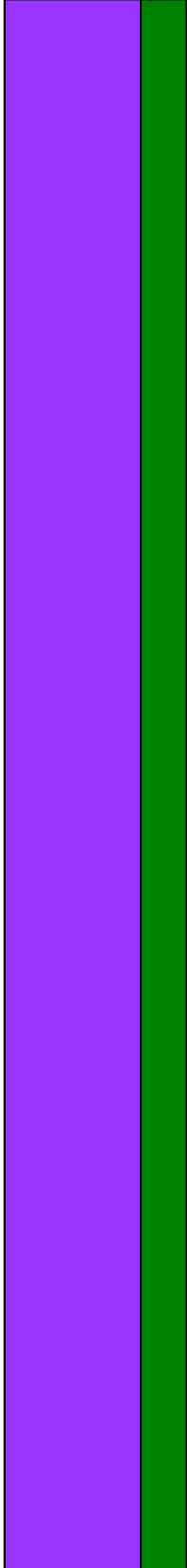




## **The good, the bad and the ugly**

Would you like to know what it really takes to achieve top marks in your exams? What makes the difference between a really high-scoring exam answer; a passable answer and a really poor answer?

Well, look no further, because Q&A author and experienced examiner Mike Cuthbert provides you with the answers here.



**The High Court is hearing a case which raises the question of the validity of a Directive and the interpretation of Article 141 EC in relation to the facts of the case. The parties are not directly affected by the EC law at issue but wish to see it tested in the courts.**

**The judge recognises that the European Court of Justice has a heavy workload and can take up to two years to answer a request for a preliminary ruling under Article 234EC. However, she decides to send a request dealing with the interpretation and application of Article 141EC, even though the court has not ascertained all the facts surrounding the case and there is a volume of case law on the article. The judge decides not to include the question of the validity of the Directive in the request.**

**Discuss the soundness of the judge's decision to make a reference.**



## The Good

The objective of the preliminary ruling procedure is to provide definitive judgements regarding the interpretation and validity of Community law. Any court or tribunal in the EU can make a reference to the European Court of Justice if it needs to obtain a definitive answer to a question of interpretation of the EC Treaty or the interpretation or validity of a Community act. The principles for requesting a preliminary ruling are found in Article 234 EC and the actual procedure for English courts is laid out in Rule 68 of the Civil Procedure Rules. Before coming to a conclusion about the judge's decision it is necessary to review the scope of Article 234 EC and the case law associated with it.

As the High Court comes within the category of a 'court' it can be seen that the preliminary ruling procedure is available to the judge. The questions raised in the problem of interpretation and validity are covered by Article 234(1) EC so they come within the jurisdiction of the ECJ. The High Court comes within Article 234 (2) EC because there is an appeal to the Court of Appeal from any judgment given in the case. More importantly Article 234(2) EC does give the judge discretion as to whether they feel that such a reference is 'necessary' to enable them to give judgement. However, in the instant case is there such a necessity? There may be existing case law on the interpretation of Article 141 EC, which deals with equal pay, but this does not mean that no reference can be made. The ECJ respects its previous judgements but it is not bound to a system of binding precedent found in common law systems like the UK. In Da Costa (1963) the ECJ ruled that a question can still be referred under the Article 234 EC procedure even if the ECJ has ruled on a similar question as it might depart from the earlier ruling.

With regard to the discretion of the judge to make a reference are there any other factors to be taken into account? The information produced by the ECJ and our Civil Procedure Rules indicate that a reference can be made at any stage in the proceedings. However, in order to assist the judge considering a reference some non-binding guidelines have been produced to assist the UK judge. Denning MR in Bulmer v Bollinger said that the facts should be decided first so that the question as to whether it was 'necessary' could be settled. He also suggested that a lower court should deal with the case and leave it to a higher court to decide whether or not to make a reference. A view echoed by Lord Lane CJ in R v Plymouth Justices, Ex p. Rogers [1982] QB 863. Other guidance has been given by Bingham MR in R v International Stock Exchange, ex p Else (1993) where he reiterated the need to ascertain the facts first. The ECJ also states that it is desirable for the national court to ascertain the facts first. In Pretore di Genova v Banchero (1993) the ECJ said that the national court must define the factual and legal framework in which questions arise before making a preliminary reference. This may not seem logical in that questions of fact and national law may not be referred and the ECJ should not rule on the application of EC law to particular facts of a case (Arsenal Football Club plc v Reed [2003]). Although in some cases, like R v HM Treasury, ex p BT (1996) the

answers provided by the ECJ are so specific that it could be classed as application. For the

purposes of this question it is sufficient to say that these are guidelines and are not binding on the judge, who still has the discretion to make the reference.

