Let me begin by saying something about the legislative context of article 177, that is the EC Treaty, the Statute of the Court, and the Rules of Procedure. Then I will say something about how the machine actually works at the moment, and finally go on to recent interpretations.

3.1 The Legislative Context

Article 177 gives the Court of Justice jurisdiction in questions relating to interpretation of the Treaty and the validity of interpretation of acts of the institutions. Such questions can be raised by any court or tribunal of a Member State if it considers a decision on that question necessary to enable it to give judgment. Under the third paragraph of article 177, where there is no judicial remedy against the decision, the national court must, in theory, refer. The early jurisprudence of the Court of Justice gave a wide interpretation to the words "interpretation of the Treaty" and "interpretation and validity of the acts of Institutions". The Court also gave a wide interpretation to the notion of "court or tribunal" in a Member State, and it took a strict view of the obligation to refer, coupled, on its part, with an unquestioning acceptance of the decision to refer. Furthermore, since many Member States' courts asked questions which were strictly speaking impermissible, asking the Court of Justice to decide the cases before them rather than to state the law, the Court developed the practice of reformulating the questions in order to avoid answering directly the question which was for the national court to decide.

All this was based on two underlying concerns, sometimes made explicit: first, that there should be uniform interpretation and application of the Treaty rules (what in British sporting parlance is called the "level playing-field" between Member States) and second, judicial co-operation. At least in theory, the idea is that the Court of Justice states what the law is for all the Member States at all moments of time. The statement of the law is an abstract statement, not dependent upon the facts of the case at issue, although, as the Court has repeatedly said, the facts help to define the issue.

Passing to the Statute of the Court, which of course is a Protocol to the Treaty and amendable only by the procedure requiring unanimity among the Member States, there are two points I need to draw attention to. First, the procedure falls into two parts, written and oral, and the oral procedure cannot start until the written procedure is complete. Second, article 20 of the Statute envisages that the national court which makes the reference suspends its proceedings at that moment. In some Member States the consequence of that provision is that the referring court cannot do anything further until the answer comes back from Luxembourg.

The decision to refer has to be notified to the parties, the Member States, the Commission, and, where it is also involved, the Council. Parties have two months within which to submit observations, and this time limit is prescribed in the Statute.
and is not extendable. The texts make no provision for written replies to the observations of any other party.

The Rules of Procedure require notification to each Member State in the official language of that state. That means that every reference must be translated into eight other languages before it is notified. If one considers, from looking at the shelves of one's own library and how the European Court Reports have grown, the volume of translation which is necessary, bearing in mind that the corps of translators has not grown proportionally with the volume of ECR, one will realise that getting references translated into eight languages within a reasonable time necessarily delays the production of the ECR Reports amongst other things.

Article 104 of the Rules of Procedure provides that where the question is manifestly identical to a previous one, the Court may rule by order at that point, and (a new provision) the Court may also dispense with the oral hearing if the parties agree. The Court can, under article 92 of the Rules, reject the case by order, where it is clear that it has no jurisdiction, or that a case is manifestly inadmissible.

The consequence of all this is that we are operating within a fairly rigid procedural framework which cannot be changed without the agreement of all of the Member States, and, in practice, of the Commission. It takes months, or even years, to make such changes in the Rules, even when they are non-controversial. There is no provision for any coming and going during the procedure with the national court, which is assumed to have suspended its procedure once the reference is made.

### 3.2 The Procedure in Practice

How does the procedure work? The order arrives from the national court at the Registry of the Court. The Registry, and, if necessary, the President's cabinet, check that the reference is in order and check that this is not a question that can be answered simply by referring to a previous judgment. (That can quite easily happen when a Member State court does not know of a recent decision on the same point.) Once that stage is over, the reference is sent for translation into the other eight languages. The translators try to delimit the volume of translation to be done by omitting what they consider to be not very important, but there have been examples of translators omitting the facts when they considered them to be unimportant. In such an instance we have to go back and start again.

When the translations are complete, the reference is notified and published and that - the moment of receipt of the notification by the party or the Member State - is when the clock starts running for observations.

At this stage we have probably consumed two months already. The case is meanwhile assigned to a Judge Rapporteur and an Advocate General, and at the moment, in practice, they take no action unless some procedural question is raised or, for example, there is a request for legal aid. As I said, the parties and Member States have two months to submit observations plus the extension for distance - ten days in the case of the United Kingdom. Once the observations are in, then they have to be translated into the working language of the Court, which is currently French, unless of course the language of the case is French. The Institutions provide their own translations, but sometimes take longer than the Court translators to produce them. Again, the speed of translation is a function of the volume of material to be translated. The consequence is that we are extremely lucky to be able to start work within six months of the start time, or the moment when the reference leaves the national court. (I think it is advisable to forget the good old days, the days when it was possible for the Court to produce an answer in six months, because that is no longer realistic given the volume of material going through.)
Andenas - Article 177 References to the European Court

Not all parties or Member States will in fact lodge observations and there is, as I said, no right of reply.

