with the highest number of new cases ever: 580 (except for 1979, more than 1300 cases, but there was a huge flood of actions in annulment with the same subject matter). The Court of Justice dealt with 551 cases compared with 503 in 2006.

[13] See Report of the Committee on Legal Affairs, cited *supra* note 6. A very large number of respondents (24%) to the questionnaire criticised the length of the procedure. Also the resolution of the EP (points 25 and 26) called on the Court of Justice and all parties concerned to further reduce the average length of the preliminary ruling procedure, thus making this crucial opportunity for dialogue more attractive to national judges. Also it urged the Commission to investigate whether any national procedural rules constitute an actual or potential hindrance to the possibility for any court or tribunal of a Member State to make a preliminary reference, as provided for in the second paragraph of Article 234 of the EC Treaty, and to pursue vigorously the infringements which such hindrances represent.

[14] Report of the Working Group on the Preliminary Ruling Procedure, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, The Hague, December 2007. The bulk of the working group would have been in favour of the inclusion in the Treaty of Lisbon of a provision enabling the Court of Justice to determine its own Rules of Procedure, i.e. without the approval of the Council. It points out, in this respect, that the European Court of Human Rights is already in this position. Also, the working group welcomes the dropping of the prerequisite of a qualified majority in the Council for amending the Rules of Procedure in the Treaty of Lisbon as a step in the right direction.

of Procedure. As put by Lenaerts, "[this procedure] has not been found to cut down sufficiently the duration of the proceedings and its acceleration is achieved at the expense of all the other cases pending before the Court, thereby explaining why it has been used by the Court only on a very exceptional basis".[15] Moreover, the possibility for questions referred for preliminary ruling in specific areas to be heard by the Court of First Instance (Article 225 (3) EC Treaty) is perhaps not such a good idea since the CFI is overloaded. Finally, the recent introduction of a new urgent procedure in January 2008 (entered into force on the first of March) should be analysed in more detail.

C. The New Urgent Procedure

The Council Decision 2008/79 has amended the Protocol on the Statute of the Court of Justice and allows for the possibility of an urgent procedure in the area of freedom, security and justice, i.e. areas covered by Title VI of the EU Treaty and Title IV of the EC Treaty.[16] The aim is to ensure that the procedures are completed in about three months. Article 104(b) of the Rules of Procedure of the Court of Justice sets out the new urgent procedure. The new procedure enters into force on March 1st 2008. The referring national court may request that the urgent procedure be applied or the Court of Justice may decide to apply it of its own motion in exceptional cases. The parties to the national proceedings, the Member State of the court making the reference and the EC institutions may submit written observations within the time fixed by the Court of Justice. Also, Article 9 of the Rules of Procedure is amended to the effect that a special chamber of five judges is specifically designated for a period of one year to be responsible for the screening and processing of such cases. If that Chamber decides to allow a request for the urgent procedure to be applied, it will go on to give its ruling shortly after the hearing, and after hearing the Advocate General. The procedure will, in practice, essentially be conducted electronically. Communication between the Court and the national courts, the parties to the main proceedings, the Member States and the Community institutions will, as far as possible, be electronic. Only the parties to the main proceedings, the Member State of the court making the reference, the European Commission and, if appropriate, the Council and the European Parliament (if one of their measures is at issue) are authorised to lodge written observations in the language of the case within a short period of time.[17] The Court of Justice has delivered its first judgment using the urgent preliminary reference procedure in Case C-195/08 PPU *Inga Rinau.*[18] The case, referred by Supreme Court of Lithuania, involves the interpretation of the Brussels IIa Regulation (Council Regulation 2201/2003 of November 27 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of

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[15] K. Lenaerts, "The Rule of Law and the Coherence of the Judicial System in the European Union", 44 CMLRev. (2007), 1625, 1654.

[16] The Brussels European Council of 4-5 November 2004 decided that "thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court".

[17] The other interested persons and, in particular, the Member States other than that of the referring court, do not have that opportunity but are invited to a hearing at which they may, if they wish, submit their oral observations on the questions referred by the national court and on the written observations lodged.

[18] Case C-195/08 PPU *Inga Rinau* [2008] n.y.r. See also, for a second illustration, Case C-296/08 PPU *Santesteban Goicoechea* [2008] n.y.r. Those cases carry out the suffix "PPU". That suffix indicates that the case will use that urgent preliminary reference procedure.

parental responsibility. It took two months to hand down the case. This is clearly effective.[19] But in the long run?

D. Green Light Procedure

As said before, the resolution of the Parliament called the Court of Justice to consider all possible improvements to the preliminary ruling procedure which would involve the referring judge more closely in its proceedings. In that sense, it is pointed out national judges should be given more responsibility in a decentralised Community legal order. Therefore, it recommended a "green light" system whereby national judges could include their proposed answers to the questions they refer to the Court of Justice, which could then decide within a given period whether to accept the proposed judgment or whether to rule itself in the manner of an appellate court.[20] This procedure was already proposed in the Reflection document of the Court as well as in the Due report.[21]

Accordingly, the national courts would be encouraged**,** but in no way compelled, when referring a case for a preliminary ruling, to include their suggestion for the answers to be given. Consequently, a substantial number of cases could be simply disposed of by the Court of Justice. This option would seem to be in line with the aim of the preliminary ruling procedure as a dialogue between courts. The national courts, on their part, would be stimulated to play a greater role. This suggestion was already integrated in the guidance given to national courts in 2005.[22] The Court considered that, "in so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred".[23] Also, it was reiterated in March 2008, following the implementation of the urgent preliminary ruling procedure in the context of freedom, security and justice. In that sense, it is worth noting that Article 104b (1), of the Rules of Procedure of the Court of Justice prescribes that the national court or tribunal indicates in so far as possible the answer it proposes to the questions referred.

In my view, for the "green light" system to be efficient, it requires a very good knowledge a of EU law by the national judge. Perhaps, this task could only be carried on by the highest courts. But is it realistic for the lower national courts? Also, it is in no way sure that this procedure will reduce the length of the preliminary ruling procedure. The Court of Justice will have, in any case, to give some comprehensive consideration for deciding whether the

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[19] The Supreme Court of Lithuania seized the Court of Justice of a preliminary reference in May 14th 2008 and requested that the urgent preliminary reference procedure be applied on May 21st 2008, the request reaching the Court of Justice the following day. The Court of Justice agreed to apply the urgent procedure on May 23rd 2008 - one day after it received the request. The parties, six governments of member States and the Commission made written or oral submissions on June 26th and 27th 2008. And finally, judgment was given on July 11th 2008. Two months for a rather complicated case, translated into so many languages too.

[20] EP Resolution, cited *supra* note 3, points 30-31.

[21] Respectively, Report on the Future of the Judicial System of the European Union, May 1999 and Report of the Working Party on the Future of the European Communities' Court System, January 2000 (Ole Due Report).

[22] [2005] OJ C143/01.

[23] See, "Information note on references from national courts for a preliminary ruling", following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice of March 3 2008, point 9.

question can be answered in the terms specified by the national court. It is time now to look at the case law of the Court of Justice on the preliminary ruling procedure in order to assess whether a trend of increased judicial cooperation is discernable.