If we assume that the reference on the interpretation of Article 141 EC is made there is another problem facing its success. The ECJ sees the procedure under Article 234 EC as signifying the cooperation between the national courts and the ECJ in ensuring that EC law is correctly applied. It is very rare for the ECJ to refuse a reference if it comes from a court or tribunal. It has done so where it thought that an attempt was being made to question the compatibility of another Member State's law with EC law, as in Bacardi-Martini v Newcastle United FC (2000). More significantly it has refused a reference where there was an absence of any real legal dispute between the parties, as in this problem. In the two cases of Foglia v Novello in 1989 and 1990 the ECJ refused the reference on this ground. This is not something that the ECJ does lightly, as stated in Parfumerie-Fabrik v Provide (1989). The ECJ is likely to remind the High Court judge, as it did in the Meilicke case, that it does not give opinions on general or hypothetical questions. The reference is very likely to be declared inadmissible.

The judge decided not to include in the reference the question raised in the case about the validity of the Directive and this is within her discretion. Questions can be raised under the Article 234EC procedure on the validity of the acts of the Community institutions and a Directive is defined as a Community act under Article 249EC. Such a challenge was made in R (on the application of BAT) v Secretary of State for Health (2003). However, given the role and objective of the ECJ to have the consistent application of EC law in all the Member States, it does not like individual national courts to declare a Community act invalid. This is because of the legal implications such a declaration would have for all the other States where EC law was binding and has supremacy over national law. In the Foto-Frost case (1985) the ECJ held that national courts were entitled to find that acts of the Community institutions were valid, but that they had no power in normal proceedings to declare such acts invalid. If a national court suspected that an act maybe invalid the ECJ stated that a reference must be made.

In conclusion the judge did not have to make a reference concerning the interpretation of Article 141 EC. She could have used the principle of *Acte Clair*, explained in the CILFIT case (1982) to decide that the previous ECJ case law was sufficient to deal with the facts of the case before her. As she did make a reference it is likely that the ECJ will declare it inadmissible because there is no real legal dispute between the parties. Finally, on the question of validity of the Directive the case law of the ECJ is clear. She has to make a reference if she feels that there are grounds for questioning its validity.

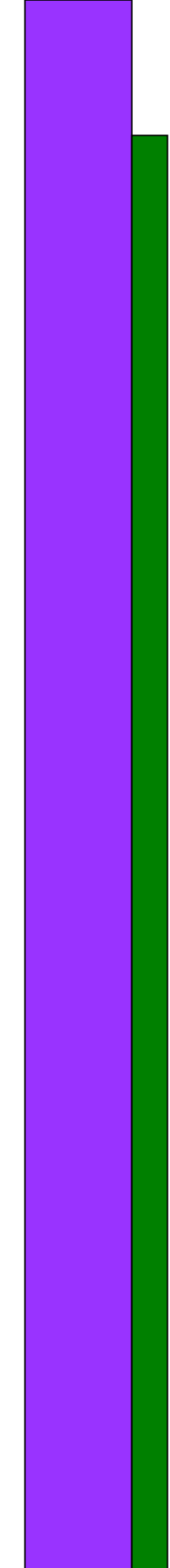
# The Bad

The preliminary referencing procedure in Article 234EC provides a process where national courts and tribunals can ask the ECJ for their advice on questions of validity and interpretation. Article 234EC provides that a court like the High Court may make request a ruling on the interpretation of the treaty or the interpretation or validity of a Community act. A Directive is a Community act.

The first issue is whether the reference should be made given that there is already case law on the interpretation of Article 141EC and the ECJ is overburdened. The ECJ generally encourages national courts to make references because they see it as part of the cooperation between the different courts and the ECJ. The High Court comes within Article 234(2) EC because Article 234(3) only applies to courts where there is no judicial remedy against their decisions, such as the House of Lords. The question states that there is a volume of case law on the Article 141 EC so maybe the judge should read this and not make a reference. She can decide the question of interpretation herself and this would be quicker as a request under Article 234EC may take up to two years. The wording of Article 234 (2) is where the reference is necessary in order for the court to come to a judgment, so if it is not necessary she does not have to make a reference. As far as the ECJ is concerned she has the choice as they state that a reference can still be made even if there are already rulings on the article by the ECJ.

The second issue is that the question states that the facts have not yet been ascertained by the court. As Lord Denning said this may mean that the judge cannot really decide if the reference is necessary as the case might be settled on English law. How does the judge know that the reference is necessary? If the answer to the question of EC law is X will it mean that the judge will find for the claimant or if it Y will she find for the defendant? This is what some judges' mean by necessary. Lord Denning in the BabyCham case gave some guidelines to judges about what to do about making a reference. One of the points he stressed was that it was important to decide the facts first given that there will be a long delay before the answers come back from the ECJ. The ECJ prefer for the facts to be ascertained in advance of the reference as well.

