

**CCBE/COLLEGE OF EUROPE COLLOQUIUM
BRUGES, 19-20 NOVEMBER 1999
REVISING THE EUROPEAN UNION'S JUDICIAL SYSTEM
ASSESSING THE POSSIBLE SOLUTIONS
REVISING THE PRELIMINARY RULING MECHANISM**

**THE PRELIMINARY REFERENCE PROCEDURE:
CONSTRAINTS AND REMEDIES**

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DAVID EDWARD¹

There is no shortage of papers telling us what is wrong with the preliminary reference system and what should be done to put it right. Most of the problems are already self-evident. So, taken individually, are many of the possible solutions. But the solutions proposed are often mutually incompatible. or, while improving matters in one direction, would only make things worse in another. Many of them proceed from a purely national viewpoint, taking little or no account of the attitudes and traditions of other member states. Most of them could not be implemented without the unanimous consent of the Member States - a scarce commodity.

What is surprising is not how badly, but how well the system still works. References are made in ever-growing numbers, on an ever-expanding range of subject matter, by judges at all levels of the judicial hierarchy in the member states. Given the workload and the complexity of some cases, most references receive an answer within a reasonable time². In all but a few cases, the Court's judgments are available on the Internet in 11 languages by the evening of the day they are pronounced. Inevitably, some judgments give rise to criticism, but not, proportionately, more so than the judgments of courts in the member states. In very few cases does the referring court make a new reference because the Court's judgment was unhelpful or unclear.

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In this paper "the Court" refers to the court of Justice as a court (as distinct from the Court of First Instance) rather than as an institution.

² What is a "reasonable time" depends, of course, on one's point of view. By the standards of some member states, the Court's speed of reply is positively electric, and the states that most often complain of delay in Luxembourg are not themselves immune from criticism. A recent case from one such state began more than five years before the decision was taken to make a reference. It took a further five months for the reference to reach the Registry of the Court. The procedure before the Court took 21 months from beginning to end. At the time of writing, eight months after the judgment, no date has been fixed for a hearing before the referring court to decide how to proceed in light of the judgment. Of the 34 months that have so far expired since the decision to refer, 13 have been attributable to delays in the national court.

So Doomsday has not yet arrived. Provided that the short- and medium-term proposals submitted by the Court to the Council on 28 May 1999 are adopted with the minimum of delay, there is time for rational discussion of the best way to go forward.

Rather than add to the corpus of wish-lists and magic solutions, this paper approaches the problem by identifying the constraints within which the Court has to work. These are the fixed points round or past which any reform will have to navigate, and it is important to know where they are before setting out. This approach will, it is hoped, put the Court's proposals in context and show why it is so important to adopt them. As regards the longer term, the paper suggests some of the questions that need to be faced without seeking to answer them.

Broadly speaking, the constraints on the working of the preliminary reference system are the following:

- (1) procedural and structural constraints imposed by the basic texts (the Treaties, the Brussels and other Conventions, the Statute of the Court and the Rules of Procedure);
- (2) linguistic constraints;
- (3) constraints resulting from "cultural diversity" - the divergences between the legal systems and the underlying traditions and attitudes of lawyers and judges;
- (4) constraints of the workload, caused by
 - (i) the volume of references (a quantitative constraint) and
 - (ii) the subject-matter (a qualitative constraint), and
- (5) practical constraints of time, manpower, budget and technical resources.

Procedural and structural constraints

The basic texts dictate in considerable detail how the preliminary reference procedure is to work. Unlike the Court of Human Rights, the Court of justice has no autonomous power to alter its own rules of procedure or to derogate from them. Every amendment of the Rules of Procedure requires the unanimous approval of the Council.

The texts impose constraints, first, on the way in which the reference procedure is initiated and, second, on the procedure to be followed thereafter.

Initiating the reference

The texts

If a national court or tribunal decides that a reference is necessary, the Court must, in principle, accept it and answer the questions posed. All references must, in principle, follow the same procedure and ought, if possible, to be dealt with "in the order in which the preparatory inquiries

in them have been completed"³. The power of the President "in special circumstances" to order that a case be given priority⁴ is rarely exercised.

As far as the referring court is concerned, Article 20 of the Statute envisages that the referring court shall "suspend its proceedings" in order to make the reference. In some countries, the effect of suspension is that the referring court *cannot* act further until the Court has dealt with the reference.

The texts envisage only one circumstance in which a reference need not go all the way to judgment. That is where the question referred is "*manifestly identical* to a question on which the Court has already ruled". In that case, the Court can dispose of the case by order, but *only* after informing the referring court and hearing the parties, the intervening governments, the Commission and, where appropriate, the Council⁵.

This provision was introduced in 1991 in response to a proposal of the Court but, as adopted, it seriously limits the usefulness of what was proposed. The administrative procedures involved in consulting the parties, governments and institutions, and the need to translate both the reference and the observations submitted, make the procedure extremely clumsy to operate. If the point is "manifest", one might have thought that the Court could be trusted to deal with it without further consultation, but the obligation to consult was insisted upon by the Council. This *illustrates the way in which the member states approach quite modest proposals for reform*.

Mitigating the rigour of the texts

The Court has mitigated the rigour of the texts *in* three ways: by informal contacts between the Court Registry and national courts; by rejecting some references as inadmissible; and through the CILFIT⁶ judgment.

Informal contacts

A number of references are withdrawn following informal contacts between the Registry and the referring court. The Registry draws the attention of the referring court to previous judgments which seem to provide the answer to the questions posed. The national court does not normally insist that the reference be dealt with as it stands. More often, it is withdrawn altogether or the questions are reformulated with a more detailed explanation of the reasons for making the reference.

