

REPUBLIC OF TURKEY
MARMARA UNIVERSITY
EUROPEAN COMMUNITY INSTITUTE
DEPARTMENT OF EUROPEAN UNION LAW

THE STRUCTURAL AND PROCEDURAL ANALYSIS OF
THE EUROPEAN COURT OF JUSTICE
WITHIN THE FRAMEWORK OF
EUROPEAN UNION LAW

M.A. THESIS

Emre DOĞAN

ANTALYA, 2006

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P R E F A C E

The purpose of this study is to examine the organization and the working methods of the European Court of Justice. More than a half century, the Court has protected the Treaties, which are accepted by the Member States. In this process, the Court has seen some several amendments that are related with its organization and its process. However, the ultimate aim of the Court has never been changed. Briefly, in this study, the reader can find information about the physical organization and the scope of jurisdiction of the Court. Moreover, the information about the most frequent case types is given by the help of Treaty provisions and the decisions of the Court. Subsequent to this subject, the reader can discover information about the procedure that is followed in the cases before the Court.

The first chapter of the study deals with the Court's historical background. The foundation of the Court and the motives that are lying under this foundation is explained. Afterwards, succinct information about the evolution of the Court from ECSC to Nice Treaty is given in this chapter.

The structural analysis of the Court is done in the second chapter. The reader can find out detailed information about the rights and obligations of the Judges, Advocate Generals and the other employees of the Court.

The provisions of the Treaties describe the areas, which fall under the jurisdiction of the Court. Therefore, in the third chapter, the jurisdiction of the Court is clarified. You can also find information about the characteristics of the Court in proceedings.

The following chapter scrutinizes the most common types of cases such as, annulment of a community act or references for a preliminary ruling. The conditions and that are stated in the Treaties and in the orders of the Court are explained for these cases. Moreover, the effects of the decisions, which are given by the Court of Justice, are clarified in this chapter.

In the fifth chapter, the litigation system before the Court is explained generally by the help of “Rules of Procedure” and the “Statute of the Court”. Besides, the previous decisions of the Court, which are related with the procedure, are taken into account while making this enlightenment. Briefly, the reader can find information about the process from the beginning to the end.

Finally, the remarks and general observations over this work is mentioned in the last chapter of the thesis.

ABBREVIATIONS

CFI	Court of First Instance
CMLR	Common Market Law Reports
EAEC	European Atomic Energy Community
EC	European Community
ECB	European Community Bank
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
ESCB	European System of Central Banks
EU	European Union
OJ	Official Journal
ROP	Rules of Procedure
SEA	Single European Act
TEC	Treaty on European Communities
TEU	Treaty on European Union

ACKNOWLEDGEMENTS

The content of this study is about the embodiment of the Court of Justice and its process. Initially it describes the historical background of the Court, the structure of the Court and its area of Jurisdiction is clarified after this subject. At the following chapters, the common case types and their procedural operation are explained.

First, i would like to express my appreciation to my supervisor Yrd. Doç. Dr. Murat YÖRÜNG for his tolerance and his great contributions to my study. I am also grateful to all of my teachers and my classmates who have supported me at every stage of my thesis. Also, I am thankful for my family for their everlasting encouragement.

Lastly, I would like to mention that I am solely responsible from any mistakes or deficiencies in this study.

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I. HISTORICAL BACKGROUND

To build up a Union, the Member States have signed treaties that construct the European Communities. According to the rules of treaties, Member States should act in accordance with each other in the fields where the rules of founding treaties applied. Member States have accepted to establish the institutions that can adopt legal rules and laws in some specific areas to reach this aim. To apply these rules and to observe the treaties the Communities have established judicial institutions in Luxembourg. Court of Justice and the Court of First Instance of the European Communities are these institutions.

By the assist of national courts, the Court of Justice and the Court of First Instance represent the judicial authority of the European Communities. As a high authority, the Court of Justice is a vital institution for the European Union. Its main task is to ensure that in the interpretation and the application of Treaty, the law is observed¹. This general definition gives the whole idea about the foundation of the Court. As it is protected by the other institutions, the European Court of Justice shall also protect the interests of the Union to establish continuity.

¹ ECSC Treaty. Art 31.

The origins of The European Court of Justice were originally set up under the ECSC treaty², which was signed in Paris on 18 April 1951. This treaty established the Court as an institution in Luxembourg and gave it some essential powers to reach its ultimate aim. The Court has gained power to annul some certain acts of the other institutions, hear pleadings against pecuniary sanctions, and impose penalty payments. In addition, the court is engaged to give preliminary rulings to national courts while implementing law of the treaty. As we see, these tasks are quite significant and necessary.

After the ECSC treaty, the Member States have concluded the Rome Treaty, which has founded European Economic Community (EEC), and European Atomic Energy Community (EAEC). These two treaties have established similar sets of institutions, which were established in the ECSC. The duty for reaching the ultimate goals of the Member States was entrusted to the two new Communities. In addition, the Member States concluded a Convention on Certain Institutions Common to the European Communities, forming a particular Parliament and a single Court of Justice with jurisdiction under all three Treaties³. From this point of view, it can be assumed that the EEC treaty and the Convention have created some severe differences in the EJC as an institution. After the establishment of the EEC, we could say that the institutions, especially the Court, started to function completely. Because the EEC treaty had a broad definition and it is less detailed. In 1986, the Single European Act was signed by the Member States. By this treaty⁴, a new court is introduced to the Community as Court of First Instance in 1989, which has jurisdiction to see some certain types or of action or proceeding brought by natural or legal persons.

6 years later, the Member States concluded the Maastricht Treaty by adding second and third pillars (The common foreign and security policy and the

² Lasok D. Lasok K.P.E. Law and Institutions of the European Union. Sixth Edition. London, 1994. p.244

³ Lasok K.P.E. The European Court of Justice, Practice and Procedure, London, 1984, p.2

⁴ Single European Act , Article 168a

Cooperation in the fields of justice and home affairs) to Communities to form the European Union. The jurisdiction of the Court of Justice is excluded from these pillars⁵. Another substantial amendment was made in Article 165 of the EC treaty by Maastricht treaty. By this amendment, The European Court of Justice gained power to impose penalty payments to Member States, which failed to comply with the judgments of the court. After Maastricht Treaty, the Amsterdam treaty was signed by the Member States in 1997. Amsterdam Treaty has widened the Court's powers. The Court has gained jurisdiction in some areas which were falling outside its competence in Maastricht, These are; fundamental rights, asylum, immigration, free movement of persons and judicial cooperation in civil matters , police and judicial cooperation in criminal matters. But the Court could not give rulings in those areas unless there is an urgent need to protect individual rights. The Nice Treaty was added as a new ring to the chain of Treaties in 1st February of 2003. The vital amendments related with the Court were aimed to lighten the work of the Court. As the cases rapidly increased in years, the Court needed to be more flexible to respond demands. Thus, the Nice Treaty facilitated the way of amendments about the Court's Rules of Procedure and established a Statute of the Court, which will deal with the organization, and procedure of the Court⁶. The Treaty established a better partition of authority between the Court and the Court of First Instance, to ease workload of the Court of Justice. Nice Treaty gave the European Parliament right to bring a case before the Court of Justice⁷, which was allowed for the Commission, the Council and for the Member States. The treaty has also introduced the Grand Chamber comprised of 13 judges (the President of the Court, the 3 Presidents of the Chambers of 5 judges and 9 other judges.

⁵ Treaty of European Union , Article L

⁶ **Craig, DeBucra.** Eu Law Text Cases and Materials. Third Edition, Oxford, 2003. p.89

⁷ Nice Treaty, Article 230 TEC

II. COMPOSITION

A. Judges:

Parallel to the number of Member States, there are 25 judges in the Court of Justice⁸. This proportionality creates an advantage for the cases arising from Member States. The appointments of judges, who are experts in their national laws, create a major benefit for the Court to understand and analyze the law system of Member States. The judges are appointed by the common accord of the governments of the Member States for a renewable term of six years. They can hold the position after six years only if they are reappointed by their Member State. In practice, most judges have been reappointed. The secrecy of the Courts deliberations may be a protection against perceived political appointments or refusals to renew⁹. Currently there are two female judges in the court and no female judges appointed to the Court until 1999¹⁰.

⁸ Nice Treaty, Article 221 TEC

⁹ *ibid*

¹⁰ *ibid* (Appointed by Ireland)

According to Treaties, “the judges must be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence¹¹ “.This principle distinguishes the court from other institutions. Although the members of the court are appointed by the governments, they are not agents of their national governments. This is a must for the judges to protect their impartialities. Also the judges can be appointed from the jurisconsults. This clause allows the appointment of academic lawyers¹². Therefore, there is no obligation for a judge to have a judiciary position in his/her own country. The Member States can appoint a judge who is not a national of them. Although a judge must be a national to take role at the highest court in its own country, the Treaty did not close this option as an indication of impartiality. To increase objectivity, twenty sixth judge can be added from the eligible non-nationals of the Member States. This would also decrease the nationalistic pressures from the Court¹³.

After the appointment by the Member State, the judge swears the following oath "I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court¹⁴" and signs a declaration which announces that he/she will respect the obligations arising from the duty both during and after his term of office. After this ceremony the judge begins his/her work in the Court.

The independence of the members is assured by their statute to reduce the doubts. The judges cannot take role in any other political or administrative office during their work in the office. Only the Council may allow the Judges to perform

¹¹ Nice Treaty, Article 223 TEC

¹² **Weatherhill, Beamont.** EU Law. Third Edition. England. 1999 P. 173

¹³ **Smit, Herzog.** The Law of the European Economic Community. Volume 4.. New York. 1976. p 5-305.

¹⁴ Rules of Procedure of the Court of Justice. Art 3/1.

this type of task¹⁵. They enjoy the immunity from legal proceedings while they hold office. After the office duty, they only benefit from a partial immunity for the written or spoken acts performed by them in an official capacity. According to the Article 21 of the Protocol on the privileges and immunities of the European Communities, the judges, their spouses and also their dependents benefit from some privileges such as;

- a- Exemptions from immigration restrictions and formalities for the registration of aliens,
- b- The right to the same facilities accorded to the officials of international organizations in respect of currency or exchange regulations,
- c- The right to import free of duty of their furniture, and the effects at the time of first taking up office,
- d- The right to re-export free of duty of their furniture and effects on termination on office,
- e- The right to import and re-export free of duty a motor car for their personal use,
- f- Exemption from national taxation on salaries, wages, and emoluments paid by Communities.

"These immunities can only be prohibited by the voting of the Court in full session¹⁶. The judges cannot take part in a case in which he has previously taken part as an agent or adviser or has acted for one of the parties. This rule is put to prevent the conflict of interests. In addition, a judge may request to the President to recede from a case for a special reason. After the evaluation, the President notifies the Judge if he/she may or may not participate in the case¹⁷. The Statute of the Court does not define what constitutes a special reason. This could include the situation where a member of relevant Court has acted for one of the parties, in a case other than the one under construction¹⁸. The Judges must reside at the place

¹⁵ Statute of the Court. Art 4.

¹⁶ Art 3/1,2 of Statute of the Court.

¹⁷ Art 16 of Statute of the Court.

¹⁸ **Plender.** European Courts Practice and Precedents. London. 1997. p 155

where the court is seated¹⁹. The salaries, allowances, and pensions of the judges are determined by the Council. A qualified majority is required for this determination²⁰. These are some positive and negative rights vested to the Judges to intensify their independence and impartiality. Although the Members of the Court have legal immunity, they obviously feel the political pressures in their shoulders. Consequently, the court does not ignore the wishes and interests of the Member States in its decision-making²¹

A judge can be ceased from its duty firstly by death or by finishing its tenure. In addition, there is no compulsory retirement necessity for the judges. Resignation and the removal are the second causes of dismissal. The judge informs the President of the Court about his resignation and the President notifies the President of the Council to create vacancy. On the other hand, there are two general reasons for removal. If a judge has no capacity to fulfill the required conditions or if he cannot meet the obligations resulting from his office, he may be removed from the office by the unanimous opinion of the Court. This decision is communicated to the Presidents of the Parliament and Commission and it must be notified to the President of Council by the President of the Court²².

The Judges elect their President in a secret session by an absolute majority vote. If no one reaches absolute majority in first ballot then the second ballot is held and the judge who obtains the most votes is elected. The duration of work as a President lasts three years. This period may be renewed by new election²³. The President allocates cases to the Chambers when the application is received, and directs the work of the Court. He assigns a judge-rapporteur for each case and puts out the scheme for the different stages of the process and the dates of hearing and deliberations. He also gives judgment in summary proceedings on

¹⁹ Art 14 Statute of the Court.

²⁰ Nice Treaty. Art 210 TEC

²¹ **Craig, DeBucra.** Eu Law Text Cases and Materials. Third Edition, Oxford, 2003. - p.89

²² Art 5,6 of Statute of the Court.

²³ Art. 7 of Rules of Procedure.

applications for provisional measures²⁴. The current President of the Court (by the year of 2005) is Vassilios Skouris. The Greek member of the Court holds the position from 7 October 2003.

B. Chambers:

After the new accessions to the Union, the workload of the Court has increased year by year. During 2003, the court has faced 561 new cases and it has concluded 494 cases including the cases from the past. At the beginning of 2004 there were 974 cases pending in the Court²⁵. In past the cases were scrutinized in plenary sessions but the previous Treaties have forecasted these case piles and allowed the Court to establish Chambers.

There are four kinds of Chambers in the Court. As it can be understood from its name, Full Court is the session where 25 judges attend the process. The formation chosen is in principle determined by the difficulty or the importance of the proceedings. The full Court is also used to maintain consistency between the Chambers. A Member State or a Community institution, which is a party to the proceedings before the Court, may request to sit in full court²⁶.

Secondly, the Grand Chamber is established by the Rules of Procedure. This Chamber is composed of 13 judges. The President of the Court and the Presidents of the five-judge Chambers are the stable members of this Chamber. Remaining 10 judges are nominated from their rankings²⁷. In addition, a Member

²⁴ *ibid.* Art. 8

²⁵ <http://www.curia.eu.int/en/instit/presentationfr/rapport/stat/st03cr.pdf>

²⁶ **Arnall**. *The European Union and its Court of Justice*. Oxford. 1999. p.12

²⁷ The judges are ranked by their seniorities; (Rules of Procedure Article 6) if the service durations are equal the age of the members are taken into account.

State or an institution of the Communities which are party to a case, may demand the case to be seen by the Grand Court²⁸.

Thirdly, the Court is represented by the two types of Chambers, which have three and five members. There are two Chambers having five members and five Chambers having three members by reaching the total of 25 members. Every Chamber elects its own President, which undertakes the administrative work of its Chamber for one year. In addition to this, every President of the seven Chambers, elect a President of Chambers who will be in charge for three years²⁹. At any stage in the proceedings, the Chambers may refer to the Court a case assigned to or devolving upon it, if it considers that the case rises points of law requiring decision by the full Court³⁰. To summarize, the cases are seen in; Full Court, Grand Chamber, Five Judged Chambers or in Two Judged Chambers. The intention of the Court was that the most important cases would be reserved for the Full Court, cases of minor importance for Chambers of three judges, and cases of middling importance for Chambers of five³¹.

C. Advocate-Generals:

By Nice Treaty it is accepted that the Court of Justice is assisted by eight Advocates-Generals. After the request of the Court of Justice, the Council may increase the number of Advocates-General by acting unanimously³². Although the number of Judges is parallel to the number of Member States, the Treaties have limited the number of Advocates-Generals in the Court.

Today the five large member states (Germany, France, Italy, the United Kingdom, and Spain) have always had one Advocate-general's post each, with the

²⁸ Rules of Procedure. Art 11/b, Statute of the Court. Art 16.

²⁹ Art. 10 of Rules of Procedure.

³⁰ **European Documentation Periodical**, Fourth edition, 5/1986, Luxembourg, p.10

³¹ **Lasok K.P.E. The European Court of Justice, Practice and Procedure**, London, 1984, p.13

³² Nice Treaty Art. 222 TEC.

remaining Advocates-general appointed alternately from the small member states³³. The rotation system is used for remaining three Advocates-generals. If we consider the work period of Advocates-generals and the accessions to the European Union, it will take years for new members to appoint their own Advocate-generals to the Court. Although the Council may increase the number of Advocates-generals by unanimous vote after the request of the Court³⁴, the rotation system should be used for eight Advocates-generals if there is an intention to fix the number of Advocates-generals³⁵. Otherwise, the number must be equal to the number of Member States. This should provide more equality and transparency to the court where the opinions of the Advocates-generals has a considerable effect on the decisions of the Court³⁶.

Because of its impartial situation and its indirect effect³⁷ to the Court, it can be argued that the Advocates-General are not members of the court³⁸. According to Nice Treaty “the Court consists of one judge per Member State” and “the Court shall be *assisted* by eight Advocates-General”. From contextual interpretation, we can assume that the Judges are in higher-ranking position hierarchically. On the other hand, the Status of the Court is aiming to equate the position of the Advocates-General and the Judges³⁹.

³³ **Joint Declaration on Article 31 of the Decision adjusting the instruments concerning the accession of the new Member States to the European Union**, Official Journal L 001 , 01/01/1995 p. 0221 - 0221

³⁴ Nice Treaty. Art. 222 TEC

³⁵ **A Report by the Members of the EC Section of the British Institutes Advisory Board Chaired by the Lord Slynn of Hadley.**The Role and Future of the European Court of Justice. London. 1996. p. 46

³⁶ Case C-284/91 Suiker Export v Belgium (1992), Case C-59/92 Hauptzollamt Hamburg – St Annen v Ebbe Sönnischen GmbH (1993)

³⁷ Advocates-General do not participate in the deliberations of the decisions and some other votings. Also they do not represent any party but the Community law.

