Chapter 19: The Court of Justice

Introduction

19-1 This chapter covers:
- the general role of the Court of Justice,
- the sources of the laws governing the Court's composition, jurisdiction and procedure,
- the composition of the Court of Justice,
- the jurisdiction of the Court of Justice,
- the procedure of the Court of Justice and
- the enforcement of the judgments of the Court of Justice.

The general role of the Court of Justice

19-2 On the face of it, the definition in the Treaty of the Court's role is disarmingly simple. It is the duty of the Court to "ensure that in the interpretation and application of this Treaty the law is observed".[1] The definition does, however, give rise to some uncertainties. Ensuring that the law is observed is closely akin to the enforcement role of the Commission; and, although the Commission is sometimes referred to as "the guardian of the Treaty", this is in some respects a better description of the Court of Justice. Yet, as the enforcement provisions, discussed below[2], make clear, the Court's powers are somewhat limited. Again, the definition does not settle whether ensuring that the law is observed includes a presumption that the Court of Justice has some kind of inherent jurisdiction. It does not: it has only such jurisdiction as the Treaty allows, though it is reasonable for the Court to exercise its powers in such a way as to enable it to fulfil the general role envisaged under the Treaty.[3]

19-3 Nothing in the Treaty justifies the supposition that the Court is a politically oriented institution. Some of its judgments have had political reactions.[4] Some of its judgments have hinted, though only in the most circumspect terms, at the need for political action.[5] Some of its judgments have had wider effects than many political acts and have given rise to changes in political policy. [6] But these fall some way short of the Court exercising anything resembling a political role. At the same time, in addition to acting as a final court on matters of substantive law, it unquestionably acts also as the European Community's constitutional court. The constitution is for the most part contained in the Treaty; and the Court is responsible for giving rulings on the Treaty. It follows that the Court is, subject to specific exceptions[7], the arbiter of the European Union's constitutional law.

19-4 References in this chapter to the Court of Justice include the Court of First Instance, unless either the context or an express comment distinguishes the two. The Court of First Instance is "attached" to the Court of Justice.[8]

The sources of the laws governing the Court's composition, jurisdiction and procedure

19-5 Four sources of law govern the composition, jurisdiction and procedure of the Court of Justice:
- the Articles of the Treaties[9],
- the Statute of the Court[10],

- the Rules of Procedure of the Court[11] and
- certain Conventions concluded among the Member States.[12]

The composition of the Court of Justice

19-5 Fifteen Judges form the Court of Justice.[13] A further fifteen form the Court of First Instance.[14] The work of the two Courts is helped by eight (or, from 1995 to 2000, nine) Advocates-General.[15] If the Court of Justice so requests, the Council may, acting unanimously, increase the number of Judges and Advocates-General and make the necessary adjustments to the provisions on consequential matters.[16]

19-6 Judges and Advocates-General are chosen from persons
- whose independence is beyond doubt and
- who either
    - possess the qualifications required for appointment to the highest judicial offices in their respective countries or
    - are "jurisconsults" of recognised competence.

They are appointed by common accord of the governments of the Member States for a term of six years. Every three years there is a partial replacement of the Judges. Eight and seven Judges are replaced alternately. Every three years there is a partial replacement of the Advocates-General. Four Advocates-General are replaced on each occasion. Retiring Judges and Advocates-General are eligible for reappointment. The Judges elect the President of the Court of Justice from among their number for a term of three years; he may be re-elected.[17]

19-7 As a genera] rule, the Court of Justice sits in plenary session. However, it may form chambers, each consisting of three, five or seven Judges, either to undertake certain preparatory inquiries or to adjudicate on particular categories of cases in accordance with rules laid down for these purposes.[18] The Court of Justice sits in plenary session when a Member State or a Community institution is a party to the proceedings and so requests.[19]

