THE UNITY OF EUROPEAN LAW AND THE OVERLOAD OF THE ECJ – THE SYSTEM OF PRELIMINARY RULINGS REVISITED

by

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A. *Introduction*

Underscored by the title of this discussion, the unity of European law and the system of preliminary rulings form an inextricable bond. It is often said that Article 234 EC[1] is the most important procedural provision of the EC Treaty[2]. This is because the system of preliminary rulings for which it provides ensures coherent and effective judicial protection of European citizens' Community law rights. This is also because it serves the following "two fold need: to ensure the utmost uniformity in the application of Community law and to establish for that purpose effective cooperation between the Court of Justice and national courts"[3].

Indeed, the need for the uniform application of Community law must not be underestimated. Article 234 EC 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"[4]. Particularly as to validity control, varying views among the courts of the Member States as to the validity of a Community act would threaten the unity of European law[5]. In this sense, there is also a constitutional aspect to the function performed by the European Court of Justice ("ECJ" or the "Court") inasmuch as disparate interpretation of

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1 The relevant provisions of the EAEC Treaty and now expired ECSC Treaty lie outside the scope of this discussion: *see* Lenaerts, Arts and Maselis, *Procedural Law of the European Union* (2nd ed., Sweet and Maxwell, London, 2006) §2-001 and §2-004.

2 Tridimas and Tridimas, "National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure" (2004) 24 Int'l Rev. L. & Econ. 125-145, 127; *see also* Schermers and Waelbroeck, *Judicial Protection in the European Union* (6th ed., Kluwer Law International, The Hague, 2001) §451, at 221.

3 Case C-221/88 *Busseni* [1990] E.C.R. I-495, para. 13.

4 Case 166/73 *Rheinmühlen-Düsseldorf* [1974] E.C.R. 33, para. 2.

5 This has resonance with the *Foto-Frost* case, discussed *infra*, Part II.B.

Community law would run counter to the achievement of the objectives laid down in the Treaties[6].

Given its paramount significance to the Union legal order, the preliminary rulings procedure has long been considered the "paradox of success"[7]: the more it is used, the greater the burdens placed upon the ECJ, with the result that the system itself is jeopardized. To date, the danger of the ECJ's overload looms large on the European judicial landscape. The average duration of the procedure dropped two months – from about 25.5 to 23.5 months – last year[8]; yet, a waiting period of almost two years is not something to be celebrated, particularly when the amount of new references is expected to increase, thereby inciting doubt as to whether a further decisive drop in duration can be expected in the long run[9]. Judicial overload constitutes a threat for the quality of the reasoning of judgments and for the speed with which they can be delivered. Such threats strike at the heart of the effectiveness of the judicial cooperation underpinning the system of preliminary rulings. That is why reflection on the functioning of this system appears to be vital at this point.

Admittedly, the Treaty of Nice has introduced a number of innovations in the ECJ's *modus operandi*, further elaborated by the Court itself, and opened the way to a re-allocation of jurisidiction between the ECJ and the Court of First Instance ("CFI"). But fundamentally, these reforms have not made superfluous the discussion as to how to ensure the continued viability of the system of preliminary rulings in the face of judicial overload. The structure of this discussion follows these remarks. Part One cites several reasons to explain the ever-increasing volume of preliminary rulings. Part Two examines several devices considered by the Court's Advocates General to curtail the volume of preliminary rulings. Part Three provides reflection on the specific reforms to transfer preliminary ruling jurisdiction from the ECJ to the CFI and to streamline the ECJ's working procedures put in place by the Nice Treaty and the Court itself.

6 *See further* Lenaerts, "The Role of the Court of Justice, Court of First Instance and Judicial Panels in the Long Term – Discussion Paper" in CCBE Colloquium on the Judicial Architecture of the European Union, 15 November 2004, 1-12, at 1, available at http://www.ccbe.org/doc/colloquium_nov_2004/programme.htm.

7 Weiler, "The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC", E.U.I. Working Paper No. 85/203 (European University Institute, San Domenico, 1985). Or put another way, the "victim of its own success": *see* Koopmans, "La procédure préjudicielle - victime de son succès?" in Capotorti, et al. (eds), *Du droit international au droit de l'integration - Liber amicorum Pierre Pescatore* (Nomos Verlagsgesellschaft, Baden-Baden, 1987), 347-357.

8 Court of Justice, 2004 Annual Report, at 174, available at http://www.curia.eu.int/en/instit/presentationfr/index.htm.

9 *See* Part I, *infra*. It must be noted, however, that in the first nine months (1 January to 30 September) of 2005, the average duration of the procedure dropped further to 20.5 months.

B. Reasons for the rising volume of preliminary rulings

There are several reasons to explain the rising influx of preliminary rulings. These include the enlargement of the European Union and the expansion of Union competence; in essence, the "widening and deepening" of the Union. Many of these reasons are certainly not new, but they gain greater significance due to the seminal changes to the Union's judicial landscape exacted by recent Treaty revisions and the course of the Court's jurisprudence.

I. Enlargement of the European Union

After the enlargement of the European Union to twenty-five Member States on 1 May 2004, preliminary references from the ten new Member States have only just begun. In 2004, it was from only one Member State – Hungary – that two preliminary references were made[10]. This is not surprising, as a certain lagtime is bound to occur before the full weight of references from all new Member States will be felt. Given plans for the accession of Bulgaria and Romania in 2007 and potentially more countries in the coming years[11], the volume of preliminary rulings may well become overwhelming.

II. Expansion of Union competence

The expansion of Union activity into an increasingly wider variety of areas bolsters the need for references on a large, complex and often technical number of issues: "European law is no longer confined to the realm of trade and commerce, but reaches into the nooks and crannies of national life"[12]. Many of these fields, such as the various policies related to the area of freedom, security and justice – *e.g.*, aspects of criminal law, visa, asylum and immigration – warrant particular strain on the procedure because they are "highly sensitive areas – both in political and human terms – [that] require effective, transparent and above all speedy court procedures"[13]. Apart from the proliferation of Community legislation fostering the need for preliminary references, the ECJ must also answer questions concerning the interpretation of numerous conventions entered into by the Member States, such as the 1968 Brussels

10 Court of Justice, 2004 Annual Report, cited at n. 8, at 185-186.

11 *See* the European Union's website on enlargement: http://www.europa.eu.int/pol/enlarg/ index_en.htm..

12 Arnull, "Judicial architecture or judicial folly? The challenge facing the European Union" (1999) 24 E.L.Rev. 516-524, at 516.

13 Prechal, "Administration of justice in the EU – Who should do what?" in *La Cour de justice des Communautés européennes 1952-2002: Bilan et perspectives* (Bruylant, Brussels, 2004), 63-85, at 66.

Convention[14] whose Luxembourg Protocol allows both last instance and appellate courts to make preliminary references to the ECJ[15].

The Amsterdam Treaty expressly added two additional fields of Union law to the ECJ's preliminary ruling repertoire, but with severe limitations. First, the ECJ gained jurisdiction to deliver rulings for the provisions of Title IV of the EC Treaty, *i.e.*, measures concerning visas, asylum, immigration and other policies related to free movement of persons. Under Article 68(1) EC, the ECJ's jurisdiction was restricted, however, to receiving references from the highest courts only, thereby curtailing a most fruitful source of preliminary rulings to be delivered on request from lower courts[16].

In particular, with the conversion of the Brussels Convention into a Community instrument, the interpretation of the "Brussels I" Regulation[17] fell within Article 68 EC with anomalous results: the scope of the ECJ's jurisdiction was narrowed to receiving references from the highest courts only[18], in contrast to its Convention format under which national appellate courts were also included. Of course, the Court's limited jurisdiction extends to all other Community instruments in the area of judi-

14 Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention) (consolidated version) ([1998] O.J. C27/1).

15 Luxembourg Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention (consolidated version) ([1998] O.J. C27/28): *see* Art. 2 (also allowing the courts provided under Article 37 of the Convention to make references).

16 *See, e.g.*, Case C-45/03 *Dem'Yanenko*, order of 18 March 2004, unpublished; Case C-51/03 *Georgescu* [2004] E.C.R. I-3203, paras 29-33. *See also* citations in n. 18 below.

17 *See* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2001] O.J. L12/1). This does not mean that the interpretation of the Brussels Convention is no longer viable as for instance with regard to Denmark.

18 *See, e.g.,* Case C-24/02 *Marseille Fret* [2002] E.C.R. I-3383, paras 14-15; Case C-555/03 *Warbecq* [2004] E.C.R. I-6041, paras 13-15.

cial cooperation in civil matters, such as the new "Brussels II" Regulation[19] and the expected "Rome I" and "Rome II" Regulations[20], among others.

Within the non-Community field of police and judicial cooperation in criminal matters of Title VI of the EU Treaty, preliminary ruling jurisdiction was also bestowed upon the ECJ, but again with troubling restrictions. Article 35 EU requires that Member States make a declaration accepting the ECJ's jurisdiction for all national courts or for the highest[21]. To date, only one Member State has opted for the more restrictive approach[22], and several have even gone further than indicated in the Treaty text by obliging their highest courts to refer for a preliminary ruling, if need be[23]. Yet, the fact that twelve Member States[24] have not made any declaration to date means that an important loophole in the EU system of judicial protection exists.

19 *See* Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ([2003] O.J. L338/1), repealing Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ([2000] O.J. L160/19).