³⁸ **Kabaalioglu, AB Kurumları ve Avrupa Hukukunun Uluslararası Özellikleri Işığında Avrupa Birliği ve Kıbrıs.** İstanbul Yeditepe University Publishment, 1997 p.245

³⁹ Statute of the Court. Art 8, Rules of Procedure. Art. 5

The appointment of the Advocates-General is in the discretion of Member States like the Judges. They must possess the same qualifications required for Judges⁴⁰. Also, Advocates-General may retire and be removed by the same procedure as in the case of judges and they share the similar privileges with Judges⁴¹.

After the appointment of Advocates-Generals, the Court appoints First Advocate-General for a period of one year. The First Advocate-General undertakes the administrative works and authorizes the Advocates-Generals for the cases⁴²

The legal status of the Advocates-General has no resemblance with the prosecutors in the Member States. The French delegation contributing in preparation of the Treaty establishing the European Coal and Steel Community questioned for the necessity to institute the role of Advocate-General in view of his or her probable participation to the improvement of judicial exercise and legal doctrine. Therefore the Advocates-General has possessed the duty of the *comissaire-du-gouvernement*, which is the office instituted by the French *Conseil d'Etat*. The role of the *comissaire* is to act as “the embodied conscience of the Court”. He is required to consider the issues in a case impartially and individually and to reach his own personal conclusion as to what in law and justice should be done⁴³.

The principal duty of the Advocate-General of the Court is to act independently of the Court in a case before it. The Advocate-General will scrutinize the facts of the case, the conflicts between the parties, the related Treaty and secondary legislative provisions, the previous decisions of the Court of Justice, and, of highest importance, relevant legal rules from the legal systems of

⁴⁰ Nice Treaty. Art. 223 TEC

⁴¹ **Church, Phinnemore.** A Handbook and Commentary on the post-Maastricht Treaties. Harvester-Wheatsheaf, Canteburry, 1994 P.281

⁴² Art 10 of Rules of Procedure

⁴³ **Lasok D, Lasok KPE.** Law and Institutions of the European Union, London, 1994, p. 246

the Member States and from international law, in order to propose a solution to the given litigation⁴⁴. The Advocates-General performs this duty by launching their reasoned submissions⁴⁵. These submissions are usually named as Opinion of the Advocate-General. When a case comes before the Court, an Advocate-General and a judge rapporteur are appointed to gather the information relating to the case and to hold the necessary preparatory oral and written enquiries⁴⁶. The opinion is usually given after the end of oral hearing and before the judges deliver their judgment. It is also published with the judgment of the Court. The parties may not comment on the Opinion. The Advocate-General is assisted by his/her legal secretaries who are allowed to work with legal secretaries of judge rapporteur in the considerations⁴⁷.

The appointments of Advocates-General are done by the Member States. Therefore, the Opinions *do* have a very significant role for the tenure, from the political point of view. Advocates-General declare its Opinion in open meeting in contrary to the judges. This situation creates a major importance especially when the Member States are parties to the trial. Therefore, the Advocates-General feel more pressure that is political although they do not join the deliberations of the decision. The importance of the Advocates-General's opinion in legal way can be summarized by three aspects;

The opinion of the Advocate-General provides best training ground for a judge of the Court. Also the opinion of an Advocate-General may contain ideas that are adopted by the Court as part of Community law.

Secondly, the Opinions of the Advocates-General can be referred to the commentators and to the case law where it can be used in as an argument in

⁴⁴ **Pollard, Ross**, European Community Law Text and Materials, London, 1994, p. 198.

⁴⁵ Nice Treaty. Art 222. TEC.

⁴⁶ **Hix**, The Political System of the European Union. London. 1999. p.105

⁴⁷ **Plender**, European Courts Practice and Precedents. London. 1997. p 146

future Cases or repeated by a subsequent Advocate-General to persuade the Court to change its position⁴⁸.

Thirdly, the Opinion of Advocates-General offers a detailed analysis of the case with references to pertinent authorities and source materials where it could not be expected from the Clerk's of the Judges⁴⁹.

Lord Slynn, who was an Advocate-General from 1981 to 1988 and judge from 1988 to 1992, expresses that "as an Advocate-General one always hoped that the function had some utility, as a judge I now that it is very valuable in this kind of court to have a detailed first-round assessment on which the judges can work. The research, the analysis of fact and law, the direction indicated by the Advocate-General are of considerable help. Although the submission of the Advocate-General is not binding for the Court, it sometimes simply refers to the reasoning of the Advocate-General without giving any independent reasons of its own⁵⁰.

In simple Cases, a fully reasoned Opinion may not be necessary. If the Case raises no new point of law, the Case shall be determined without the submission from the Advocate-General⁵¹.

D. The Registrar:

The administration of the Court is in the hands of the Registrar and his staff⁵². Although the Registrar is not a member of the Court, he is appointed by the Court for six years. The president of the court notifies the nominees to the members of the Court two weeks before the appointment. The Judges and

⁴⁸ **Weatherhill, Beamont.** EU Law. Third Edition. 1999. England. p. 181

⁴⁹ **Smit, Herzog.** The Law of the European Economic Community. Volume 4. 1976. New York. p. 5-298

⁵⁰ **Arnulf.** The European Union and its Court of Justice. Oxford. 1999. p. 9

⁵¹ Art 20 of Statute of the Court.

⁵² **Lasok D, Lasok KPE.** Law and Institutions of the European Union, London, 1994, p 247

Advocates-General make the appointment in secret ballot. After the appointment, the registrar takes his oath as Judges do and starts his duty⁵³

The Registrar can be deprived of the duty if he no longer meets the obligations arising from it or if he no longer fulfils the conditions required. These conditions are not specified in the legal texts. They would no doubt be considered as falling within the “Rules governing his service”, which the Court is responsible for drawing up under the Treaties⁵⁴. If the Registrar is decided to be deprived of his office, the Court elects a new Registrar for a term of six years.

While holding the office, he enjoys privileges and immunities under the Protocol on the Privileges and Immunities of the European Communities as Judges and Advocates-General. He is also obliged to reside in Luxembourg where the Court is seated⁵⁵. The Registrar acts as a secretary-general of the Court⁵⁶. The Registrar’s functions are many and various but they may be summarized as falling into three separate categories:

- a- The administrative and budgetary work is the duty of the Registrar. In the annual budget negotiations, the registrar represents the court in its dealings with the financial experts of the Member States⁵⁷. Also he is responsible for the operation in the subdivisions of the court.
- b- The acceptance and transmission of the procedural documents, fixing the times and the registry is under the responsibility of the Registrar⁵⁸.
- c- Subject to certain exceptions⁵⁹, the Registrar attends the sittings of the Court and of the Chambers⁶⁰

⁵³ Art 11 of Statute of the Court.

⁵⁴ **Lasok K.P.E.** The European Court of Justice, Practice and Procedure, London, 1984, p. 13

⁵⁵ Art 14 of Statute of the Court.

⁵⁶ **European Documentation Periodical**, Fourth edition, 5/1986, Luxembourg, p. 10

⁵⁷ **Plender.** European Courts Practice and Precedents. London. 1997. p 199

⁵⁸ *ibid.*

⁵⁹ The deliberations about the case

⁶⁰ **Pollard, Ross.** European Community Law Text and Materials, London, 1994, p. 199

Because of this heavy workload the court may also appoint one or more assistant registrars to assist or replace the registrar in the circumstances defined by the Court's instructions⁶¹ When the Registrar and Assistant Registrar are absent for some reason, the President may designate an official to perform the Registrar's duties for the interim⁶².

⁶¹ **Smit. Herzog.** The Law of the European Economic Community. Volume 4. 1976. New York. p. 5-311

⁶² Rules of Procedure. Art. 14

III. THE POWER AND JURISDICTION OF THE COURT

A-Background

Article 220 of the EC Treaty points out that the Court should “*ensure the interpretation and application of this Treaty.*” To allow the Court to execute this duty, subsequent provisions of the Treaty confer on it a range of specific powers. It includes ;at the suit of the Commission on a Member State to declare that a Member State has failed to comply with its obligations under the treaty; to review the legality of certain Community acts ; to declare that certain institutions have illegally failed to act; to aid national courts called upon to apply provisions of the Community law and to hear claims describing to return for damage caused by the institutions of the Community or its servants in the presentation of their duties. Those powers have not in all aspects kept pace with the development of how to reconcile its duty under article 220 with the terms in which its jurisdiction defined in the Treaty.

The formation of the EU at Maastricht confirmed the desire of Member States to institute a structure for assistance in certain areas outside the discipline imposed by the three Community Treaties with much weaker supranational elements. Under Titles V and VI on foreign and security policy and justice and home affairs correspondingly, the role of the Court along with that of the Commission and the European Parliament, was restricted. Art 46 of the TEU made it clear that the provisions of the three Community Treaties on the powers of the Court did not apply to the Title V of the TEU and Title VI. At Amsterdam, the scope of Title VI of the TEU was significantly extended and new powers were conferred on the Court to rule on disputes arising out of its application.

Most recently, under the Nice Treaty a number of reforms were introduced to reform the EU Court system. These amendments are stated in the Protocol on the Statute of the Court. Changes for the European Court of Justice are intended to undertake the caseload that it presently faces. Because of the increase in the cases, decisions can often take as long three years before a ruling. The European Court of Justice will be composed of judges from each member state, as will the Court of First Instance. "The Court of First Instance becomes the general law judge for all direct procedures such as appeals against a court decision, action for failure to act from a court decision, and action for damages," the Commission said in a statement outlining the Nice Treaty changes. "The Court of Justice retains responsibility for other proceedings, particularly action for failure to fulfill obligations by member states.⁶³" And also the Council, the Commission, the member states and – since the Nice treaty – the European Parliament may before signing a treaty ask for the ECJ-s opinion if the agreement complies with the community law.

⁶³ Office for official publications of the European Communities, The institutions and the bodies of the European Union, Who's who in the European Union? L-2985 Luxembourg

B- Area of Jurisdiction:

The jurisdiction of the ECJ can be founded in the Article 46 of Title VIII of TEU (Ex Article L). The treaty has used a *numerus clausus* listing on the jurisdiction of the Court. We can assume that the aim of this codification may firstly guide the court to deliberate its own work area. Thus, the court shall determine the case whether it falls into ambit of its competence. On the other hand, this wording strongly helps parties to comprehend if they may benefit or lack from to the European Union law. The jurisdiction of the ECJ includes;

i- Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community; From this definition, we can understand that the Court has jurisdiction to hear cases related with the first pillar of the Union. These areas are;

- a- European Union citizenship
- b- Free movement of goods,
- c- Customs Union,
- d- Prohibition of quantitative restrictions between Member States,
- e- Agriculture,
- f- Free movement of persons, services and capital,
- g- Workers, Right of establishment, Services,
- h- Visas, asylum, immigration and other policies related to the free movement of persons
- i- Transport
- j- Common rules on competition, taxation, and approximation of laws.
- k- Fishery

ii- Provisions of Title VI, under the conditions provided for by Article 35; Title VI is related with the police and judicial cooperation in criminal matters. As it is

mentioned, the range of jurisdiction of the Court is restricted by the Article 35. According to this article, the Court may give preliminary rulings on the validity and interpretation of framework decisions under this title. The treaty has made a separation between high courts and ordinary courts of the Member States. High Courts, whose decisions cannot be argued in another court, shall bring the case to the ECJ if there is a demand from the parties. This rule is not compulsory for first instance courts in the Member States⁶⁴. Furthermore, the court is kept away from reviewing the validity or proportionality of operations carried out by the police or other law enforcement services of a Member States. In other words, the Court has very limited jurisdiction on security policies of Member States. In addition, the article 35, which is referred by article 46, puts forward the types and methods of cases, which can be initiated by the institutions and member states. These issues will be scrutinized hereafter.

iii- Provisions of Title VII, under the conditions provided for by Article 11 and 11a of the Treaty establishing the European Community and Article 40 of this Treaty; Title VII and its sub articles aims to create enhanced cooperation between the Community Institutions and the Member States. Enhanced cooperation makes it possible for groups of Member States to cooperate on specific issues when no Member States wish to. Any cooperation will however be subject to strict rules and safeguards to protect both the interests of the EU and Member States. As we see, the main target is to speed up the integration between Member States, which volunteered to participate in enhanced cooperation packages. According to article 46 of TEU, the disputes arising from enhanced cooperation between Member States will be solved in the ECJ. This jurisdiction rule is clearly stated in the Article 40 of TEU.

iv- Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty; From ECSC, European Community had some several

⁶⁴ Art 234 TEC.

arguments about the protection of fundamental rights. This discussion created a conflict between European Court of Justice and European Court of Human Rights. As the founding treaties have an ultimate aim of economic integration, European Court of Justice did not accept the fundamental rights issue in its jurisdiction⁶⁵. While the integration changed gear in the 80ies, protection of fundamental rights became inevitable for European Court of Justice. To satisfy this necessity European Community has accepted Charter of fundamental rights of the European Union.

There is no provision related with the human rights in the founding treaties. Protection of fundamental rights in European Union has developed by the decisions of European Court of Justice. Paris and Rome treaties have mostly commercial and pragmatic point of view. The provisions about the coal and steel industries mainly took place in ECSC. After the ESCS, the community has accepted European Economic Community. Although European Economic Community treaty has a wide coverage, it was mainly about economic issues. Briefly, European Community had economic concerns in the first place until Single European Act.

At the third paragraph of the preamble of the Single European Act it was stated that; the member states are determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice. This impression expresses the intention of the states who signed this treaty. It is not binding for all member states. Furthermore, the preamble of the founding treaties in fact shall not be considered as a binding

⁶⁵ **House of Lords, THE FUTURE STATUS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS**, Session 2002–03 6th Report p.12

piece of legislation. In contrary, the expression in the preamble is important as it is explaining the will of the member states about the fundamental rights.

The jurisdiction of the European Court of Justice can be found in the Article 220 of the Treaty of the European Communities. According to this article, European Court of Justice can interpret and rely on the articles the Treaty of the European Communities. But there were no provisions concerning with the fundamental rights in the Treaty of the European Communities. At the Stork case, European Court of Justice stated that the fundamental rights concept did not belong in Treaty of the European Communities. The court used this argument in the Nord I case. Therefore, the court refused the cases for the reason of lack of competence.

After ten years from the Nord I⁶⁶ and Stock cases, European Court of Justice changed its attitude. Stauder case may be considered as the first step of this process. At this case, Mr. Stauder was forced to give his name in return for a social aid. Although the court refused the claimants submission, it stated that the general principles of the community were including fundamental rights. With this explanation, the court has initially accepted that the community had a fundamental rights concept in its own framework. ECJ regularly stressed this principle in its rulings after Stauder case. By its decision, the European Court of Justice has accepted the fundamental rights as a principle of community law. So what were these rights?

- a- Rights originated from the constitutional traditions of the member states.
- b- Rights originated from the international agreements, which are binding for member states.

In the 6/2 Article of the TEU it was stated that;

⁶⁶ **Vaughne Miller.** Human Rights in the EU: the Charter of Fundamental Right. International Affairs and Defence Section, House of Commons Library, RESEARCH PAPER 00/32 20 MARCH 2000.p.11

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” By this legitimization, the ECJ has attempted to protect fundamental rights by classifying them as general principles of community law⁶⁷. We can easily understand that this article is a summary of the decision which the European Court of Justice included in Stauder case.

The European Court of Justice has protected fundamental rights in the Community as part of the general principles of Community law, and it has turned itself as a source of generally accepted principles of human rights law against which to interpret Community law. Its decisions on human rights matters have followed the Strasbourg Court’s case-law and the European Court of Human Rights. There are some cases in which these courts gave some different decisions about some similar occasions. These examples are mainly related with the, permissibility of searches of business premises and the right to reply to the Advocate General’s conclusions. Nowadays, it is widely approved that a specific Community human rights shelter mechanism has been built up through the European Court of Justice’s case-law⁶⁸. This result is more significant since concerns had been spoken about the European Court of Justice's primary enthusiasm to deal with human rights issues.

Protection of human rights by the European Court of Justice presents definite restrictions. In the first place, it is essential that the rights in question be considered to be part of Community Law and protected areas must fall inside the jurisdiction of the European Court of Justice. In addition, the Court is not obliged to look for the case if human rights have been violated, even if one of the parties to

⁶⁷**Dimple D. Dhabalia** . The European Court of Justice? An active enforcer of freedom or a passive player in the EC game. Denver Journal of International Law and Policy, September, 1999, .p.568

⁶⁸ **Opinion of Council of Europe** ,EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW ,Opinion no. 256/2003 p.4

the proceedings has raised the issue. Lastly, European Union citizens have a limited right about litigation before the European Court of Justice.

Under the light of these limitations, European Union citizens who assumed themselves sufferers of infringement of their rights under the European Court of Human Rights by Community institutions have gradually turned to the Strasbourg Court, which has developed its case-law and increasingly extended its jurisdiction according to the legal structure of the Community act at the source of the so-called violation.

In its early case-law, inadmissibility was the problem for the citizens of the European Union. Ever since the 1970s a discussion on how to strengthen the protection of fundamental rights within the Community legal order has focused on either adopting a legally binding fundamental rights catalogue or an accession by the Community to the ECHR⁶⁹. The previous European Commission of Human Rights evaluated the complaints directed against the Community on the ground that the European Community was not a party to the European Court of Human Rights. The Human Rights Commission considered that European Community member States could not be held liable for implementations of the Council of Ministers in the sense of Article 1 of the European Convention of Human Rights.