19-8 It is the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, to help the Court in the performance of the general task[20] assigned to it.[21] These reasoned submissions are referred to as the Advocate-General's Opinion, which is delivered at the conclusion of the oral hearing of a case and before the judgment of the Court. In form, the Opinions delivered by Advocates-General are often more detailed, explanatory and individual than the Court's judgments. The Court does not have to follow either the Advocate-General's proposed ruling or the reasons for it[22]; but, whether the Opinion is followed by the Court or not, it often has strong "persuasive value", according to the quality of its reasoning.[23]

19-9 Responsibility for the conduct of the Court's proceedings is entrusted to a Registrar, who is appointed by the Court, which is required to lay down the rules governing the Registrar's service.[24] There are deputy registrars and staff. There are also legal secretaries who are attached to Judges and Advocates-General and who help in the research for and drafting of judgments. The staff of the Court of Justice includes librarians, researchers, translators, interpreters and others, including a helpful and efficient public relations department, from which many Court documents are available.

The jurisdiction of the Court of Justice: types of action

19-10 Five types of action fall within the jurisdiction of the Court of Justice:

- actions against Member States for infringement of the Treaty,
- legality actions against certain Institutions and other bodies,
- actions against certain Institutions and the European Central Bank for failure to act,
- requests and references for a "preliminary ruling" and
- miscellaneous actions.

Each of these is discussed below. The only type of action which the Court of First Instance is expressly excluded from hearing, under the Treaty, is requests and references for a preliminary ruling.[25] However, at the request of the Court of Justice and after consulting the European Parliament and the Commission, the Council, acting unanimously, determines the classes of action or proceeding for which the Court of First Instance has jurisdiction.[26]

19-11 Actions against Member States for failure to fulfil an obligation under the Treaty may be taken only by the Commission[27] or by another Member State.[28] In either case, the proceedings are subject to the Commission delivering a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.[29] Where the Commission is the originator of the proceedings, only if the State concerned does not comply with the opinion within the period laid down by the Commission, may the latter bring the matter before the Court of Justice.[30] Where a Member State is the originator of the proceedings, it must first bring the matter before the Commission. The Commission must then deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. However, if the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion does not prevent the matter from being brought before the Court of Justice.[31]

19-12 One of the most frequent examples of action by the Commission against a Member State for its failure to fulfil its obligations under the Treaty arises when a Member State fails to implement, usually within a given time, a Community Directive, whether issued by the Council or by the Commission. There is a more or less standard wording for the Court's ruling in cases of this kind:

> By failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with [title of Directive] on [subject of Directive], the [Member State] has failed to fulfil its obligations under Article [number of Article] of that Directive.[32]

The obligations may, however, arise not only in respect of Directives but also in respect of Regulations and other instruments, provisions of the Treaty itself or judgments of the Court.

19-13 If the Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaty, the State is required to take the necessary measures to comply with the judgment of the Court of Justice.[33] If the Commission considers that the Member State concerned has not taken such measures it must, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.[34] If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing, the Commission must specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.[35] If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty

payment on it.[36] For example, in a case in which Greece had failed to implement fully the terms of a Council Directive on toxic waste[37] and to comply with a Court judgment requiring Greece to comply with the Directive, the Court ordered

> the Hellenic Republic to pay to the Commission of the European Communities, into the account "EC Own Resources"[38], a penalty payment of €20,000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91 from delivery of the present judgment until the judgment in Case C-45/91 has been complied with.[39]

This penalty procedure does not affect the rights of other Member States to take action.[40] Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.[41]

19-14 In legality actions, the Court of Justice has power to review the legality of

- acts adopted jointly by the European Parliament and the Council,
- acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and
- acts of the European Parliament intended to produce legal effects vis-a-vis third parties.[42]

19-15 For this purpose, the Court of Justice has jurisdiction in actions brought by

- a Member State,
- the Council,
- the Commission[43] and, for the purpose of protecting their prerogatives,
- the European Parliament,
- the Court of Auditors and
- the European Central Bank.[44]

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.[45]

19-16 Legality actions may be brought on the following grounds[46]:

- lack of competence[47] *(ultra vires)*,
- infringement of an essential procedural requirement[48],
- infringement of the Treaty[49] or of any rule of law relating to its application[50] or
- misuse of powers.[51]