20 On 14 January 2003, the European Commission presented a Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation ("Rome I") (COM (2002) 654 final). On 22 July 2003, the Commission submitted a proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II") (COM (2003) 427 final). There are further plans for a "Rome III" instrument concerning the conflict of laws in matters relating to divorce: *see* the European Council's recent submission, The Hague programme: strengthening freedom, security and justice in the European Union ([2005] O.J. C53/1), point 3.4.2., fourth para., fourth indent.

21 *See* Articles 35(2) and (3) EU.

22 At the time of writing, the only Member State is Spain, but notably, it has ensured that its highest courts are under a duty to refer: *see* Information concerning the date of entry into force of the Treaty of Amsterdam ([1999] O.J. L114/56 and [1999] C120/24). The importance of all courts – highest as well as lower – being able to submit preliminary references in this field is evidenced by Case C-105/03 *Pupino*, judgment of 16 June 2005, not yet reported, submitted by an Italian lower court.

23 At the time of writing, in addition to Belgium, Germany, Spain, Italy, Luxembourg, the Netherlands and Austria (*see* Information concerning the date of entry into force of the Treaty of Amsterdam ([1999] O.J. L114/56 and [1999] C120/24)), the Czech Republic has made a declaration to this effect: *see* Declaration by the Czech Republic on Article 35 of the EU Treaty ([2003] O.J. L236/980). Article 35(3)(a) EU does not contain language obliging highest courts to refer as found in the third paragraph of Article 234 EC.

24 At the time of writing, Denmark, Ireland and the United Kingdom have not made any declaration, nor have nine out of the ten (all but the Czech Republic) Member States that acceded to the Union on 1 May 2004.

Indeed, among the many problems associated with the limitations of Article 68 EC and Article 35 EU[25], paramount are their detrimental effects for the rule of law[26]. While the Member States chose to forego the opportunity to align Article 68 EC with Article 234 EC at the Nice Intergovernmental Conference[27], the Treaty establishing a Constitution for Europe (the "Constitution")[28] would erase the restrictions on the ECJ's preliminary ruling jurisdiction in both areas here under consideration[29]. In fact, as far as Article 68 EC is concerned, it is even possible to solve the problem without waiting for the Constitution to enter into force[30].

But at the same time that the Constitution addresses this deficit, it adds additional burdens on the ECJ's workload. In its recasting of Article 234 EC, the final paragraph of Article III-369 provides: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the *minimum of delay*"[31]. Conceivably, this provision contains nothing new, as the ECJ has always sought to achieve this objective; nevertheless, this explicit command makes no excuse for judicial workload. In addition to augmenting Union competence in several areas[32], the incorporation of the Charter of Fundamental Rights of the European Union as Part II of the Constitution has also been considered likely to raise further issues that will be submitted to the ECJ by way of preliminary references.

Moreover, there is not only the formal expansion of Union competence, but also the evolving impact of European law in fields belonging to Member State competence to take into account. The progressive stream of questions concerning the significance of the free movement principle in relation to national social security

25 *See generally* Cheneviere, "L'article 68 CE – rapide survol d'un renvoi préjudiciel mal compris" (2004) 40 C.D.E. 567-589 (and citations therein); Fennelly, "The Area of 'Freedom, Security and Justice' and the European Court of Justice – A personal view" (2002) 49 I.C.L.Q. 1-14; Eeckhout, "The European Court of Justice and the 'Area of Freedom, Security and Justice': Challenges and Problems" in *Liber Amicorum in Honour of Lord Slynn of Hadley – Judicial Review in European Union Law* (Vol. 1, Kluwer Law International, The Hague, 2000), 153-166 (and citations therein).

26 *See, e.g.,* Eeckhout, cited at n. 25, at 153-161, 165-166; Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" (2003) 40 C.M.L.Rev. 9-50, at 14-15.

27 *See* Arnull, "The Past and Future of the Preliminary Ruling Procedure" (2002) 13 E.B.L.Rev. 183-191, at 187.

28 Treaty establishing a Constitution for Europe [2004] O.J. C 310/01.

29 *See* Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (2nd ed., Sweet and Maxwell, London, 2005) §4-007, at 71 and §10-086, at 455.

30 *See* Article 67(2), second indent, EC.

31 Article III-369, fourth para., Constitution (italics added).

32 *E.g*., energy, civil protection, tourism and sport: *see* Lenaerts and Van Nuffel, cited at n. 29, §5-234, at 299 and §5-238, at 306.

schemes covering in whole or in part the cost of health care and serves as a quintessential example[33].

III. The effective enforcement of Community law

Two factors related to the effective enforcement of Community law put further upward pressure on the preliminary rulings workload of the ECJ. The first is derived from the content of the ruling given by the Court. As part of the its role to furnish the referring court with the most useful answer (a "*réponse utile*") for resolving the dispute before it, the ECJ has steadily come to provide more "concrete", as opposed to "abstract", rulings warranting complex analysis of the facts, national legislation and other aspects of the main action[34]. The "concrete" character of the rulings increases the amount of work involved in any single case because it often requires quite intricate study of numerous technical details. It also tends to make the scope of the rulings narrower, thereby diminishing somewhat their precedent value for similar – but not identical – cases, leading in turn to new references. As the preliminary questions referred thus become more precise, tailor-made to the fact setting of the main action, providing a "*réponse utile*" amounts to an incremental development of the law, almost like a common law judge proceeds from one case to the next.

In *Grundig Italiana*[35], for example, the Court was confronted with a preliminary question concerning the interpretation of the principle of effectiveness[36] as regards an Italian law laying down a 90-day grace period in order to transition from a five to three year time-limit for the recovery of sums paid but not due[37]. Advocate General Ruiz-Jarabo Colomer advised the Court to do no more than provide an "abstract" answer:

> It is not possible to determine whether or not a 90-day transition period, such as that in the present case, complies with the principle of effectiveness, without having regard to all the factual and legal requirements, both procedural and substantive, which the domestic legal order imposes for the bringing of actions for recovery. Only with that overview, which the Italian courts alone have, is it possible to give a definitive answer.[38]

33 *See, e.g.*, Case C-120/95 *Decker* [1998] E.C.R. I-1831; Case C-158/96 *Kohll* [1998] E.C.R. I-1931; Case C-157/99 *Smits and Peerbooms* [2001] E.C.R. I-5473; Case C-385/99 *Müller-Fauré and van Riet* [2003] E.C.R. I-4509; Case C-372/04 *Watts*, pending.

34 *See further* Lenaerts, "Form and Substance of the Preliminary Rulings Procedure" in Curtin and Heukels (eds), *Institutional Dynamics of European Integration – Essays in Honour of Henry G. Schermers* (Vol. II, Martinus Nijhoff, Dordrecht, 1994), 355-380, at 358.

35 Case C-255/00 *Grundig Italiana* [2002] E.C.R. I-8003.

36 As regards the principle of effectiveness, *see generally* Lenaerts, Arts and Maselis, cited at n. 1, §3-010-§3-050.

37 *Grundig Italiana*, paras 21-22.

38 Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Grundig Italiana*, para. 27.

Yet, the ECJ gave a "concrete" ruling, specifying that in such a situation, "a transitional period of 90 days must be regarded as insufficient and six months must be regarded as a minimum period required to ensure that the exercise of rights of recovery is not rendered excessively difficult"[39]. The following year, the Advocate General repeated arguments to the same effect in the *Recheio* case[40], also involving the interpretation of the principle of effectiveness with regard to a Portuguese rule setting a 90-day time-limit for claims seeking repayment of charges unduly levied, but the Court persisted in giving a "concrete" answer so as to provide the utmost assistance to the referring court[41].

Both *Grundig Italiana* and *Recheio* are in fact related to the second factor contributing to the influx of preliminary references implicating the Court's role to ensure effective enforcement of Community law. This is perhaps best exemplified by the *British American Tobacco* ("*BAT*") case[42], which concerned the interpretation and validity of a Community directive on tobacco products[43]. A critical issue was the admissibility of the reference due to a national procedural rule allowing the parties to seek judicial review in the time period before the United Kingdom was required to transpose the directive[44]. Both France and the European Commission argued that such reference was inadmissible because it was brought prematurely (*i.e.*, before there was implementing legislation or the time-limit for transposition had expired) and because it circumvented the inadmissibility of an action for annulment brought by a private party under Article 230 EC[45].

The Court rejected these arguments and held the reference admissible[46]. Given the very narrow standing granted to private parties under Article 230 EC to challenge the legality of Community acts of general application (*e.g.*, the directive in *BAT*), the indirect route of preliminary rulings is crucial to "the complete system of legal remedies and procedures established by the EC Treaty"[47]. In this way, the ECJ's affirmation of national rules allowing private parties to seek judicial review of Community acts as early as possible firmly grounds the effective enforcement of Community law rights. Although Article III-365(4) of the Constitution has broadened somewhat the standing for such parties as compared to Article 230 EC, commenta-

39 *Grundig Italiana*, para. 42.
40 Opinion of Advocate General D. Ruiz-Jarabo Colomer in Case C-30/02 *Recheio – Cash & Carry* [2004] E.C.R. I-6051, paras 35-36.
41 *Recheio – Cash & Carry*, para. 26.
42 Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco* ("*British American Tobacco*") [2002] E.C.R. I-11453.
43 *Ibid.*, para. 1.
44 *Ibid.*, para. 24.
45 *Ibid.*, paras 28-31.
46 *See ibid.*, paras 32-41.
47 *Ibid.*, para. 39.

tors still find fault with this new provision[48], thereby making the indirect route of preliminary rulings in line with *British American Tobacco* all the more relevant.