III. *Acte Clair,* Reformulation and Raising EU Law *ex offico*

A. The Acte Clair and the CILFIT criteria

At first blush, it should be noted that the *acte clair* doctrine derived from French administrative law and that the national courts in France had abusively recourse to this doctrine in order to circumvent the application of EU law.[24]As a result, it was essential for the Court of Justice to give meticulous guidelines (the *CILFIT* criteria) - for circumscribing the scope of the doctrine - and also to interpret the *acte clair* doctrine restrictively in order to avoid abuses. In that respect, the Court of Justice ruled that a national court, using *acte clair*, must be convinced that the interpretation would not lead to divergences in other Member States' courts and the Court of Justice. Importantly, the existence of this possibility must be assessed on the basis of the characteristic features of EU law regarding interpretation, i.e. comparison of the different language versions, specificity of the Community law terminology and recourse to contextual/teleological interpretation.

The restrictive interpretation of the *acte clair* doctrine has often come under attack. For instance in 2000, a group of experts set up by the Commission to reflect on the future of the judicial system concluded in their report (the so-called Ole Due report) that the national courts should be encouraged to apply Community law more regularly and that the courts of last resort should refer a question only if it is of sufficient interest.[25] Another notable proponent of the relaxation of the *acte clair* doctrine is A.G. Jacobs. In its powerful Opinion in the *Wiener* case, he proposed the references to be limited to cases where there is a genuine need for uniform application of the law throughout the Community because the question is one of general interest.[26] To put it differently, the national court must refer only when the reference is truly appropriate to achieve the objectives of Article 177 (234 EC). The main reason advanced for such relaxation is based on the need to preserve the effectiveness of the preliminary ruling procedure. Indeed, it may be argued that too many questions referred would prejudice the quality of the preliminary ruling procedure. In addition, the national courts may appear mature enough to apply correctly the body of case law developed by the Court of Justice.[27] Such a type of relaxation amounts, as lucidly put by Hettne and Öberg, to a "*de facto* regionalisation".[28]

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[24] Under the doctrine no question of interpretation arises from a provision where the meaning is clear. It was usually invoked in the context of international Treaties where, if the meaning was clear, there was no need for the *Conseil d'Etat* to refer a question of interpretation to the government.

[25] Report of the reflection group on the future of the judicial system of the European Communities, January 2000.

[26] Case C-338/95 *Wiener* [1997] ECR I-6495, para. 50.

[27] Ibid., paras. 60-64.

[28] J. Hettne and U. Öberg, *Domstolarna i Europeiska unionens konstitution* (SIEPS, 2003:15), 33.

In December 2007, the working group on the preliminary ruling procedure considered that a literal interpretation of the *CILFIT* criteria is no longer possible.[29] In particular, the original requirement to compare the text of all language versions (which is now 24 languages) is no longer realistic or feasible. Therefore, the criteria should be interpreted in a reasonable way. The opinion of the working group is that that the national court should consider whether the problem under consideration is worth the burden of a reference for a preliminary ruling. Interpretation with common sense entails that the lesser the problem the more the national court can convince itself that he is capable, at first sight, to solve itself the question on the basis of its own knowledge and understanding of EU law, as the Court should not be bothered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way. The majority of the working group recommended that the Court of Justice should seize a suiting opportunity to clarify its position in a judgement, taking into account that since *CILFIT* the number of member states and languages has increased.

The ruling of the Court of Justice in *Intermodal,* a case concerning the interpretation of the Common Customs Code, already reflected the need to clarify the scope of the *CILFIT* criteria in a rather relaxed way.[30] Here, the Court confirmed that the national court has the sole responsibility for determining whether the correct application of Community law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court of Justice a question concerning the interpretation of Community law which has been raised before it. It made also clear that that the obligation to refer imposed by Article 234(3) EC is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. Finally, it held, referring to paragraph 16 of *CILFIT,* that before the national court or tribunal comes to the conclusion that the correct application of a provision of Community law is so obvious that there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved and therefore refrains from submitting a question to the Court for a preliminary ruling, it must in particular be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. However, the Court of Justice stressed that a national court cannot be required to ensure that the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities.[31]

A.G. Tizzano in *Lyckeskog* follows a very restrictive interpretation of the *acte clair* doctrine and recommend to follow very carefully the criteria of interpretation set up in *CILFIT*. [32] The future of European law definitely passes through a *de facto* regionalisation and an empowerment of the national courts. However, the counter-arguments are still

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[29] Report of the Working Group on the Preliminary Ruling Procedure, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, The Hague, December 2007, at p.11. See also, M. Bobek**,** "On the Application of European Law in (Not Only) the Courts of the New Member Sates: "Don't Do as I say"?", Vol 10 (2007-2008) Cambridge Yearbook of European Legal Studies. The author stressed the disrupting effect of the faithful obedience to the *CILFIT* criteria.

[30] Case C-495/03 *Intermodal* [2005] ECR I-8551.

[31] Ibid., paras. 37-39.

[32] A.G. Tizzano, in Case C-99/00 *Lyckeskog* [2002] ECR I-4839, para. 76.

substantively strong for a broad loosening of the *CILFIT* criteria.[33] It is also a s*ecret de polichinelle* that the national courts have never carefully check the interpretation in other Member States as required by *CILFIT.* Finally, it is important to remark that the Grand Chamber in *Gaston Schul* has confirmed the scope of the *CILFIT* doctrine and also, in a way, refused a wild regionalisation of the preliminary ruling on validity.[34] The main question at issue was whether the interpretation adopted in the *CILFIT* judgment, referring to questions of interpretation, could be extended to questions relating to the validity of Community acts in order, *inter alia*, to reduce the length of proceedings. In other words, can national court declare Community law to be invalid? The Court of Justice gave a clear negative answer by relying heavily on the strong reasoning of the *Foto-Frost* case based on the unity of the Community legal order, the coherence of the system of judicial protection the Statute of the Court of Justice putting the Community Courts in the best position to rule on the validity of Community acts.[35] It appears from this line of jurisprudence that a kind of flexibility is required in order to ensure a smooth cooperation between the Court of Justice and the national courts. This assertion is confirmed by the next case.

B. Raising Point of Community law of its own Motion

The recent *van der Weerd* case provides significant findings as to the duty for national courts to raise points of Community law *ex officio*.[36] In this case, a number of measures taken by the Dutch authorities to restrain the spread of foot and mouth disease were contested before a Dutch court. In the main proceedings, the applicants did not raise the issue of the compatibility of the Dutch measures with EC law, a point that had been raised in another lawsuit which gave rise to the ruling of the Court of Justice in Case C-28/05 G.J. *Dokter.*[37] The domestic court was hesitant as to whether EC law compels it to take into account arguments based on EC law which had not been raised by the parties. Is there an obligation for a national court, when examining the legality of an administrative measure, to raise of its own motion the point of Community law? The Court of Justice held that, in the circumstances of the present cases, the national court was under no obligation to consider arguments of EC not raised by the parties. Recalling its settled case law related to the context of national procedural autonomy, the Court stated that in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed

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[33] Firstly, it should ways be kept in mind historically the *CILFIT* criteria were established to avoid the actual abuses of national courts applying the *acte clair* doctrine. Secondly, the number of preliminary referred by the courts of last instance cannot be considered, at this time, as impairing the effectiveness of the preliminary procedure. A.G. Tizzano, in this respect, remarked that, from 1960 to 2000, 1173 preliminary rulings out of 4381 result from the national courts of last instance. Thirdly, the *CILFIT* criteria constitute an exception to the text of the Treaty. And as any exception, they must be thus interpreted restrictively. Fourthly, the only possible solution, by consequence, should be to modify the text of the Treaty. Notably, new Art. 267(3) TFEU does not alter the wording of Article 234(3) EC. Fifthly, there are still many examples where the national courts wrongly apply Community law. Finally, the national courts from the new Member States are not mature enough.

