

## The Referral Procedure; The Jurisdiction, Duties and Obligations of the European Court of Justice and Member States under Article 234 E.C

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### Introduction

*"The reference procedure laid down in article 234 must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion – beautiful but not of much practical utility<sup>1</sup>"*

The Treaty of Rome adopted in 1957 gives jurisdiction to the European Court of Justice<sup>2</sup> and states that the Court must *"ensure that in the interpretation and application of the Treaty the law is observed"*<sup>3</sup>. The European Commission serves the role therefore of "guardian of the treaty". The E.C.J has two main functions to fulfil in order to preserve this provision. Firstly, the E.C.J must settle disputes that arise out of a Member States failure to fulfil their Treaty obligations and secondly, it will interpret questions of Community law, which are referred to it by Member States. This provision is encapsulated in Article 234 E.C and allows Member States who may be unsure of European Union Law to refer questions to the E.C.J for interpretation. Article 234 E.C states that;

*'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

- (a) the interpretation of this treaty;*
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB*
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

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<sup>1</sup> The Substantive Law of the E.E.C, by D. Wyatt and A. Dashwood, 2ed., 1987

<sup>2</sup> The Treaty of Rome refers to the treaty which established the European Economic Community (EEC). Article 1 of the Treaty stated that "The Court of Justice shall be constituted and shall function in accordance with the provisions of the Treaty on European Union (EU Treaty), of the Treaty establishing the European Community (EC Treaty), of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute". The ECJ according to this treaty is effectively the Supreme Court for Europe and is more formally known as the 'Court of Justice of the European Communities'.

<sup>3</sup> Article 220 of the Treaty of Rome.

This provision has been described as “radical jurisprudence” and it exemplifies the supremacy of the European Union while simultaneously empowering lower national courts in member states. The rationale behind the Article 234 function is that if European Union objectives are to be adequately achieved then E.U law must take supremacy over inconsistent national or domestic law and therefore Article 234 allows member states to identify inconsistent provisions within their own laws<sup>4</sup>. In the case of *Rheinmuhlan*<sup>5</sup>, the court states that Article 234 (ex 177) E.C “is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community”. *Van Duyn v. Home Office*<sup>6</sup> was the first English case referred to the European Court of Justice. It secured an individuals right to rely on Community law before a national court and through the doctrine of direct effect it allowed access to the E.C.J via national courts<sup>7</sup>. There have been many such referrals since 1974 and due to the heavy workload of the E.C.J, the Court of First Instance was created in 1988 to relieve the E.C.J of some of its duties<sup>8</sup>.

The relationship between the E.C.J and the national courts of Member States is one of a shared and complimentary jurisdiction involving mutual co-operation and ultimate success<sup>9</sup>. It is essential that a balance be struck between both in order to preserve a uniformity of Community law. This essay will consider the importance of the E.C.J’s role in accepting and also rejecting referrals from the national courts and it will also examine the national courts responsibility to be aware of the necessity to refer and the implications of such actions.

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<sup>4</sup> *Costa v. ENEL* [1964]

<sup>5</sup> *Rheinmuhlan* (1974) Case 166/73 ECR

<sup>6</sup> *Van Duyn v. Home Office* (1974) ECR

<sup>7</sup> If a provision of E.U Law is directly effective, this means that the provision creates rights that an

individual may rely upon in the courts. If the individual is taking an action against governments it is a vertical direct effect or against other citizens and organisations is referred to as horizontal direct effect.

<sup>8</sup> The number of annual referrals to the ECJ by national courts has increased beyond expectation with a steady and marked expansion of Article 234 (ex. 177) activity. Currently the court may deal with up to 200,000 applications in one year, compared to figures reaching barely 20,000 in the early 1970’s.

<sup>9</sup> Advocate General Lagrange acknowledged in *Rewe-Handellsgesellschaft Nord v. Hauptzollamt Kiel*, [1981] E.C.R 1805, [1982] CMLR 440, that; “[Article 234 EC] ... must lead to a real and fruitful collaboration between the municipal courts and the European Court ... with mutual regard for their respective jurisdictions”.