C. Jurisprudential devices to curtail the volume of preliminary rulings

In light of the foregoing, reflection on the jurisprudential devices put forward by some of the Court's Advocates General to curtail the volume of preliminary rulings seems fitting. While they are not the only relevant proposals in this regard, the devices examined below are chosen because they lie at the heart of the ECJ's preliminary rulings case law and because they illuminate the tensions between judicial reform and the preservation of the important role played by the procedure.

I. "Self-Restraint" of the ECJ and the national courts

One of the most well-known devices comes from the Opinion of Advocate General Jacobs in the *Wiener SI* case[49]. The so-called "pyjama" case[50] concerned a reference from the highest German finance court (the Bundesfinanzhof) concerning the classification of certain garments as women's "nightdresses" under the 1985 Common Customs Tariff, *i.e.*, whether this term denoted clothing mainly, but not exclusively, intended to be worn in bed as nightwear and whether this issue should be resolved in accordance with the ECJ's prior ruling on the meaning of the term "pyjamas"[51].

Although commending the German court's compliance with its obligation to refer under Article 234 EC (as well as its well-reasoned order for reference) and the ECJ's "pragmatic" approach to ensure its rulings were of greatest use to the national courts[52], Advocate General Jacobs found that the "net result is that the Court could be called upon to intervene in all cases turning on a point of Community law in any court or tribunal in any of the Member States", causing it to "collapse under its caseload"[53]. He therefore considered that "the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court"[54].

48 *See* Koch, "*Locus standi* of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy" (2005) 30 E.L.Rev. 511-527; Usher, "Direct and individual concern – an effective remedy or a conventional solution?" (2003) 28 E.L.Rev. 575-600.

49 Opinion of Advocate General F.G. Jacobs in Case C-338/95 *Wiener SI* [1997] E.C.R. I-6495.

50 *See* Timmermans, "The European Union's Judicial System" (2004) 41 C.M.L.Rev. 393-405, at 402.

51 *See* Opinion of Advocate General F.G. Jacobs in *Wiener SI*, paras 1-6.

52 *See ibid.*, paras 9, 13-14.

53 *Ibid.*, para. 15.

54 *Ibid.*, para. 18.

For national courts not of last instance[55], Advocate General Jacobs proposed that references be restricted to those cases "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"[56]. While not denying difficulties of assessment, he did not provide further guidance save to rely on the national courts' discretion and perhaps "informal guidance" from the ECJ[57]. For the ECJ, he urged that for "some areas of Community law, where there is already an established body of case-law, … unless it were shown that a novel issue of principle was raised the Court would not consider the particular merits of such references; it would simply recall its existing case-law"[58]. As to issues of demarcation, he stated that cases presenting the Court with questions of "general significance" will "usually be obvious"[59], and as for the relevant areas of Community law, he confined himself to listing three examples in addition to the field of customs classification, noting "[a]t this stage I do not think that any systematic attempt can be made to define those areas"[60].

The ECJ declined the Advocate General's suggestions in full and, following its traditional approach, provided a specific answer to the referring court as to the interpretation of "nightdresses"[61]. Aside from problems of demarcation, scholars were quick to expose some of the dangers resulting from this device, *e.g.*, "the delivery of what might be perceived as unhelpful replies might have a generally discouraging effect on the willingness of national courts to refer"[62]. Although his proposal was disregarded by the Court, its value in attempting to grapple with the Court's workload was not lost from sight[63], and his further statements concerning the obligation to refer resting on the highest courts and the *CILFIT* criteria captured the attention of other Advocates General.

II. Reconsideration of *CILFIT* and *Foto-Frost*

Before continuing with the discussion of Advocate General Jacobs' Opinion in *Wiener SI*, a word of background on the *CILFIT* and *Foto-Frost* cases may be in order. In *Foto-Frost*[64], the Court declared that a lower court does not have the power to de-

55 As regards courts of last instance, his remarks are discussed below in relation to *CILFIT*: *see* Part II.B.
56 Opinion of Advocate General F.G. Jacobs in *Wiener SI*, para. 20.
57 *Ibid.*, para. 20
58 *Ibid.,* para. 21.
59 *Ibid.*, para. 50.
60 *Ibid.*, para. 46. For discussion of these three examples, *see* paras 46-49.
61 *See Wiener SI*, para. 22.
62 Arnull, cited at n. 12, at 521; *see also* Timmermans, cited at n. 50, at 402.
63 *See, e.g.,* Bellis, "Une justice communautaire rapide. Quelques commentaires" in Dony and Bribosia (eds), *L'avenir du système juridictionnel de l'Union européenne* (Editions de l'Université de Bruxelles, Brussels, 2002), 155-158, at 156-157.
64 Case 314/85 *Foto-Frost* [1987] E.C.R. 4199.

clare a Community act invalid, thereby laying down an exception to such court's discretion to refer under the second paragraph of Article 234 EC by requiring it to submit a reference when under the belief that such act is invalid[65]. In contrast, the discussion of *CILFIT* may seem, at first glance, misplaced because it lays down certain exceptions to the highest court's obligation to refer, which would seem to place additional responsibility on the national courts, not the ECJ. A closer look, however, reveals a somewhat different story and explains the context for the devices put forward to relax certain of its criteria.

It bears repeating that the purpose of the third paragraph of Article 234 EC is "to prevent a body of national case law not in accord with the rules of Community law from coming into existence in any Member State"[66], in other words, to prevent questions on the interpretation or validity of Community law from "finishing up in a domestic cul-de-sac, so to speak"[67]. *CILFIT* thus sought to achieve a "reasonable balance" between the need to avoid unnecessary references and the need to ensure the uniform application of Community law[68]. It established several exceptions to the highest court's duty to refer: (1) where the question is irrelevant[69]; (2) where the question is "materially identical" to that of a previous preliminary ruling[70]; (3) where the question has been decided by previous rulings of the Court although the nature of the proceedings and the questions at issue are "not strictly identical" (*acte éclairé*)[71]; and (4) 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" (*acte clair*)[72].

As for the *acte clair* exception, the Court underlined in no uncertain terms that the national court "must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice"[73]. The ECJ required the national court to make this assessment by taking into account the following factors stemming from the "characteristic features of Community law and the particular difficulties to which its interpretation gives rise"[74]: comparison of different language versions; cognisance of legal terminology and legal concepts peculiar to Community

65 Under *Foto-Frost*, it is only when the lower courts are under the belief that the measure is valid that they need not make a reference: *see ibid.*, paras 14-15. *See generally* Lenaerts, Arts and Maselis, cited at n. 1, §2-056-§2-058.

66 Case 107/76 *Hoffman-La Roche* [1977] E.C.R. 957, para. 5.

67 Opinion of Advocate General C. Stix-Hackl in Case C-495/03 *Intermodal Transports,* judgment of 15 September 2005, not yet reported, para. 42.

68 Opinion of Advocate General A. Tizzano in Case C-99/00 *Lyckeskog* [2002] E.C.R. I-4839, para. 56. *See generally* Lenaerts, Arts and Maselis, cited at n. 1, §2-048-§2-052.

69 Case 283/81 *CILFIT* [1982] E.C.R. 3415, para. 10.

70 *Ibid.*, para. 13.

71 *Ibid.*, para. 14.

72 *Ibid.*, para. 16.

73 *Ibid*.

74 *Ibid.*, para. 17.

law; and regard to the context and objectives of Community law and "its state of evolution at the date on which the provision in question is to be applied"[75].

Without taking part in the debate concerning the import of the *CILFIT* judgment and the *acte clair* exception[76], it must be recognized that the Court's formulation of this exception was "the expression of a particularly subtle compromise" between enhancing the responsibility of the highest courts and setting stringent conditions "to preclude *bona fide* inadvertence"[77]. The dangers inherent in this delicate bargain were highlighted by Advocate General Capotorti's Opinion in the *CILFIT* case itself, urging the Court not to recognize such an exception[78]. They must also be considered in light of the "precarious" situation[79] of *Köbler* liability[80] and recent cases in which the highest courts have not abided by their *CILFIT* duty to refer[81]. This may serve to shed light on the Court's refusal to tamper with the *CILFIT* conditions despite repeated proposals by its Advocates General to the contrary.

As part of his advocacy of greater "self-restraint" on the part of national courts, Advocate General Jacobs pleaded in *Wiener SI* for a relaxation of the duty to refer resting on the highest courts in relation to a question of Community law "which, on the view I take, this Court should not be called upon to decide because it should be left to the courts and tribunals of the Member States"[82]. Specifically, he argued that the *CILFIT* conditions should only apply in cases "when there is a general question and when there is a genuine need for uniform interpretation"[83]. He also found that the factor concerning the comparison of different language versions in *CILFIT* should be "reconsidered or refined"[84]: "I do not think that the *CILFIT* judgment should be regarded as requiring the national courts to examine a Community measure in every one of the official Community languages" but rather "as an essential caution against taking too literal an approach to the interpretation of Community provisions …"[85]. As noted above, the ECJ did not take up his suggestions, which however did not go unnoticed[86].

