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OBTAINING A REFERENCE TO THE EUROPEAN COURT OF JUSTICE FROM THE ADMINISTRATIVE COURT

PART 1: THE BASIC PROCEDURAL STRUCTURE

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1. **Power To Refer Under Art. 234 Ec**

Jurisdiction. Art. 234 EC sets out the following four jurisdictional requirements for the making of a preliminary reference to the European Court of Justice ("ECJ"):

(a) the question must relate to a provision of EC law upon which the ECJ has jurisdiction to give a ruling;
(b) the question must be related to the interpretation and/or validity of those provisions;
(c) the question must have been raised before a national court or tribunal; and
(d) a decision on the question must be necessary to enable the national court or tribunal to give judgment.

(a) A question relating to a provision of EC law

Sources of EC law

Provisions of EC law include the following: the treaties (The EC Treaty as amended, the Merger Treaty, the Accession Treaties, the Single European Act, the Treaty on European Union), treaties or conventions between Member States under Article 293 EC or where the conventions contain provision for references to the ECJ), acts of the institutions of the Community under Art. 234(1)(b) EC (Council, Commission,[1] European Parliament, Court of Auditors, European Central Bank), where the statutes of bodies established by acts of the Council so provide (under Art. 234(1)(c)), international agreements of the Community[2] and general principles of law under Art. 215 EC.

National law

It is not for the ECJ to rule on the applicability of provisions of purely national or international law which are relevant to the outcome of the main proceedings.[3] The ECJ does not have jurisdiction to interpret the laws of the Member States even when those laws were introduced in order to give effect to Community law obligations.[4]

Purely internal situations

Nevertheless, where, in relation to purely internal situations, domestic legislation adopts solutions which are consistent with those adopted in Community law in order, in particular, to ensure a single procedure in comparable situations, the ECJ will accept a reference "*in order to*

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[1] The Council and Commission may adopt measures which produce legal effects but which do not take the form of the acts referred to in Art. 249 EC (Case 44/84 **Hurd v Jones** [1986] ECR 29.

[2] Case C-37/98 **R v Secretary of State for the Home Department ex p. Abdulnasir Savas** [2000] ECR I-2927. This includes "*mixed agreements*" where the both the Community and the Member States are parties (Case 12/86 **Demirel** [1987] ECR 3719; Joined Cases C-300/98 and C-392/98 **Dior and others** [2000] ECR I-11307).

[3] **R v Secretary of State for the Environment Transport and the Regions Ex p. International Air Transport Association** [1999] 2 CMLR 1332.

[4] Case 23/75 **Rey Soda v Cassa Conguaglio Zucchero** [1975] ECR 1279, paras 50-51.

forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply".[5]

It is not necessary for the national legislation to be "*indisputably aligned*" with EC law.[6] In Case **C-306/99 BIAO**, the provisions of national law did not reproduce exactly the EC provisions but the ECJ accepted the reference,[7] contrary to the advice of the Advocate General. The ECJ distinguished *BIAO* from **Case C-346/93 Kleinwort-Benson,**[8] in which reference had been declared inadmissible, on the basis that, in the earlier case, the national rules had provided for divergences from the EC model whereas in **BIAO** nothing indicated that the EC and domestic law positions could be interpreted differently.

In any event, the ECJ must "*take account*" of the legislative context in which the question put to it is set in the order for reference.[9] This will normally include all of the relevant national and international law.

(b) <u>Interpretation of EC law</u>

Interpretation not application. The ECJ interprets EC law but has no jurisdiction to apply EC law to particular facts in the main proceedings, which is purely a matter for the national court.[10] It is legitimate, however, for the ECJ to rule on the legal consequences of given primary facts, what the ECJ calls "*the legal characteristics of the facts*".[11] The ECJ will generally regard itself as bound by facts established before the reference is made even if they have been agreed by the parties rather than found by a court.[12] The ECJ might not be so bound if there are serious doubts regarding the assessment by the national court.[13]

<u>Information gathering by the ECJ</u>

The ECJ may address specific questions to the parties[14] and has the power to request clarification from the national court.[15] The ECJ may find facts of its own volition where the necessary fact-finding exercise is outside the jurisdiction of the referring court or where the issue is of the validity of EC legislation.