### The European Court of Justice knowing when to accept referrals

The rulings of the E.C.J clarify the scope and meaning of European Union law. The Court is bound by Article 234(2) and (3) to consider any question presented to it by the court of a member state<sup>10</sup>. Such questions are referred to in Article 234(1) and include questions on the interpretation of the Treaty, the validity and interpretation of the acts of the institutions of the Community and of the European Central Bank and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. However, it will only advise on the interpretation and not the application or decision of those questions posed<sup>11</sup>. These very important decisions are then binding on all Member States or those to whom they are addressed. This is an attempt by the E.C.J to safeguard the uniform application of Community law, as there is a danger that equivalent measures may not be taken in all Member States and such laws may be interpreted and applied differently. Such a risk would be “inimical to the proper functioning of the common market”<sup>12</sup>. Article 234(2) states that only a “court or tribunal” can refer a question to the E.C.J for interpretation. This definition has caused much controversy but the E.C.J has defined it in quite broad terms. In *Dorsch Consult Ingenieurgestellshaft*<sup>13</sup>, the E.C.J stated that a body must be established by law, must be permanent, independent, have compulsory jurisdiction, apply rules of law and the procedure must be *inter partes*<sup>14</sup>. The body must also have a judicial function rather than an administrative one. In *Nordsee*<sup>15</sup> it was held that a body would not be considered a court and tribunal unless it is closely linked to “the organisation of legal remedies through the courts in the

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<sup>10</sup> Article 234 (ex 177) E.C Treaty;

(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 of Justice 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 of Justice.

<sup>11</sup> *Dzodzi v. Belgium* 1990 ECR I-3763, in this case the ECJ stated that a member state had discretion in certain internal country matters and it would not interfere with this discretion. It could merely advise the member state on an interpretation of its international provisions and it could not reach a decision for the applicant and enforce this against the member state.

<sup>12</sup> *European Union Law*, 4<sup>th</sup> ed, Wyatt & Dashwood, Chapter 11, p 264

<sup>13</sup> *Dorsch Consult Ingenieuresellschaft v. Bundesbaugesellschaft Berlin* Case C-54/96 [1997] ECR I-4961 para. 23

<sup>14</sup> The term ‘*inter partes*’ refers to legal proceedings to which all parties have been notified and given the opportunity to attend the proceedings. These proceedings or hearings may involve two or more parties, and all parties have the right to be heard and to make submissions in their defence.

<sup>15</sup> *Nordsee v. Reederei Mond*, Case 102/81 [1982] ECR

member state in question". There are further problems' regarding referrals however. The Court must be aware of the increasing damage and danger that could be caused if referrals were not made. National courts are reluctant to refer for many reasons and this is not often helped by the E.C.J's seemingly harsh attitude to referrals especially as many Member State judges are often venturing into unknown E.U law territory, for which they are not always adequately equipped to deal with. The E.C.J must thus accept a referral if there is a real and substantial doubt on a national courts behalf and the court feels that there would be an inconsistent application of Community law if it were not for the intervention of the E.C.J. The Article 234 provision is not an appeal procedure and the interpreted question is than referred back to the national court for a final judgement and decision. The E.C.J does not have jurisdiction to interpret a member states national law or assess its validity<sup>16</sup>.

### **The European Court of Justice knowing when to decline a referral**

The E.C.J may decline to interpret if the reference is not within the scope of Article 234. It cannot challenge the validity of the Treaty nor can it declare national laws invalid. The Court will not decide issues of fact or national legislation or examine questions relating to the particular issue, that the national court has not specifically referred to it<sup>17</sup>. It is bound to give a ruling other than in a situation where a preliminary reference is requested, but the question has no relevance to Community law<sup>18</sup>. However, the Court may dismiss irrelevant questions and may decline if the background of the case is not set out clearly as in *Telemarsicabruzzo*<sup>19</sup>, or if the

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<sup>16</sup> Guidelines for the exercise of the discretion under Art. 234 (2) (ex. 177(2)) E.C were suggested by Lord Denning MR in the case of *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226, and for Art. 234 (3) (ex. 177(3)) E.C by the ECJ in *CILFIT v Ministry of Health* [1982] ECR 3415. However, the most recent guidelines released by the ECJ are provided in an Information Note on References by National Courts for Preliminary Rulings. These guidelines have subsequently been incorporated into the *Practice Direction for the Court of Appeal*, 14 January 1999.