This informal approach is not available where suspension of the national proceedings means that the referring court is unable to act.

³ Rules of Procedure ("RP"), Article 55 (1).

⁴ RP, Article 55 (2).

⁵ RP, Article 104 (3).

⁶ Case 283/81, *CILFIT v Alinistero della Sanità* [1982] ECR 3415.

Inadmissibility

Since *Foglia v Novello*⁷, the Court has rejected references as "inadmissible" for want of clarity, relevance or basic information. This practice has been criticised as a breach of the principle of judicial cooperation, but it is important to keep the criticisms in proportion. In the past nine years, only 27 references have been rejected as inadmissible - on average, around one per cent per year.

In practice, the Court makes great efforts, through the Registry, to give national courts the opportunity to supplement inadequate references. But even where there is no formal barrier to their doing so, some national judges seem to be unable or unwilling to see the point. In other cases, the terms of the reference have effectively been dictated by the parties and the judge feels unable to amplify the reference without reopening the procedure and hearing the parties. In these cases, it is quicker in the long run to reject the reference as inadmissible, allowing the national court to make a fresh reference.

The most telling objection to dismissal of references as inadmissible is that it gives an impression of discourtesy to the national judge. This is inconsistent with the idea of judicial cooperation as the cornerstone of the system, even though, in the cases that are so dismissed, cooperation has proved impossible.

To overcome these difficulties, the Court has proposed a new rule of procedure⁸ which would enable the Court to make a formal request to the referring court for clarification of the order for reference. This would enhance judicial cooperation and overcome the formal problem for those national judges who feel that, under the existing rules, they cannot act. If a national judge were still to decline to provide the clarification requested, this could be made clear in the order rejecting the reference.

It has been suggested that the referring court should be required to include in the order for reference its own proposal as to how the questions referred should be answered. This suggestion is discussed later.

CILFIT

The judgment in *CILFIT* provides a basis for applying the doctrine of *acte clair* where the treaty requires a national court whose decision would otherwise be final to make a reference⁹. The *CILFIT* criteria are criticised as being excessively restrictive and the Court is frequently urged to make them more flexible so as to allow a greater degree of latitude to national supreme courts.

The problem, however, lies, not in *CILFIT*, but in the texts. According to its terms, Article 234 leaves no room for *acte clair* or any other limitation of the obligation to refer. In truth, *CILFIT* is

⁷ Case 104/79, *Foglia v Novello* [1980] ECR 745.

⁸ Adding another paragraph to Article 104 RP

⁹ Article 234 EC (ex-article 177), third paragraph.

an example of the "judicial activism" (going beyond the texts) which the same critics are often the most vocal in deploring.

The real question is whether the texts should now be amended so as either (a) to restrict or abolish the right of lower courts to make a reference, and/or (b) to remove the obligation of supreme and other final courts to do so.

Abolishing the right of lower courts to refer

Many, if not most, references raise technical points of interpretation that are obvious from the outset in the court first seised. What matters, especially to the affected citizen, is that that court should know how to interpret the texts, and that other national courts should follow the same interpretation of the same text. The points at issue very rarely merit the attention of a national supreme court or the delay and cost involved in getting them there.

A single reference made at an early stage by a lower court is surely more economical than creating a logjam of cases on the same point making their way up the national court hierarchy until a reference can be made.¹⁰

There may, however, be a case for some form of filtering mechanism, at national or Community level, to ensure that references by lower courts are not made prematurely or in an unsatisfactory way. This would involve treaty amendment. For the time being, the Court's proposal to allow formal requests for clarification would go a long way towards meeting such problems.

Abolishing the obligation of final courts to refer

If supreme and other final courts were not obliged to refer, and especially if lower courts could not refer, the question is, how would uniform interpretation and application of the texts be ensured? In particular, how could the internal market be maintained if the courts of the member states were free to pursue their own interpretation, not only of treaty provisions, but of a host of technical regulations, directives, customs codes and other texts whose very purpose to ensure uniform application of the law?¹¹

To meet that objection, it has been suggested that the Commission should be able to "refer" decisions of national courts to the ECJ "in the interest of the law". This proposal raises a number of questions that go well beyond the scope of this paper but are worth mentioning.

Does the Commission have the resources to police the decisions of national supreme courts in the way suggested? If the issue has already become *res judicata* as between the original parties as

¹⁰ By the time the case mentioned in footnote 2 above was referred to Luxembourg by the national supreme court, there were said to be thousands of cases awaiting a decision on the same point.

¹¹ An apparently trivial question as to the tariff classification of pyjamas may have considerable implications for the flow of trade from the Far East since, if the tariff is set lower in one country than another because of different interpretations of the same text, the goods in question will be routed through the cheaper port of entry.

a result of the decision of the national court, who would be entitled to appear before the ECJ and who would be the proper contradictor of the Commission's point of view? What would be the factual background against which the Court would be asked to rule - the facts of the case in the national court giving rise to the reference, hypothetical facts, or no facts at all? What would be the permissible scope of the arguments that could be advanced? (At present, the scope of a reference is, in principle, determined by the order for reference.)

Perhaps most importantly, how would such a procedure differ from the procedure already available to the Commission under Article 226 (ex-article 169) by which the Commission can bring before the Court a failure by a member state to fulfil its treaty obligations? If acts of the national legislature are subject to review in this way, so in principle are acts of the national judiciary.

Throughout the history of the Community, both the Commission and the Court have sought to maintain a relationship of cooperation rather than confrontation with national courts. The objection to using Article 226 to challenge decisions of national courts has always been that it would require the Commission to assume a "prosecutorial" role, and the Court an "appellate" role, vis-à-vis the judiciary of the member states. It is not clear why the position should be any different if the Commission were able to initiate some sort of *pourvoi dans l'intérêt de la loi*.