In the rare event that the ECJ exceeds its jurisdiction and applies its ruling to the facts of the main proceedings, as in **Sirdar**,[16] the referring court may disregard that part of the ruling.[17]

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[5] Joined Cases C-297/88 and C-197/89 **Dzodzi** [1990] ECR I-3763, para. 37; Case C-130/95 **Giloy** [1997] ECR I-4291, para. 28; and Case C-300/01 **Salzmann** [2003] ECR I-4899, para. 34

[6] Case C-222/01 **British American Tobacco Manufacturing BV** (judgment of 29 April 2004, unrep.) paras 40-41.

[7] [2003] ECR I-1, paras 92-93.

[8] [1995] ECR I-615, para. 18

[9] Case C-475/99 **Ambulanz Glöckner** [2001] ECR I-8089, para. 10; Case C-153/02 **Neri** [2003] ECR I-1355, para. 34 and 35; Case C-28/04 **Tod's SPA and Tod's France SARL** (judgment of 30 June 2005, unrep.) para. 15

[10] Case C-421/01 **Traunfellner** [2003] ECR I-11941 paras 21-24; **BHB v William Hill** [2005] EWCA Civ 863 *per* Jacob LJ at para. 22.

[11] **Arsenal v Reed** [2003] RPC 39 (CA) at para. 25 following the ruling of the ECJ in Case C-206/01 **Arsenal FC v Reed** [2002] ECR I-10273; see, also **BHB v William Hill** [2005] EWCA Civ 863 *per* Jacob LJ at para. 22.

[12] Case 145/88 **Torfaen Borough Council v B&Q plc** [1989] ECR 3851.

[13] Opinion of AG Reischl in Case 36/79 **Denkavit** [1979] ECR 3439 at page 3462.

[14] Statute of the ECJ, Art. 24, Art. 54a.

[15] Art. 104(5) of the ECJ Rules of Procedure.

[16] Case C-273/97 **Sirdar** [1999] ECR I-7403.

(c) Validity challenges

Validity of acts of the Community institutions

The ECJ will rule on the validity of acts of the Community institutions only. The ECJ will not rule on the validity of the Treaties. The national court has no jurisdiction to declare an act of a Community institution invalid, except on an interim basis and according to the strict conditions set out by the ECJ.[18] As grounds for declaring an act of the Community institutions invalid on a reference under Art. 234 EC, the ECJ will generally rely on Art. 230 EC.

(d) Raised before the national court or tribunal

The question raised before the national jurisdiction

A question of Community law may be raised at any stage in the proceedings by any of the parties or by the court of its own motion. A reference may not normally be sought after judgment has been given because the court is *functus officio.* Since the reference is the national court's, even where a party argues a point of EC law, the national court is entitled to ignore the possibility of a reference on the basis that no arguable question of Community law is raised.[19]

Whether a referring body is a '*court or tribunal*' for that purpose is a question governed by Community law alone. The Administrative Court clearly satisfies this test.

(e) A decision on the question is necessary for the national court or tribunal to give judgment

(i) *"Decision"*

Meaning of "*Decision*"

It is not clear whether the term "*decision*" refers to a decision by the national court or the ECJ. It will rarely make any difference to a reference from the Administrative Court. The better view is that the term refers to a decision of the national court on the basis of the literal wording of the Article and majority of the ECJ jurisprudence.[20]

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[17] As the Employment Tribunal at Bury St. Edmunds did in that case.
[18] Case 314/85 *Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199; Case C-334/95 *Kruger v Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517.
[19] See the judgment of Stanley Burton J in *R(Payir) v First Secretary of State* 7 July 2005, unrep.
[20] *References to the European Court,* Anderson and Demetriou (2nd ed., 2002) para. 3-110.