May I, at this point, make two observations in relation to things which may be said later. It is suggested, and is being considered, that there should be an intervention of the Judge Rapporteur or the Advocate General, or both, at an early stage to clarify the issues and to pick up any points that are obscure. It is also suggested that there should be a right of reply in writing. Intervention of the Judge Rapporteur or the Advocate General at an early stage involves, in the first place, language skills, if the language of the case is one which the Judge or the Advocate General is not in a position to cope with within his cabinet. By fairly judicious selection my cabinet is able to deal, I think, with six official languages and to check a point in any of them, but it cannot be assumed that every cabinet is in a position to do that. Secondly, in either case you would add to the delay.

Once the observations are available in translation, the Judge Rapporteur starts work (that means in effect that his legal secretaries start work, as far as possible in collaboration with the legal secretaries of the Advocate General concerned). The Judge Rapporteur presents to the Court his preliminary report, in which he says what the case is about. Is it ready for hearing? By whom? The full Court? By what is known as the "small plenum", a court of nine? By a chamber of five or a chamber of three? How long will the hearing last? Are there any measures of enquiry necessary? Are there any documents that are needed? Are there any questions which should be put for written or oral reply?

The current deadline for producing the preliminary report, after all the translations are in, is two months. That may seem a long time but remember what is currently the caseload of the judge's chambers. In a busy week a judge may be in three to five hearings, five to eight deliberations, and at the beginning of every week there is the meeting to consider the preliminary reports, which involves considering plus or minus ten cases per week. That means to say that any judge must have a fairly close knowledge of somewhere in the region of twelve cases plus the ten cases in the administrative meeting. That does not include committee meetings, speaking to visitors, or indeed preparing for seminars on Saturday morning!

As regards the range of work, agriculture now occupies plus or minus ten percent of the time, common customs tariffs (article 30 and article 36) about another plus or minus ten percent. There is a huge amount of work of interpretation of detailed social security legislation, company law legislation, VAT, taxation, and the growing volume of 1992 Internal Market legislation. The volume and range of work is, I think, more like that of the Civil Division of the Court of Appeal, and it is substantially more than the House of Lords would deal with.

If we assume that the Judge Rapporteur gets his report in within two months, and then we assume that you have got to allow the parties six to eight weeks to prepare for the hearing, we are already plus or minus ten months from start time to the point of the hearing. The hearing may or may not be informative, it may or may not define the issues, it may or may not suggest the proper solution, and quite often it does not. On occasions you find that the party that could have given you the information you need does not turn up. Even, rather surprisingly, the Member State concerned in a major case simply may not send anybody to the hearing. Perhaps this is because they do not want to be asked those questions that they do not wish to answer.

The Court then goes away for the Advocate General to give his opinion, and of course, that has to be translated if his own language is not French. It is at this point, when the Opinion comes in, that the Court starts the process of decision. The Judge Rapporteur tells the Court in broad terms whether he intends to follow the
Edward - Recent Interpretations of Article 177

Advocate General and he may submit a draft. He may say that he disagrees with the Advocate General and wishes to discuss the case. He may instead say that "This case is of such fundamental importance that, whether or not we follow the Advocate General, we should discuss it first". Some cases go through on the nod, and therefore go through very quickly.

In recent times the Court has, in a few cases, simply referred to the Opinion of the Advocate General as the basis for the reasoning, so that the reasoning of the decision is simply the Opinion of the Advocate General. However, this is possible only when the Advocate General's Opinion is clear and his reasoning is acceptable as such. One has to remember that the Court of Justice, like every other Institution of the Community, is bound to reason its decisions. So, if the Court is going to adopt the reasoning of the Advocate General, it must be in a position to adopt it entirely.

Cases of any difficulty or complexity will be debated by the Court in deliberation - sometimes heatedly, but always, in my experience, in a good faith attempt to reach agreement. If, but only if, disagreement has become clear there will be a vote. But the minority still takes part in the process of decision and frequently points out flaws in the reasoning suggested by the majority when it comes back in draft form. The Judge Rapporteur is basically responsible for the judgment and may have to do further, substantial research on the facts or on the law. This may be due to the lacunae in the procedure and the fact that all the issues in the case may not have been brought out for perfectly sound reasons. Remember, the Court is trying to state the law for all the Member States in an abstract way. For example, yesterday at lunchtime I had to go down to the Registry, find the original file in a case and do some grubbing about, in order to find out a particular point of fact which did not appear in any of the written observations.

At this point, may I say, that whatever the merits of dissenting opinions, they would not, in my opinion, increase the speed of reaction and they could produce a serious delay. I merely state that. I am not saying that I am in favour of them or not, but the prospect of greater delay is a fact, in my opinion.

Currently a difficult case may be in deliberation for months. In one recent case I think there were four hours of discussion before it was clear that it had to come to a vote. That was before any draft had even been submitted. The speed of production may be a function of the ingenuity of the Judge Rapporteur, of his capacity to draft in French, and of the availability of a lecteur d'arrêts - "Reader of Judgments" - who makes sure that one's franglais is turned into something which is quite unrecognisable, and actually bears some resemblance to academic French. Much depends, as I say, on the completeness and effectiveness of the oral submissions, but the Court cannot be limited by the submissions because, of course, it is declaring the law for every Member State.