<sup>17</sup> As set out in the guidelines issued by the E.C.J in the *Practice Direction for the Court of Appeal*, 14 January 1999, the referral must contain a clear statement of reasons which are sufficiently complete to give the E.C.J a clear understanding of the factual and legal context of the main proceedings. If such is not given there is a danger that the ECJ will not be aware of all elements relating to the referral and thus give an incomplete or inconclusive assessment of the situation.

<sup>18</sup> *Tarentik v. Director of Services Fiscaux de Seine-et-Marne*, [1999] 2 C.M.L.R

<sup>19</sup> *Telemarsicabruzzo v. Circostel* [1993] E.C.R I-393. A similar view was taken in *Meilicke v Meyer* [1992] E.C.R. I-4871 the E.C.J defined the reference under Art. 234 E.C as inadmissible 'because the order for reference is too vague about the legal and factual situations ...or because the situations are purely hypothetical'. Also in the *Dzodzi* line of case the ECJ

national court presents inadequately explained references as set out in Article 92(1) Rules of Procedure [1993]. Similarly, the E.C.J does not entertain hypothetical situations or academic disputes and the Court refused to interpret a dispute between two Italian companies in *Foglia v. Novello*<sup>20</sup> where it became aware that the situation was a conspired action brought in by parties who are not actually in dispute. The definition of 'dispute' was explored in *Meilicke v. ADV*<sup>21</sup>. However, the notion of a genuine dispute was argued in *Foglia*<sup>22</sup>. It claimed that Article 234 speaks only of questions and does not impose such a restriction on theoretical interpretation. The E.C.J concluded that it is the responsibility of the national court to interpret its own domestic law and due to the heavy workload of the E.C.J, it is advised that questions should only be referred in relation to pending cases before national courts if there appears to be a conflict over Community law provisions<sup>23</sup>. Finally, the E.C.J will also decline if owing to new developments that it believes the national court to be aware of, the national court should have withdrawn the referral<sup>24</sup>. The Court is therefore bound to reply if all facts of case are set out with a clear background of factual and legal aspects stating satisfactory reasons for interpretation.

### **The importance of the national court of Member States knowing how to refer**

The national courts of Member States must be aware of what exactly they can refer to the E.C.J under Article 234 E.C. National courts must act in accordance with the E.C.J's judgement as non-compliance with such could threaten the E.C.J legislation and undermine E.C.J decisions and uniformity. There is a high onus therefore, on the national court judges to set out facts, issues and relevant legislation clearly for the E.C.J. However, often such domestic judges especially those of lower courts are inexperienced in E.U practices and it is frequently unfamiliar territory to them.

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declined the jurisdiction on the ground that the factual background was not clearly presented..

<sup>20</sup> Case 104/79 [1980] E.C.R 745, , the Court said it could only entertain such a reference in the case of a genuine dispute and not merely where not where parties had used a 'a procedural device to induce a ruling.' This was not the function of Article 234 E.C.

<sup>21</sup> *Meilicke v. ADV ORGA FA Meyer AG* [1982] ECR – this was an interpretation containing a statement of reasons setting out the factual and legal elements which characterize the dispute.

<sup>22</sup> Case 104/79 [1980] E.C.R 745

<sup>23</sup> Case C-318/98, *Fornasar*, para. 27 and 31, it was stated that "dismissal of a request from a national court is possible only where it is clear that the interpretation of Community law or the consideration of the validity of a Community rule requested by that court has no bearing on the real situation or on the subject-matter of the case".

