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Primus Inter Pares: The European Court and National Courts. The Follow-up by National Courts of Preliminary Rulings ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands

J. Korte (ed.), A. E. Kellermann,
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European University Institute, Florence

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

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Foreword

The present report is the Dutch contribution to an EEC-wide research project of the European University Institute in Florence, directed by Joseph Weiler, external professor of Law at this Institute. The aim of this project is to examine the "Follow-up by Member-State Courts of Preliminary References ex Article 177 of the Treaty of Rome".

The report is the result of a truly collective effort. When in June 1985 the T.M.C. Asser Instituut was invited to participate in the project, the Committee for European Law of this Institute, which consists of all teachers of European Law at the Dutch Universities, decided to establish a Special Working Group for this project. The members of this Working Group – not only university staff, but also some other persons with specialized knowledge in the subject-matter concerned – were to take care of the analysis of the 150 or so judgments of the Dutch courts which fell within the scope of the project. This analysis had to be carried out by answering for each judgment a detailed questionnaire which had been established by the Florence Institute. The names of the members of the Working Group and the institutes to which they belong have been listed in an Annex which is published at the end of this foreword.

The questionnaires have been answered during the period between March 1986 and April 1987. The T.M.C. Asser Instituut assisted with the documentation and coordinated the interpretation and distribution of the questionnaires; it also took care of the coordination with Florence. Subsequently, the Working Group appointed from among its members four rapporteurs, who would prepare – each of them in respect of a part of the judgments – draft-texts for the final report. These four rapporteurs are the authors of this report.

On 27 and 28 April 1987, the European University Institute held a conference for all national rapporteurs to enable them to make a preliminary exchange of information and to get some guidance for the finalisation of their reports. It took, however, until March 1988 before the national rapporteurs received an Interim report, established by the Florence Institute, containing a computerized overview of all the relevant judgments. In April 1988, the Dutch rapporteurs received moreover a special report with all the computer data concerning the Netherlands' judgments. With the aid of these data each of the Dutch rapporteurs has prepared the

part of the report which he or she had been previously asked for. The final version of the report has been prepared by Mr. J. Korte. The Dutch rapporteurs enjoyed the administrative assistance of Ms. R.J.M. Bosch, legal secretary at the Tariffcommission; they owe a special debt of gratitude to her for the pleasant and professional way in which she took care of this function.

The English of this report has been revised by Ms. Helen Smith, student at the International course in European Integration of the University of Amsterdam.

When reading the report, one should keep in mind that it is intended to become a part of a larger one, which will cover all the national reports. The terminology of the report has, therefore, been derived from the questionnaires which, as has already been remarked, had been established by the European University Institute at Florence.

On behalf of the Committee for European Law of the T.M.C. Asser Instituut, I would like to thank all the members of the Working Group and in particular the four rapporteurs/authors for their work. The report certainly offers a clear and thorough analysis of the follow-up by the Dutch courts of the preliminary rulings of the Court of Justice.

R.H. Lauwaars, May 1989

Chairman of the Committee for European Law of the T.M.C. Asser Instituut

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Chapter I: Introduction

Mr. J. KORTE

1. Structure of the report

In accordance with the original objectives of the Florence research project, the Dutch national team considered all preliminary rulings given by the Court of Justice of the EC (ECJ) at the request of courts in the Netherlands in relation to which the judicial process came to an end, either by final judgment or by a settlement of the parties, before December 1st 1985. For each of these cases, a questionnaire drawn up by the Florence Steering Group, was completed. The number of rulings thus considered amounts to 152.[1] As the total number of preliminary judgments given by the ECJ in this period amounts to 1014, Dutch courts accounted for some 15% of these judgments. In this respect, Dutch courts rank second to those in the Federal Republic of Germany, which have initiated 410 judgments, *i.e.*, 40.4%. Compared to the remaining Member States of the EC, Dutch courts are responsible for a high proportion of all preliminary questions to the ECJ.

In view of the size of the population of the Netherlands, approximately 14 million, it is remarkable that its courts have requested more rulings than, *e.g.*, courts in France and Italy, countries with approximately 60 million inhabitants. Apparently, other factors, like, *e.g.*, the familiarity with Community Law, the degree of Community orientation of the Judiciary and the Bar or, the tradition of litigation and the system of judicial protection also have an impact on the practice of the national courts to refer preliminary rulings to the ECJ. However, in view of the

[1] Unless expressly indicated otherwise, all numbers and percentages mentioned in this report relate to the period between 1961 and the first of December 1985, the cut-off point of the Florence research project. The 152 judgments given by the ECJ at the request of Dutch courts form the basis for all arithmetic conclusions submitted in this report. The relevant judgments as well as their follow-up, are listed in the annexes to this report.

It may be interesting to note that between December 1985 and the moment this report was finalized (May 1989), requests under Article 177 by Dutch courts have resulted in another 47 or so preliminary rulings by the ECJ.

scale of this report and the dimensions of the problem, we will not enter into these and other possible explanations for the distribution of the preliminary cases over the various Member States. From the statistical data, presented in the Interim Report of the European University Institute,[2] it appears that over the years, the differences between the Member States of the EC are becoming smaller. In this respect, the countries are converging and the Netherlands may soon lose its second position, to French courts in particular.

After this introduction and some remarks concerning the research methods, Chapter II gives a survey of the jurisdiction of the various Dutch courts which have requested preliminary rulings under Article 177 EEC. In this report, the referring courts are chosen as the starting-point for the analysis of the 177 cases originating in the Netherlands. In chapter III, IV and V the application of the preliminary procedure by the various types of Dutch courts is subsequently analysed on the basis of the data collected by the Dutch national team and aggregated by the Florence Steering Group. The conclusions of the report are included in Chapter VI.

2. Methods of research

Each of the 152 relevant cases was investigated by the Dutch team on the basis of a detailed questionnaire, prepared by the Florence Steering Group. The Steering Group had prepared three types of questionnaires; one for preliminary questions on the interpretation of Community Law ("177a-questionnaire"), one for preliminary questions regarding the validity of Community acts ("177b-questionnaire") and one for cases where an appeal was lodged against the judgment concerning the preliminary ruling or where some other kind of follow-up took place before another court in the same Member State.[3] The "177a-questionnaire" is applicable to 143 of the Dutch cases investigated in this report. As will be indicated later in Chapters III and IV, the ECJ gave only 12 judgments at the request of courts in the Netherlands where the validity of Community acts was challenged.[4] Thus, only 12 "177b-questionnaires" were completed. In three cases, both types of questionnaires were completed, because the referring court requested a ruling on the interpretation as well as on the

2 Primus Inter Pares, the European Court and National Courts: Thirty Years of Cooperation (The Florence 177 Project), An Interim Report, European University Institute, March 1988.

3 The questionnaires are included in Annex IV to this report.

4 These judgments are listed in Annex III to this report.

validity of Community acts. Finally, in 5 cases, the "appeal-questionnaire" is applicable.

The fact that the relevant cases were investigated solely on the basis of questionnaires imposes some important restrictions on the conclusions which may be drawn from this report. First of all it should be born in mind that the questionnaires only relate to the judgments as such and not to the complete files of each case. The questionnaires, therefore, were completed entirely on the basis of the texts of the set of judgments concerned, namely the judgment of the court making the reference, the ECJ's ruling and the final judgment of the national court. It is submitted that an analysis of, for instance, the full arguments of the parties and of the other documents relating to the case might have provided us with even more information as to the application of the preliminary procedure and might, consequently, have infuenced the conclusions of the report.

Secondly, account is to be taken of the fact that the research was conducted entirely in the form of desk-research. Thus, we did not supplement or test our information by interviewing judges, parties or their counsel or by conducting any other form of field-research.

Thirdly, answering some of the questions of the questionnaires requires a personal evaluation of the person filling in the questionnaire. To avoid different standards being applied, the Dutch team[5] devoted much attention to a uniform treatment of the questionnaires. Still, it should not be forgotten that the completion of the questionnaires for the Netherlands involved some fifteen people. Some caution, therefore, seems to be appropriate when considering the results of these type of questions.

The "177a-" and "177b-questionnaires each consist of some 16 questions, mostly divided into several subquestions. Through these questions virtually every aspect of the preliminary procedure is assessed. The elaboration of the questionnaires, therefore, resulted in an impressive amount of information on the dialogue between the courts in the Netherlands and the ECJ. In view of the amplitude of information collected, the complete outcome of the "Dutch" questionnaires has not been included as such in this report. The exact computerized results of the questionnaires are contained in a separate report drawn up by the Florence Steering Group[6] at the request of the Dutch team. These data were used by the Dutch team as the basis for this report.

Rather than trying to review every aspect of the questionnaires, the Dutch team decided to give an analysis of a selective number of issues only. Consequently and in accordance with the guidelines for the national

5 Primus Inter Pares, The European Court and National Courts: Thirty years of cooperation, (The Florence 177 Project), The Netherlands, Data specified on a court by court basis, European University Institute, Florence, April 1988

6 See the Interim Report of March 1988, *supra* note 2, pp. 15 and 16.

reports provided by the Florence Steering Group this report is built essentially upon two components: a global description of the functioning of the Article 177 procedure in the Netherlands (the general pattern) and an analysis of the cases considered to be most problematic (the exceptional or pathological cases).
Chapters III (Ordinary Jurisdiction), IV (Administrative Courts) and V (Special Courts) have the same structure; after a short introduction on the composition and jurisdiction of the various types of courts which have made use of Article 177, a global description of the application of Article 177 by these courts is given. Next to a summary of the most relevant statistical data (how many references were made, type of proceedings in which the references were made, subject of the preliminary questions etc.), special attention is paid in these Chapters to those questions in the questionnaire, considered to be most important for this research project. These questions are: question 2b (who initiated the reference?), 3d (did the national judge offer any possible interpretation of Community Law?), 6c (overall, do you have the impression that the ECJ was satisfied with the way the national court posed questions? Possible answers: satisfied; neutral; less than satisfied), 10a (outcome of the national proceedings, was there a formal judgment?), 11 (does the national judgment comply with the preliminary ruling or does it deviate from the terms of the ruling? Assess the character of the compliance (possible answers: in strict conformity with the terms of the ruling; further interpreting the answers given by the ECJ) or deviation (possible answers: mistaken application; evasive application; defiant application) and 13b (did the national court give indication of the helpfulness of the preliminary ruling?).

Following these general remarks as to the application of Article 177, we discuss in Chapters III, IV and V two illustrative cases for each type of court. These cases may be considered as typical of the court concerned, where the ordinary procedural rules were followed and the rulings of the ECJ were duly taken into account. Through these cases, the general pattern of the application of the preliminary procedure in the Netherlands is clearly illustrated.

The second component of the report deals with the pathologies, *i.e.*, cases deviating from the general pattern for the Netherlands. If any pathological or exceptional cases were found, these are discussed in Chapters III, IV and V[7] as well. In this respect, cases deserving special attention are those in which the ruling was not, or was only partly followed, or, in which the ruling turned out to be of no use to the referring

[7] It should be noted that the terms "pathological" and "exceptional" stem directly from the guidelines for the national reports prepared by the Florence Steering Group. See the Interim Report, *ibid.*, p. 16.

court. If we found any dramatic differences between Dutch courts and courts of other Member States these are also discussed.

3. Preliminary remarks

By way of the first preliminary remark, it is pointed out that this report only gives a partial picture of the application of the preliminary procedure by Dutch courts. After all, a complete and accurate research into the attitude of the courts towards the procedure would require an analysis of every decision in which Article 177 EEC is, considered or mentioned in any manner whatsoever. Strictly speaking, Article 177 is applied also even if a case is not referred to the ECJ for a preliminary ruling, *e.g.*, because the national court considers that it can decide the case without a preliminary interpretation by the ECJ. These cases, which are not included in this project, may in some respects be even more relevant to an analysis of the application of the procedure, than those in which questions were addressed to the Court in Luxembourg. However, the number of relevant cases that would have to be considered in this approach, would be far too great for any thorough analysis. Moreover, as they are not systematically registered it would be very difficult, if not impossible, to trace them all.

Between 1961, when the first (ever) preliminary ruling under Article 177 was asked for by the Court of Appeal (Gerechtshof) at The Hague in Case 13/61 (*De Geus and Uitdenbogerd*), and the cutoff point of this project a total of 152 preliminary rulings were given by the ECJ at the request of Dutch courts.

It is emphasized that this number relates only to the judgments that were given by the ECJ, not to the actual number of requests that were made by Dutch courts. For two reasons, the number of requests under Article 177 does not correspond with the number of judgments actually handed down by the ECJ. Firstly, the ECJ joined a considerable number of cases under Article 43 of its Rules of Procedure, for the purpose of the written or oral procedure and of its final judgment. Consequently, preliminary references in approximately 33 cases before Dutch courts did not result in separate preliminary rulings by the ECJ. It is to be noted that these 33 rulings are "hidden" in the 152 rulings of the ECJ. Secondly, in a number of cases the ECJ did not succeed in answering the preliminary questions referred to it, due to the fact that the referring courts, for various reasons, withdrew their requests.

By way of example, mention can be made of the following cases which were so removed from the Register; 271/80 (*Pharmon v Hoechst*), 288/81 (*Eli Lilly v Bergel*) and 273/86 (*Atletiekvereniging "NEA*

Volharding").[8] The first case is particularly interesting, since it was removed because appeal was lodged against the decision of the District Court in Rotterdam to request a preliminary ruling. Eventually, however, the case came back to the ECJ, when the Supreme Court (*Hoge Raad*) requested a preliminary ruling in case 19/84 (*Pharmon v Hoechst*).

Rulings by the Court of Justice under Articles 41 ECSC-Treaty on the validity of acts of the Commission (High Authority) and the Council, and under Article 150 EURATOM, do not form part of the original research project and are, therefore, not considered. There are no references under Article 150 EURATOM by Dutch courts. The ECJ has, up to now, only handed down one ruling under Article 41 ECSC at the request of a Dutch court.[9] In the Gerlach Case, it is interesting to note that the referring court, *i.e.*, the Court of Last Instance in Matters of Trade and Industry (*College van Beroep voor het Bedrijfsleven*), did not specifically request for a ruling under Article 41 ECSC. In fact, it was the ECJ that classified the request under Article 41. However it could be argued that, strictly speaking, some of the questions, notably the ones concerning the interpretation of secondary EEC Law, could not be answered under this Article. In this report, though, the classification given by the ECJ is followed. The Gerlach case is, therefore, not considered.

The judgments of the ECJ on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement in Civil and Commercial Matters, have not been taken into consideration either. For the record, Dutch courts have to date (January 1989) requested some 12 rulings under Article 3 of the 1971 Protocol on the Interpretation of the Convention.

Finally, in order to be comprehensive, we mention here the possibility for certain Dutch courts, to refer preliminary questions on the interpretation of parts of the law of the BENELUX Economic Union to the Benelux Court of Justice in Bruxelles (*BENELUX-Gerechtshof*). It goes without saying that the 26 or so references (up to January 1, 1989) by Dutch courts under Article 6 of the Treaty concerning the Establishment and the Statute of the BENELUX Court of Justice (*Verdrag betreffende de instelling en het Statuut van het BENELUX-Gerechtshof*), are not considered in this report. Still, it may be useful to know that, Dutch courts, as well as those in Luxembourg and Belgium, have experiences with a second international court possessing "preliminary" jurisdiction besides the ECJ.

[8] See OJ 1982, C113/6 and C180/4 and EC Bulletin 1987(4).

[9] Case 289/84 (*Gerlach & Co.*) (1985)ECR 3507.

Chapter II: Survey of the Judicial Organization in the Netherlands

Mr. J. KORTE

1. Division of Jurisdiction of the courts

Under Articles 112 and 113 of the Constitution (*Grondwet*) and under Article 2 of the Act on the Organization of the Judiciary (*Wet op de Rechterlijke Organisatie*), the courts of the Ordinary Jurisdiction (*Gewone Rechterlijke Macht*) have exclusive jurisdiction in disputes over property or rights and claims, as well as in the trial of criminal offences. It follows from these provisions that the ordinary courts which are listed below in paragraph 2 under A, have, in principle, jurisdiction over all civil (including commercial) and criminal matters. Under Article 112(2) *juncto* Article 115 of the Constitution, the law can give jurisdiction over disputes rising out of actions of an administrative nature to either the Ordinary Jurisdiction, to Administrative courts or to so-called administrative appeal bodies (*administratief beroep*).

Consequently, actions against the Government or other public authorities, based on contract or a right *in rem*, as well as actions based on torts committed by public authorities, are in principle considered as civil matters and can therefore be dealt with by the Ordinary Courts. However, in the case of certain administrative actions, the law does indeed provide for specific procedures before an Administrative Court, referred to as Administrative Jurisdiction (*administratieve rechtspraak*) or provides for an appeal within the administrative hierarchy, referred to under Dutch law as Administrative Appeal (*administratief beroep*). Because of the availability of these two types of administrative remedies, the role of the Ordinary Jurisdiction in providing legal protection against the Government is a residual one only. Nonetheless, as shall be indicated later, Ordinary Courts, and the Presidents of the District Courts in particular, perform some important functions in this area. The impact on the obligations of the courts, under Article 177, on the residual character of the jurisdiction of the Ordinary Courts in administrative actions, is illustrated by Cases 35 and 36/82 (*Morson and Jhanjan*). Here, preliminary

questions were addressed by the Supreme Court on the obligations under Article 177 of courts adjudicating in summary proceedings.

1.1 Differences between Administrative Jurisdiction and Administrative Appeal

It follows from the preceding subparagraph that review of decisions of administrative law in the Netherlands is possible in two ways: within the public administration via administrative appeal or by Administrative Courts. There are major differences between appeals to an Administrative Court and appeals to administrative bodies. For the purpose of this report, it is sufficient to mention only the most fundamental ones.

Firstly, the bodies to which administrative appeal lies cannot be considered as independent courts because they belong to the same organisation as the body against whose decision the appeal is brought. For instance, an appeal against a decision of the Burgomaster and Aldermen of the Municipality can be brought before the Municipal Council. Also, an appeal lies to the Crown against a decision of a Minister. Usually, the body hearing the appeal belongs to a higher tier of authority and frequently, there is a possibility of a second appeal to a still higher administrative body. The Provincial Executive and the Crown, in particular, are designated in many cases as the highest body to which appeal lies. The Administrative Courts on the other hand, are administering justice completely independent of the administration.

Secondly, the jurisdiction of the Administrative Courts is primarily governed by general provisions of jurisdiction, for the most part, found in Acts relating to the organisation of the relevant courts. Administrative appeals however, are provided for from case to case in the basic regulation which also determines the kind of decision under appeal. This Chapter contains no information on the specific jurisdictions and powers of each individual court or body to which an administrative appeal lies, as these are discussed in Chapters III, IV and V.

Thirdly and finally, it is submitted that the modalities for judicial review differ considerably for both remedies. According to the principle of separation of powers of the State, the courts can encroach upon the powers of the executive to a limited extent only. In the Netherlands this holds true for ordinary and administrative courts alike. Thus, all courts' interference with Government policy is restricted primarily to certain legal aspects of the decision at issue. An administrative body hearing an administrative appeal, on the other hand, may also assess the expediency or appropriateness of the contested order or decision.

For the present report, the administrative appeal procedures are not very relevant as only one of the bodies concerned has ever requested a preliminary ruling. Therefore, only the Division for Administrative

Disputes of the Council of State (*Afdeling voor de Geschillen van Bestuur van de Raad van State*) has to be considered. Unlike the other Division of the Council of State (the Judicial Division; *Afdeling Rechtspraak van de Raad van State*), this Division cannot be considered to be an administrative court. As a matter of fact it only submits its recommendation to the Crown (*Kroon*) which, at its turn, takes the final decision. The Division for Administrative Disputes, therefore, is formally an advisory body to the supreme level in the administrative hierarchy. Consequently it must be regarded as part of an administrative appeal procedure rather than an administrative court. In practice, however, the Division maintains an independent position vis-à-vis the Crown itself which only very seldom departs from the Division's recommendations. The independent position of the Division was recently formally recognized for all administrative appeal procedures in disputes relating to civil rights and obligations by the Temporary Act on Adminstrative Disputes (*Tijdelijke Wet Kroongeschillen, 1987*). The question whether the Division is a court in the meaning of Article 177 EEC was at issue in the *Nederlandse Spoorwegen Case* (36/73). Most doubts were removed by the ECJ, when it accepted without comments the preliminary questions addressed to it. The Council of State is discussed further in Chapter IV, paragraph 6.

Besides the Division for Administrative Litigation, no other preliminary rulings originated from administrative appeal bodies. There are various committees of e.g. the Municipal or Provincial Executives which submit recommendation to the Executives. It is the latter which take the final decision though, in the framework of the administrative appeal procedure. Therefore it is questionable whether these committees can be considered as courts in the sense of Article 177, on the same footing as the Division for Administrative Disputes. Unlike the Division for Administrative Dispustes, these organs are in most cases not sufficiently independent from the administration to fulfill the requirements set by the ECJ in this respect.[1]

1.2 Taxation matters

The jurisdiction in matters concerning taxation is shared between the Courts of Appeal and the Supreme Court on the one hand and the Tariffcommission on the other. Tax matters belong to administrative law. Most of them, however, including those relating to direct taxation (notably income and corporation taxes) and turnover taxes (since 1976), are dealt with by the Courts of Appeal in the first instance. Appeals can be submitted to the Supreme Court in the framework of a cassation pro-

[1] See, *e.g.*, Case 17/76 (*Brack v Insurance Officer*) (1976)ECR 1429 and Case 318/85 (*Greis-Unterweger*), Order of 5.3.1986, OJ 1986, C121/3.

cedure. For these purposes, the Courts of Appeal and the Supreme Court sit in specially constituted Taxation Divisions (*Belastingkamers*). Although they are formally and organically part of the ordinary courts, the Courts of Appeal and the Supreme Court can effectively be considered as separate administrative courts when they deal with taxation matters.[2]

2. Relevant types of courts

Almost every type of court in the Netherlands has referred preliminary questions to the ECJ. In fact, of all the courts in the Netherlands only the Civil Service Tribunals of First Instance (*Ambtenarengerechten*) and the two instances of the Military Jurisdiction (*Krijgsraden* and the *Hoog Militair Gerechtshof*), have so far never asked the ECJ for a ruling under Article 177.

As regards the Civil Service Tribunals, it should first of all be taken into account that appeals from these courts can be lodged with the Central Court of Appeal. The former Courts are, therefore, under no obligation to refer questions regarding the interpretation of Community Law to the ECJ. Other possible explanations for the lack of references by the Civil Service Tribunals are discussed in Chapter IV, paragraph 5. The absence of references by the two instances of the Military Jurisdiction is self-evident and needs no explanation.

For the purpose of this report, three different types of courts can be distinguished.

A. The courts belonging to the Ordinary Jurisdiction (*Gewone Rechterlijke Macht*), *i.e.*, Cantonal Courts (*Kantongerechten*); District Courts (*Arrondissementsrechtbanken*); Courts of Appeal in civil and criminal matters (*Gerechtshoven*) and the Supreme Court (*Hoge Raad*) . The ECJ handed down 45 preliminary judgments at the request of the ordinary courts, *i.e.*, approximately 30% of the total number of cases originating from Dutch courts. It is to be noted that the 13 preliminary judgments given at the request of the Supreme Court and the Courts of Appeal, in their capacities as taxation courts, are not included in this number. The application of the preliminary procedure by the courts belonging to the Ordinary Jurisdiction is discussed in Chapter III.

[2] For the sake of completeness, it is to be noted that, under Dutch Law, the courts belonging to the Ordinary Jurisdiction are also empowered to hear appeals in some specific administrative actions, like the Act on Elections (*Kieswet*). As no references under article 177 were made in these cases, these powers are not discussed here.

B. The Administrative courts, *i.e.*, the Court of Last Instance in Matters of Trade and Industry (*College van Beroep voor het Bedrijfsleven, CBB*); the Tariffcommission, the court of last instance in Customs and Excise Matters (*Tariefcommissie*); the Courts of Appeal in taxation matters (*Gerechtshoven in belastingzaken*) and the Supreme Court in taxation matters (*Hoge Raad in belastingzaken*); the Social Security Courts of First Instance (*Raden van Beroep*) and the Central Court of Appeal, which is the court of last instance in social security matters (*Centrale Raad van Beroep*) and finally, both Divisions of the Council of State: the Judicial Division (*Afdeling Rechtspraak*) and the Division for Administrative Disputes (*Afdeling voor de Geschillen van Bestuur*). As mentioned in the previous paragraph, the latter, strictly speaking, cannot be regarded as an Administrative court. For practical purposes, however, it is listed under this letter (B) as well. The ECJ handed down 105 preliminary judgments at the request of these administrative courts, *i.e.*, approximately 70% of the total number of preliminary rulings originating from Dutch courts. The application of the preliminary procedure by these courts and by the Division for Administrative Disputes of the Council of State is discussed in Chapter IV.

C. Finally, a special category has to be created for two courts which have each requested one preliminary ruling but which do not come under the courts mentioned earlier. In this report they are referred to as Special Courts. Firstly, the Arbitration Tribunal which settles Disputes regarding the Pension Fund for the Mining Industry (*Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf*). This was the referring court in Case 61/65 (*Vaassen-Goebbels*). Secondly, the Appeals Committee for General Medicine (*Commissie van Beroep Huisartsgeneeskunde*), which requested a ruling in Case 246/80 (*Broekmeulen*).

These two judgments amount to approximately 1.3% of the total number of judgments considered in this report, they are discussed further in Chapter V.

Chapter II: Evaluation of the Application of the Preliminary Procedure by Courts Belonging to the Ordinary Jurisdiction (Gewone Rechterlijke Macht)

Mr. J. KORTE

1. Introduction

There are four instances of Ordinary Jurisdiction in the Netherlands. These are the Supreme (or Cassation) Court (*Hoge Raad*)[1], Courts of Appeal (*Gerechtshoven*), District Courts (*Arrondissementsrechtbanken*) and Cantonal Courts (*Kantongerechten*). The 177-references made by these courts have resulted in 45 preliminary rulings of the ECJ, *i.e.*, 30% of the total number of judgments considered in this report. From judgments of the Cantonal Courts or District Courts, as a rule, appeal lies with the competent District Court or Court of Appeal respectively. The Supreme Court is the highest court of the Ordinary Jurisdiction. It hears appeals on points of law and procedure against judgments of lower courts in a cassation procedure. The Supreme Court has no power to hear appeals on questions of fact.

This Chapter deals with the application of the preliminary procedure under Article 177 by these courts. A typical feature of the references by these Ordinary Courts is that no questions on the validity of Community Law were addressed to the ECJ. Every case considered in this report, was concerned with questions on the interpretation of Community Law. In fact, of all courts concerned, ordinary and administrative alike, only the Court of Last Instance for Matters of Trade and Industry and the Tariffcommission have ever requested rulings on the validity of EEC-law. This happened in 12 cases, *i.e.*, in approximately 8% of the total number of Dutch cases considered. This compares to some 15% of the 1014 preliminary rulings *ex* Article 177, given by the ECJ in the period covered by this research project. In paragraph 6 of this Chapter, this observation will be discussed further.

1 As the *Hoge Raad's* only jurisdiction is virtually to hear appeals on points of law and procedure against judgments of lower courts belonging to the Ordinary Jurisdiction in a cassation procedure, it is formally speaking more correct to refer to it as a Cassation Court. In this report, however, the more common English designation Supreme Court is used.