The same objection applies *a fortiori* to the suggestion that a party dissatisfied with the judgment of a final national court should be able have the judgment reviewed by the Court of Justice. On the other hand, this approach would at least have the merit of ensuring that the legal and factual context of the case was circumscribed as at present and that the Court would not be ruling hypothetically on a question which had already become *res judicata* between the parties.

The procedure before the Court

The existing constraints

The obligatory steps in procedure before the Court are essentially the following:

- translation and notification of the reference;
- translation and notification of the written observations;
- preparation of the judge Rapporteur's preliminary report on the basis of which the Court decides whether the case is to be heard by the full plenary (15 judges), a *petit plenum* (11 judges), or a chamber (five or three judges);
- preparation, translation and notification of the Report for the Hearing;
- the oral hearing;
- preparation, translation and presentation of the Advocate General's opinion,
- deliberation by the judges;
- preparation, translation and delivery of the judgment; and
- publication of the judgment and opinion.

Every reference, unless disposed of by order, must follow this procedure. Simple cases cannot be dealt with simply and urgent cases cannot be dealt with fast. Translation is required at five

separate stages of the procedure, which cannot proceed to the next stage until the necessary translations have been completed. On average, translation consumes about seven months of the total time taken to process a reference - i.e. one third of the average total time.

Notwithstanding complaints that the procedure takes too long, critics suggest that the written procedure is fundamentally defective in that the parties have no opportunity to comment in writing on the observations of others or, in due course, on the opinion of the Advocate General. The oral procedure is limited in scope and usefulness, giving little opportunity for exploring the factual and legal issues through the dialogue between bench and bar which is particularly characteristic of the common law system.

No uniform system of procedure could respond adequately to all these difficulties and criticisms. The existing system at least has the merit that it is known, tried and tested; that it affords basic protection for the rights of defence; and that, for the time being, it still works. It is important to realise that the parties before the Court (as opposed to governments and institutions) are often represented by advocates (or other people¹²) who have no previous experience of the procedure and may never be involved in it again.

It is therefore essential to keep the rules reasonably simple such that they can be understood and applied, not only by experienced lawyers from big cities, but by day-to-day practitioners in all sorts of local courts and tribunals. This will be all the more important after enlargement.¹³

The most urgent requirement at this stage is greater flexibility. In essence, the member states, the institutions and the parties must decide whether they are prepared to trust the Court to deal fairly with their concerns and not require it to work within a procedural straitjacket.

The Court's proposals

Procedural autonomy

The most radical solution proposed by the Court would be to allow the Court to be master of its own rules of procedure, like the Court of Human Rights. Fundamental rules or principles of procedure on which the member states might reasonably wish to insist could be "entrenched" in the treaties or in the Statute of the Court - in particular, in Title III of the Statute. Within that framework, the Court would be free to make its own rules and also *to modify them in the light of experience*, adapting them to the needs of particular types of case. This would also, over time,

¹² In references, parties can be represented by anyone who is entitled to plead before the referring court. Since many national courts and tribunals dealing with matters such as labour law or social security have no formal rules of representation, parties may be, and quite often are, represented in Luxembourg by people who are not members of a bar and may have no legal training whatever. They are not necessarily the least persuasive advocates !

¹³ The author was able to measure the scale of the problem for the candidate countries during a recent visit to Poland. There is still no set of *European Court Reports* available to students in Wroclaw, the third largest university in Poland. A Polish judge said he had asked a Community law enthusiast how he could find the law, and *was* assured that he would soon be able *to* find all the law on Internet with his computer. "My computer!", exclaimed the judge; "I don't even have a typewriter".

allow room for experiment - new types of procedure could be adopted, and maintained if satisfactory but abandoned or modified if not. Such experiment is practically impossible at the moment.

In the shorter term, the Court has proposed four amendments of the Rules of Procedure which would allow greater flexibility and conduce to greater efficiency.

Greater scope for disposing of cases by order

The first proposed amendment would allow the Court, after hearing the Advocate General, to dispose of a case by order (i) where the question posed is identical (rather than manifestly identical) to a question previously ruled upon, (ii) where the answer can clearly be deduced from existing case law or (iii) where the answer leaves no room for reasonable doubt.

Provided it were adopted in its entirety, this proposal would, by itself, substantially alleviate the Court's workload overall. In a significant number of references on technical points the answer leaves no room for reasonable doubt, even if it cannot be said to have been *acte clair* from the point of view of the referring court. Where the answer is not obvious from the outset, the written submissions point clearly to what the answer should be. In such cases, it is a waste of over-strained resources to require the case to go through all the subsequent stages of normal procedure, with all the costs and delay involved, especially in translation, in order to reach the same result in the end.

In due course, after amendment of the treaties or at least of the Statute, this proposal might be developed by requiring the referring court to suggest its own answer to the questions referred. If the Court agreed with the suggested answer, this could be confirmed by order without taking the procedure further. But it should be recognised that this idea assumes a certain degree of sophistication on the part of the referring court which is not always evident from some of the references and could certainly not be counted on in the first years after enlargement. It may therefore be questioned whether it would be wise to insist that all orders for reference should include suggested answers to the questions referred.

Adoption of any such proposals would, of course, carry the risk that the Court would too quickly reach an answer which, on more mature reflection, would turn out to be wrong. The safeguard lies in the fact that (except where a case is withdrawn or settled) any proposal by a judge Rapporteur to dispose of a case by order goes before the whole Court at one of its weekly general meetings. In practice, as any judge of the Court will bear witness, this is a salutary brake on precipitate enthusiasm to dispose of cases.