[34] Case C-461/03 *Gaston Schul* [2005] ECR I-10513.

[35] Ibid., paras. 21-24.

[36] Joined Cases C-222/05 to C-225/05 *van der Weerd and others* [2007] ECR I-4233.

[37] Case C-28/05 *Dokter and Others* [2006] ECR I-5431.

procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[38]

As regards, the principle of equivalence, the Court of Justice considered that it was clear from the order for reference that the Dutch court is competent to raise of its own motion issues relating to the infringement of rules of public policy, which are construed in Dutch law as meaning issues concerning the powers of administrative bodies and those of the court itself, and provisions as to admissibility. However, the provisions which are at issue do not occupy a comparable position within the Community legal order. Indeed, they govern neither the conditions in which procedures relating to the control of foot-and-mouth disease may be initiated nor the authorities which have the power, within their area of responsibility, to determine the extent of the rights and obligations of individuals. Therefore, those provisions cannot be considered as being equivalent to the national rules of public policy.[39]

As regards the principle of effectiveness, the Court reiterated that the national provision must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. And it is also necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[40] Then it compared the situation in *van Schijndel* with the present case. In *van Schijndel and van Veen*, the Court examined the compatibility with the principle of effectiveness of a principle of national law which provided that the power of the court to raise pleas of its own motion in domestic proceedings was limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it. In this previous case, the Court of Justice held that the national provision was justified and found no breach of Community.[41] Notably, in *van der Weerd*, the Court of Justice considered that those two procedures differ only in so far as the national court is not ruling as a court of last instance, as in *van Schijndel*, but as a court of first and last instance. The reasoning used in *van Schijndel* was thus declared applicable. Finally, the Court of Justice concluded that Community law does not oblige the national court, in the circumstances of the case, to raise of its own motion a plea alleging infringement of the provisions of Community legislation, since neither the principle of equivalence nor the principle of effectiveness require it to do so. Finally, the issue of the reformulation of the preliminary question illustrates once again the need of flexibility in a successful dialogue between the national courts and the Court of Justice.

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[38] The Court of Justice recalled *Van Schijndel* (Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, para. 17).
[39] Ibid., paras. 29-32.
[40] See, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14; and *Van Schijndel* and *van Veen*, cited *supra* note 38, para. 19.
[41] Ibid., paras. 34-36.

C. Reformulation of the Preliminary Question

The questions referred by the national courts are often reformulated by the Court of Justice. Unfortunately, there is no official statistics in the annual report on the percentage of questions reformulated by the Court of Justice. In practice, the Court usually the same phrasing: "by its question the national court asks essentially whether Community law,…must be interpreted as…". According to an inquiry reported in March 2008, 11 % of the judges have experienced a reformulation.[42] Two judges' questions were completely reformulated and one judge from the United Kingdom considered this reformulation excessive. In that respect, a labour court judge proposed a compulsory consultation of the referring judge before the ECJ could reformulate any part of the reference. It is true that a closer involvement of the referring in the reformulation of the question would enhance the dialogue with the Court of Justice. But would it be so effective?

In the recent *Promusicae* case the Court of Justice reformulated the question put by the national court.[43] Using its regular phrasing, it considered that by its question the national court asks essentially whether Community law read also in the light of Articles 17 and 47 of the EUCFR, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings. Also, the Court of Justice extended the scope of the question to the Privacy and Electronic Communication Directive 2002/58, which is clearly not mentioned by the national court. It stressed, referring to settled case law, the importance to provide the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it (See Case C-392/05 *Alevizos* [2007] ECR I-3505, para. 64; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, para. 16; Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, para. 7 and Case C-241/89 *SARPP* [1990] ECR I-4695, para. 8). In that sense, it is considered that Directive 2002/58 is crucial to the interpretation of Article 12 LSSI. Indeed, this Directive concerns specifically the protection of privacy in the electronic communications sector. Therefore, before looking at the three directives mentioned by the national court, it is first ascertained whether Directive 2002/58 precludes the Member States from laying down an obligation to communicate personal data in the context of civil proceedings. This specification of the question amounts, arguably, to another reformulation touching upon the very substance of the question. In the circumstances of the case, the three directives mentioned by the national court (Directive 2000/31, Directive 2001/29 and Directive 2004/48) which ensure especially in the information society, effective protection of industrial property, cannot affect the requirements of the protection of personal data. At the end of day, reformulation appears as an effective tool in order to ensure effective judicial cooperation. The recent case law of the Court of Justice on the criteria of admissibility in the preliminary ruling procedure should now be analysed in order to find out whether flexibility is also apparent and needed.

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[42] Report of the Committee on Legal Affairs, *The Role of the National Judge in the European Judicial System*, 2008, cited *supra* note 6.

[43] Case C-265/07 *Promusicae* [2008] n.y.r.

IV. Admissibility and the National Courts

A. Admissibility and Article 35 TEU

Following the *Pupino* case,[44] the Court of Justice clarified recently the scope of application of Article 35 TEU in *Dell'Orto*. [45] Mr. Dell'Orto was accused of the offence of giving false information about companies with the further intention of committing the offences of aggravated misuse and of unlawful financing of political parties. Several companies were affected by those crimes, one of them was the applicant, Saipem.[46] Several governments doubted of the admissibility of the reference for a preliminary ruling. According to the UK, "the reference for a preliminary ruling is inadmissible because it is based in Article 234 EC, whereas the interpretation sought concerns the Framework decision".[47] To put it differently, the UK claimed that Article 234 EC is not applicable in the case and that Article 35 TEU should have been applied instead by the Italian Tribunal. However, the Court did not follow such an approach and considered, relying on *Pupino,* that Article 46(b) EU provided that the provisions of the EC and EAEC Treaty concerning the powers of the Court and the exercise of the powers, including the provisions of Article 234, apply to the provisions of Title VI of the Treaty on the European Union under the conditions laid down by Article 35 TEU. The Court of Justice ruled that the mere fact that the order for reference did not mention explicitly Article 35 TEU, but referred to Article 234 EC, could not of itself render the reference for preliminary ruling inadmissible. Accordingly, this conclusion was reinforced by the fact that the Treaty on the European Union neither expressly nor by implication laid down the form in which the national courts must present its reference for a preliminary ruling.[48]

It is also worth noting that the Dutch government challenged the admissibility of the reference for a preliminary ruling on the ground that the factual and legislative context was not sufficiently defined. First of all, The Court observed that, like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU. Therefore, in Union law, the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, namely where the interpretation which was sought referred to in the questions bore no relation to the actual

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[44] Case C-105/03 *Pupino* [2005] ECR I-5285, para. 29. The Court stated that "[l]ike Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

[45] Case C-467/05 *Giovanni Dell'Orto* [2007] ECR I-5557. See also Case C-296/08 PPU *Santesteban Goicoechea* [2008], cited *supra* note 18.