The Strasbourg Court also, was not competent to scrutinize provisions concerning secondary Community law. As an alternative the Strasbourg Court has accepted to observe the virtues of submissions which are done by the member states under the perspective of Community law. In 1999, with the *Matthews*⁷⁰ case, the Strasbourg Court clearly recognized its jurisdiction to control primary Community law over which the European Court of Justice has no competency. The United Kingdom was found responsible for an infringement of Article 3 of the

⁶⁹ **Mats Lindfelt** .The Implications of the Proposed EU Charter of Fundamental Rights, Publication of Abo Akademi University, 2001 p.127

⁷⁰ **Giuseppe Tesaro**. Some thoughts on the Charter of fundamental rights of the EU. Naples, 2002, p.5

First protocol to the European Court of Human Rights for the prohibition of Gibraltar from the extent of application of the Act of 20 September 1976 regarding the voting of the representatives to the European Parliament by direct universal suffrage, which was consequent to the European Council's Decision to advise a treaty related to the election of the members of the European Parliament. The Strasbourg Court instituted for the first time the dependability of a member State of the European Union for finalising an international treaty incompatible with the European Court of Human Rights.

The Strasbourg Court has managed the sensitive issue of the split legal personality of the European Communities by applying the so-called principle of the "useful effect" of the Convention. It was mainly argued that it would not be probable to maintain an efficient and exclusive control of respect for the European Court of Human Rights by all contracting Parties, if it were not feasible for it to implement control over State acts also in the field of transferred powers. In fact, the transfer of sovereignty should have an effect until the transferred authorities could be supervised for respecting fundamental human rights. To build up efficient treaties, the Community member States should be held admissible by the European Court of Human Rights from the infringements resulting from the Community institutions' actions.

The case of *Bosphorus Airways v. Ireland* held by the Strasbourg Court, for instance, raises the problem of the responsibility of a member State for a so-called human rights breach originating from secondary Community law that was seen by the European Court of Justice. In conclusion, we can assume that implementations of primary and secondary community law was subject the Strasbourg Court's review. Now with the Charter of Fundamental Rights of the European Union, the complexity of the situation is increased by having two instruments about fundamental rights protection in the European Union.

After this brief explanation, we can clearly accept that the situation in the fundamental rights protection in the EU is seriously changed after the Charter of

Fundamental Rights. Although this charter can be deemed as a recommendation it empowered the jurisdiction of ECJ in the fundamental rights area. This improvement will reach its utmost point when the EU constitution will be adapted by the member states. It is obvious that the Constitution will bring some difficulties to the position of ECHR. In conclusion, the member states had some serious doubts about giving authority to supranational judicial organs and they presumed this issue as an open intervention to their sovereignty.

v- The purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article; From Nice there are two mechanisms determining if there is a risk of a severe and persistent breach of the common values (Article 7/1,2). The fact that Article 7 of the Union Treaty is quite understandable that seeks to shelter respect for the circumstances of Union membership. If a Member State violates the primary principles in a way, it is adequately serious to be caught by Article 7.

Article 7, therefore, gives the Union a power of action to guarantee that Member States respect fundamental rights when performing Union law. The ECJ has always mentioned that Member States are indebted to respect fundamental rights as general principles of Community law. Article 7 gives a flexible authority to the Council to decide if there is a clear threat of a serious breach or if there is a serious and persistent breach, acting as appropriate based on a proposal by the European Parliament, one third of the Member States or the Commission. On the other hand, under Article 7(3), once the Council has determined the significance and persistence of the violation, it may decide to apply penalties. Although, the Council's optional power cannot avoid autonomous control by the European Parliament, in the form of the assent that it must give before the Council can act. The Treaty of European Union does not give the Court the power of judicial assessment of the decision determining that there is a solemn and indomitable breach of common values or an apparent threat of such a breach. Under Article

46(e) of the Union Treaty, the Court reviews the purely procedural stipulations in Article 7, which allows the relevant State's defense rights to be respected⁷¹.

vi- Articles 46 to 53: The sixth paragraph of Article 46 states that the Articles between 46 and 53 is under judicial review of the Court. Article 47 of TEU declares that Treaty of European Union respects the founding and modifying Treaties of the Union. As we see, the article includes no imperative measures. Article 48 of TEU arranges the amendment of the Treaties; the initiation, decision making progress and the ratification of those amendments. In Article 49, the way of accepting a country as a new Member State is described. The procedure for becoming a Member State for the Union is explained in this article. After the 50th article, which defines the repealed treaties, the 51st article states that the Treaty of European is valid for unlimited time. Lastly, the 52nd and 53rd articles are concerned with the ratification and the language of this Treaty.

In addition, the Treaty has given the Court a special jurisdiction under the Article 237. According to this article, the Court is competent to hear cases related with;

a- The fulfillment of obligations under the Statute of the European Investment Bank by Member States,

b- Disputes, arising from the measures adopted by the Board of Governors of the European Investment Bank,

c- Disputes, arising from the measures adopted by the Board of Directors of the European Investment Bank and

d- The fulfillment of obligations under this Treaty and the Statute of the ESCB by national central banks.

⁷¹ **Comission of the European Communities**, Communication From the Commission to the Council ant the European Parliament. COM(2003) 606 final, Brussels, 15.10.2003

C- Position of the Court:

a- The Court as a Constitutional Court:

Constitutional courts are aimed to interpret their constitutions in an purposive and teleological way while international courts as a presumptive rule, typical in international law, have to interpret international treaties in an approach that minimizes infringement on state independence. The most specific peculiarity of a constitutional court is to check compliance of law enacted by the legislations with the constitution. The word “enacted legislation” stands for the primary law in the EU law system. According to Art.230 EC (Art.III-365), the Court can supervise the constitutionality of the acts of the Council and the Parliament, also the acts enacted by the Council and the Commission.

The ECJ can give a decision for an act as it is unconstitutional on the basis of breach of necessary provisions concerning the form of the act, infringement of the Treaty or violation of a act that has to be applied for the implementation of the Treaty and on the argument of misuse of discretion⁷². If the Court finds a provision that violates Treaties or other primary law source, unlike other international courts, it declares this violation, also declares this breaching provision invalid.

In addition, individuals can argue the constitutionality of the EU provisions by help of Art 230/1 of EC. First, they must meet all the requisites that are applicable for legal actions of the private plaintiffs. However, legal standing of private parties’ is further limited. Individuals may only claim the claim their constitutionality argument whether they argue a ruling that has been affected to them or if they challenge a legal act that has been directed to other individuals but in both cases concern the plaintiff individually and directly according to Art.230/4 of EC. On the other hand , individuals which are not directly taken effect from the “so-called invalid” provision of the EC must wait for Member States to put into practice

⁷² Art 230/2 of TEC

of this provision. Afterwards the private parties may challenge the non-compliance of the Community act with the constitutional primary law in front of their Member States' courts as in *Jégo-Quéré vs. Commission* case⁷³.

b- The Court as an Administrative Court:

As a common rule of all constitutions, all the decisions and actions of administration is dependant to judicial control. This general rule is also applicable in the Community law. All the institutions of the Community are responsible from their administrative actions or decisions in front of The European Court of Justice. The Court reviews the legality of the acts enacted by the Union. Moreover, we may see the European Union as an employer who has ten thousands of employees.

The conflicts, arising from the issues pertaining to the personnel like expulsion or promotion are also handled in the Court of Justice⁷⁴. For instance, when a Greek agent, who works under Commission in London, is expelled from his duty, he should persuade his rights nor in Greek, English or Belgium Courts but in the ECJ⁷⁵.

c- The Court as an Appeal Court:

By the foundation of CFI, the ECJ became a court of appellate in some specific areas⁷⁶. The article points out that the decisions of the CFI may exceptionally be subject to review by the Court of Justice under the conditions mentioned in the Statute of the Court. According to Article 56 of the Protocol on the Statute of the Court, substantive issues or procedural issues may be subject to appeal based on lack of competence or inadmissibility. The ECJ as an appeal court can be understood as protecting and escalating the recognition of the CFI.

⁷³ See link: <http://www.curia.eu.int/en/actu/communiques/cp02/aff/cp0241en.htm>

⁷⁴ ARTICLE 236 (ex Article 179) TEC

⁷⁵ **Kabaalioğlu**, *AB Kurumları ve Avrupa Hukukunun Uluslararası Özellikleri Işığında Avrupa Birliği ve Kıbrıs*. İstanbul Yeditepe University Publishment, 1997 p.247

⁷⁶ Article 225 para 1 of EC

On the other hand, the CFI has accepted itself as a vital element of the EU's jurisdiction organization.

d- The Court as Compensation Court:

Art 235 of EC states that The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288. The referred article 288 para.2 briefly mentions that the Community Institutions shall have contractual and non-contractual liability from their implementations. There must be three necessities to claim for compensation for breaches of Community law by the Institution;

- i- Existence of a unlawful act or omission on the part of the institution or its servants (vicarious liability)
- ii- Harm suffered by the plaintiff
- iii- Link between wrongful act or omission and damage.

Although the liability for the Community Institutions is accepted in the Treaty, the liability of Member States is established by the case-law of the ECJ. The Francovich case is the initiator of those decisions. The Francovich Case based its judgment mainly on the efficient legal security and effet utile⁷⁷ doctrines. The Court stated that, *"It has been consistently held that the national Courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals."* *"The full effectiveness of Community law would be impaired and the protection of the rights which they grant would be weakened,"* the Court concluded, *"if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible"*⁷⁸

⁷⁷ Direct applicability and the strict supremacy over the national law of the member states

⁷⁸[Http://www.sixthform.info/law/02_cases/mod1/10_1_cases_ec_law.htm#Francovich%20v%20Italy%20\[1993\]%20ECJ](http://www.sixthform.info/law/02_cases/mod1/10_1_cases_ec_law.htm#Francovich%20v%20Italy%20[1993]%20ECJ)

IV. CASE LAW

A- Overview

The Courts adjudicatory powers are exclusively defined in the articles between 226 and 245. The Court does not have discretionary power to refuse cases arising from those articles. Thus, the court unlike for example the U.S Supreme Court must proceed to a determination in any case, in which it has adjudicatory authority. The courts judicial power also varies in some different aspects. In some cases, the Court finds the facts and applies the law⁷⁹. However, the Court sometimes, without finding the facts, makes interpretation of the Community law and applies it⁸⁰. Moreover, the court, in some cases, just makes the interpretation of the Community law⁸¹. As it is mentioned earlier, the nature of the Court varies in the cases occasionally. The court possess' the identities as an International Court, Constitutional Court or even sometimes Administrative Court. The application to the Court is also limited to the parties. The individuals may not always enjoy the right to invoke to the Court for litigation⁸². Furthermore, the Courts adjudicatory power is also compulsory. Therefore, the Member States are obliged

⁷⁹ Cases arising from Articles 229 and 235

⁸⁰ Cases arising from Article 230

⁸¹ Cases arising from Article 234

⁸² **Smit. Herzog.** The Law of the European Economic Community. Volume 4. 1976. New York. p5-314

to submit the cases to the court, which are related with the interpretation and application of the Treaty.

The treaty defines the types of cases as follows; Articles 226 through 228 characterize the Courts power to control the duties under Community law of a Member State. Authority to review the legality of acts of Council, the Commission, and the European Parliament is regulated in articles 230 through 233 and 241. Article 234 defines the Courts power to respond to the questions of Community law arising in Member States' Courts. Lastly, in articles 235 through 240, the court is empowered to hear cases related with the contractual liabilities, conflicts of servants⁸³ of the Community, Central Bank and Investment Bank.

B- Failure to fulfill an obligation

a- Article 226 (EX Art 169 of EEC)⁸⁴

The roots of Article come from the Article 88 of the Treaty establishing the European Coal and Steel Community. The Article has amended into Article 169 of the EC treaty and currently, after Amsterdam Treaty, it is renamed as Article 226. According to this article, the Commission, as guardian of the Treaties and of the decisions taken by the institutions, has power to initiate proceedings for failure to fulfill an obligation⁸⁵.

Generally, the article regulates the control of the Commission over the Member States. Although the European Central Bank and European Investment

⁸³ Art 237

⁸⁴ Art 226: If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

⁸⁵ **European Documentation Periodical**, Fourth edition, 5/1986, Luxembourg, p.14

Bank are shown as the plaintiffs of this procedure, the main actor in article 226 is the Commission⁸⁶. The article has faced with some several amendments but the aim of it has not changed. Article 226 of the Treaty gives the Commission power to take legal action in opposition to a Member State that is not fulfilling its duties under this Treaty. The phrase "this treaty" shows us the scope of the article. According to this phrase, we can surely accept that the secondary legislation is involved to the scope of the article as well as the Treaty⁸⁷. If the Commission considers that, the infringement may cause a huge crisis and needs to be solved rapidly, it may bypass the article 226 and resort to article 243. According to this article, the Commission may demand interim measures from the Court before it initiates the procedure in article 226.

The procedure in article 226 not only serve the constricted function of enforcing the responsibilities of the Member States in particular cases, but they also present the Court with a vehicle for scrutinizing more widely the nature of the Treaty obligations of the Member States⁸⁸. If the Commission considers that there is an infringement of Community law deserving the opening of a violation process, it launches a "Letter of Notice" (first letter) to the Member State in concern, requesting it to submit its explanations by a particular date, usually in two months. If the Member State does not respond to the first letter at the end of the deliberated time, the Commission shall deliver its reasoned opinion. In *Commission v. Italy* case⁸⁹ Italy did not responded to the Commissions letter and this omission is not even argued before the Court.

Before the first letter, the Commission initiates informal discussions with the Member State in practice. The Commission always attempts to work out with the Member State to avoid initiation of formal proceedings. The aim of first letter is to obtain facts of the Member States, to make a friendly settlement, give time to

⁸⁶ **Tekinalp, Tekinalp**, Avrupa Birliği Hukuku. 2. Edition. Istanbul 2000. p. 241

⁸⁷ *ibid.* P. 242

⁸⁸ **Lasok D, Lasok KPE**. Law and Institutions of the European Union, London, 1994, p.254

⁸⁹ Case 7/61 [1961] ECR 169 CMLR 02

Member State about the dispute, to give arguments of the dispute to the Member State in concern and to assure the compliance with the Union law.

Following to this reply or lack of a response from the Member State in concern, the Commission shall address a "Reasoned Opinion" (final letter) to the Member State. This apparently and eventually explains the motives why the Commission deemed to think there to have been a violation of Community law and desires the Member State to provide the conditions in a specific duration. Before the article 226 (Ex Art 169) a different systems was accepted by the Community. According to article 88 of ECSC, the Commission was sending the reasoned opinion to the Member State and the Member State was referring the arguments in reasoned opinion before the Court within two months.

By sending reasoned opinion, the Commission concludes the first stage of the communication with the Member State in concern⁹⁰. The reasoned opinion signifies the Commission final outlook to the conflict. Although it is not binding, it must give detailed information to the Member State about the breach of Community law. The reasoned opinion does not require a formal shape. In *Commission v. Italy*⁹¹ the Commission wrote a letter to the Italian Government about an infringement. The Government did not comply with the Commissions request and the Commission has brought the conflict before the Court. Italian government argued that the letter in concern was not a reasoned opinion within the article 226. The court has rejected this argument and stated "... the letter in question has a coherent statement of the reasons which convinced the Commission ". In other way, if a notification which has sufficient reasons related with the infringement of member state, then it can be regarded as a reasoned opinion. After the explanation in the reasoned opinion, the Commission gives Member State a specific time to submit its view about the issue in question. The time limit given to the Member State to act is also usually two months. The

⁹⁰ **Smit. Herzog.** The Law of the European Economic Community. Volume 4. 1976. New York. p5-326

⁹¹ Case 39/72 [1972] ECR 317, CMLR 39.

Commission may prolong or shorten this period. But this discretion is also limited by the decisions of the Court. Therefore, the Court stated that "... any kind of excessive duration of pre-litigation procedure would infringe the rights of defence by making it more difficult for the Member State to refute the arguments put forward in support of the action...⁹²". The reasoned opinion sent to Member State cannot be argued by a Member State before the court in a new case. In *Alfons Lütticke GmbH v. Commission*⁹³ the Court stated that the reasoned opinion of the Commission has no binding effect and therefore it cannot be annulled.

If the Member State is unsuccessful to comply with with the Reasoned Opinion, the Commission may decide to take the matter before the Court of Justice. As we see, the Treaty gives discretion to bring the issue before the Court as it uses the term "may" in the second paragraph in the article. In contrary, the Commission "shall" launch a reasoned opinion, as it is mentioned in the first paragraph of the article. Therefore, we can say that the Commission may not address a reasoned opinion if it finds out that there is no infringement of Community law. Usually the Member States amends the legislature that is initiated by the Commission and the procedure stops at this point.

When the Commission decides to take the issue before the court, it must show sufficient evidences to prove its claim. Otherwise, the arguments of the Commission usually are rejected by the Court⁹⁴. The Commission claims that the Member State breaches the Community law by its legislation or by its actions. Proceedings will lie against Member States not only for any acts on the part of a Member State but also for omissions, including administrative failures to implement Community law^{95 96}.