2. Cantonal Courts

2.1 Jurisdiction and composition

There are 62 Cantonal Courts which have jurisdiction in the first instance over all claims not exceeding Dfl. 5,000, as well as over all disputes concerning agency contracts, hire-purchase agreements, labour law matters and leases of real property. From these judgments appeal lies with the District Courts only if the claim exceeds Dfl. 2,500.

In criminal matters, the Cantonal Courts are competent to try minor offences that are not assigned to the District Courts. Normally appeal lies with the District Court. Furthermore, a petition for cassation can be filed with the Supreme Court against the civil and criminal judgments of the Cantonal Courts, where no (normal) appellate proceedings are available. It is to be noted, however, that the grounds for cassation against the Cantonal Court's judgments, listed in Articles 100 and 101 of the Act on Judicial Organization, are more restrictive than those listed in Article 99, which can be used against judgments of the District Courts and the Courts of Appeal.

The Cantonal Courts sit with a single judge, referred to as *Kantonrechter*.

2.2 Application of Article 177 EEC

Only the Courts at Rotterdam, Case 104/75 (*De Peijper*), Apeldoorn, Cases 141-143/81 (*Holdijk et al.*) and The Hague, Case 39/82 (*Donner*) have requested preliminary references to the ECJ.

The references in *De Peijper* and in *Holdijk* were made in criminal cases, whereas *Donner* concerned civil matters. The cases originating from Cantonal Courts represent approximately 2% of the total number of Dutch cases that were considered by the ECJ during the period of this research.

Of course, the relatively few references by Cantonal Courts can be explained, primarily, by the fact that these courts are of first instance. Their decisions are always subject to appeal either to a District Court or, for cassation to the Supreme Court. Consequently, the Cantonal Courts are under no obligation to refer preliminary questions to the ECJ[2].

[2] In fact there is one procedure in Dutch Law, where there is no remedy whatsoever against a judgment of a Cantonal Court. Article 1639W(11) of the Civil Code stipulates that no remedy is available against an order of the Court concerning rescission of an employment contract for significant reasons (*ontbinding wegens gewichtige redenen*). In these cases, Cantonal Courts must be considered as being courts in the sense of Article 177, third paragraph. It is questionable to what extent the

Furthermore, most cases dealt with by these courts are of relatively minor importance, in particular as far as the financial implications are concerned. References under Article 177 EEC by Cantonal Courts are, therefore, exceptional. A closer look at the three preliminary cases in the next subparagraphs shows that, in fact, exceptional circumstances were present in each reference from a Cantonal Court.

As for the follow-up of the three preliminary rulings, the statistical data indicate that only in one Case (*Holdijk et al.*), the final judgment was in strict conformity with the ECJ's ruling. In the other two Cases (*De Peijper* and *Donner*), the Cantonal Courts further interpreted the rulings before giving their final judgments.

2.3 Two illustrative cases

1. The decision to refer in *De Peijper*, even though it was only the first stage of the procedure, was probably influenced by the fact that the controversial actions of Centrafarm and its director Mr. De Peijper, regarding parallel imports and the undercutting of the established prices of pharmaceutical preparations, had been in the focus of attention for some time already. Moreover, they had given rise to other legal proceedings as well. About a year before the Cantonal Court's decision to request a preliminary ruling, the ECJ had answered questions put to it by the Supreme Court in two civil proceedings against Centrafarm and its director on the subject of parallel imports and the protection of patent and trademark rights.[3] The case against Mr. De Peijper before the Cantonal Court could in some respects be considered as the criminal counterpart of the civil proceedings against the Centrafarm company, which had been initiated by competing companies, as all three proceedings were aimed at ending the parallel imports. The relevance of Community Law to the Centrafarm Case was, therefore, obvious from the outset and this may have influenced the Cantonal Court's decision to refer questions to the ECJ.[4]

The judgment of the ECJ in *De Peijper* is leading, particularly on the issue of the relation between Articles 36 and 100 EEC. In its final decision of September 6, 1976 the Cantonal Court held that the contested

restricted grounds for cassation on the basis of which judgments of Cantonal Courts may be quashed by the Supreme Court, have an impact on the Cantonal Courts' obligations under Article 177. See: C.W.A. Timmermans in an annotation on a judgment of the Supreme Court of 8.1.1988 in *NJ* 1988, 942. See also: paragraph 5.1.1 of this Chapter.

3 These cases were also the first references to the ECJ by the Supreme Court; Case 15/74 (*Centrafarm and De Peijper v Sterling Drug*) and Case 16/74 (*Centrafarm and De Peijper v Winthrop*). See also paragraph 5.3 of this Chapter.

4 For the record, it is mentioned that the Centrafarm Company was involved in two other preliminary procedures originating in the Netherlands as well; Cases 24/67 (*Parke, Davis et al.*) and 3/78 (*Centrafarm*).

provisions in the Decree on Pharmaceutical Preparations (*Besluit Farmaceutische Preparaten*) were contrary to Articles 30 and 36 EEC and acquitted Mr. De Peijper. To arrive at this decision, the Cantonal Court had to further interpret the preliminary answers given by the ECJ, notably with regard to some factual questions. The Public Prosecutor did not lodge an appeal against the judgment of the Cantonal Court. Case 104/75 is one of the relatively few preliminary rulings considered in this report, in which the judgment of the ECJ led to an amendment of the law. After consultations with the Commission of the EC, Article 23 of the Decree on the Registration of Medecines (*Besluit Registratie Geneesmiddelen*) was enacted by the Government on September 8, 1977. This article provides for a simplified registration procedure for parallel imported preparations from other EC Member-States. The fees payable upon such registration were also under discussion before the District Court in Roermond, which requested a preliminary ruling from the ECJ on the matter in Case 32/80 (*Kortmann*).

2. The reference made by the Cantonal Court in The Hague in the *Donner Case*, concerned a dispute between Mr. Donner and the Netherlands Postal, Telegraphic and Telephone Services (*P.T.T.*) on charges for customs presentation of a consignment of books delivered by mail from other Member States. Mr. Donner was of the opinion that the sum charged upon him constituted a charge having equivalent effect to an import duty in the sense of Articles 12 *et seq.* EEC and brought an action before the Cantonal Court for the recovery of the sum paid (Dfl. 85.30).

To explain the reference in this case, it is to be noted in the first place that the Cantonal Court was the final instance as far as the facts of the case were concerned. As mentioned in subparagraph 2.1, the claim of Mr. Donner was too low for appellate proceedings to be possible. Taking into account the remaining possibility of cassation on points of law with the Supreme Court, the Cantonal Court was not, strictly speaking, obliged to refer questions to the ECJ. Still, this aspect may have influenced the decision of the Cantonal Court to request a preliminary ruling.

A more important explanation for the reference may, in our view, be found in the person of the plaintiff, Mr. Donner, who is a former President of the ECJ. It appears from the file of the case that Mr. Donner was very determined to insist on his rights under Community Law, even though the financial implications of the dispute were rather small. Mr. Donner first appealed to the Council of State (Judicial Division) against the implied refusal of the P.T.T. to amend its invoices. After the Council of State had held the application inadmissable, he brought an action under civil law before the Cantonal Court claiming the recovery of the sum paid. The fact, referred to in the opinion of the Advocate-General, that the parties in the main proceedings agreed on the wording of the ques-

tions can be considered as another indication of the influence Mr. Donner had on the decision to request a preliminary ruling. Despite Mr. Donners efforts, the Cantonal Court, taking into account the judgment of the ECJ, decided against him in its final decision of April 13, 1984. Mr. Donner did not lodge an appeal for cassation with the Supreme Court.

2.4 A Pathological case

The preliminary requests to be considered here were made by the Cantonal Court in Apeldoorn in three criminal proceedings brought against Mrs. *Holdijk* and Mulder and the Alpuro Company. Cases 141-143/81, which were joined by the ECJ can like the other references from Cantonal Courts, be regarded as exceptional. They can also be considered as pathological in that they deviate strongly from the normal procedure in several respects.

Criminal proceedings were brought against the three defendants for having kept fatting calves in pens which did not meet the requirements of Article 2(b) of the Royal Decree on fatting calves (*Mestkalverenbesluit*). The Cantonal Court in its order for reference, considered it "of crucial importance for the inquiry into the case (..), whether or not the Decree (..) is contrary to or incompatible with the EEC Treaty as regards the keeping of fatting calves and if so whether that is also the case if a specific set of rules, which still do not exist, are adopted in an amended decree in this regard concerning the pen in which the calf is kept"[5]. The Cantonal Court instructed the Public Prosecutor (*Officier van Justitie*) to send the files of the cases to the ECJ and to ask for a ruling on this question.

At least three issues concerning the preliminary procedure may be distilled from these cases. Firstly, the Cantonal Court, instead of requesting a preliminary ruling itself, instructed the Public Prosecutor, who is one of the parties in the main proceedings, to send the files to Luxembourg. This is clearly not in conformity with the procedural rules of Article 177 and conflicts with the concept of the procedure as a dialogue between judges. Secondly, the Cantonal Court did not clearly phrase a question, it only indicated that Community Law was of "crucial importance" for the inquiry. Moreover, both the relevance of Community Law *per se* to the legal issues in these cases, and the actual justification of the reference were rather obscure. Thirdly, as the problem submitted to the ECJ concerned the compatibility of national law with Community Law, it could, strictly speaking, not be dealt with by the ECJ under Article 177. This holds true *a fortiori* for the second question submitted to it regarding future legislation.

5 (1982)ECR 1310.

The reference was severely criticized by Advocate-General Sir Gordon Slynn and by the Danish Government. The latter argued in its written observations that it could not go into the substance of the matters at issue because "(..) the incomplete judgments making the reference have not enabled it to decide whether or not it is appropriate to submit observations"[6]. The Danish Government did not explicitly submit that the ECJ should not answer the question at hand, still it did state that the traditional tolerance on the part of the ECJ as regards badly formulated preliminary questions, must not be allowed to deprive of all substance the right accorded to, *inter alia*, Member States to submit observations.

Although the ECJ itself had to go to great lengths to remedy the deficiences in the orders of references, it did answer the "question" of the Cantonal Court. Almost half of the judgment of the ECJ is devoted to "the formulation of the reference". Under this heading, the ECJ, in reaction to the remarks made by the Danish Government, summarized the guidelines which it had developed in earlier case law as to the requirements which references under Article 177 must satisfy. It then deduced a question from the referring judgments. After rephrasing this question in a more abstract fashion, the ECJ held that in the absence of specific EEC-legislation on this point, Community Law does not prevent a Member State from maintaining such unilateral rules which apply, without distinction, to calves intended for the national market and to those intended for export.

The overall impression obtained from *Holdijk et al.* is that the Cantonal Court was not well informed, either on the use of the preliminary procedure or on the relevance of Community Law for the offences it had to try. Considering the absence of specific Community Law one can indeed seriously question whether the references were really necessary. This issue becomes even more pressing if regard is had to the final judgment of August, 1 1983 in Case 141/81, in which the Cantonal Court sentenced the defendant to a suspended fine of Dfl. 300, without even mentioning the preliminary ruling given at his request eights months earlier. (The same holds true for the final judgments in Cases 142 and 143/81). Against these judgments no appeals were lodged.

3. District Courts

3.1 Jurisdiction and composition

There are nineteen District Courts in the Netherlands. In civil matters they have jurisdiction in the first instance over all claims that do not come

6 Observations of the Danish Government, (1982)ECR 1308.

under the jurisdiction of the Cantonal Courts. They also act as instances of appeal with respect to judgments of the Cantonal Courts.

In criminal matters, the District Courts have original jurisdiction over a few minor offences that are not assigned to the Cantonal Courts and, over all (serious) crimes (*misdrijven*). Furthermore, they hear appeals against decisions of the Cantonal Courts. Appeal lies with the Court of Appeal against the civil and criminal judgments of the District Courts, given in the first instance. Finally, the civil and criminal judgments of District Courts given in an appeal procedure are subject to appeal on points of law and procedure in a cassation procedure before the Supreme Court. In both civil and criminal cases, the District Courts usually sit with three judges in a so-called Full Court (*Meervoudige Kamer*). But, there are two important exceptions to this rule.

Firstly, in civil matters requiring urgent attention, the President of the court is competent to render a provisional order or temporary injunction in summary proceedings (*Kort Geding*). The decision of the President does not impair the decision of the Full Court sitting on the case in ordinary proceedings. But in practice the judgment of the Full Court is seldom sought after the President's decision has been obtained. From the President's decision, appeal lies with the Courts of Appeal, whose decisions are, in turn, subject to review by the Supreme Court in a cassation procedure. Summary proceedings are used very often, in particular in disputes of a commercial nature and in proceedings contesting an act of the Government or of another public authority. As regards the latter cases, there emerges clearly, the residual jurisdiction of the ordinary courts in offering protection against the Government or against public bodies, mentioned in Chapter II, paragraph 1.

Secondly, in criminal matters, a large number of cases is dealt with by a single judge. Simple criminal cases, are normally brought before a single judge known as the Magistrate (*Politierechter*), leaving only the more serious and complicated cases, as well as the cases on appeal from the Cantonal Courts, to be tried by the Full Court. Similarly, simple offences that are listed and punishable under the Act on Economic Offences and Crimes (*Wet op de Economische Delicten*), are dealt with in the first instance by a single judge within the District Court, known as the Magistrate in Economic Matters (*Economische Politierechter*).

More serious or complicated crimes under the Act on Economic Offences and Crimes, on the other hand, are brought before a separate division within the District Court, referred to as the Full Court dealing with Economic Matters (Meervoudige Economische Kamer) which sits with three judges. Appeals against judgments of the Magistrate and of the Full Court in Economic Matters are decided upon by a special division in the Court of Appeal known as the Economic Division (*Economische*

Kamer), sitting with three justices. Against the latter, like all other Court of Appeal judgments in criminal cases, an appeal for cassation can be filed with the Supreme Court.

3.2 Application of Article 177 EEC

The preliminary references by District Courts have resulted in 24 judgments by the ECJ, *i.e.*, approximately 16% of the cases considered in this report[7]. Of these, 13 cases concern civil matters and 11 concern criminal matters.

Nine out of the eleven criminal cases were concerned with economic offences and crimes; 8 of them were decided by a Magistrate in Economic Matters and the remaining 1 by a Full Court in Economic Matters. Only Cases 32/80 (*Kortmann*) and 227/82 (*Van Bennekom*) had to be decided by the (ordinary) Full Court dealing with criminal matters, as they were appeal cases from Cantonal Courts, concerning offences of an economic nature, but not listed in the Act on Economic Offences and Crimes. Not surprisingly, the conclusion may be drawn that the impact of EEC-Law on national criminal law is predominantly present in the field of economic law. As will be indicated in paragraph 4 of this Chapter, the same holds true for the Courts of Appeal.

As for the 13 civil cases, six cases were decided by the President in summary proceedings. The remaining judgments were given in ordinary proceedings by a Full Court. Three summary proceedings concerned actions of private parties brought against the State before the President of the District Court in The Hague; Case 181/82 (*Roussel Laboratoria et al.*), 237/82 (*Jongeneel Kaas et al.*) and Case 238/82 (*Duphar et al.*). In the remaining two cases, private parties sued each other; Cases 106/79 (*Eldi Records*) and 187/80 (*Merck & Co. v Stephar and Exler*).

It is interesting to note that references by a Full District Court in civil matters, have tended to become rare since the end of the seventies. In fact, after three references in the sixties, two of which were concerned with an interpretation of Regulation No. 3 on social security for migrating workers[8], and four in the seventies, not one was made between 1980 and 1985.

[7] It is to be noted that the actual number of *requests* by District Courts to the ECJ is much higher than 24 due to the fact that the ECJ joined a relatively high proportion of District Court cases under Article 43 of the Rules of Procedure. In Cases 185-204/78 (*Van Dam*), *e.g.*, the ECJ joined 20 cases in which the Rotterdam Court requested preliminary rulings.

[8] Cases 31/64 (*Bertholet*) and 33/64 (*Koster*). These were also the first two cases in which preliminary questions were referred to the ECJ under Article 177 by District Courts. In Case 78/72 (*L'Étoile-Syndicat Général*), the District Court in Breda, like the others, requested a preliminary ruling on Regulation No. 3.

The last reference considered in this research project was made in 1979 in Case 99/79 (*Lancôme*).

Compared to the preliminary rulings initiated by Cantonal Courts, it is rather difficult to trace the reasons for the references that were made by District Courts. According to the Interim Report, in 11 out of the 24 cases considered, the reference has been initiated by one of the parties in the main proceedings[9]. In 5 cases the District Court decided to refer of its own motion and in 8 others, no information was available on this point. Save for the role that was played by the second party, these figures do not deviate considerably from those that were given for the other courts in the Ordinary Jurisdiction, *i.e.*, the Courts of Appeal and the Supreme Court. In some 30% of the District Court cases, the second party in the main proceedings, *i.e.*, the defendant or respondent, suggested to submit questions to the ECJ. This compared to 7.7% of the Courts of Appeals and 6.3% of the Supreme Courts cases. We were not able to find a satisfactory explanation for this difference.

In 17 cases, by far the greater part of the proceedings considered in this report, the District Courts gave a formal judgment after the preliminary ruling of the ECJ. In five cases, the proceedings ended without a formal judgment and in two cases no information is available on this point. Again, these numbers do not differ considerably from those that were found for the Courts of Appeal and the Supreme Court. However, as can be inferred from paragraph 2 above, all proceedings before Cantonal Courts ended in a formal judgment. Of the 17 cases in which the District Courts gave a formal judgment, 15 were considered to be in strict conformity with the ECJ's ruling. In only one case, the court first had to interpret the ECJ's ruling before giving its final decision. On the remaining case no such details appears from the statistical information.

Generally speaking, it can be inferred from the statistical data that the application of the 177 procedure by District Courts is satisfying. With a few exceptions, the proceedings in which the ECJ was addressed had a regular character. In practically every case the preliminary judgment was helpful to the referring court and duly taken into account.

3.3 Two illustrative cases

1. In Case 94/83 (*Albert Heijn BV*), the owner of a supermarket-chain, whose distribution centre is in Zaandam, was summoned before the

9 The expression "initiated" was adopted in this report, following the original Florence-questionnaire on the basis of which all 177 cases were analysed. The expression may give rise to confusion as, formally speaking, it is always the national court which decides to make a request under Article 177. Whenever the expression is used in this report, therefore, it should be understood as meaning "who suggested the court make the reference?".

Haarlem Magistrate in Economic Matters. The company was charged with having in stock for sale, a quantity of "Granny Smith" apples on which was found residues of a pesticide called "vinchlozoline", not permitted by the Law of Pesticides (*Bestrijdingsmiddelenwet*). The apples were imported from Italy. Violation of the Law of Pesticides is punishable under the Law on Economic Offences and Crimes. The Law of Pesticides contains rules prohibiting the sale, possession, storage and use of any pesticide not authorized thereunder. A pesticide is approved only if it satisfies the requirements laid down by the Minister in the Residues Decree (Residubesluit) and the Residues Order (*Residubeschikking*). As regards the pesticide "vinchlozoline", the Residues Order provides that the level of residues allowed in apples is zero.

Before the Magistrate, the defending company did not deny the offence. It contended, however, that the apples had come from Italy where they had been legally placed on the market. Consequently, the prohibition on their being marketed in the Netherlands was a measure having equivalent effect to quantitive restrictions, contrary to Articles 30 to 36 EEC. It was argued therefore, that Albert Heijn should be acquitted. The Magistrate submitted, therefore, by judgment of April, 25 1983, four preliminary questions to the ECJ on the compatibility of the Residues legislation with Community Law. In its ruling of September 9, 1984, the ECJ joined these questions and held that in the absence of specific Community rules on "vinchlozoline", Articles 30 and 36 do not prevent a Member State from prohibiting the importation of apples from another Member State on account of the presence of a quantity of this pesticide greater than that authorized by the legislation of the first Member State. The authorities of the importing Member State are however obliged to review the prescribed maximum level if it appears to them that the reasons which led to its being fixed have changed, for example, as a result of the discovery of a new use for the pesticide involved.

In the subsequent proceedings before the Magistrate, Albert Heijn insisted that the rules under discussion were contrary to Community Law because they can not be justifiably exempted under Article 36 EEC. Firstly, because there is no proof that the apples in question are harmful to public health and secondly, because the application of the rules by the authorities is so strict and rigid that it constitutes a disproportionate means to attain the protection of public health. As to the latter point, Albert Heijn argued that it was almost impossible to have the Minister amend the Residues Decree to take account of new scientific developments, within a reasonable period of time. Both arguments were rejected by the Magistrate in its final decision of May 6, 1985. The Magistrate held that following the preliminary ruling, the legislation at hand should be accepted under Article 36 unless it is executed in an unreasonable way.

The fact that the Residues Decree had been amended several times since its enactment in 1965 formed sufficient proof in itself for the Magistrate that the application by the authorities was not too rigid. Furthermore, it was considered that the three months which the Minister needed to reply to Albert Heijn's request for allowing a certain amount of "vinchlozoline" was not excessive given, *inter alia*, the time that it took to collect the necessary information from Italy. The Magistrate sentenced Albert Heijn to a fine of Dfl. 600.

2. In Case 238/82 (*Duphar et al. v the Netherlands State*), the President of the The Hague District Court referred five preliminary questions to the ECJ. Duphar and 22 other pharmaceutical companies brought an action before the President in summary proceedings for the adoption of an interim measure prohibiting the implementation of the Sickness Insurance Fund (*Provision of Medicinal Preparations*) Order (*Besluit Farmaceutische Hulp Ziekenfondsverzekering*). This Order was intended to enhance the quality of pharmaco-therapeutical services and to eliminate the considerable deficit of the Netherlands health care scheme. To that end, the Order prohibited the supply of certain medicinal preparations, laid down in several annexes, to persons insured under the Sickness Insurance Fund (*Ziekenfonds*).

The plaintiffs argued, *inter alia*, that this measure is contrary to Community Law, notably Articles 30 and 34 EEC, as roughly 80% of the medicinal preparations consumed in the Netherlands are imported, most of them from other Member States. Also, the Order denies persons insured under the Sickness Insurance Scheme, who account for more than 70% of national consumption, the entitlement to supply of a specifically listed medicinal product from another Member State. These arguments were rejected by the counsel for the State and the President decided, by judgment of September 16, 1982 to stay the proceedings and request a preliminary ruling.

The ECJ gave its judgment on February 7, 1984. In an extensively motivated ruling it rejected all arguments but the one concerning Article 30. As to Article 30, it held that the provisions under discussion could be brought under the so-called "rule of reason". Therefore the measures which aim to refuse insured persons the right to be supplied, at the expense of the insurance institutions, with specifically named preparations may only be compatible with Community Law under certain conditions. These are; the determination of the excluded medicinal preparations involves no discrimination regarding the origin of the products and is carried out on the basis of objective and verifiable criteria. Furthermore, it must be possible to amend the list whenever compliance with such specified criteria so requires.

Again, before the President of the The Hague District Court, the plaintiffs argued that the measures are not in conformity with Community Law because the requirements set by the ECJ are not met. They contended firstly that the measures are not appropriate to attain the wanted budgetary savings. Furthermore, the determination of the excluded products is not carried out on the basis of objective and verifiable criteria and, the lists are not amended whenever required. The President, basing himself strictly on the literal wording of the ECJ's ruling and on the additional information supplied by the State, rejected these arguments in his judgment of June 7, 1984.

3.4 A pathological case

It follows from the preceding subparagraphs that there are no "real" exceptional cases among the references by District Courts. The only Case that may be considered as such is 31/68 (SA Chanel v Cepeha). In this Case, an appeal was lodged with the Court of Appeal against the referring judgment of the District Court in Rotterdam, after the questions had reached the ECJ. Because of the appeal, execution of the judgment was deferred. In its judgment of May 6, 1970, the Court of Appeal in The Hague eventually quashed the judgment of the District Court.

These events resulted in two orders of the ECJ. In the first order of June 3, 1969, it suspended judgment pending notification that the appeal has been decided. Secondly, after the ECJ was informed of the outcome of the appeal, it removed Case 31/68 from the Register by order of June 16 1970, considering that "the reference for interpretation has lost its purpose".

As indicated in Chapter I, paragraph 2, Case 31/68 is not the only Case in which the ECJ did not answer the preliminary questions, due to the fact that the referring court withdrew its request. In this respect, Case 31/68 may be regarded as a rather arbitrary example for the problems arising whenever appellate proceedings are brought against preliminary references. Chanel v Cepeha is nevertheless explicitly mentioned here because it is the only preliminary reference originating from a Dutch court, in which the order of the ECJ, suspending and removing the Case, was published in the European Court Reports (ECR). In paragraph 4.3 of this Chapter, the consequences for appellate proceedings brought against referring judgments for Dutch (procedural) Law are discussed with Case 13/61 (*De Geus and Uitdenbogerd*).

4. Courts of Appeal

4.1 Jurisdiction and composition

The five Courts of Appeal are situated in Amsterdam, The Hague, 's-Hertogenbosch, Arnhem and Leeuwarden. The most important part of the jurisdiction of these courts is to hear appeals against the judgments in civil and criminal matters, given at first instance by the District Courts within their region. As mentioned before, each Court also consists of a Taxation Division, which serves as a court of first instance in certain tax matters. These Divisions are discussed in Chapter IV, paragraph 4.

All decisions of the Courts of Appeal in civil, criminal and tax matters are subject to appeal on points of law and procedure in cassation with the Supreme Court. The Courts of Appeal usually sit with a bench of three justices, but in tax matters, chambers consisting of a single justice may be established.

4.2 Application of Article 177 EEC

The ECJ has given 15 judgments at the request of Courts of Appeal, *i.e.*, 10% of all preliminary rulings considered. Four of them concern taxation matters, *i.e.*, almost 30% of the Courts of Appeal cases.

Of the 11 non-taxation cases, six concern criminal matters, which were all tried by the Economic Divisions of the Courts of Appeal. The remaining five references were made in civil matters, two of which were made in summary proceedings; 6/81 (*Beele*) and 144/81 (*Keurkoop*). The share of references made by Courts of Appeal in summary proceedings, corresponds largely with the share of requests made by Presidents of District Courts in the framework of such proceedings. As indicated earlier in paragraph 3.2, about 50% of the references in civil cases from the procedure of District Courts were summary proceedings. Different to the District Courts, however, these proceedings related to disputes between private parties only.

Only the Courts in The Hague, Amsterdam and Arnhem have requested preliminary rulings (in non-tax matters) in the period considered in this report. As for the references in criminal cases, it is quite remarkable that all but one, (Case 272/80, *Biologische Producten*) which emanated from the The Hague Court of Appeal, were made by the Amsterdam Court.

Similarly, for the references in civil matters, clear preponderance is evident in the practice of the Court in The Hague which requested all rulings except one. Besides the court in The Hague, only the Arnhem Court of Appeal requested a preliminary ruling in case 25/75 (*Van Vliet*). The inflow of cases before the Courts of Appeal in non-tax matters de-

pends entirely on appeals from the District Courts within their region. Therefore, only fragile conclusions as to the attitude of the Court of Appeal in relation to Article 177, may be drawn from this distribution of cases. In this respect, the preponderance of some Courts as well as the lack of references from other Courts of Appeal concurs more or less logically with the distribution of the 177-cases requested by District Courts. The absence of references by the Court of Appeal in Leeuwarden, *e.g.*, is not surprising given the fact that only one of the three District Courts in its region, the court in Assen, has ever addressed questions to the ECJ in the period considered here, *viz.*, 33/64 (*Koster*) and 27/80 (*Fietje*). The curious absence of references from the Leeuwarden and Groningen District Courts, as well as from the Leeuwarden Court of Appeal itself, may, furthermore, be explained by the fact that these courts do not deal with issues of EEC-Law on a large scale. Alternatively, the question may be raised whether these courts are fully aware of their obligations under Article 177.

