

Answers
to the

Questionnaire for the 2004 Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union: "The quality of European legislation and its implementation and application in the national legal order"

Austria

1. Preventing interpretation problems

Preliminary remark:

As the Austrian Administrative Court has only judicial functions, it is not directly involved in the legislative process (neither with respect to national law, nor with respect to Community law and its preparation). The competence lies with the Federal Chancellery (to be precise: with the Constitutional Service of the Federal Chancellery, which is a unit responsible for matters of constitutional law as well as for general questions of administrative law, such as administrative procedure or legislation on the whole). The Constitutional Service has amended the Legistic Guidelines with respect to the implementation of EU-law by national legislation (see below, 1.3.1.).¹

Nevertheless, the court answers also the questions under chapter 1 of the questionnaire. It has to be stated, that the questions primarily are answered from the point of view of the court, which, of course, is highly interested in a sufficient quality of Community legislation. The problem for the court in the application of Community law lies mainly in the field of examining national legislation in relation to Community law, as the court is bound by the principle of supremacy of Community law and therefore

¹ According to an oral information by a member of the staff of the Federal Chancellery there is practically no time to devote oneself to problems of a complete and correct implementation of Community law in the process of examining draft bills. Only severe problems with respect to Community law could be addressed.

cannot simply apply the national provisions implementing Community law. Most problems with respect to Community law concern the question of compliance of national law with Community law.

1.1.1. Does the present lack of clarity on the hierarchy of European legal norms pose specific problems for the national legislator and courts? If so, which?

It does not seem, that there is a specific problem with respect to a "lack of clarity on the hierarchy of European legal norms", as the problem of the hierarchy of norms always will be there, no matter, how sophisticated or "simple" the hierarchical structure of the legal system will be.

It is doubtful, whether there could be achieved a "higher clarity" with respect to the hierarchy of rules (cf. the proposals of the Lamfalussy report [Final report of the Committee of wise men on the regulation of European Securities Markets, Brussels, 15 February 2001] and its present implementation according to interinstitutional agreements; "Four-level-approach"; framework principles adopted by European Parliament and Council, Commission issues - together with the European Securities Committee and the European Securities Regulators Committee - technical implementing measures; the Committees that should also advise the Commission and help to draft "common standards" for the implementation of the "technical implementing measures"; there will also arise the problem of the conformity of the implementing rules issued on the basis of general rules with those general rules; although those proposals have been worked out in a group of wise men, it does not seem that they can contribute to solve the problem that is dealt with in chapter 1 of the questionnaire).

It is also doubtful, that the discussed limitation of instruments could lead to a reduction of interpretation problems. The question, whether a specific norm is in line with primary law always can arise, no matter, how many layers of a hierarchically structured system you have. If the number of instruments is reduced, there even might arise the problem that instruments of the same level logically depend one from the other. Moreover, even now, many questions do not arise, because there is a problem of hierarchical inter-dependence, but of the relation of norms regulating different fields of Community law (e.g.: the regulation of the Common market organisation and the norms governing State aid; of course, finally also in such a context there arises the question of hierarchy, as the principle of prohibition on implementation according to art. 88 para 3 EC is a rule of primary Community law; cf. Annex 1, dealing with the

judgment of the Administrative Court of 20 March 2003, 2000/17/0084, where the question of the relation of regulations of the Common market organisation of beef and Community law on State aid arose).

1.1.2. To what extent can the proposals in the Convention or any other form of simplification and hierarchical classification of the legal instruments of the European Union help to improve implementation and application of these instruments in the national legal order?

See 1.1.1.

There are doubts, whether such changes can influence the problems of interpretation.

1.1.3. To what extent would the differentiation of the legal instruments of the European Union which has also been proposed (open coordination, self-regulation and co-regulation) create new problems for the implementation and application of Community legislation in the national legal order?

See answer to 1.1.1.; it might well be, that there do not arise more problems, although there might arise "specific problems", but those would not be so different from the problems arising now. Cf. the hint to the legislative process according to the Lamfalussy report.

1.1.4. Do you expect that transparency of the entire process of drafting of European legislation will improve the implementation, interpretation and application of European legislation?

Yes, indeed!

Transparency also means, that the main ideas behind the rules, the reasons, why a specific clause is used or why a provision has been changed, etc. can be traced by those who have to apply the norms.

In many cases the meaning of clauses of directives and regulations could be clarified if there were travaux préparatoires that explain the substance of the provision at stake. This applies especially to provisions that have been changed in the legislative procedure (so that it is not enough to have a look into the proposal of the Commission and the reasons given in it; in this context, it has to be pointed out, that it is very helpful, when there are detailed explanations concerning an amended proposal of the Commission).

It should be the aim to enlarge the information given in the PreLex data base by gradually taking up also material on older provisions and adding substantive material on the discussions in the Council.

1.1.5. What contribution would the availability of systematic and complete travaux préparatoires make to preventing interpretation problems (see also point 2.1. below)?

It would speed up the interpretation process and in many cases help to exclude one or the other possible hypothesis on the meaning of a clause, thus avoiding uncertainty and reducing the number of cases in which there is reasonable doubt in the sense of the CILFIT formula.

To this end the information contained in the PreLex data base is very helpful. As soon as the information in this data base will date back some time it will be easier to interpret Community law.