⁹² Case C-96/89 Commission v. Netherlands [1991] I E.C.R. 2461

⁹³ Case 48/65 [1966] ECR 169.02

⁹⁴ Case 375/90. Commission v. Greece [1993] E.C.R. 2055

⁹⁵ **Lasok D, Lasok KPE.** *Law and Institutions of the European Union*, London, 1994, p.254

⁹⁶ Case 31/69: Commission v. Italy [1970] ECR 25 [1970] CMLR 175

There are three possibilities that Court can decide after proceedings. Firstly, the court may find the submission of the Commission inadmissible. Secondly it may declare that the Member State has violated its obligations concerning with the Community law, or thirdly, it may state that there is no violation of Community law. The decision of the Court is binding for the Member State in question. If the Court finds in proceedings under article 226 of the treaty that the Member State's legislation is incompatible with the obligations under Treaty, it declares that the act or implementation of the Member State void.

b- Article 227(EX Art 170 of EEC)⁹⁷

As in Article 226, Article 227 of the Treaty aims to take legal action against a Member State that is failing to fulfill its obligations under this Treaty. The main difference between these articles is the initiators of the procedure. According to Article 226, the Commission deliberates the failure of a Member State and pursues the legal route. On the other hand, in Article 227, a Member State is the main applicant, which considers that there is a breach of Union law in another Member State. The article is also supported by additional articles. The Treaty states that, "The Court of Justice shall have jurisdiction in any dispute between the Member States⁹⁸" and "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than

⁹⁷ Art 227: A Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

⁹⁸ Art 239 (Ex 182)

those provided for therein⁹⁹.” This insistence on referring inter-state disputes to the Court of Justice underlines one of the major purposes of the Court and that is to guarantee uniformity of interpretation and application of the law of the Communities¹⁰⁰.

When a Member State believes that another Member State is not fulfilling its duties under Treaties, it may submit its arguments to the Commission for evaluation. The Commission has three options in this position. Firstly, the Commission may find the claims significant and addresses a reasoned opinion to the Member State in concern in three months. The Member State may or may not reply to this opinion. Usually the negotiations start at this point between the Commission and the alleged Member State. If the debates are ended unsuccessfully, the Commission or the Member State may bring the issue before the Court. Up to now, only one case is solved before the Court¹⁰¹.

The Commission may also declare that the claims are insufficient for sending a reasoned opinion. From this point, the claimant may carry its positions before the Court. The burden of proof rest with the Member State bringing the proceedings¹⁰²

Lastly, the Commission may abstain from delivering a reasoned opinion in three months after the application. In such a case, the Member State may again file a claim in the Court. The Member States, prefer the Commission to take action against fellow member states rather than doing so themselves in practice. This saves the member state the cost involved in litigation, the difficulty of carrying the burden of proof and the diplomatic embarrassment attached to taking a close ally to court¹⁰³.

⁹⁹ Art 292 (Ex 219)

¹⁰⁰ **Lasok D, Lasok KPE.** Law and Institutions of the European Union, London, 1994, p. 253

¹⁰¹ Case 141/78 France v. United Kingdom, (1979) ECR 2923

¹⁰² **Weatherhill. Beamont.** EU Law. Third Edition. 1999. England. P. 232

¹⁰³ *ibid.* P.232

C- Actions for annulment (Art 230)

As the Articles 226 and 227 controls the breaches of Community law, the Article 230 examines legal propriety of the acts. The article allows the acts of the Union to be reviewed by the Court. The Court reviews the act in only legal aspect. Therefore, the discretion and the legislative or administrative wisdom of the act attacked are left for the institution. Of course, legal realists realize that the legislative or administrative wisdom of the act or the lack of it may play a part in persuading the Court to hold the act incompatible with Community law¹⁰⁴.

The subject of the procedure is defined in the first paragraph of the article. The court reviews the acts of the Union. However, the article has limited the scope of the article with regulations, directives, and decisions. As a result, recommendations and opinions are not included into the assessment of the Court. The reason of this limitation can be found in the article 249 of the TEU. According to this article, the recommendations and the opinions have no binding effect. Therefore, they do not create any legal effect and excluded. Although the article presumes that those acts are deprived from legal review, the Court has evaluated some of them. The court in one case¹⁰⁵ stated that “an action for annulment must therefore be available in the case of measures adopted by the institutions, whatever their nature or form, which are intended to have legal effect.” From this explanation, we can figure out that the annulment procedure should only be applicable to regulations, directives, and decisions. However, the acts, which have binding force in legal aspect and not falling into those categories, may be challenged for annulment before the Court.

The defendants of the annulment proceedings are the institutions, which have legislative prerogative. As it is counted in the article, the Parliament and the

¹⁰⁴ **Smit. Herzog.** The Law of the European Economic Community. Volume 4. 1976. New York. p 5-373

¹⁰⁵ Case 22/70 Commission v. Council [1971] E.C.R 263

Council jointly and solely, Commission and the European Central Bank may be defendants in the proceedings. In addition, The Board of Governors and The Board of Directors of European Investment Bank may be a party in cases as defendants¹⁰⁶. The plaintiffs are also described in the article, but the system is more complicated than the defendants are.

The right to bring an action (*locus standi*) under Article 230 is indefinite for the Commission, the Council and for the Member States. The Parliament was not mentioned in the EEC but after the Maastricht amendments, the position of the Parliament is verified by the Treaty. The European Central Bank and Court of Auditors may also directly be an applicant for annulment process. The *locus standi* of the natural and legal persons are rather limited. They have right to bring action against the acts which are addressed to them. The measure in question must affect an individual concern of specific individuals¹⁰⁷. The main dispute arises in regulations and directives because of their broad scope. If a person could prove individual concern in relation to a measure entitled a “Regulation” even if only part of it, then the Court would regard the measure as not being a true regulation¹⁰⁸¹⁰⁹. In case *International Fruit Company BV v. Commission*, a group of importers of apples applied for an import license to the appropriate public authorities. They informed the Commission who act out the regulation laying down the rules for those applications. This regulation was applicable only to those who made import applications in the previous week and therefore the Court found that the measure was a bundle of individual decisions.

The general principle applied by the Court was yet the theoretical language test, which can be enlightened on an instance of a case *Calpak*. The applicants, producers of William pears, sought to annul a regulation, which calculated the production aid based on one marketing year, while the previous regulation used as

¹⁰⁶ Article 237/b and c

¹⁰⁷ Cases 16, 17/62 *Producteurs de Fruits v. Council* [1962] ECR 471, 478

¹⁰⁸ *ibid.* 479

¹⁰⁹ **Weatherhill. Beamont.** EU Law. Third Edition. 1999. England. P. 254

a basis a three-year period. The applicants claimed that they were a close and definable group, the members of which were known to, or identifiable by the Commission. However, the Court held that “The nature of the measure as a regulation is not called in question by the mere fact that it is possible to determine the number or even identity of the producers to be granted the aid which is limited thereby”¹¹⁰. So even in cases where it was possible to identify the exact, small group of persons affected by the regulation, the actions were dismissed¹¹¹. The Court’s judgment in Cordinou case¹¹² is significant for the deliberation of “individual concern”. The applicant looked for to annul the regulation, which reserved the word “crémant” as a designation sparkling wines produced in some regions of France and Luxembourg. The applicant, a Spanish wine producer, had a trademark including the word “crémant” for his products, registered since 1924. The Court stated that in this case although the measure was of a common legislative character, which concerned the merchants in a common way, it did not avoid it from being of individual concern to the applicant.

A natural or legal person can also claim that a decision is addressed to him or another party with indirect effect. The Plaumann v. Commission case¹¹³ was a crucial one for deliberating individual concern. It set the character of limiting interpretation for the complete structure of the legal assessment in the Court of Justice. Plaumann, German importer of mandarins, filed a case against the decision of the Commission addressed to Germany, about rejecting the approval of lowering of the levies on the imports of mandarins into the European Community from 13 to 10 %.

The Court stated that; *“in order to have the right to bring an action for annulment of a decision which is not addressed to them, the defendants must*

¹¹⁰ Cases 789-90/79, Calpak v. Commission [1980] ECR 1949

¹¹¹ J.H.H.Weiler, Jean Monnet Working Paper 12/03, The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community, P. 9

¹¹² Case 309/89 Cordinou v. Council [1994] ECR I-1853

¹¹³ Case 25/62 Plaumann v. Commission [1963] ECR 95

show that they are individually concerned if the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually”.

In the Court’s view the fact that Plaumann is affected by the decision as an importer of clementines, so by the reason of his commercial activity, which may at any time be practised by any person, does not distinguish him in the relation to the contested decision as in the case of the addressee¹¹⁴. In applying that definition, the Court has declined to find individual concern where a decision is addressed to an abstractly defined category of persons even where in reality decision only affects an ascertainable number of such persons¹¹⁵.

The Court of Auditors and the European Central Bank can only bring actions to protect their own privileges. Also, private citizens may demand annulment only if their personal benefit is breached. On the other hand, any member state, the Parliament, the Council or the Commission may bring an action before the Court although their concern is not violated. The cases arising from article 230 may also be distinguished from their grounds. Four basic grounds can be challenged before the Court;

a- Lack of Competence: The institutions of the Community shall act within the limits of the powers conferred upon it¹¹⁶. If an Institution adopts an act although it has no power, the act in concern may be a subject to annulment procedure on the grounds of lack of competence. In addition, when an institution with power adopts an act based on wrong Treaty provision, or when the act is exercised by wrong institution, those acts may also be challenged before the Court.

¹¹⁴ **Arnulf**. The European Union and its Court of Justice. Oxford. 1999. p.44

¹¹⁵ **Lasok D, Lasok KPE**. Law and Institutions of the European Union, London, 1994, p. 261

¹¹⁶ Art 5 of TEC (ex art 3b)

b- Infringement of Essential Procedural Requirements: In this procedure, the Court scrutinizes if the defendant has followed the correct route while adopting an act. Without having strict rules, the Court does not annul an act only when a insignificant and inconsequential procedural rule is missed. To annul an act, the procedural rule must be essential and it must be enacted in the Treaties or in secondary legislation.

c- Infringement of the treaty or any rule of law relating to its application: This title is broader than other grounds. We can say that the claims that do not fall into other grounds are listed in this title. Grounds of legitimate expectations and proportionality are the most well known claims in this category.

d- Misuse of powers: If the discretionary power of an Institution has been used to reach an objective while, it has been shown as another objective is pursued, then the act in concern may be subject to annulment. The court seeks the hidden motive of the Communities while adopting a measure.

The Treaty has put a time limit on annulment cases. The proceedings must be initiated within two months of the publication of the measure, or of its notification to the plaintiff, or of the day, which it came to the knowledge of the application if there is no notification. However, even after that period has elapsed, any party may, in proceedings in which a regulation of the Council, adopted jointly or acting on its own, or of the Commission or of the ECB is in issue, plead the ground specified above, in order to invoke the inapplicability of that regulation¹¹⁷. Therefore, the validity of the regulations can be contested even if the two-month period has been expired.

If the Court finds out that the action is well founded, it declares the measure void. The Court may declare the act completely void or it may annul a part of it¹¹⁸. The decision affects both the parties to the case and individuals are directly

¹¹⁷ Art 241 (Ex art 184 TEC)

¹¹⁸ Cases 56, 58/64 *Consten & Grundig v. Commission*[1966] ECR 299

affected by the measure allowed. Moreover, the effect of annulment is *ex tunc* and *erga omnes*¹¹⁹¹²⁰.

The Treaty explicitly demands from the Court to announce regulations, which are void. Yet, the Court in some cases¹²¹ annulled some articles of a regulation and stated that these articles should continue to have effect until the defendant passes a new legislation. In *Simmentahl v. Commission*¹²², a Commission decision was annulled but the Court preserved its effects in relation to everyone except the applicant because legal certainty required for who had relied on the decision¹²³.

D- Failure to Act (Art 232)¹²⁴

Article 232 gives Court the authority to act where States and Institutions simply fail to do something expected of them rather than actually doing something abusively or incorrectly¹²⁵. The Treaty enforces the Institutions not only to act within their powers but also to act on those powers. Consequently, articles 230 and 232 have tense correlation. One cannot bring a case before the Court based on Article 232, when there is a measure, which can be subject to annulment. In addition, if

¹¹⁹ Valid for the past and towards all.

¹²⁰ **Lasok K.P.E.** The European Court of Justice, Practice and Procedure, 1984, p.325

¹²¹ *Commission v. Council Case 81/72 & Commission v. Council, Case 59/81*

¹²² *Case 92/78, 1979 ECR 777, 811*

¹²³ **Weatherhill. Beamont.** EU Law. Third Edition. 1999. England. P. 305

¹²⁴ Art:232 Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established. The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

The Court of Justice shall have jurisdiction, under the same conditions,

¹²⁵ **Church, Phinnemore.** A Handbook and Commentary on the post-Maastricht Treaties, Harvester-Wheatsheaf . Canterbury, 1994, P.283

the Institution has already acted on an issue, the plaintiff must refer to annulment procedure instead of Article 232¹²⁶. The purpose of the procedure is to acquire a ruling of the Court setting up that the failure to act is illegal and thus compelling the defendant Institution to act.

From this explanation, we understand that the defendants of these proceedings are the Institutions, which have power to act within the Community. The defendants are unambiguously stated in the article. On the other hand, the plaintiffs are separated into two groups. The Institutions of the Community and the Member States have right to bring an action before to Court without any hesitation¹²⁷. Likewise, in the Article 230, natural and legal persons may pursue their rights only if their individual concern is breached.

Before the proceedings, the plaintiff must inform the Institution about his claims. After this notification, the Institution has given two months to respond. There is no formalism arranged in the context of the Treaty. However, the application of the claimant shall be written.

The Institution may act in three ways;

a- It may reply to complainant as there is no necessity to act on the subject that he demanded. After this decision, the complainant may bring a case before the Court and he should request for annulment of this decision. Therefore, he cannot allege the Institution on behalf of failure to act. The Court in one case reiterated that Article 232 referred to failure to act or to define the position but not to adoption of a measure to the satisfaction of applicant¹²⁸¹²⁹.

¹²⁶ **Tekinalp, Tekinalp**, Avrupa Birliği Hukuku. 2. Edition. Istanbul 2000. p. 252

¹²⁷ **Plender**. European Courts Practice and Precedents. London. 1997. p 61

¹²⁸ Case C-25/91 Pesqueras Echebastar SA v Commission [1993] ECR I-01719

¹²⁹ **Lasok D, Lasok KPE**. Law and Institutions of the European Union, London, 1994, p. 240

b- It may take a decision about the subject but the decision may be different from the demand of the applicants. In this situation, the complainant yet again should initiate annulment proceedings before the Court, as there is a decision about the conflict. The Court finds sufficient for the Institution to get set into action although it is not satisfying the demands of the applicant.

c- It may not respond the complainant's demands in two-month period. Consequently, the applicant may bring a case before the Court on grounds of failure to act¹³⁰.

The outcome for an affirmative ruling of the Court is simply a statement that the Institution in concern is violating its duty and thus has to "take the essential measures to meet the terms of the decision of the court"¹³¹

E- Preliminary Rulings (Art 234) ¹³²

The preliminary rulings procedure has a key significance to the appropriate implementation of the legal and monetary organization established by the Treaties. It is in the framework of that procedure that basic principles of the Community legal order, such as direct effect and supremacy, have been developed¹³³. The Court is not the only institution that has power to apply and interpret the

¹³⁰ **Tekinalp, Tekinalp**, Avrupa Birliği Hukuku, 2. Edition. Istanbul 2000. p. 254

¹³¹ Art 233 of TEC

¹³² Art 234 (ex Article 177) TEC

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this Treaty;
- b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

130 Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

¹³³ **Dinan**, Ever Closer Union?, London, 1994, p. 299

Community Law. There are many measures in Treaties and in secondary legislation, which is directly applicable in Member States. Individuals may base their facts on those provisions in their National Courts. Therefore, the Courts in Member States become the Court of Communities and they apply and interpret the Community Law. The Treaty has appropriated the preliminary ruling system to evade varying and conflicting interpretations of Community law. Essentially, the Courts of the Member States may submit an application to the Court of Justice when they possess a hesitation about the validity or interpretation of the Community law. With this system, the necessity for interpretation of the Community provisions can be covered. On the other hand, the Court of Justice can check the legal validity of the Community Law by the request of National Courts. The Court of Justice possesses the characteristics of both an international court and a constitutional court by the jurisdiction to give preliminary rulings¹³⁴.

According to Article 225 of the Treaty, the Court of First Instance may give preliminary rulings under Article 234 in specific areas laid down by the Statute of the Court. The Treaty did not amend the Statute to declare these areas but the Nice IGC specified them in declarations number 12 and 13¹³⁵. Article 234 of EC states that, *courts and tribunals of the Member States are entitled to ask for preliminary rulings*. The conflict arising for the ECJ is to decide what kind of institutions are to be deemed as courts and tribunals under the article. When deciding on the topic, the ECJ took a number of qualities into account, including: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes¹³⁶ whether it applies rules of law, and whether it is independent¹³⁷.

¹³⁴ Pollard, Ross. European Community Law Text and Materials, London, 1994, p. 198.

¹³⁵ Craig and de Búrca, EU LAW Text, Cases and materials, Third Edition, Oxford University Press, 2003, p. 91.

¹³⁶ Mutually binding.

¹³⁷ Case 54/96 Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH. [1997] ECR I-4961 1998 CMLR 237

The requirement of being a court or tribunal to refer to ECJ can be challenging in arbitration. The court, in one case, has declared that although an arbitral body gives its decisions according to law, and the judgment is binding on the parties, can not be sufficient for it to be considered as a court or tribunal of a Member State. For this to be so there must be a closer link between the arbitration procedure and the ordinary court system in the Member State¹³⁸. According to the Dorsch Consult decision, the body that refers to the Court for preliminary ruling should meet the requirements listed in the decision. Moreover, in one case¹³⁹ the Court expressed that if the parties have chosen to apply to arbiter by their own will, then the arbiter in concern shall not be deemed as a Court within the meaning of Article 234. On the other hand, if the application to arbiter is compulsory in national law, therefore, the decision of the arbiter shall be subject to the preliminary ruling process before the Court of Justice.