The proceedings taken under the provisions on legality actions must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.[52] Notwithstanding the expiry of this period, any party may, in proceedings in which a regulation adopted jointly by the Parliament and the Council, or a regulation of the Council, of the Commission, or of the European Central Bank is at issue, plead the grounds specified above to invoke before the Court of Justice the inapplicability of that regulation.[53] If the action is well founded, the Court of Justice declares the act concerned to be void.[54] In the case of a regulation, however, the Court of Justice may, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.[55]

19-17 One of the grounds for a legality action is an infringement of the Treaty or of any rule of law relating

to its application.[56] The latter part of this ground calls for some explanation. In its case-law, the Court of Justice has applied a number of concepts derived from national laws, as well as from the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, pleas before the Court may be admissible when they are based on any of the following rules of law:

- the principle of proportionality (that is, the principle that the effects of a legal measure or a legal remedy should be proportionate to the seriousness of the matters which the measure or remedy seeks to address)[57];
- the principle of legal certainty (that is, the principle that parties should be entitled to know with a reasonable degree of certainty how the law will be interpreted and applied)[58];
- the principle of legitimate expectations (that is, the principle that parties should be entitled to base their actions and their financial and other calculations on a reasonable expectation of the way in which the law operates)[59] and
- respect for basic human rights (that is, the principle that the specific laws in any given area should conform with such basic rights as those of being heard in contentious proceedings, of being compensated for dispossession, and so on).[60]

Although the Court of Justice has only an indirect jurisdiction over the European Union's formal commitment to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms[61], it has on many occasions and in a wide variety of cases treated those provisions as part of the Member States' laws and hence as a part of Community law. In an agricultural case involving property rights, the Court put the matter in the following way:

> The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights.[62]

19-18 In actions alleging that, in infringement of the Treaty, an Institution or other body has failed to act, the Court of Justice has jurisdiction in cases against:

- the European Parliament,
- the Council,
- the Commission and
- the European Central Bank.[63]

19-19 Actions for failure to act may be taken by:

- the Member States,
- the other Institutions of the Community,
- the European Central Bank (in the areas falling within its competence) and
- natural or legal persons (by way of a complaint that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion).[64]

An action for failure to act is admissible only if the institution concerned has first been called upon to act. if, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.[65]

19-20 Where an act has been declared void[66] or where a failure to act has been declared contrary to the Treaty, the Institution or Institutions, or the European Central Bank, responsible for that act or failure to act is required to take the necessary measures to comply with the judgment of the Court of Justice.[67] This obligation does not affect any obligation which may result from the Community's non-contractual liabilities.[68]

19-21 Where there is a request or a reference from a Member State's court or tribunal, the Court of Justice has jurisdiction to give "preliminary rulings" on:

- the interpretation of the Treaty;
- the validity and interpretation of acts of the institutions of the Community and of the European Central Bank;
- the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.[69]

Requests arise where such a question is raised before any court or tribunal of a Member State and that court or tribunal, if it considers that a decision on the question is necessary to enable it to give judgment, requests the Court of Justice to give a ruling thereon.[70] References arise where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law; in a case of this kind that court or tribunal is required to bring the matter before the Court of Justice.[71] It is not within the jurisdiction of the Court of First Instance to give preliminary rulings.[72]

19-22 Preliminary rulings account for a large majority of the judgments delivered by the Court of Justice[73] and for a substantial amount of important decisions in the development of Community law.[74] Typically, a national court formulates one or more legal questions for the Court of Justice, which gives a judgment in the form of a general ruling on the point of law, leaving it to the national court to apply the ruling to the circumstances of the particular case. It is not therefore an appellate procedure. At the same time, the ruling itself is legally binding on the national court.[75]

19-23 Although the preliminary ruling procedure generally operates well, apart from the delays which it inevitably causes to the conclusion of the case[76], it carries some problems. One of these problems concerns the identification of the courts and tribunals entitled to make a request.[77] Another concerns the framing of the questions for determination by the Court of Justice.[78] A third problem concerns the possible difficulty involved in applying the ruling of the Court of Justice to the case in the national court and the possible need to come back to the Court of Justice for clarification.[79]