[46] Ibid., paras. 16- 17.

[47] Ibid., para. 33.

[48] Ibid., paras 34-36.

facts of the main action or to its purpose, the problem was hypothetical or the Court did not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[49] The Court held that the order for reference set out the underlying facts of the main action, and the provisions of applicable national law which were directly relevant and it explained the reasons why the court making the reference was seeking an interpretation of the Framework Decision, and also the link between the latter and the national legislation applicable in the matter.[50] As a result, the reference for a preliminary ruling was declared admissible.

B. Admissibility and the Body Making the Reference

Article 234 EC provides that any court or tribunal may make a reference to the ECJ. In the early years, the Court of Justice has broadly interpreted whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, in order to enhance the use and effect of the preliminary ruling procedure. The main factors, taken into consideration, have been, *inter alia,* whether the jurisdiction is compulsory, whether it involves the public authority, whether it is an adversarial procedure, whether the decision must be considered as final. Independence as a new criteria appeared at the end of the eighties.[51] Notably, all those criteria have been finally listed by the Court in *Dorsch Consult,* which establishes the following non-exhaustive guidelines:[52]

- the body is established by law.

- the body is permanent.

- its jurisdiction is compulsory.

- its procedure is *inter partes*.

- the body applies rules of law.

- the body is independent. [53]

Problematically, not all the mentioned criteria constitute absolute requirements but mere guidelines.[54] One of the consequences is that the jurisprudence of the Court appears to be not consistent. In 2001, A.G. Ruiz Jarabo Colomer, criticised with strength the lack of objective criteria to determine the national courts falling under the scope of Article 234 EC.

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[49] Ibid., para., 39-40. The Court relied on paragraph 29 of *Pupino*.
[50] Ibid., para. 43.
[51] See Case 14/86 *Pretore di Salò* [1987] ECR 2545; and Case C-24/92 *Corbiau* [1993] ECR I-1277.
[52] Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 23; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, para. 33; Case C-17/00 *De Coster* [2001] ECR I-9445. para. 10; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, para. 24; and Case C-516/99 *Schmid* [2002] ECR I-4573, para. 34.
[53] Ibid., *De Coster*.
[54] In *Dorsch Consult*, cited *supra* note 52, the Court for instance considered that the procedure *inter partes* was not necessary. This case concerns the German Federal Supervisory Board in cartel matters.

Referring ironically to Cervantes and Don Quijote de la Mancha, the A.G. considered that, *"[t]he case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted"*.[55] He proposed, instead, a new test in light of the requirements deriving from the definition of "tribunal" in Article 6(1) ECHR and the substantive standards of justice. Accordingly, a body which does not form part of the domestic judicial system and which lack the competence to "state the law" in judicial proceedings must not be considered a court or a tribunal. In other words, the body must have exclusive jurisdiction to give judgment since this element reflects independence and submission to the law.[56] This interpretation is very restrictive and would impede the possibly to make a preliminary ruling for administrative bodies. The Court of Justice did not follow the Opinion of the A.G.

It appears clear that this area is marked by numerous disagreements between the A.G.s and the Court of Justice as to the scope of application of the criteria.[57] Once again, in 2005, the Court of Justice refused to follow A.G. Jacobs in *SYFAIT*, who opined for allowing the national competition authorities the possibility to make a preliminary ruling.[58] In order to reject the A.G. argumentation, the Court of Justice has recourse to an additional criteria already used in the *Victoria Film* case.[59] According to the Court, *"a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature"*.[60] The Court remarked, in that regard, that the Commission may relieve a national competition authority such as the *Epitropi Antagonismou* of its competence. Consequently, the proceedings initiated before that authority will not lead to a decision of a judicial nature.[61] The reasoning of the Court of Justice is really close from the Opinion of Ruiz-Jarabo Colomer in *De Coster* and the requirements derived from Article 6(1) ECHR. This type of analysis leads to a very restrictive definition of the term "body" and reflects again the lack of consistency of the ECJ case law.

In 2007, the Court of Justice had to determine whether the *Oberster Patent- und Markensenat* (higher board of patent and trade mark) of is a court or tribunal within the meaning of Article 234 EC.[62] Referring to *Dorsch Consult* and *Syfait*, it pointed out a number of factors need to be taken into account.[63] The Court, following the Advocate General, looked closely at the 1970 Law on Patents (*Patentgesetz*) in order to find out whether the body fulfills the criteria of independence, whether its jurisdiction is compulsory, it applies

[55] Ibid., para. 14.
[56] Ibid., paras. 84-86.
[57] See e.g., *Dorsch Consult, De Coster,* and *Gabalfrisa*, cited *supra* note 52; and Case C-407/98 *Abrahamssson* [2000] ECR I-5539.
[58] Case C-53/03 *Syfait* [2005] ECR I-4609.
[59] Case C-134/97 *Victoria Film* [1998] ECR I-7023, para. 14; and Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, para. 25.
[60] *Syfait,* cited *supra* note 58, paras. 29 and 35.
[61] Ibid., para. 36.
[62] Case C-246/05 *Armin Häupl* [2007] ECR I-4673.
[63] *Dorsch Consult*, cited *supra* note 52, para. 23; and *Syfait*, cited *supra* note 58, para. 29.

the rule of law and the procedure is *inter partes*. According to the Court of Justice that Law provides expressly that the members of that body are to perform their duties entirely independently, without being bound by any directions. It is also clear from those provisions that the jurisdiction of that body is compulsory, since its competence to decide the abovementioned appeals is provided for by law and is not optional. As regards the procedure before the *Oberster Patent- und Markensenat*, the *Patentgesetz* specifically lay down procedural rules indicating that that body applies rules of law and that the procedure is *inter partes*. Consequently, it follows that the *Oberster Patent- und Markensenat* is a court or tribunal within the meaning of Article 234 EC and that the Court has jurisdiction to answer the questions submitted to it by that body.[64] In the recent PPU *Santesteban* case, the Court of Justice – going through the relevant criteria- concluded that the Indictment Division of the Court of Appeal of Montpellier, which gives opinions on requests for extradition, constitutes a court or tribunal within the meaning of Article 234 EC.[65] The conclusion to which we are inescapably drawn is that flexibility appears as the chief rule in the determination of the body making the reference. The same assertion appears true in relation to the other criteria concerning procedural admissibility.