As the Courts of Appeal in their capacity as taxation courts, are the courts of first instance, a more accurate picture on the basis of the geographical distribution may be drawn for them.[10]

Much of what is said about the application of the preliminary procedure by District Courts in paragraph 3 holds true for the Courts of Appeal as well. The influence of the parties on the decision to refer was discussed in paragraph 3.2. The Courts of Appeal handed down a final judgment taking into account the preliminary ruling in 9 cases, leaving only two undecided by judgment. The statistical data further indicate that all 9 judgments were in strict conformity with the ECJ's ruling.

Generally speaking, the conclusion to be drawn from the statistical data available, must be that the application by Courts of Appeal is also satisfying.

4.3 Two illustrative cases

As there are no real exceptional cases among the references initiated by the Courts of Appeal, we decided to discuss two cases in which something "peculiar" occurred. These cases can also be considered as illustrative of the referring practice of the Courts of Appeal under Article 177.

1. Firstly, in Case 13/61 (*De Geus and Uitdenbogerd*) – more or less similar to Case 31/68 (*SA Chanel v Cepeha*) – the referring judgment of the Court of Appeal in The Hague was submitted for cassation with the Supreme Court. The proceedings before the Supreme Court were particularly interesting for this report because the plaintiffs asked the Supreme Court to quash the judgment of the Court of Appeal on the ground that it

[10] See Chapter IV, paragraph 4.

wrongfully requested a preliminary ruling. The reactions of both the ECJ and the Supreme Court as regards this complication are discussed briefly here.

Before the ECJ, the plaintiffs in the main proceedings, Bosch and Van Rijn, as well as the French Government argued that this court should await the outcome of the cassation proceedings before giving a ruling on the question referred to it by the Court of Appeal. The argument was based, *inter alia*, on Article 389(5) (in the meantime replaced by Article 404(1)) of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), under which a petition in cassation has suspensory effect. The ECJ, following Advocate-General Lagrange, dismissed the argument that a preliminary ruling can only be made in a case which is *res judicata*, as "[t]his interpretation of Article 177 is not only *not* suggested by the literal meaning of the wording, but rests also on a failure to appreciate that the municipal law of any Member State, whose courts request a preliminary ruling from this court, and Community law constitute two separate and distinct legal orders."[11] From the considerations in *De Geus & Uitdenbogerd*, it can be inferred that the ECJ retains jurisdiction until and unless the referring order is quashed in appellate or cassation proceedings. Apparently, the risk is taken by the ECJ, that the referring judgment might be quashed after the ECJ has given its ruling, which accordingly would be without legal effect as to the judgment in the main action.

In its judgment of May 18, 1962, *i.e.*, after the ECJ had given its judgment, the Supreme Court upheld the referring judgment of the Court of Appeal.[12] The Supreme Court considered that in the absence of specific EEC rules on the matter, the suspension of proceedings by a Dutch court for the purpose of a preliminary ruling, has to be in conformity with national law and is, therefore, "in principle" within the jurisdiction of the Supreme Court. In order to judge whether the suspension was allowed under Dutch law, the Supreme Court, subsequently examined whether the question as formulated by the Court of Appeal, was suitable and necessary for submission to the ECJ under Article 177. Notwithstanding the somewhat factual nature of the question, which was also criticized by the ECJ, the Supreme Court concluded that these conditions were clearly met in the present case. In the end, the cassation proceedings turned out to be of no relevance to the completion of the preliminary procedure in *De Geus & Uitdenbogerd*. However, the readinesss of the Supreme Court to examine the suitability and necessity of preliminary references under Article 177

[11] (1962)ECR 49 and 50.
[12] *NJ* 1965, 115.

according to national law, must be criticized since it may conflict with the primacy of Article 177 over national law (of procedure).

2. In Case 82/77 (*Van Tiggele*) the reference by the Court of Appeal was made at the very end of the proceedings, *viz*, after the case had been dealt with by the Supreme Court which quashed the first appellate judgment of the Court of Appeal in The Hague. It remitted the case to the Court of Appeal in Amsterdam for final settlement, taking into account the Supreme Court's judgment. The Court of Appeal, eventually, suspended proceedings and requested a preliminary ruling.[13] It is rather peculiar that, apparently, the relevance of Community Law was only recognized in the ultimate stage of the proceedings. However, a closer examination of the facts of the case provides an explanation for this.

Criminal proceedings were brought against Mr. Van Tiggele for infringment of the rules concerning minimum prices for the marketing of spirits, issued by the Product Board for Spirits (*Produktschap voor Gedistilleerde Dranken*). As a matter of fact, price competition in the Dutch spirits retail sector used to be limited, by mutual agreement, via the application of individual resale price maintenance agreements. In 1975, however, after these agreements were held invalid by the Utrecht District Court, the Government empowered the Product Board to fix minimum retail prices, which it did by issuing the relevant regulation at the end of 1975.

The judgment of the Rotterdam Magistrate in Economic Matters, sentencing Van Tiggele in the first instance, was quashed by the Court of Appeal in The Hague on the ground that the price control was invalid under national law, *inter alia*, because the Council of State had not been heard on the matter. The Supreme Court rejected this reasoning of the Court of Appeal and held the regulation valid under national law. The controversy with respect to the validity under national law appears to have completely preoccupied the parties and the courts so far. Only once this issue had been settled by the Supreme Court, did the Community Law perspective emerge in the proceedings before the Amsterdam Court of Appeal.

In its judgment of April, 27 1978, this court acquitted Mr. Van Tiggele of both charges brought against him, even though, strictly speak-

[13] More or less the opposite occurred in Case 286/81 (*Van Oosthoek's Uitgeverij*). Here, the final judgment of the Court of Appeal of November 11, 1983 in which the defending company was fined Dfl. 235 for having infringed the Act on the Curtailment of Sales Promotion (*Wet Beperking Cadeaustelsel*), was submitted for cassation with the Surpreme Court by Van Oosthoek's Uitgeverij. As the sole ground for cassation, submitted by the counsel of Van Oosthoek's Uitgeverij concerned an alleged violation of national law only, the judgment of the Supreme Court of November 29, 1983, in which the appeal was dismissed (*NJ* 1984, 293), had no impact on this case as far as aspects of Community Law were concerned.

ing, the ECJ's judgment compelled a partial acquittal only. The Court of Appeal considered this lenient approach justified, given the fact that the entire Product Board Regulation, as a consequence of the ECJ's ruling, had not been renewed by the Product Board. The fact that the regulation happened to be partially valid under Community Law at the time of the infringment, was "in view of the changed perceptions of the Product Board" left outside of consideration by the Court of Appeal.

5. Supreme Court (*Hoge Raad*)

5.1 Jurisdiction and composition

The Supreme Court is the highest court of the Ordinary Jurisdiction in the Netherlands. Its most important role is to hear appeals on points of law and procedure against judgments of lower courts in a cassation procedure. The essential difference between the cassation procedure before the Supreme Court and the appeal procedure before courts with appellate jurisdiction, is to be found in the fact that the Supreme Court may only adjudicate on questions of law (and procedure), whereas appeal courts may consider questions of law as well as the facts of the case. The Supreme Court regards the facts of the dispute as irrevocably established by the lower courts and it only decides on points of law. The grounds on which the Supreme Court may quash a judgment, the so-called grounds for cassation (*cassatiegronden*) are, therefore, limited.

As for the parties in the dispute, they can only appeal for cassation if there are no other (so-called "normal") legal remedies available (*gewone rechtsmiddelen*). Thus, only judgments given in the final instance, *i.e.*, judgments that can not be submitted for appeal to either a District Court or a Court of Appeal, can be quashed by the Supreme Court.

In addition to the parties, the Attorney-General (*Procureur-Generaal*) can also, under certain conditions, file an appeal for cassation with the Supreme Court "in the interest of the Law" (*cassatie in het belang der wet*). So far, the Supreme Court has never requested a preliminary ruling in a procedure concerning cassation in the interest of the Law[14].

The Supreme Court can hear appeals for cassation in civil, criminal and taxation matters. For this purpose, the court is divided into three Chambers, one for each field of law. The First or Civil Chamber and the Second or Criminal Chamber, decide on judgments given by the Cantonal Courts, District Courts and, most frequently, Courts of Appeal. The

[14] However, we found one case in such proceedings in which the Attorney-General requested the Supreme Court to do so. The Supreme Court did not follow its Attorney-General in a judgment of 30.9.1986 (*Ambtman Import Export, NJ* 1987, 299).

Third or Taxation Chamber can hear appeals for cassation against judgments of the Courts of Appeal and, in a limited number of cases, against judgments given by the Central Court of Appeal.

If the Supreme Court quashes a judgment, it can either decide itself on the final outcome of the case or refer the case to a lower court. The rules for this differ according to whether it concerns a civil, criminal or taxation case.

The Supreme Court usually sits with a bench of five justices. Benches of three or one justices, however, may be established under Article 102 of the Act on the Organization of the Judiciary.

5.1.1 Differences between the procedures in cassation

There are some important differences between the procedures in cassation to be followed before the Supreme Court. Firstly, the grounds for cassation differ according to whether a civil, criminal or taxation case, on the one hand, or, on the other, a judgment from a Cantonal Court, is being brought. The grounds for cassation in the former cases are listed in Article 99 of the Act on the Organization of the Judiciary; neglect of (important) procedural requirements and violation of the law. The diverging, and more restrictive, grounds for the cassation of (civil and criminal) judgments of the Cantonal Courts can be found in Articles 100 and 101. So far, no preliminary references were made by the Supreme Court in cassation proceedings against judgments of Cantonal Courts[15].

Secondly, whenever the Supreme Court has to decide a civil case, the rules of the Code of Civil Procedure are applicable. The rules of procedure to be followed in those cases are more strict in some respects than in criminal or, in particular, taxation cases. The difference which is most relevant to this report, bears upon the rule that the Supreme Court cannot quash a civil judgment *ex officio*. Thus, such a judgment can only be quashed if: (1) the Supreme Court finds that one of the requirements of Article 99 is violated, and (2) this is raised explicitly and substantiated by the appealing party[16]. Judgments in criminal and taxation matters, on the other hand, may be quashed *ex officio*. In those cases, the Supreme Court may quash more easily, *i.e.*, even if one of the grounds for cassation has not been brought forward explicitly. The question may be raised whether

[15] In a Case decided by the Supreme Court on 8.1.1988 (*Hofmann, NJ* 1988, 942), this Court had a rare opportunity to make a reference in such a case. See also *supra* note 2.

[16] This essential rule for cassation proceedings in civil cases is laid down in Article 419(1) of the Code of Civil Procedure. For the interpretation of this rule by the Supreme Court and for the impact it may have on the referring practice of the Supreme Court in civil cases, see: C.W. Dubbink, "Als vragen niet vrij staat maar verplicht is, Uitleggingsvragen aan het Hof van Justitie van de Europese Gemeenschappen en het BENELUX-Gerechtshof in de cassatieprocedure", in: Een Goede Procesorde, Opstellen aangeboden aan Mr. W.L. Haardt, Deventer, 1983.

the strict rules which are to be followed in cassation proceedings in civil cases, are always reconcilable with the Supreme Court's obligations under Article 177. This question becomes particularly pertinent if the Supreme Court would decline from making a reference, as a result of these procedural rules in a case in which it is, *under Community Law*, bound to address preliminary questions to the ECJ. However, such a conflict between Dutch Law of Procedure and Community Law will probably not occur frequently in practice, in particular not, because it is hardly conceivable that the party appealing for cassation actually omits to argue before the Supreme Court that Community Law is relevant to the outcome of the case. Taking into account the purpose of the Florence project and the rather academic nature of this problem, this is not the proper place to elaborate it further. Therefore, we confine ourselves here to the observation that questions may be raised as to the compatibility of the rules of procedure in (civil) cassation proceedings with the requirements of Article 177 EEC.

Finally, it is submitted that the divergent procedural rules may have an impact on the application of Article 177 by the various Chambers of the Supreme Court, in that more references are likely to be made when the court has the power to quash *ex officio*. Next to the fact that Community Directives have largely harmonized national VAT-legislation, the power to quash *ex officio* may, *e.g.*, explain the large share of taxation cases in which the Supreme Court referred questions to the ECJ.

5.2 Application of Article 177

The Supreme Court requested 18 preliminary rulings in the period considered in this report. Due to the fact that several cases were joined by the ECJ, these requests resulted in 16 preliminary rulings by the ECJ, *i.e.*, approximately 10 % of the total number of cases originating from courts in the Netherlands. Nine of these references were made in taxation cases by the so-called Third Chamber of the Supreme Court, *i.e.*, 50% of its cases which is much higher than the 30% taxation cases of the Courts of Appeal. These cases will be considered below in Chapter IV, paragraph 4. Of the remaining seven cases, five were concerned with civil matters and two with criminal matters. In four of the civil cases preliminary questions were referred in the framework of summary proceedings.[17] This percentage corresponds with those of the District Courts and the Courts of Appeal. Two of these summary proceedings (*Morson and Jhanjan*) concerned actions against the State.

[17] 15/74 (Centrafarm v Sterling Drug); 16/74 (Centrafarm v Winthrop) and 35 and 36/82 (Morson and Jhanjan).

The Supreme Court gave a formal judgment in six out of the seven cases in which preliminary rulings were requested. Only in Case 35 and 36/82 (*Morson and Jhanjan*) there was no judgment. All final judgments were considered to be in strict conformity with the ECJ's ruling.

It is remarkable that the number of cases in which the assistance of the preliminary ruling was indicated by the Supreme Court, differs significantly from the other ordinary courts. In 92.9% of the cases, as compared to 16.7% for the Courts of Appeal and 38.95% for the District Courts, the Supreme Court considered the ruling of the ECJ to be helpful. This percentage comes as no surprise. After all, the Supreme Court will only make a reference for a preliminary ruling if this is strictly necessary in the light of one of the grounds for cassation. If the Supreme Court were able to quash a judgment on a ground lying in national law, it would not make a reference. The Supreme Court, therefore, needs the ECJ's ruling to decide whether or not the judgment involved should be quashed. In other words, if after a preliminary procedure, the judgment is quashed this is because of the preliminary ruling and if not, this is also due to the interpretation given by the ECJ. Consequently, it is practically unavoidable that the Supreme Court mentions the helpfulness of the ECJ's judgment in its own final decision.

It follows from the information available that the application of the 177 procedure by the Supreme Court in civil and criminal matters is satisfactory. There are no pathological cases. However, as has been mentioned earlier in this report, the Florence 177 project only examined the cases in which questions were actually put to the ECJ, leaving out all cases in which a preliminary procedure might have been initiated. In this respect the Supreme Court, being the highest court in the hierarchy, bears a larger responsibility than the other courts of the Ordinary Jurisdiction.

In this respect, the following critical remarks may be submitted. In a judgment of January 13, 1961 (*KIM v Sieverding*)[18], *e.g.*, the Supreme Court did not make a reference because it did not consider itself to be under an obligation to do so as the question of Community Law was of no relevance to the outcome of the case. The approach of the Supreme Court in this case was, eventually, approved by the ECJ in *CILFIT* (Case 283/81[19]). Even though it is admittedly common sense for a national court to decline from making a reference if this is not necessary to decide the dispute before it, it is submitted that at the time the Supreme Court gave its judgment (1961), the approach was not in complete conformity with the ECJ's case-law on Article 177.

[18] Judgment of 13.01.1961, *NJ* 1961, 245.
[19] (1982)ECR 3415.

Secondly, there have been some cases in which the Supreme Court refused to address questions to the ECJ even though its Attorney-General (or one of its Advocates-General) considered the Court to be under an obligation to request a ruling under Article 177. This occurred, *e.g.*, in a judgment of April 10, 1964 (*Constructa Werke v De Geus & Uitdenbogerd*)[20]. In a recent criminal case, brought before the Supreme Court by the Attorney-General in cassation proceedings "in the interest of the law", the latter asked the Court to quash a judgment of the Court of Appeal because it misinterpreted an EEC Directive.[21] In the event that the Supreme Court were to uphold the judgment, the Attorney-General argued, it could only do so after having asked the ECJ for an interpretation under Article 177. Unlike the Court of Appeal, the Attorney-General did not consider the matter to be an acte clair or an acte éclairé. The Supreme Court, however, upheld the Court of Appeal's judgment. It did not feel obliged to request a preliminary ruling, because it considered there was no doubt as to the meaning of the Directive concerned.

5.3 Two illustrative cases

1. The first two requests for preliminary rulings by the Supreme Court were made on March 1, 1974 in Cases 15/74 (*Centrafarm v Sterling Drug*) and 16/74 (*Centrafarm v Winthrop*). The proceedings in these Cases being to a large extent identical, we will only discuss Case 15/74.

Sterling Drug is the holder of national patents in several countries (including the Netherlands and the U.K.) relating to the mode of preparation of a medication with the trade-mark "Negram". Centrafarm imported medicinal preparations which were manufactured according to the patent method. Some bore the trade-mark "Negram", without the agreement of Sterling Drug, from England and the Federal Republic of Germany, where they had been put onto the market in a regular manner by subsidiaries of Sterling Drug. Sterling Drug brought an action against Centrafarm in summary proceedings before the President of the Rotterdam District Court. Sterling Drug applied, *inter alia*, for interim measures, requiring Centrafarm to refrain from any further infringement of the patent belonging to Sterling Drug. The President rejected the application by judgment of May 9, 1972 whereupon Sterling Drug brought an appeal before the Court of Appeal at The Hague. This Court found in favour of Sterling Drug in a judgment of March 2, 1973. It is interesting to note that the Court of Appeal explicitly refused to submit preliminary questions to the ECJ. Apparently, the Court of Appeal refused, *inter alia*, because of the fact that it concerned summary proceedings.

[20] Judgment of 10.04.1964, *NJ* 1964, 439.

[21] Judgment of 30.09.1986 (*Ambtman Import Export*), *supra* note 14.

Centrafarm submitted a ground for cassation with the Supreme Court, which related, *inter alia*, to the impact of articles 30 to 36 and article 85 on the lawfulness of parallel importations by Centrafarm. Considering that the decision on this part of the ground depended on the interpretation of Community Law, the Supreme Court stayed the proceedings and requested a preliminary ruling. The Attorney-General with the Supreme Court had also concluded that a preliminary procedure was necessary.

In response to the questions, the ECJ held in essence that it is contrary to Articles 30 to 36 EEC for the patentee to prohibit the sale of a product protected by patent, which has been marketed in another Member State by him or with his consent. The ECJ, therefore, limited the protection of patent rights under Article 36 EEC to the specific subject-matter of that right. Thus, the patentee as a reward for his creative effort, is guaranteed the exclusive right to use the invention with a view to manufacturing the product and putting it into circulation for the first time, as well as the rights to oppose infringements of this right. Consequently, the patentee's right is exhausted when the product is marketed in another Member State in a legal manner, by himself or with his consent. After putting the product into circulation in one Member State, the patentee can, therefore, no longer partition off national markets and thereby restrict trade between Member States.

In its final judgment of February 21, 1975 the Supreme Court quashed the judgment of the Court of Appeal and rejected the applications for interim measures submitted by Sterling Drug.

2. In Case 279/80 (*Alfred John Webb*), preliminary questions were put to the ECJ by the Criminal Chamber of the Supreme Court. Webb is the manager of International Engineering Services Bureau (UK), a company based in the United Kingdom according to British company law. The company's principle business is supplying technical staff to the Netherlands, the staff being recruited by the company and supplied for a fixed period to businesses located in the Netherlands. The company holds a licence as provided for by U.K. legislation, but pursues its business without of a Netherlands licence. Webb was sentenced by a judgment of April 27, 1978 of the Magistrate in Economic Matters at the Amsterdam District Court for having provided manpower without being in posession of a licence issued by the minister for Social Affairs, under the Law on the provision of manpower (*Wet op het ter beschikking stellen van Arbeidskrachten*). The judgment was confirmed on appeal by a decision of the Economic Chamber of the Amsterdam Court of Appeal, on February 14, 1980. The accused sought to have the conviction quashed by the Supreme Court.

In the grounds for cassation submitted by Webb, he argued, *inter alia*, that Articles 59 and 60 EEC had not been observed by the Court of

Appeal. His main argument was that the Netherlands may not require a separate Dutch licence from those who provide manpower in another Member State as well, if they hold a licence in the latter State which duly supervises its activities and which has been issued on conditions comparable to those imposed by the State in which the services are provided. In a judgment of December 9, 1980 the Supreme Court considered that a decision in the dispute depended on questions concerning the interpretation of Community Law and referred three questions to the ECJ. The Advocate-General with the Supreme Court had also concluded that a preliminary reference was required.

The ECJ gave its judgment on December 17, 1981. It held that Article 59, in principle, does not preclude a Member State which obliges agencies for the provision of manpower to hold a licence, from requiring a provider of services established in another member State, to comply also with that condition even if he holds a licence issued by the State in which he is established. After this judgment, the Supreme Court rejected the appeal for cassation and upheld the Court of Appeal's ruling in a decision of April 20, 1982. The final judgment of the Supreme Court is remarkably short. In fact, the Court only repeated the dictum of the ECJ and rejected the appeal without giving a reasoning of its own.

6. Summary of the main results of the questionnaires

1. The ECJ gave 45 preliminary rulings at the request of courts belonging to the Ordinary Jurisdiction, *i.e.*, 30% of all requests made by Dutch courts. Overall, the answers that were given to the questionnaires indicate that the application of the 177 procedure by courts belonging to the Ordinary Jurisdiction is satisfactory. We found only one pathological case, *viz.*, 141-143/81 (*Holdijk et al.*).

In 35 of the 45 cases, the referring courts delivered a formal judgment taking into account the ECJ's ruling. Eight cases were resolved otherwise and the outcome of two cases remained unknown.

Of the 35 cases in which a final judgment was given, 32 are considered to be delivered in strict conformity with the ECJ's ruling. In the remaining three cases the referring courts had to further interpret the ECJ's ruling first. We found no cases in which an evasive application of the ECJ's ruling was given.

2. As for the distribution of the cases over the various fields of the law, it appears from the statistical data that 24 cases were concerned with civil matters and 21 with criminal matters.

The greater part of the civil cases dealt with the free movement of

goods (12). Six cases concerned Articles 85 and 86 EEC and another three, social security. Finally, there were two cases on the free movement of persons and one on EEC Social Policy. Thirteen of the 24 civil cases were decided in summary proceedings, demonstrating the important function of such proceedings in judicial protection under Community Law in the Netherlands.

In view of the scope of EEC-Law, it goes almost without saying that in criminal matters, the Magistrates in Economic Matters and the Full Courts within the District Courts and Courts of Appeal dealing with Economic Matters, have played an important role as far as the references under Article 177 are concerned. Looking more closely at the criminal cases, it appears that only two of them were not concerned with the Act on Economic Offences and Crimes, *viz.*, 32/80 (*Kortmann*) and 227/82 (*Van Bennekom*). These two cases were decided by the District Courts on appeal from judgments of Cantonal Courts even though they dealt with offences of an "economic nature". However, as they are not punishable under the aforementioned Act, they had to be decided in the first instance by a Cantonal Court.

3. Only in 7 out of the 45 cases (16%) were the references made by courts of last instance. Apparently, the question whether or not the court is under the obligation to request a ruling under the third paragraph of Article 177 does not have an important influence on the courts' decisions to actually address questions to the ECJ.

4. In all cases, the courts asked for a preliminary ruling on the interpretation of Community Law. In the period considered in this report, not a single validity question was put to the ECJ by courts belonging to the Ordinary Jurisdiction. By way of explanation it may be submitted that the ordinary courts are not called upon frequently to decide matters relating to secondary Community Law. Such disputes usually have to be brought before an administrative court. This holds true in particular for those parts of Community Law which have to be further implemented by a national administrative body. This probably explains why Dutch administrative courts have requested rulings as to the validity of Community Law in 12 cases.

Chapter IV: Evaluation of the Application of the 177 Procedure by Administrative Courts

1. Introduction

In this Chapter the following courts belonging to the Administrative Jurisdiction are subsequently discussed: the Court of Last Instance in Matters of Trade and Industry, the Tariffcommission, the Courts of Appeal and the Supreme Court in taxation matters, the Civil Service Tribunals, the Social Security Courts and the Council of State. After these administrative courts, paragraph 6 is devoted partially to the referring practice by the Division for Administrative Disputes of the Council of State, which has been accepted by the ECJ as a court under Article 177.

One of the main features of the Administrative Jurisdiction in the Netherlands is the existence of so many highly specialized courts. These courts all have their own specific jurisdictions and are functioning completely independent from one another. Therefore, it needs no explanation that the Dutch system of judicial protection against the Government is often regarded as being too fragmentary. In the light of Article 177, however, it may be assumed that the existence of several specialized administrative courts together with the fact that most of them are last instance courts, is beneficial since it produces more references. Furthermore, it is important for this project to note that three of the administrative courts hear cases in the first as well as in the final instance. This holds true for the Court of Last Instance in Matters of Trade and Industry, the Tariffcommission and the Judicial Division of the Council of State.

Under the present organization of the Administrative Jurisdiction, it is possible that a dispute over Community Law, following, *e.g.*, from one (Customs) declaration (aangifte), has to be brought before three separate courts. The Tariffcommission for customs and excises, the Courts of Appeal for VAT and the CBB for agricultural levies. Consequently, preliminary rulings may be requested by one of these courts, which do not stand in a hierarchical relation to each other. In the cases considered in this report, no such double references to the ECJ have been made. In the future, however, this conjunction may cause problems and unnecessary delay.

Several other types of conjunction can be distinguished in this respect. For instance, the amount of an agricultural levy, due under the rules of the Common Agricultural Policy, often depends on the classification of the agricultural product under the CCT. This inter-relation between the CAP and the CCT, however, is not found in the organization of the Administrative Jurisdiction in the Netherlands. As a matter of fact two administrative courts, the CBB for most CAP disputes and the Tariffcommission for the CCT, are administering justice independently from each other. It comes as a surprise that no "double" references have been made as yet by Dutch courts in these matters. However, some flaws can be discerned. In three Cases 101/78 (*Granaria II*), 80/72 (*Koninklijk Lassiefabrieken*) and 137/78 (*Henningsen Van Den Burg et al.*), referred by the CBB, *e.g.*, this court dealt with classification problems even though the General Act on Customs and Excises clearly stipulates that this comes under the jurisdiction of the Tariffcommission. In later cases the CBB took a correct position by referring applicants in similar cases to the Tariffcommission.

The 177 references made by the administrative courts and by the Division for Administrative Disputes of the Council of State have resulted in 105 preliminary judgments of the ECJ, *i.e.*, 70% of the total number of preliminary rulings which originated in the Netherlands. On the basis of this percentage we may assume that most litigation on matters of Community Law is brought before the administrative courts in the Netherlands. It is clear, therefore, that these courts perform an important function in offering judicial protection under Community Law.