19-24 *Stare decisis* is a further problem. While the Court of Justice recognises the need for legal certainty, it is not formally committed to the principle of *stare decisis;* and there are cases to show that the Court of Justice may change its mind completely.[80]

19-25 Miscellaneous actions fall within the jurisdiction of the Court of Justice:

- disputes relating to compensation for damage in connection with the Community's non-contractual liabilities[81];
- any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment[82];
- disputes concerning:
  - the fulfilment by Member States of obligations under the Statute of the European Investment Bank[83];
  - measures adopted by the Board of Governors of the European Investment Bank[84]; - measures adopted by the Board of Directors of the European Investment Bank[85];
  - the fulfilment by national central banks of obligations under this Treaty and the Statute of the European System of Central Banks[86];

- matters pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract is governed by public or private law[87];
- any dispute between Member States which relates to the subject matter of the Treaty if the dispute is submitted to it under a special agreement between the parties[88];
- appeals against the decisions of the Boards of Appeals set up in connection with the Community Trade Mark and Community Plant Variety Rights[89]; and
- interpretation of the Convention on documents in civil or commercial matters.[90]

Except where jurisdiction is conferred on the Court of Justice by the Treaty, disputes to which the Community is a party are not on that ground excluded from the jurisdiction of the courts or tribunals of the Member States.[91]

19-26 Where an agreement is envisaged between the Community and one or more states or international organisations, it is open to the Council, the Commission or a Member State to obtain the opinion of the Court of Justice as to whether the agreement is compatible with the provisions of the Treaty.[92] Where the opinion of the Court of Justice is adverse, the agreement may come into force only if the Treaty is amended.[93]

19-27 Appeals lie from the Court of First Instance to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute.[94]

19-28 Jurisdiction to hear and determine at first instance, subject to the right of appeal referred to above, certain classes of action or proceeding, is conferred on a Court of First Instance attached to the Court of Justice. Unless the Council decides otherwise, the provisions of the Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statute of the Court of Justice, apply to the Court of First Instance.[95]

19-29 Classes of action or proceeding which may be heard by the Court of First Instance are determined by the Council.[96] At present, these include:
- actions brought by natural or legal persons in respect of
  - the legality of an act of an Institution[97],
  - an Institution's failure to act[98],
  - claims for damages arising from the Community's non-contractual liabilities[99],
- staff cases[100] and
- appeals from the Boards of Appeal of the Office for Harmonisation of the Internal Market.[101]

The procedure of the Court of Justice

19-30 Three general rules of procedure are laid down in the Treaty itself:
- that actions brought before the Court of Justice do not have suspensory effect[102];
- that the Court of Justice may in any cases before it prescribe any necessary interim measures[103]; and
- that the Court of Justice must adopt its Rules of Procedure, which require the unanimous approval of the Council.[104]

19-31 Procedure before the Court of Justice is governed by the Statute of the Court of Justice and by the respective Rules of Procedure of the Court of Justice and the Court of First Instance. The salient features of the rules are:

- the written procedure (the filing of an application with the Registrar, the defence, the reply and the rejoinder)[105],
- the nomination by the President of the Court of a reporting judge and the nomination by the Advocate-General of an advocate-general for the case,
- the time limits, laid down in the Treaty and the Statute,
- the reporting judge's preliminary report, on the basis of which the Court decides on assignment to chambers or a plenary and whether inquiries should be conducted[106],
- the oral hearing, which may be dispensed with if the parties agree[107],
- the Advocate-General's Opinion, which may be delivered at any time between the end of the hearing and a date several weeks afterwards, and
- the judgment, which is collegiate (there are no dissenting judgments).

The working language of the Court of Justice is French.