(ii) "Necessary"

Meaning of "*Necessary*"

National courts or tribunals may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.[21] As to the need for a true dispute, the proceedings need not necessarily be inter partes within the meaning of the case-law of the ECJ provided that the decision subsequent to the reference is "intended to resolve a dispute".[22]

It is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the ECJ. Even if it appears to the ECJ that the question referred may not be necessary to resolve a genuine dispute, the view of the referring court that it is necessary will be persuasive.[23]

Where the ECJ will examine the basis of the reference. In exceptional circumstances, however, the ECJ will examine the conditions in which the national court referred the case to it.[24] The presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only where it is "quite obvious" that the interpretation of Community law sought "bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted".[25]

Hypothetical questions. Where the ECJ cannot be sure from the reference file that the judgment it gives will be applied in the main proceedings because, for example, the national court may subsequently find that the EC legislation had no application, ECJ may rule the reference inadmissible for being "hypothetical in nature".[26] If events occur during the proceedings subsequent to the making of the reference which renders the ECJ's ruling unnecessary (such as the settlement of the proceedings), the national court should withdraw the reference.

Unnecessary questions

Where it is clear that, because of such a change in the circumstances, the ruling is no longer necessary, the ECJ may declare that an answer to the questions referred for a preliminary ruling is no longer necessary even where the referring court continues to request the ruling.[27]

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[21] Case 138/80 **Borker** [1980] ECR 1975, para. 4, Case 318/85 **Greis Unterweger** [1986] ECR 955, para. 4
[22] Case C-111/94 **Job Centre** [1995] ECR I-3361, and the order in Case C-447/00 **Holto** [2002] ECR I-735
[23] Case C-96/04 **Standesamt Stadt Niebüll** (Opinion of AG Jacobs of 30 June 2005, unrep.) para. 32.
[24] Case C-448/01 **EVN and Wienstrom** [2003] ECR I-14527, para. 75; Case C-379/98 **PreussenElektra** [2001] ECR I-2099, para. 39
[25] Case C-355/97 **Beck and Bergdorf** [1999] ECR I-4977, para. 22, Case C-390/99 **Canal Satélite Digital** [2002] ECR I-607, paras 18 and 19; Case C-373/00 **Adolf Truley** [2003] ECR I-1931, paras 21 and 22, and Case C-380/01 **Schneider** [2004] ECR I-1389, paras 21 and 22), Joined Cases C-462/03 and C-463/03, **Strabag AG v Österreichische Bundesbahnen** (judgment of 16 June 2005, unrep.) para. 29). See also in relation to references under Art 35(1) EU regarding justice and home affairs matters, Case C-105/03 **Maria Pupino** (judgment of 16 June 2005, unrep.) para. 29).
[26] Case C-350/03 **Schulte v Schulte**, (Opinion of AG Leger 28 September 2004, unrep.) paras 40-47.
[27] Case C-225/02 **Rosa Garcia Blanco** (Opinion of AG Kokott of 28 October 2004, unrep.).

To order to qualify for a reference, a question of Community law in the Administrative Court does not need to be "*conclusive*" of the case. "*Necessary*" has been held to mean "*reasonably necessary*"[28] and in **Commissioners of Customs and Excise v Samex ApS**, Bingham J held a decision was "*necessary*" because it was "*substantially determinative*" of the case.[29]

In **Bacardi-Martini**, however, the ECJ rejected as inadmissible a reference from Gray J on the grounds that the High Court did not state expressly that the question was "*necessary*" to enable it to give judgment. The High Court stated in its reasons for making the reference that the question of EC law was "*critical to the final outcome of the legal proceedings, even if not necessarily determinative*". The ECJ asked Gray J to clarify his reasons under Art. 104(5) of the ECJ Rules of Procedure and the learned judge repeated that the question was "*central to the resolution of the proceedings before [it]*". The ECJ could not see from the reasons for the reference or the submissions of the parties that the question was determinative of the main proceedings in any way.[30] The ECJ was influenced, however, by the fact that in **Bacardi-Martini** the legality of a provision of French law was challenged in an English court. In those circumstances, the ECJ held that it "*must display special vigilance*" in ensuring that the question was genuinely necessary to enable the English court to give judgment.[31]