1.2. Implementation techniques; what is the method adopted for transposition?

Preliminary remark:

From the point of view of the court that has to apply Community law, no matter how it has been transposed (correctly or not; in full or only partly), there are no great differences between the different methods of transposition. The court has to examine, whether the national rule is in compliance with Community law. Therefore, it has to apply the Community law and interpret the meaning of the Community law that has been transposed, no matter, whether the national law uses the terms of a directive or not. This applies to any administrative field, to tax problems as well as to questions of environmental impact assessment and all other fields of administration. Therefore, interpretation problems normally will not depend on the chosen method of transposition. If the national legislator uses the same terms as the directive, the national law will be in compliance with Community law. But the contents of the national norm has to be interpreted by interpreting the terms in the directive. If the national legislator, on the other hand, uses another term or two or more terms for one term in the directive, there might arise the question, whether the national norm comprises all possible cases that are comprised by the broader term in the directive. To examine this, the court has to interpret the notion in the directive as well, as there arose the problem of interpretation in conformity with Community law or of direct application of the directive (in case the requirements for such an application are fulfilled), when the

national norm does not comprise all possible cases. So, the problem of interpretation for the court is more or less the same in both cases.

1.2.1 What do you think about the adoption of the terminology and system of European legislation in implementation? What problems does this give rise to in practice?

There are no great differences between the "method" to "adopt" the "terminology and system" of European legislation and the "method", not to stick to the terminology of the European legislation. Interpretation problems in both cases are more or less the same: it does not matter, whether you say "bank" in the national legislation or "credit institute", when implementing a EU norm that speaks of "banks" or "credit institutes". What counts, is, that each body that is comprised by the clause in the Community regulation also is comprised by the national regulation. Interpretation problems can arise with respect to the notion "bank" as well as with respect to the notion "credit institute", even when you use the same expression as in the Community regulation. On the one hand, "Bank" might be a wider or narrower expression in national law, on the other hand the scope of the term 'bank' at EU level has to be interpreted, anyway (to scrutinise whether the implementation complies with Community law). Interpretation according to the principle of conformity with EU law will be necessary in any case.

1.2.2 Would you prefer to confine implementation to ad hoc adaptation with maintenance of the legislative system concerned as long as possible or would you prefer to bring the entire system of national legislation in that field into line with European legislation (see point 5 of the discussion paper where a number of examples relating to environmental protection and VAT are given). Does the one or the other choice in practice result in problems?

No preference.

The solution might differ from field to field, depending on the differences in existing legislation from the Community regulation.

See also the description of problems concerning the implementation of 6th VAT Directive, 1.2.5. Problems arise as well when the whole system of a directive is taken

over in the implementing act as when there are only adaptations; in both cases there are frictions, either as the new system of a single Act does not fit properly into the rest of the national legal order or in trying to stick to the traditional national system the legislator runs the risk not succeeding in transposing the directive completely.

1.2.3 Does your member state use methods for accelerated implementation such as referral and delegation? How often does this occur? What in practice are the pros and cons of the use of such methods?

There are cases where implementation can be carried out by means of regulations of the administration (without the necessity to change an Act of Parliament); e.g. with respect to the Common organisation of the market of agricultural products. But there are constitutional restrictions to this method as there is a strict principle of legality in the Austrian Federal Constitution (cf. Constitutional Court, 6 June 1998, V 6/98, V 7/98 and V 8/98, CCR 15.189/1998; against *Öhlinger*, Legalitätsprinzip und Europäische Integration, in: 75 Jahre Bundesverfassung, Österreichische Parlamentarische Gesellschaft (Hrsg.) - Austrian Parliamentary Society - 1995, 645, the constitutional court held, that it is necessary to have a determinate basis in an Act of Parliament, even when there is a directive the contents of which is to be transposed into domestic law.

A specific problem arises with respect to administrative penal law declaring the breach of directly applicable Community law (a regulation) as constituting an offence. In its decision of 29 January 2003, 2001/03/0194, the Court had no objections against such a clause, as the regulation described the behaviour of the persons concerned precisely enough. This indicates, that the Court saw problems, when the regulation was not precise enough. There seems to be no case-law on the question, whether it was possible to issue a national provision to make the provision precise enough.

1.2.4 Could you indicate fields in which specific problems of interpretation have occurred or are occurring in implementation? If so, what kind of problems are these and what is their cause? (see also question 2.1.1).

It cannot be said that there are areas where there are specific problems or more problems than in other areas. Problems in the transposition of Community law can arise as well in the field of environmental law as in social law or tax law.

Besides problems with respect to the Value Added Tax directive and the Bird and Habitat directive that are described in more detail below (see 1.2.5.), there have arisen questions of interpretation especially in the field of the agricultural market organisations (cf. the examples given under 2.1.8; moreover, there are also problems with respect to the concepts of the producer and holdings in Regulation (EEC) N° 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector or other provisions) and with respect to State aid. But there have also been isolated problems with respect, e.g., to residence clauses (in the Trade, Commerce and Industry regulation Act).

There might as well arise problems with respect to provisional court protection; so far there have only been a few applications in this context.

The reason of the difficulties partly lies in the difficulties concerning the access to travaux préparatoires or problems in the definitions in the provisions as well as difficulties with respect to the translation (there are cases where the German version does not render the will of the EU body that issued the norm exactly; cf. 2.1.8). As far as primary Community law is concerned (e.g. the rules governing State aid) the problem mostly is caused by the case-law character of Community law.

There is only rare case-law also with respect to the above mentioned area of the common market organisations (cf. ECJ 8 May 2003, case C-268/01, *Agrargenossenschaft Alkersleben eG*), so that there normally is no comprehensive clarification of questions of general interest but only a selective examination of specific problems by the ECJ.