Accelerated procedure

The Court's second proposal would allow for an "accelerated procedure", omitting or shortening particular stages of procedure, where a national court requests it and the circumstances show unusual urgency. The availability of such a procedure would be particularly important, and may prove to be essential, in Brussels 11 and Third Pillar cases.

The problem with any acceleration of existing procedure is to know what to leave out and what to speed up. The reactions to the Court's proposal suggest, as might have been expected, that some would prefer to omit the written procedure altogether and proceed straight to an oral hearing, while others attach fundamental importance to written procedure and would be prepared to forego the oral hearing.

The essential point, at this stage, is to decide whether the system can continue without any provision for accelerated procedure. If not, the Court must be allowed some leeway in adapting the procedure to the needs of the particular case. The worst solution would be to adopt a rule permitting accelerated procedure but to hedge it about with detailed procedural requirements involving consultation of the parties, governments or institutions and/or requiring translation of documents or pleadings. This would probably make the procedure unworkable, and therefore virtually useless, in practice.

Power for the Rapporteur and Advocate General to seek further information

At present, only the Court as such, acting on a report by the judge Rapporteur, can ask parties, governments or institutions to provide documents or information. Neither the Rapporteur nor the Advocate General can do so without asking the Court to act. This hampers preparation of the case at two crucial stages: first, preparation of the Rapporteur's Preliminary Report and Report for the Hearing; and second, preparation for the oral hearing.

The Court therefore proposes that the judge Rapporteur and the Advocate General should be empowered to ask for documents or information without needing to refer the request to the whole Court for prior approval.

Power to issue Practice Directions

The fourth proposal is that the Court should have power, as in Strasbourg, to issue Practice Directions¹⁴. This would make it possible, to specify in greater detail what is expected of those who take part, particularly as regards the presentation, content and length of pleadings. This would be particularly useful in the context of accelerated procedure.

Structural constraints

The most serious structural constraint on the working of the Court results from the treaty requirement of "partial renewal" of half of its membership every three years¹⁵. Where a new judge or Advocate General is appointed to succeed another in the course of his mandate, the new member is appointed only for the unexpired portion of his predecessor's mandate, and must receive a new mandate at the appropriate three-yearly renewal.

¹⁴ It has been suggested that the Court already has power to issue Practice Directions. Whether this is so or not, the Court does not have power to enforce such directions.

¹⁵ Article 223 EC (ex-article 167), second paragraph.

The effect is that, every three years, the Court has to go into low gear for nine months in order to be sure that all cases that have reached the stage of oral hearing can be completed by October 6th when the terms of office of half the judges and Advocates General come to an end. It is frequently not known until a very late stage which of them will be reappointed.

This is manifestly inefficient. In its paper submitted to the IGC preparing the Amsterdam Treaty, the Court proposed that, whatever the length of the mandate, the mandate of newly appointed judges and Advocates General should run from the date of first appointment. Over time, this would stagger departures and arrivals and would allow the Court to operate like any other Court that has to make allowance for retirements, whether on grounds of age or of expiry of the mandate. So far as is known, this proposal was not even considered worthy of discussion by the member states.

Linguistic constraints

The Court's language regime is laid down in the Rules of Procedure¹⁶. All languages are treated as being equal. In particular, judges and Advocates General are entitled to use any language and to require translation of any document into the language of choice.

Some commentators (particularly in some of the larger member states) propose that the number of permitted languages should be limited, as in Strasbourg. They fail to take account of the extreme sensitivity of the language question which makes any overt¹⁷ reform of the linguistic regime very unlikely (to say the least). They also fail to notice that proceedings in Strasbourg can begin only when all domestic remedies have been exhausted. The preliminary reference procedure, by contrast, is an integral part of on-going proceedings conducted in national courts in the national language.

It is difficult to see why a national judge should be interested in co-operating in a procedure that would require him to write a reference, or apply judgments, in a language other than his own. That was the main reason why the Court changed its own methods of working to ensure that, as far as possible, its judgments are available to judges and lawyers throughout the Community in their own language on the day they are pronounced.

The language regime applied by the Court is as economical as it can be, consistently with maintaining the equality of languages. Only the orders for reference which start the procedure, the opinions of the Advocates General and the judgments of the Court are translated into all languages. The judges and Advocates General do not normally insist on their right to have documents translated into their language of choice, and indeed the system would break down if they did.

¹⁶ RP, Articles 29-31.

¹⁷ Experience shows that the institutions can go some way towards relaxing strict application of the language regime provided that no-one makes a noise about it!

Internally, the Court uses a single working language. Largely for historical reasons, this is French, but the cost implications would be the same whichever language were chosen. Use of a single working language avoids extensive cross-translation, the bulk of the translators' work being translation into or out of that language.

So long as this arrangement can be maintained, it is possible to predict with some accuracy the cost of adding new languages as a consequence of enlargement. In broad terms, each additional language would involve recruiting about 30 translators, interpreters and secretaries.

The use of a single working language has other, less obvious, consequences. In some respects these are advantageous, in others less so.

Differences between legal systems are reflected in lawyers' use of language. Even if legal vocabulary has a common origin (for example, in Roman law), development of the same concept in different countries may lead to the same word acquiring different meanings or at least different nuances. The problem is all the greater when legal systems start from radically different assumptions, as anyone knows who has tried to explain the English concept of "trust" to a civil lawyer, or the difference between *conclusions*, *moyens* and *arguments* to an English lawyer.

The Court's use of French should be compared with the use of Latin in universities and scholarly exchanges at least until the eighteenth century (and at the Gregorianum in Rome well into the twentieth). It ensures a reasonably consistent use of vocabulary which acquires its own "Community meaning" and provides the degree of linguistic stability that legal certainty requires and national legal systems acquire as a matter of course.