(iii) "To enable it to give judgment"

Meaning of the phrase

The court which makes the reference should be the court which will use the ruling to give judgment.[32] The English Court of Appeal has decided that, where the question goes to an issue which would subsequently be tried in the lower court, it is generally more appropriate to remit the matter to the High Court to decide whether a reference should be made.[33]

2. Exercise of discretion to refer

(a) The general test

When to refer

The general test, in the exercise of the Court's discretion is that set out in **R v International Stock Exchange of the United Kingdom and Republic of Ireland Ltd Ex p. Else***:*

> *"I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can*

[28] **Polydor v Harlequin** [1980] 2 CMLR 413, p. 428 *per* Ormrod LJ.
[29] [1983] 3 CMLR 194 at 209.
[30] [2003] ECR I-905, paras 47-49.
[31] [2003] ECR I-905, para. 44.
[32] Case 338/85 **Pardini** [1988] ECR 2041.
[33] **BLP Group plc v Commissioners for Customs and Excise** [1994] STC 41. See, further, the discussion on this authority in Anderson & Demetriou at para. 3-131.

with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer".[34]

Qualifying the test in Ex p. Else

The Court of Appeal has held that, in general, regard should also be had to the Opinion of Advocate General Jacobs in **Wiener SI GmbH v Hauptzollamt Emmerich**[35] where he urged "*a greater measure of self restraint on the part of both national courts and this Court [the ECJ]*".[36] A reference should be made "*where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. Some caution should be exercised" where there is an established body of case law which could readily be transposed to the facts of the instant case; or where the question turns on narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case*".[37]

(b) factors relevant to exercise of discretion

Relevant factors in exercise of discretion

The difficulty of the question of EC law at issue is a key factor in the exercise of the discretion to refer. An indication that a question of EC law may be complex or difficult may be found in the fact that different Member States take different views or the jurisprudence of the ECJ itself may not be clear.

The Court should consider whether any of the following specific qualities of the ECJ may make it the court best fitted to decide the question:[38]

(a) the ECJ has a panoramic view of the Community and its institutions;

(b) the ECJ has a detailed knowledge of the treaties and of much subordinate legislation made under them;

(c) the ECJ has an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve;

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[34] [1993] QB 524 at 545 *per* Sir Thomas Bingham MR.

[35] **Professional Contractors Group v Commissioners for Inland Revenue** [2002] STC 165, CA; see also **Prudential Assurance Co v Prudential Insurance Co** [2003] 1 WLR 2295 *per* Chadwick LJ at para. 50.

[36] Case C-338/95 [1997] ECR I-6495, para. 18

[37] Case C-338/95 [1997] ECR I-6495, paras 20

[38] **Commissioners of Customs and Excise v Samex ApS** [1983] 1 All ER 1042 at 1054-1055 *per* Bingham J, subsequently approved in **R v Intervention Board Ex p. The Fish Producers' Organisation** [1988] 2 CMLR 661 at 676-677, **Brown v Secretary of State for Scotland** [1988] 2 CMLR 836.

(d) where questions of administrative intention and practice arise the ECJ can receive submissions from the Community institutions, as also where relations between the community and non-member states are in issue;

(e) where the interests of Member States are affected they can intervene to make their views known (which is a material consideration where there is evidence that the practice of different member states is divergent);

(f) where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival;

(g) the interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires.

Further factors may be the importance of the question,[39] the chance of possible joinder with another case on the same or very similar issue pending before the ECJ[40] and the costs and delay which a reference may involve.[41]

Acte Claire

The following doctrine of *acte claire* is often invoked to indicate that a court feels that a question of EC law may be resolved without reference to the ECJ: namely where "*the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved*".[42] This doctrine has no application to the jurisdiction of courts other than those of last instance under Art. 234(3) EC.[43] Even if a question is not *acte claire*, the Administrative Court may properly refuse a reference provided that it can resolve the question with "*complete confidence*". If a question is *acte claire* it simply indicates that a reference is not appropriate.