1.2.5 Could you indicate how the implementation of tax law or environmental law directives has been tackled, in particular directive 77/388/EEC (Sixth VAT directive) and the directive 79/409/EEC and 92/43/EEC (Bird and Habitat directive).

a) Implementation of directive 77/388/EEC of the Council

The directive 77/388/EEC of the council has become effective in Austria on January 1st, 1995, when Austria joined the European Union.

Austria had introduced the system of a value added tax (VAT) similar to that provided for by the directive 77/388/EEC on January 1st, 1973, when the VAT Act 1972 came into force.

The „new“ VAT Act 1994, Federal Gazette N° 663/1994, which implements the directive 77/388/EEC and replaced the VAT Act 1972, maintained the structure and the terminology of the old VAT Act. So each section of the new VAT Act regulated the same subject and had almost the same contents and often even the same wording as the corresponding section of the old VAT Act. Apart from the formal denomination as a new VAT Act national legislation only tried to keep the VAT Act in conformity with the directive 77/388/EEC and did not follow the structure and terminology of the directive.

So, to give an example, the directive 77/388/EEC defines in Art. 5 and 6 as taxable transactions the supply of goods and the supply of services. According to Art. 5 para 6 the application of goods forming part of his business assets for private use or, more generally, for purposes other than that of his business shall be treated as supplies made for consideration, according to Art. 6 para 2 the use of goods forming part of the assets of a business for purposes other than those of the business and the supply of services for his private use carried out free of charge shall be treated as supply of services considered.

The VAT Act 1994 provides in section 1 that the chargeable event is constituted by the supply of goods, the supply of services and by self consumption. Self consumption is defined as the use of goods which are or until then were used for the assets of the business for private means or if the taxable person supplies goods or services in the context of his business for private use. As self consumption under the VAT Act 1994 is defined as a chargeable event of its own it is also mentioned within the provisions providing tax exemptions (e.g. for the leasing or letting of immovable property and for the self consumption of that property), because it was thought that self consumption has to be treated as the service "leasing or letting an immovable property" according to Art. 13 B b of the directive 77/388/EEC.

In its judgment of 8 May 2003 in the case C-269/00 (*Seeling*) the European Court of Justice clarified that the private use of a building (the self consumption of the building) is not covered by the provisions of the directive (Art.13B (b)) which grants

tax exemption for the leasing or letting of immovable property. So national legislation has to be amended to bring it into conformity with directive 77/388/EEC. A draft amendment of the VAT Act 1994 eliminates the exemption for the self consumption and adopts the system of the directive in this point and follows the wording in Art. 5 and 6 of the directive.

Another problem is, that the same wording in the context of the EC-directive has another meaning than in national legislation.

As an example, the term „leasing or letting“ has a specific meaning which was clarified in the case-law of the European court (cf. case C-326/99 *Goed Wonen* or case C-75/01, *Sinclair Collins Ltd.*).

National interpretation of that term is used to stick to national understanding. So the administration is used to take the understanding from section 1090 of the ABGB. In the decision dated October 30th, 2003, 2000/15/0109, the Administrative Court (concerning the question of tax exemption) pointed out that for the purpose of VAT the facts have to be established in a way, that allows the examination, whether the case can be subsumed under that term in its meaning according to the interpretation of the European Court of Justice. The court decided that the administration was wrong in assuming "leasing or letting" was to be understood according to section 1090 ABGB.

As a result, the wording in national legislation has to be examined whether it has to be understood in its domestic meaning or - because it is part of provisions implementing an EC-directive - in the meaning the expressions used have in Community law.

Another question arises when national legislation refers to other Acts of national legislation.

As an example, section 12 of VAT Act 1994 exempts from deduction those taxes on leasing or letting which according to the (national) provisions of income tax or corporate tax are not to be accounted as costs of the business. This is not covered by the provisions of Art. 17 of the directive concerning deductions. But in general, this is in line with Art. 17 para 6 of the directive 77/388/EEC which allows member states to maintain certain exceptions already existing at the time when the directive came into force.

But in the particular case of this exemption in the VAT Act with a reference to other national provisions the amendment of those provisions concerning income tax or corporate tax can enlarge the scope of the provision so that it would not be fully

covered by the above mentioned exemption clause in directive 77/388/EEC. This, once again, leads to the necessity of a (restrictive) interpretation in conformity with Community law.

So an amendment of section 20 of the Austrian Act on the income tax in 1996 restricted the possibility to treat the costs for a working room inside a dwelling as costs of the business. The Austrian Administrative Court held (19 December 2002, 2001/15/0093), that the reference in section 12 of VAT Act 1994 to that provision in the Act on the income tax has to be understood in the sense it had on January 1st, 1995, and that therefore for the purpose of proceedings concerning VAT the facts have to be established in a way that allows to decide, whether the room at stake can be subsumed under the former provision of the Act on the income tax, whereas for the purpose of proceedings concerning income tax evidence has to be provided that the room can be subsumed under the amended provisions of the income tax Act.

b) Problems in the implementation of the directives 79/409/EEC on the conservation of wild birds (birds directive) and 92/43/EEC on the conservation of national habitats and of wild fauna and flora (Habitat directive)

1. The competence for implementation of those two directives in the Austrian legal system generally lies with the Austrian provinces (the *Länder*; Art. 15 para 1 of the Federal Constitution; there is a Nature Protection Act in each Land², in implementation of the directives these Acts have been amended; the competence to name areas for the lists that have to be drafted by the Commission lies with the government of the Land). But the directives also pertain to questions that are regulated in the Forestry Act, which falls within the competence of the *Bund* (the Federation), and to the hunting and fishing regulations, which fall into the competence of the *Länder* again.