Once the judgment is agreed, it then has to be translated into the language of the case and delivered. The minimum, I would suspect, is about four months from presentation of the preliminary report to pronouncing the judgment. In other words, you are talking about fourteen months minimum under current conditions.
3.3 Recent Cases

Turning to recent cases, I would like to begin with Holdek in 1982. Remember that Holdek refers to Foglia v Novello: the national court must explain on what grounds it considers an answer to its question to be necessary. The need to give an interpretation, which is of use to the national court, makes it essential to define the legal context in which the interpretation is to be placed. Also, as Irish Creameries shows, it is convenient for the facts to be established and for questions of purely national law to be settled at the time when the reference is made. That is the basic thinking of the Court and it has not changed.

The case of Meiicke, decided on 16 July 1993, is really like Foglia v Novello. Dr Meiicke had a particular bee in his bonnet about some provisions relating to the capitalisation of companies. He had written, I think, a book or at least a very long article on the subject. He managed to persuade a court in Germany to refer his "bee" to the Court of Justice. An old judge in the Court of Session said that a court is neither a debating club nor a consumer advice bureau, and that is what Meiicke effectively says. In the case of Lorenco Dias, in which judgment was given the same day, the Court was presented by a Portuguese tribunal with an enormous set of examination questions on the legality of the Portuguese system of vehicle taxation.

A much more dramatic and contentious step, was taken in Telemarsicabruzzo on 26 January 1994. In that case there had already been a very long procedure and an Opinion from the Advocate General, but in the end the Court refused to answer the questions put before it. By way of background, it should be explained that in the first place there was a challenge by the Member State concerned, namely Italy, to the competence of the Court "a quo". The Court "a quo" was the Vice Preote or Frascati, who is, I suppose one might say, rather like the Stipendiary Magistrate in Chelmsford. The complainants had already failed in an administrative challenge, the circumstances and range of the questions were suspiciously wide, and the form of the question was impermissible: it asked whether the Italian system of allocation of frequencies for television was legal. It was an example of a phenomenon, which has not been unknown all the way through, and is perhaps growing, namely of a judge fairly low down in the hierarchy, putting questions which raise issues of enormous political and economic importance. There is nothing wrong with that. The case of Costa v ENEL, after all, came from the Giudice Conciliatore in Milan. But the question, nonetheless, is posed, how should the Court react?

Let us assume that there has been an application for judicial review of the allocation of television frequencies to the High Court in England. The High Court refuses judicial review in a peremptory fashion and the prospective television company concerned then goes off to the Stipendiary Magistrate in Chelmsford and says to him "You refer a question to Luxembourg on this!" and without reference to whether he has competence or not, and without explaining the facts of the case, or

any of the context, he then sends an examination paper to Luxembourg. Do you think, or do you not, that the Court is bound to answer such an examination paper? That was the issue. Essentially, it was really the same point as in Foglia v Novello. A similar situation arose in the case of Banchero on 19 March 1994, where a similar point was put by a judge fairly low down in the Italian hierarchy, about the validity of the Italian state tobacco monopoly.

Two other cases to mention: Corblau, 31 March 1993, where the question was, was the Directeur des Contributions of Luxembourg a court or tribunal? He has a kind of appellate function in relation to taxation questions, but it was held that he was not a court or tribunal and therefore not entitled to refer a question on the grounds that a court or tribunal must be a third party relationship to the body which took the decision at issue. A further question as to the existence of a court or tribunal, was when the liquidator of Monin put a series of questions about the import of Japanese cars into France. The Court refused the reference on the same grounds as Banchero with deciding whether the liquidator was a court or tribunal.

Now what is the essence of the Court's position as illustrated by these recent cases? It is not, I think, to seek to impose new rules, or to abandon the principle of judicial co-operation. It should be borne in mind that there is an active campaign to cut down the right of lower courts to refer, and to limit ordinary article 177 references in the same way as references under the Brussels Convention, that is, to limit the right to make references to superior courts. The pretext is that this would relieve the caseload of the Court of Justice. It is for you to decide whether that would be good for the Member States and good for the enforcement of the Internal Market.

What then should the national court do? What the Court of Justice really needs is, as has already been said many times, an explanation of the factual context and an explanation of the legal context in which the case arises. It is not necessary that the facts be established, because everybody knows that a point of Community law can be decisive, and one simply has to put the hypothesis of fact. But one does have to know what the facts might be in order to define what the issue is. And this is particularly so where the context of a case is, for example, a jury case where the reference is made by an appeal court, where the decision on fact in the court below has been a jury decision.

Essentially the issue is, going right back to the beginning, judicial co-operation, and that really involves a degree of mutual trust and respect between the Court of Justice on the one hand, and the national court on the other. I do not think (at least I hope not) that Telemaricabruzzo and other cases of that type have in any way damaged the relationship between the Court of Justice and the courts of the Member States. They have simply underlined that one cannot blindly accept every reference without any enquiry as to the circumstances in which the reference is made.