The downside is that French legal terminology, although commendably precise, does not always lend itself to translation into other languages, particularly when one is not sure how much intellectual baggage is packed in the French portmanteau. How, for example, should one translate *marge d'appréciation* into English? It is neither "discretion" nor "room for manoeuvre", nor even "degree of latitude", although all three are partly right. Probably the best solution, as with *acquis communautaire*, is to surrender and adopt the French phrase into the language. But that gives an unfortunate impression of francophone dominance, even in circles where leek and potato soup is relished as *vichyssoise*.

The same problem would exist whichever language or languages were chosen as the working languages. Legal texts in translation can rarely be quite as clear and precise as the original, and there are relatively few lawyers who can read and write with speed and confidence in a language other than their own.

The linguistic regime is an important constraint on the productivity of the Court and the understanding of its judgments. It may be possible to avoid its more extreme consequences - e.g. by not insisting on translations unnecessarily. Subject to that, it is, and will continue to be, a fixed point to be steered round rather than removed.

Constraints of cultural diversity

Differences in legal culture is as important as language as a point of reference for reform. The constraints they impose are more difficult to define but are nonetheless real.

It is often suggested that the Community is divided between the Common Law and Civil Law systems. But the longer one spends in the Court, the more one is aware that there are fifteen different legal systems (or more if you count Scotland and other strange animals in the juridical zoo). Some of them have more in common than others but all of them owe something to particular national attitudes and ways of doing things which are themselves the product of history and culture.

Differences in legal culture and approach become apparent in any discussion of possible reforms of the Court and its procedure. German lawyers attach fundamental importance to the principle of "the legal judge" (*gesetzlicher Richter*), according to which the rules for composition of the tribunal deciding a case must be known and published in advance. English lawyers, on the other hand, regard it as normal to allocate cases, or to change the composition of appeal courts, as judges become available or are prevented from sitting.

German lawyers prize the written procedure; English lawyers the oral.

In practice, it is surprising how little this cultural diversity affects the day-to-day working of the Court. Indeed, the bringing together of lawyers from widely differing backgrounds is part of the richness of the Community system, and there is no country (including the most recent accessions) the influence of whose legal culture cannot be found in the Court's jurisprudence.

Differences of attitude or approach can nevertheless affect a crucial stage in the procedure which outsiders do not and cannot observe - the process of deliberation. Quite frequently, the parties to the proceedings before the referring court do not submit written observations or take part in the oral procedure, and the member states which might have most to contribute do not intervene. The Commission no longer has the financial resources or the manpower to provide a comprehensive overview of every case and its consequences, and the Advocates General cannot always do so either.

Consequently, it may well be that it is only at the stage of deliberation that the points of view of lawyers with different perspectives are brought to bear on the case. Even if, at the end of the day, the judgment appears to "follow" the opinion of the Advocate General, this may only be after the issues have been extensively debated between the judges and a decision taken in favour of one approach rather than another.

The case for and against dissenting judgments

Some commentators suggest that the differences of opinion and differences of approach between judges of different traditions should be brought into the open by allowing dissenting opinions.

This would, they say, speed up the process of decision-taking since a vote could be taken at an early stage, leaving the majority to write the judgment and the minority to write their dissents.

The majority judgment would be less obscure since it would not have to accommodate the views of dissentients.

To anyone bred in the common law tradition, the case for allowing dissenting opinions is seductive. Today's powerful dissent can become tomorrow's orthodoxy. The case for dissents does not need to be elaborated here because it has been made so often. The contrary case has not been made in any detail, so it is worth pointing out some of the questions that have not, so far, been asked.¹⁸

The objection normally put forward against dissenting judgments in the ECJ is that this would subject the judges to unacceptable political pressure. This seems a weak argument, considering that the Advocates General have to express their own opinions and that dissenting judgments are permitted in Strasbourg.

A more persuasive variant of the argument is that the right to dissent might lead judges to become identified with a particular approach or tendency - progressive or conservative, strict constructionist or purposive constructionist; federalist or nationalist, etc. Would the enforceability of the Court's judgments be enhanced if they were liable to be dissected in this way? Would judges feel compelled to maintain positions expressed in dissenting opinions even if, on reflection, they recognised that they were wrong? (That has happened to most of us.)

Dissenting judgments do not form part of the legal tradition of all the member states - perhaps, indeed, only that of a minority. Where dissenting judgments are permitted, this may only be in the Constitutional Court whose members are appointed by a special parliamentary process different from that applying to the ordinary courts. Is there a general willingness amongst the member states, not only to change the rules to permit dissenting judgments, but also to change the method of appointing the members of the Court of Justice?

Assuming that there is, it is important to clarify what would be allowed. Would all judges, as in Strasbourg or the US Supreme Court, be entitled to file concurring as well as dissenting opinions, or opinions that concur in part and dissent in part? Or would the dissentient minority be required to file a single document of dissent? If so, what would be the position of a judge who could not, in conscience, agree either with the majority or with the rest of the minority? That is not a far-fetched question in a context where, in a difficult case, the "formation of judgment" could consist of IS or, after enlargement, more than 20 judges.

In terms of *total time saved*, would the gain, if any, be more than marginal? It would be difficult to write a dissent without knowing what one is dissenting from. Presumably, therefore, the majority judgment would have to be available, at least in draft, before the dissents were written.

¹⁸ The arguments against dissenting judgments in the Court when dealing with references do not necessarily apply to all direct actions, especially in the Court of First Instance.

Could the majority then claim the right, having read the dissents, to adjust their judgment in order to take account of them? At what point would the judgments and dissents become final so that they could be sent for translation - a question that does not arise in a monolingual system?