The third paragraph of Article 234 gives a responsibility on national courts to submit for a preliminary ruling from the Court. The rationale of Article 234/3 has been illustrated by the Court as follows: “ ... that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice ... and it is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State.¹⁴⁰” A national Court¹⁴¹ may refer a question to the Court of Justice only if it considers ruling on the question necessary to enable it to render judgment. Therefore, the national courts are the ones that will determine the necessity for referral. As it is obvious in the third paragraph, national courts *may* refer to the Court of Justice for interpretation of Community law. Conversely,

¹³⁸ **Craig and de Búrca**, EU LAW Text, Cases and materials, Second Edition, Oxford University Press, 2003, p. 412.

¹³⁹ Case 102/81 Nordsee v. Reederei Mond [1982] ECR 1095

¹⁴⁰ Case C-393/98 Ministerio Publico v. Antonio Gomes Valente, [2001] ECR I-1327.

¹⁴¹ From the definition of national Court it must be understood that all the courts and tribunals in a state, such as administrative Courts, appeal Courts, may refer a preliminary ruling.

the Treaty has obliged the national courts to apply to the Court of justice when there is no judicial remedy for their decisions. One of the questions that appear when reading Article 234/3 is whether this rule is applied for the national supreme courts or to lower courts whose rulings shall not be appealed. The Court has accepted that Article 234/3 applies, in addition to national supreme courts, also to those courts against whose decision there is no possible judicial remedy in the case at hand. An ordinary court may consequently bring itself inside the scope of Article 234/3 if its decisions have not been a subject to appeal.

A court of a Member State can demand a preliminary reference for three kind of issues which are mentioned in Article 234 (1) a, b and c. The article enables any question of Community law to be referred to the Court of Justice at the instance of any national court before which such question arises¹⁴². Firstly, provisions of the Treaties, amendments of Treaties and all the other Protocols, Annexes, and Conventions of the Treaties may be referred to the Court for interpretation and validity. Secondly, the acts of the empowered Institutions, which have legal effect on Community law, are subject to preliminary ruling process even if they are named as recommendations. Lastly, the Statutes of the bodies, which are enacted by the Council, may be interpreted by the Court until it is allowed in the Statute¹⁴³

The Court does not evaluate the validity of a measure of national law while in the preliminary ruling process. It leaves this up to the national court. Nevertheless, the Court's practice blurs that distinction by focusing on the facts and context of each case and by deciding the question of compatibility of national law¹⁴⁴. Although it is not a duty for the Court to assess the national laws, the

¹⁴² **Arnall**. The European Union and its Court of Justice. Oxford. 1999. p.50

¹⁴³ **Smit. Herzog**. The Law of the European Economic Community. Volume 4. 1976. New York. p 5-459

¹⁴⁴ **Eeckhout, Tridimas**, Yearbook of European Law, Oxford University Press, 2000, P.3

outcome of such an assessment is frequently that, a national measure is found to be incompatible with Community law¹⁴⁵.

The questions asked for the Court shall arise from real occasions. Therefore, the Court does not reply to imaginary questions that are not based on a actual and solemn dispute. The ECJ has also declined to accept a reference for a preliminary ruling on the question of the validity of a Community act where the party challenging the act before the national court could have challenged it directly under Article 230, since there was no doubt as to the party's legal standing to do so.

If the Court declares a Community provision invalid after the preliminary ruling process, the decision binds all the member states even if the referral has not been made by them. Whoever enacted the provision must withdraw it or amend it in accordance with the Court's decision. The judgments related with the interpretation of the Treaty are binding and *ex tunc*. The national court must give its decision on the grounds of the Courts judgment. The judgment of the Court of Justice does not prevent other national courts to ask for preliminary ruling on same subject¹⁴⁶. In case of a similar request, the Court may directly give an order as it has given to the previous case.

There have been 531 new references made to the Court in year 2004. Almost half of these referrals¹⁴⁷ are preliminary ruling requests. The first application made to the Court was in 1961 from the Court of Hague. The workload of the Court has increased by the enrichment of the Community law and new accessions. By the time, the duration of the process increased from ten months to two years. This extension of time can also be seen in other types of actions¹⁴⁸.

¹⁴⁵ **Kabaalioğlu**, AB Kurumları ve Avrupa Hukukunun Uluslararası Özellikleri Işığında Avrupa Birliği ve Kıbrıs. İstanbul Yeditepe University Publishment, 1997 p.247

¹⁴⁶ **Tekinalp, Tekinalp**, Avrupa Birliği Hukuku. 2. Edition. İstanbul 2000. p. 266

¹⁴⁷ 249 cases in year 2004.

¹⁴⁸ See Table of Statistics at p.

F- Plea of Illegality: (Art 241)¹⁴⁹

The application to the Court for annulment of a Community provision is restricted by a specific period of time and by the subject of application. As it is mentioned above, the Court may find an application for annulment successful or inadequate after its evaluation. From this point of view, one can say that if an application for annulment is rejected and the “ two months “¹⁵⁰ time period is passed, then the provision in concern shall be deemed as valid unless it is altered by another provision. The plea of illegality steps into the matter at this point. Treaty makers have found this situation irrational and allowed the validity of community provisions to be argued in some specific circumstances.

Firstly, to plea an illegality of a community provision, there must be an ongoing proceeding before the Court. The claimant shall forward its plea in the proceedings. Therefore, Art 241 does not give the opportunity to claimant to lodge an independent action as the court pointed out this outcome in its former rulings¹⁵¹. We can encounter this type of procedure in French Law system¹⁵² and in Turkish Constitutional Law¹⁵³.

Secondly, the subject of this procedure changes from the main action. Unlike the annulment procedure, only regulations, which are adopted jointly by the European Parliament and the Council, or regulations of the Council, of the Commission, or of the ECB can be subject for a judicial review. The article

¹⁴⁹ Art 241 (Ex Art 184):Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.

¹⁵⁰ Art 230/5 of TEC

¹⁵¹ Cases 31,33/62: *Milchwerke Heinz Wöhrmann and Sohn KG v Commission* [1962] ECR 501, 1963 CMLR 152 and Joined Cases 275/80 and 24/81

¹⁵² **Lasok D, Lasok KPE.** *Law and Institutions of the European Union*, London, 1994, p. 270

¹⁵³ Constitution of Republic of Turkey Art. 152

excluded directives, regulations, and other provisions by this definition. Moreover, the regulation of which the legality is called in question must be applicable, directly or indirectly, to the issue with which the application is concerned¹⁵⁴. As a result, a regulation may only be challenged by illegality only if it is primary object of the main action.

The plea would be challenged by any party according to the article 241. However, the utility of article 241 is to enable a non-privileged applicant to challenge the validity of a true regulation, which it does not have standing to demand annulment under Art 230¹⁵⁵. From this point of view, the aim of 241 is to provide private persons to invoke this plea while they are restricted from exercising annulment procedure of Article 230. Parallel to this conclusion, the Court in one case has rejected the plea of a Member State¹⁵⁶, which did not initiate any annulment proceedings laid under article 230.

Lastly, the main difference between annulment procedure and plea of illegality appears at the effect of the decision of the Court. After annulment proceedings, the Court may declare a measure completely or partially void. On the other hand, the Court has stated in one of its decision¹⁵⁷ that if it finds a provision to be illegal, the decision should not lead to the annulment of the provision but only to the annulment of the individual decision, which is based on it. Therefore, the regulations, which are challenged for their illegality, may be accepted as void for only one who pleaded for illegality in proceedings.

¹⁵⁴ Case 32/65 Italy v. Council and Commission . [1966] ECR 389.

¹⁵⁵ **Weatherhill. Beamont.** EU Law. Third Edition. 1999. England. P. 312

¹⁵⁶ Case 156/77 Commission v. Belgium. [1978] ECR 1881

¹⁵⁷ Case 9/56 Meroni & CO v. High Authority. [1957 – 58] ECR 133.

V. PROCEDURE

A-Prologue

Proceedings before the Court of Justice are regulated by firm rules, which can be found in the Treaties, Statute of the Court and Rules of Procedure¹⁵⁸. Because of these provisions, the Court is unable to make exceptions to these rules. The Rules of Procedure governs the organization and the procedure of the court and supported by Supplementary Rules, which defines the rules related with some subordinate issues as legal aid, and reports of witnesses. The Rules of Procedure are published in Official Journal first in 1974¹⁵⁹ and amended up to now. The latest amendment was made in 2005¹⁶⁰.

The proceedings before the Court are divided into two sections as written and oral phases. The written procedure is composed of the communiqués between parties which includes; applications, defenses, replies, observations and statements of the case. These communications are made by the Registrar within the time limit, which is deliberated in the rules of procedure. In the oral procedure,

¹⁵⁸ Hereafter ROP

¹⁵⁹ OJ No L350/1 of 28/12/1974

¹⁶⁰ OJ No L288 of 29/10/2005 P. 0051 - 0053

the Rapporteur-Judges reports and the speeches of Agents, Lawyers and submissions of Advocate General are heard. Although the Oral Procedure may be skipped by the Court, the practice of Written Procedure is necessary for Court and for the parties to accomplish a proceeding. Lastly, after the end of the proceedings the Court declares its decision about the case.

The second distinction in the procedure can be made in Direct Actions and requests for Preliminary Rulings. As it is mentioned above¹⁶¹, preliminary rulings are separated from direct actions by its applicants, the subject of actions and the decisions. Although there are lots of common procedural applications, the preliminary ruling procedures differ from direct actions in some aspects.

B- Language:

The language that can be used in the proceedings before the Court is deliberated by the Article 29 of the Rules of Procedure. The article states that, all the official languages of the Member States¹⁶² can be the language of the case. On the other hand, every proceeding has its own language. The applicant may choose only one language as the language of the case. However, when there are joint cases before the Court each language of joint cases can be used in the case.

According to this article, the applicant chooses the language of the case. Nevertheless, there are some exceptions for this rule as;

1- When the defendant is a Member State or an individual or legal entity who is a national of a Member State in a direct action, the language of the case is the official language of that State.

2- In preliminary rulings, the language of the case is always that of the national court making the reference.

¹⁶¹ See p.45

¹⁶² Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish or Swedish

3- The Member States may use their own language where they intervene in a direct action or take part in preliminary-ruling proceedings.

4- When a party requests to use another official language, the Court may authorize the referrer after consulting the Advocate General and the other party. The Institutions of the Community may not demand.

5- The applicant must use the language of the decision of the Court of First Instance when appealing a decision of the CFI¹⁶³.

6- The intervener is not required to use the language of the case while requesting for intervention. When the request is accepted the intervener must therefore use the language of the case unless it is a Member State.

The request for changing the language of the case is made by written petition as a rule. Although the Rules of Procedure requires formalism¹⁶⁴, the Court in one case, accepted the request for change in the language by simple letter¹⁶⁵. In addition, the statements of; Judges, Advocate General's, Judge Rapporteur's, which is given by using another language of the case is translated into the language of the case by Registrar. The witnesses and experts may use another language than the language of the case if they consider that they can express themselves better by the former one¹⁶⁶. The Registrar makes these declarations translated into the language of the case afterwards.

During proceedings, the documents, which are expressed in another language, are translated into the language of the case. However, when the documents are too long to translate, the Court may demand only the summaries of the documents, which are submitted to the Court. The registrar may reject any pleading, which is not written by the language of the case. The Judges and Advocates General are not obliged to use the language of the proceeding. As a result, they are free to raise questions in any official languages during cases

¹⁶³ RoP Art.110

¹⁶⁴ Art 91 of RoP

¹⁶⁵ Case 260/81 Regul-Eberhardt v Commission 21/10/1981 (Case withdrawn)

¹⁶⁶ Art 29/4 of ROP

although it is not the language of the case. There is no limitation for the working language of the Court as the Judges and the other employees can use any language they prefer. Currently, the language used in Court is French. Therefore, the applications, which are given in another official language, are translated into French.

C-Direct Actions:

a- Written Procedure;

i- Parties;

Firstly, to start the proceedings, there must be one applicant and naturally a defendant. The Parties of a case before the Court is not defined in one provision but it differs up to the type of the case. While the Treaties standardize the types of actions, it has also deliberated the parties that can be an applicant or defendant or an intervener. For instance, only Institutions of the Community shall be defendants for cases that are requested for annulment of a Community provision. In actions for *failure to act*, the Institutions of the Community, Member States, to some extent natural and legal persons may lodge an action before the court. On the other hand, only the Commission can be an applicant in the cases arising from the *failure to fulfill an obligation*. Exceptionally the Community, by itself, may be a party in a case before the Court. A Community is rarely becomes a party in cases. The most important of them are actions arising from damages. According to Article 236 of TEC, the Court of Justice has jurisdiction in any cases between the Community and its servants. Therefore, the Community, the Institutions of the Community, the Member States and the persons or entities who have a right under the Treaties to participate in proceedings can be regarded as a party in a case.

The most challenging issue comes forward when individuals or entities take part in the proceedings. The Court does not respect the National Law of the applicant although he/she is not deemed to possess legal personality in his State. An individual initially shall be the subject of rights and obligations¹⁶⁷. Subsequently, it must;

- i- Undertake autonomous action and
- ii- Assume Liability¹⁶⁸.

When the entities, which characterize cooperative benefit, are in concern, such as union, there is a supplementary prerequisite that they must be truly representative of the interests, which they protect or defend¹⁶⁹.

ii- Representation;

The requirement of representation is declared in the Statute of The Court¹⁷⁰. Individuals must be represented in cases by a lawyer. On the other hand, the Member States and the Institutions of the Communities are represented by their selected agents. The main exceptions for this situation is the parties who seek legal aid and in references for preliminary rulings.

While choosing these agents, the Member States and the Institutions have a complete discretion. In addition, there are no requirements sought as practising law for those agents. University professors who are nationals of Member States whose law allows them to plead before courts are treated as an agent¹⁷¹. The main requirement for a lawyer to represent natural or legal person is that he/she must be entitled to practise before a Court of a Member State. On the other hand, the lawyer in concern may practise law in another Member State than his own Member State. There is no necessity for agents, lawyers or for professors to

¹⁶⁷ Case 135/81 Groupement des Agences de Voyage v. EC Commission [1982] ECR 3799

¹⁶⁸ Case 15/63 Lassalle v. European Parliament [1964] ECR 31

¹⁶⁹ Case 175/73 Union Syndicate v. EC Council [1974] ECR 917

¹⁷⁰ Art 19 of the Statute of the Court

¹⁷¹ *ibid*

possess the same nationality with the party he/she is representing. In one case¹⁷², the applicant was a Scottish company who was represented by a Belgian lawyer while the Commission was represented by two Scottish agents. In addition, the parties may select one or more lawyers or agents to be represented in proceedings.

The lawyers are requested to put together a certificate declaring his right of representation before the Courts of one of the Member States when lodging an application. A copy of the Lawyer's Professional Identity Card is accepted for this purpose. When a lawyer, who is discarded from its own National Bar, represents the party in proceedings, the Court announces that the lawyer in concern is therefore incapable of pursuing the case. However, in other disciplinary sanctions, such as suspension, condemnation, or official reprimand, the Court has discretion to decide whether to allow lawyer for representing the party or not¹⁷³.

The agents or lawyers of a case do enjoy some privileges that are granted for them by the Rules of Procedure. Firstly, the representatives have legal immunity in respect of words spoken or written by them during the proceedings¹⁷⁴. The papers and the documents of the case, which belongs to a representative, cannot be searched or seized¹⁷⁵. Also, they have right to travel within the Community to perform their duties without restraint¹⁷⁶. To benefit from these immunities, an agent must possess a document declaring that he/she is the official representative of the party. Moreover, the agent must notify his authorization to the Registrar immediately. In case of lawyers, the Registrar is entitled to give a certificate, announcing that the lawyer in concern is the official representative. The Registrar deliberates the duration of this document by taking account of the period of the proceedings¹⁷⁷. The Court may put aside those immunities if it is

¹⁷² Case 30/78 Distillers Co Ltd v. EC Commission [1980] ECR 2229

¹⁷³ Case 4/73 Nold v Commission [1974] ECR 491

¹⁷⁴ Art 32 of RoP

¹⁷⁵ Art 33/1 of RoP

¹⁷⁶ *ibid*

¹⁷⁷ Art 33 of RoP

manipulated by the beneficiary. Furthermore, the Court has right to exclude the lawyer from the proceedings when the lawyer;

- a- is incompatible with the dignity of the Court,
- b- is incompatible with the requirements of the proper administration of justice,
- c- is using his rights for purposes other than those for which they were granted¹⁷⁸.

In this situation, the Court that is seeing the case, informs the lawyer in concern and demands a defence for allegations. After hearing the defence of the lawyer, it refers to the Advocate General of the case for his opinion and gives an order whether to exclude the lawyer from the proceedings or not. This rule is inapplicable for an agent because it is considered that Member States could be expected to exert such control as may be necessary in relation to their agents. However, when it is asserted, the Court should have right to exclude an agent by following same procedure that is used for lawyers¹⁷⁹.

iii- Legal Aid;

Any party may request legal aid at any step of a case when he/she is totally or partially recover costs of the proceedings. The right to make such a request is not restricted by the type of the action or procedure. When a party applies for legal aid, he/she should prove his insolvency by all appropriate information and by a document from a competent authority¹⁸⁰. By the definition of competent authority, it may be understood as a national institution, which has authority to evaluate the monetary position of the applicant. The Court could assume that the applicant is unable to meet the costs of proceedings with the information in this document If

¹⁷⁸ Art 35/2 of the RoP

¹⁷⁹ **Plender**. European Courts Practice and Precedents. London. 1997. p 272

¹⁸⁰ Art 76 of the RoP

such a document is not submitted, the application may be rejected for lack of proof¹⁸¹.