2. Court of Last Instance in Matters of Trade and Industry (*College van Beroep voor het Bedrijfsleven, CBB*)

A.E. KELLERMANN and F.H.M. POSSEN

2.1 Jurisdiction and composition

The Court of Last Instance in Matters of Trade and Industry, henceforth abbreviated to CBB, is considered to be the most specialized court in the field of economic law. The jurisdiction, organization and proceedings of the CBB are laid down in two administrative laws; the Act concerning Administrative Jurisdiction in Matters of Trade and Industry (*Wet Administratieve Rechtspraak Bedrijfsorganisatie, 1954*) and the Act on Disciplinary Proceedings within the Organization of Trade and Industry (*Wet Tuchtrechtspraak Bedrijfsorganisatie, 1954*). The latter regulates the internal disciplinary jurisdiction of public bodies. This act

was under review in Case 29/82 (*Van Luipen*) as a result of a disciplinary measure by the Quality Standards and Control Bureau for Lettuce and Fruits (*Kwaliteits Controlebureau voor Groenten en Fruit*), a disciplinary Body.

The Act concerning Administrative Jurisdiction in Matters of Trade and Industry, regulates, *inter alia*, the procedure of appeal against decisions of the various bodies established under public law. Under Article 4 of the Act, any private or legal person can lodge an appeal with the CBB against decisions and acts taken by these public bodies, provided they do not involve matters of civil law. However, these persons must be either, individually concerned or directly affected by that decision or act.

The grounds for appeal are listed in Article 5. An appeal may be lodged on the grounds that,: (1) the decision is contrary to a generally binding provision; (2) in taking the decision, the administrative body manifestly used its power for purposes other than for which the powers were vested in it; (3) in taking the decision, the administrative body acted contrary to a principle of proper administration generally held to be equitable. The first is the most important. This ground may also be invoked in case of violation of European Community Law. The CBB may, after annulment of a decision, order the responding body to take certain action and even to pay damages to the applicant. Against a judgment of the CBB no further appeal is possible.

The bodies referred to are either the Social and Economic Council (*Sociaal Economische Raad*) or, one of the various Boards (trade and industrial organizations) designated to execute a specific part of Dutch social and economic legislation. These executive functions are primarily performed by so-called Productboards (*Produktschappen*) and Trade and Industry Boards (*Bedrijfschappen*). Both have an autonomous power, under the general supervision of the Government, to issue regulations for the trade and industry with which they are concerned. This covers, *inter alia*, certain aspects of production, competition, labour conditions and training and employment.

These already existing bodies were called in by the Minister of Agriculture and Fisheries to assist, *inter alia*, in the implementation of the EEC Common Agricultural Policy. Important powers have been conferred ever since upon the Productboards and Trade and Industry Boards. On the basis of the Act on Agriculture (*Landbouwwet, 1957*), *e.g.*, the Minister has designated the Productboards to effect intervention purchases under the various EC common market organizations. Equally, the Import and Export Act (*In- en Uitvoerwet, 1962*) and the Royal Decrees based thereon, confer upon the Productboards the power to charge levies or grant refunds with, regard to imports from or exports to the world markets.

Apart from the two Acts mentioned, a number of others also give the CBB jurisdiction in the sphere of economic law. Consequently, it is competent to hear appeals against decisions taken by, *inter alia*, the Chambers of Commerce and by the Central Bank of the Netherlands.

2.2 Application of Article 177

The CBB holds the record for the Netherlands in requesting preliminary rulings to the ECJ. The preliminary references made by the CBB have resulted in 42 judgments of the ECJ. This amount represents 28% of the total number of references put forward by Dutch courts in the period of this research. Besides the fact that it is a court which decides in the first and last instance, there is another reason for the relatively frequent recourse by the CBB to the preliminary procedure. Appeals against the decisions of the bodies referred to in the previous subparagraph, implementing the Common Agricultural Policy, are heard by it. In fact, 25 of the ECJ judgments at the request of the CBB were concerned with EEC Common Market Organizations, *i.e.*, 60 %. Some specific remarks as to the follow-up of these cases will be made in subparagraph 2.2.1 below. The other references made by the CBB were concerned mainly with the interpretation of the Common Customs Tariff and the EEC Commercial Policy. Six cases relate to the freedom to provide services and the free movement of goods.

According to the Interim Report, one of the parties initiated the reference in 11 cases, *i.e.*, approximately 25% of the total number of references by the CBB. For the remaining cases no indication was found as to the question who initiated the reference. This is the highest percentage of all Dutch courts, ordinary and administrative alike. In all 11 cases, the initiating party happened to be the applicant. Apparently, the responding party, which is always a body vested with certain powers under public law, never suggested the CBB to make use of Article 177. The same conclusion can be drawn from the statistical data for the Tariffcommission and for the Judicial Division of the Council of State. The responding parties before these courts never suggested the submission of preliminary questions to the ECJ either. In fact, the only administrative courts where the responding parties demonstrated more initiative as to the application of Article 177, are the two instances of the Social Security Courts. The statistics show that the responding parties before a Social Security Court of First Instance initiated a reference in one out of seven cases and before the Central Court of Appeal, in 6 cases (approximately 25%!). This is a deviation from the normal pattern found for administrative courts.

The CBB requested a ruling of its own motion in approximately 7 cases, 17%. In even more cases, however, no information on this point could be deduced from the referring judgment; 24 cases or 60%.

The CBB requested a preliminary ruling on the validity of Community Law in 10 cases (24%). This "score" is by far the highest of all Dutch courts. In fact, next to the CBB only the Tariffcommission referred questions on validity of Community Law. This happened in two cases, 12%.[1]

In 27 cases (65%), the proceedings before the CBB ended with a formal judgment taking account of the preliminary ruling. In two cases, the outcome is unknown. The remaining 13 cases were resolved otherwise, but the statistical information does not indicate clearly, in what manner. Twenty-six of the cases in which final judgments were delivered, were considered to be in strict conformity with the ECJ's rulings. In the remaining cases, the CBB had to further interpret the ruling before giving its final judgment. The CBB gave an indication as to the usefulness of the ECJ's interpretation, in 15 cases (35%).

2.2.1 Some specific remarks as to the follow-up of the preliminary rulings requested by the CBB in cases concerning Common Market Organizations.

From the analysis of the proceedings before the CBB in these 25 cases, it appears that the Central Product Board for Agricultural Produce (*Hoofdproduktschap voor Akkerbouwprodukten*) holds the record for appearing as the respondent. The Central Product Board was the respondent in 15 of these cases.

In these cases, the CBB had to deal with a variety of sometimes rather technical agricultural matters. These included the application of the system of import and export licences, the advance fixing of refunds in respect of milk and milkproducts, the criteria for fixing monetary compensatory amounts or the denaturing of sugar.

In eight of the investigated cases, questions concerning the validity of Community Law were put forward by the CBB. It is remarkable that of these eight cases, the ECJ held the Community Regulation to be invalid in only one. This happened in Case 116/76 (*Granaria I*), which will be analysed in subparagraph 2.3 below. This is even more remarkable since, in one year falling outside this project, 1988, the ECJ declared a Regulation invalid in two cases originating from the CBB, *viz.*, Cases 120/86 (*Mulder*) and 217/87 (*Krohn and Van Es*).[2]

In seven out of the eight cases in which validity questions were addressed to the ECJ, this court held the provision of Community Law to be

1 The 12 cases in which questions on the validity of Community Law were addressed to the ECJ are listed in Annex III to this report.

2 ECJ judgment of 28.04.1988, not yet reported (*Mulder*) and ECJ judgment of 20.09.1988, not yet reported (*Krohn and Van Es*).

valid. In those 7 cases, the CBB did not have to give a final judgment because the applicants withdrew their claims. This is a remarkable conclusion as regards the follow-up.

In the Second Granaria Case, 101/78, the CBB decided on January 18, 1980 not to provide compensation for damage, *inter alia*, because the Central Product Board For Agricultural Produce could not be held responsible for applying an invalid Regulation. In two recent cases, which fall outside the scope of this project, however, the CBB did order damages to be compensated by the responding authority. In Case 207/84 (*Rederij De Boer*),[3] *e.g.*, the CBB decided on April 12, 1988 that the Product Board for Fish and Fishproducts (*Produktschap voor Vis en Visprodukten*) should compensate the damage incurred by enacting an invalid Decision (*Besluit Maatjesharingvisserij*). According to the CBB, the amount of damages had to be fixed between the parties. In Case 275/84 (*FRICO*)[4] the CBB decided on July 15, 1988 that compensation for damages should be given to the applicants. Even though the granting of MCA's by the Product Board for Dairy and Dairyproducts turned out to be contrary to Community Law, it nonetheless had raised legitimate expectations and confidence. Parties were themselves ordered to agree amongst each other on the amount of the damages, according to the criteria given by the CBB.

In Case 327/82 (*EKRO*), the CBB requested a preliminary ruling on the interpretation of Regulation 2787/81. The CBB did not deliver a final judgment in this Case. We were informed that EKRO's claim for an export refund was dropped because the responding body, the Product Board for Meat and Cattle (*Produktschap voor Vee en Vlees*) decided itself to pay EKRO the disputed export refunds after the preliminary ruling, without awaiting the outcome of the proceedings before the CBB.

Generally speaking, it took the CBB approximately one year to give judgement once the preliminary rulings had been handed down by the ECJ. It is submitted however, that the length of time it takes to provide the final decision is tending to become longer. For example, in more recent cases like 207/84 (*Rederij De Boer*)[5] and 275/84 (*FRICO*),[6] which fall outside the scope of this project, it took the CBB some 30 months to deliver the final judgment. One explanation for this may be found in the increasing workload of the CBB after 1985, caused, *inter alia*, by approximately 8000 appeals brought before it against the Super Levy Decree concerning milk quota.

3 (1985)ECR 3210.
4 (1985)ECR 3656.
5 *Supra* note 3.
6 *Supra* note 4.

2.3 Two illustrative (or pathological) cases

As there are no real exceptional cases among the references initiated by the CBB, we decided to discuss two cases in which something "peculiar" occurred. These cases can also be considered as illustrative for the referring practice under Article 177 by the CBB.

1. Joined Cases 51-54/71 and 21-24/72 (*International Fruit Company et al.*) concern safeguard measures enacted by the EC for certain apples originating from third countries. They are implemented in the Netherlands by the Productboard for Lettuce and Fruit (*Produktschap voor Groente en Fruit*), against which the applicants lodged several appeals.

Thus, proceedings were brought before the CBB against the national measures. In addition, the companies brought direct appeals under Article 173 EEC against the Commission of the EC, before the ECJ in Cases 41-44/70. In the former Cases, the applicants argued in particular that the national measures were invalid because they were based on invalid Community Regulations of the EC Commission. The CBB decided to refer several preliminary questions as to the validity of the said Regulations in the light of Article 30 EEC, by orders of July 30, 1971 (Cases 51-54/71).

In its judgment of December 15, 1971 the ECJ upheld the Regulations. It considered, *inter alia*, that Member States are free to organize the proceedings regarding the execution of Community Law. Back before the CBB, this court decided to refer another set of preliminary questions to the ECJ by orders of May 5, 1972 (Cases 21-24/72). This time, the validity of the Regulations was questioned in relation with provisions of the General Agreement on Tariffs and Trade, GATT. In a judgment of December 12, 1972, however, the ECJ held the Regulations to be valid in this respect as well. As a consequence of these ECJ rulings, the complaining companies withdrew their appeals before the CBB. The latter court, therefore, never had to give its final judgment. The Article 173 Cases (41-44/70) against the Commission were rejected by the ECJ as well.[7]

2. In Case 116/76 (*Granaria I*), the applicant in the main action applied to the Central Board for Agricultural Produce for a protein certificate within the meaning of Article 3(1) of Regulation 563/76. This would facilitate the free circulation in the Community of a consignment of maize gluten feedmeal pellets originating from North America. Replying to this request on the same day, the responding authority stated that it was not

[7] (1971)ECR 411.

possible to issue such a certificate without a security being provided for first. Granaria instituted proceedings for the annulment of this decision on the ground that it was based on Regulation 563/76, which, they argued, was void because it conflicted with various provisions and principles of Community Law. The CBB stayed the proceedings and asked the ECJ for a preliminary ruling on 7 questions and 7 sub-questions. In its order for reference of December 7, 1976, the CBB specified that it questioned the validity of Regulation 563/76 because of its possible incompatibility with the following; Article 190 EEC, the objectives of the common agricultural policy as defined in Article 39 EEC, Articles 3(f) and 85-86 and 40(3) EEC and with Article 1 of the Decision of the EC Council of April 21, 1970. As a matter of fact several German Courts had requested preliminary rulings on the validity of Regulation 563/76 just before the CBB, in Cases 114/76 (*Bela-Mühle*) and joined Cases 119 and 120/76 (*Öhlmühle Hamburg and Kurt Becher*). On July 5, 1977, the ECJ answered the preliminary questions of the German Courts[8] and the CBB; it held Regulation to be null and void as it violated Articles 39 and 40(3) EEC.

In its original appeals against the decisions of the Central Product Board for Agricultural Produce in Case 116/76, Granaria had requested the CBB to annul them because Regulation 563/76 was invalid, thus leaving it for the CBB to determine the consequences of this annulment. Following the ECJ's judgment in Case 116/76, the parties filed further submissions on September 8, 1977. They requested the CBB to annul the decisions and to order the Central Board to make good the damage which they had suffered, together with the costs and disbursements of the action. Since the CBB considered that the action raised further questions on the interpretation of Community Law, it decided to suspend proceedings again and refer 9 preliminary questions to the ECJ. These concerned the effect in time of the invalidity and, the interpretation of Article 215 (second paragraph) EEC. This reference was registered at the ECJ as Case 101/78 (*Granaria II*).

On February 13, 1979 the ECJ gave its ruling; the declaration of invalidity under Article 177 has an effect *ex nunc*. Furthermore, it held that the question of compensation by the national agency for damage caused to private parties, must be determined in accordance with the national law of the Member State concerned. The CBB gave its final judgment in the Granaria Cases on January 18, 1980. It annulled the decisions of the Central Product Board and ordered the latter to pay the applicant's legal charges. Concerning the compensation for damages incurred by Granaria, these were rejected by the CBB. It argued that the Central Product Board could not be held responsible for applying the invalid Regulation. At the

8 (1977)ECR 1211 (Bela-Mühle) and 1269 (Öhlmühle Hamburg and Kurt Becher).

time concerned it took the necessary decisions and could not be held responsible for matters beyond its influence. After the preliminary rulings by the ECJ, several German companies attempted to order the Commission and Council of the EC to compensate the damages, but failed also. Their actions under Articles 178 juncto 215 EEC were dismissed by the ECJ which did not hold the EC liable. (Cases 83 and 94/76 and 4, 15 and 40/77).[9]

The conjunctions between the procedures of Articles 177 and 173 which emerged from the International Fruit Company Cases, demonstrate the double judicial protection available under Community Law. That is, via the national courts, if need be in combination with a preliminary reference and/or via a direct appeal to the ECJ. It can be expected that the application of both "remedies" in one case will occur more frequently in the future.

In the area of customs law, this may, *e.g.*, be caused by the introduction some years ago, of a kind of "administrative preliminary procedure" in EEC Regulations 1430/79, 1697/79 and 918/83. Under this procedure, the national tax authorities are compelled to ask the EC Commission for its decision, before taking a position themselves. The ECJ has judged several times already that importers are directly and individually concerned by these decisions, given by the Commission at the request of (and addressed to) the authorities of the Member States. Actions for annulment, instituted against the Commission by the importers concerned will, therefore, in general be held admissable under Article 173. Of course, action instituted under national law against the decision eventually taken by the administration remains possible as well. The national court may, before deciding the case, request a preliminary ruling on the validity of the Commission Decision under Article 177.

As for the relationship between the preliminary procedure and the action for damages (Article 178 *juncto* 215, second paragraph), which arose in the "German" cases mentioned above, it may be interesting to take note of a recent Case of the CBB in which more or less the reverse happened.

In *De Boer v Minister for Agriculture and Fisheries* of February 3, 1987 the CBB had to settle a dispute on the restriction of exports of steel pipes and tubes to the United States of America. In this case the CBB did not ask for a preliminary ruling on the validity of the relevant secondary Community Law (Regulations 60/85 and 61/85), even though the applicant requested it.

The decision not to refer may be explained by the fact that De Boer had also instituted proceedings according to Articles 178 *juncto* 215 EEC.

9 (1978)ECR 1209 (Bayerische HNL et al.).

The validity of the Regulations could, therefore, be examined by the ECJ in the framework of the direct action under Article 215 EEC making a preliminary reference not strictly necessary in that case. In case 81/86, the ECJ rejected the appeal for damages by De Boer, *inter alia*, because the system of export licences provided for in the two Regulations was not shown to be illegal.[10]

3. Tariffcommission (*Tariefcommissie*)

Mr. F.H.M. POSSEN

3.1 Jurisdiction and composition

The jurisdiction with regard to customs, excise duties and several other comparable levies, which are considered to be "special" taxes under Dutch law, belongs to the Tariffcommission. The present organization of the Tariffcommission, the court deciding these cases in the first and last instance, is dealt with by the Tariffcommission's Act (*Tariefcommissiewet,1971*). This Act regulates its composition and provides, *inter alia*, for professional judges as well as lay members with a specific expertise in, for instance, customs law or accountancy, to sit in the court. The Tariffcommission is supported by a Secretary and a legal and administrative staff. Its actual jurisdiction is laid down in Articles 108 and 109 of the General Act on Customs and Excises (*Algemene Wet inzake de douane en de accijnzen, 1961*). Before appealing to the Tariffcommission, the appellant first has to make an objection against the litigious decision by the Inspector of Customs and Excises (*Inspecteur Invoerrechten en Accijnzen*). Upon this notice of objection, an appeal can be lodged with the Tariffcommission. As the General Act on Customs and Excises does not contain any specific ground for appeal, any ground can be brought forward by the appellant against the assessment by the Inspector of Customs and Excises.

3.2 Application of Article 177

The Tariffcommission addressed preliminary questions to the ECJ in 16 cases, resulting in 13 judgments of the ECJ, *i.e.*, 8.5% of the cases considered in this report.

From the statistical data aggregated by the Florence Steering Group, it can be inferred that no active role was played by the parties before the Tariffcommission, in initiating the references. The court referred of its own motion in 12 cases, *i.e.*, 75%. For the remaining 4 cases no informa-

[10] ECJ Judgment of 29.09.1987, not yet reported.

tion was available. The number of references made by the Tariffcommission out of its own motion is by far the highest of all courts (administrative and ordinary alike) considered in this report.

As mentioned in subparagraph 2.2 of this Chapter, two of the preliminary rulings were concerned with the validity of secondary Community Law; Cases 38/75 (*Douaneagent N.S.*) and 185/83 (*Interfacultair Instituut*). In the latter Case, however, it was clearly not the intention of the Tariffcommission to submit "validiy-questions". In fact, the ECJ handled the preliminary request as a "validity" question even though the Tariffcommission had formulated a question on the interpretation.

The Tariffcommission gave a formal judgment taking into account the preliminary ruling, in 12 cases (75%). For the remaining 4 cases, *viz.*, 26/62 (*Van Gend & Loos*) and 28-30/62 (*Da Costa en Schaake*), no information is available as to the resolution of the case. From the 12 cases in which the Tariffcommission delivered a final judgment, 10 are considered to be in strict conformity with the ECJ's ruling. Two cases needed a further interpretation before the dispute could be decided. Furthermore, the Tariffcommission explicitly mentioned the helpfulness of the preliminary ruling in all 12 cases in which it gave a final judgment. This remarkable "score" of 100% is even higher than the one found for the Supreme Court (92.7%) in Chapter III, paragraph 5.

The area of customs law has been almost completely harmonized by EC legislation, leaving only the administration and enforcement in the hands of the Member States. Therefore, it goes without saying that the Tariffcommission always has to decide whether to apply the procedure of Article 177 or to abstain from using it because of an acte clair or éclairé. As excise duties have not been harmonized at EC level, they are primarily judged by the Tariffcommission in the light of Article 95 EEC.

In custom matters, the Tariffcommission often has to decide about the classification of goods under the Nomenclature of the Common Customs Tariff (CCT). As a court against whose decision there is no judicial remedy in the meaning of Article 177, paragraph three, the Tariffcommission is under an obligation to refer preliminary questions to the ECJ, whenever this is necessary to enable it to give judgment. Many of the classification problems brought before it, however, concern factual problems or problems of evidence only. For this reason, the Tariffcommission distinguishes between cases concerning principle matters and cases which are of a more procedural and technical nature. Generally speaking, preliminary questions are only referred to the ECJ in the former type of cases, leaving the other questions to be dealt with by the Tariffcommission itself.

3.3 Two illustrative cases

1. Case 160/80 (*Smuling-De Leeuw*) concerned the classification of a bacterium called "Xanthomonas campestris", which is naturally found on cabbage leaves where it forms a slimy thickener called "Xanthan gum". In the chemical industry, this process has been imitated in such a way that the product is produced in economically profitable quantities for the textile, food and pharmaceutical industries. The appellant argued that the product, still being obtained through a natural/biological process, should be classified under heading 13.03 C-III "lacs, resins and other vegetable saps and extracts", for which no customs duties are due. The Inspector of Customs and Excises, however, found the product to be a polymer produced in the chemical industry as meant in heading 39.06 of the CCT, for which a 16% customs duty had to be charged. After the objection had been rejected by the Inspector, the dispute was brought before the Tariffcommission. In a well reasoned judgment of June 27, 1980 this court found that a preliminary interpretation was required.

The ECJ subscribed the position taken by the tax authorities and classified "Xhantan gum" under heading 39.06. This judgment was directly applied by the Tariffcommission in its final judgment of February 1, 1982. In similar disputes over the same product which have subsequently arisen, the Tariffcommission considered the matter to be an acte éclairé.

2. In Case 28/77 (*ENKA*), the action before the Tariffcommission concerned the method to be used for the calculation of the value for customs purposes, of goods which are declared for import *ex* a customs warehouse. Steel cord used in the manufacture of tyres was stored in a customs warehouse under the control of ENKA, pending their sale and delivery to Ireland. In assessing the value of these goods the Inspector for Customs and Excises relied on the Customs Order (*Tariefbesluit*) adapted in the light of EEC Directive 69/74 (on the harmonization of customs warehouse procedures). ENKA contested this assessment and argued, *inter alia*, that Article 10(2)(b) of the Directive had been transformed into Dutch law incorrectly.

On November 11, 1976 the Tariffcommission requested a preliminary ruling on the interpretation of Article 10(2)(b) and on the question whether this Article could be relied upon in proceedings before a Member State court. In its judgment of November 23, 1977 the ECJ held, *inter alia*, that parties may rely on this Article for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it. In addition the national court must give it precedence over any national measure which may prove incompatible with its terms. Furthermore, it appeared from the interpretation given by the ECJ that the Directive had not been correctly implemented in the Customs Order.

In its final judgment of January 30, 1978 the Tariffcommission followed completely the ECJ's ruling. It held that the Customs Order was incompatible with Article 10(2)(b) of the Directive and that the Inspector of Customs and Excises had, consequently, incorrectly assessed the customs duties. He should not have included certain costs for the storage of the steel cords in the customs warehouse in the value for customs purposes. Shortly afterwards, the Customs Order was amended by the legislator taking into account the ECJ's ruling.

3.4 A pathological case

Case 72/77 (*Universiteit Utrecht*) concerned a request for the exemption from import duties of scientific apparatus. EEC Regulations 1798/75 and 3195/75 allow certain educational, scientific and cultural materials to be imported from third countries free of CCT duties. As importing companies apply for exemptions under these provisions frequently, it is crucial for the Tariffcommission to distinguish between cases concerning principal questions and, the more technical and procedural cases. Case 72/77, being the first case in which an interpretation of the term "scientific apparatus" was requested, clearly belongs to the first category.

The application for exemption of an ultraviolet spectrophotometer made by the University's heart surgery department on behalf of its biochemical laboratory, was rejected by the Inspector of Customs and Excises on the ground that such apparatus can, next to research, be used for general purposes as well, thereby losing its specific scientific character. The request for a preliminary ruling was made on May 2, 1977 and was answered on February 2, 1978 by the ECJ. The ECJ held, *inter alia*, that the term "scientific apparatus" means equipment which has objective characteristics making it particularly appropriate for scientific research.

The application of this criterion to the case before it, caused some difficulty for the Tariffcommission and forced it to further interpret the ECJ's ruling, in particular with regard to the requirement of "objective characteristics". After giving the matter thorough consideration, the Tariffcommission ordered the appellant to give evidence of the equipment having such characteristics. Due to the fact that neither the appellant nor his representative were present at the hearing, this evidence was not produced and the request for exemption was rejected in the Tariffcommission's final judgment of March 13, 1978.

The final judgment in Universiteit Utrecht is not completely satisfying. It is submitted that, by deciding that the onus of proof for the apparatus being considered as scientific rests with the appellant, the Tariffcommission introduced too subjective a criterion. Thus it ignored the ECJ's interpretation, according to which the "objective characteristics" of the equipment had to be the decisive factor. As the appellant did

not manage to furnish this proof, the preliminary ruling turned out to be of no relevance to the outcome of the case. The clear wish of the ECJ for an objective examination of the equipment was thus frustrated by national rules of procedure and evidence.

4. Courts of Appeal (*Gerechtshoven*) and Supreme Court (*Hoge Raad*) in taxation matters

Mr. F.H.M. POSSEN

4.1 Jurisdiction and composition

Specific tasks have been attributed to the Courts of Appeal and the Supreme Court in the sphere of taxation, under the Act on the Administrative Jurisdiction in Taxation Matters (*Wet Administratieve Rechtspraak Belastingzaken, 1956*). Under this Act, the five Courts of Appeal administer justice at first instance in taxation matters, except customs and excise duties. Appeal for cassation against these judgments lies with the Supreme Court.

The hearings before these taxation courts are in general not open to the public. Prior to a case being brought before the Courts of Appeal, an objection to the tax assessment has to be made to the tax authorities within two months. Within a period of another two months, an appeal can be lodged with the Courts of Appeal against the decision on the objection. As the Act does not contain any specific grounds for appeal, any ground can be brought forward by the appellant against the assessment by the tax authorities. In accordance with the relevant Articles in the Act on Administrative Jurisdiction in Taxation Matters, (*Article 25*) the Supreme Court can quash judgments of the Courts of Appeal at the request of the parties in the dispute or *ex officio* on one of the grounds for cassation listed in Article 99 of the Act on the Organization of the Judiciary. For this and other reasons, like the fact that no legal counsel is required, the rules governing the cassation procedure in taxation matters are less strict than those applicable to proceedings in civil and criminal cases. As mentioned in Chapter III, paragraph 5, this difference may open the way to a more extensive use of the 177 procedure by the Supreme Court whenever it deals with taxation matters.

After quashing, the Supreme Court can either take a new decision on the principal matters, or, if a closer examination of the facts is necessary, refer the case back to the Court whose judgment was quashed or, even to another Court of Appeal. If it only concerns facts of marginal importance, the Supreme Court, instead of making such a reference, usually gives itself the final judgment.

4.2 Application of Article 177

The Courts of Appeal and the Supreme Court requested a preliminary ruling in 14 cases, resulting in 13 judgments of the ECJ, *i.e.*, approximately 8% of the total number of preliminary rulings given at the request of Dutch courts. The Courts of Appeal requested 4 preliminary rulings and the Supreme Court 10. The ECJ joined Cases 181 (*Van Paassen*) and 229/78 (*Denkavit Dienstbetoon*).