In terms of quality, it is true that Anglo-American legal literature is full of powerful dissents which, in the long run, have changed the course of legal thinking. But the right to file a dissenting or concurring opinion does not always contribute to legal certainty, as any lawyer who has practised in the common law system must admit.

In the Community context, legal certainty is essential to the working of the internal market and it is important that the judgments of the Court be both comprehensible and workable in all languages and all legal systems. Exclusion of the minority from taking part in the deliberations of the majority could result in a situation where the binding judgment of the majority completely overlooked a problem of language or legal technique for one or more member states.

Again, would a member state feel more or less inclined to respect a Court judgment where the "national judge" dissented, particularly if the dissent were based on the ground that the majority judgment would be unworkable in the national legal system? And would the "powerful dissent" be heard in the same way if the dissentient minority were required to concur in a single document of dissent?

Whatever be the merits of dissents in national legal systems, the merit for the Community system of deliberation *in camera* with no dissents is not that the judgment is "unanimous", but that the points of view of judges representing different legal traditions and languages have been fully taken into account *at all stages* in developing and formulating the judgment. So far as is humanly possible, all the judges taking part should feel comfortable with the judgment as a judgment, even if they disagree with it.

Indeed, the sole juridical (as opposed to political) justification for having one judge of the Court per member state is to ensure that, in cases meriting the attention of the plenary, the legal culture and traditions, and the needs of the legal system and language of every member state are taken into account. The need to maintain a broad spread of languages and traditions is taken into account in the composition of chambers and in the decision whether to assign a particular case to a chamber or retain it before the plenary.

"One Judge per member state" and the size of the plenary

It is suggested that, after enlargement, there should continue to be one judge per member state but that the plenary should be limited to a fixed proportion of the total number, as in Strasbourg. This overlooks two considerations.

First, the Strasbourg system specifically entrenches the concept of the "national judge" by requiring that the judge from the state concerned in the case, or an ad hoc judge nominated by that state, should always sit. The Luxembourg system has always resisted that approach. Is it desirable to adopt it now?

Second, cases in Strasbourg are, by definition, concerned with the treatment of an individual by a particular member state. Cases in Luxembourg have a much wider range. Why, in a reference raising a point that affects all member states, should priority be given to the judge from the member state from which the reference happens to come?

Of course, with 20 or more judges, only a small minority of cases could or should be dealt with by a full plenary. Even at the moment, the number of cases heard by the *Grand Plénum*, as opposed to a *Petit Plénum*, is very small. Finding ways to limit recourse to the *Grand Plénum* would simply involve a development of well-established existing practice.

But there is no logical justification for maintaining the principle of "one judge per member state" and then excluding altogether the right of every judge to sit in the most important and/or sensitive cases. If it is felt that a Court of 20 or more judges is *inherently* unmanageable, now is the time to abandon the principle of "one judge per member state" and fund a new and acceptable way of appointing a Court consisting of fewer judges than there are member states.

Legal culture after enlargement

judges and lawyers in all the existing member states have experienced some degree of culture shock in coming to terms with Community law, and some have still not come to terms with it. The culture shock for judges and lawyers in the new member states will be infinitely greater since many of them will have had little or no experience of legal methods which are second nature to judges and lawyers in the existing member states. There is no point in making proposals for reform without first asking whether those proposals would be understood - let alone made to work in a consistent way - by judges and lawyers with such diverse backgrounds.

Constraints of workload

The problem

Currently, the workload imposes constraints on the working of the Court in two respects, quantitative and qualitative.

First, it is obvious that, if the number of incoming cases rises disproportionately to the number of cases decided, delays can only get longer and, ultimately, the system will break down. The same result is likely to follow if the member states refuse to give the Court the minimum degree of flexibility that it considers essential. On the other hand, given greater flexibility, the Court could be significantly more productive and the Doomsday scenario will be avoided in the short- and probably the medium-term.

Second, however, the character of the workload is changing. The 1992 programme put in place a range of regulations and directives whose provisions are now coming forward for interpretation. Although the pace of Community legislation has slowed down, legislative activity will not come to an end.

Much of the new legislation deals with highly technical questions which, in the member states, would be dealt with by specialist lawyers pleading before specialist courts with specialist judges.¹⁹ Indeed, a large proportion of references now come from such courts. In order properly to interpret the legislative text, the Court must first understand the problem. In this respect, the Court is at a serious disadvantage compared with the higher courts of the member states.

When members of the US Supreme Court recently visited Luxembourg, justice Ginsberg perceptively observed that, although the Court of Justice is not a court of first instance, it is often the "court of first view" or of "first look". The point at issue may never have been the subject of a judgment in any national court at any level. If referred at an early stage (as for other reasons it should have been), the issues and arguments will not have gone through the winnowing process by which irrelevant issues and bad arguments are discarded before a case reaches the higher courts of a member state. The problem may be obvious enough to specialist advocates or to the specialist judge making the reference, but not necessarily to the non-specialist.

Consequently, the Court, which is "specialist" only in the sense that it specialises in Community law, must try to identify the true issues. It must, moreover, ensure that its judgment will be capable of being understood and applied in all the national systems, even where only one or two member states have intervened to explain the problem from their point of view.

In times gone by, the Commission was able to provide the detailed analysis and comparative study which, in ideal circumstances, the Court needs. It can no-longer do so for reasons both of budget and manpower. Nor is it reasonable to expect that the gap can be completely filled by the Advocates General, so the full technical complexity of the questions raised may appear only at the stage of deliberation by the judges.