The third issue is that the question states that there is no real dispute between the parties, who just want to get the views of the ECJ. This kind of speculative action is not welcomed by the ECJ as they see it as a waste of their time and a misuse of the procedure. There were two cases surrounding the dispute between Foglia and Novello and both involved an Italian court making a reference under Article 234EC for the interpretation of another article of the Treaty. Both cases were rejected by the ECJ because there was no real dispute but rather a hypothetical legal argument which was not the purpose of the preliminary ruling procedure.



The final issue is one concerning the validity of the Directive. Although this question is not included in the reference it could have been. This is because Article 234EC includes questions on the validity and interpretation of Directives. The ECJ does not approve of judges in national courts declaring such Directives invalid because of the implications this has for Community law. This does not matter in this problem as the judge did not include it in her reference but although she can declare the Directive valid she cannot declare it void.

**[This answer is poor but it shows potential. What it is missing is a conclusion but more importantly authorities to support and develop the points.]**

# The Ugly

This question is similar to the facts of Folia v Novella where a hypothetical case was brought before an Italian court because a Frenchman imported some alcohol from Italy. There was no real dispute between the parties, only a friendly rivalry as to who should pay the customs duty. The French customs levied a tax and the importer paid it. This action is where the Frenchman is seeking to recover the tax from the Italian exporter. As there was no real dispute between the parties the European Court of Justice refused to answer the questions sent to it on the interpretation of Article 90EC.

Therefore the judge in the problem should not make a reference because the parties are not directly affected by the EC law at issue and are only bringing an academic problem before the court. If a reference is made by the judge she will do this under Article 177 of the EC Treaty which allows for questions to be sent to the European Court of Justice on matters of interpretation and validity of Community law.

If the judge thinks that the Directive is not valid she should look at Article 173 EC which deals with judicial review. This article gives the grounds which have to be satisfied if a Community act is to be declared invalid. This might be on the grounds of not fulfilling a procedural requirement such as not consulting the European Parliament, as happened in the case of SA Roquette Frere v EC Council. If the judge thinks that the Directive is invalid she can make such a declaration so that it will not be applied in English law.

A Directive is created to harmonise national law and Community law on the same lines. Directives are subject to Article 189EC and are addressed to Member States themselves or named individuals. To fully understand the definition of a Directive the case of van Gend en Loos (1963) illustrates the leading principles that need to be taken into account. For example van Gend en Loos (1963) sets out the criteria that a Directive must be clear, precise and unconditional. With no room or need for further implementation.

As Directives are binding as to the results to be achieved. However, it is left to the national courts to select the adequate method in terms of implementing the Directive. When implementing a Directive the period in which to implement the Directive is given. This can be from one to five years depending on the complexity of the case and the urgency of the legislation. Conversely, it has been known and illustrates that in some cases a Directive has not been implemented or implemented accordingly. As in Commission v UK or Francovich v Italian State. Commission v UK illustrates the fact that the UK failed to implement legislation to allow recording equipment on road transport.

Moreover, this can comfortably lead onto direct effect within a Directive as in van Duyn. Similarly, horizontal effect can be linked to this question as illustrated in Marshall. In Marshall, Mrs Marshall brought a claim and succeeded whilst relying on Community law.

Whereas Duke on the other hand, although her case was very similar her case failed as she constituted to being a private sector employee.

Next to discuss is the issue of the interpretation of Article 141EC and its application to the facts of this question. Firstly one must define what Article 141 EC requires and is about. Article 141 EC is defined as being 'equal pay for work of equal value'. A case to help and explore and define what this requirement demands is to look at the case of Defrenne v Sabena. Defrenne v Sabena illustrates the principle that air hostesses and cabin stewards should be paid the same, as they are doing equal work.

Finally there is the issue of preliminary references under Article 234EC post Amsterdam. Van Gend en Loos demonstrates the usage of preliminary references as in this case the Dutch court referred to the ECJ for uniformity on interpretation of the treaty. This procedure is done under Article 234EC. The second required part is the interpretation done under Article 177EC.

The ECJ gives its advice or assistance to the national court and refers it back to that court to apply to that case. In this question guidance is asked on the matter of Article 141EC. It is important to reiterate the point this is done under Article 234 post Amsterdam. As a matter of preliminary reference it would also be beneficial to mention that preliminary references in which a court may send a question or seek advice from the ECJ. Under Article 234EC this is possible. However, in return the ECJ creates a secure uniformity on the interpretation and refers it back to the court. It is also important to mention that the ECJ is not obligated to answer the question if it feels that the court can answer it itself.

To draw this discussion to an end it is necessary to touch on all of the above points made in order to successfully answer the question. It is possible to suggest, following case law which illustrates both sides of each required point, could enable the court to make a concrete decision without the need and interpretation under Article 177EC of the ECJ.

**[This answer carries a health warning: This answer can seriously damage your chances of passing! The student did not prepare for this topic and so is using what material they think they know to put together an answer which confuses Articles and the law.]**