<sup>24</sup> *Zabala Erasun & others* [1995] ECR I-1567

Therefore, in 1996 the E.C.J issued a report to advise national court judges. This report was called the '*Guidance on Referrals by National Courts for Preliminary rulings*'. It broached the concept of 'necessity' to refer in certain situations. The guidelines aimed at providing that the national court on making a referral should include a statement of comprehensible reasons for such reference with clear factual and legal background. It should also have the same meaning when translated into all languages of Member States, and it would take into account that the E.C.J does not assess validity or interpret national law. It must be aware of discretionary and mandatory referrals and their exceptions, and finally, after the final judgement is made in the national court, the E.C.J may request a copy of the final decision. If referrals are not made in the correct manner, there is a danger that they might be rejected by the E.C.J and this in turn could jeopardise the uniform and correct application of Community law. The E.C.J's heavy workload has been alleviated somewhat by the ratification of the Nice Treaty 2001, which came into force in the 1<sup>st</sup> February 2003. Article 225(3) of the Treaty of Nice replaced Article 225 of the Treaty on European Union. This amendment extended the jurisdiction and powers of the Court of First Instance and more significantly gave it Article 234 jurisdiction<sup>25</sup>. It states that, "The C.F.I shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 in specific areas laid down by the statute". Such decisions are "subject to review by the E.C.J" especially where "there is a serious risk of the unity or consistency of Community law being affected". The C.F.I may also refer cases back to the E.C.J for a ruling. Judges returning from the E.C.J and C.F.I back to Ireland and other Member States are "europeanised" to such an extent. They are more aware and knowledgeable in E.U law and the workings of the E.C.J, and therefore more capable of handling disputes and question over E.U matters when they return to their domestic courts in their respective Member States.

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<sup>25</sup> This Court subsequently took a vast amount of the workload from the E.C.J. It has been stated by the European Commission that "the extension of the jurisdiction of the Court of First Instance, coupled with a constant progression in the amount of traditional litigation, has led to a very considerable increase in the number of cases brought each year before the Court of First Instance, with a more than fourfold increase since 1990. That trend towards an appreciable increase in the number of cases brought before the Court of First Instance is set to become even more pronounced in the future. As a result, a growing proportion of Community litigation will fall to be dealt with by the Court of First Instance and the number of cases to be decided by it will exceed, as it has already exceeded, the number brought before the Court of Justice", *Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference*, 17 May 1995.

### **The importance of the national courts knowing when to refer and the implication of such actions**

A national court must be aware of when to request a preliminary ruling from the E.C.J under Article 234 E.C. Where a question is raised before a Court or Tribunal of a Member State, that Court may make a referral to the E.C.J if it considers that interpretation of such a question is necessary to enable it to give a judgment. This is a discretionary measure and the national court must act responsibly when entrusted with Community law aspects, which may arise in a judgement (Article 234(2)). Furthermore, Article 234(3) states that where a question is raised in a Court or Tribunal of a Member State against those decisions there is no legal remedy under national law, then that Court or Tribunal shall refer to the E.C.J. This is however, a mandatory provision but it retains some discretionary elements like Article 234(2). References should be made to the E.C.J only if a ruling by the E.C.J is 'necessary' to enable the national court to give judgement. This definition is stated in Lord Denning's judgement in *Bulmer v. Bollinger*<sup>26</sup>. However, more recently, the E.C.J have discussed the exceptions for not referring under Article 234 in the case of *CILFIT v. Minister for Health*<sup>27</sup>. There are three particular reasons where a national court may decide not to refer a question to the E.C.J. Firstly, under the doctrine of *acte clair*, a national court may decide not to refer if the Community law in question is clear and unambiguous. This law must be apparent enough to ensure a similar standard of clarity in all Member States and to the E.C.J. The problem arises where a national court believes that it understands a seemingly clear provision of Community law, when it has however, incorrectly interpreted it. This could lead to inconsistencies in a field, which requires a high level of uniformity and homogeneity. Secondly, a court may decide not to refer if there are no questions of Community law and it is a