For a very short survey on the implementation cf. *Weber*, Stand und Entwicklung des österreichischen Naturschutzrechts, JBI³ 2000, 701 (703), a comprehensive description can be found in *Ennöckl*, Natura 2000, Die Vogelschutz- und Fauna-Flora-Habitat-Richtlinie und ihre Umsetzung im österreichischen Naturschutzrecht (Vienna, Verlag Österreich, 2002). Moreover a copy of a survey on

² In German "Naturschutzgesetz" or "Natur- und Landschaftsschutzgesetz".

³ Juristische Blätter ('Judicial leaves').

the legal aspects of transposition of those two directives by *V. Mauerhofer* is added to the material that is enclosed.⁴

2. Problems in the implementation arise as well in the legislative process as on the level of administration and in the judiciary.

3. According to Article 4 para 2 and 3 of the Habitat directive the Commission has to draft and adopt a list of sites of Community importance within six years of the notification of the Directive.

The problem in the implementation of the Directive mainly lies in the complicated set of duties for administrative authorities arising from the directives according to the case-law of the ECJ. According to this case-law member states have to comply with a lot of obligations in the period before a site is finally listed as a site of Community importance (cf. judgments 28 February 1991, case C-57/89, Commission/Germany (Leybucht), 2 August 1993, case C-355/90, Commission/Spain (Santona), or 11 July 1996, case , and 18 March 1999, case C-166/97, Commission/French Republic). Those obligations are also applicable, when the member state failed to name a site, although it should have done so, or classified an area that is not large enough.

Those obligations can hardly be made the contents of a general regulation in the Nature Protection Act of the relevant province. Therefore, there will be the necessity for direct application of Community law as it can be derived from the case-law of the ECJ in this context.⁵

⁴ *V. Mauerhofer*, Zur Umsetzung der Vogelschutzrichtlinie in Österreich - rechtliche Aspekte, in: Karner/Mauerhofer/Ranner, Handlungsbedarf für Österreich zur Umsetzung der EU-Vogelschutzrichtlinie, Umweltbundesamt (ed.), Report N° 144, 2nd ed., 1997, 112

⁵ On the discussion concerning the possibility of direct application in cases where this leads to disadvantages for citizens *Ennöckl*, Natura 2000, 59, *Madner*, Naturschutz und Europarecht, in: Potacs (ed.), Beiträge zum Kärntner Naturschutzrecht, 17 [56], *Mauerhofer*, Das Schutzgebietssystem "Natura 2000" nach den Richtlinien 79/409/EWG ("Vogelschutz-Richtlinie") und 92/43/EWG ("Fauna-Flora-Habitat-Richtlinie"), RdU (environmental law) 1999, 83; cf. also the paper that has been transmitted by the Austrian rapporteur in the preparation of the meeting in Trier, March 2003; in the implementation of the directives at stake the ECJ seems to follow the approach of an "objective effect" of directives, thus deviating from the line, that directives cannot produce effect detrimental to the citizen; cf. - in the context of interpretation in conformity with Community law - General Advocate Léger in his opinion in case C-224/01, *Köbler*, para 56: "The only restriction on the national court, in that exercise of interpretation in conformity with Community law, is not to impose on an individual an obligation laid down by a directive which has not been transposed or to determine or aggravate, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions" (with reference to the judgments *Arcaro*

The principal relevant obligations at issue (with respect to the Bird Directive) - according to Advocate General *Fennely* in his opinion in case C-166/97, delivered on 10 December 1998, para 6 - "are those imposed on the Member States, firstly, by Article 4 (1) and (2), to 'classify in particular the most suitable territories in number and size as special protection areas for the conservation of [endangered and migratory] species, taking into account their protection requirements in the geographical sea and land area where this Directive applies, and, secondly, by Article 4 (4), to avoid pollution and deterioration of habitats, and disturbances of birds, in respect of the areas so classified, 'in so far as these would be significant having regard to the objectives of this Article'."

According to the case-law of the ECJ national authorities as well as the Courts have to check in each individual case, whether the member state has classified a sufficiently large area as a Special Protection Area. If this were not the case, the obligations arising from the directive had to be complied with.

Moreover, in its judgement of 7 December 2000, case C-374/98, Commission/French Republic, the ECJ held, that areas that have not been named as Special Protection Area according to Art 4 para 2 of the Bird Directive but should have been so classified continue to fall under the regime governed by the first sentence of Art 4 para 4 of the Bird Directive (para 47; cf. Administrative Court, 27 June 2002, 99/10/0159).

4. In the above mentioned judgment of 27 June 2002 the Administrative Court had to apply the Styrian Nature Protection Act in the version before its amendment in order to comply with the obligations arising from the two directives at stake (LGBl. N° 79/2000).

The questions, nevertheless, would be more or less the same, if the newly adopted provisions (of the Styrian Act) were applicable, as also in this case the administrative authority and the Court were obliged to examine, whether the areas

and *Kolpinghuis Nijmwegen*, that concern the question of direct application, but not expressly the question of interpretation in conformity with Community law; in the same way General Advocate *Alber* in his opinion in case C-343/98, *Collino and Chiappero*, para 28, derives from the case-law of the ECJ, that the same restrictions that have been established for the direct application of Community law are applicable for the interpretation in conformity with Community law; he, too, refers to the *Arcaro* judgment; the ECJ did not follow this opinion with respect to the interpretation in conformity with Community law in its judgment in this case, but - in paragraph 20 of the judgment - affirmed its opinion that, in accordance with settled case-law, a directive may not of itself impose obligations on a private individual and may not therefore be relied on as such against such a person (see, inter alia, Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 20, and Case C-192/94 *El Corte Inglés v Blázquez Rivero* [1996] ECR I-1281, paragraph 15).

named by the government of the Land are in full compliance with the directives or whether there should have been named another area or a greater area.