The enforcement of the judgments of the Court of Justice

19-32 Enforcement of the judgments of the Court of Justice is governed by the rules of civil procedure in force in the state in whose territory it is carried out.[108] Enforcement of the judgments of the Court of Justice against Member States is governed by the procedure already described above. However, the procedure does not apply to legal consequences of Member States' infringements; and the Court of Justice has no residual power to supplement the procedure. As the Court of Justice itself put it:

> Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.[109]

All the Court of Justice can reasonably do is to affirm the right of individuals prejudiced by a State's infringement:

> the responsibility of the State for damage caused to an individual by the State's infringement of Community law is inherent in the Treaty system. The obligation on the part of the Member States to make restitution for this damage is also based on [the provision] of the Treaty, under which the Member States are obliged to take any and all general or individual measures capable of ensuring performance of the obligations incumbent on them under Community law. These obligations include the obligation to rectify the unlawful consequences of an infringement of Community law.[110]

1. Article 220 (formerly 164), EC Treaty.

2. Paragraph 19-32.

3. For example, "legislation must be interpreted by reference to its purpose": Case T-102/96, *Gencor Ltd v Commission of the European Communities*, paragraph 149, and the cases cited in that paragraph.

4. As in the British reactions to Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd.*

5. As in Case 119/75, *Terrapin (Overseas) Ltd v Terranova Industrie.*

6. For example, Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung fuer Branntwein* (the Cassis de Dijon case).

7. For example, under Article 46 (formerly L), EU Treaty. There is a fine dividing-line between the Court's jurisdiction in certain areas covered by the EU Treaty and certain areas covered by the EC Treaty, as was shown in Case C-170/96, *Commission of the European Communities v Council of the European Union.*

8. Article 225 (formerly 168a), EC Treaty. See paragraph 19-28.

9. Principally, Articles 220 to 245 (formerly 164 to 188), EC Treaty and Article 46 (formerly L), EU Treaty; on the latter, see paragraph 9-2 above and the notes thereto.

10. Article 245 (formerly 188), first and second paragraphs, EC Treaty.

11. Ibid, third paragraph.

12. In particular, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels, 27 September, 1968; Protocol on Jurisdiction of the Court of Justice, signed in Luxembourg, 3 June 1971 and subsequently amended.

13. Article 221 (formerly 165), first paragraph, EC Treaty.

14. Article 225(2) (formerly 168a(2)), EC Treaty.

15. Article 222 (formerly 166), first paragraph, EC Treaty. For certain cases before the Court of First Instance, a judge can be nominated to carry out the functions of an Advocate-General: Article 18, Rules of Procedure of the Court of First Instance.

16. Articles 221 (formerly 165), fourth paragraph, and 222 (formerly 166), third paragraph, EC Treaty.

17. Article 223 (formerly 167), EC Treaty.

18. Article 221 (formerly 165), second paragraph, EC Treaty. In the Court of First Instance, chambers are composed of three or five judges: Article 10, Rules of Procedure of the Court of First Instance.

19. Ibid, third paragraph.

20. That is, under Article 220 (formerly 164), EC Treaty. See paragraph 19-2 above.

21. Article 222 (formerly 166), second paragraph, EC Treaty.

22. For example, in Case 158/86, *Warner Brothers v Christiansen,* the Court took a view diametrically opposed to that of Advocate-General Mancini.

23. To many, the Opinion of Advocate-General Fennelly, in case C-267/95, *Merck & Co v Primecrown Ltd,* was more persuasive than the judgment of the Court.

24. Article 224 (formerly 168), EC Treaty.

25. Article 225(1) (formerly 168a(1)), EC Treaty.

26. A series of Council Decisions (EEC/591/88, EEC/50/93, EC/149/94) has extended the jurisdiction to the point at which most types of action by natural and legal persons can be taken.

27. Article 226 (formerly 169), first paragraph, EC Treaty.

28. Article 227 (formerly 170), first paragraph, EC Treaty.

29. Article 226 (formerly 169), first paragraph, EC Treaty.

30. Article 226 (formerly 169), second paragraph, EC Treaty.

31. Article 227 (formerly 170), second, third and fourth paragraphs, EC Treaty.

32. This wording is taken from Case C-285/97, *Commission of the European Communities v Portuguese Republic.* The reference to "laws, regulations and administrative provisions" is based on the words used in Articles 94 and 95 (formerly 100 and 100a), EC Treaty (which differ slightly).