By the stage of deliberation, it is normally too late, if judgment is not to be delayed indefinitely, to seek further clarification from the parties, the member states or the Commission. Although there may be no fundamental disagreement between the judges as to the result, the precise formulation of the judgment may entail a succession of drafts and deliberations which have to be fitted into an already tight schedule of hearings and deliberations.

The remedy

The increasing technicality of the questions referred is a problem that would be alleviated, to some extent, by the proposal to allow the Rapporteur and Advocate General to ask for additional documents or information while preparing the case.

It is important, too, that referring courts take care (as the Court has asked) to explain the factual and legal background of the questions and the reason why, as Article 234 itself provides, an answer to those questions is necessary to enable the referring court to give judgment. Experience

¹⁹ These include VAT and other forms of indirect taxation; the effect of double taxation conventions; intellectual property rights; regulation of financial services; company law and company accounts; detailed aspects of labour law; and social security.

shows that a well-drafted order for reference promotes written observations that address the real issues and help the Court to find a solution.

The problem would be further alleviated if the Commission's Legal Service were once again given sufficient manpower (and sufficient funds to consult experts where required) in order to provide an overview of the case from a Community perspective.

In that connection, it might be helpful to establish a series of specialist committees (on the lines of the Customs Code Committee) to which technical problems could be referred by the Commission, by national authorities, and possibly also by national courts, for a non-binding opinion. Even if, at the end of the day, it became necessary to refer the question to the Court for a binding ruling, the availability of an expert opinion would provide the Court with the "first look" which, at the moment, it lacks.

In terms of finance and time, this would almost certainly be less costly than the creation of new specialist courts (or specialist chambers of the CFI).

Constraints of time, manpower, budget and technical resources

These constraints interact, as indeed do all the others. As the workload increases in volume and complexity, less time can be devoted to cases that are simple or straightforward in order that more time can be given to important or difficult cases. The more time that is spent by the judges in listening to oral argument, the less time they have for reading files and attending to the finer points of judgments. If there are not enough translators, the procedure cannot go faster and will gradually slow down as the backlog increases²⁰. The Court cannot take advantage of new technologies unless it has the budget to do so, and access to new technologies is limited by the extent to which the software on offer is adapted to a multilingual environment and can operate with the hardware and software currently in use.

Such constraints are inevitable since the Court is not immune from the constraints of the real world. *These constraints will not go away - though they may present themselves in a different form - if the problem is moved elsewhere.*

Thus it is suggested that the productive capacity of the Court will be increased if competence to deal with certain classes of references is transferred to the CFI. That is true - provided that enough additional judges are appointed to the (already overloaded) CFI to deal with the additional cases and that the two courts do not get bogged down in demarcation disputes (for example, "Is this case a social security case or a citizenship case?" - see *Martinez Sala*²¹).

²⁰ By way of illustration, when the Court started issuing judgments in all languages on the day they are pronounced, the delay between final deliberation and judgment was approximately 3 weeks. This has now extended to 5 weeks because of shortage of translators and the increasing number and length of documents to be translated.

²¹ Case 85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

Whichever court has competence, the translation problem will remain the same, as will the other budgetary and technical constraints.

The issue therefore comes to be one of priorities, and to some extent of rationality and a sense of proportion.

For example, as regards the budget, should it really be necessary for the Court to apply to three other institutions²² for authority to transfer funds from the telephone account to the computer account? And is it necessary that the Council and Parliament should control the precise number of translators the Court may employ? The administrative budget of the Court amounts to 2,7 % of the total administrative budget of the European Union²³ and is less than the shared administrative budget of the Economic and Social Committee and the Committee of the Regions.

The general trend in public administration in the member states is towards a greater degree of budgetary autonomy - that is to say, greater power for institutions to allocate their use of resources within a global package, subject to control by the national equivalent of the Court of Auditors. Are the member states and, in this case, the European Parliament prepared to follow this trend, as the Court has asked them to do?

The Court's proposals for greater procedural autonomy and flexibility (discussed above) can be seen in the same light. The present allocation of resources is inefficient because all references are required to jump through the same procedural hoops.- So long as the existing procedural and budgetary straitjackets are in place, it will be impossible to achieve significantly better allocation of time, manpower and other limited resources.

Against that background, four issues merit closer examination, though they can be touched on only briefly in this paper:

- the need for, and the role of, the oral hearing;
- the problems of the translation service;
- access to new technologies; and
- the desirability of moving some of the burden of dealing with preliminary references away from Luxembourg altogether.

The oral hearing

There is a cultural divide between those who value the oral hearing and those who do not. In terms of usefulness, some oral hearings contribute greatly to the judges' understanding of the case and serve to clarify the questions to which an answer is required. Some, however, do not. They amount to little more than a ritual in which the parties (especially, it trust be said, governments)

²² The Council and Parliament must authorise and the Commission must give its opinion.

²³ This amounts to about 0,14 % of the total EU budget.

read out memoranda repeating, sometimes word for word, what has already been said in their written pleadings and summarised in the Report for the Hearing.

At present, the judges spend much of Tuesday and Thursday, and sometimes Wednesday too, at oral hearings²⁴. Time spent at an oral hearing is time not spent in reading files, discussing problems with référendaires or other judges, drafting judgments and deliberations. Even an oral hearing that lasts only from 0930 till 1030 eats substantially into a useful morning's work.

Time spent in unprofitable oral hearings is an unprofitable use of resources which must be balanced against the legitimate concern to preserve the rights of defence. In 1991, the step was taken of allowing the Court to dispense with an oral hearing if no party asked for one²⁵. At the moment, the oral hearing is dispensed with in about 10% of references.

The Court has now proposed to take this a step further, but not to give the Court exclusive discretion to decide whether there should be an oral hearing or not. All that is proposed is that those who ask for an oral hearing should be required to specify why they want it. Both the Court and the other parties could then come to the hearing with a much clearer idea than at present of the purpose of the hearing and the scope of the arguments.