Wishes of the parties

The wishes of the parties will also be relevant although the Court is obliged in the appropriate case to make a reference of its own motion.[44] In **Three Rivers (No. 3)**, the Court of Appeal that the parties unanimity in not seeking a reference was "*a significant factor (but not the only factor) in that decision*".[45]

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[39] *HP Bulmer v J. Bollinger* [1974] 2 CMLR 91, para. 35.
[40] Case 74/99 *R v Secretary of State for Health Ex p. Imperial Tobacco* [2000] ECR I-8559;
[41] As to costs: *HP Bulmer v J. Bollinger* [1974] 2 CMLR 91, para. 36, as to delay: *HP Bulmer v J. Bollinger* [1974] 2 CMLR 91, para. 29.
[42] Case 283/81 **Srl CILFIT v Ministry of Health** [1982] ECR 3415, para. 16.
[43] See, as to its application, Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)[2003] 2 AC 1 per Lord Hope at 219.
[44] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01) 11 June 2005, para. 10.
[45] [2003] 2 AC 1, at 77 *per* Hirst LJ.

(c) factors relevant to exercise of discretion in validity cases

Factors in validity challenges

Although the Administrative Court may reject a challenge to the validity of Community acts, the ECJ has exclusive jurisdiction to declare such acts invalid. The ECJ has stated that "*all national courts **must** therefore refer a question to the Court when they have doubts about the validity of a Community act, stating the reasons for which they consider that the Community act may be invalid*" (ECJ's emphasis).[46] As Advocate General Jacobs noted in Case C-338/95 *Wiener*, "i*t is clear that the proposed self-restraint could not apply to those types of case: they are not concerned with interpretation, but with validity, and it is well known that this court [the ECJ] alone has the power to declare Community acts invalid*".[47] This view was upheld in **R (Unitymark Ltd) v DEFRA**.[48]

3. Making the reference

(a) When to refer?

Timing of reference

The ECJ advises national courts that they may refer a question as soon as they find that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment.[49] The English courts generally follow the guidance in **Bulmer v Bolliger** that it is better to decide the facts first.[50]

The ECJ has advised national courts that it is "*desirable*" that a decision to seek a preliminary reference should be made when the proceedings have reached a stage at which the national court is able to define the factual and legal context of the question so that the ECJ has available to it all the information necessary to check, where appropriate, that Community law applies to the main proceedings.[51]

(b) The form of the reference

Procedural requirements

An order for reference to the ECJ is made under CPR Part 68 and is transmitted to the ECJ by the Senior Master under CPR rule 68.3. The Practice Direction to CPR Part 68 provides guidance as to what the reference should contain.

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[46] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01) 11 June 2005, paras15-16.
[47] [1997] ECR I-6495, para. 25.
[48] [2003] EWHC 2748 Admin *per* Evans-Lombe J at paras 28-31.
[49] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01) 11 June 2005, para. 18
[50] **HP Bulmer v J. Bollinger [**1974] 2 CMLR 91, para. 30 *per* Lord Denning MR.
[51] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01) 11 June 2005, para. 19.

Where the court intends to refer a question to the European Court it will welcome suggestions from the parties for the wording of the reference. However the responsibility for settling the terms of the reference lies with the court and not with the parties.[52]

As a general rule it is for the national court alone to delimit the scope of the questions which it considers it must refer to the Court. It is important that the parties satisfy themselves that the reference covers all of the relevant points because it will not be possible to raise any issue before the ECJ which goes beyond the scope of the question formulated by the national court.[53]

(b) The content of the reference

Content of the reference. The reference should identify as clearly and succinctly as possible the question on which the court seeks the ruling of the ECJ. In choosing the wording of the reference, it should be remembered that it will need to be translated into many other languages.[54] For this reason, the ECJ advised in its Information Note of 11 June 2005 that the reference should be drafted "*simply, clearly and precisely, avoiding superfluous detail*".[55]