All taxes with the exception of customs and excises can be brought before the Courts of Appeal and the Supreme Court. Most preliminary requests by Courts of Appeal and the Supreme Court, were made in cases concerning turnover tax (VAT). In the period considered in this report, 9 out of 13 cases were concerned with VAT. In fact, only in some of the old cases, were other problems of taxation law referred to the ECJ; see Cases 32/67 (*Van Leeuwen*), 23/68 (*Klomp*) and 7/74 (*Broverius van Nidek*).

As for the jurisdiction in VAT matters, it should be noted that a change has taken place during the period of this research. Until the first of January 1976, when this jurisdiction was transferred to the Courts of Appeal and Supreme Court, the VAT came under the jurisdiction of the Tariffcommission. Interesting illustrations for this tranfer can be found in Cases 51/76 (*VNO*), 126/78 (*N.S*) and 181/78 (*Van Paassen*), in which preliminary questions were referred to the ECJ by the Supreme Court. These cases were brought before the Supreme Court on appeal (for cassation) from the Tariffcommission. Such proceedings were possible under transitional law for a limited period of time only. Every taxation case in which the Courts of Appeal and the Supreme Court requested preliminary rulings, ended in a formal judgment. All but one judgment were considered to be in strict conformity with the ECJ's ruling.

In Chapter III, subparagraph 5.2 it was concluded that the performances of the First and Second Chambers of the Supreme Court under Article 177 appear to be satisfying. The same conclusion must be drawn for the Taxation Chamber. No pathological cases were found. Still, the Taxation Chamber has been criticized for its application of Article 177 several times, in particular for not making a reference. In various judgments, the Court considered the matter of Community Law to be an acte clair or éclairé, even though a different approach was justifiable, or the requirements set by the ECJ in CILFIT were not completely met. The criticism seems to be particularly valid in those cases where the Supreme Court

declined to make a reference despite the opinion of its Advocate-General that it was necessary.[11]

4.3 Two illustrative cases

1. Case 15/81 (*Schul I*) concerns some fundamental aspects of VAT with regard to the importation of a second-hand pleasure boat from another Member State by a private person. The person concerned had bought the boat, for which VAT had been paid in the past in France, from another private person in France. At the importation in the Netherlands, however, the Dutch tax authorities charged VAT again. Schul lodged an objection with the Inspector against the turnover tax on importation, claiming that the boat had already been subject to VAT within the Community, namely France and that there had been no remission of tax on exportation. The Inspector, however, dismissed the objection on the ground that the levy was made pursuant to the provisions of the Netherlands law on VAT. Against this decision, Schul lodged an appeal before the Court of Appeal in Den Bosch. His main contention being that the taxation is contrary to Article 13 and, as the case may be, Article 12 EEC. He also observed that Article 95 may be relevant to the case.

After the Court of Appeal had referred several questions to the ECJ in a judgment of December 19, 1980, the ECJ endorsed the arguments of the appellant, stating that the second charge of VAT in the Netherlands is an additional burden, prohibited by Article 95 EEC. As a consequence of the ECJ's judgment, dated May 6, 1982, the Dutch tax authorities had to reduce the amount of VAT with the residual part of the VAT paid in France and which was still supposed to rest on the pleasure boat.

2. Case 47/84 (*Schul II*) is a continuation of the first Schul Case. The State Secretary for Finance argued that the Court of Appeal had given a wrong interpretation of the ECJ's ruling in its final judgment of February 18, 1983 and lodged an appeal for cassation with the Cassation Court. On February 15, 1984 the Supreme Court referred further questions to the ECJ, asking in particular how the residual part of French VAT still resting on the boat had to be determined. As the method applied by the Court of Appeal in the first instance was endorsed by the ECJ's judgment of May 21, 1985, the Supreme Court rejected the appeal by judgment of October 23, 1985. Thus, after some five years of litigation including two preliminary references to the ECJ, Gaston Schul had finally won his case, demonstrating that pleasure boats sometimes, partly due to the 177 procedure, have to make unpleasantly long trips!

[11] See, e.g., judgments of 22.12.1965, *BNB* 1966, 165 and of 27.9.1977, *NJ* 1978, 487. See also: B.H. ter Kuile, De Hoge Raad en de prejudiciële verwijzing, *NJB* 1978, 212.

4.4 A pathological case

In Case 23/68 (*Klomp*), the Taxation Division of the Court of Appeal in the Hague requested a preliminary ruling on the interpretation of Article 11(b) of the ECSC Protocol on Priviliges and Immunities. The case concerns an appeal lodged by Mr. Klomp, a civil servant of the ECSC, against the assessment by the Tax Inspector of his insurance contribution to be paid over the year 1959, under the General Act on Old Age Pensions (*Algemene Ouderdomswet*). The Tax Inspector had included the salary paid by the ECSC in his calculation of the contribution to be made. Mr. Klomp argued that this was in violation of Article 11(b) of the ECSC Protocol on Priviliges and Immunities. The reference was made on September 24, 1968.

Before the ECJ two complicated problems arose. Firstly, the Court of Appeal did not clearly indicate the legal basis of the request. Apparently, it founded its reference on Article 177 EEC. However, when the facts giving rise to the case before the Court of Appeal actually arose (1959), there was no express legal foundation for a preliminary ruling. The provisions relevant in 1959, were either Article 41 ECSC or Article 16 of the ECSC Protocol on Priviliges and Immunities. Strict application of the law therefore, would have resulted in the case being considered under one of these provisions. As Article 41 is not applicable to questions concerning the interpretation of the ECSC law and, Article 16 of the Protocol does not provide for a preliminary procedure at the request of national courts, this would have left the Court of Appeal empty-handed.

In this respect, Advocate-General Gand submitted that there was no reason to oppose a preliminary ruling under Article 16 of the Protocol, in combination with Article 43 of the ECSC Treaty. Thus, the Advocate-General argued that, under these Articles, national courts are also entitled to request preliminary rulings concerning the interpretation of the Protocol. The ECJ followed the Advocate-General in this reasoning.

Before answering the question, the ECJ had to solve the second problem. By the time the question was addressed to the ECJ (1968), the ECSC Protocol had been repealed and Article 16 had not been re-enacted in the new EC Protocol on Priviliges and Immunities. For this reason, the ECSC Protocol could, strictly speaking, not be the legal basis of the request at all. On this problem of transitional law, the Advocate-General had suggested that the ECJ should nonetheless accept jurisdiction on the basis of Article 177 EEC (150 EURATOM).

The ECJ followed the Advocate-General here as well. It held that the procedure provided for by Article 16 of the ECSC Protocol and the provisions on preliminary rulings for interpretation of the Treaties establishing the EEC and EURATOM have an identical objective. That is to ensure

a uniform interpretation and application of the Protocol in the (then) six Member States. To fill the lacuna, the ECJ, in the interest of continuity of the legal system, based itself, *inter alia*, on "principles common to the legal systems of the Member States, the origins of which may be traced back to Roman Law". Thus, it held that it had jurisdiction to give a ruling ex Article 177 EEC or 150 EURATOM.

On the substance of the case, the ECJ held on February 25, 1969 that the contributions under the Act on Old Age Pensions did not come within the meaning of the taxes covered in Article 11(b) of the ECSC Protocol on Priviliges and Immunities. Consequently, ECSC-staff were not exempted from paying those contributions.

In its final judgment of June 20, 1969, the Court of Appeal rejected the appeal made by Mr. Klomp. Afterwards, an appeal for cassation was submitted to the Supreme Court on a different ground than the one discussed before the ECJ. The Supreme Court, in a judgement of January 7, 1970, further interpreted the ECJ's ruling and, taking into account the judgment of the ECJ in Humblet (Case 6/60),[12] rejected this appeal as well.

5. Civil Service Tribunals, Social Security Courts of First Instance and the Central Court of Appeal

Prof. Mr. W.M. LEVELT-OVERMARS

5.1 Jurisdiction and composition

5.1.1 First Instance Courts

The Civil Service Tribunals (*Ambtenarengerechten*) decide all disputes between civil servants and their employer, arising from the appointment of the former. The Social Security Courts of First Instance (*Raden van Beroep*), decide all appeals brought before them by individuals, against decisions concerning social security benefits or contributions made by the various administrative bodies competent in this field.

There are ten (regional) Civil Service Tribunals and ten Social Security Courts of First Instance. They have the same territorial jurisdiction and share the same President, registrar, clerks and registry and are residing in the same courthouse. Both courts usually sit with three judges, of whom only the President is a professional judge appointed for life. The other two members are lay-judges appointed for six years, by the Crown on recommendation of the unions of employers and employees (Social Security Courts) or, by the Minister of Justice (Civil Service Tribunals).

12 (1960)ECR 559.

The jurisdiction and the rules of procedure regarding the Civil Service Tribunals are laid down primarily in the Civil Servants Act (*Ambtenarenwet, 1929*). As regards the Social Security Courts, only the most important rules of procedure and the rules governing its composition and organization are embodied in the Appeals Act (*Beroepswet, 1955*). The jurisdiction of these courts, on the other hand, is to be found in the various Acts (governing social security benefits) which provide the basis for the administrative bodies to take their decisions.

Uncomplicated cases can be dealt with by the President of the Social Security Courts alone. However, the parties have the right to appeal to the full court from judgments of the President, except in most cases concerning sickness-benefit. The last sentence renders the present factual situation. The Appeals Act outlines a different procedure for most cases concerning sickness benefits. This Act prescribes for cases concerning disability because of sickness that the President, sitting as a single judge, gives a ruling solely on the basis of expert medical opnion (Articles 131-152a Appeals Act). From these judgments the parties have the right to appeal to the Full court only on ground which are strictly limited to incorrect use of procedural rules (Article 142). As will be sen in paragraph 5.1.2, no appeal can be lodged to the Central Court of Appeal against the judgments of a Social Security Court, given by a Full Court, in which an appeal against the judgment of its President held to be inadmissable on good grounds. Formally speaking, the Social Security Courts are courts of last instance in this type of cases and thus, obliged to refer questions on the interpretation of Community Law to the ECJ under Article 177 EEC. However, no references were made by the Social Security Courts in this type of cases during the period of this research. The European Court of Human Rights stated in the Feldbrugge Case that this procedure does not satisfy the requirements set by Article 6 of the European Convention of Human Rights and Fundamental Freedoms.[13] Following this judgment the association of Presidents of the Social Security Courts decided to apply the normal rules for an appeal to the Full Court for all cases decided by the President sitting as a single judge. This practice has been approved by the Central Court of Appeal.[14]

Generally speaking, an appeal may be lodged against the disputed decision of an administrative body on three grounds; (1) the decision was taken contrary to a generally binding provision, (2) the administrative body manifestly used its powers for a purpose other than that for which the powers were vested in it; (3) the administrative body acted contrary to

[13] European Court of Human Rights, judgment of May 29, 1986, Series A: Judgments and Decisions, Vol. 99, Feldbrugge.

[14] Judgment of the Central Court of Appeal of July 8, 1987, *RSV* 1988, 74.

a principle of proper administration generally held to be equitable. Next to these grounds, the Civil Service Tribunals can, in disputes concerning disciplinary measures, hear appeals based on a breach of the principle of proportionality, between the disputed measure and the violation in respect of which, the civil servant concerned was punished. Finally, in some disputes concerning social security benefits, the Social Security Courts can quash the contested decision on the ground that it was taken contrary to reasonableness.

The rules of procedure to be followed before both courts are not strict. However, both courts do have the right to make inquiries *ex officio*, whenever this is necessary to come to judgment. The courts have the right to confirm or annul a decision. In the case of annulment they can instruct the responding administrative body to enact a new decision in conformity with their judgment or, replace the one annulled with a decision of their own. However, the latter is not possible if the decision under appeal refers to matters which are within the discretion of the administrative body.

5.1.2 Central Court of Appeal

The Central Court of Appeal serves as a court of appeal for both the Civil Service Tribunals and the Social Security Courts. The Central Court of Appeal is situated in Utrecht and consists of only professional judges, who are appointed for life. The court is divided into different chambers of three judges each. Both parties can lodge an appeal against the judgments of the Civil Service Tribunals and the Social Security Courts.

As regards some judgments of the Social Security Courts, however, no appeal can be lodged. This holds true for most cases concerning sickness benefits, referred to in the previous subparagraph, which are given by the President of the Social Security Court, acting as a single judge. Like the Social Security Courts, the rules governing the composition and organization of the Central Court of Appeal, as well as its rules of procedure, are primarily laid down in the Appeals Act. Equally, the various acts concerning social security benefits provide for the jurisdiction of both courts. Finally, in a limited number of cases, the Third Chamber of the Supreme Court can hear appeals for cassation against judgments of the Central Court of Appeal. This concerns only questions of law regarding terms or notions which are common to social security as well as taxation law. In the period covered by this project, no preliminary references have been made by the Supreme Court in cases originating from the Central Court of Appeal. In fact, Case 43/86 (De Rijke) is the first case in which this occurred.[15]

15 ECJ judgment of 24.09.1987, not yet reported.

5.2 Application of Article 177

Nearly all preliminary rulings in social security cases deal with the interpretation of the relevant EEC Regulations on social security for migrant workers. At first, these questions concerned Regulations No. 3 and 4, which were later replaced by Regulations No. 1408/71 and 573/72. Regulations No. 3 and 4 originally derive from a Treaty on social security, signed in December 1957, which was based upon Article 69 of the ECSC Treaty. On December 9, 1958, the EEC Council decided, on the basis of Article 51 EEC, to adopt the text of the Treaty on Social Security as EEC Regulation No. 3. Likewise, the text of a second Treaty implementing the Treaty on Social Security was transformed into Regulation No. 4.

The origins of the two Regulations have caused many problems of interpretation. In the first place, it should be noted that the text of the provisions, being originally accepted by the parties as a Treaty, was meant to be interpreted primarily according to the intention of the signatory States. After the transformation into a Regulation *ex* Article 51, however, the ECJ took the aim and purpose of this Article as the guiding principle for the interpretation of the Regulations. It took a long time before the administrative bodies and the judiciary in the Netherlands fully realized the consequences of the ECJ's approach.

Secondly, problems arose in the Netherlands because the EEC Regulations were never introduced as such into Dutch social security law. These Regulations and the relevant Articles of the EEC Treaty are directly applicable in the Netherlands, putting aside the otherwise relevant national law. However, that turned out to be insufficient for a correct application of several provisions. This may, *e.g.*, be a simple matter with provisions which exclude foreigners from some benefits. On the other hand it can be very complicated in respect of those provisions in Dutch law which are conflicting with the scheme envisaged in the Regulations. By way of example, two difficulties are described here.

The basic rule of Regulation 1408/71 holds that a person is submitted to the social security scheme of the State where he or she is working. According to the Dutch social insurance schemes, however, every resident is, in principle, insured. Thus, the question was raised before Dutch courts whether non-residents could be insured and whether residents could be excluded from insurance. As Community Law prevails, this is no longer a matter of interpretation of Dutch law alone.

The same kind of problem rose with regard to the divergence between the Dutch disability and widow pension schemes on the one hand and, the scheme of the EEC Regulations on the other. Under Dutch law, *e.g.*, an insured person who becomes disabled, gets a full benefit irre-

spective of the period of his affiliation. Conversely, an individual receives no benefit whatsoever, if the contingency occurs after the insurance has ended. This scheme conflicts with the EEC Social Security Regulations, which provide for benefits being built up during the period of affiliation. Consequently, it produces differences in benefits according to the time of affiliation. Moreover, it is not strictly necessary that the person concerned is insured at the moment the contingency occurs. In subparagraph 5.3 some of the problems mentioned here confronting the Central Court of Appeal, are discussed on the basis of two illustrative cases.

5.2.1 First Instance Courts

The Civil Service Tribunals have, up to now, never requested a preliminary ruling from the ECJ. This is not surprising, given their jurisdiction and the fact that they are first instance courts. In fact, practically the only ground for reference imaginable, would be Article 119 EEC and the Directives concerning equal treatment of men and women. The Central Court of Appeal, though, serving as a court of appeal for several Civil Service Tribunals, has referred a number of preliminary questions regarding equal treatment, in Case 23/83 (*Liefting*).

The Social Security Courts, taking into account their jurisdiction, seem to have ample opportunity to refer questions to the ECJ, in particular with regard to cases concerning the implementation of EEC Regulations on social security. However, it is only in recent years that these courts have found their way to Luxembourg. In 1976, the first preliminary ruling ever was asked for by the Court in Amsterdam (Case 109/76, *Blottner*). The total number of cases to be considered for this project amounts to seven, *i.e.*, 4.6% of all preliminary rulings considered in this report. A possible explanation for the rather late start and this relatively low number are discussed in the next subparagraph, concerning the application of Article 177 by the Central Court of Appeal.

The statistical information aggregated by the Florence steering group indicates that the First Instance Social Security Courts referred preliminary rulings to the ECJ of their own motion, in 4 cases. As was mentioned earlier in this Chapter, the responding party suggested that a reference be made in one case. Surprisingly, the first party (applicant), never initiated a reference according to the statistical information. This is clearly a deviation from the normal pattern in administrative cases.

The statistics further show that the Social Security Courts gave a final judgment in six out of the seven cases in which preliminary questions were put to the ECJ. In one case, 104/84 (*Kromhout*), the outcome is unknown. Five of the judgments were considered to be delivered in strict conformity with the ECJ's ruling. In one case, the referring court had to further interpret the ruling before giving its final judgment. Finally, in 3

cases (about 50%), the referring courts indicated that the preliminary ruling was helpful.

5.2.2 Central Court of Appeal

The ECJ has given 25 judgments at the request of the Central Court of Appeal, *i.e.*, approximately 15% of the preliminary rulings considered in this report. The court asked for a preliminary ruling as early as 1963, thereby giving the ECJ an early opportunity to direct the Member-States in the interpretation of Articles 48-51 EEC and of EEC Regulations No. 3 and 4 (respectively 1408/71 and 572/72) concerning the social security of migrant workers. In the previous subparagraph, the discrepancy between the number of preliminary rulings asked by the lower courts and the Central Court was mentioned. Two explanations bearing upon the type of procedure can be given for this.

Firstly, the Social Security Courts of First instance have a huge caseload. For reasons of economy and time, therefore, most cases are decided by way of a so-called oral judgment. In these cases, the decision is taken in chambers, on the day of the public session and is recorded in the minutes of the session. Then, after a week, a judgment in writing, containing only the grounds for this decision is sent to the parties. Written judgments, which are more fully argued, are given relatively seldom by the Social Security Courts. As the brevity of the oral judgments paves the way for a factual rather than a legal argumentation, the administrative bodies tend to keep in store their full legal arguments, for the appeal procedure before the Central Court of Appeal, rather than raising them in the first instance. This attitude is likely to have an impact on the number of preliminary rulings requested by the lower courts.

Secondly, it is to be noted that, in the first years of the introduction of the EEC Regulations on social security for migrant workers, their context and meaning could hardly be called public property. In fact, hardly any literature was available on the subject and the knowledge about it was largely kept in the seclusion of the administrative bodies designated to pay out the benefits. As the knowledge increased, legal counsels of the claimants, as well as the Presidents of the Social Security Courts of First Instance, started to question more closely the (non-)application of the Regulations. Consequently, the Social Security Courts felt the need to ask for preliminary rulings. This process is still continuing and one can even say that in recent years, instead of the Central Court of Appeal, it is some of the Social Security Courts which are predominant in the scrutinous implementation of the EEC Regulations and Directives in the field of social security. This is in particular so for those concerning the equal treatment of men and women.

Actually, the fact that most preliminary rulings in the field of social security were requested by a last instance court, concurs the overall picture which appears from the statistical data for all Dutch administrative courts. In fact, administrative courts of last instance account for the greater part of references under Article 177. Besides the fact that most administrative courts in the Netherlands administer justice in the first as well as in the last instance, this may, as far as social security is concerned, also be explained by the two factors mentioned above.

Furthermore, it appears from the statistics that both parties in the proceedings before the Central Court of Appeal initiated 6 references, *i.e.*, 25%. The court itself took the initiative in another 6 cases. As we concluded earlier, this is a deviation from the normal pattern found for the administrative courts.

The Central Court of Appeal gave a formal judgment in 24 of the preliminary cases considered. In only one case did the parties settle the dispute after the ECJ handed down the preliminary ruling. Twenty of these judgments were considered to be delivered in strict conformity with the ECJ's ruling. In four cases, the referring court further interpreted the ruling before giving its final judgment. In one Case, 51/73 (*Smieja*), the final judgment is regarded as an evasive application of the ECJ's preliminary ruling. This case is the only one case considered in this report which has been qualified as such. It is further discussed in the next subparagraph. Finally, the Central Court of Appeal indicated the usefulness of the preliminary rulings in 13 cases, *i.e.*, approximately 50% of all cases in which questions were referred. In the remaining cases, there was no explicit comment as to the question of helpfulness.

5.3 Two illustrative (or pathological) preliminary cases from the Central Court of Appeal

1. Case 100/63 (*Kalsbeek-Van Der Veen*), illustrates the difficulties which arise when the referring court is under a serious misapprehension about the interpretation of an EEC Regulation. The case concerns the settlement of widow pensions for persons who have acquired insurance periods in the Netherlands and in Germany.

A pension was granted to several widows under the Netherlands General Widows'and Orphans'Act (*Algemene Weduwen- en Wezenwet*). The amount of the pension, however, was below the normal amount since the widows also benefitted from a widow's pension under the German Life Annuity Insurance Scheme. The competent Netherlands administrative body considered that, under Article 28 of Regulation No. 3, it was compelled to so calculate the pensions (*pro rata*), resulting in a lower pension for the widows concerned. As a matter of fact, the combined amount of the German and Dutch pensions was in some cases even less

than the amount which would have been due under the Dutch Scheme alone. Mrs. Kalsbeek-Van Der Veen and 9 other widows disputed the application of Article 28 to their case.

Their applications being rejected by the Social Security Courts, the women appealed to the Central Court of Appeal. The latter court decided to request a preliminary ruling to the ECJ on November 30, 1963. Out of the procedure that followed, it appears in the first place, that the Central Court was not fully conversant with the rules governing the preliminary procedure as such. The questions had been phrased in a way as to obtain, *inter alia*, an interpretation of Dutch Law. In its reply of July 7, 1964 the ECJ noted that it is not entitled, under Article 177 EEC, to apply Community Law to a particular case before it or, to judge on the propriety of a measure of domestic character. The ECJ then answered the questions put before it, without rephrasing them first. The criticism of the ECJ as to the phrasing of the questions did not affect the answers given.

After having decided that the General Widows'and Orphans's Act came within the scope of Regulation No. 4, the ECJ went on to give an interpretation of Articles 27 and 28 of the said Regulation. Contrary to the views expressed by the responding administrative body and the Commission of the EEC, which stated that Article 28 (containing the pro rata calculation of the benefits) was made with the intention of sharing the financial burden of the pensions and was in accordance with one of the objectives of Regulation No. 3 which is to prevent the joint application of different laws to the same periods and the resultant cumulative payment of benefits, the ECJ did not consider the original intentions lying behind the Social Security Treaty. Instead, it interpreted Regulation No. 3 entirely within the framework of Articles 48-51 EEC, which are aimed at securing freedom of movement. It held that Article 28 (*pro rata* calculation) is only applicable in cases provided for by Article 27, that is when there is a question of the acquisition, maintenance or recovery of the right to benefit. By restricting the interpretation of Regulation No. 3 in this way, the ECJ deprived the Regulation of one of the original intentions of the Social Security Treaty, *i.e.*, next to the aggregation of insurance periods for the purpose of acquiring and retaining the right to benefit, the prevention of double insurance and so-called unjustified cumulation of benefits.

A close study of the final judgments in each of the ten cases, discloses that the Central Court of Appeal did not expect the ruling given by the ECJ. The fact of the matter is that the ten widows did not find themselves in the same circumstances at all. Some of them could claim a Dutch pension as well a German pension without having to rely upon Article 28, while at least one of them did not need Regulation No. 3 to effect her claim under the German pension scheme. The fact that the Central Court

of Appeal did not distinguish between these positions leads one to suppose that the ruling of the ECJ was not expected. Moreover, as it appears that the Central Court of Appeal by its implementation of the ECJ's ruling, applied Article 28 in the last case mentioned, one can doubt whether it fully understood the extent and scope of the preliminary ruling.[16] The wording of the preliminary ruling was perhaps ambiguous and would have justified a second request for a preliminary ruling. Moreover, later judgments by the ECJ, given at the request of a French and a Belgian court (Cases 1/67, *Ciechielski* and 12/67 *Guissart*[17]) made it abundantly clear that Article 28 should be considered from the national viewpoint alone, so as to exclude the application of it to all widows concerned.

As a result of the ECJ's judgment in Kalsbeek-Van Der Veen, a national anti-cumulation measure was enacted in the Widows'and Orphans'Act (Article 30a). In the disability insurance scheme which entered into force in 1967, a corresponding provision was included right from the beginning (Article 52 of the Disablement Insurance Act, *Wet op de Arbeidsongeschiktheidsverzekering*). On the basis of these new provisions, the insured person could receive more or less than he or she would have received under the Dutch pension scheme alone. The wording of these provisions covers all persons which enjoy foreign pensions of a certain type. It is the responsibility of the competent administrative bodies to discern whether the application of the Royal Decree is compatible with the EC Regulation in a given case. As the full extent of the ECJ's ruling became clear, the administrative bodies decided to apply the national anti-cumulation measures to all cases in which the *pro-rata* calculation was no longer allowed. This practice was abandoned again when Regulations No. 3 and 4 were replaced by Regulations No. 1408/71 and 573/72. Articles 37-51 of Regulation 1408/71 provide for a comprehensive regulation of the determination of disablement- and widows-pensions for migrant workers who have completed insurance periods in more than one Member State.

These new rules and Article 46(3) in particular, however, have given rise to the same kind of problems as Article 28 of Regulation No. 3 had done in the past. Article 46(3) limits the total amount of benefits payable in the Member States to the highest theoretical amount, *i.e.*, the amount which would have been due in each State if the migrant worker had acquired all his insurance periods in that State. Considering the differences which exist between the pension schemes of the various Member States, it

16 Compare two of the judgments which were delivered by the Central Court of Appeal, taking into account the ECJ's ruling in *Kalsbeek-Van Der Veen* (both final judgments were delivered on October 7, 1964); Case AWW 1963/4, *RSV*, 1964, 169 with Case AWW 1963/9, *RSV* 1964, 187.

17 Case 1/67 (*Ciechielski*) (1967)ECR 181; Case 12/67 (*Guissart*) (1967)ECR 425.

is possible that a migrant worker claims benefits to a higher total amount on the basis of national laws alone in the States in which he has been employed, than he could on the basis of Article 46(3). In the Petroni Case,[18] the ECJ upheld the essence of its Van Der Veen judgment, stating that Article 46(3) is incompatible with Article 51 EEC is so far as it limits calculation of benefits acquired in two different Member States, by reducing the amount acquired under the legislation of one Member State alone.

Consequently, the national authorities decided that the national anti-cumulation measures should be used again in cases in which Article 46(3) could no longer be applied. From certain Belgian cases,[19] it was already clear that the employment of national anti-cumulation measures was restricted by Article 46 of Regulation 1408/71 in such a way as to guarantee the migrant worker at least the amount due under that Article. The wording of the preliminary ruling and the text of the said Article or parts of it were not applicable at all. It was held that in those cases the national rules should be applied without restrictions.