The translation service

For reasons already discussed under linguistic and cultural constraints, the task of a translator (more accurately, a "lawyer-linguist") in the Court of Justice is unique. It involves a familiarity with, and a capacity to convey the nuances of legal language as used, on the one hand, in the Court and, on the other, in 15 member states using 11 languages.

When translating documents coming in to the Court, the translator must not only be familiar with the established conventions for translating legal expressions from one language to another but also be ready to find an adequate translation for an expression that has not been encountered before, often in highly technical fields. When translating an Advocate General's opinion or a judgment of the Court, the translator must be aware of subtle differences in emphasis - for example, between "discrimination", "inequality of treatment" and "difference in treatment". These nuances may shift over time, so it is just as important to know when the conventional translation is not appropriate as to know when it is. There is a constant coming and going between the translators, the members and their référendaires on such points.

Over the past few years, the Court has insistently sought an increase in the number of translators. For the 1999 budget, the Court asked for 40 additional translators. The Council allowed 10 (one less than the number of languages that have to be translated). The Parliament then froze five of those posts, requiring the Court to produce a report with proposals for "stabilising the volume of

²⁴ The position of the Judges differs, in this respect, from that of the Advocates General. An Advocate General has to attend hearings only in cases where he is acting as Advocate General. Judges have to attend all hearings in which they are part of the "formation of judgment".

²⁵ RP, Article 44a.

documents to be translated". The Court produced a report (dated 23 March 1999) demonstrating, not only that the productivity of the Court's translators is already *significantly* higher than that of the other institutions, but also that the volume of documents to be translated is not under the control of the Court and is rising at an alarming rate. In the light of that report, the Court asked for an additional 51 translators. The Council and Parliament have allowed 30 additional posts.

Privatisation, farming-out and greater use of individual freelance translators²⁶ is no answer to the Court's problem. Close and continuous contact between the translators and cabinets would be impossible. But the overriding consideration is the need for confidentiality. The need for confidentiality of draft opinions and judgments is obvious, but many other documents that pass through the Court are of considerable commercial or political sensitivity, and therefore of considerable value if leaked.

In any event, experience shows that it takes a considerable time fully to train a Court translator and that any saving in use of freelancers can be more than offset by the additional costs involved in revision of the text by an experienced translator based in the Court.

Access to new technologies

Access to new technologies is subject, like all other aspects of the Court's activities, to budgetary constraints. Considerable progress has, however, been made on this front, and the Court now has

- a Division specially dedicated to computers and new technologies.

The aim should be, to the greatest extent possible, to move from paper-based to electronic communication and storage, both within the Court and between the Court and the outside world. Three particular constraints have been encountered which are not insuperable, but for which there is no straightforward solution:

- the need to *ensure* confidentiality;
- the need to authenticate documents in terms both of content and date of lodging; and
- the need for multilingual compatibility.

Taken together, these constraints restrict the extent to which the Court can buy in commercially available software. Consequently, special programs have to be written for the Court which requires manpower, time and money.

Looking towards the longer term (particularly in connection with the replacement of the asbestos-ridden Palais), consideration is being given to the use of video-conferencing as a means of access to the Court and of communication between the Court and parties, governments and institutions. In the context of enlargement, with a catchment area potentially extending from Portugal to Estonia and from Ireland to Cyprus, there would be considerable cost savings overall if parties did not need to come to Luxembourg to plead.

²⁶ Approximately 12% of translation is done by freelance translators.

In references, the availability of video links might: make it easier for poorer litigants to be represented. (Particularly in social security cases, the claimant is frequently not represented before the Court and observations are submitted only by governments and institutions.) In complex cases (particularly before the CFI) informal video conferences could be used to clarify the issues and identify the points for discussion at the hearing.

At this stage, video-conferencing seems to present three particular difficulties:

- the need for mutual compatibility of systems since the participants would not only have to be linked to Luxembourg, but linked to one another;
- the need to maintain continuous communication with all participants: if one link went down, the proceedings would have to be suspended until it was restored; and
- the need to make facilities for video-conferencing conveniently available in all the member states (possibly in local courthouses), with staff trained and available to operate the machinery.

These difficulties are again not insuperable, but setting up and working such a system would require a considerable collaborative effort on the part of the institutions, the member states and the European Bars. Up to now, no-one has attempted to put in place a system of electronic filing or video-conferencing on a continent-wide basis, and certainly not in the context of 11 or more languages and 15 or more legal systems. Imagination is required as well as money.

When the difficulties have been overcome, the use of new technologies will go a long way towards meeting the last point to be discussed here: moving work away from Luxembourg.

Moving work away from Luxembourg

Numerous proposals have been made for "renationalising" preliminary references, creating regional courts or, in one way or another, shifting some-of-the burden away from Luxembourg. It should, however, be recognised that moving work away from Luxembourg would not necessarily make the system more efficient or less costly. The linguistic and cultural constraints are unavoidable components of any Community system. To take only one example, it could be inordinately costly to move interpreters round Europe in order that all national governments could be represented in all regional courts.

Given the constraints, it must seriously be considered whether it is not better to concentrate adequate resources in one place and develop the new technologies so as to make that place more accessible and user-friendly. After all, ***the long-term aim of any reform must be to make the system better.*** That will not be achieved by applying mid-twentieth century solutions to twenty-first century problems.

Many of the Court's existing problems can be overcome with the political will of the member states and the goodwill of national courts and legal practitioners. The true challenge, which it is hoped the present Colloquium will address, lies in finding imaginative ways of creating a European legal system worthy of the next Millennium.