33. Article 228(1) (formerly 171(1)), EC Treaty.

34. Article 228(2) (formerly 171(2)), first paragraph, EC Treaty.

35. Ibid, second paragraph

36. Ibid, third paragraph.

37. Council Directive EEC/442/75, in conjunction with Council Directive EEC/319/78.

38. See paragraph 24-2.

39. Case C-387/97, *Commission v Hellenic Republic*.

40. Under Article 227 (formerly 170), EC Treaty; see paragraph 19-11 above. See Article 228(2) (formerly 171(2)), fourth paragraph, EC Treaty.

41. Article 229 (formerly 172), EC Treaty.

42. Article 230 (formerly 173), first paragraph, EC Treaty. Legality actions include actions challenging the legal basis of a measure. There have been many actions of this type. One of the most recent was Case C-36/98, *Kingdom of Spain v Council*, in which Spain challenged the legal basis of a Council Decision approving the Convention on the use of the River Danube.

43. Ibid, second paragraph.

44. Ibid, third paragraph: "under the same conditions".

45. Ibid, fourth paragraph. For a leading case on a challenge by a private party to a regulation, see Case C-309/89, *Codorniu SA v Council.* See also Case 386/96P, *Dreyfus v Commission*; and Case T-69/99, *Danish Satellite TV A/S v Commission*.

46. Article 230 (formerly 173), second paragraph, EC Treaty.

47. For example, the Commission's lack of power to conclude an agreement with the United States anti-trust authorities: Case C-327/91, *France v Commission of the European Communities.* See the Commission's XXIVth Report on Competition Policy, page 261, for an interesting note on the consequences of this judgment.

48. Such as a failure to state adequately the reasons for the instrument in question, as required by Article 253 (formerly 190), EC Treaty. This is a common cause of action under the general heading in question. For an important example, see Case T-371/94, *British Airways v Commission of the European Communities*.

49. Most actions falling within this category arise from secondary legislation based on provisions of the Treaty relating to Agriculture, Competition, Social Funds, Transport and so on.

50. See paragraph 19-17 below.

51. "Often pleaded but seldom proved": Advocate-General Warner in Case 105/75, *Giuffrida v*

Council. In that case the plea was proved. In a more recent case, it was pleaded but not proved: Case T-199/96, *Laboratoires Pharmaceutiques Bergaderm SA v Commission of the European Communities.* Misuse of powers is defined by the Court of Justice as "the adoption by a Community Institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case": C-48/96P, *Windpark Groothusen GmbH & Co Betriebs KG v Commission of the European Communities.*

52. Article 230 (formerly 173), fifth paragraph, EC Treaty.

53. Article 241 (formerly 184), EC Treaty.

54. Article 231 (formerly 174), first paragraph, EC Treaty.

55. Ibid, second paragraph.

56. See the third indent of paragraph 19-16 above.

57. In Case 122/78, *Buitoni v Fonds d'Orientation et de Regularisation des Marches Agricoles,* which was a request for a preliminary ruling (see paragraph 19-21 below), the proportionality plea succeeded. But in two legality cases, Case C-84/94, *United Kingdom v Council,* and Case 359/92, *Germany v Council,* the plea failed. The United Kingdom case included an important discussion of the principle of proportionality, as well as a discussion of the relationship between proportionality and subsidiarity. See, further, Chapter 25.

58. In a tax case, the Court said that "the principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what his rights and obligations are and may take steps accordingly": Case 169/80, *Administration des Douanes v Gondrand Freres.* See also Case 115/94, *Opel Austria GmbH v Republic of Austria,* in which the overlapping principles of legal certainty and legitimate expectations were considered by the Court.