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<sup>26</sup> *Bulmer (HP) Ltd v. J Bollinger SA* [1974] Ch 401. In this case it was stated that the "correct application of Community law may be so obvious as to leave no scope for any reasonable doubt." The definition of 'necessary' as set out by the Council of the European Union is that "according to the Court of Justice it is up to the national courts (both the lower courts and the highest court(s)) before which actions are brought and are responsible for the subsequent judicial decision to assess, in the light of the special features of each case, whether a preliminary ruling is required. However, a request from a national court may be dismissed by the Court of Justice if: the question is not relevant in the sense that the answer to that question, regardless of what the answer may be, in no way can affect the outcome of the case; the requested interpretation of Community law bears no relationship to the actual facts; the problem is hypothetical; or the Court has not been provided with the factual or legal material necessary to give a useful answer on the questions submitted", *Guide to preliminary ruling proceedings before the Court of Justice EC*, March 1st, 2004

<sup>27</sup> *CILFIT v. Minister for Health* (1982) ECR

“dispute of a purely domestic nature” – *CILFIT*<sup>28</sup>. Finally, there is no need to refer on an issue that has already been discussed by the E.C.J in a previous case<sup>29</sup>. However, this is not a bar to referral and a Member State should not feel discouraged from referring with the objective of clarifying E.U law. It must refer where there is a “real difficulty.....of a kind to create doubt in an enlightened mind”<sup>30</sup>.

National courts must however, be aware of the implications of making a referral. A preliminary ruling by the E.C.J is “binding on the national court as to the interpretation of the Community provisions and Acts in question” – *Benedetti v. Munari*<sup>31</sup> and it “may require it (the national court) to refuse to apply conflicting provisions of national law”. There is no precedence in E.U law but the E.C.J does require Member States to follow previous rulings. The national court then decides the case using the E.C.J judgement as binding guidelines. Many things must be taken into account before a National Court refers. It can take approximately eighteen months for a question to be interpreted by the E.C.J, and the overloading of the E.C.J can cause even more delays. The Court needs to consider the difficulty and importance of the case and the expense factor involved. Finally, the national court may consider the parties wishes in referring the matter even though it they cannot make or refuse a reference themselves.

### Conclusion

Preliminary rulings account for more than 50% of the E.C.J workload each year. This extensive growth in referrals emphasises the increasing value and acknowledgement of E.U rights, obligations and their importance. Judges now think in terms of the Community rather than simply the narrow spectrum of their own respective states. They are aware of the complimentary rather than hierarchical nature of the E.C.J. Article 234(1) poses a duty on the E.C.J to interpret questions of Community law to enable national courts to achieve consistency in their judgements. Correspondingly, Article 234(2) and (3), place both an obligation on national courts to refer in certain

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<sup>28</sup> *CILFIT v. Minister for Health* (1982) E.C.R

<sup>29</sup> This is referred to as *Acte éclairé*. The European Commission states that “the highest court is not under an obligation to refer if the question that has arisen has already been answered in an earlier judgment of the Court of Justice”. See *Joined Cases 28-30/62, Da Costa and Schaake, Case 283/81, CILFIT*, para, 14-15.

<sup>30</sup> Invoked by French jurist Lafriere in *Traité de la jurisdiction administrative*, 1896.

<sup>31</sup> *Benedetti v. Munari* (1977) E.C.R

circumstances while allowing them a certain independent discretion and in addition offering them a valuable and functional resource. Article 234(2) and (3) poses a positive duty to refer but not an absolute duty. The preliminary ruling procedure takes the form of a 3-stage process. Firstly, the national court decides to refer a question to the E.C.J, the E.C.J's considers the treatment of the reference and lastly, the national courts implementation of the E.C.J's decision. In conclusion, codification of E.U law may be the most productive way forward. Well-codified areas of E.U law are less ambiguous and more transparent, there is less need for referral and provisions are clear enough for the national court to interpret. This subsequently would alleviate the E.C.J of a quantity of its heavy workload allowing more productivity and less delay and expense to be incurred by the Member State.