C. Presumption of Relevance and the National Courts

It is, as a rule, solely for the national courts to assess the necessity and relevance of the questions submitted.[66] In that sense, there is a presumption of relevance attached to the questions referred by national courts for a preliminary ruling which may be rebutted only in exceptional cases. In principle, the Court of Justice is bound to give a ruling unless it cannot provide an adequate answer due to the questions submitted by the national courts.[67] The rationale behind this, as emphasised in *Floglia* v. *Novello*, is that the Court of Justice contributes to the administration of justice in the Member States and thus its task is not to give opinions on general or hypothetical questions.[68] The Court of Justice has established different categories of exceptions. In that respect, it has held many times that, "it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or 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".[69] In the words of A.G. Maduro, a *"degree of latitude"* is given to

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[64] Ibid., paras. 15-21.
[65] Case C-296/08 PPU *Santesteban Goicoechea* [2008], cited *supra* note 18. See also A.G. Maduro in Case C-210/06 *Cartesio,* 22 May 2008, n.y.g.
[66] See e.g. Case C-415/93 *Bosman* [1995] ECR I-4921, para. 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, para. 31; and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, para. 40.
[67] Ibid.
[68] Case 244/80 *Foglia* v. *Novello* [1981] ECR 3045, paras. 18-20; and Case 149/82 *Robards* v. *Insurance Officer* [1983] ECR 171, para. 19.
[69] See e.g., *Bosman*, cited *supra* note 66, para. 61; Case C-83/91 *Meilicke* [1992] ECR I-4871, para. 25; Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paras. 17-18; and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, para. 20.

the Court of Justice in assessing the need and relevance of a reference.[70] Furthermore, due to the spirit of cooperation imbuing the whole system of preliminary ruling, the application of a strict standard by the ECJ is certainly not required in this context.[71] Overall, the Court of Justice may reject a reference from a national court when:

- the question does not provide the factual or legal context necessary to give an useful answer,

- the question is hypothetical or does not contain the facts of the main dispute,

- the question does not fall within the scope of Community law.[72]

D. Factual and Legal Background

In the early years, the Court, under the adage come on come all, tried to do everything it could to reply the questions of the national court, no matter how succinct or inadequate the order for reference. This is no longer the situation. Nowadays, the Court regularly declines jurisdiction over preliminary references that are not supported by adequate factual or legal frameworks. A.G. Gulmann in *Telemarsicabruzzo* argued for the need to provide clear and detailed information to the Court of Justice. The Advocate General did not think, however, that the request for a preliminary ruling should be declared inadmissible. In contrast, the Court of Justice came to the conclusion that it should decline jurisdiction and stated that, "[i]t must be pointed out 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.[73] It is thus necessary, and not any more convenient, for the national court to provide information. In *Saddick*, a reference for a preliminary ruling from the Magistrate for the Rome district concerning a number of questions on the interpretation of Articles 3, 9, 30, 37, 85, 86, 87, 88 and 90 of the EC Treaty was also declared inadmissible.[74] Mr Saddik, a Moroccan national, is accused of the offence of smuggling 93 packets of foreign cigarettes of various brands but not bearing any indication of their origin. The first question raised by the magistrate is whether the penalties for which Mr Saddik is liable on account of non-payment of frontier duties are compatible with Community law. Interestingly, while the Irish Government considers that the absence of established facts and especially of any information as to the origin of the goods concerned in the proceedings greatly impedes the ability of the Member States to

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[70] A.G. Maduro in Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, para. 54.

[71] See, A.G. Lenz in *Bosman,* cited *supra* note 66, para. 75. Lenz advocated for a flexible approach.

[72] See Case C-328/04 *Attila Vajnai* [2005] ECR I-8577; C-212/06 *Government of the French Community and Walloon Government* [2008] n.y.r., para. 33; and Case C-127/08, *Metok* [2008] n.y.r., para.77. In *Metock* the Court stated that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C-212/06 *Government of the French Community and Walloon Government* [2008] n.y.r., para. 33).

[73] Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, para. 6.

[74] Case C-458/93 *Mostafa Saddik* [1995] ECR I-511.

assist the Court in its deliberations, the Italian and UK governments point out the importance of adequate information for the parties submitting written observations under Article 20 of the Statute of the Court of Justice [now Article 23 of the Statute]. The Court restated the *Telemarsicabruzzo* formulation and added that information provided in decisions making references not only enables the Court to give helpful answers but also enables the Governments of the Member States and other interested parties to submit observations. It is the duty of the Court to ensure that the opportunity to submit observations is maintained bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties.[75] Finally, the Court rightly considered that the order for reference did not contain sufficient information since the origin of the tobacco seized is not clear from the order for reference and was consequently too vague. The Court held pursuant to Article 92 of the Rules of Procedure that questions referred to it for a preliminary ruling are manifestly inadmissible.[76]

Telemarsicabruzzo and *Saddik* constitute exemplifications, in a myriad of rulings, concluding to the inadmissibility of the order of reference during the Nineties.[77] One may wonder whether this approach leads to *undue formalism*.[78] Also, it should always be kept in mind that Article 234 EC established a procedure of cooperation between the Court of Justice and the national courts. Thus, it appears that the Court should not have a strict interpretation of the need to provide clarity. The important of the factual and legal context should not outweigh the primary goal of cooperation. In that sense, A.G. Lenz in *Bosman* advocated for a *"benevolent approach"*.[79] To put it differently, the rejection of a reference for a preliminary ruling on the ground of an inadequate account of the factual and legal context should therefore be restricted to exceptional cases. Analysing the case law regarding inadmissibly, the A.G. remarked that the ECJ sometimes uses a rather inappropriate strict standard. Other A.G.s, like Jacobs have pinpointed the need to apply the requirements leading to inadmissibility in a more flexible manner.[80] By contrast, in *Grau Gomis,* the Court of Justice added to the *Telemarsicabruzzo* formulation that the national court must also give some explanation of why it has selected the particular Community provision for interpretation and of the link between those provisions and the national legislation applicable to the dispute.[81] Accordingly, the Court has held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and on the link it

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[75] Ibid., paras 12-13. See also Joined Cases 141/81, 142/81 and 143/81 *Holdijk and Others* [1982] ECR 1299, para. 6.
[76] Ibid., paras. 15-19.
[77] See, *inter alia*, orders in Case C-157/92 *Banchero* [1993] ECR I-1085; Case C-386/92 *Monin Automobiles* [1993] ECR I-2049) Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757; Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181; and Case C-9/98 *Agostini* [1998] ECR I-4261.
[78] *Saddik,* cited *supra* note 74, para. 9.
[79] A.G. Lenz in *Bosman,* cited *supra* note 66, para. 75 [1995] 4955.
[80] See A.G. Jacobs in Case C-316/93 *Vaneetveld* [1994] ECR I-736.
[81] Case C-167/94 *Grau Gomis* [1995] ECR I-1023. See also Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito and others* [2004] ECR I-1605. The Court rejected an order for reference, which merely referred to the facts found in other judgments instead of mentioning the relevant facts.

establishes between those provisions and the national legislation applicable to the dispute.[82] The *Graus Gomis* formulation constitutes an additional hurdle, which is asked to be provided for the national courts in order to help the Court answering the question but also, as emphasized in the judgment, help the parties to submit observations.[83]

In the recent *Centro Europa 7* case, the Court of Justice made clear that it is not the task of the Court, to rule upon the compatibility of provisions of national law with Community law or to interpret national legislation or regulations.[84] However, the Court has, repeatedly held that it is competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it.[85] Also, as seen before, it is the responsibility of the national court to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Yet, the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation of a Community rule 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.[86]