The Administrative Court in this decision accepted the necessity of direct application of the directives in principle, thus following the case-law of the ECJ⁶.

The Court, on the other hand, held, that the (specific) question, whether the Habitat directive is directly applicable in "potential habitat-areas", was not sufficiently clarified in the case-law of the ECJ (cf. *Gellermann*, *Natura 2000*, *Europäisches Habitatschutzrecht und seine Durchführung in der Bundesrepublik Deutschland*², 121). The Court came to the conclusion, that the administrative authority had been obliged to examine according to the case-law described above, whether the area at stake fulfilled the criteria for a special protection area. As the administrative act in this respect lacked a sufficient reasoning, the Court quashed the act (as there had not been a sufficient establishing of facts, the question, whether there was an area that should be classified as an special protection area, could not be answered).⁷

**1.2.6 Did the implementation of these directives encounter obstacles?
What do you think were the reasons for this? (see also question 2.1.1 below).**

There were obstacles with respect to the Sixth VAT directive, as well as with respect to the Bird and Habitat directives. The reason for this in the latter case was the complicated system of nominating potential areas for the protection by the member states and the fixing of the definitive list of protected areas by the Commission. The province of Lower Austria nominated one third of its territory, so that the restrictions arising of the directives and the case-law of the ECJ described above (1.2.5) were applicable with respect to one third of the territory.

⁶ In a decision of 23 October 1995, 95/10/0108, the Court had denied the direct applicability of the Habitat directive (because the time limit for the classification of areas had not expired) and had not examined the case in the light of the Bird directive, which was criticised in Austrian literature; cf. *Ennöckl*, *Natura 2000*, 58; in the decision of 27 June 2002 the Court stresses, that the question at stake in the former decision was the prolongation of the validity of a licence granted before the Austrian accession to EU, the question at stake therefore not being the same as in the latter case.

⁷ Cf. also Annex 1, para 10 and 11; the reason for the quashing of the administrative act in the decision described in annex 1 was similar to the one in the decision concerning the Bird and Habitat Directives (breach of procedural rules; the relevant facts to decide the question of Community law, the applicability of domestic law that might be contrary to Community law, had not been established sufficiently).

For the problems concerning the VAT see above, 1.2.5, a).

1.2.7 If the problems have been solved how was this done? (see also point 3.1.2 below).

As far as there has not been a solution in the legislature, in tax matters the Federal Ministry of Finance consequently issues instructions on all relevant questions arising in the application of tax law. In this context, the most important questions relating to Community law have been dealt with, too.

1.2.8 Do you think that national implementation data of other Member States available in CELEX could be used in preparing implementation legislation?

Availability of such data could give some hints on the understanding of Community law, but there will be many cases, where even such knowledge would not really solve the problem whether a specific national provision is in conformity with Community law (cf. the example of the interpretation of the notion "bank" or "credit institute"; it would afford deep insight into the other legal system to understand, whether "bank" or "credit institute" in the other system is understood in the same way as in ones own legal system; but of course, it could be helpful, e.g., to learn, whether a specific provision is applied for holding companies or subsidiary companies as well or to what extent it is applied to such companies, esp. with respect to restrictions concerning the seat of such companies etc.). But it has to be admitted, that a survey on the solutions in other member states in many cases might help to clarify the situation (cf. the examples above). The Austrian Administrative Court, indeed, is using the national legislation in Germany in many cases to examine, whether a specific solution might be in line with at least the legislation in one other member state; if it was possible to enlarge the scope of such an investigation, it would be helpful.

1.3. Ex ante checking of European legislation

1.3.1. What possibilities of ex ante examination for compatibility do you think are desirable/useful or necessary?

The Austrian Parliament - de lege lata - has to be informed on legislative initiatives on EU level by the competent minister (Art. 23e of the Federal Constitution; the information pertains to any "project within the framework of the European Integration"; it is understood that the minister has to transmit the relevant documents to the national diet; the national diet has the right to give observations to the project, in cases where a federal law is necessary to implement the Community regulation, the national diet can issue a binding opinion; the idea of the norm is, that the national diet should be able to determine the Austrian position in such matters in substance, politically⁸; but the institute could well be used also to give observations with respect to the quality of legislation or technical problems in the implementation of the proposed action.

Moreover, the Constitutional Service of the Federal Chancellery usually is involved in the legislative process and has the task to look at the logistic quality of a proposed Community norm. The problem seems to be, that the huge amount of legislative projects cannot be covered sufficiently by a centralised institution in the member states, unless it has an adequate staff.⁹ Problems of the scope of a regulation, definitions of the notions used in the regulation, practical problems etc. usually can only be detected by somebody that is familiar with the relevant field of administration (be it banking, agriculture, competition law or whatever).