When legal aid is applied for before the initiation of procedures, the party must give a short explanation of the issue matter of the application with the purpose of enabling the Court to consider if the application is not potentially groundless. The application of legal aid may not be made by a representative before the proceedings are initiated. Although all the pleadings before the Court must be made by a representative, the application for legal aid is an exception¹⁸².

By receiving the application, the President of the Court appoints a Judge to act as a Rapporteur. After hearing the comments of this Judge, the Chamber of the Rapporteur asks other party to submit their remarks and takes the opinion of the Advocate General. Finally, the Chamber reaches a decision of three possibilities as; granting full legal aid, granting partial legal aid or rejecting the application¹⁸³. An order granting or refusing the application for legal aid does not cover the reasons on which it is based and is not subject to appeal. Usually the Court looks for the applicants incomes and belongings whether it is sufficient to effort the costs of the case or not.

The aid granted to the applicant covers the fees and the supplementary expenses of the applicant's lawyer. If the applicant wins his case the Court orders other party to pay the costs including the legal aid. On the other hand, when the party who benefits from the legal aid, loses the case, pays the legal aid and other costs. Both in two circumstances, the Registrar seek after the legal aid in the Member State where the legal aided party resides¹⁸⁴.

iv- Pleadings;

¹⁸¹ Case 30/80 Fedele v. Parliament order of 24 April 1980

¹⁸² Case 108/63 Merlini v. High Authority [1965] ECR 1

¹⁸³ Art 76/3 of RoP

¹⁸⁴ Art 76/5 of RoP

The procedure before the court starts with the initiation of the petition before the Court. Once the Court receives an application for initiation of proceedings, the Registrar informs the President of the Court. After having this information, the President assigns a Chamber to carry out the proceedings and assigns a Judge from that Chamber to act as a Judge-Rapporteur¹⁸⁵. The First Advocate General is also informed of the commencement and he appoints an Advocate-General to perform in the case.

A regular application must satisfy the requirements, which are set out in Rules of Procedure¹⁸⁶;

- a- The name and the permanent residence of the applicant,
- b- The name of the defendant,
- c- The grounds of application and the subject matter,
- d- The request sought by the applicant¹⁸⁷,
- e- Evidences that are in possession of applicant and the evidences that can be demanded by the Court,
- f- Name and express willingness of authorized person and service address in Luxembourg¹⁸⁸.

When the application does not possess the requirements in article 38 the Registrar gives a specific time to the applicant to correct or to complete the defects in his application¹⁸⁹. The deliberation of the time, which will be given to the applicant, is in the discretion of the Registrar. If the applicant does not straighten up the errors or deficiencies in his application the Court, then, decides whether to reject the application by consulting the Advocate General,¹⁹⁰ or accepts it. The submissions and the form of order is the crucial part of the petition.

¹⁸⁵ Art 9/2 of RoP

¹⁸⁶ Art 38/1 of RoP

¹⁸⁷ Form of Order

¹⁸⁸ Art 38/2 of RoP

¹⁸⁹ Art 38/2 of RoP

¹⁹⁰ Art 38/7 of RoP

Therefore, these subjects must be clearly described in the application to dissolve hesitation. The Court is always free to ask to the applicant for explanation if there are unclear statements in the application.

Also, the applicant may benefit from any reasonable argument to support his grounds. However, the applicant may not enlarge the scope of his action by adding new grounds and he cannot amend his form of order after giving his application. There are two exceptions for this rule. Firstly, the Court, even if they are not pleaded by the parties, holds the obligatory grounds *ex officio*¹⁹¹ and the grounds based on the matters of law or fact which come aside in written procedure.

According to the Article 21/1 of the Statute of The Court, the application shall consist of a brief statement of pleas, which supports the aim of the application. However, the grounds of the case must have sufficient details and the facts of the case must be stated clearly to identify, analysis and to dissolve the conflict in concern. The form of order of the petition must be clear. If the form of order in the application is ambiguous, the Court may ask to the applicant to explain the order he is requesting¹⁹². The applicant may request for different issues in the form of action. When the claims of those applications are not connected properly, the Court shall decide to disjoin the claims¹⁹³.

The petition of application shall include those annexes;

a- A documentation declaring that the lawyer acting for the applicant is entitled to practise before a court of a Member State¹⁹⁴.

b- The authority of the lawyer to act on behalf of applicant.

c- In actions brought before the Court pursuant to arbitration clause contained in a contained in a contract concluded by, or in the name of the

¹⁹¹ Due to its responsibility

¹⁹² Case 804/79 Fishery Conservation Measures, Commission v. United Kingdom [1981] ECR 1045

¹⁹³ Case 567/79A Flamm v. Commission and Council [1981] ECR 2383

¹⁹⁴ Art 38/3 of the RoP

Community, or pursuant to a special agreement concluded between Member States,

d- In the application of legal persons; the document that constitutes the legal person and the authority given to the applicant's lawyer,

e- In annulment cases, the contested provision of the Community and in cases of "failure to act," the request to act by the applicant to the Institution.

v- Defence;

The defendant may reply to applicant within one month after receiving the application¹⁹⁵. This duration starts when the document is obtained at the address for service in Luxembourg. The day on which the document is received or sent is not included within the time limit¹⁹⁶. The time limit for the defendant may be extended by the President only if the defendant applies to the Court with a petition including reasonable facts¹⁹⁷. If no defense is lodged, the default procedure may be pursued¹⁹⁸.

Like the petition for application, the defense must contain some basic elements. They are¹⁹⁹;

a- The name and address of the defendant,

b- The arguments of fact and law relied on,

c- The form of order sought by the defendant,

d- The nature of any evidence submitted by him,

e- An address for service in Luxembourg and the name of a person authorized and willing to accept the service.

The defendant may respond to the application in two central subjects. Firstly, he can argue the admissibility of the application and secondly, he can reply

¹⁹⁵ Art 40/1 of the RoP

¹⁹⁶ Art 80/1 of the RoP

¹⁹⁷ Art 82 of the RoP

¹⁹⁸ Case 85/94 Branco LDA. v. Commission [1995] ECR 45

¹⁹⁹ Art 40/1 of the RoP

to the merits that are asserted against him. The Court expects from defendant to lodge his submissions in a plain way to avoid confusion. The same possibilities of amending or extending the defence are available as in the case of application. In form of order, the defendant usually requests from the court to dismiss the case and leave the costs on the applicant. However, the defendant cannot raise a separate claim against the applicant in proceedings. As an exception to this rule, the Court once²⁰⁰ accepted the counter-claim because of close connection between claims and regarded the claim of the defendant as a true defence for the case.

The defence must include;

- a- A documentation declaring that the lawyer acting for the applicant is entitled to practise before a court of a Member State
- b- In annulment cases, the contested provision of the Community and in cases of “failure to act,” the request to act by the applicant to the Institution,
- c- In the application of legal persons; the document that constitutes the legal person and the authority given to the applicant’s lawyer,
- d- In actions brought before the Court pursuant to arbitration clause contained in a contained in a contract concluded by, or in the name of the Community, or pursuant to a special agreement concluded between Member States.

The submissions, which are related with the procedural issues of the case, are set out in the 91st article of the Rule of Procedure. According to this article, these kinds of submissions must be made by a separate document. The submission must only concern the conflicts arising from the procedural issues. Therefore, a party who lodges a pleading about the merits of the case under article 91 shall be found inadmissible²⁰¹. After the submission has been received, the Court sends it to the other parties and the President of the Court gives a time limit

²⁰⁰ Case 250/78 *Deka Getreideprodukte GmbH & Co Kg v. Council and Commission* [1983] ECR 421

²⁰¹ *Macchiorlatti Dalmas e Figli Sas v. High Authority.* , order of 17 November 1959

to parties to commence their answers to the application in written²⁰². When the parties reply to the application, the Court decides to give a decision directly or not. In complex situations, the Court shall open a oral hearing and ask for the Advocate General to declare his view about the submission. Otherwise, the Court, by taking the opinion of the Advocate General, may announce its decision by skipping the oral hearing.

The parties of a case, usually the defendant, may request from Court to reject the case because of inadmissibility. The defendant may claim it in his defense as a preliminary objection or he may assert it in his rejoinder or at the hearings. The Court, who is carrying out the case, may claim for inadmissibility in any step of the procedure. When the defendant claims inadmissibility in his defence, the Court resolves the conflict at the end of the case by its main ruling. However, the parties may agree for deciding on the subject of the claim immediately. Also, the Court may take the issue to its priority and may rule on the subject by its own motion. When the defendant claims the inadmissibility of the case after his defence, the Court may accept the application only if the issue is in its own motion. There are some specific reasons that cause the inadmissibility of a case. For instance, when the Court has no jurisdiction to hear an application it shall find the case inadmissible²⁰³ because lack of jurisdiction. When a party does not possess the right to lodge an application²⁰⁴, the court may also find the application inadmissible and reject the case²⁰⁵. A party should also follow the durations at the Treaties and the provisions of the Union, which is given to start proceedings before the Court. The cases that are lodged after the expiration of the definite durations shall be deemed as inadmissible and be rejected. These are absolute bars for the case and even if they are not delivered by the parties, the Court shall consider the fact by its own motion.

²⁰² Art 91/2 of the RoP

²⁰³ Case 31,33/62 *Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH v. EC Commission* [1962] ECR 501

²⁰⁴ Such as having no individual concern with the case or having no right to plead in means of the Treaties.

²⁰⁵ No Locus Standi

vi- Reply and Rejoinder;

Once the applicant receives the defence of the defendant it may respond to the assertions by a “reply”. In addition, the defendant may respond to this reply by a rejoinder. The reply is intended merely to respond to the pleas and arguments raised in the defence. Similarly, the sole purpose of the rejoinder is to respond to the pleas and arguments put forward in the reply. The heading of those petitions must be same as the application and the defence unless there is a third party who joins to the proceedings. As in application and defence, the parties shall not enlarge the scope of their assertions by adding new issues and they cannot amend the previous form of order. The Rules of Procedure stated that the parties may derogate from this limitation only when the new allegations are based on matters of law or of fact which come to light during the written procedure²⁰⁶.

After receiving the pleadings, the Registrar indexes the applications²⁰⁷. The representative of the party must sign the original documents and certificate the copies. All the pleadings and the annexes must be presented with five copies for the Court and, for the purposes of notification, a copy for every other party to the proceedings. If pleadings are sent by post, the envelope must only have the address of the Court²⁰⁸.

vii- Interim Relief;

The applicant may also request an interim relief by his application. This request must be made to the President of the Court by a different application from the former one²⁰⁹. There are two main types of interim relieves in the Community Law that an applicant may request from the Court. Initially, the applicant may

²⁰⁶ Art 42/2 of the RoP

²⁰⁷ Art 37 of the RoP

²⁰⁸ The European Court of Justice - Registry -L - 2925 Luxembourg

²⁰⁹ Art 83/3 of the RoP

demand for the suspension of an act challenged before the Court. According to Rules of Procedure²¹⁰, the applicant may request suspension for any measure adopted by an Institution. On the other hand, the measure in concern must have an effect on the applicant and the application must be made because of this effect. In some cases²¹¹, the Court has refused to grant suspension for a Regulation because the lack of infringing individual interest. In contrary, when the Court finds out that the conditions are suitable for granting relief, it suspends the application of the requested measure. The power to suspend an application cannot be used in references for preliminary ruling. To suspend a provision, the Treaties and the Rules of Procedure sought an action, which is brought before the Court. Since the Preliminary Rulings are non-contentious references, a party, therefore shall not demand suspension of an act.

Secondly, the applicant may request for an interim measure in the case. Along with art 83/1 of Rules of Procedure, only applicant may request for interim measure. Therefore, an intervener shall not request it because of lack of interest. The interim measure, which is demanded from the Court, must also be consistent with the alleged provisions in the main case. The applicant may ask for interim measure from Court to rule as the Institution shall act or implement in a way by the request of him. Usually the Court acts unenthusiastic against these requests, as the defendant is an Institution. In addition, the applicant may request specific payments by interim measures. The Court accepts these demands in cases where the applicant can provide sufficient conditions for interim measures. If the plaintiff's application is found appropriate, he keeps the money, which is given to him by the decision of interim measure. Otherwise, the applicant returns the money to defendant²¹².

²¹⁰ Art 83/1 of the RoP

²¹¹ Case 92/78R Simmenthal SpA v. Commission [1978] ECR 1129

²¹² Case 33/80 Albin v Council and Commission [1981] ECR 2141

When evaluating the requests for suspension and interim measures, the Court looks after if there are sufficient indications to ask for interim relief²¹³. In addition, the applicant must have urgency in case of facing severe and irreversible damages. Lastly, the Court assesses the effects of the interim relief against third parties. Considering the fact that requests for interim measures are made because of urgency and of the need for swift translation, applicants are asked to describe the grounds of their applications briefly. When a party requests for an interim relief, the counter party is usually permitted to present written comments one month. Generally, the President estimates the observations of Judge-Rapporteur and the Advocate General and gives its decision. In some cases, when there is high urgency, the President may bypass the reply of the other party and give his decision in a short dated meeting. Even if the court grants for interim relief, the right to reply to the request is kept and after the declaration of observations about the request, the court orders its final decision about the interim relief after the hearing.

viii- Intervention;

An application for intervention must be made within six weeks after the publication of the case in Official Journal²¹⁴. This time limit cannot be extended for any party. The Statute of the Court states that the Member States and the Institutions of the Community may always²¹⁵ intervene into the actions before the Court²¹⁶. On the other hand, other persons may intervene if they have a concrete and direct interest in the outcome of the case. Third parties shall only intervene in direct actions and appeals. They may only support the applicant or the defendant. Therefore, the intervener shall not produce any submissions that are not related with the form of order sought by applicant or defendant.

²¹³ Cases 31,53/77R Pig Production Subsidies, Commission v. United Kingdom [1977] ECR 621

²¹⁴ Art 93/1 of RoP

²¹⁵ By complying with the time limit mentioned above

²¹⁶ Art 40/1 of the Statute of the Court.

A person wishing to intervene in a direct action must submit an application to intervene. The application to intervene may not be in the same language of the case. This application shall possess some elements as in application and defense. It must include;

- a- the description of the case;
- b- the description of the parties;
- c- the name and address of the intervener;
- d- the intervener's address for service
- e- the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene;
- f- a statement of the circumstances establishing the right to intervene²¹⁷.

After the application, the Court requests from the parties to declare their opinions about the intervention. In addition, the Court asks the parties if they want to keep their confidentiality. When the Court decides to accept the application for intervention, the intervener receives all the documents related with the case and submits a statement about its intervention. From that time, the intervener must use the language of the case unless it is a Member State. The parties may assert their comments to this statement. The intervener shall submit its statements orally when he/she is accepted as an intervener in the oral procedure.

ix- Evidences;

As it is mentioned above, the Member States, the Institutions of the Community and natural or legal persons may be parties in a proceeding. Although there is no distinction between them, there is an obvious difference when a natural or legal is standing against a Member State or a Community Institution. A natural or legal person, even if a large and wealthy multinational corporation may easily be kept ignorant of relevant evidence held by a Community Institution or Member State. However, the Court shall treat parties especially when providing evidence

²¹⁷ ibid

equally and ensure the law is observed. The Court has a duty to ensure that sources and the evidences are placed before it fairly and accurately. Therefore, the evidences of a case have great significance to protect the Community law²¹⁸.

The burden to submit evidences is on the parties. The Court may also request evidence by its own motion. The parties shall avoid themselves to provide evidences, which are denying their own case. When a party abstains from submitting adequate evidence, the Court may refuse the application because of lack of sufficient evidence. The evidences, which are put forward before the Court, must have connection with the case. They shall not be unnecessary and irrelevant with the arguments of the case. Furthermore, the Court may not request an evidence to be heard in the case if it is not trustworthy. For example, the Court may not accept a witness who is an employee of a party.

The parties may put forward their evidences until the opening of oral procedure. In contrary, the Court has power to order an evidence at any time. Also, it can order to recheck the previous evidences of the case. Both in two circumstances, the Court asks for the evidences after hearing the view of Advocate- General. The Court may request an evidence, which is demanded by a party after the opening of oral procedure. However, the evidence in concern must relate to the facts, which are capable of having a decisive influence, and which the party concerned was not able to put forward before the opening of oral procedure²¹⁹. Before the end of written procedure, the Court may ask the parties to submit their opinions on the evidences brought to the case. Otherwise, the Court may directly open the oral procedure²²⁰.

There are some types of evidences listed in the Rules of Procedure. The list is not *numerus clausus* therefore the parties may present different evidences²²¹.

²¹⁸ Lasok K.P.E. The European Court of Justice, Practice and Procedure, 1984, p.200

²¹⁹ Case 77/70 Prolle v Commission [1971] ECR 561

²²⁰ Art 54 of RoP

²²¹ Art 45/2 a of RoP

a- The Personal Appearance of the Parties:

The parties of a case are defined as evidence in the Rules of Procedure. Although they can plead by their representatives, the Court may ask questions to the parties during the hearing. Naturally, their speeches are not counted as a declaration of a witness. Therefore, they do not need to take an oath like witnesses. When a party is heard before the Court, the other party may ask to him by commencing their questions to court. In fact, only natural or legal persons can be subject to these questions as the Member States and the Institutions of the Community is represented solely by their agents.