In the present decision, the Court of Justice declared some of the questions inadmissible. The referring court should 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. [87] Those requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations.[88] Though the decision seems to ask for an interpretation of the provisions of the Treaty on competition in its second question, the decision making the reference does not contain any indication regarding, *inter alia,* the definition of the relevant market, the calculation of the market shares held by the various undertakings operating on that market, and the supposed abuse of a dominant position. Consequently, the second question is inadmissible.[89]

In relation to the ninth question, the national court does not give any indication as to the Community provisions which it requires to be interpreted or any explanation of the link it establishes between those provisions and the dispute in the main proceedings or the subject-matter of that dispute. According to settled case law, it is essential that the national

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[82] Ibid., *Grau Gomis*, para. 9; Case C-116/00 *Laguillaumie* [2000] ECR I-4979, para. 16; and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, para. 29.
[83] Following the *Holdijk* line of jurisprudence, cited *supra* note 75.
[84] Case C-380/05 *Centro Europa 7* [2008] n.y.r.
[85] Ibid., paras. 48-51. See also Case C-292/92 *Hünermund* [1993] ECR I-6787, para. 8; and Case C-237/04 *Enirisorse* [2006] ECR I-2843, para. 24.
[86] Ibid., paras. 51-52. See also Case C-415/93 *Bosman* [1995] ECR I-4921, paras. 59 and 61; and Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paras. 47-48.
[87] See Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo*, cited *supra* note 73, para. 6; and Case C-67/96 *Albany International* [1999] ECR I-5751, para. 39.
[88] Ibid., *Telemarsicabruzzo*, para. 7; and *Albany International*.
[89] Ibid., paras. 57-62.

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.[90] To conclude, it is worth quoting Edward, a former judge at the Court of Justice: "[i]n practice, the registry of the court makes great efforts to give national courts the opportunity to supplement inadequate references. But even where there is no formal barrier to their doing so, some national judges seem unable or unwilling to see what is needed. Also, where the terms of the reference have been drafted by the parties, the judge may feel unable to amplify the reference without reopening the procedure and hearing the parties. In theses cases it is quicker in the long run to reject the reference as inadmissible, allowing the national court to make a fresh reference".[91]

E. Hypothetical Questions or Absence of Genuine Dispute

Two cases given the same day, *Meilicke* and *Dias* are important to determine the meaning and scope of the hypothetical questions.[92] In *Dias*, the Customs Court in Portugal referred eight questions on the interpretation of the provisions of the EEC Treaty on taxes with a view to assessing the compatibility with Community law of national legislation imposing a motor-vehicle tax. In the main proceeding, Automóveis Citroën SA imported a vehicle, manufactured in 1989, into Portugal from France in November of the same year. This vehicle was fitted with a fixed separating panel and a continuous floor. According to a Decree-law, vehicles with such characteristics are considered to be "light goods vehicles" and may be imported into Portugal free of the motor-vehicle tax. However, the vehicle was converted and the Director of the Customs Office accused Mr Lourenço Dias of modifying some of the technical characteristics of a motor vehicle without paying the tax to which that modification gave rise. The Court was not convinced of the relevance of certain questions referred in the order. More precisely, the Court considered that certain question bear no relation to the facts of the main dispute. To give an example, in its seventh question, the national court asks whether Article 95 prohibits a Member State from exempting the importation of "vintage" motor vehicles from a tax when other vehicles do not qualify for such exemption. The Court rightly remarked that that the motor vehicle in question in this case was manufactured in 1989. Therefore, there was no need to reply to this question since it is manifestly unrelated to the actual nature of the main proceedings. Finally, the Court refused to answer to 6 out of 8 questions referred by the national court.[93] Lenaerts considered that "[a]t first sight, that judgment may suggest that the Court trespassed over the borderline between interpreting Community law and interpreting national law. Yet its

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[90] Ibid., paras. 54-56. See also Case C-167/94 *Grau Gomis*, cited *supra* note 81, para. 9; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA* [2005] ECR I-10423, para. 46; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, para. 34; and Case C-295/05 *Asemfo* [2007] ECR I-2999, para. 33.

[91] See D. Edward, "Reform of Article 234 Procedure: The Limits of the Possible", in D. O'Keeffe and A. Bavasso (eds.), *Judicial Review in European Union Law*, volume 1 (Kluwer, 2000), 119.

[92] Case C-83/91 *Meilicke* [1992] ECR I-4871, and Case C-343/90 *Lourenço Dias,* cited *supra* note 69. See also Case C-315/02 *Lenz* [2004] ECR I-7063; Case C-380/01 *Gustav Schneider* [2004] ECR I-1389; Case C-165/03 *Mathias Längst* [2005] ECR I-5637; and on the scope of hypothetical questions, A.G. Maduro in *Cartesio*, 22 May 2008, cited *supra* note 65, para.13.

[93] Ibid., paras. 39-42.

approach was perfectly proper since it did not pronounce upon any factual or national legal aspect of the main proceedings, which was in issue between the parties. The Court regarded itself as being obliged simply to supply the lacunae which the national court had left in its order, namely its omission to give reasons why it considered it needed an answer to the preliminary questions so as to decide the main action, in order not to exceed its own jurisdiction".[94] This case demonstrates two points. Firstly, the Court looks at all the questions and tries to provide an answer whenever it is possible. This attitude reflects the spirit of cooperation between the Court of Justice and the national courts. Secondly, it appears difficult to distinguish the boarder line between a hypothetical question and a question bearing no relationship with the facts of the main dispute. It may be said that a question bearing no relationship with the facts of the main dispute constitutes also a hypothetical question.

In *Meilicke*,[95] the Court had to reply complex and lengthy questions from a German court (Landgericht Hannover) raising the problem of the compatibility of the Second Company Directive with the doctrine of disguised contributions that is embodied in the German case-law. In formulating the questions, it was clear from the case file that Mr Meilicke, an academic lawyer and father of the above doctrine, had a decisive influence on the content and direction of the questions referred to the ECJ. The Court, referring to *Foglia II*, noted that though the questions submitted raise the problem of the compatibility with the Second Directive of the doctrine of disguised contributions, the main dispute concerns the right of shareholders to receive information from the management. Then, it emphasized that it is apparent from the documents before the Court that it has not been established that the conditions for the application of that doctrine have been satisfied in the main proceedings. The Court thus concluded that the problem of compatibility was hypothetical. In addition, it considered that its conclusion is confirmed by the lack of factual and legal framework. Indeed, the determination of the compatibility with the Second Directive of the doctrine of disguised contributions depends on the circumstances in which the capital was increased. In that regard, the documents provided do not identify the context in which the company's increase of capital took place. In light of the foregoing, the Court concluded that it was inappropriate to reply to the question since it would be exceeding the limits of its function.[96] In *Saddik,* the Pretore asks the Court whether the Treaty precludes legislation imposing penalties for contraventions of the Italian rules on processed tobacco sales. However, Mr Saddik has not been charged with illegal resale of tobacco, although the Pretore states that he might be so charged in the future. The Court referring to the settled case law according to which the task entrusted to the Court of Justice, is not to deliver advisory opinions on general or hypothetical questions, concluded that the situation envisaged by the national court was purely hypothetical and held that the question referred was manifestly inadmissible.[97]

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[94] K. Lenaerts and D. Arts, *Procedural Law of the European Union* (Sweet and Maxwell, 1999), 42.
[95] Cited *supra* note 92.
[96] Ibid., paras. 27-34.
[97] Case C-458/93 *Saddik*, cited *supra* note 74, paras. 17-19.