It could, though, be helpful, to create a (n international) unit of experts from different countries who could try to identify the most important aspects of a certain proposal (the "crucial points"). In many cases the difficulty will be, that problems from the point of view of a specific national legal system are over emphasised, when lawyers from this country judge a draft. But it would be worth while discussing problems that might arise in more than one country or that really are of general interest. Work within such a multi-national body could help to identify questions of general interest and might help to concentrate on problems that really are of interest for all (or most) authorities and courts that will have to apply the norm. It could help to avoid that there are discussed problems that only arise in one country and moreover could be solved by specific measures in this member state; this does not mean, that one should neglect problems that only arise in a few member states, as even such problems could indicate principle deficiencies of the proposed legislation; but within a

⁸ Cf. the description of the Finnish system under Chapter 4.1. of the Discussion paper for the meeting in Trier.

⁹ Cf. the Cabinet Office in Great Britain; such an institution seems to be the right body for the task of having also a look into the quality of the proposed Community legislation, but this, probably, would surmount the capacities of this institution.

multi-national group it could be easier to decide, which problems really are of general importance and which are not.

Legistic problems in the implementation of Community law have been dealt with in Austrian literature more or less from the date of the accession to the European Union. There has been an amendment to the "Legistic Guidelines" dealing with the implementation of Community law (the so called "EU-Addendum zu den Legistischen Richtlinien 1990" - EU-Addendum to the Legistic Guidelines 1990¹⁰) and it is one of the tasks of the Constitutional Service at the Federal Chancellery to have an eye on legistic aspects of implementation. Amongst the contributions on the topic there are *Obenaus*, *Gemeinschaftsrechtliche Anforderungen an die österreichische Legistik*, JRP (=Journal für Rechtspolitik) 1999, 111, and *Bußjäger/Kleiser (ed.)*, *Legistik und Gemeinschaftsrecht*, 2001 (in which an excerpt of the above mentioned "EU-Addendum to the Legistic Guidelines" can be found on pp 129-138). Moreover, there have to be mentioned the activities within the OECD with respect to the improvement of government regulation (carried out mainly by PUMA, the Public Management Committee)¹¹. Implementation of Community law is part of government regulation; therefore, the problem of improving the implementation of Community law also is part of the general regulatory process.

1.3.2. At what phase of the European legislative process would advice be most appropriate?

Although one could argue, that advice would be necessary as early as possible, so that suggestions could be used early in the legislative process (before the Commission issues a legislative proposal), the structure of the legislative process, on the other hand, leads to the assumption, that it will also be necessary, to have the

¹⁰ www.bka.gv.at; "Legistik".

¹¹ Although it has to be admitted, that this work mostly concerns questions that refer to the Community level (e.g. the question, whether government action is needed or not - "to regulate or not regulate" - or which action is most appropriate) and therefore do not directly deal with questions of - compulsory - implementation of norms of another authority (here: the Community law); cf. the Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, 9 March 1995, OCDE/GD (95) 95. That the work of OECD also influenced the deliberations on Community level can be seen from the quotations of OECD publications in the UNICE Regulatory Report 1995. There have also been so called "checklist-activities" within PUMA in the 90ies. Finally, PUMA held a Symposium on "Managing Regulatory Complexity in Multi-Tiered Government in October 1993 in Paris. This Symposium also dealt with problems of the "Management of Supra-National Regulation".

opportunity also to give advice after a legislative proposal of the Commission has been issued or even later. As the Commission can change its proposal until the Council has decided and there might be changes after the European Parliament has formulated its position, the advice - especially in cases in which the codecision procedure applies - might be given after the first reading in European Parliament (as this is the time, where it is clear whether there will be changes or not). When the European Parliament in its resolution recommends amendments, it could be waited till the Commission presents an amended proposal; otherwise the advice could be given at once at this stage. Of course, the draft of the regulation or directive and the proposal of the Commission should be to the disposal of the advising body earlier as it should be informed on the development of the proposal; but it would not be necessary that it gives a *detailed* opinion earlier; this should, moreover, be handled in a flexible way, as in many cases it would be necessary to inform the Commission on *general* problems before it issues the proposal; in this way it could be avoided that it was necessary to amend the proposal again after the European Parliament or the Council have already finished their respective readings; such advice normally would not be very successful as there might be no readiness to accept it at this late stage of the procedure; so one could think of a combination of statements on fundamental questions before the legislative proposal is issued and more detailed advice when the Commission has to present an amended proposal or after the first reading in European Parliament.¹² It has to be admitted, that there might be problems with respect to giving advice even later, as the availability of the relevant texts in this stage of the procedure is restricted (Council documents seem to be secret at this stage of the procedure). Moreover, the time limit, within which such advice had to be given, would be very strict.

1.3.3. Do you have any suggestions for the setting up of an informal advisory procedure?

If the Association could have the opportunity to give an opinion to a proposal, this chance should be seized.

There should be thought of a cooperation within the members of the Association to be able to cope with the work load amounting of such informal advice procedure.

¹² Cf the proposal on a Council Directive on minimum standards on Procedures in Member States for granting and withdrawing refugee status COM (2002) 326 final/2 that has undergone important changes up to now.

2. Handling and solving interpretation problems

2.1. Interpretation methods and aids to interpretation

2.1.1. Have the problems referred to under 1. 2. 2. and 1. 2. 4. occurred in the administration of justice and if so, in what way? How were they solved?

It has to be stressed, that the problem addressed under 1. 2. 2 might lead to problems in the judiciary but that it is not up to the Courts to decide on the technique of implementation.

It cannot be said, that one or the other technique has significant advantages or disadvantages. As can be seen in the field of environmental impact assessment, where the implementation more or less followed method 2, it is not possible to avoid problems of interpretation concerning the relation between Community law and national law by this method.

Moreover, as can be demonstrated at the example of the fees foreseen by the Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultry meat and the Austrian Fleischuntersuchungsgesetz (law on health inspections of meat), it is doubtful, whether there can be drawn a clear distinction between method 1 and 2 mentioned under 1. 2. 2.