75 *Ibid.*, paras 18-20.
76 *See, e.g.*, Opinion of Advocate General C. Stix-Hackl in *Intermodal Transports*, cited at n. 67, para. 83 (and citations therein).
77 Lenaerts, Arts and Maselis, cited at n. 1, §2-052.
78 *See* Opinion of Advocate General F. Capotorti in *CILFIT*, cited at n. 69, paras 4-10, at 3436-3442.
79 Opinion of Advocate General C. Stix-Hackl in *Intermodal Transports*, cited at n. 67, para. 105.
80 Case C-224/01 *Köbler* [2003] E.C.R. I-239.
81 *E.g.,*Case C-453/00 *Kühne and Heitz* [2004] E.C.R. I-837, para. 18.
82 Opinion of Advocate General F.G. Jacobs in *Wiener SI*, cited at n. 49, para. 54.
83 *Ibid.*, para. 64.
84 *Ibid*., para. 65.
85 *Ibid*.
86 *See, e.g.,* Rasmussen, "Remedying the crumbling EC judicial system" (2000) 37 C.M.L.Rev. 1071-1112, at 1108.

Subsequently, the *Lyckeskog*[87]case involved a preliminary reference concerning, *inter alia*, the highest courts' duty to refer when the answer to the questions of Community law raised in the main action appears clear to them but these questions do not satisfy the *CILFIT* conditions for either the *acte clair* or the *acte éclairé* doctrines[88]. Although confirming the highest courts' duty to refer in such a case[89], Advocate General Tizzano also advocated a functional, not literal, approach to *CILFIT*'s requirements:

In my view, the Court is insisting not that the national court should always compare the various language versions of a provision but that it should bear in mind that the provision in question produces the same legal effects in all those versions so that, before assuming that an interpretation is correct, it must be sure that it is not doing so merely for reasons associated with the wording of the provision.[90]

Regrettably, the Court did not have the opportunity to reach this issue[91].

More recently, in *Intermodal Transports*[92] the Court was confronted with the question whether a conflicting decision by the administrative authorities of one Member State (called a "BTI" or binding tariff information) that the court of another Member State considers contrary to Community law and seeks to depart from: (1) requires the lower court of that Member State to refer a question in accordance with *Foto-Frost*; and (2) prevents the highest court of that Member State from satisfying the *CILFIT* criteria, thereby triggering its obligation to refer under the third paragraph of Article 234 EC[93].

In her Opinion, Advocate General Stix-Hackl argued that both questions should be answered in the negative, *i.e.*, a conflicting decision of a customs authority did not oblige lower courts to make a reference under *Foto-Frost*[94], nor did it fall within the confines of *CILFIT* for highest courts[95]. Notably, the Advocate General devoted considerable attention to analysing the issue in light of *CILFIT*.

She echoed the arguments of Advocates General Jacobs and Tizzano for a functional approach to the *CILFIT* conditions: "the requirements set out in *CILFIT* cannot be regarded as a type of instruction manual on decision-making for national courts of last instance which is to be rigidly adhered to …[96]. Rather, they are "intended to alert the national court to the specific characteristics of Community law,

87 Case C-99/00 *Lyckeskog* [2002] E.C.R. I-4839.
88 *Ibid.*, para. 9.
89 *See* Opinion of Advocate General A. Tizzano in *Lyckeskog*, para. 76.
90 *Ibid.*, para. 75.
91 *Lyckeskog*, paras 20-21.
92 Case C-495/03 *Intermodal Transports*, judgment of 15 September 2005, not yet reported.
93 *Ibid.*, para. 3; Opinion of Advocate General C. Stix-Hackl in *Intermodal Transports*, paras 55-57.
94 Opinion of Advocate General C. Stix-Hackl in *Intermodal Transports*, paras 59-72, 142.
95 *Ibid.*, paras 108-122, 128, 142.
96 *Ibid.*, para. 100.

thus cautioning it against hasty or one-sided conclusions and, therefore, steering it towards a 'considered certainty' "[97]. Yet, in contemplating whether "the rule in *CILFIT* could be called in question in its entirety"[98], the Advocate General did not plead for any alteration: "While the *CILFIT* criteria discussed above may be imprecise in terms of their specific meaning, it is likely to be difficult to define, on the basis of the Treaty, a more practicable or more objective 'filter system' for questions of interpretation which should be referred to the Court of Justice, on the one hand, or left to the national courts of last instance, on the other"[99].

The ECJ agreed with the Advocate General's final conclusions. As for the lower court's duty to refer, without citing *Foto-Frost* explicitly, the Court held that a decision of the administrative authorities of another Member State "cannot limit the freedom of assessment thus vested in that court under Article 234"[100]. As for the highest court's duty to refer in light of *CILFIT*, the Court held that "such a court cannot be required to ensure that, in addition, the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities"[101]. In effect, the Court held the line of *CILFIT*'s "subtle compromise" at bay, reiterating its requirements while underscoring the critical role of the highest courts with "sole responsibility" to apply the *acte clair* exception[102].

The case of *Gaston Schul*[103] squarely presented another opportunity for reconsideration of *CILFIT* and *Foto-Frost*. At issue was whether a court of last instance may refrain from applying provisions of a Community regulation without referring the question concerning the validity of those provisions for a preliminary ruling where the ECJ has already ruled that analoguous provisions of another Community regulation are invalid[104]. In his Opinion, Advocate General Ruiz-Jarabo Colomer strongly urged the Court to reconsider or refine *CILFIT*[105] and sought to carve out an exception to the mandate of *Foto-Frost* under certain conditions[106]. To date, however, the Court remains transfixed within the *CILFIT* and *Foto-Frost* jurisprudence despite the strong proposals offered by its Advocates General for the relaxation of their requirements that, if adopted, could help decrease the ECJ's preliminary ruling workload.

97 *Ibid.*, para. 102.
98 *Ibid.*, para. 103.
99 *Ibid.*, para. 104 (highlighting difficulties with Advocate General F.G. Jacobs' proposal in *Wiener SI*).
100 *Intermodal Transports*, para. 32.
101 *Ibid.*, para. 39.
102 *Ibid.*, para. 37.
103 Case C-461/03 *Gaston Schul Douane-Expediteur*, judgment of 6 December 2005, not yet reported.
104 Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Gaston Schul Douane-Expediteur*, para. 11.
105 *Ibid.*, para. 58; *see generally* paras 49-59.
106 *Ibid.*, para. 92. The Court did not follow the Opinion.

III. The "*Dzodzi* line of cases"

Another area fertile with devices to lessen the ECJ's workload is the "*Dzodzi* line of cases", the reference used by the Court to denote those cases in which it has found jurisdiction to deliver rulings on provisions of Community law in "situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract"[107]. While the ECJ rests its jurisdiction in this context on several grounds[108], the "real justification" seems premised on the need to ensure the uniform interpretation of Community law[109]:

[T]he declaration of its jurisdiction avoids a certain risk of the continual extension of Community provisions, through the unilateral and autonomous operation of national legislation, without the latter having to accept the uniform interpretation provided by the Court. The Court of Justice, as supreme interpreter of the Community legal order, could not remain impassive to the development of different interpretations by the national courts of the same Community provision[110].

Despite this objective, this case law is "a source of major opposition" between the ECJ and its Advocates General[111] due to the ECJ's "progressive extension"[112] of its jurisdiction to many cases deemed utterly inadmissible by its Advocates General. Certainly, this tension was evident in certain cases underlying the very foundations of the "*Dzodzi* line of cases" itself[113], but it is with its progeny that several devices to curtail the Court's ever-expanding "largesse"[114] warrant serious examination.

Conceivably, in *Kleinwort Benson*[115], the Court was considered to take "a somewhat narrower view of the limits of its jurisdiction"[116]. For the first time, it held a

107 Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161, para. 27 (and citations therein); Case C-130/95 *Giloy* [1997] E.C.R. I-4291, para. 23 (and citations therein).

108 *See* Opinion of Advocate General D. Ruiz-Jarabo Colomer in Case C-1/99 *Kofisa Italia* [2001] E.C.R. I-207, para. 26.

109 Lefèvre, "The interpretation of Community law by the Court of Justice in areas of national competence" 29 (2004) E.L.Rev. 501-516, at 508; *see also* Betlem, Case note on Case C-28/95 *Leur-Bloem* and Case C-130/95 *Giloy* (1999) 36 C.M.L.Rev. 165-178, at 172.

110 Delgado and Muñoa, Case note on Joined Cases, C-297/88 and C-197/89 *Dzodzi* and Case C-231/89 *Gmurzynska-Bscher* (1992) 29 C.M.L.Rev. 152-159, at 159.

111 Lefèvre, cited at n. 109, at 502; *see also* Tridimas, cited at n. 26, at 34; Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Kofisa Italia*, cited at n. 108, paras 22-25.

112 Lefèvre, cited at n. 109, at 503.

113 *Compare* Case 166/84 *Thomasdünger* [1985] E.C.R. 3001, para. 11 *and* Opinion of Advocate General G.F. Mancini in *Thomasdünger*, paras 2-3, at 3002-3003; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] E.C.R. I-3763, paras 29-43 *and* Opinion of Advocate General M. Darmon in *Dzodzi*, paras 8-16; Case C-231/89 *Gmurzynska-Bscher* [1990] E.C.R. I-4003, paras 15-26 *and* Opinion of Advocate General M. Darmon in *Gmurzynska-Bscher*, paras 5-14.