59. The principle of legitimate expectations "forms part of the Community legal order": Case 112/77, *August Toepfer & Co GmbH v Commission.*

60. "Fundamental rights form an integral part of the general principles of law...": Case 4/73, *Nold v Commission.*

61. Article 6(2) (formerly F(2)), EU Treaty. Article 46 (formerly L), EU Treaty confers, in a somewhat roundabout way, certain powers on the Court in this area.

62. Case 44/79, *Hauer v Land Rheinland-Pfalz.*

63. Article 232 (formerly 175), first paragraph (as regards the three institutions) and fourth paragraph (as regards the European Central Bank), EC Treaty.

64. Ibid, first paragraph (as regards the Member States and other Institutions), fourth paragraph (as

regards the European Central Bank) and third paragraph (as regards natural and legal persons), EC Treaty.

65. Ibid, second paragraph.

66. Under Article 231 (formerly 174), EC Treaty. See paragraph 19-16 above.

67. Article 233 (formerly 176), first and third paragraphs, EC Treaty.

68. Under Article 288 (formerly 215), second paragrah, EC Treaty; Article 233 (formerly 176), second paragraph, EC Treaty.

69. Article 234 (formerly 177), first paragraph, EC Treaty. "Where the judicial authorities of the Member States are called upon to order provisional measures for the protection of intellectual property rights falling within the scope of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994, and a case is brought before the Court of Justice in accordance with the provisions of the EC Treaty, in particular Article 177 thereof (now Article 234 EC), the Court of Justice has jurisdiction to interpret Article 50 of the TRIPs Agreement": Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA v Tuk Consultancy BV* and *Assco Gerüste GmbH, Rob van Dijk, v Wilhelm Layher GmbH & Co. KG, Layher BV*.

70. Ibid, second paragraph.

71. Ibid, third paragraph.

72. Article 225(1) (formerly 168a(1)), EC Treaty.

73. In 1997, 168 of the Court's judgments, out of a total of 193, were preliminary rulings: *Proceedings of the Court of Justice and Court of First Instance of the European Communities, 36/97,* page 44 (Statistics).

74. Even constitutional law has been developed in the preliminary ruling procedure, since the validity of Community acts can be challenged not only in proceedings under Article 230 (formerly 173), but also in proceedings under Article 234 (formerly 177), EC Treaty. For example, see Case 115/78, *Knoors v Secretary of State for Economic Affairs.*

75. For example, Case 52/76, *Benedetti v Munari.*

76. It may add two to three years to the duration of a case, one and a half to two years in the Court of Justice.

77. In practice, this is dealt with on a case-by-case basis. For two cases in which the issues were

discussed - one in favour, one against, the right of the tribunal concerned, - see Case 14/86, *Pretore di Salo v Persons Unknown,* and Case C-74/95, *Procura della Repubblica v X.*

78. In a number of cases, the questions have been asked so obscurely that the Court of Justice has had some difficulty providing a response. Consequently, the Court has made available a *Note for Guidance on References by National Courts for Preliminary Rulings; Proceedings of the Court of Justice and the Court of First Instance, 34/96*. The Note is helpful, but does not have legal force.

79. If a national court or tribunal which has made a reference is uncertain about the manner in which a preliminary ruling should be applied, it must decide whether to make a further reference: Case 69/85, *Wuensche Handelsgesellschaft Gmbh v Federal Republic of Germany*. This is in contrast with the procedure under other forms of action by which a party may apply to the Court for an interpretation of its judgment: Article 40 of the Statute of the Court of Justice.

80. Perhaps the most striking example is in two cases concerning trade marks for Hag coffee. Case 192/73, *Van Zuylen Freres v Hag AG,* was virtually reversed by Case C-10/89, *SA CNLSucal BV v Hag GF AG*.

81. Article 235 (formerly 178), EC Treaty. See also Article 288 (formerly 215), second paragraph, EC Treaty. Claims based on the Community's contractual liabilities, other than staff cases, would normally be heard by national courts.

82. Article 236 (formerly 179), ECTreaty.

83. Article 237(a) (formerly 180(a)), EC Treaty. In this connection, the Board of Directors of the Bank enjoy the powers conferred upon the Commission by Article 226 (formerly 169), EC Treaty.