The problems arising in the judiciary to a great extent are caused by the principle of supremacy of Community law and its consequences. Besides, there is the problem of interpretation of the Community provisions (as well of regulations as of directives, or even primary law). A general technique to solve the arising problems cannot be applied.

Concerning the advantages or disadvantages of different implementation methods cf. the answers to questions 1.2.1 and 1.2.2.

Depending on the character of the Community provision which had to be implemented, the consequences for the application of the implemented provision differ. If the Community provision has itself direct effect, the "implementation error" can rather easily be resolved by direct application of the Community provision itself (e.g. if a directive with direct effect is concerned). There are also cases, where it is possible to reach the result intended by the Community legislation by interpreting the national legal norms in conformity with the EC provision. Both solutions presuppose that Community legislation is itself clear enough to give an answer to the legal questions at stake.

However, none of the implementation methods can avoid problems in the administration of justice.

Examples:

The Austrian Lebensmittelgesetz (law on foodstuffs) tried (at least partly) to implement the Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer. The preliminary ruling of the Court of justice of 23 January 2003, joined cases C-421/00, C-426/00 and C-16/01, clearly showed that parts of the Austrian Lebensmittelgesetz still do not comply with the Directive 79/112/EEC. The Administrative Court reversed the decisions of the public authorities which had infringed the provisions of the Directive 79/112/EEC.

But even if there is a change of the entire national system e.g. for the implementation of regulations where national legislation can only complete the regulation if the regulation leaves sufficiently wide margins to the national legislation or if the regulation needs complementing provisions in the national legal system in order to guarantee its effectiveness, there are often interpretation problems of the EC provisions themselves.

This, of course, applies to a greater extent with respect to the application of Community regulations.

So, for example, in the individual case the direct application of Art. 9 of the Commission Regulation (EEC) No 3887/92 of 23 December 1992, laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, encounters a number of obstacles due to the ambiguity of its provisions. The Administrative Court managed to resolve the questions arisen in the individual case without referring them to the Court of Justice.

2.1.2 To what extent are interpretations in conformity with directives or community law used in interpreting national legislation implementing European legislation?

This is a widely spread method of interpretation. It is frequently used by the Austrian Administrative Court (e.g. decision of 27 June 2002, 99/10/0159, concerning the Bird and Habitat directive 92/43/EEC, or decision of 22 March 1999, 98/10/0250).

The Administrative Court clearly follows the opinion, that Community law requires the application of this method (cf. the decision 22 March 1999, 98/10/0250, concerning the Austrian Lebensmittelgesetz (law on foodstuffs), where the Court held, that the Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of

foodstuffs for sale to the ultimate consumer has to be taken into account in interpreting the Austrian Lebensmittelgesetz according to the principle of the interpretation in conformity with Community law.

It has to be added, though, that there are still logical problems with respect to the concept of interpretation in conformity with directives. In short, the question is: when there is no case in which a directive is to be applied directly, why should the same result be achieved by interpreting the national provision in conformity with the directive? Can the result of such an interpretation really be, that the effect of direct application is achieved? And if this is so: why is it necessary, to stick to the strict conditions under which according to the case-law of the ECJ Community law is directly applicable.

There has to be mentioned, in this context, the decision of the Administrative Court of 23 October 1995, 95/10/0108, in which the Court also sees **limits for an interpretation in conformity** with directives. The court states in this decision, that it is not possible to go beyond the meaning of the wording of the national norm; there is no settled case law on the matter (in which case it is possible to apply the interpretation in conformity with a directive and in which case not).

2.1.3 In interpreting European legislation is use made of travaux préparatoires (in so far as these are available)?

Generally, it would be very useful to find the travaux préparatoires. There are only few cases so far in which the Austrian Administrative Court has made use of these documents for the interpretation of European legislation. The Administrative Court in its decision of 30 August 1999, 98/17/0100, referred to travaux préparatoires in stating, that a certain interpretation of EC law was not acceptable because of the lack of confirmation in the travaux préparatoires.

It can be assumed, that the situation will improve as soon as the information in PreLex will comprise a greater variety of provisions.

2.1.4 In interpreting European legislation is use made of documents drawn by the Commission at a later date?

The use of documents issued by the Commission 'at a later date' (later than the provision at stake) might not be suitable in every case. This applies to communications with respect to primary law as well as with respect to secondary law.

As can be seen from the Communication of the Commission following the judgement of the Court of Justice of 8 March 1988, *Apple and Pear development*

council versus commissioners of customs and excise, C-102/86, there can be differences in the opinion of the Commission and the Court of Justice.

Nevertheless, also in such cases, it can be helpful to be able to refer to documents of the Commission, as they can demonstrate, which measures (if the point of view of the Commission is stricter than that of the ECJ: "even in the eyes of the Commission") are in conformity with EU-law (it then can be said, that a specific solution can be qualified as being in conformity with Community law "in any case"). Such documents - e.g. concerning questions of the common organisation of the Market in agricultural goods - can demonstrate, that also the Commission bases its deliberations on a certain opinion. This can help to assume that there is no room for a doubt and avoid a reference for preliminary ruling (cf. the decision of the Administrative Court of 20 March 2003, 2000/17/0084, concerning the relation between Art. 28 EC and its consequences for national provisions on quality labels and Art. 87 and 88 EC on State Aid; the Administrative Court in this case found several of its assumptions shared in documents of the Commission and therefore refrained from referring the question to the Court of Justice according to Art. 234 EC).