114 Rasmussen, cited at n. 86, at 1083.

115 Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615.

preliminary reference in this context inadmissible because: (1) the national legislation referring to provisions of the Brussels Convention[117] failed to make a "direct and unconditional *renvoi*" to EC law provisions[118]; and (2) its interpretation would not be binding on the national court[119]. Yet, in *Leur-Bloem*[120] and *Giloy*[121], the ECJ extended its jurisdiction to two cases in which the national legislation at issue contained no explicit reference to provisions of Community law[122]. The Court deemed both references admissible, underscoring in *Giloy* that "it is clearly in the Community interest that, in order to 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"[123].

In a strong Opinion for both cases, Advocate General Jacobs not only adopted the criticisms voiced by his colleagues in prior Opinions[124], but he also proposed a new test: "the Court should only rule in cases in which it is aware of the factual and legislative context of the dispute and in which the context is one contemplated by the Community rule", the latter phrase denoting "situations which can be said to have resulted naturally from the implementation of Community law and not Community law being shifted sideways into a situation in which its application was never intended"[125]. Based upon this test, he found that the Court had no jurisdiction in either case[126] and urged the Court to no longer rule in accordance with its previous case law

116 Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Kofisa Italia*, cited at n. 108, para. 43. While Advocate General Tesauro agreed with the ECJ's holding of inadmissibility, his suggestion to reconsider *Dzodzi* was ignored: *see* Opinion of Advocate General G. Tesauro in *Kleinwort Benson*, cited at n. 115, paras 27, 29.

117 For discussion as regards the relationship between the Court's preliminary rulings on the Brussels Convention and the EC Treaty, *see* Betlem, Case note on Case C-346/93 *Kleinwort Benson* (1996) 33 C.M.L.Rev. 137-147, at 141-147.

118 *Kleinwort Benson*, cited at n. 115, para 16; *see also* paras 17-22.

119 *Ibid.*, paras 23-24.

120 Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161.

121 Case C-130/95 *Giloy* [1997] E.C.R. I-4291.

122 In *Leur-Bloem*, it was an explanatory memorandum related to the Dutch legislation, and in *Giloy*, it was case law and legal doctrine related to the German legislation, which provided the *renvoi* to Community law: *see* Opinion of Advocate General F.G. Jacobs in *Leur-Bloom* and *Giloy*, paras 13, 22.

123 *Giloy*, para. 28; *see also Leur -Bloem*, para. 32. For comment on the Court's reasoning in this case as opposed to *Dzodzi* and *Kleinwort Benson*, *see, e.g.*, Lefèvre, cited at n. 109, at 505, Betlem, cited at n. 109, Case note, at 171-174.

124 *See* Opinion of Advocate General F.G. Jacobs in *Leur-Bloem* and *Giloy*, cited at n. 120-121, paras 47-74.

125 *Ibid.*, paras 75, 81. In this way, he advocated a distinction between the "horizontal" versus "vertical" effects of Community law within a national legal system, finding the Court's jurisdiction only applied in the latter situation: *see* para. 80. Noting the lack of clarity surrounding the application of this test, one scholar suggested the use of another device inspired by the *acte clair* doctrine of *CILFIT*: *see* Lefèvre, cited at n. 109, at 514-516.

126 Opinion of Advocate General F.G. Jacobs in *Leur-Bloem* and *Giloy*, cited at n. 120-121, para. 76.

save two exceptions[127]. The ECJ did not adopt this proposed device, and one year later, in his Opinion in *Schoonbroodt*[128], Advocate General Jacobs cited certain *Dzodzi* cases without any mention of his prior suggestions[129]. Yet, this did not signal final acquiescence by the Advocates General in the face of the further extension of the Court's jurisdiction in this area.

In *Kofisa Italia*[130], the Court was faced with a preliminary reference involving the interpretation of the Community Customs Code rendered applicable due to provisions of an Italian law on the Value Added Tax (VAT) that referred generally to "customs legislation" and that pre-dated the entry into force of the Code[131]. In effect, "[t]he distinct feature of this case is that the *renvoi* to the Community provisions made by the domestic statute was only indirect"[132]. The Court found it had jurisdiction[133], in spite of the Advocate General Ruiz-Jarabo Colomer's Opinion to the contrary. Notably, in addition to highlighting the many difficulties associated with this line of cases, including its negative effects for the Court's workload[134], the Advocate General took a more moderate stance, proposing that the Court "should restore the criterion applied in *Kleinwort Benson*", *i.e.*, decline jurisdiction where there is no direct and unconditional reference to Community law[135]. This proposal was also passed over by the Court, and shortly thereafter, it proceeded to stretch its jurisdiction even further in *Adam*[136].

Adam involved a request for the Court's interpretation of certain provisions of a Community directive on the Value Added Tax (VAT) even though the Luxembourg legislation related to the fixing of a reduced VAT rate for the liberal professions, not to VAT exemptions under the directive[137]. Still, the Court confirmed its jurisdiction[138], despite Advocate General Tizzano's conclusion that the link between the national proceedings and EC law was "too slender"[139] to uphold such jurisdiction because the legislation did not refer either directly or indirectly to the Community rules, and as a result, the Court's ruling "would be wholly alien to the factual and legal context of the main proceedings"[140]. Even though the ECJ did take note of ap-

127 *Ibid.*, para. 77 (excepting Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035 and Case C-73/89 *Fournier* [1992] E.C.R. I-5621).
128 Case C-247/97 *Schoonbroodt* [1998] E.C.R. I-8095.
129 Opinion of Advocate General F.G. Jacobs in *Schoonbroodt,* para. 19 (and citations therein).
130 Case C-1/99 *Kofisa Italia* [2001] E.C.R. I-207.
131 *Ibid.*, para. 18.
132 Tridimas, cited at n. 26, at 35.
133 *Kofisa Italia*, cited at n. 130, para. 33.
134 *See* Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Kofisa Italia,* paras 26-42.
135 *Ibid.*, para. 51; as for the second condition set down in *Kleinwort Benson*: *see* paras 45-50.
136 Case C-267/99 *Adam* [2001] E.C.R. I-7467.
137 Opinion of Advocate General A. Tizzano in *Adam*, para. 25.
138 *Adam*, para. 32.
139 Opinion of Advocate General A. Tizzano in *Adam*, para. 27.
140 *Ibid.*, para. 34.

parent incongruencies in the case[141], it held that "the fact that the concept of Community law whose interpretation is requested is to be applied, in the context of national law, in circumstances different from those envisaged by the corresponding Community provision does not of itself exclude all links between the interpretation sought and the subject-matter of the main proceedings"[142].

Then, in *BIAO*[143], the Court was confronted with a preliminary reference on the interpretation of provisions of the Fourth Company Law Directive on company accounts, which were rendered applicable by virtue of the fact that in transposing the directive into German law, several rules were extended beyond their scope to cover not just capital companies but more generally all traders[144]. Advocate General Jacobs considered this case to present "a golden opportunity" for the Court to reconsider *Leur-Bloem* and *Giloy*[145]. He urged the Court to reverse the two rulings and the related case law or, alternatively, to affirm the *Kleinwort Benson* criteria as suggested by Advocate General Ruiz-Jarabo Colomer in *Kofisa Italia*[146]. Again, the Court did not take up this invitation; yet, it did take pains to distinguish the case from *Kleinwort Benson*[147].

Following this case, several Advocates General have recognised that the "*Dzodzi* line of cases" is firmly established without further protest[148]. For instance, in the pending case of *Poseidon Chartering*[149], Advocate General Geelhoed concluded, in line with vested case law, that the Court had jurisdiction over the intepretation of Community law provisions rendered applicable by Dutch legislation that, in the transposition of the Commercial Agency Directive, was extended beyond the directive's scope to include transactions for both goods and services[150]. Certainly, this does not mean that the Advocates General have stopped putting a critical eye to the Court's case law, as evidenced by the recent Opinion of Advocate General Tizzano in *Ynos*[151]. Yet, despite repeated proposals to contract its jurisdiction in this area, the

141 *See Adam*, para. 25.
142 *Ibid.,* para. 29.
143 Case C-306/99 *Banque internationale pour l'Afrique occidentale (BIAO)* [2003] E.C.R. I-1.
144 *Ibid.*, paras 18-20.
145 Opinion of Advocate General F.G. Jacobs in *BIAO*, para. 47.
146 *Ibid.*, paras 67-68.
147 *See BIAO*, paras 91-93.
148 *See, e.g.,* Opinion of Advocate General A. Tizzano in Case C-222/01 *British American Tobacco Manufacturing* [2004] E.C.R. I-4683, paras 21-22; Opinion of Advocate General Ph. Léger in Case C-300/01 *Salzmann* [2003] E.C.R. I-4899, paras 28-30; Opinion of Advocate General Ph. Léger, delivered on 1 March 2005, in Case C-152/03 *Ritter-Coulais*, pending, paras 75-76; Opinion of Advocate General M. Poiares Maduro in Case C-170/03 *Feron*, judgment of 17 March 2005, not yet reported, para. 66.
149 Opinion of Advocate General L.A. Geelhoed, delivered on 28 April 2005, in Case C-3/04 *Poseidon Chartering*, pending.
150 *Ibid.*, paras 12-18.
151 Opinion of Advocate General A. Tizzano, delivered on 22 September 2005, in Case C-302/04 *Ynos*, pending, paras 45-50.