Usually the parties individually attend to proceedings when they need to answer some questions, make statement about the testimony of a witness or to give information about technical information²²². The Court generally listens to the parties in closed sessions by inviting other party. Obviously, a party, who comments on the case by means of article 45/2, shall behave in favor of himself. Because of that fact, the Court evaluates the answers of the Parties more skeptical than the other evidences of the case.

b- Production of documents and information;

The Courts right to request documents and information is based on the independence of the Court. The Court is one and only judicial body of the Union and it has a wide authority to demand documents from the Member States and the Institutions of the Union. This right is visibly stated in the Rules of Procedure²²³. Thus, any of addressees, who are requested to present documents to the Court, shall send them without formal notice. The Court frequently requests the documents and information from parties or third persons by unofficial letter. There are two provisions for the Court to request documents and information from the

²²² Case 111/63 Lemmerz-Werke GmbH v. High Authority [1965] ECR 677

²²³ Art 45/2 b of RoP

parties. First one, as it is mentioned above, is the art 45/2b of the Rules of Procedure. Secondly, the Court may order the parties to put forward some documents and information by means of Statute of the Court²²⁴. The approach of the Rules of Procedure is more restrictive than the Statute. To request a document from the provisions of the former one, the Court shall hear the opinion of the Advocate General, describe the facts that must be proved and draft a formal order. However, according to the Statute of the Court, the Court may ask for the parties to present documents to the case when it considers that it is desirable. Moreover, the Court may request documents from a third party, such as Member States or the Institutions, which are accepted as necessary for the proceedings²²⁵. The parties shall put forward some specific information when it is requested by the Court like documents. Besides, the Court may request information from a third party, which is regarded as essential for the case. Any kind of information can be demanded from a Member State or an Institution that is necessary for the case.

The parties have right to access to the document or information which is introduced to the Court as an evidence. In one Case,²²⁶ the Court has stated that any restriction to the right to access documents would infringe the principle of “equality of arms “and “fair hearing “. There are two main exceptions for this rule. Firstly, the interveners may be completely or partially restricted to investigate the documents of the case²²⁷. When there are satisfactory reasons, the Court may restrict the intervener in any step of proceedings. The document or information in concern should be truly confidential because of its nature. The Court may order confidentiality by its own motion or by the request of the parties. Secondly, the materials, which are presented by a party, may not be revealed to the other party if there are joint cases between them. Currently, the Court is not insisting on this rule, which was accepted by its previous decisions²²⁸.

²²⁴ Art 24/1 of the Statute of the Court

²²⁵ *ibid* /2

²²⁶ Case 42,49/59 SNUPAT v. High Authority [1961] ECR 53

²²⁷ Art 93/3 of RoP

²²⁸ Joint Cases 209 – 215 – 218/78 Van Landewyck. Commission [1980] ECR 3125-3236-3237

A document or information, which is produced before the Court, shall be relevant with the form of order and the grounds of the case. Even though, the Court does not usually reject the applications for irrelevant evidences at the beginning of the proceedings. In further steps, the Court may decline an evidence because of its uselessness or irrelevancy.

A party may refrain from producing documents that has legal professional privilege. In one case²²⁹, the Court has accepted that the communications between a lawyer and his client are confidential and protected from production. The medical records of a party or a third person shall be kept away from the case because of the secrecy of doctor – patient relationship. On the other hand, when; the patient gives consent, the doctor is a personally involved to the proceedings or the confidentiality of the records hardly obstruct the case, the Court may decide to evaluate the records as evidence. In addition, the Treaty of European Communities has accepted another exception for the Member States. According to Treaty, the Member States shall not be obliged to supply information to the Court, when the issue is contrary to their security²³⁰. Therefore, a Member State may not produce an information if it contradicts with its own security. The evaluation of the information and its essentiality is up to the Member State. When an Institution or another Member State considers that the Member State in concern is arbitrarily or purposely avoiding information, any of them may refer the matter to the Court²³¹. Consistent with this article, the Court assess' the essentiality of the information and gives a decision whether the evaluation of the Member State is appropriate or not. The Court discusses the issue in camera.

There are no sanctions accepted in the Rules of Procedure or in the Statue for a party who rejects to produce a document or information to the case. The Court may only write a formal notice to the party. However, the refusal of the

²²⁹ Case 155/79 A. M & S v. Commission [1982] ECR 575

²³⁰ Art 296 of TEC

²³¹ Art 296/2 of TEC

request may lead the Court to accept the form of order when the challenging party does not express the reason of its refusal. i.e. confidentiality.

c- Opinions of Experts;

When the Court seeks an opinion about technical or special matter, it may request an expert to comment on the issue. The power of requesting expert derives from two different provisions. Both in the Rules of Procedure²³² and in the Statute of the Court²³³, the Court is empowered to request opinion of an expert. The parties, during the case, may request an expert to commence questions about specific issues. Moreover, the Court may request an expert by its own motion. Parties of the case may request expert; by their pleadings, by the application under Art 91²³⁴ or exceptionally with the request of interim measures. Before requesting an expert, the Court, determines if the appointment of expert is useful for the case or not. When the Court considers that there is a necessity for expert report, it may by its own motion, assign an expert even in the oral hearings²³⁵. When there is no need to seek an expert opinion, the Court may reject the application²³⁶. If the subject of the case is just related with a legal conflict, the Court may avoid requesting an expert. In addition, when the content of the case does not require any expert opinion, the Court may not request for an expert opinion.

The expert who will be appointed to the case must be independent. Therefore, the expert shall not have any kind of relation²³⁷ with the parties. When a party believes that the expert in concern is not proper to produce opinion, he may

²³² Art 45/2 d of RoP

²³³ Art 25 of the Statute of the Court.

²³⁴ See ART 91 in bahsedildiği yeri yaz

²³⁵ Case 169/89 Frederiksen v Parliament [1991] ECR 1403

²³⁶ Case 3/65 SA Metallurgique d' Esperance-Longdaz v. High Authority [1965] ECR 1065

²³⁷ Legal or Parental

object to the Court within two weeks after the appointment of the expert²³⁸. The applicant shall put forward its evidences to support the claim.

The Court may appoint one expert or three experts as a committee. Usually, the Parties reach a settlement on the name of the Expert. In case of disagreement, the Court appoints an expert by its own decision. The parties may hire their own private experts during proceedings. In one case²³⁹, when two parties have their own expert, the Court ordered these experts to appoint the official expert of the case. After the appointment, the Court addresses some particular questions to the expert, which are related with the conflict it concern. The questions of the Parties are added to the questions of the Court. The Court, then, designates a specific time to the expert to answer these questions. The time limit varies by the nature of the work. The expert begins to fulfill its duty when questions of the Court and necessary documents of the case are delivered to him.

The expert may request from the Court to produce evidences²⁴⁰ to the Case²⁴¹. During the performance, the expert is supervised by the Judge-Rapporteur of the case. After the end of the time limit, the expert may request for an extension or may present its opinion in the form of report. Once the report is presented, the Court may call the parties to submit their written observations on the subject. Also, the Court may invite the expert to the hearings to ask questions about his report. If the expert attends the hearings, he shall take an oath before replying the questions that are addressed to him²⁴². Lastly, the expenses of the expert are financed by the Court²⁴³. At the end of the procedure the party who loses the case, is ordered to pay the costs made by the Court.

d- The witnesses;

²³⁸ Art 50/2 of RoP

²³⁹ Case 285/83 Nobili v Commission. Order of 11 October 1984

²⁴⁰ i.e Hearing of witnesses or request of documents.

²⁴¹ Case 23/81 Commission v. Royale Belge order of 9 December 1991

²⁴² Art 49/6 of RoP

²⁴³ Art 51 of RoP

The Court has two fundamental provisions²⁴⁴, which give authority to summon and appoint witnesses. The Statute of the Court²⁴⁵ points out that the condition of hearing witness is regulated by the Rules of Procedure. Under the provisions of Rules of Procedure, the Court may hear a witness by its own decision. Therefore, the parties shall only apply to the Court to summon witnesses. There is no limitation for the witnesses unless the number is reasonable and acceptable. After the request, the Court may reduce the number of witnesses if there is no necessity to hear all of them.

The Court does not automatically summon witness after any request. The hearing of the witness must be essential for the case. Moreover, the applicant party should not carry his grounds only with testimonials of witnesses. The Court, in one case, has rejected the application²⁴⁶ because of lack of other evidences. Therefore, the testimony of the witness must be assisted by evidences, which are presented by the applicant. The statements of the witness must also be related with one or more facts of the case. The Court may not hear the evidence for minor issues.

The Court usually tends to hear only one witness who is mutually selected by the parties. In informal meetings, the Court asks to the parties to deliberate the name of the witness and the questions that may be referred to the witness. In case of disagreement, the parties may request for summoning their own witness. The parties may make their request; in their pleadings, in a separate procedural application under Article 91 or by a simple letter²⁴⁷. The Court may also summon the witness by its own motion. Before summoning the witness, the Court refers to the Advocate General to hear his opinion. Exceptionally, Advocate General of the

²⁴⁴ Same in appointment of experts

²⁴⁵ Art 26 of Statute of the Court

²⁴⁶ Case 2/65 Ferreria Ernesto Preoe Figli v. High Authority [1966] ECR 219

²⁴⁷ Case 49/93 Michael-Chiou v. Commission [1994] ECR 929

Case may request from Court to summon witness²⁴⁸. In application for summoning witness, the party must give out the exact reasons or facts to hear the witness. The court may reject the application if hearing the witness is inappropriate or pointless for the case.

As a principle, the request for a witness shall be made until the opening of the oral procedure. If a party applies for a witness after this period, the Court may accept this request only if; the testimonial of the witness has a decisive influence on the case and, the party in concern has just acquired the information about the existence of the witness²⁴⁹. When these conditions are not satisfied, the Court simply rejects the request. The summoning of a witness is made by an order of the Court. Once the decision is given by the Court, the parties may object to it within two weeks. The parties may object to the decision by challenging the competency or properness of the witness. If there are any other reasons for their objection, the parties shall indicate those subjects in their petition. The Court may insist on its decision and rejects the decision. When the Court finds out that the grounds of objection is well founded, it may simply renounce its order, or it may summon a new witness.

The Court may summon the witness to the official day of hearing or it may arrange a separate session for hearing the witness. The Court also informs the parties and their representatives to attend the meeting. After the hearing, the Court may ask questions by its own motion or by the request of the parties. During the session, the witness may refuse to give information about the subjects, which are related with the confidential issues, especially deriving from its profession. If a witness omits to attend to the hearings²⁵⁰, the Court may impose him a pecuniary up to 5.000 Euros²⁵¹. This rule is also applied when a witness refuses to take an oath or to give an evidence related with the case. However, if the witness proves

²⁴⁸ Art 47 of RoP

²⁴⁹ Case 77/70 Prelle v. Commission [1971] ECR 561

²⁵⁰ which he will be heard.

²⁵¹ Art 48 of RoP

that he has a valid excuse for those actions, therefore the Court may not impose penalties on him.

During the hearing, the testimony of the witness is recorded and it is read to him at the end. The witness signs the transcript and takes the oath, which is described in the Rules of Procedure²⁵². The costs of the witness, such as travel and accommodation, are supported by the Court. The Court, in its final decision, deliberates the Party to pay the costs of the witness. In addition, it may decide to leave the cost on two parties or on itself²⁵³.

b- Oral Procedure;

The aim of the oral procedure is; to reply the inquiries forwarded by the Court, and to summarize the assertions of the parties, which are presented by their pleadings. The parties may use some compound assertions that need clarification. In addition, by the oral hearings, the Court gives chance to the parties to submit the events, which are occurred after the written procedure. The oral procedure is accepted as an addition the written procedure and it shall not be understood as the duplication of the written procedure.

When the pleadings of the parties are exchanged and the evidences are examined, The President of the Court may announce the end of the written procedure. After this declaration, the President may request to the parties to submit their observations about the written procedure. This submission must be made in written. The Court arranges a hearing for evaluation of these submissions. Afterwards it fixes a date for opening of oral procedure. Also, the Court may directly fix a date for opening of oral procedure by skipping the submissions.

²⁵² Art 47 of RoP

²⁵³ Art 51 of RoP

According to Rules of Procedure²⁵⁴, the Court may skip the oral procedure in both direct actions and preliminary ruling cases. Opposite to direct actions, in preliminary rulings, the consent of the parties are sought to give this decision. However, if the subject of the case is not unique and if the court has already given a decision about a case, which possesses exactly the same subject, therefore, it may bypass the oral hearings. The Court may refuse some applications for oral hearings, which are not related with the merits of the case. For instance, the Court may not open oral hearings when it decides that the subjects of the case are not falling under its jurisdiction of the Court. Likewise, it may skip the oral hearings when it considers that the main application is inadmissible²⁵⁵.

Following to the rejoinder of the defendant, the Judge Rapporteur lodges its report and the Advocate General declares his opinion about the necessity of oral procedure. The Court shall not give a decision to open or skip oral procedure before these procedural steps. In cases, which are arising from the “Member States failure to fulfill an obligation “, the court automatically asks the opinions of the parties about oral hearings at the end of the written stage. However, the Court may not refer to the parties in cases, which are not pleaded under Art 226 of TEC. The report of Judge Rapporteur is also essential at this point. He may state that some steps of the written procedure is missing and it needed to be completed. The Court, by having this report, may not open oral hearings and complete the deficiencies, which are deliberated by the Judge Rapporteur.

Before the oral hearings, a special report²⁵⁶ is arranged by the Court describing the essential parts of the case²⁵⁷. They are written only in the language of the case. When the case is in progress, the reports shall only be given to the parties of the case and interveners. When the representatives notice that there are

²⁵⁴ Art 44A of RoP

²⁵⁵ Case 50/90 Sunzest BV Europe and Sunzest Netherlands v. Commission [1991] ECR 2917

²⁵⁶ European Court Reports E.C.R

²⁵⁷ Such as; assertions, defences, legal texts and evidences.

some deficiencies or errors, they may inform these issues to the registrar to requests amendment of the report.

There are four steps in oral hearings²⁵⁸ .;

- a- hearing of the report of the Judge-Rapporteur,
- b- hearing of the representatives of the parties,
- c- hearing of experts and witnesses,
- d- hearing of the opinion of the Advocate General.

In the oral hearings, the representative of a party; answers the questions that are commenced to his client, replies to the assertions of the counter party or intervener and states their facts and grounds about the case. These issues are mentioned in “Notes for the Guidance of Counsel²⁵⁹ “which is prepared for representatives to act more efficiently.

Initially, the representative of the applicant begins his speech at oral hearings. It is followed by the intervener who is supporting the applicant. Afterwards, the representative of the defendant makes his speech. The intervener who is supporting the defendant takes the last place in this order. The representatives shall not repeat the facts that are already submitted in the written procedure, as they are known by the Judges and Advocate General of the case. On the other hand, the Counsel²⁶⁰ does have right to remain silent. The Court does not consider this attitude as an acceptance. The explanations of the representative should be exact and brief. In addition, he should mention the sources he used when he is referring to a provision or a previous decision of the Court. The speeches of representatives shall take 15 minutes in the chambers, which has three Judges. In other chambers,²⁶¹ it can take up to thirty minutes. The party may request an additional time for his speech. This request shall be done to

²⁵⁸ Art 20 of the Statute of the Court.

²⁵⁹ Published by the European Court of Justice July/2004

~Web: www.curia.eu.int/en/instit/txtdocfr/autrestxts/txt9.pdf

²⁶⁰ Name given to advocates performing before the Court.

²⁶¹ Full Court, The Grand Chamber, Chambers with five Judges.

the Registrar before fifteen days of hearing. The limitation for speeches is not applied for the responses to the questions in hearings.

At the end of the speeches, the President of the Court asks, Advocate General and Judge Rapporteur if they have any questions to be answered by the representatives of the parties. A representative of a party may also forward questions to his colleague in oral hearings²⁶². After the representatives make their speeches and reply the questions the Advocate General submits his Opinion orally in the hearings. Usually, the summary and the conclusion of the Opinion are read before the Court²⁶³. The oral hearings shall be done in closed sessions and the speeches are not published by the Court²⁶⁴.

The parties shall not present any written document in or after oral hearings. These documents must be annexed to the pleadings in the written procedure²⁶⁵. In some occasions, the Court exceptionally permits the parties to serve documents to the case. Moreover, the parties shall agree on presenting documents in or after oral procedure. According to Court, the parties shall reach to a document, which is only new and previously unknown by them²⁶⁶.

The Court may request some evidences even after the oral hearings. Usually when the experts submit their reports to the case, new questions arise at the oral hearings. If the Court considers that these questions may essentially affect the merits of the case, it may requests some evidences, such as a new report from the expert, after the oral stage. Before this decision, the Court shall hear Advocate General for requesting these evidences²⁶⁷. In addition, the Court may fix a new date for a new oral hearing if some new facts or questions arose in the first

²⁶² Art 57 of the RoP

²⁶³ Art 59 of the RoP

²⁶⁴ Art 56 of the RoP

²⁶⁵ Art 37 of the RoP

²⁶⁶ Case 53/72 Guillot v. Commission [1977] ECR 1309

²⁶⁷ Art 60 of RoP

meeting²⁶⁸. The Court yet again should hear the Advocate General before taking this decision²⁶⁹.