V. Judicial Dialogue and Discursive Theories

The dialogue is indispensable between the Court of Justice and the national courts. It seems to me clear that the national courts are the preferred interlocutors of the Court of Justice. This assertion appears true by considering the special and crucial role given to the preliminary ruling procedure in the European legal order. In a similar vein, the national courts are the *"powerhouse"* of EU law.[98] Indeed, the local courts enforce Community law by applying the principle of construction (indirect effect) and Member State's liability; and - more generally - are entrusted with ensuring the legal protection which citizens derive from the Community law, e.g. in the context of national procedural autonomy (effectiveness/equivalence) and human rights. This transfer of power is vital in order to ensure the efficacy of the system since the Court of Justice cannot obvioulsy take all the "enforcement" burden. This delegation means also an increased discretion given to the national courts to assess, for instance, the proportionality of national measures in free movement or/and fundamental rights'cases.[99]

The importance of this accommodating dialogue has been recognised both by the national courts and Court of Justice. Already, in the Maastricht decision, the Federal Constitutional Court pointed out the need of a *"relationship of cooperation"* in the context of fundamental rights.[100] As an aside, this case shows that an indirect dialogue is established between the Court of Justice and the national constitutional courts even when no preliminary rulings procedure is made available.[101] The same remark applies to, for instance, Italy, [102] France[103] and Spain.[104] It is worth noting that the French *Conseil constitutionnel* justified the absence of direct dialogue by the nature of the *ex-ante* system of constitutional review which requires a ruling rule before the promulgation of the Act, within the time frame of Article 61 of the Constitution. Interestingly, the *Conseil constitutionnel* has also stressed that it depends on the ordinary national courts to refer, by way of preliminary ruling, to the Court of Justice, as the occasion arises.

The judicial discourse is also established or encrypted within the Court of Justice case law relating to the (effective) judicial protection of individuals. In that respect, it is worth recalling the *UPA* case where the ECJ stated that,

> "in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [new 10 EC], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that

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[98] D. Edward, "National Courts- the Powerhouse of Community Law", 5 CYELS (2002), 1.

[99] M.P. Maduro, "Contrapunctal Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), 501, 528-529.

[100] F.C. Mayer, "The European Constitution and the Courts", in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart, 2006), 281, 312.

[101] The FCC has never made a preliminary ruling to the Court of Justice. *See also*, FCC, 5 August 1998, BVR 264/98.The situation is different with the constitutional courts in Austria (Case C-144/99 *Adria-Wien Pipeline* [2001] ECR I-8365) and Belgium (*Cour d'arbitrage Belge*, case no 6/97, 19 February 1997).

[102] Case No 536/95, 29 December 1995.

[103] Case No 2006-540 DC, 27 July 2006 *loi transposant la directive sur les droits d'auteurs*.

[104] Case No 28/1991, 14 February 1991.

> enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act".[105]

Notably, the Court in 2007 has delivered in the *Segi* case the same type of (subliminal?) message in relation to the judicial protection of individuals within the third pillar.[106] The case established a duty of loyal cooperation for the national courts within Union law. In addition, the *Unibet* case (2007), affirms once again the importance of the national courts in the context of national procedural autonomy.[107] This new trend appears to reinforce the dialogue between the national courts and the Court of Justice.

The spirit of conciliation resorts also from the jurisprudence of the Court in the field of fundamental rights. The Court of Justice appears ready to respect the specific constitutional identity of the Member States**.** At least, this is my reading of the *Omega case,* in which the Court balanced the right to dignity (Article 1 of the German Basic Law) with the freedom to provide services.[108] It is interesting to note that the Court in *Laval* (2007*)* made an explicit reference to the importance of the right to collective action enshrined in the Swedish Constitution.[109] This is not really the style of the Court to make such an observation in relation to the general principles of Community law. Moreover, it appears that the ECJ has given discretion to the national courts for applying the proportionality test.[110] As put clearly in *Viking Line*, "it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements".[111] The domestic court is explicitly seen as the ultimate arbiter of the validity of national law in the context of EU fundamental rights. Besides, in *Advocaten voor de Wereld*, a preliminary ruling on validity of the EAW (European Arrest Warrant) Framework Decision, the Court has confirmed the need of dialogue and concession within the third pillar.[112] Indeed, it appears clear that the Court of Justice has given a wide margin of appreciation to the Member States in the third pillar and, in the same way, confirmed the importance of fundamental rights for limiting the Member State's action in this area. Put in the context of the *EAW* saga – which can be perceived in itself as a horizontal discourse between highest courts - this ruling of the Court of Justice could be seen as fitting perfectly *discursive legal pluralism*. Indeed, as outlined by Sarmiento, the decision of the Court of Justice confirmed the Czech approach and gave some support to the

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[105] Case P C-50/00 *UPA* v. *Council* [2002] ECR I-6677, para. 42.
[106] Case C-355/04 P *Segi* v. *Council* [2007] ECR I-1657, para. 38.
[107] Case C-432/05 *Unibet* [2007] ECR I-2271, paras. 38-39, "[u]nder the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law…it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law".
[108] Case C-36/02 *Omega* [2004] ECR I-9609.
[109] Case C-341/05 *Laval* [2007] n.y.r., para.92.
[110] See e.g. Case C-438/05 *Viking Line* [2007] n.y.r., paras. 80-85. The Court of Justice may, however, provide guidance.
[111] Ibid., para.85.
[112] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

German and Cypriot cases by confirming the Member State's wide discretion in third pillar matters. [113] The upshot of all this is that a spirit of dialogue and compromise emerges from this multi-level system of European constitutionalism. As rightly stressed by the *commissaire du gouvernement* in *Arcelor*, a general trend of judicial cooperation is clearly discernable between the supreme national courts of the Member States and the European Court of Justice.[114] Compromise is necessary and the dialogue is of essence.

Also, the recent *Gourmet Classic* offers an interesting illustration.[115] Wishing to sell cooking wine in Sweden and to know how it would be taxed, Gourmet Classic applied for a preliminary opinion from the *Skatterättsnämnden*.[116] Gourmet Classic contended that cooking wine falls within the exemption provided for in Article 27(1)(f) of Directive 92/83 and Paragraph 7(1)(5) of the LAS. In its preliminary opinion, the *Skatterättsnämnden* came to the conclusion that although cooking wine is, in principle, subject to excise duty, since it is a foodstuff it is exempt from such duty under Article 27(1)(f) of Directive 92/83. However, the President of the *Skatterättsnämnden* issued a dissenting opinion according to which cooking wine does not fall within the scope of the LAS. The *Skatteverket* appealed against the preliminary opinion of the *Skatterättsnämnden* to the referring court, seeking confirmation of the opinion. The *Regeringsrätten* considers that, in order to rule on the application by the *Skatteverket,* it is necessary to determine whether cooking wine contains ethyl alcohol.