The court will incorporate the reference in its order. Scheduled to the order should be a document which "*must be succinct but sufficiently complete*" containing "*all the relevant information to give the Court and the parties entitled to submit observations a clear understanding of the factual and legal context of the main proceedings*".[56] This document should

(i) give the full name of the referring court;
(ii) identify the parties;
(iii) summarise the nature and history of the proceedings, including the salient facts, indicating whether these are proved or admitted or assumed;
(iv) set out the relevant rules of national law giving in each case precise references (e.g. page of an official journal or specific law report with any internet reference);
(v) summarise the relevant contentions of the parties;
(vi) explain why a ruling of the ECJ is sought; and
(vii) identify the provisions of Community law which it is being requested to interpret.[57]

Where, as will often be convenient, some of these matters are in the form of a judgment, passages of the judgment not relevant to the reference should be omitted.[58] The ECJ advises that "*a maximum of about ten pages is often sufficient to set out in a proper manner the context of a reference for a preliminary ruling*".[59]

Views of the referring tribunal

The ECJ further advises that the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the question. Finally, the ECJ advises that

[52] Practice Direction to CPR Part 68, para. 1.1
[53] Case C-132/03 **Codacons** (judgment of 26 May 2005, unrep.) paras 44-45.
[54] Practice Direction to CPR Part 68, para. 1.2
[55] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), para. 21.
[56] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), para. 22.
[57] Practice Direction to CPR Part 68, para. 1.3
[58] Practice Direction to CPR Part 68, para. 1.4
[59] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), para. 22.

that questions themselves should appear in a separate and clearly identified section of the order for reference, generally at the beginning or end. It must be possible to understand the questions without referring to the statement of grounds for the reference.[60]

The questions should not be too general and should contain all the elements which are relevant for providing an answer which will be useful to resolving the case before it. Where it does not, the ECJ may seek this detail in the information in the case-file and the written observations submitted by the parties. [61]

(c) Consequences for a poorly drafted reference

Consequences of a poorly drafted reference

The consequences of poorly drafted or framed references are evident from the case-law of the ECJ. The ECJ has on various occasions stressed that it is important for the national court to state the precise reasons for which it is in doubt as to the interpretation of Community law and which led it to consider it necessary to refer questions to the Court for a preliminary ruling.[62]

In Case C-341/01 **Plato Plastik Robert Frank GmbH** (where only the clearly framed questions were found to be admissible),[63] the ECJ held it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment.[64]

The ECJ will strain, however, to extract meaning from a poorly drafted reference. In Case C-293/03 **Gregorio My,** the Advocate General noted that the information provided was "*meagre*" but sufficient to apprise the ECJ of the factual and legislative background to the main proceedings to enable it to determine the question.[65] Where, however, the national court supplies "*no useful information*" concerning the connection between the EC provisions referred to and the national legislation applicable to the dispute, the question will be declared inadmissible.[66]

The framing of references from the UK courts has, on rare occasions, been criticised by the ECJ. In C-203/02 **The British Horseracing Board Ltd and Others AG**, the Advocate General noted that "*in many respects the questions referred do not so much concern the interpretation of Community law, in other words the Directive, as the application of the directive to a specific set of facts*".[67]

4. Ancillary orders

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[60] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), paras 23-24.
[61] Case C-466/03 **Albert Reiss Beteiligungsgesellschaft mbH** (Opinion of AG Geelhoed of 16 June 2005) para. 12.
[62] Case C-101/96 **Italia Testa** [1996] ECR I-3081, para. 6, Joined Cases C-128/97 and C-137/97 **Testa and Modesti** [1998] ECR I-2181, para. 15, and Case C-116/00 **Laguillaumie** [2000] ECR I-4979, para. 16.
[63] (judgment of 29 April 2004, unrep.) para 36-40.
[64] See also Case 244/80 **Foglia** [1981] ECR 3045, para. 17;
[65] Opinion of AG Tizzano of 9 September 2004, unrep., paras 30-33.
[66] Case C-72/03 **Carbonati Apuani Srl v Comune di Carrara** (judgment of 9 September 2004, unrep.) paras 12-14. See also, **Bacardi-Martini** [2003] ECR I-905, para. 44.
[67] Opinion of AF Stix-Hackl of 8 June 2004, unrep., paras 28-30 regarding the reference by the CA at [2001] EWCA Civ 1268