84. Article 237(b) (formerly 180(b)), EC Treaty. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 303 (formerly 230), EC Treaty.

85. Article 237(c) (formerly 180(c)), EC Treaty. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 303 (formerly 230), EC Treaty, and solely on the grounds of non-compliance with the procedure provided for in Article 21(2), (5), (6) and (7) of the Statute of the Bank.

86. Article 237(d) (formerly 180(d)), EC Treaty. In this connection the powers of the Council of the European Central Bank in respect of national central banks are the same as those conferred upon the Commission in respect of Member States by Article 226 (formerly 169). If the Court of Jusuce finds that a national central bank has failed to fulfil an obligation under this Treaty, that bank is required to take the necessary measures to comply with the judgment of the Court of Justice.

87. Article 238 (formerly 181), EC Treaty.

88. Article 239 (formerly 182), EC Treaty.

89. Council Regulation EC/40/94 (as amended); and Council Regulation EC/2100/94 (as amended). The first case to be heard, by way of appeal to the Court of First Instance from a Board of Appeal of the Office for the Harmonisation of the Internal Market was Case T-163/98, *Proctor & Gamble Company v OHIM*. There have been many subsequent cases.

90. Article 17 of the 1999 Convention; Protocol based on Article 31 (formerly K.3), EU Treaty.

91. Article 240 (formerly 183), EC Treaty.

92. Article 300(6) (formerly 228(6)), EC Treaty. See Opinion 1/78, *International Natural Rubber Agreement*; and Opinion 1/94, *World Trade Organisation Agreement*.

93. That is, in accordance with Article 48 (formerly N), EU Treaty.

94. Article 225(1) (formerly 168a(1)), EC Treaty

95. Article 225(2) (formerly 168a(2)), EC Treaty

96. Ibid. See, for example, Council Decisions EEC/591/88, EEC/350/93 and EC/159/94.

97. Article 230 (formerly 173), EC Treaty. See paragraph 19-16 above.

98. Article 232 (formerly 175), EC Treaty. See paragraph 19-19 above.

99. Article 235 (formerly 178), EC Treaty. See paragraph 19-25 above.

100. Under the Regulations for Officials of the European Communities: see Chapter 24 and, in particular, 24n21. The Court of First Instance serves as a kind of industrial tribunal for the Community's staff; and it was largely because of the numbers of staff cases clogging the work of the Court of Justice that the Court of First Instance was originally set up (under the Single European Act). Staff cases accounted for nearly half the judgments delivered by the Court of First Instance in 1997 (43 out of 96): *Proceedings of the Court of Justice and Court of First Instance of the European Communities, 36/97*, page 45 (Statistics).

101. Council Regulation EC/40/94 (as amended); and Council Regulation EC/2100/94 (as amended). See paragraph 19-25 above.

102. Article 242 (formerly 185), EC Treaty. The Court of Jusuce may, however, if it considers that circumstances so require, order that application of the contested act be suspended; ibid.

103. Article 243 (formerly 186), EC Treaty.

104. Article 245 (formerly 188), third paragraph, EC Treaty. The Court of First Instance must establish its own Rules of Procedure in agreement with the Court of Justice. Those rules also require the unanimous approval of the Council. Article 225(4) (formerly 168a(4)), EC Treaty.

105. Rules governing the written procedure for cases involving a preliminary ruling differ from those applying to other cases.

106. As to measures of inquiry, see Articles 21 and 22 of the Statute and Article 45 of the Rules of Procedure.

107. Articles 44a, 104 and 120 of the Rules of Procedure.

108. Article 244 (formerly 187), EC Treaty, applying the provisions of Article 256 (formerly 192), EC Treaty, which are discussed in chapter 21.

109. Case C-46/93, *Brasserie du Pecheur v Germany:* paragraph 27.

110. Case C-6/90, *Francovitch v Italy:* paragraphs 35 and 36. On Article 10 (formerly 5), EC Treaty, see paragraph 13-3 above.