Looking backward one is inclined to say that the intention of the court to compel the national authorities of making in each case two calculations, one according to the national law and according to the EC Regulation, to be able te determine the highest amount which should be awarded, was clear enough. The fact is that there have been at least 15-20 preliminary rulings concerning the exact scope and meaning of Article 46 of Regulation 1408/71. For the Netherlands, 4 cases can be mentioned: Cases 98/77 and 176/78 (*Schaap I and II*), Case 105/77 (*Boerboom-Kersjes*) and Case 238/81 (*Van Der Bunt-Craig*). In all four cases, the ECJ spelled out the rule that the migrant worker has a right to the application of those Articles which would result in the calculation most favourable to him. One is inclined to expect that after the Boerboom-Kersjes Case of 1978, the interpretation of the relevant rules would be clear to the Dutch administrative bodies responsible for paying out the pensions. The Van Der Bunt-Craig case, however, gives reason to doubt this as the Central Court of Appeal had to overrule the application of the Dutch anti-cumulation rules by the administrative body concerned, as late as January 1983 (!), the system of Article 46 of Regulation 1408/71 being more favourable to the widow in question.

2. A different solution to the problems caused by a preliminary judgment of the ECJ can be found in the follow-up of the Case 51/73 (*Smieja*) concerning the Dutch old-age pensions scheme.

In January 1957 the General Old Age Pensions Act (*Algemene Ouderdomswet*) entered into force, introducing an old age pension cover-

[18] Case 24/75 (*Petroni*), (1975)ECR 1149.

[19] Case 22/77 (*Mura*), (1977)ECR 1699 and Case 37/77 (*Greco*), (1977)ECR 1711.

ing all residents. This Act contains transitional provisions whereby anyone who had attained the age of 15 years but not 65 years on the first of January 1957 shall be deemed to have been insured for the period between the date on which he completed his fifteenth year and the first of January 1957, provided he has been resident in the Netherlands for the six years immediately following the completion of his fifty-ninth year. Article 44 of the Act adds that only persons of Dutch nationality, who are habitually resident in the Netherlands may be accorded these transitory benefits. The requirements listed in Article 44, however, may be waived by an administrative order.

Mrs Smieja, a German national and resident in the Federal Republic of Germany, was granted an old age pension amounting to 45.6% of the pension normally available. She appealed against this decision before the Social Security Court of First Instance and argued that it was contrary to Community Law. In the course of these proceedings, the administrative body concerned altered its position and suggested that the court award a pension of 88% instead. The Social Security Court rejected this proposition and upheld the original decision, as it considered it to be in conformity with the relevant provisions of Dutch law.

The administrative body concerned, however, was not satisfied with the Social Security Court's interpretation. Consequently, it appealed to the Central Court of Appeal and argued that these requirements are contrary to Article 10(1) of both Regulations No. 3 and 1408/71. They provide, in sum, that benefits acquired under the legislation of one or more Member States shall not be subject to any reduction by reason of the fact that the recipient resides in the territory of a Member State, other than that in which the institution or body responsible for payment is situated. The Central Court of Appeal referred two preliminary questions to the ECJ in a judgment of March 8, 1973.

The second question dealt with the transitional provisions of the Old Age Pensions Act, according to which only those persons who have been a resident in the Netherlands for the six years following the completion of their fifty-ninth year, can enjoy the transitional benefits. The ECJ ruled on November 11, 1973 that the protection afforded by Article 10(1) extends to benefits arising from particular schemes under national law, which are given effect by increasing the value of the payment to be made to the beneficiary. Thus, the ECJ continued, to the extent that a national law such as Article 44 of the Old Age Pensions Act imposes a condition of residence on would-be recipients of some of the benefits of the type mentioned in Article 10, the fact that the person concerned resides in the territory of a different Member State is no ground for modification, withdrawal or suspension of such benefit.

One would expect that, as a result of the ECJ's ruling, Mrs. Smieja would be granted a full transitional benefit. Surprisingly, however, the Central Court of Appeal ruled differently in its final judgment of February 19, 1974. It considered that the terms of Article 10 as well as the considerations of the ECJ had brought it to the conclusion that the Article includes a guarantee for the payment of benefits acquired under national law after a change of residence, but does not guarantee the acquisition of these rights.

The Dutch Government, not trusting that the judgment of the Central Court of Appeal would prevail in the end, initiated certain alterations in Appendix VI of Regulation 1408/71. In Article J2 of the Appendix, the so-called transitional benefits under the Old Age Pensions Act were extended to non-residents of other EC Member-States who fulfill certain conditions. Subsequent case-law of the ECJ proved that the Government took the right decision. In Case 92/81 (*Carcciolo*[20]) and still more explicit in Case 300/84 (*Van Roosmalen*[21]), the ECJ whilst referring to the Smieja judgment, held that Article 10 covers also the acquisition of benefits. The legality of Appendix VI under J2 has not yet been contested before the ECJ. However, in a recent case, falling outside the scope of this project, the ECJ gave an extensive interpretation of a part of this appendix, clearly going beyond the literal wording of the text (Case 284/84, *Spruijt*[22]).

By way of conclusion it is submitted that in the Kalsbeek-Van Der Veen Case as well as in the Smieja Case, it is difficult to assess the final judgments of the Central Court of Appeal. Even if it is clear today that the court misinterpreted the ECJ's judgment in both cases, it is hazardous to conclude that it did so in defiance of the ECJ's ruling. As the Central Court of Appeal was one of the first courts to ask for preliminary rulings in the Netherlands and has continued this practice ever since, it is difficult to doubt its willingness to follow the guidance of the ECJ. Therefore, it seems more likely that the Central Court of Appeal acted in good faith but, simply did not fully understand the bearing of ECJ's approach to interprete each provision of the relevant Regulations in the light of Article 51 EEC.

20 (1982)ECR 2213.
21 (1986)ECR 3116.
22 (1986)ECR 693.

6. Council of State

Mr. A.E. KELLERMANN

6.1 Jurisdiction and composition

The legal basis for the Council of State can be found in Articles 73-75 of the Constitution. The implementing and detailed rules concerning the powers, functions and organization of the Council of State are contained in the Act on the Council of State (*Wet op de Raad van State, 1962*) and in the Administrative Jurisdiction (Government Orders) Act (*Wet Administratieve Rechtspraak Overheidsbeschikkingen, 1975 (AROB)*). The Council of State is one of the bodies collectively known as the High Institutions of State. Its origins are in the sixteenth century, when Emperor Charles V established it as an advisory body to the Crown.

Her Majesty the Queen is President of the Council of State. Meetings of the plenary Council are presided by the Vice-President, who supervises the work of the Council and is the head of the Council's staff. The Council is at present composed of 25 members, out of a maximum of 28. Up to 14 additional members can be appointed as extraordinary Councillors for special duties. Under the present Constitution, the Council of State is entrusted with important advisory and judicial tasks. The judicial tasks are dealt with by the two Divisions (*Afdelingen*) of the Council of State; the Judicial Division (*Afdeling Rechtspraak*) and the Division for Administrative Disputes (*Afdeling voor de Geschillen van Bestuur*).

6.1.1 Judicial Division

The Judicial Division of the Council of State only adjudicates on disputes submitted to it under the Administrative Jurisdiction (Government Orders) Act. Under this Act, any interested party may lodge an appeal against government orders, falling within the scope of this Act, for which no other remedy is available under Dutch law. Other than the Division for Administrative Disputes, the Judicial Division is an administrative court (of last instance). The grounds on which the Judicial Division must exercise judgment are listed in Article 8 of the Administrative Jurisdiction (Government Orders) Act. An appeal may be lodged on the ground that: (1) the order is contrary to a generally binding provision; (2) in making the order the administrative body manifestly used its power for a purpose other than that for which the powers were vested in it; (3) the administrative body could not reasonably have made the order if it weighed up the interests involved or (4) in making the order, the administrative body acted contrary to a principle of proper administration generally held to be equitable. It appears that the Division's examination is limited to the question of lawfulness of the contested order, excluding

aspects of expediency. The Judicial Division deals with approximately 9,000 cases yearly. It is divided into a number of Chambers with three councillors in each. In matters requiring urgent attention, the President of the Judicial Division can order temporary injunctions.

6.1.2 Division for Administrative Disputes

The Division for Administrative Disputes is responsible for handling administrative appeals and other disputes which are to be settled by the Crown. As mentioned before in Chapter II, subparagraph 1.1, such Crown appeals (*Kroonberoep*) are provided for in certain legislation. Before deciding on the appeal, the Crown is under the obligation to consult the Division for Administrative Disputes, which produces a draft Royal Decree. Moreover, the Crown can only depart from the Division's draft under certain strict conditions. In practice it follows the latter's advice in nearly all cases. Still, the Division cannot be regarded as an (administrative) court. The Division for Administrative Disputes evaluates not only the legality of the contentious order but also its expediency. Thus, it is authorized to examine the order in its entirity, without restricting itself specifically to the grounds given for the appeal. It can also review aspects of the disputed decison ex officio. The rules of procedure for Crown appeals are primarily laid down in the Act on the Council of State.

The Division for Administrative Disputes is divided into a number of Chambers with each three members. Simple cases can be dealt with by a single member of a Chamber. In the Benthem Case, the European Court of Human Rights judged that the procedure for Crown appeals is not in conformity with Article 6 of the European Convention for Human Rights and Fundamental Freedoms as far as it concerns the determination of "civil rights and obligations".[23] The Temporary Act on Administrative Disputes (*Tijdelijke Wet Kroongeschillen, 1987*), enacted to comply with this judgment, gives the Division for Administrative Disputes a more independant position vis-à-vis the Crown, whenever it is consulted in administrative appeals in disputes relating to civil rights and obligations. The Act entered into force on January 1, 1988.

6.2 Application of Article 177

The ECJ gave 5 preliminary rulings at the request of the two Divisions of the Council of State, *i.e.*, some 3% of all references by Dutch courts. No statistical information on the Council of State is available as to who initiated the reference. However, from the files of the cases, it ap-

[23] European Court of Human Rights, judgment of October 23, 1985, Series A: Judgments and Decisions, Vol. 97, Benthem.

pears that in both Cases of the Division for Administrative Disputes, the applicants or their counsel suggested a request for a ruling from the ECJ. From the remaining statistical information it can be inferred that the Council of State gave a formal judgment in all 5 cases, all of which were considered to be in strict conformity with the ECJ's rulings. The Council of State gave no specific indication as to the usefulness of the preliminary rulings.

1. In the period investigated here, the Judicial Division requested 3 preliminary rulings; 145/78 (*Augustein*), 146/78 (*Wattenberg*) and 53/81 (*Levin*). One can wonder why only three references were made, especially since the Division is a court of last instance with a rather broad jurisdiction. It is most likely that the low number can be explained first of all, by the jurisdiction of the Division under the Administrative Jurisdiction (Government orders) Act. In fact, most of the 9,000 cases relate to regulations and laws on subjects like military service and, various local authority decision contested by individuals, which have little or nothing to do with Community Law. If the jurisdiction of the Judicial Division is compared to the jurisdiction of the other administrative courts, like the CBB, the Social Security Courts and the Tariffcommission, it is more or less self-evident that the latter attract much larger proportions of cases with Community Law-aspects. In fact, the only area where Community Law is frequently involved before the Judicial Division, concerns disputes under the Aliens Act (*Vreemdelingenwet*). Whenever residents of EC Member-States are involved, Community Law on the free movement of persons may emerge before the Division.

A second explanation can be found in the fact that the Judicial Division started functioning only in 1976, when the Administrative Jurisdiction (Government Orders) Act entered into force. A third may be found in the policy which appears to be followed by the Judicial Division, to make "economical" use of the preliminary reference instrument. By this it is meant that, apparently, the Division makes a great effort in finding the answers to problems of Community Law raised before it, in the case-law of the ECJ. This leaves only questions on which there is no such established case-law, to be referred for interpretation by the ECJ. The Division can maintain such a policy in compliance with the rules of Article 177, because it appears to be well-informed on the development of Community Law and because it deals mainly with a relatively limited part of Community Law only, viz., the free movement of persons.[24]

[24] Still, the Judicial Division has been criticized on some occasions for not making a reference under Article 177. See, *e.g.*, the unfavourable comments made on a decision of June 13, 1985 (R02.83.0552), *Rechtspraak Vreemdelingenrecht 1985*, no. 103.

As a consequence of this approach, the references by the Judicial Division have resulted in judgments of the ECJ which are important for the development of Community Law. The fourth explanation submitted here is related to the previous one. There are indications that the Judicial Division applies the preliminary ruling requested for, to more cases than the one case pending before it. Rather than requesting in each individual case a preliminary ruling, the Division chooses one representative case which it uses as a basis for the request, at the same time staying the other proceedings. In a decision of November 28, 1980, *e.g.*, the Division suspended the case until the ECJ would have delivered its ruling in a similar question in Case 53/81 (*Levin*). The Division rendered its final judgment in the former case on January 23, 1983, taking into consideration the ECJ's ruling in the Levin Case. More or less the same occurred with problems of Community Law referred by the Judicial Division and decided by the ECJ, after the period considered in this report, in the *Kempf*, 139/85 and the *Steymann* Cases, 196/87.[25] It goes without saying that the number of preliminary cases originating from the Judicial Division of the Council of State would have been much higher if this approach were not adopted. Moreover, it is self-evident that the small number of references is not due to any misapprehension on the part of the Division, of its responsibilities and obligations under Article 177.

2. In two cases brought before the Division for Administrative Disputes, preliminary rulings were requested; 36/73 (*Nederlandse Spoorwegen v Minister van Verkeer en Waterstaat*) and 126/78 (*Smit v Commissie Grensoverschrijdend Beroepsgoederenvervoer*).

It is difficult to explain this relatively small number of cases before the Division in which questions were referred to the ECJ. This is particularly so if one takes into consideration that it is a "court" against whose decision there is no judicial remedy under national law and that the Division has a fairly broad jurisdiction. It should be pointed out in the first place, however, that for the period up to 1973, it was questioned whether the Division, or rather the Crown, for reasons which were discussed in the previous subparagraph and in Chapter II, subparagraph 1.1, could be regarded as a court in the meaning of Article 177. The uncertainty as to their status under Article 177, may have caused some reticence on their part to request preliminary rulings. The doubts were removed by the ECJ's ruling in Case 36/73, when it accepted without any comment the questions referred in a case brought before the Division for Administrative Disputes. The ECJ's position, however, did not result in a substantial increase in references from the Division. Actually, it took an-

[25] (1986)ECR 1746 (*Kempf*) and ECJ judgment of 05-10-1988, not yet reported (*Steymann*).

other thirteen years before the next, and up to now last, preliminary questions were referred to the ECJ.

A second and more satisfying explanation for the few preliminary cases may, therefore, be found in the fact that relatively few disputes concerning Community Law are brought before the Division. Even though the jurisdiction of the Division is broad, parties will only rarely bring before it disputes in which, aspects of Community Law play an important role. Like the Judicial Division, most cases before the Division for Administrative Disputes concern typical internal Dutch matters falling outside the present powers of the EC. The Division, for instance, deals with zoning schemes and redivision of Municipalities. This submission is also illustrated by the fact that the only references made to date were concerned with matters of transportation, a subject not dealt with very often by the Division for Administrative Disputes.

6.3 Two illustrative cases

As there are no real exceptional cases among the references initiated by the Council of State, we decided to discuss two cases in which something "peculiar" occurred. These cases can also be considered as illustrative of the referring practice under Article 177 by the Council of State.

1. Case 36/73 (*Nederlandse Spoorwegen*), is the first case in which a preliminary ruling was requested in a case pending before the Division for Administrative Disputes.

In this case, the Netherlands Railway Company appealed to the Crown on the basis of the Act on Appeal against Administrative Decisions (*Wet Beroep Administratieve Beslissingen*), against a decision taken by the Minister of Transport and Waterways. The Division for Administrative Disputes was called upon to produce a draft Royal Decree. After being authorized by the Crown to do so, the Minister concerned, and thus not the Division itself, submitted three preliminary questions on Regulation 1191/69 of the EC Council to the ECJ on January 26, 1973.

Before the ECJ, Advocate-General Mayras considered the question whether, given the organization, jurisdiction and procedure of the Council of State, this reference could be accepted under Article 177. He concluded that, in view of the authorization given by the Crown to make the reference, the Sovereign only felt it her duty to give the Division for Administrative Disputes formal authority to apply for a ruling under Article 177 and that the question could be accepted. The Advocate-General further argued that even though the Division does not have the last word, the decisions of the Crown on the basis of its advice are of a judicial nature, which is sufficient for being accepted as a court under Article 177.

The ECJ gave its ruling on November 27, 1973. It answered all three questions without making any comment on the status of the Division under Article 177. It is submitted that the ECJ could easily take this position because the Netherlands Government had not raised the issue of the Crown's or the Division's standing under Article 177.

Following the ECJ's ruling, the Crown gave its final decision on June 6, 1974. The decisions of the Minister of Transport and waterways were upheld.

As for the other reference (Case 126/78) originating from the Division for Administrative Disputes, it is to be noted that instead of the Minister concerned, the Division requested the preliminary ruling itself. In this Case as in Case 36/73, however, the Crown was asked first for an authorization to make the reference. This authorization was given to the Division in a separate Royal Decree of February 2, 1982. The Division subsequently requested the ruling in the form of a (simple) letter to the ECJ, dated April 4, 1982. The final decision of the Crown, taking the preliminary ruling into account, was given in a Royal Decree of December 2, 1983.

2. In Case 53/81 (*Levin*), a British subject applied for a residence permit in the Netherlands on January 13, 1978. Her application was rejected as she was not regarded as "a favoured EEC subject" under the Dutch Aliens Order (*Vreemdelingenbesluit*). By letter of April 9, 1979 she applied to the Secretary of State for Justice for the decision to be reconsidered, claiming, *inter alia*, that even though she had not pursued an occupation in the Netherlands in the sense of the Dutch regulations, this does not in itself constitute a relevant argument for refusing her a residence permit since she and her husband had sufficient property and income for their maintenance. No decision being taken within the period prescribed, Levin took her case to the Judicial Division. The Division took the view that the case raised questions of Community Law and referred three questions to the ECJ in an interlocutory judgment of November 28, 1980.

The ECJ answered these questions in its judgment of March 28, 1980. It held, *inter alia*, that Mrs. Levin pursued an activity as an employed person and could, therefore, be regarded as a "worker" under Community Law even though she yields an income lower than that which is considered in the Netherlands as the minimum required for subsistence, provided the activity she pursues is effective and genuine.

Following this ruling, the Judicial Division gave its final decision on July 21, 1982. It considered that the Secretary of State had unlawfully refused to consider whether Mrs. Levin could be regarded as "a favoured EEC citizen" and declared the decision refusing a residence permit to mrs Levin to be null and void.

It may be interesting to note that Mrs. Levin lodged appeals to the President of the Amsterdam District Court in summary proceedings as well. Against the President's judgment, the Netherlands State appealed to the Court of Appeal. The appeal to the President of the District Court was made by Mrs. Levin to prevent the State from expelling her as long as the appeal before the Judicial Division of the Council of State was still to be decided. Both courts decided in favour of her. These summary proceedings are an indication of the conjunction which exists under Dutch law, between administrative proceedings and proceedings brought before the ordinary courts against the Government.

More or less the reverse situation rose in Cases 35 and 36/82 (Morson and Jhanjan). In these cases the applicants, like Mrs. Levin, appealed to the Judicial Division to contest the refusal of a residence permit by the Secretary of State. They also appealed to the President in summary proceedings to avoid being expelled before the outcome of the former appeals. After the injunction was denied by the President and, on appeal, by the Court of Appeal, Morson and Jhanjan filed a petition for cassation with the Supreme Court. This court requested a preliminary interpretation, *inter alia*, on its obligations under Article 177. The ECJ held that in this type of proceedings the Supreme Court could not be regarded as a court in the meaning of Article 177, third paragraph. Consequently, the Supreme Court was not under an obligation to make preliminary references in these cases.

7. Summary of the main results of the questionnaires

1. The ECJ gave 105 preliminary rulings at the request of courts belonging to the Administrative Jurisdiction, *i.e.*, 70% of all requests made by Dutch courts. Overall the answers that were given to the questionnaires indicate that the application of the Article 177 procedure by these courts is satisfying. Four cases may be regarded as pathological, *i.e.*, 4% of all cases originating from these courts.[26]

In 86 of the 105 cases, the referring courts delivered a formal judgment taking into account the ECJ's ruling. Sixteen cases were resolved otherwise, the outcome of 3 cases remained unknown.

Of the 86 cases in which a final judgment was given, 77 were considered to be given in strict conformity with the ECJ's ruling. Eight final judgments required a further interpretation of the ECJ's ruling. In only one case, *viz.*, 51/73 (*Smieja*) was the application of the ECJ's ruling

[26] Cases 72/77 (Universiteit Utrecht), 31/68 (Klomp), 100/63 (Kalsbeek Van Der Veen) and 51/73 (Smieja).

found to be "evasive". No judgments were found, in which the referring court gave a "defiant" application to the preliminary ruling.[27]

2. The predominance of the Administrative courts in referring preliminary questions to the ECJ can be explained by the fact that EEC-Law consists mainly of rules, regulating sectors of the economy where the Government or other organs under public law are actively engaged. In this respect, mention can be made of, *inter alia*, the Common Agricultural Policy, matters concerning customs, tariffs and excises, VAT and social security of migrating workers. This explains the fact that the bulk of litigations on EEC-Law takes place against the State or its organs and not between private parties.

Consequently, the Administrative courts are called upon most frequently to decide disputes on EEC-Law. The number of preliminary requests by these courts, therefore, will be higher than the requests by courts belonging to the Ordinary Jurisdiction.

Other factors like, *e.g.*, the system of administration of justice, the cost of litigation, the procedural techniques that have to be followed and the attitude of the judges concerned, may have an impact on the number of references to the ECJ as well. Even though these factors are much more difficult to determine, the following submissions can be made.

a) The relatively great number of specialized administrative courts in the Netherlands is probably beneficial to the number of requests being made under Article 177. It may even be assumed that this has caused the initial lead of Dutch courts when it comes to referring preliminary questions. The CBB, the Central Court of Appeal and, to a lesser extent, the Tariffcommission asked for a large number of rulings in the early sixties, probably due to their specialized jurisdiction. Consequently, they have built up a considerable familiarity with Community Law and have acquired much experience in cooperating with the ECJ under Article 177. Furthermore, it is possible that these circumstances explain the relative decline of references by Dutch courts in comparison with courts from other Member States. As a matter of fact, the considerable Community Law know-how present at some of the administrative courts to date, may result in (relatively, *i.e.*, in comparison with references from courts in other Member States) less references being made in the future.

[27] The expressions "evasive" and "defiant" stem from the questionnaire drawn up by the Florence Institute (Question 11 of the 177-interpretation questionnaire). The application of the preliminary ruling is to be considered "evasive" when the national court, although it is aware that the ECJ would have preferred another solution, deliberately misconstrues the preliminary ruling. As an example of "defiant" attitude, the questionnaire mentions the *Bundesfinanzhof* in its final decision following Case 70/83 (*Kloppenburg*).

(b) Furthermore, the fact that the majority of the administrative courts considered in this report are first and last instance courts, may have an influence as well, since these courts are restricted in their discretion to decide whether or not to make a reference.

c) The fact that proceedings before administrative courts and administrative appeal bodies are usually more informal than proceedings before the ordinary courts, may make it easier to suggest preliminary rulings. This holds true in particular for the cassation procedure in taxation cases before the Supreme Court, which is relatively simple if it is compared to the procedures to be followed in civil and criminal cassation cases.

3. It appears clearly from the statistical information that the responding parties in administrative proceedings, *i.e.*, some kind of public authority, have made hardly any suggestion to the courts as to the application of Article 177. Only for disputes before the Social Security Courts and the Central Court of Appeal, we found a more active approach from the part of the responding parties.

4. In 12 cases, the referring administrative court requested a preliminary ruling on the validity of Community Law.[28] In only one of these Cases did the ECJ hold the litigious provision to be invalid, *viz.*, 116/76 (*Granaria I*).

Even though the ECJ makes a clear distinction between questions as to the interpretation of Community Law and questions concerning the validity of secondary Community Law, we found two cases in which this court handled a request for interpretation as a "validity-question". This occurred in Case 80/72 (*Koninklijke Lassiefabrieken*) and Case 185/83 (*Interfacultair Instituut*). In Case 38/75 (*Douaneagent N.S.*) a certain restructuring of the preliminary questions was brought about as well.

5. It is somewhat surprising that the Netherlands Government seems to make use of its right to submit observations to the ECJ only very rarely, in cases concerning customs and excises referred to the ECJ by Dutch courts. This is even more surprising if regard is taken of the fact that the responding party in the main proceedings before the Tariffcommission, the Inspector of Customs and Excises, does not submit observations either. Apparently, the Government considers these cases to be of too little relevance for submissions to be made before the ECJ.

28 These cases are listed in Annex III to this report.

Chapter V: Evaluation of the Application of the Article 177 Procedure by Special Courts

Mr. J. KORTE

1. Introduction

In this Chapter, the references made by the Arbitration Tribunal for Disputes regarding the Pension Fund for the Mining Industry (henceforth abbreviated to the Arbitration Tribunal) and the Appeals Committee for General Medicine, are briefly discussed. As these courts do not come under the Ordinary Jurisdiction nor under the Administrative Jurisdiction, they are referred to as special courts. The references made by the special courts represent 1.3% of all preliminary rulings considered in this report.[1]

In accordance with the objectives of the Florence research project, these courts were only examined as to their performance under Article 177.

2. Arbitration Tribunal for Disputes regarding the Pension Fund for the Mining Industry (*Scheidsgerecht voor het Beambten fonds voor het Mijnbedrijf*)

In Case 61/65 (*Vaassen-Goebbels*), the plaintiff appealed to the Arbitration Tribunal because the Pension Fund for the Mining Industry refused to reinstate her as a member of its Sickness Insurance Fund. Mrs. Vaassen argued that the decision by the Pension Fund was not in conformity with Community Law, because under Regulations No. 3 and 4 she was still entitled to benefit from the Insurance Fund. The Pension Fund contested this submission and argued that the Regulations are only appli-

[1] After the conclusion of this report two further references were made by a special court. Preliminary questions were submitted to the ECJ by the "Commission of Appeal for Disputes regarding the granting of Scholarships by the Government" (*Commissie van Beroep Studiefinanciering*) on December 24, 1987 in joined Cases 389 and 390/87 (*Echternach and Moritz v Minister van Onderwijs en Wetenschappen*). The ECJ accepted jurisdiction and gave its ruling on March 23, 1989 (not yet reported).

cable to social security regulations provided for by legislation and not to private arrangements like its Sickness Fund.

On December 10, 1965 the Arbitration Tribunal decided to suspend proceedings in order to request a preliminary ruling on the matter. The referring judgment does not indicate who initiated the reference. As to its position under Article 177, the Pension Fund argued that the Arbitration Tribunal is not a "court or tribunal of a Member State" in the meaning of Article 177 as it is formally not a "court" under Dutch legislation. The Tribunal itself, however, considers that the fact that it is not instituted under Dutch legislation does not necessarily mean that it is not a court under Article 177 either. It states that it is for the ECJ to decide whether its questions are admissable under Article 177. On the substance of the case, the Arbitration Tribunal did not submit its own interpretation.