Court has not wavered from its "uncompromising approach"[152] to the *Dzodzi* case law.

VI. The Community definition of "court or tribunal"

Alongside the "*Dzodzi* line of cases" comes examination of the Court's definition of "court or tribunal" for purposes of Article 234 EC because both are commonly cited together for contributing to the expansion of preliminary rulings and for raising "points of tension between the Court and its Advocates General"[153]. This is in no small part due to the ECJ's relaxed approach to certain factors – referred to as the "*Vaassen* criteria"[154] – used to determine whether a referring body can be deemed a court or tribunal[155].

For example, in *Dorsch Consult*[156], the Court held that the German Federal Public Procurement Awards Supervisory Board fell within the scope of court or tribunal[157], notwithstanding the arguments of all intervening parties (Germany, the Commission and the applicant itself)[158] and the Opinion of Advocate General Tesauro, which raised "serious doubts" as to the lack of judicial independence of the body[159], as well as any *inter partes* procedure, "minimum" procedural safeguards or binding nature of its decisions[160]. Certainly, underlying the Court's rationale is the "overriding concern to make the preliminary reference procedure available as widely as possible, thus ensuring the uniform interpretation of Community law and the availability of a remedy for the protection of Community rights"[161].

Nevertheless, the Court's expansive approach received scathing criticism in the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster*[162]. After taking issue with, among other things[163], the Court's "gradual relaxation" of judicial inde-

152 Tridimas, cited at n. 26, at 36.
153 *Ibid.*, at 47.
154 Case 61/65 *Vaassen* [1966] E.C.R. 261, at 273. While this case has been taken as a shorthand reference, certain criteria were developed in subsequent cases: *see* citations in n. 155.
155 These criteria are as follows: (1) the body is established by law; (2) it is permanent; (3) its jurisdiction is compulsory; (4) its procedure is *inter partes*; (5) it applies rules of law; and (5) it is independent (Case C-54/95 *Dorsch Consult* [1997] E.C.R. I-4961, para. 23 (and cases cited therein); Case C-53/03 *Syfait and Others*, judgment of 31 May 2005, not yet reported, para. 29 (and cases cited therein)).
156 Case C-54/95 *Dorsch Consult* [1997] E.C.R. I-4961.
157 *Dorsch Consult*, para. 38.
158 *See* Opinion of Advocate General G. Tesauro in *Dorsch Consult*, paras 19-20.
159 *Ibid.*, para. 33.
160 *See generally ibid.*, paras 29-38.
161 Tridimas, cited at n. 26, at 30.
162 Opinion of Advocate General D. Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] E.C.R. I-9445; his criticism is perhaps best epitomized by his prefacing remark: *see* para. 14.
163 *See ibid.*, paras 39-57.

pendence[164] and the "diminishing importance" of the *inter partes* requirement[165] – for which *Dorsch Consult* was cited as an example for each[166] – he proposed a more restrictive definition of court or tribunal: "a body that is part of the court system of a Member State which acts independently to decide a case, in accordance with legal criteria, in adversarial proceedings, always constitutes a court or tribunal within the meaning of Article 234 EC"[167]. Bodies falling outside that definition would in principle be excluded from making references[168].

The Advocate General carved out one exception, however, for bodies outside the national judicial structure "where no further legal remedy can be pursued and provided that safeguards of independence and adversarial procedure are available"[169]. This exception may be considered somewhat of a non-starter since "such situations, as well as being exceptional, are virtually non-existent, thanks to the recognition of the right to effective legal protection, which requires the abolition of areas exempt from judicial review"[170]. As a result, Advocate General Ruiz-Jarabo Colomer believed that the volume of preliminary references would decrease[171], illustrated by the case at hand, deeming the *Collège juridictionnel de la Région de Bruxelles-Capitale* (Judicial Board of the Brussels-Capital Region of Belgium) to fall outside his new definition[172].

Yet, without citing the Advocate General's Opinion in its judgment, the Court decided the case in accordance with its established case law, particularly as regards the disputed requirements of *inter partes* procedure and judicial independence[173], holding that the *Collège juridictionnel* satisfied the criteria[174]. The Court's neglect of the Advocate General's device should not be taken to mean that it did not heed his arguments regarding judicial independence in this and subsequent cases[175]. The Court's failure to take up the Advocate General's test may also be seen in the light of its potentially harmful effects: "If the ECJ were to decline jurisdiction, the referring court would have to resolve the issue of Community law itself and there is no guarantee that the opportunity for making a reference would arise at a subsequent stage"[176].

164 *Ibid.*, paras 19-28.
165 *See ibid.*, paras 29-38.
166 *See ibid.*, paras 21, 36.
167 *Ibid.*, para. 85.
168 *Ibid.*, para. 86.
169 *Ibid.*, para. 95.
170 *Ibid.*, para. 88.
171 *Ibid.*, para. 97.
172 *Ibid.*, para. 118.
173 *See ibid.*, paras 14-21.
174 *Ibid.*, para. 22.
175 *See* Tridimas, cited at n. 26, 32-34 (and citations therein).
176 *Ibid.*, at 32.

That being said, the Court has not wavered from its traditional approach to the assessment of the requisite criteria, whatever be its concrete outcome. For instance, in *Syfait*[177], contrary to the Opinion of Advocate General Jacobs[178], the ECJ found inadmissible a preliminary reference from the Epitropi Antagonismou (the Greek Competition Commission)[179]. Its judgment was based upon the lack of adequate guarantees of judicial independence, in addition to the absence of a decision of a judicial nature in cases where the Commission relieves the body of its competence under Regulation No. 1/2003[180]. While the case presents the uncommon situation in which the Court's opinion differed from that of its Advocate General not because it sought to hold the reference admissible, but rather inadmissible, it should certainly not be interpreted as a signal that the ECJ is departing from its vested case law.

Although Advocate General Ruiz-Jarabo Colomer's proposal for a new definition of "court or tribunal" was not accepted by the Court in *De Coster*, his Opinion remains well-cited for another reason. As part of his suggestion to clarify the definition of court or tribunal, he called explicit attention to the envisaged transfer of preliminary ruling jurisdiction to the CFI, underlining the need for the ECJ to "make clear what it understands by national court or tribunal, as a relevant guideline for the Court of First Instance. If it does not do so, there is a risk that … the hesitancy of the first body will be matched by that of the second"[181]. Following this, he stressed the importance of keeping exclusive jurisdiction over preliminary rulings in the hands of the ECJ:

It is an indivisible jurisdiction, which suggests that the Court of First Instance should not be asked to share the task. The key to the success of the preliminary ruling procedure has lain in the centralisation of the interpretative function, which promotes uniformity. If other bodies are invited to participate there is a risk that the unity will be destroyed. The day that two different interpretations are given by the two Courts in respect to the same precept of Community law, the death knell will sound for the preliminary ruling procedure[182].

The Advocate General did not find solace in the qualification that the CFI's jurisdiction would only be in "specific matters, since any jurist knows that different matters share common categories, institutions and legal principles, so that the possibility of disagreements does not disappear"[183]. These comments have resonance with the discussion below.

177 Case C-53/03 *Syfait and Others*, judgment of 31 May 2005, not yet reported.
178 Opinion of Advocate General F.G. Jacobs in *Syfait and Others*, paras 26-46.
179 *Syfait and Others*, paras 37-38.
180 *Syfait and Others*, paras 30-36. For discussion of the interplay between the preliminary rulings procedure and Regulation No. 1/2003, *see* Komninos, "Article 234 EC and National Competition Authorities in the Era of Decentralisation" (2004) 29 E.L.Rev. 106-114.
181 Opinion of Advocate General D. Ruiz-Jarabo Colomer in *De Coster*, cited at n. 162, para. 70.
182 *Ibid.*, para. 74.
183 *Ibid.*; *see also* para 73. For his further remarks in this regard, *see* n. 192.

D. The solutions of Nice and the ECJ itself

Since the jurisprudential devices considered to curtail the volume of preliminary rulings have apparently not led to that outcome, it is now necessary to look into some aspects of coping with the workload flowing from such rulings. Admittedly, detailed examination of all proposals to reform the system of preliminary rulings in light of the Nice Treaty cannot be taken up in this discussion[184]. Rather, the objective here is to provide reflection on the transfer of preliminary ruling jurisdiction to the CFI and on some of the ECJ's procedural reforms provided by the Nice Treaty and completed by the Court itself.

I. Transfer of preliminary ruling jurisdiction to the CFI

Added by the Nice Treaty, Article 225(3) EC provides: "The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in *specific areas* laid down by the Statute"[185]. Its novelty is well-known. Before Nice, incursions into the ECJ's exclusive jurisdiction over preliminary rulings were not accepted and in fact were even explicitly forbidden by the Treaty[186].

Despite this revolutionary change, the Nice Treaty only contained the embryo for a fundamental re-allocation of jurisdiction between the Community courts[187]. Compared to the subsequent action taken in respect of the division of jurisdiction between the ECJ and CFI concerning direct actions[188] and the creation of a judicial panel[189], execution of the transfer of preliminary ruling jurisdiction to the CFI has remained at a standstill: "A Court of First Instance with new-found dignity, Judicial Panels and all the rest not-withstanding, Europe continues to drive in its rusty and

184 *See, e.g.*, Jacobs, "Possibilities for further reforming the preliminary ruling procedure" in CCBE Colloquium on the Judicial Architecture of the European Union, cited at n. 6, 62-69 (and citations therein); Dony and Bribosia (eds), *L'avenir du système juridictionnel de l'Union européenne* (and citations therein), cited at n. 63; Dashwood and Johnston (eds), *The Future of the Judicial System of the European Union* (Hart, Oxford, 2001).