Ancillary orders

The ECJ advises (and it is practice of the Administrative Court in any event) that a reference for a preliminary ruling in general calls for the national proceedings to be stayed until the ECJ has given its ruling.[68] CPR rule 68.4 provides that "*where an order is made, unless the court orders otherwise the proceedings will be stayed until the European Court has given a preliminary ruling on the question referred to it*".

The ECJ notes, however, that the national court may still order protective measures, particularly in a reference on determinations of validity.[69]

(a) Interim relief against domestic measures

Interim relief against domestic measures

A reference to the ECJ introduces substantial delay which makes interim relief more important.[70]

The conditions for the grant of interim relief in respect of a national provision is likely to be matter for the legal system of the Member State provided that the methods and pre-conditions do not make it impossible to exercise on an interim basis the rights claimed and are not less favourable than those provided for in order to protect national law rights.[71]

In the Administrative Court, the test to be applied is that approved by the House of Lords in **American Cyanamid v Ethicon**.[72] Legislation will never be disapplied without great circumspection.[73] Similarly, where an interim injunction is sought for the purposes of prohibiting the Government from introducing subordinate legislation to implement Community legislation which is claimed to be invalid, the "*balance of convenience*" test must be adapted in order to take account of the exceptional nature of the relief.[74]

(b) Interim relief in respect of Community acts

Interim relief in validity challenges to EC acts

The test for interim relief is that in Case C-465/93 **Atlanta Fruchthandelsgesellschaft (I)** namely that that interim relief can be ordered by a national court only if:[75]

(a) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the ECJ, itself refers the question to the ECJ;

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[68] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), para. 25.
[69] ECJ Information Note on references from national courts for a preliminary ruling (2005/C 143/01), para. 26.
[70] **Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd** [1993] AC 227, 270E *per* Lord Goff.
[71] Case C-213/89 **R v Secretary of State for Transport Ex p. Factortame Ltd**. [1990] ECR I-2433 *per* AG Tesauro at 2465.
[72] [1975] AC 396.
[73] **R v HM Treasury Ex p. BT plc** [1994] 1 CMLR 621.
[74] **R v Secretary of State for Health Ex p. Imperial Tobacco Ltd** [2000] 2 WLR 834 at 861 *per* Laws LJ.
[75] [1995] ECR I-3761, para. 61, subsequently approved in Case C-224/95 **Kruger** [1997] ECR I-4517, paras 44-46.

(b) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

(c) the national court takes due account of the Community interest; and

(d) in its assessment of all those conditions, the national court respects any decisions of the ECJ or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

In **Kruger**, the Commission pleaded that, in taking due account of the Community interest, the national court must, where it is minded to grant interim relief, give the Community institution which adopted the act whose validity is in doubt an opportunity to express its views. The ECJ rejected this submission holding (at para. 46) that it is the national court which has to assess the Community interest upon an application for interim relief to decide, in accordance with its own rules of procedure, which is the most appropriate way of obtaining all relevant information on the Community act in question.

5. Appeal against the making of a reference

Appeal against the decision to refer

As a result of the very broad nature of the discretion of a judge of the Administrative Court in granting or refusing to grant an order to refer under CPR Part 68, the Court of Appeal will interfere with the decision "*when and only the judge's discretion 'exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong*".[76]

[76] **HP Bulmer v J. Bollinger** [1974] 2 CMLR 95, para. 58 *per* Stephenson LJ (with whom Stamp LJ agreed).