Finally, when the oral hearings are completed, the Registrar prepares a document that includes the minutes of the speech. After the President of the Court and the Registrar sign the document it is accepted as an official record and the parties may copy these records²⁷⁰. The Court, then, announces the end of the oral hearings and declares their judgment.

c- Judgments;

After the end of proceedings, the Judges gather in the Deliberation Room to give their decision. The deliberation by the Judges shall be done in closed meeting²⁷¹. The judges, who have not attended the oral hearings, shall not attend the deliberations for the order²⁷². When there is a question about the administration of the Court, the Court may invite Advocate General to the deliberations. The Court may also invite the Registrar to this meeting²⁷³. During the deliberations, the official speeches of the Judges and the other attendants are recorded by the Registrar. In the absence of Registrar, the most junior judge of the Court keeps the records.

The voting starts from the most junior judge to the senior. Two possibilities appear after the end of deliberations. The Court may accept or refuse the case by quorum²⁷⁴ or the Court may order in favor of the majority of the votes. In the deliberations, the number of the judges must be uneven. The decisions, which are not taken by this method, are accepted as invalid. When the case is seen before

²⁶⁸ Case 170/78 Commission v. United Kingdom [1983] ECR 2265

²⁶⁹ Art 61 of RoP

²⁷⁰ Art 62 of RoP

²⁷¹ Art 35 of the Rules of Procedure

²⁷² Art 27/2 of RoP

²⁷³ Art 27/7 of RoP

²⁷⁴ All for acceptance or refusal.

the Chambers, the order must be given on behalf of decisions of three judges. For example, when a case is seen before a chamber of five judges, the Court shall only give a decision by voting of either three or five judges. If four judges attend to the deliberations, the most junior judge of the chamber refrains from voting. The Court may follow different ways to give its decision in the deliberation room. The Judges may either discuss the case by the help of analyses of Judge Rapporteur or discusses over the draft decision of the Judge Rapporteur. If there are no analyses or draft decisions presented by the Judge Rapporteur, the Judges may act upon their approaches to the case²⁷⁵. Indeed, these reports are not binding and they are used as informative documents in the deliberation. Therefore, the Court may give its order totally opposite to the content of these documents.

The President of the Court, the Judges of the Case and the Registrar shall sign the original text of the decision. The President of the Court or a member then reads the decision to the parties at the hearing²⁷⁶. Generally, the summary of the case and the operative part of the decision is read. The attendance of the parties is not sought as the copies of the decisions are sent to them. The judgment of the Court shall contain some basic elements²⁷⁷. These are;

- a- The statement that it is the judgment of the Court,
- b- Date of delivery,
- c- Names of President of the Court, Judges, Advocate General, Registrar, Parties and the representatives,
- d- Forms of order sought by the parties,
- e- Opinion of the Advocate General,
- f- Summary of facts and grounds for decision
- g- Operating part of the Judgment.

²⁷⁵ **Craig, DeBucra.** Eu Law Text Cases and Materials. Third Edition, Oxford, 2003. p.89

²⁷⁶ Art 37 of the Statute of the Court

²⁷⁷ Art 63 of RoP

The judgment of the Court binds the parties when it is delivered to them²⁷⁸. The decision determines the rights and the obligations of the parties arising from the case. The Court may rectify its decision by the application of a party or by its own motion. The application must be done by the party within two weeks of delivery of the decision. Before the reports of the Court are publicized, minor errors in the decisions are rectified by the Court without application of a party. The rectification does not mean an appeal for the decision. Therefore, the parties shall not apply to amend the decision or revise the facts of the case²⁷⁹. However, if the Court omits to answer a claim, which was previously requested, the party may request a supplementary judgment. This request shall be done within one month of delivery of the decision²⁸⁰. For instance, in one case, the Court has rectified its order, which it has not given a decision about the costs of the Judgment²⁸¹.

When the court is giving its decision about the case, it also gives an order about the costs, which are expended during the proceedings²⁸². Principally, the Court leaves the burden to pay the costs to the unsuccessful party. However, this situation may change by the order of the Court or by the agreement of the parties. The parties shall agree on the payment of the costs in the proceedings. In the absence of an agreement, the Court shall order a party or parties to reimburse the costs. If there is more than one party, which is unsuccessful, the Court shares the costs to the parties in its decision. In the main decision, the opposite parties of the case may be found partially successful and unsuccessful²⁸³. In this situation, the Court may order both parties to share the costs of the proceedings. When a party causes an unnecessary expenditure during the case, the Court may leave these costs on him even if he succeeds in the case²⁸⁴.

²⁷⁸ Art 65 of RoP

²⁷⁹ Case 27/76 United Brands Co. v. Commission [1978] ECR 345

²⁸⁰ Art 67 of RoP

²⁸¹ Joined Cases 89,104,114,116,117,125,129/85 Ahlström Osakeyhtiö v Commission [1994] ECR 99

²⁸² Art 38 of Statute of the Court.

²⁸³ Especially in the cases for compensation.

²⁸⁴ Case 271/94 Eugenio Branco Ltd v. Commission, decision of 11 July 1996

D- Preliminary Rulings:

The procedure of preliminary ruling differs from direct actions by some various aspects. The Judge of the national Court or his registrar makes the application for preliminary ruling by an order. The application shall include; the title of the Court, details of the facts and the conditions that lead to the request, observations of the Court on the issue. The questions in the application shall be clear. When the Registrar delivers the application, he translates the documents into all official language of the community and serves to the Member States in concern. The order for application and annexes are also sent to these Member States in its original language.

The first and the basic can be seen at the parties of the cases. In direct actions, the applicants of the case shall be; a person, a member state or an institution. In references for preliminary ruling, there are no parties in the first sense. Those persons who are parties to the proceedings before the referring court are entitled to submit observations in the preliminary ruling proceedings. It may be also a Member State or Community Institutions²⁸⁵. Theoretically, the applicant in the references for preliminary ruling is a National Court of a Member State. According to the Treaties, only a court of a Member State may refer to the Court of justice for a preliminary ruling. In these cases, the applicant does not have an obligation to point out the defendant in its case. According to the Statue of the Court²⁸⁶, the Registrar shall designate the Institution, which is related with the case. When a national court refers to the Court of Justice, it requests for an interpretation of a specific Community Law. The Institution, which has solely acted the provision in concern, is invited to the case by the Registrar. If there is more than one Institution enacting the provision, the Registrar notifies them to lodge their observations. The litigants before the national court are not entitled to refer to

²⁸⁵ Lasok K.P.E. The European Court of Justice, Practice and Procedure, 1984, p.57

²⁸⁶ Art 23 of Statute of the Court

the Court of Justice on their own. Principally, the parties, which have participated in the proceedings before the national court, are shown as the parties of the case of preliminary ruling. They are also notified by the Registrar to forward their observations. The parties of the case, shall forward their observations within two months of their notification. This time limit may be extended only once for ten days by the Court.

The representation of the parties is also different in preliminary rulings. The representatives, who are qualified to perform before the Court of a Member State, shall also represent the party in preliminary rulings²⁸⁷. The national law of the Member State may not oblige the party to be represented by a lawyer in proceedings. In this situation, the party in concern may attend to oral hearings and submits his own observations. Therefore, the necessity for a representative as in direct actions is not sought in preliminary rulings. Legal aid for the request of preliminary ruling is similar with the cases in direct actions. Yet, the applicant shall initially request legal aid from his own Member State. In case of refusal, the Court may grant legal aid to the applicant.

In written observations, the parties propose their own answers to be given by the Court to the questions submitted by the national court. They scrutinize the relevant facts of the case, evaluate the implementation of the provisions, and compare the national legislation with the Community provisions. These observations are sent to other parties of the case. However, the parties are not bound to respond these observations in written. When they attend to oral hearings, they may reply to observations, which are forwarded by other parties. The importance of the written observations appears at the oral hearings. Even if a party does not forward its own observations, it may launch his arguments or responses in the oral hearings. On the other hand, the Court may decide to bypass the oral hearings in the case. Therefore, the party in concern may have no word on the

²⁸⁷ Art 104/2 of RoP

decision that will be given by the Court²⁸⁸. After the written observations are presented, the Court draws up a Report including; the suggestions which are put forward in the written observations. This report is sent to parties of the case. When a party notices an error or deficiency in the report, he informs the Registrar for correction. The decision for making amendment on the report is on the discretion of the Judge Rapporteur²⁸⁹.

The Court may by skip the oral hearings under some conditions. After the delivery of written observations, the parties may apply to the Court to open oral hearings. This application shall be done within three weeks of delivery of written observations²⁹⁰. A party, who requests for an oral hearing, shall point out his reasons for this application. In the absence of application, the Court may dispense with the oral hearings after informing the parties and hearing the opinion of the Advocate General.

According to the Rules of Procedure, the national Court who refers to the Court of Justice may request an accelerated procedure in case of urgency. The request of the applicant is brought before the President of the Court by the proposal of Judge Rapporteur. After the delivery of the application, the President of the Court may directly deliberate a date for oral hearings by taking the opinion of Advocate General. The Court deliberates a time limit for the parties to launch their written observations on the case. This duration begins from the delivery of the application and it shall not be less than fifteen days²⁹¹

In direct actions, the parties of the case are vested with rights and obligations by the decision of the Court. When a national Court refers to the Court of Justice for a preliminary ruling, the Court just interprets the Community in its

²⁸⁸ **A Report by the Members of the EC Section of the British Institutes Advisory Board Chaired by the Lord Slynn of Hadley.**The Role and Future of the European Court of Justice.. London. 1996. p. 17

²⁸⁹ Art 104/4 of RoP

²⁹⁰ *ibid*

²⁹¹ Art 104/A of the RoP

decision. Principally, the Court shall not give any rights or create liabilities to the parties. However, the Court may find a measure in breach of Community Law. The decision of the Court implicitly binds the Institutions and the Member States of the Community. Moreover, the national Court in concern shall give its decision parallel to the order of the Court of Justice²⁹². When the Court notices that the reference in concern is already been decided by a previous order of its own, it shall decide to respond to the reference as it has been responded to the previous one in the past. The Court shall ask the opinion of the Advocate General before acting in that way²⁹³

The costs of natural or legal persons, which have requested an application for preliminary ruling, are deliberated by their own national court of the case. The parties, which have attended to the proceedings, such as Member States or the Institutions of the Community, shall have no right to request their costs from other parties²⁹⁴.

²⁹² Case 112/76 *Manzoni v Fonds National De Retraite des Ouvriers Mineurs* [1977] ECR 1647

²⁹³ Art 104/3 of the RoP

²⁹⁴ Art 104/6

VI. CONCLUSION AND OPINIONS

The European Court of Justice has a significant role in the Union Law. Not because its judicial identity, the Court might be considered as the key factor at the evolution of the union. The Treaties have given the Court wide discretion and jurisdiction area. By the help of these elements, the Court organizes the flow of the European Union law. This characteristic of the Court accelerates the integration of the Union.

Maybe the most challenging issue about the Court is its physical capacity. Although the Treaties have seen several amendments, the workload of the Court increases time to time. It is obvious that the acquisition of the Union is growing constantly. On the other hand, the Court's capacity to scrutinize the references and conflicts is briefly inadequate. Although the Court is assisted by the Court of First Instance, need for time and personnel is increasing every day. Possible solutions are forwarded by the experts of this subject. In my opinion, to enrich the interaction within the Union, the Court may be represented as a national Court in Member States. By this way, accession to the Court may be more easy for the parties to solve their disputes arising from the Union Law. Moreover, the number of employees in the Court shall be increased to act more rapidly in the cases.

The Court has two essential missions in the Union. First, it ensures that the law of the Union is observed. Secondly, it shows the way for the implementation of the Union law. The orders given in the preliminary rulings point out the exercise of provisions to the Member State courts. We can say that the Court is assessing the requested provisions before they create any conflicts in Member States. In other cases, the Court usually endeavors to bridge the breaches of Union Law. Decisions which are given in the cases create a common precedent to the parties and to the Union. The Institutions of the Union shall obey these decisions while they are enacting or implementing a measure. All these efforts are designed for the proper exercise of the Union. While participating in this system, by its decisions, the Court sometimes directly or indirectly effects the legislative and administrative organs of the Union. The authors, who work on the Law of the Union, name this effect as “judicial review”.

The litigation before the Court of Justice is arranged by some specific rules. The provisions which operate the proceedings are influenced from the provisions of the Member States. Although there are some several similarities between them, some of the measures are quite different from national codes of procedures. This difference appears because of the nature of the Court of Justice. The founders of the Treaties have empowered the Court to see various types of actions arising from the Union law. The procedure, therefore, varies in cases which have different subjects. However, in its decisions, the Court aims to unify the procedural issues by its decisions and by the help of the Rules of Procedure.

Lastly, the Court, which is the last resort for the judicial remedies in the Union, is obliged to protect uniformity in the interpretation of the Union law. It possesses different identities such as being a constitutional court or an appeal court. As it is mentioned above, the Court faces some problems while its performing its tasks. However, the existence of the Court and its performance create a positive effect to the Union and it gives a priceless value to the integration of the Union.

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VIII. LIST OF CASES

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Case 33/80 Albin v Council and Commission [1981] ECR 2141

Case 48/65 Alfons Lütticke v. Commission [1966] ECR 169.02

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Case 3/65 SA Metallurgique d' Esperance-Longdaz v. High Authority [1965] ECR 1065

Case 42,49/59 SNUPAT v. High Authority [1961] ECR 53

Case 92/78 Simmentahl v. Commission [1979] ECR 777, 811, 1129

Case 284/91 Suiker Export v Belgium (1992), Case C-59/92 Hauptzollamt Hamburg – St Annen v Ebbe Sönnischen Gmbh (1993)

Case 50/90 Sunzest BV Europe and Sunzest Netherlands v. Commission [1991] ECR 2917

Case 27/76 United Brands Co. v. Commission [1978] ECR 345

Case 175/73 Union Syndicate v. EC Council [1974] ECR 917

Cases 209 – 215 – 218/78 Van Landewyck. Commission [1980] ECR 3125-3236-3237

IX. TABLES RELATED WITH THE WORKLOAD OF THE COURT

16. General trend in the work of the Court (1952-2004) –

New references for a preliminary ruling (by Member State per year) ¹

	BE	CZ	DK	DE	EE	EL	ES	FR	IRL	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	SI	SK	FI	SE	UK	Benelux 2	Total
1961																	1										1
1962																	5										5
1963														1			5										6
1964										2							4										6
1965				4				2									1										7
1966																	1										1
1967	5			11				3						1			3										23
1968	1			4				1		1							2										9
1969	4			11				1						1													17
1970	4			21				2		2							3										32
1971	1			18				6		5				1			6										37
1972	5			20				1		4							10										40
1973	8			37				4		5				1			6										61
1974	5			15				6		5							7								1		39
1975	7	1		26				15		14				1			4								1		69
1976	11			28				8	1	12							14								1		75
1977	16	1		30				14	2	7							9								5		84
1978	7	3		46				12	1	11							38								5		123
1979	13	1		33				18	2	19				1			11								8		106
1980	14	2		24				14	3	19							17								6		99
1981	12	1		41				17		11				4			17								5		108
1982	10	1		36				39		18							21								4		129
1983	9	4		36				15	2	7							19								6		98
1984	13	2		38				34	1	10							22								9		129
1985	13			40				45	2	11				6			14								8		139
1986	13	4		18		2	1	19	4	5				1			16								8		91
1987	15	5		32		17	1	36	2	5				3			19								9		144
1988	30	4		34			1	38		28				2			26								16		179
1989	13	2		47		2	2	28	1	10				1			18			1					14		139
1990	17	5		34		2	6	21	4	25				4			9			2					12		141
1991	19	2		54		3	5	29	2	36				2			17			3					14		186
1992	16	3		62		1	5	15		22				1			18			1					18		162
1993	22	7		57		5	7	22	1	24				1			43			3					12		204
1994	19	4		44			13	36	2	46				1			13			1					24		203
1995	14	8		51		10	10	43	3	58				2			19	2		5				6	20		251
1996	30	4		66		4	6	24		70				2			10	6		6			3	4	21		256
1997	19	7		46		2	9	10	1	50				3			24	35		2			6	7	18		239
1998	12	7		49		5	55	16	3	39				2			21	16		7			2	6	24		264
1999	13	3		49		3	4	17	2	43				4			23	56		7			4	5	22		255
2000	15	3		47		3	5	12	2	50							12	31		8			5	4	26	1	224
2001	10	5		53		4	4	15	1	40				2			14	57		4			3	4	21		237
2002	18	8		59		7	3	8		37				4			12	31		3			7	5	14		216
2003	18	3		43		4	8	9	2	45				4			28	15		1			4	4	22		210
2004	24	4		50		18	8	21	1	48				1	2		28	12		1			4	5	22		249
Total	495		104	1414		92	153	676	45	844				57	2		610	261		55			38	50	396	1	5293

General trend in the work of the Court (1952-2004)

15. New cases and judgments

Year	New cases ¹					Applications for interim measures	Judgments ²
	Direct actions ³	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total		
1953	4				4		
1954	10				10		2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43		10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37		24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79		64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	62	69			131	5	78
1976	52	75			127	6	88
1977	74	84			158	6	100
1978	147	123			270	7	97
1979	1218	106			1324	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	217	129			346	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165
1985	294	139			433	23	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	193	179			372	17	238
1989	244	139			383	19	188
1990 ⁴	221	141	15	1	378	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	5	210
1993	265	204	17		486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	6	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
2004	220	249	52	6	527	3	375
Total	7528	5293	615	57	13493	339	6465

Cases pending as at 31 December

13. Nature of proceedings (2000-2004) ¹