185 Article 225(3) EC, first para. (italics added).

186 *See* Tizzano, "La Cour de justice après Nice: le transfert de compétences au Tribunal de première instance" in *Mélanges en hommage à Jean-Victor Louis* (Vol. 1, Éditions de l'Université de Bruxelles, Brussels, 2003), 499-516, at 506-507; Kovar, "La réorganisation de l'architecture juridictionnelle de l'Union européenne" in Dony and Bribosia (eds), *L'avenir du système juridictionnel de l'Union européenne*, cited at n. 63, 33-48, at 43 n.35.

187 *See further* Lenaerts, cited at n. 6, at 1.

188 *See* Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice ([2004] O.J. L132/5).

189 *See* Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal ([2004] O.J. L333/7). The judges were appointed by Council Decision 2005/577/EC, Euratom of 22 July 2005 ([2005] O.J. L197/28). They took the oath of office on 5 October 2005.

trusted 1950 model with the steering wheel firmly in the hands of the Court of Justice"[190].

This may be explained by the severe difficulties in delineating the "specific areas" ripe for transfer[191]. In addition to Advocate General Ruiz-Jarabo Colomer's clear-cut opinion in *De Coster*[192], Advocate General Jacobs further noted that "it would not be easy to define water-tight categories. Cases frequently raise questions in different areas, and even when a reference appears to be confined to a particular topic, it may raise much more wide-ranging and fundamental problems"[193]. Indeed, there do not seem to be many areas of Community law that constitute a separate body of law, the interpretation of which by the CFI is unlikely to affect other areas of Community law[194]. It should be added that almost every subject matter of general Community law involves aspects of constitutional law of the European Union in one or another respect. Examples can be found in the fields of free movement[195], competition law[196] or private international law[197]. As a consequence, it does not seem feasible to separate the so-called "constitutional" jurisdiction, to be reserved to the ECJ, from the "general" jurisdiction, susceptible to be transferred to the CFI. That explains the choice made in the Nice Treaty to limit the potential transfer of preliminary jurisdiction to the CFI to "specific areas", as well as the conceptual difficulties encountered in defining the latter.

There do exist, however, some areas in which the unity of European law would probably not stand in the way of a partial transfer of preliminary jurisdiction to the

190 Weiler, "Epilogue: The Judicial Après Nice" in de Búrca and Weiler (eds), *The European Court of Justice* (Oxford University Press, Oxford, 2001), 215-226, at 217.

191 *See, e.g.*, Jacobs, "Recent and ongoing measures to improve the efficiency of the European Court of Justice" (2004) 29 E.L.Rev. 823-830, at 826; Dashwood and Johnston, "The Outcome at Nice: An Overview", Dashwood and Johnston (eds), *The Future of the Judicial System of the European Union*, cited at n. 186, 219-232, at 223.

192 The Advocate General bolstered his remarks in this regard in a subsequent publication: *see* Ruiz-Jarabo Colomer, "La réforme de la Cour de justice opérée par le traité de Nice et sa mise en œuvre future" (2001) 37 R.T.D.E. 705-725, at 711-714.

193 Jacobs, cited at n. 186, at 64; *see also* Arnull, cited at n. 12, at 520.

194 *See further* Lenaerts, cited at n. 6, at 5.

195 *E.g.*, Case C-71/02 *Karner* [2004] E.C.R. I-3025; Case C-112/00 *Schmidberge*r [2003] E.C.R. I-5659. For discussion of the constitutional implications of the free movement principle for the division of competence between the Community and the Member States, *see* Snell, "Who's Got the Power? Free Movement and Allocation of Competences in EC Law" (2003) Y.E.L. 323-351.

196 *E.g.*, Case C-453/99 *Courage v Crehan* [2001] E.C.R. I-6297; for detailed citations of competition case law in relation to the ECJ's development of general principles of Community law, *see* Lenaerts and Van Nuffel, cited at n. 29, §17-065-§17-071, at 711-719.

197 *E.g.*, Case C-7/98 *Krombach* [2000] E.C.R. I-1935.

CFI. First, customs matters come to mind[198]. This is because the customs field is essentially one warranting the ECJ to play the CFI's role of assessing the facts within the context of the classification of a certain product under the Combined Nomenclature[199]. As highlighted by Advocate General Jacobs' Opinion in *Wiener SI*, such cases may be more easily severable from general European law, especially when only cases involving exclusively the classification issue are transferred to the CFI, not those involving simultaneously other issues[200].

Second, for matters in which the CFI acts *not* as a first instance court but rather as an appellate court and the preliminary reference pertains to the same subject as that on appeal, the CFI's preliminary ruling jurisdiction would not be likely to jeopardise the unity of European law[201]. With the proliferation of intellectual property cases, particularly trademark cases[202], gradually seeming to occupy the place formerly reserved to staff cases in the CFI's docket before the creation of the European Union Civil Service Tribunal, the creation of a special Community trademark – if not a Community intellectual property – court could be envisaged[203]. Since the CFI is to act in relation to such cases as a court of appeals as provided by the first paragraph of Article 225(2) EC[204], the ECJ's exceptional review jurisdiction would equally exist for direct actions and preliminary rulings in this field in case of transfer to the CFI of the jurisdiction to deliver such rulings[205].

Conversely, the reasoning just set out explains why the transfer of preliminary jurisdiction to the CFI in competition law or other matters in which the CFI acts as a

198 *See further* Lenaerts, "La réorganisation de l'architecture juridictionnelle de l'Union européenne: quel angle d'approche adopter?" in Dony and Bribosia (eds), *L'avenir du système juridictionnel de l'Union européenne*, cited at n. 63, 49-64, at 61-62, mentioning also the Community instruments in the field of private international law, which upon reflection are definitely less clear as a "specific area" within the meaning of Article 225(3) EC. *See* indeed *supra*, n. 197 by way of example.

199 *Compare, e.g.*, Case T-243/01 *Sony Computer Entertainment Europe* [2003] E.C.R. II-4189 *with* Case C-467/03 *Ikegami Electronics (Europe)*, judgment of 17 March 2005, not yet reported.

200 That would, *e.g.*, prevent cases such as *Intermodal Transports*, cited at n. 92, or *Gaston Schul*, cited at n. 103, from being dealt with by the CFI.

201 *See further* Lenaerts, cited at n. 198, at 62-63.

202 *See* Court of First Instance, 2004 Annual Report, cited at n. 8 at 111, available at http://curia.eu.int/en/instit/presentationfr/index.htm.

203 The European Commission had already submitted a Proposal of a Council Decision establishing the Community Patent Court (*see* COM (2003) 828 final), but the instrument providing for the Community patent has not yet been adopted.

204 *See also* Article 225a, third para., EC.

205 Article 225(2), second para., EC, provides for the ECJ's exceptional review of the CFI's judgments concerning appeals from the judicial panels, whereas Article 225(3), third para., EC, concerns the ECJ's exceptional review of the CFI's preliminary rulings; in both cases, the First Advocate General may propose that the ECJ review the CFI's decision when he "considers that there is a serious risk of the unity and consistency of Community law being affected": *see* ECJ Statute, Art. 62.

"real first instance court" would not work. That would leave the ECJ with only exceptional review jurisdiction in relation to the CFI's preliminary rulings in these matters, while it has full appeal jurisdiction on points of law in relation to the CFI's direct action jurisdiction in the same matters[206]. Thus, the parallelism between direct actions and preliminary rulings in the overall system of "saying the law" as to these matters would be broken. Notably, at least one commentator has come to the opposite conclusion:

Many of the cases which currently go to the ECJ for a preliminary ruling involve indirect challenges to the validity of Community norms where the non-privileged applicants cannot satisfy the standing criteria under Article 230. The substance of such cases are therefore concerned with just the kind of issues which would be heard by the CFI itself in a direct action under Article 230. It is therefore very difficult to argue that the CFI should not be able to hear the substance of such cases if they emerge indirectly via national courts as requests for preliminary rulings[207].

However, it must be considered that the "substance" of what the CFI hears in a direct action, involving facts and law, and always subject to full appeal to the ECJ on points of law, is quite separate from that of a preliminary ruling bearing on the law only and in principle definitive, subject only to exceptional review. In addition, the argument above only relates to preliminary references for validity control, not for the interpretation of Community law. Therefore, arguments seeking merely to align the CFI's jurisdiction in direct actions to that in preliminary rulings should be treated with utmost caution.

Certain commentators go even further and favour not just partial, but general preliminary ruling jurisdiction to be transferred to the CFI[208]. Aside from the fact that such a proposal would require a Treaty amendment since Article 225(3) EC explicitly provides for such transfer in "specific areas", care must be taken in distinguishing general jurisdiction over most direct actions (entrusted to the CFI by the Nice Treaty[209] as further implemented by the Council[210]) from general preliminary ruling jurisdiction for which a change of appellation of the CFI in the Constitution – in some of the Union's official languages – should not blur[211]. The transfer of general preliminary ruling jurisdiction to the CFI would first of all lead to the problem re-

206 *See* Article 225(3), third para., EC; Article 225(1), second para., EC.