In its judgment of June 30, 1966 the ECJ considered the request to be admissable. The Netherlands Government had taken the same position in its observations to the ECJ. On the substance of the case, it held that the Sickness Insurance Fund comes, in principle, under Regulations 3 and 4.

The Arbitration Tribunal delivered its final judgment on October 4, 1966. Further interpreting the ECJ's ruling, it decided in favour of the plaintiff when it ordered that the Pension Fund could not refuse the reentry into the Sickness Insurance Fund.

3. Appeals Committee for General Medicine (*Commissie van Beroep Huisartsgeneeskunde*)

In Case 246/80, Mr Broekmeulen, a Netherlands national, had obtained the diploma of doctor of medicine, surgery and obstetrics at the Catholic University of Louvain. When he applied to be enrolled on the register of recognized general practitioners in the Netherlands, this was refused by the General Practitioners Registration Committee, which is an organ of the Royal Netherlands Society for the Promotion of Medicine. Broekmeulen appealed against that decision to the Appeals Committee for General Medicine, which is also set up by the Society to determine disputes as to the registration of general practitioners.

Before this Committee Broekmeulen argued, *inter alia*, that the Registration Committee's refusal was contrary to Community Law and in particular, to EEC Directives 75/362 and 75/363. By order of October 21, 1980, the Appeals Committee stayed the proceedings and referred a preliminary question to the ECJ. It appears from the statistical information that the Committee requested this ruling of its own motion.

The ECJ gave its judgment on October 6, 1981. It held that it had jurisdiction to reply to the question asked because the Committee must be

considered as a court or tribunal of a Member State in the meaning of Article 177. The Netherlands Government had adopted the same position in its observations to the ECJ. On the substance of the case, the ECJ decided that Directive 75/362 must be interpreted as meaning that a person like Mr Broekmeulen may establish himself as a general practitioner in the Netherlands.

In its final judgment of December 30, 1981, the Committee annulled the decision of the Registration Commission and ordered this Commission to enrol Mr Broekmeulen on the register as from the first of December 1981. Broekmeulen's claim for reimbursement of the costs of litigation was rejected. The final judgment is considered to be delivered in strict conformity with the ECJ's ruling.

4. Summary of the main results of the questionnaires

It can be inferred from the answers that were given to the questionnaires that the application of Article 177 by special courts is satisfying. In fact, no irregularities were found in the two references concerned.

As to the standing of these courts under Article 177, it is submitted that the observations which were made by the Netherlands Government, may have contributed to the ECJ's acceptance of the questions.

Chapter VI: Conclusions

Mr. J. KORTE

In this report, the application of the Article 177 EEC-procedure by courts in the Netherlands is discussed. The report is the Dutch contribution to a research project on the follow-up by national courts of preliminary references ex Article 177 in nine EC Member-States, initiated and directed by the European University Institute in Florence. It is intended to become part of a general report, covering all the national reports.

The report considers all preliminary rulings given by the ECJ at the request of courts in the Netherlands in relation to which the judicial process came to an end, either by final judgment or by a settlement of the parties, before December 1st 1985. Between 1961, when the first (ever) request for a preliminary ruling on the basis of Article 177 reached the ECJ in Case 13/61 (*De Geus & Uitdenbogerd*) and December 1st 1985, the number of preliminary rulings by the ECJ references by Dutch courts discussed in this report, amounts to 152. These judgments as well as their follow-up are listed in the annexes to this report.

The relevant Dutch cases were examined on the basis of a detailed questionnaire, prepared by the European University Institute in Florence. The research based on the questionnaires resulted in an impressive amount of information on virtually every aspect of the dialogue between the referring courts in the Netherlands and the ECJ. In view of this amplitude of information, the Dutch team decided to deal with only a number of selected issues in its report. In accordance with the guidelines for the national reports provided by the Florence Steering Group, the Dutch report consists of two components: a global description of the functioning of the Article 177 procedure in the Netherlands and an analysis of the cases considered to be most problematic (the so-called exceptional or "pathological" cases). The general pattern as to the application of the preliminary procedure by the ordinary, administrative and special courts as it was found on the basis of the repies to the questionnaires, is subsequently outlined in Chapters III, IV and V by means of two illustrative cases for each type of court. The exceptional or "pathological" cases found are discussed in detail in these Chapters as well. Each of the Chapters end with a summary of the main results of the

questionnaires for the type of court concerned. Before summarizing the most important results and before turning to the conclusions that may be drawn from the replies to the questionnaires, it is emphasized that the report only contains a partial survey of the application of the preliminary procedure by Dutch courts. The dialogue between the referring Dutch courts and the ECJ and the follow-up of the preliminary rulings in the pertinent domestic proceedings were the main subjects of the study. As the research project is restricted to the cases where preliminary rulings were indeed requested by Dutch courts, it is rather hazardous to draw conclusions from it as to the attitude of the courts in general towards Article 177. After all, disputes on EEC-Law of which no reference was made even though the national court might have requested a preliminary ruling or was even obliged to do so, were not examined here. The cases in which Dutch courts neglected the most essential rule of Article 177, *i.e.*, the obligation to request a preliminary ruling, were thus not considered in this project. It is submitted that the exclusion of these "real pathological cases", must have greatly affected the favourable overall result emerging from the questionnaires. In this regard, the research project confirmed our initial hypothesis that once a national court is prepared to request from the ECJ a ruling on the interpretation or the validity of Community Law, it will in all probability not obstruct the application of the ECJ's ruling when it comes to delivering its final judgment.

As was mentioned in Chapter I, paragraph 2, the fact that the relevant cases were investigated solely on the basis of questionnaires imposes some important restrictions on the conclusions which may be drawn from this report as well. First of all it should be born in mind that the questionnaires only relate to the judgments as such and not to the complete files of each case. The questionnaires, therefore, were completed entirely on the basis of the texts of the set of judgments concerned, *i.e*, the judgment of the court making the reference, the ECJ's ruling and the final judgment of the national court. It is submitted that an analysis of, for instance, the full arguments of the parties and of the other documents relating to the case might have provided us with even more information as to the application of the preliminary procedure and might, consequently, have infuenced the conclusions of the report.

Secondly, account is to be taken of the fact that the research was conducted entirely in the form of desk-research. Thus, we did not supplement or test our information by interviewing judges, parties or their counsel or by conducting any other form of field-research.

Thirdly, answering some of the questions of the questionnaires requires a personal evaluation of the person filling in the questionnaire. To avoid different standards being applied, the Dutch team devoted much attention to a uniform treatment of the questionnaires. Still, it should not

be forgotten that the completion of the questionnaires for the Netherlands involved some fifteen people. Some caution, therefore, seems to be appropriate when considering the results of these type of questions.

1. The general pattern and the "pathologies"

The examination of the 152 cases on the basis of the questionnaires demonstrates that the general pattern of the application of the preliminary procedure in the Netherlands is satisfactory.

This submission is first of all proved by the fact that only six out of the 152 cases were regarded as exceptional or "pathological", *i.e.*, 4% of all cases originating from Dutch courts. These cases are 141-143/81 (Holdijk et al.), 31/68 (*SA Chanel v Cepeha*), 72/77 (*Universiteit Utrecht*), 23/68 (*Klomp*), 100/63 (*Kalsbeek-Van Der Veen*) and 51/73 (*Smieja*). These problematic cases (or "pathologies" as they are called in the Guidelines provided by the Florence Steering Group) were discussed in Chapters III and IV.

The problems as regards the application of the preliminary procedure which were found in these cases, may be classified according to their seriousness in two categories; a first and most reprehensible category, consisting of those cases where the referring court withheld one of the parties its right under EEC-Law, contrary to the purpose of the ECJ's ruling. Here, the malfunctioning of the preliminary procedure had an unfavourable impact on the outcome of the case. The final judgments in *Universiteit Utrecht, Kalsbeek-Van Der Veen* and *Smieja* clearly belong to this category. The remaining cases (*Holdijk, SA Chanel* and *Klomp*) belong to a second and less reprehensible category, where the defect in the dialogue between the ECJ and the referring court, apparently, did not seriously affect the outcome of the case.

Taking a closer look at the roots of the problems in the six "pathological" cases, three causes can be distinguished. In *Holdijk* and *Klomp*, problems arose primarily due to poorly formulated preliminary questions. Indeed, these cases should not be regarded as "pathological" because of failures in the follow-up -both final judgment were in fact given in strict conformity with the ECJ's ruling- but because the national courts (the Cantonal Court in Apeldoorn and the Taxation Division of the Court of Appeal in The Hague) made it difficult for the ECJ to give proper answers to the preliminary questions. In view of the difficulties that had to be surmounted by the ECJ, it is somewhat paradoxical that, when these cases came to final judgment, EEC-Law turned out to be irrelevant for their outcome.

The problems in *SA Chanel* and *Universiteit Utrecht* belong to a different category, since national procedural law created the difficulties here. In *SA Chanel* this difficulty consisted in that the referring judgment of the District Court in Rotterdam was quashed in appellate proceedings by the Court of Appeal in The Hague, which made a preliminary ruling of the ECJ superfluous. In Chapter IV, paragraph 3 Possen argues that in *Universiteit Utrecht*, the rules on evidence that were applied by the Tariffcommission effectively hindered an application of the ECJ's ruling, favourable to the appealing party.

The two remaining cases, *Kalsbeek-Van Der Veen* and *Smieja*, are the only ones where problems arose due to a malcomprehension of the ECJ's ruling on the part of the referring court, the Central Court of Appeal in Social Security Matters. In Chapter IV, paragraph 5 Professor Levelt-Overmars indicates that the unexpected interpretation given to Regulation No. 3 together with the ambiguous wording of the ECJ's ruling, forms the most likely explanation of the remarkable final judgments in *Kalsbeek-Van Der Veen*. Furthermore, if regard is taken to the fact that this case was one of the first where questions on the complex system of Regulation No. 3 were put to the ECJ, it is not too difficult to appreciate the problems caused by the ECJ's ruling. Under these circumstances, one can only reproach the Central Court of Appeal for not requesting a second preliminary ruling. As Professor Levelt-Overmars rightly points out, a second preliminary ruling would probably have solved most problems. Cases 98/77 (*Schaap I*) and 176/78 (*Schaap II*) as well as 117/77 (*Pierik I*) and 182/78 (*Pierik II*) demonstrate that the Central Court of Appeal in Social Security Matters does indeed not hesitate to take recourse to Article 177 for a second time in the same case, whenever it feels unable to adjudicate cases on the basis of the first preliminary ruling.

As distinct from *Kalsbeek-Van Der Veen*, no mitigating circumstances can be advanced for the approach that was adopted by the Central Court of Appeal in Smieja. The analysis of this case in Chapter IV, paragraph 5 clearly indicates that the Central Court of Appeal did not follow the ECJ's interpretation, thereby denying Mrs Smieja the transitional Old Age Benefit she was entitled to under the provisions of Regulations Nos. 3 and 1408/71. Fortunately, the Government decided to ignore the Smieja judgment of the Central Court of Appeal and enacted legislation in conformity with the ECJ's ruling. In fact, the final judgment in *Smieja* is the only decision reviewed in this report where the preliminary ruling was "evasively" applied.

A second indication for the satisfactory application of the Article 177-procedure by Dutch courts can be found in the replies that were given to question 11 of the questionnaire: does the national judgment comply with

the preliminary ruling or does it deviate from the terms of the ruling? 110 out of the 123 cases in which a final judgment was delivered (for the remaining 29 cases no final judgments were found; in 24 cases because the parties settled!), were considered to be in strict conformity with the ECJ's ruling, *i.e.*, 90%. In several of these cases, the operational part of the ECJ's ruling was expressed in such clear terms that the referring courts could even confine themselves to a literal repetition of the ECJ's *dictum*, as part of their final decisions. In twelve cases, the preliminary ruling required further interpretation by the referring court before being applied (9.75%). Here, before giving their final decisions, the referring courts first had to "fill in" the latitude which was left by the ECJ in its rulings. Apparently, the preliminary rulings as such were not sufficiently specific for an immediate application by the referring courts to the dispute at hand. As we mentioned earlier, only in the Smieja Case an "evasive application" of the ECJ's ruling was found. Not one case, however, was found in which a Dutch court took a "defiant" attitude to the ECJ's ruling. By way of example of such an attitude, the Florence Steering Group mentioned the judgment of the *Bundesfinanzhof* in *Kloppenburg* (Case 70/83). According to the Florence Interim Report, the percentages found for Dutch courts in this respect do not deviate from the average results found for all references made by Member State courts in the period considered by the Florence project.[1]

A further indication for the generally faithful application of Article 177 by Dutch courts may be found in the response that was given to the question whether the ECJ was satisfied by the preliminary questions posed (question 6c). It appears from the replies to the questionnaires that the Dutch team estimated the ECJ to have been satisfied in 46% of the cases. The EEC-average for all 1014 references considered in this respect is 51.%.[2] In 42% the Dutch team estimated the ECJ to be neutral as to the way in which the questions were formulated, average 32% and in 11% it considered the ECJ to be less than satisfied, the EEC-average here being 8.5 %. Although the standards applied by national teams may differ, it is safe in our view to conclude that references by Dutch courts have not caused exceptional difficulties to the ECJ.

It is to be noted that the greater part of the "less than satisfied" cases were classified as such because the ECJ was forced to reformulate the preliminary questions in a more abstract fashion before answering them (question 6a). The most important reason for this is that the referring courts instead of asking for an interpretation of Community Law, referred questions to the ECJ as to the compatiblity of domestic law with

1 See graph 36 of the Florence Interim Report of March 1988.

2 *Ibid.* graph 22.

EEC-Law. The ECJ does not have the jurisdiction under Article 177 to answer this type of questions. Due to the lenient approach the ECJ usually takes towards inaccurately formulated questions, which are to be found in a good many preliminary references, they usually have no impact on the outcome of the case. The important function which is in fact performed by the preliminary procedure in the judicial review of provisions of national law, will be further discussed in this Chapter in paragraph 3. Even though it is not a failure with serious consequences, one can wonder why Dutch courts, as well as courts from other Member States, keep formulating this type of questions after so many years and after so much redrafting by the ECJ.

A second inaccuracy that we found in rather many Dutch references, making it sometimes difficult for the ECJ to give a proper answer, is a lack of information as to the facts of the case. In about 30% of the cases, the Dutch team indicated that the ECJ was not sufficiently supplied with the relevant facts (question 6b). The EEC-average found here is 22%. The high percentage found for Dutch cases comes as a surprise and must be avoidable in the future.

Finally, our overall favourable conclusion regarding the general pattern can be built on the response that was given to the questions concerning the usefulness of the ECJ's ruling to the national courts' final judgments (question 13b). In only 2.3% of the cases did Dutch courts explicitly mention that the ruling was *not* helpful. According to the Florence Interim report, the EEC-average for all member State courts amounts to 2.2%. In about 50% of the (123) Dutch cases in which a final judgment was delivered, the referring court considered the preliminary ruling to be helpful. The EEC-average here is 50% as well. For the remaining Dutch cases (some 47%) no indication as to the helpfulness was found. Even though the large share of cases where no indication of the helpfulness was found makes it difficult to draw safe conclusions, it is submitted that the low proportion of cases where the ECJ gave preliminary rulings which were explicitely stated to be unhelpful, corroborates the overall favourable pattern. Moreover, if we would have the courage to violate the laws of statistics and apply the maxim "silence gives consent" to the 47% of dark number cases, which is not so irresponsible in the context of this research project as it would seem to be, the helpfulness of the ECJ's rulings becomes almost undisputed.

2. The courts

The greater part of the rulings (105 or 70%) were requested by administrative courts, 45 judgments were given at the request of the

ordinary courts (30%) and 2 at the request of special courts. Besides this numerical preponderance for the administrative courts, we did not find any indication that the type of proceedings (administrative or ordinary) was of influence to the performance under Article 177.

The preponderance of references by administrative courts which is significant in itself, can be explained if regard is had to the type of litigation where disputes on EEC-Law rise. After all, it follows more or less logically from the fact that EEC-Law consists mainly of rules, regulating sectors of the economy where the Government or other public organs are actively engaged, that the bulk of EEC-litigation takes place against the State and not between private parties.[3] Consequently, in the system of administration of justice in the Netherlands, the Administrative courts (the Court of Last Instance in Matters of Trade and Industry (CBB), the Social Security Courts and the Central Court of Appeal in Social Security Matters, the Tariff- commission, the Courts of Appeal and the Supreme Court in Taxation Matters and the Judicial Division of the Council of State) are called upon most frequently to decide disputes on EEC-Law. The number of preliminary requests by these courts, therefore, will as a matter of course equally be higher than the requests by courts belonging to the Ordinary Jurisdiction.

It appears from the Florence Interim Report that only German courts made a higher proportion of references in administrative proceedings; almost 90%.[4] On the other hand, German and Dutch courts made relatively few references in civil cases in comparison with the other Member States' courts. The share of references made in Dutch criminal cases, however, is about average. It is submitted that these interesting differences between the Member States are determined largely by the organization of the Judiciary and by the system of administration of justice. Thus, they are probably more indicative of the differences in this respect than of the application of Article 177.

Whereas the EEC-average on this point is 23.5%,[5] appellate proceedings were brought against the final judgment of the referring courts in the Netherlands in only 5 cases (3%). This low result might give an indication of the authority the ECJ's rulings enjoy in the Netherlands.

3 According to Graph 8 of the Interim Report, a public authority was one of the parties in the dispute in 89% of the Dutch cases. The EEC-average is 83%. Classified according to the subject-matter of the disputes, the break-down for the Dutch cases is as follows: social security and social policy 37 cases; free movement of goods 33 (6 of these disputes took place between private parties, in the remaining 27 either the public prosecutor or some other public authority was involved); CAP 30; CCT 18; VAT 9; free movement of persons 8 (only 1 between private parties); Arts. 85-86 6; transport policy 4; commercial policy 4; Protocol on Priviliges and Immunities 3.

4 *Ibid.* graph 6.

5 *Ibid.* graph 33.

A more likely explanation for this deviation, however, may be found in the fact that appellate proceedings are impossible in most procedures before Dutch administrative courts. As a matter of fact, the CBB, the Tariffcommission and the Council of State, accounting for 70 references, adjudicate in the first as well as in the last instance.

Another deviation that was found for Dutch courts as compared to courts in the other Member-States, is the share of references made by last instance courts. Whereas the EEC-average on this particular point is 34%, Dutch last instance courts account for a total of 103 references, *i.e.*, 67% of all references made by Dutch courts.[6] This deviation must also be explained by the mere fact that most administrative litigation in the Netherlands takes place in one instance only. Therefore, it is in our view not possible to infer from these percentages that Dutch courts against whose judgments no remedy lies, are more willing to request preliminary rulings than lower courts. After all, the 70 references made in administrative proceedings in which there is only one instance, account for no less than 70% of all references made by Dutch courts of last instance. Moreover, if the referring practice of Dutch courts belonging to the Ordinary Jurisdiction is taken into account, where in only 7 out of 45 cases (16%) the reference was made by a court of last instance, the conclusion should rather be that the lower courts are most willing to request preliminary rulings (see Chapter III, paragraph 6).

In some 15% of the Dutch cases, the courts submitted their own interpretation of Community Law in their orders for reference (question 3d). Compared to most other Member-State courts, this result is rather low. For German and French courts, e.g., the percentages are 90 and 81! In fact only Belgian, Irish and Luxembourg courts have a lower "score" than Dutch courts.[7]

It is difficult to find an explanation for this deviation. Since this is a clear difference between the organization of the Judiciary in the Netherlands and other Member-States, the fact that a large number of Dutch courts decide in the first and last instance at the same time, may have a lowering impact on the practice to submit an interpretation of Community Law in the order for reference. One may speculate, e.g., that since these courts are the first to take cognizance of a dispute on Community Law they cannot take an earlier judgment as a basis of discussion. They will, therefore, usually be more preoccupied than second or third instance courts, with discerning and analyzing the legal problem before them and with deciding whether or not to make a reference, than with the formulation of possible interpretations of Community Law. It is

[6] *Ibid.* graph 7.

[7] *Ibid.* graph 14.

to be noted, however, that such conclusions do not follow from the replies that were given to the questionnaires.

Another explanation may be found in the fact that, apparently, most Dutch courts look at the preliminary procedure first and foremost as a useful instrument to solve (complicated) questions on the interpretation of Community Law. In examining the results of the questionnaires and in reading the orders for reference, our convinction grew that most courts' principal interest in a preliminary procedure was to obtain a clear-cut interpretation by the ECJ, rather than to start a discussion about the most desirable interpretation. What is important in our view is, that this pragmatic approach may indicate that Dutch courts are quite willing to share a part of their jurisdiction with the ECJ and are not afraid of a loss of autonomy. Nowhere in the relevant cases did we find any proof of such irritation. It would be interesting to examine where this pragmatic attitude of the Dutch Judiciary stems from and whether it differs substantially from the attitudes that were found for other Member-State courts. However, we will not enter into these discussions here.

Furthermore, the absence of (own) interpretations in so many orders for reference might be explained by a fear of face losing in case the suggested interpretation is not followed by the ECJ. It is more likely, however, that the time factor has an important impact here. In view of the huge workload Dutch courts generally have to cope with, the idea of calling in the ECJ may be an attractive solution in time-consuming cases. The pressure of time, however, may also stand in the way of an equally time-consuming formulation of views based on deliberation within the court making the reference, about a possible or preferable interpretation of EEC-Law.[8] Moreover, the formulation of such views may be virtually impossible in the event the judges making up the court, do not reach consensus. As there is no possibility of a dissenting opinion in the Dutch judicial system, this is not necessarily a theoretical problem. Rather than risking to disclose the discord by formulating more than one possible view on the interpretation of EEC-Law, which could result in a breach of the "secret of deliberation in chambers" (*geheim van raadkamer*), the judges will under such circumstances prefer to ask the ECJ to cut the knot.

It is submitted that the practice of omitting one or more possible interpretations of Community Law in the referring order, may have several drawbacks. As a matter of fact, one explanation for the remarkably large share of Dutch cases where the ECJ was insufficiently informed as to the facts of the case or for the persistent practice of

[8] However, overburdened courts are not a specific Dutch phenomenon. Therefore, saving time by calling in the ECJ should be attractive for courts in other Member States as well.

wrongly formulated preliminary questions (see earlier in this Chapter) may well be found in the absence of one or more possible interpretations in the order for reference. Surely, it must be easier for the ECJ to identify the question for which the national court seeks an answer, if the latter has indicated its own view. Likewise, the formulation of such a view forces the national court to respect the (limited) jurisdiction of the ECJ in preliminary procedures, avoiding questions as to the interpretation of national Law. Since familiarizing itself with Community Law is a prerequisite for the submission of a possible interpretation, an even greater advantage may be that the national court will find the answer itself in the case law of the ECJ or in EC-legislation, thus avoiding an unnecessary reference and leaving the ECJ more time for cases concerning unclarified questions. In view of these advantages, we think it is advisable if Dutch courts would adopt a more active approach in the formulation of their own view in future cases.

In 123 of the 152 cases, the referring courts delivered a final judgment taking into account the ECJ's ruling, *i.e.*, in approximately 80% of all Dutch cases (question 10a). In 24 cases no final judgment was given by the referring court because the ruling of the ECJ made such judgment superfluous. In most of those cases litigation ended because the parties in the dispute reached a settlement or, in criminal cases, because the prosecution was dropped as a result of the ECJ's ruling. The outcome of 5 cases remained unknown. Graph 31 of the March 1988 Interim Report of the Florence Steering Group indicates that the average "score" of final judgments for all 1014 references made under Article 177 between 1961 and 1985 is about 72%. Again the Dutch practice does not deviate substantially from the general pattern found for nine Member States.

In 12 cases Dutch courts addressed questions as to the validity of Community Law to the ECJ, accounting for some 8% of all Dutch references. For all 1014 preliminary references made during the period covered by this project, validity questions account for approximately 15% of the requests. Only French (35%) and German (22%) courts requested more rulings on the validity than Dutch courts.[9] In the Netherlands, only the Court of Last Instance in Matters of Trade and Industry and the Tariffcommission have asked such questions.[10]

In Chapter III, paragraph 6 it was argued that the absence of "177b-references" by the ordinary courts, may possibly be explained by the fact that these courts are called upon less frequently than the courts belonging to the Administrative Jurisdiction to decide matters relating to secondary Community Law. This holds true in particular for those parts of

9 *Ibid.* graph 51.

10 See Annex III to this report.

Community Law, like the CAP, which have to be further implemented by a national administrative body. Equally, questions as to the validity of Community Acts are most likely to rise in those parts of Community Law, like the CAP or the Common Customs Tariff, which are very densely regulated. As distinct from the administrative courts, most questions originating from the Ordinary Jurisdiction relate to the EEC-Treaty itself and to Articles 30-36 in particular. In all but one of the validity-cases, did the ECJ hold the contested Community Act to be valid. As Kellermann indicates in Chapter IV, subparagraph 2.3, the ECJ only decided otherwise in Case 116/76 (*Granaria I*).

3. The parties

The results to the questionnaires clearly indicate that the parties in the dispute played an important rôle in initiating the reference. The expression "initiating a reference", which is adopted here because it was used in the Florence-questionnaires, may give rise to confusion as it is formally speaking always the national court which decides to make a request under Article 177. When the expression is used here, it should be read as referring to the question who suggested the court to make the reference (question 2b). It appears from the replies to the questionnaires that the parties initiated a reference in some 30% of the cases as compared to 27% of the cases which were referred by the courts of their own motion. For the remaining cases (43%) no information is available. No substantial differences for administrative and ordinary courts where found.

It was demonstrated in Chapter IV that if one of the parties in administrative proceedings took the initiative to request a preliminary ruling, it turned out to be nearly always the private party. The responding parties in such proceedings, public authorities of some kind, have made hardly any suggestion to the courts as to the application of Article 177. Only for the two instances of the Social Security Courts did we find a more active rôle on the part of the responding public authority in this respect (see Chapter IV, subparagraph 5.2).

As regards the private parties in the disputes, the most significant conclusion of the project is the important function of the preliminary procedure as an additional mechanism for the judicial review of national provisions and thus for judicial protection against the Government. Even though the ECJ, formally, does not pronounce itself on domestic law in the context of Article 177, the replies to the questionnaires clearly demonstrate that the preliminary procedure may be considered an

effective (additional) instrument of judicial protection against the Government.

The Interim Report indicates that 83% of the Dutch preliminary cases involved a review of national provisions (question 8). Following the ECJ's rulings in those cases, the referring courts considered the national provisions to be incompatible with EEC-Law in about 43% of the cases (question 9f). In these cases, the contested provisions were in the end not applied by the referring courts when they delivered their final judgments. These percentages are almost perfectly in line with the EEC-average as found in the Interim Report.[11]

For the Dutch courts belonging to the Administrative Jurisdiction, we found a much larger share of "incompatibility verdicts" than for the ordinary courts; 58% as opposed to 26% (question 9f). The differences between some individual courts are even more remarkable. In only 10% of the references made by the Supreme Court, e.g., the contested provision was held to be incompatible with Community Law, as compared to 70 and 71% of the references made by the Central Court of Appeal and the Tariffcommission respectively[12]. Notwithstanding these interesting differences, the importance of the preliminary procedure as a mechanism for judicial review of national measures in administrative as well as ordinary proceedings, is established beyond any doubt.