Regeringsrätten (The Supreme Administrative Court in Sweden) asked the Court whether the alcohol in cooking wine must be regarded as ethyl alcohol within the meaning of Article 20 of Directive 92/83. The Commission raised an objection of admissibility and based its reasoning on the well-known *Foglia* case.[117] As stressed by A.G. Bot, all the parties are in agreement about the fact that the cooking wine is exempt from any duty on alcohol. Consequently, the Advocate General, following the Commission, considered that the Court of Justice lacked jurisdiction since there was no genuine dispute between the parties. He pointed out that *Regeringsrätten* adds its order for reference that the parties to the main proceedings are in agreement about the fact that no excise duty on alcohol should be levied. It is clear from those facts that there is no difference of opinion between the parties and therefore there is no dispute before the national court. In his words, this case concerns a request for confirmation of an opinion in the absence of any dispute.[118] The acceptance of the Court's jurisdiction would distort the objective pursued by Article 234 EC and disregard the conditions for bringing an action before the Court. By contrast, the Court ruled out the objection of admissibility. The

[113] See D. Sarmiento, "European Union: The European Arrest Warrant and the Quest for Constitutional Coherence", International Journal of Constitutional Law, Advance Access published on line on January 3, 2008.
[114] CE Ass, 8 February 2007, *Société Arcelor Atlantique et Lorraine*, Req. No 287110.
[115] Case C-458/06 *Gourmet Classic* [2008] n.y.r.
[116] See A.G. Bot in *Gourmet Classic*, paras. 30-32.
[117] See *Foglia*, cited *supra* note 68.
[118] Cited *supra* note 115, paras. 50-51.

Court of Justice considered that it was necessary to rehearse and clarify a number of principles concerning the jurisdiction of the Court under Article 234 EC.[119]

This ruling is, in my view, very instructive.[120] It is plausible to contend that the Court of Justice has the ambition to describe the preliminary ruling procedure with an educational purpose. The national judges are, of course, the target of such *"rehearsal".* The insistence on *"cooperation"* reflects also, arguably, an aspiration to stimulate the dialogue with the national courts. Notably, it is made clear, once again, that under the 234 procedure, the Court of Justice is, *in principle*, obliged to give a ruling. Yet, the Court, in exceptional circumstances, can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. Therefore, the Court may decline to rule on a question referred for a preliminary ruling by a national court 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.[121]

The Court of Justice declared that *"the spirit of cooperation"* required the Court of Justice to have regard to the particular responsibilities of the national court and implied at the same time that the national court must have regard to the particular function entrusted to the Court of Justice in this field, which was to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. The Court stressed that the purpose of the procedure before *Regeringsrätten* was to review the legality of an opinion which, once it became definitive, bound the tax authorities and served as the basis for the assessment to tax if and to the extent to which the person who applied for the opinion continued with the action envisaged in his application. In those circumstances, *Regeringsrätten* must be held to be carrying out a judicial function. The fact that all parties agreed on the preliminary opinion of the *Skatterättsnämnden* did not have an effect on the judicial nature of the main proceedings. The Court of Justice contended that *Regeringsrätten* asked the Court of Justice a question concerning the interpretation of a provision of Community law, namely the first indent of Article 20 of Directive 92/83, and it estimated that a preliminary ruling on that point was needed for reviewing the legality of the preliminary opinion of the *Skatterättsnämnden.* Thus the Court was not being asked to give an advisory opinion on a hypothetical question. Additionally, since there was no

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[119] Ibid., paras. 20-24. See further on the necessity for a request for a preliminary ruling, A.G. Maduro in *Cartesio,* 22 May 2008, cited *supra* note 65, paras. 15-21. The Advocate General, relying heavily on the Opinion of Warner in *Rheinmühlen*, considered that Article 234 EC precludes the application of national rules according to which domestic courts may be obliged to suspend or revoke a request for a preliminary ruling.

[120] See also *Promusicae*, cited *supra* note 43, for a similar reiteration of principles concerning the jurisdiction of the Court under Article 234 EC.

[121] See e.g., Case 244/80 *Foglia*, cited *supra* note 68, para. 21; Case C-379/98 *PreussenElektra*, cited *supra* note 66, para. 39; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para. 19.

judicial remedy under national law against the decisions of the *Regeringsrätten,* that court was obliged to bring the matter before the Court of Justice. As a result, it was only by referring a question to the Court for a preliminary ruling that the purpose of that provision could be achieved.[122] Finally, the Court found that it had jurisdiction to reply to the question posed by the *Regeringsrätten.* It concluded that the alcohol contained in cooking wine was, if it had an alcoholic strength exceeding 1.2% by volume, to be classified as ethyl alcohol as referred to in the first indent of Article 20 of Council Directive 92/83. This case reflects a very neat reiteration of the basic principles of the preliminary ruling procedure. On a more negative note, it should be noted that the Swedish Supreme Administrative Court could have used, without problems, the *acte clair* doctrine since the answer to the question was obvious. *Gourmet Classic* is clearly not a budget-friendly decision and constitutes, in that sense, an illustration of *expansive cooperation*.[123] It may be said, in passing, that the Advocate General was "ethically" right in upholding the objection of admissibility raised by the Commission as to the jurisdiction of the Court. Overall, *Gourmet Classic* transpires the degree of latitude given to the Court of Justice in the context of admissibility and, more generally, reflects the spirit of cooperation animating the relationship between the Court of Justice and the national courts.

Conclusion

In light of the foregoing discussion, it may be said that the *"spirit of cooperation"* has been reinforced in the last years. Indeed, this assertion appears to be true when looking at the Court of Justice jurisprudence concerning preliminary references on interpretation and validity. Didactic rulings like *Promusicae, Centro Europa 7* or *Gourmet Classic* demonstrate the willingness of the Court of Justice to provide steady guidelines to the national courts regarding the admissibility's requirements of the 234 procedure. It appears also that the jurisprudence on procedural admissibility, reformulation of the question or even *acte clair* is marked by a wide degree of latitude given to the Court of Justice. Flexibility seems to be necessary in order to ensure a prolific judicial dialogue. Besides, the case law related to Freedom Security and Justice - *Segi, Dell´*Orto, PPU *Santesteban* and *Advocaten voor de Wereld* - reflects the importance given to enhanced judicial cooperation between the Court of Justice and the national courts. The successful introduction this year of the *new urgent preliminary procedure* goes also in the sense of an increased and more effective judicial cooperation. Indeed, justice delayed may also be perceived as justice denied. Finally, the recent resolution of the European Parliament, arguably, embraces *discursive legal pluralism* by extolling the merits of a reinforced judicial dialogue and the need to adopt a *green light* procedure which may improve the preliminary ruling procedure and will increase the responsibility of the national judges in the European system of judicial protection.

[122] Ibid., paras. 26-29.

[123] This case reflects the refusal to extend the *Foglia* jurisprudence (artificial dispute between the parties) to a request for confirmation of an opinion with respect to which the parties are in agreement. Going further, it demonstrates that *Foglia* is not a strong line of case law.