207 Craig, "The Jurisdiction of the Community Courts Reconsidered" (2001) 36 Tex. Int'l L.J. 555-596, at 579 (reprinted with slight modification in de Búrca and Weiler (eds), *The European Court of Justice*, cited at n. 190, 177-214, at 205).

208 *See, e.g.*, Pernice, Paper on "The Role of the Court of Justice, Court of First Instance and Judicial Panels in the Long Term" in CCBE Colloquium, cited at n. 6, 20-25, at 23; Weiler, cited at n. 190, at 222; Prechal, cited at n. 13, at 78.

209 *See* Article 225(1), first para., EC.

210 *See* Council Decision 2004/407/EC, Euratom of 26 April 2004, cited at n. 188.

211 *See* Article I-29(1), first para., Constitution, which provides that the institution of the Court of Justice of the European Union includes the Court of Justice (currently, the ECJ), the General Court (currently, the CFI) and specialised courts (currently, the judicial panels).

lated to the absence of procedural parallelism between direct actions and preliminary references discussed above, *i.e.*, the CFI would effectively be delivering quasi-final preliminary rulings in areas of law in which as to direct actions it acts as a true first instance court on points of law.

Second, even if such transfer is qualified with the caveat that "[c]ases of particular importance, novelty and complexity, which may seriously affect the unity and coherence of EU law or cases including important or new constitutional aspects should be referred by the CFI to the ECJ"[212], in line with the second paragraph of Article 225(3) EC[213], problems of demarcation are evident here as well, not only as to the detachability of constitutional issues from general European law[214], but also as to the timeframe for the recognition of such constitutional issues, that is to say, "the full significance of a reference might not become apparent until later in the proceedings"[215].

Consequently, attention should rather be placed upon the additional solutions brought by the Nice Treaty and the Court itself.

II. The ECJ's procedural reforms

As highlighted by President Skouris of the Court of Justice, there were three key innovations of the Nice Treaty, two of which have immediate bearing for this discussion[216]. First, the Nice Treaty introduced the possibility for the ECJ to render judgments without an opinion of the Advocate General when no new points of law are raised[217]. This mechanism is increasingly relied upon by the Court: in 2004, it issued 15 judgments in preliminary proceedings without an opinion of the Advocate General and in the first nine months of 2005, that number rose to 22. Furthermore, the simplified procedure provided by Article 104(3) of the Rules of Procedure ("simpli-

212 *See, e.g.*, Prechal, cited at n. 13, at 78.

213 Article 225(3), second para., EC., provides: "Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling".

214 *See*, *e.g.*, the cases cited at n. 195-197.

215 Arnull, cited at n. 12, at 520.

216 The third innovation was the election of the Presidents of the Chambers of 5 judges for 3 years: *see* Skouris, "The European Court of Justice After Enlargement: Current trends and future challenges" in CCBE Colloquium, cited at n. 6, 4-8, at 4.

217 *Ibid. See* ECJ Statute, Article 20, fifth para.

fied procedure")[218], allowing the Court to make its preliminary ruling by short-form order and thus without an opinion of the Advocate General, produced 22 preliminary rulings in 2004[219]. In the first nine months of 2005, that number rose to 26.

Second, the Nice Treaty introduced the formation of the Grand Chamber, which is comprised of thirteen judges and "now essentially the formation that hears the cases that are considered most important"[220]. In 2004, it decided only 35 out of 225 preliminary rulings rendered, as opposed to the five-member Chambers with 133, and the three-member Chambers with 57. This means that the Chambers of three and five judges decided the overwhelming majority of about 84% of the preliminary rulings in 2004[221]. As a result of its discretion to choose the particular chamber formation for a given case and to utilize the simplified procedure, the Court – through its "*réunion générale*" – has sought to master effectively the volume of preliminary rulings while safeguarding the nature of the preliminary rulings system and the unity of European law.

If one makes a "comparative leap" to the system of *certiorari* used in the United States[222] (with all caveats of comparison firmly in place[223]), which allows the US Supreme Court to pronounce on various matters spanning the entirety of federal law as needed, *e.g.*, when there is a detrimental split among the federal circuit courts that must be addressed, one finds a striking analogy to the European Union legal order. By skillful use of the system of chambers and the simplified procedure, the ECJ can streamline the preliminary rulings of greatest bearing for the unity of European law to the Grand Chamber, while relegating others to the Chambers of either five or three judges. For example, the *Gaston Schul* case, with important implications for the system of preliminary rulings in light of *CILFIT* and *Foto-Frost*, was placed in

218 This procedure may be applied "[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt." Despite its similarity to *CILFIT* (*see* Opinion of Advocate General C. Stix-Hackl in *Intermodal Transports*, cited at n. 67 and n. 93, para. 106), they serve different purposes: *see* Opinion of Advocate General A. Tizzano in *Lyckeskog*, cited at n. 68 and n. 89, para. 74.

219 Court of Justice, 2004 Annual Report, cited at n. 8, at 13.

220 Skouris, cited at n. 216, at 4.

221 These figures do not take into account the five preliminary rulings delivered by the Plenary before the 2004 enlargement. For the first nine months of 2005, the Grand Chamber has continued to deliver only a small portion of the preliminary rulings, totalling 20 out of 168, whereas the five-member and three-member Chambers have delivered 104 and 44 rulings, respectively.

222 *See generally* Nowak and Rotuda, *Constitutional Law* (7th ed.,West, St. Paul, 2004) §2.4-§2.5, at 28-32.

223 *See* Weiler, cited at n. 7, at 12-13.

the Grand Chamber[224]. The ECJ's effective reliance on these mechanisms has contributed, to a great extent, to the further drop in the average duration of the preliminary ruling procedure in the first nine months of 2005[225].

E. Conclusion

Admittedly, the remarks set forth here may seem somewhat modest within the context of an overall approach to the reform of the system of preliminary rulings. However, viewed in light of the rationale underpinning the division of work to be performed by the ECJ, the CFI and the European Union Civil Service Tribunal, the results may be more astounding than first imagined.

As a result of the re-allocation of jurisdiction between the ECJ and the CFI as regards direct actions brought by Member States[226], for instance, the cases transferred to the CFI totalled about 5% of the cases then pending before the ECJ[227]. The establishment of the European Union Civil Service Tribunal has further lightened both the CFI and the ECJ's workload: 25% of the CFI's previous volume of cases are to be transferred to the new Tribunal and the ECJ will be released from hearing appeals in such cases[228].

In effect, these innovations instill a vital balance within the judicial architecture of the European Union. Combined with the Court's proficient use of the procedural reforms discussed above, they also serve to liberate the ECJ from various tasks contributing to its overload so that preliminary rulings can assume even greater prominence in the work of the Court and can be most efficiently handled. That in turn will allow the Court to successfully face the challenges ahead resulting not only from the ever-increasing volume of preliminary references but also from their expansion in fields requiring particularly speedy decisions[229]. With this global view in mind, both the unity of European law and the system of preliminary rulings can be preserved for

224 S*ee* Opinion of Advocate General D. Ruiz-Jarabo Colomer in *Gaston Schul Douane-Expediteur*, cited at n. 104, para. 24. *BIAO*, a case that Advocate General Jacobs cited as a "golden opportunity" for reconsidering the "*Dzodzi* line of cases", cited at n. 145, para. 47, was placed at the time before the plenary Court, today that would be the Grand Chamber.

225 *See* n. 9.

226 *See* Council Decision 2004/407/EC, Euratom of 26 April 2004, cited at n. 188.

227 Court of Justice, 2004 Annual Report, cited at n. 8, at 10.

228 *Ibid.*, at 11.

229 *See* the European Council's recent submission, The Hague programme: strengthening freedom, security and justice in the European Union ([2005] O.J. C53/1), point 3.1, third para: "In this context and with the Constitutional Treaty in prospect, 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. The Commission is invited to bring forward – after consultation of the Court of Justice – a proposal to that effect."

years to come. In these circumstances, *all* courts or tribunals of the Member States will keep the right to refer for a preliminary ruling to the ECJ at the earliest relevant moment in national proceedings involving issues of Community law. That right must be preserved in the interests of the litigants who should be entitled to avoid the costs of lengthy proceedings in several stages, if the crucial point of Community law can be cleared by the ECJ, with precedent value across the Union, at the very first stage of the proceedings. The ECJ's case law shows that this is what happens very often, both in cases relating to the major principles of Community law and in those of a more technical nature.

It should not be seen as conservative, not to remove, as a matter of principle, the general jurisdiction to deliver preliminary rulings from the ECJ. Indeed, as the main goal of this jurisdiction is the preservation of the unity of European law throughout the Union, it is not surprising that it is being entrusted to the highest court inside the legal order concerned, just like that is done in almost all national legal orders around the world. The fact that for ordinary cases such court is sitting in a relatively small chamber formation, while a bigger formation decides cases of more exceptional significance, is equally well known in the legal systems of the Member States (*e.g.* the French or the Belgian "Cour de cassation"). However, whatever the formation be, it speaks for the highest court as a whole, since it has been charged with deciding cases in accordance with the operating rules governing that court. And that is what it takes for the judicial pronouncements made – even on matters of apparently lesser importance – to carry the authority needed to effectively ensure the unity of the law. In this connection, what has been the experience of the Member States during their rich history, should probably not differ radically at the level of the European Union.