11 Graphs 37 and 38, *Supra*, note 1.

12 For the remaining courts the percentages are: Courts of Appeal 37; District Courts 35; Cantonal Courts 20; Council of State 67; CBB 25; Social Security Courts 57.

Annex I:

Survey of the Follow-up of the Preliminary rulings Considered in this report (classified according to type of court making the reference)

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
A. Courts with Ordinary Jurisdiction (gewone rechterlijke macht) (45)					
I. Cantonal Courts (Kantongerechten) (3)					
39/82	Donner	(1980) 19	13.04.84		
104/75	De Peijper	(1976) 613	06.09.76		NJ'76 549
141-143/81	Holdijk	(1982) 1299	06.01.83		
II. District Courts (Arrondissementsrechtbanken (24)					
31/64	Bertholet	(1965) 81	18.11.65	Asser 4B	
33/64	Betriebskrankenkasse	(1965) 37	15.06.65	Asser 4B	
31/68	Chanel v CEPEHA	(1970) 403	no		
78/72	Ster-Alg. Syndicaat	(1973) 499	no		
36/74	Walrave & Koch	(1974) 1405	no		
3/78	Centrafarm v AHP	(1978) 1823	unknown		
99/79	Lancôme & Cosparfrance	(1980) 2511	04.04.84	KG'84 143	
106/79	VBBB v Eldi Records	(1980) 1137	16.05.80		
187/80	Merck v Stephar	(1981) 2063	no		
181/82	Roussel	(1983) 3849	18.07.84		
237/82	Jongeneel Kaas	(1984) 483	30.05.84		
238/82	Duphar	(1984) 523	07.06.84	RvdW'84 196	
179/83	Industriebond FNV	(1985) 514	no		
190/73	Van Haaster	(1974) 1123	16.12.74	NJ'74 268	
3,4-6/76	Kramer	(1976) 1279	09.11.76	Asser 242	
185-204/78	Van Dam & 19 others	(1979) 2345	13.11.79		
27/80	Fietje	(1980) 3839	23.02.81		
32/80	Kortmann	(1981) 252	16.07.81		01.02.83[2]
124/80	Van Dam II	(1981) 144	unknown		
130/80	Kelderman	(1981) 527	03.04.81		
94/82	De Kikvorsch	(1983) 947	16.05.83		
174/82	Sandoz	(1983) 2445	31.10.83	NJ'84 178	
227/82	Van Bennekom	(1983) 3883	30.05.84		25.06.85[2]
94/83	Albert Heijn	(1984) 3263	06.05.85		

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
III. Courts of Appeal (Gerechtshoven) (11)					
13/61	De Geus & Uitdenbogerd	(1962) 45	no		
24/67	Parke, Davis v Pröbel	(1967) 345	01.03.68		
25/75	Van Vliet v Fratelli	(1975) 1103	29.06.76		
6/81	Beele	(1982) 707	09.12.82		
144/81	Nancy Kean Gifts	(1982) 2853	no		
111/76	Van Der Hazel	(1977) 901	23.06.77		
82/77	Van Tiggele	(1978) 25	27.04.78		
94/79	Vriend	(1980) 327	27.03.80		
53/80	Kon. Kaasfabriek Eyssen	(1981) 409	04.06.81		
272/80	Biologische Produkten	(1981) 3277	29.10.82	NJ'83 654	
286/81	Oosthoek's Uitgeversmij.	(1982) 4575	11.03.83		29.11.83[1]
IV. Surpreme Court (Hoge Raad) (7)					
15/74	Centrafarm v Sterling	(1974) 1147	21.02.75	NJ'75 456	
16/74	Centrafarm v Winthrop	(1974) 1183	21.02.75	NJ'75 457	
35-36/82	Morson & Jhanjhan	(1982) 3723	no		
19/84	Pharmon v Hoechst	(1985) 2291	13.12.85	RvdW'86 9	
20/84	De Jong and "Domo Bedum"	(1985) 2106	20.12.85	RvdW'86 18	
279/80	Webb	(1981) 3305	20.04.82	NJ'82 582	
97/83	CMC Melkunie	(1984) 2367	13.11.84	NJ'85 338	

B. Administrative Courts

I. Court of Last Instance in Matters of Trade and Industry (College van Beroep voor het Bedrijfsleven, CBB) (42)

73-74/63	Puttershoek	(1964) 1	19.06.64	
16/70	Necomout	(1970) 921	09.03.71	ARB'71 87
17/70	Kon. Lassiefabrieken I	(1970) 945	12.01.71	ARB'71 70
58/70	Compagnie Continentale	(1971) 163	06.07.71	ARB'70 238
38-39/71	Westzucker en Dietz	(1972) 1	11.04.72	Asser 4B
51-54/71	International Fruit I	(1971) 1107	05.05.72	ARB'72 189
18/72	Granaria	(1972) 1163	03.08.73	ARB'74 39
21-24/72	International Fruit II	(1972) 1219	no	
26/72	Verenigde Oliefabrieken	(1972) 1031	15.01.74	ARB'70 298
61/72	PPW International	(1973) 301	no	
80/72	Kon. Lassiefabrieken II	(1973) 635	18.09.73	ARB'74 24
138/73	Codrico	(1973) 1341	30.07.75	ARB'75 260
150/73	Holl. Melksuikerfabriek	(1973) 1633	16.07.74	ARB'74 311
51/74	Van der Hulst's	(1975) 79	17.02.76	ARB'76 103
92/74	Van Den Bergh	(1975) 599	05.08.75	ARB'75 261
39/75	Coenen v SER	(1975) 1547	23.03.76	ARB'75 124
45/76	Comet	(1976) 2043	11.05.77	ARB'77 802

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
50/76	Amsterdamse Bulb	(1977) 137	no		
116/76	Granaria I	(1977) 1247	18.01.80	SEW'80 12	
6/77	Schouten I	(1977) 1291	01.11.77	ARB'78 121	
125/77	Kon. Scholten Honig	(1978) 1991	no		
34/78	Yoshida	(1979) 115	no		
35/78	Schouten II	(1978) 2543	no		
101/78	Granaria II	(1979) 623	18.01.80	Asser NL6	
113/78	Schouten III	(1979) 695	27.11.79	ARB'81 259	
115/78	Knoors	(1979) 399	no		
137/78	Henningsen v.d. Burg	(1979) 1707	28.12.79	Asser 683I	
240/78	Atalanta	(1979) 2137	28.12.79	Asser 716	
265/78	Ferwerda	(1980) 617	06.10.81	Asser NL39	
15/79	Groenveld	(1979) 3409	01.04.80	Asser 624I+NL14	
124/79	Van Walsum	(1980) 813	no		
759/79	Pesch	(1980) 2705	no		
35/80	Denkavit I	(1981) 45	no		
109/80	Toneman	(1981) 881	20.05.81	Asser NL79	
136/80	Hudig en Pieters	(1981) 2233	26.02.82		
29/82	Van Luipen	(1983) 151	no		
276/82	De Beste Boter	(1983) 3331	no		
327/82	Ekro	(1984) 107	unknown		
15/83	Denkavit II	(1984) 2171	no		
38/83	Vreeland	(1984) 3343	unknown		
47-48/83	Van Miert	(1984) 1721	08.03.85	AB'86 171	
105/83	Pakvries	(1984) 2101	01.11.85		
II. Tariffcommission (Tariefcommissie) (13)					
26/62	Van Gend & Loos	(1963) 1	no		
28-30/62	Da Costa en Schaake	(1963) 31	no		
38/75	Douaneagent NS	(1975) 1439	05.04.76	UTC'76 29	
38/77	Enka	(1977) 2203	30.01.78	UTC'83 7	
72/77	Universiteit Utrecht	(1978) 189	13.03.78	UTC'78 37	
11/79	Cleton	(1979) 3069	29.10.79	UTC'80 19	
160/80	Smuling-De Leeuw	(1981) 1767	01.02.82	UTC'82 61	
208-209/81	Palte en Haentjes	(1982) 2511	05.04.83	UTC'83 45	
37/82	Ned. bevr. kantoor	(1982) 3481	20.12.82	UTC'83 3	
47/82	Gebroeders Vismans	(1982) 3983	31.12.82	UTC'83 2	
46/83	Gerlach & Co	(1984) 841	02.04.84	UTC'84 24	
185/83	Interfac. Instituut	(1984) 3623	07.01.85	UTC'85 2	
32/84	Van Gend & Loos	(1985) 782	20.05.85	UTC'85 25	
III. Surpreme Court and Courts of Appeal in Taxation Matters (13)					
Surpreme Court Taxation cases (9)					
51/76	VNO	(1977) 113	30.11.77	BNB'78 152	
102/76	Peereboom	(1977) 815	07.09.77	BNB'77 224	
126/78	NS	(1979) 2041	14.11.79	BNB'80 15	

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
181,229/78	Van Paassen	(1979) 2063	19.12.79	BNB'80 194	
154/80	Aardappelbewaarplaats	(1981) 445	10.06.81	BNB'81 1271	
89/81	Hong Kong TDC	(1982) 1277	06.10.82	BNB'82 312	
268/83	Rompelman	(1985) 660	27.08.85		
47/84	Schul II	(1985) 1501	23.10.85		
139/84	Van Dijk's Boekhuis	(1985) 1412	02.10.85	WFR'86 57	
Courts of Appeal Taxation cases (4)					
32/67	Van Leeuwen	(1968) 43	22.08.68	BNB'69 203	
23/68	Klomp	(1969) 43	20.06.69	Asser 4B	07.01.70[1]
7/74	Broverius van Nidek	(1974) 757	28.10.74	BNB'75 199	
15/81	Schul I	(1982) 1409	18.02.83	UTC'83 218	15.02.84[1]
IV. Social Security Courts of First Instance (Raden van Beroep) (7)					
109/76	Blottner	(1977) 1141	09.12.77		
9/79	Koschniske	(1979) 2717	09.10.79	RSV'80 37	
274/81	Besem	(1982) 2995	30.11.82		
285/82	Derks	(1984) 433	15.08.84		
135/83	Abels	(1985) 479	28.05.85	AB'85 342	
104/84	Kromhout	(1985) 2213	unknown		
145/84	Cochet	(1985) 803	11.06.85		
V. Central Court of Appeal (Centrale Raad van Beroep) (25)					
75/63	Unger	(1964) 177	07.07.64	ARB'66 380	
92/63	Nonnenmacher	(1964) 281	15.07.64	ARB'66 422-423	
100/63	Kalsbeek-Van Der Veen	(1964) 565	07.10.64	RSV'64 169	
24/64	Dingemans	(1964) 647	01.04.64		
4/66	Hagenbeek	(1966) 425	05.10.66	ARB'68 462-464	
19/67	Van Der Vecht	(1967) 345	01.03.68	ARB'70 258	
82/72	Walder	(1973) 599	26.07.73	RSV'74 67	
51/73	Smieja	(1973) 1213	19.02.74	RSV'74 248	
184/73	Kaufmann	(1974) 517	05.09.74	RSV'75 55B	
33/74	Van Binsbergen	(1974) 1299	13.03.75	Asser 171	
39/76	Mouthaan	(1976) 1901	05.05.77	RSV'77 246	
98/77	Schaap I	(1978) 707	19.06.79	RSV'80 64	
105/77	Boerboom-Kersjes	(1978) 717	11.07.78	RSV'78 320	
117/77	Pierik I	(1978) 825	11.07.78		
129/78	Lohmann	(1979) 853	22.05.79	RSV'79 190	
176/78	Schaap II	(1979) 1673	19.06.79	RSV'80 64	
180/78	Brouwer	(1979) 2111	30.10.79		
182/78	Pierik II	(1979) 1977	09.10.79		
69/79	Jordens-Vosters	(1980) 75	11.03.80	RSV'80 617	
238/81	Van Der Bunt-Craig	(1983) 1385	11.10.83	RSV'84 146	
275/81	Koks	(1982) 3013	18.01.83	RSV'83 84	
276/81	Kuijpers	(1982) 3027	no		
23/83	Liefting	(1984) 3225	24.06.86		

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
101/83	Brusse	(1984) 2223	18.09.84	RSV'84 227b	
181/83	Weber	(1984) 4007	28.06.85		
VI. Council of State (Raad van State) (5)					
36/73	Nederlandse Spoorwegen	(1973) 1299	06.06.74	ARB'74 283	
126/82	Smit	(1983) 73	01.12.83	ARB'84 232	
145/78	Augustein	(1979) 1025	19.07.79	Asser 636	
146/78	Wattenberg	(1979) 1041	19.07.79	Asser 637	
53/81	Levin	(1982) 1035	21.07.82	AB'83 353	

C. Special Courts (Bijzondere Rechters) (2)

I. Arbitration Tribunal for disputes regarding the pension fund for the mining industry (Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijfte Heerlen)

61/65	Vaassen-Goebbels	(1966) 261	04.10.66	Asser 4B	

II. Appeals Committee for General Medicine (Commissie van Beroep Huisartsgeneeskunde te Den Haag)

246/80	Broekmeulen	(1981) 2311	30.12.81		

* *Explanatory Note*: The column **Appeal/Cassation** is only applicable if an appeal (or an appeal in cassation) was lodged against the final judgment of the referring court taking into account the ECJ's preliminary ruling. Thus, appeals against judgments or orders in which the reference under Article 177 was made are not mentioned here.

\+ *Explanatory Note*: All remaining final decisions by the referring courts are not published. Several of them, however, were available to the rapporteurs when the report was written.

Abbreviations:

AB	Advocatenblad
ARB	Administratiefrechtelijke Beslissingen
BNB	Beslissingen in Belastingzaken
NJ	Nederlandse Jurisprudentie
RSV	Rechtspraak Sociale Verzekeringen
RvdW	Rechtspraak van de Week
SEW	Sociaal-Economische Wetgeving
UTC	Uitspraken Tariefcommissie
WFR	Weekblad voor Fiscaal Recht
Asser:	Case Law collected by and available at the T.M.C. Asser Instituut in the Hague.

– Asser 4B: Nationale Jurisprudentie op het gebied van het recht van de Europese Gemeenschappen. Deze verzameling beslaat de periode 1958–1973 en is opgeborgen in banden van groene kleur. De prejudiciële verwijzingen zijn gepubliceerd in band 4B onder art. 177 EEG en nader ingedeeld op datum van de uitspraak.

– Asser 723: Verzameling Nationale Jurisprudentie. Deze verzameling beslaat de periode 1973–1980 en is opgeborgen in banden van blauwe kleur. De uitspraken zijn genummerd 1 tot en met 864.

– Asser f. NL 33: Sinds 1980 zijn de nationale uitspraken alleen beschikbaar op fiche (f.) en nader ingedeeld op land (NL.) en nummer.

Annex II:

Survey of the Follow-up of the Preliminary rulings Considered in this report (numerical order)

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
13/61	De Geus & Uitdenbogerd	(1962) 45	no		
26/62	Van Gend & Loos	(1963) 1	no		
28-30/62	Da Costa en Schaake	(1963) 31	no		
73-74/63	Puttershoek	(1964) 1	19.06.64		
75/63	Unger	(1964) 177	07.07.64	ARB'66 380	
92/63	Nonnenmacher	(1964) 281	15.07.64	ARB'66 422-423	
100/63	Kalsbeek-Van Der Veen	(1964) 565	07.10.64	RSV'64 169	
24/64	Dingemans	(1964) 647	01.04.64		
31/64	Bertholet	(1965) 81	18.11.65	Asser 4B	
33/64	Betriebskrankenkasse	(1965) 37	15.06.65	Asser 4B	
61/65	Vaassen-Goebbels	(1966) 261	04.10.66	Asser 4B	
4/66	Hagenbeek	(1966) 425	05.10.66	ARB'68 462-464	
19/67	Van Der Vecht	(1967) 345	01.03.68	ARB'70 258	
24/67	Parke, Davis v Pröbel	(1967) 345	01.03.68		
32/67	Van Leeuwen	(1968) 43	22.08.68	BNB'69 203	
23/68	Klomp	(1969) 43	20.06.69	Asser 4B	07.01.70[1]
31/68	Chanel v CEPEHA	(1970) 403	no		
16/70	Necomout	(1970) 921	09.03.71	ARB'70 87	
17/70	Kon. Lassiefabrieken I	(1970) 945	12.01.71	ARB'71 70	
58/70	Compagnie Continentale	(1971) 163	06.07.71	ARB'70 238	
38-39/71	Westzucker en Dietz	(1972) 1	11.04.72	Asser 4B	
51-54/71	International Fruit I	(1971) 1107	05.05.72	ARB'72 189	
18/72	Granaria	(1972) 1163	03.08.73	ARB'74 39	
21-24/72	International Fruit II	(1972) 1219	no		
26/72	Verenigde Oliefabrieken	(1972) 1031	15.01.74	ARB'74 298	
61/72	PPW International	(1973) 301	no		
78/72	Ster-Alg. Syndicaat	(1973) 499	no		
80/72	Kon. Lassiefabrieken II	(1973) 635	18.09.73	ARB'74 24	
82/72	Walder	(1973) 599	26.07.73	RSV'74 67	
36/73	Nederlandse Spoorwegen	(1973) 1299	06.06.74	ARB'74 283	
51/73	Smieja	(1973) 1213	19.02.74	RSV'74 248	
138/73	Codrico	(1973) 1341	30.07.75	ARB'75 260	
150/73	Holl. Melksuikerfabriek	(1973) 1633	16.07.74	ARB'74 311	
184/73	Kaufmann	(1974) 517	05.09.74	RSV'75 55B	

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
190/73	Van Haaster	(1974) 1123	16.12.74		
7/74	Broverius van Nidek	(1974) 757	28.10.74	BNB'75 199	
15/74	Centrafarm v Sterling	(1974) 1147	21.02.75	NJ'75 456	
16/74	Centrafarm v Winthrop	(1974) 1183	21.02.75	NJ'75 457	
33/74	Van Binsbergen	(1974) 1299	13.03.75	Asser 171	
36/74	Walrave & Koch	(1974) 1405	no		
51/74	Van der Hulst's	(1975) 79	17.02.76	ARB'76 103	
92/74	Van Den Bergh	(1975) 599	05.08.75	ARB'75 261	
25/75	Van Vliet v Fratelli	(1975) 1103	29.06.76		
38/75	Douaneagent NS	(1975) 1439	05.04.76	UTC'76 29	
39/75	Coenen v SER	(1975) 1547	23.03.76	ARB'76 124	
104/75	De Peijper	(1976) 613	06.09.76	NJ'76 549	
3,4-6/76	Kramer	(1976) 1279	09.11.76		
39/76	Mouthaan	(1976) 1901	05.05.77	RSV'77 246	
45/76	Comet	(1976) 2043	11.05.77	ARB'77 802	
50/76	Amsterdamse Bulb	(1977) 137	no		
51/76	VNO	(1977) 113	30.11.77	BNB'78 152	
102/76	Peereboom	(1977) 815	07.09.77	BNB'77 224	
109/76	Blottner	(1977) 1141	09.12.77		
111/76	Van Der Hazel	(1977) 901	23.06.77		
116/76	Granaria I	(1977) 1247	18.01.80	SEW'80 12	
6/77	Schouten I	(1977) 1291	01.11.77	ARB'78 121	
38/77	Enka	(1977) 2203	30.01.78	UTC'83 7	
72/77	Universiteit Utrecht	(1978) 189	13.03.78	UTC'78 37	
82/77	Van Tiggele	(1978) 25	27.04.78		
125/77	Kon. Scholten Honig	(1978) 1991	no		
98/77	Schaap I	(1978) 707	19.06.79	RSV'80 64	
105/77	Boerboom-Kersjes	(1978) 717	11.07.78	RSV'78 320	
117/77	Pierik I	(1978) 825	11.07.78		
3/78	Centrafarm v AHP	(1978) 1823	unknown		
34/78	Yoshida	(1979) 115	no		
35/78	Schouten II	(1978) 2543	no		
101/78	Granaria II	(1979) 623	18.01.80	Asser NL6	
113/78	Schouten III	(1979) 695	27.11.79	ARB'81 259	
115/78	Knoors	(1979) 399	no		
126/78	NS	(1979) 2041	14.11.79	BNB'80 15	
129/78	Lohmann	(1979) 853	22.05.79	RSV'79 190	
137/78	Henningsen v.d. Burg	(1979) 1707	28.12.79	Asser 683I	
145/78	Augustein	(1979) 1025	19.07.79	Asser 636	
146/78	Wattenberg	(1979) 1041	19.07.79	Asser 637	
176/78	Schaap II	(1979) 1673	19.06.79	RSV'80 64	
180/78	Brouwer	(1979) 2111	30.10.79		
181,229/78	Van Paassen	(1979) 2063	19.12.79	BNB'80 194	
182/78	Pierik II	(1979) 1977	09.10.79		
185-204/78	Van Dam & 19 others	(1979) 2345	13.11.79		
240/78	Atalanta	(1979) 2137	28.12.79	Asser 716	

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
265/78	Ferwerda	(1980) 617	06.10.81	Asser NL39	
9/79	Koschniske	(1979) 2717	09.10.79	RSV'80 37	
11/79	Cleton	(1979) 3069	29.10.79	UTC'80 19	
15/79	Groenveld	(1979) 3409	01.04.80	Asser 624I+NL14	
69/79	Jordens-Vosters	(1980) 75	11.03.80	RSV'80 617	
94/79	Vriend	(1980) 327	27.03.80		
99/79	Lancôme & Cosparfrance	(1980) 2511	04.04.84	KG'84 143	
106/79	VBBB v Eldi Records	(1980) 1137	16.05.80		
124/79	Van Walsum	(1980) 813	no		
759/79	Pesch	(1980) 2705	no		
27/80	Fietje	(1980) 3839	23.02.81		
32/80	Kortmann	(1981) 252	16.07.81		01.02.83[2]
35/80	Denkavit I	(1981) 45	no		
53/80	Kon. Kaasfabriek Eyssen	(1981) 409	04.06.81		
109/80	Toneman	(1981) 881	20.05.81	Asser NL79	
124/80	Van Dam II	(1981) 144	unknown		
130/80	Kelderman	(1981) 527	03.04.81		
136/80	Hudig en Pieters	(1981) 2233	26.02.82		
154/80	Aardappelbewaarplaats	(1981) 445	10.06.81	BNB'81 1271	
160/80	Smuling-De Leeuw	(1981) 1767	01.02.82	UTC'82 61	
187/80	Merck v Stephar	(1981) 2063	no		
246/80	Broekmeulen	(1981) 2311	30.12.81		
272/80	Biologische Produkten	(1981) 3277	29.10.82	NJ'83 654	
279/80	Webb	(1981) 3305	20.04.82	NJ'82 582	
6/81	Beele	(1982) 707	09.12.82		
15/81	Schul I	(1982) 1409	18.02.83	UTC'83 218	15.02.84[1]
53/81	Levin	(1982) 1035	21.07.82	AB'83 353	
89/81	Hong Kong TDC	(1982) 1277	06.10.82	BNB'82 312	
141-143/81	Holdijk	(1982) 1299	06.01.83		
144/81	Nancy Kean Gifts	(1982) 2853	no		
208-209/81	Palte en Haentjes	(1982) 2511	05.04.83	UTC'83 45	
238/81	Van Der Bunt-Craig	(1983) 1385	11.10.83	RSV'84 146	
274/81	Besem	(1982) 2995	30.11.82		
275/81	Koks	(1982) 3013	18.01.83	RSV'83 84	
276/81	Kuijpers	(1982) 3027	no		
286/81	Oosthoek's Uitgeversmij.	(1982) 4575	11.03.83		29.11.83[1]
29/82	Van Luipen	(1983) 151	no		
35-36/82	Morson & Jhanjhan	(1982) 3723	no		
37/82	Ned. bevr. kantoor	(1982) 3481	20.12.82	UTC'83 3	
39/82	Donner	(1980) 19	13.04.84		
47/82	Gebroeders Vismans	(1982) 3983	31.12.82	UTC'83 2	
94/82	De Kikvorsch	(1983) 947	16.05.83		
126/82	Smit	(1983) 73	01.12.83	ARB'84 232	
174/82	Sandoz	(1983) 2445	31.10.83	NJ'84 178	
181/82	Roussel	(1983) 3849	18.07.84		
227/82	Van Bennekom	(1983) 3883	30.05.84		25.06.85[2]

Case		ECR	Final Judgment	Source+	Appeal[1]/ Cassation[2]*
237/82	Jongeneel Kaas	(1984) 483	30.05.84		
238/82	Duphar	(1984) 523	07.06.84	RvdW'84 196	
276/82	De Beste Boter	(1983) 3331	no		
285/82	Derks	(1984) 433	15.08.84		
327/82	Ekro	(1984) 107	unknown		
15/83	Denkavit II	(1984) 2171	no		
23/83	Liefting	(1984) 3225	24.06.86		
38/83	Vreeland	(1984) 3343	unknown		
46/83	Gerlach & Co	(1984) 841	02.04.84	UTC'84 24	
47-48/83	Van Miert	(1984) 1721	08.03.85	AB'86 171	
94/83	Albert Heijn	(1984) 3263	06.05.85		
97/83	CMC Melkunie	(1984) 2367	13.11.84	NJ'85 338	
101/83	Brusse	(1984) 2223	18.09.84	RSV'84 227b	
105/83	Pakvries	(1984) 2101	01.11.85		
135/83	Abels	(1985) 479	28.05.85	AB'85 342	
179/83	Industriebond FNV	(1985) 514	no		
181/83	Weber	(1984) 4007	28.06.85		
185/83	Interfac. Instituut	(1984) 3623	07.01.85	UTC'85 2	
268/83	Rompelman	(1985) 660	27.08.85		
19/84	Pharmon v Hoechst	(1985) 2291	13.12.85	RvdW'86 9	
20/84	De Jong and "Domo Bedum"	(1985) 2106	20.12.85	RvdW'86 18	
32/84	Van Gend & Loos	(1985) 782	20.05.85	UTC'85 25	
47/84	Schul II	(1985) 1501	23.10.85		
104/84	Kromhout	(1985) 2213	unknown		
139/84	Van Dijk's Boekhuis	(1985) 1412	02.10.85	WFR'86 57	
145/84	Cochet	(1985) 803	11.06.85		

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– Asser f. NL 33: Sinds 1980 zijn de nationale uitspraken alleen beschikbaar op fiche (f.) en nader ingedeeld op land (NL.) en nummer.

Annex III:

Survey of the cases in which Questions on the Validity of Community Acts were Addressed to the ECJ

I. Court of Last Instance in Matters of Trade and Industry (College van Beroep voor het Bedrijfsleven)

Case		ECR
73-74/63	Puttershoek	(1964) 1
21-24/72	International Fruit Company II	(1972) 1219
116/76	Granaria I	(1977) 1247
125/77	Koninklijke Scholten Honig*	(1978) 1991
34/78	Yoshida	(1979) 115
35/78	Schouten II	(1978) 2543
240/78	Atalanta*	(1979) 2137
35/80	Denkavit I	(1981) 45
276/82	De Beste Boter*	(1983) 3331
15/83	Denkavit II	(1984) 2171

II. Tariffcommission (Tariefcommissie)

Case		ECR
38/75	Douaneagent NS	(1975) 1439
185/83	Interfacultair Instituut	(1984) 3623

* *Explanatory Note*: In the three cases marked with * the CBB requested a preliminary ruling on the interpretation as well as on the validity of EEC-Law. For each of these cases, the Dutch team completed two questionnaires; one on the interpretation (177a) and one on the review of validity of Community Acts (177b).

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