2.1.5 To what extent is the preamble considered in interpreting European legislation?

Every now and then the Administrative Court tries to draw conclusions of the preamble which - due to the very general observations on the objectives of its provisions - unfortunately only seldom allows the deduction of a precise answer to a specific question (e.g. decisions of 28 January 2002, 99/17/0407, and of 20 December 1999, 99/17/0375).

But the Court follows the opinion, that the preamble could clarify the meaning of specific clauses of a regulation or directive (cf. the Communication of the Commission on the interpretation concerning the free provision of services in the second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Official Journal 10/7/1997, 97/C 209/04, Part 2, B, with reference to ECJ 11. 4. 1973, case 76/72, ECR 1973, 457, *Michel*).

2.1.6 In interpreting European legislation is reference made to statements in the minutes of Council of Ministers?

In the decisions of the Administrative Court the minutes of the Council of Ministers have not been mentioned so far.

2.1.7. In interpreting national legislation to implement European legislation is reference made to travaux préparatoires of that national legislation (explanatory memorandums, etc.).

The travaux préparatoires are commonly used in the interpretation of national legislation.

Therefore, there have also been some cases, in which the Administrative Court has made use of the travaux préparatoires of the national legislation in order to know whether or not the EC law must be considered for the interpretation of the national legislation (e.g. decisions of 18 March 2002, 99/17/0136, of 26 June 2000, 99/17/0450, of 30 August 1999, 98/17/0100, and of 21 December 1998, 96/17/0079).

But the fact, that one can clarify the will of the national legislator does not necessarily mean, that the Administrative Court follows the opinion of the legislator. The principle of supremacy of Community law can make it necessary to apply Community law directly (cf. the decision of 20 November 2002, 2001/17/0180; direct application of Community law).

2.1.8. Are different language versions used in interpreting legislation? Are the different language versions regarded as a threat for the correct and uniform interpretation of community law or do they serve to contribute to it?

The Administrative Court frequently uses different language versions (mainly French and English) in interpreting legislation trying to find confirmation for one or the other possible interpretation of a term or clause (e.g. decisions of 23 October 2000, 2000/17/0058, concerning the market organisation of milk, Regulation 3950/92 as amended by Regulation 1109/96, the wording "to take account of changes affecting their deliveries and/or direct sales", in the French version "pour tenir compte des modification affectant ses livraisons et/ou ses ventes directes" was not rendered clearly in the German version; of 17 December 2002, 2002/17/0047, of 21 December 2001, concerning export [cf. Commission regulation N° 800/1999; in the case before the Administrative Court the former Regulation N°3665/87 as amended by Regulation N° 1829/94 was applicable], problem of the appropriate time for the application for the refund; use of the English and French version, that use the *future tense* [sera demandée] in the relevant context, to show, that the application for the refund can also be posed after the presentation of the export papers to the customs authority; 21 December 2001, 99/19/0185, with respect to the notion "descendants" in Art. 10 of Regulation [EEC] 1612/68, and 4 September 2003, 2003/17/0094, concerning the notion "Betriebsinhaber"/"farmer"/"exploitant" in Regulation [EC] N° 1593/2000; cf. also ECJ 8 May 2003, case C-268/01, *Agrargenossenschaft Alkersleben*, concerning

Art. 9 of the Regulation [EEC] N° 3950/92, that contains the same notion, and Administrative Court 25 October 1996, 94/17/0300, 4 July 2001, 96/17/0440).

In many cases the different language versions are able to contribute to the clarification of a certain expression or wording.

So the existence of the different language versions cannot be seen as a threat to the interpretation or uniform application of Community law.

Moreover, knowing which language has been used for the drafting of the European legislation would allow to reduce the uncertainty of this method. For example, if a certain term in the versions of the language group A has a wider meaning than in the versions of the language group B, it would be very helpful to know, whether the language of the "original" working version was part of the language group A or B. Otherwise, in this case comparing the different language versions would not contribute much to solve the interpretation problem, because as a result there could only be vague speculations on the choice of the wide or narrow interpretation of the term.

2.1.9 Are there in your practice other aspects that are important which have not been mentioned above?

It would be useful to have better access to the travaux préparatoires of Community provisions. It could be thought of filing the sources of relevant documents or giving information on how to find relevant documents (especially in the PreLex data base; with respect to the discussion in the Council only press releases are added). At least it should be possible to trace documents connected with the proposal of the Commission.

It could also be thought of amending or modifying existing tools like the Register of European Parliament documents (to enable the user to find documents linked to a specific provision without having to search for - all - documents that are linked to the topic the provision deals with).

Perhaps a guide on the access to relevant documents with respect to Community provisions could be issued (this could perhaps be carried out after the Colloquium by the Association in cooperation with the Commission). Such a guide should contain information for the courts on the search for documents such as the proposals of the Commission for a specific provision and relevant documents of the Council and the European Parliament concerning the proposal.¹³

¹³ Cf the user's guide "Access to European Parliament, Council and Commission Documents" on the internet site of the European Parliament. The guide we are thinking of should be a specialised instrument for persons interested in the travaux préparatoires of Community law.

2.2. Cooperation on interpretation

2.2.1 Can you indicate to what extent not so much legal as policy considerations affect the use of the prejudicial procedure? What we have in mind are factors such as delay (desired or otherwise) of settling the case and the wishes of the parties. Do they have a significant impact on the decision to refer or otherwise? What is the response of the court?

Provided that in a certain case the Administrative Court is bound by Art. 234 EC to refer questions concerning the interpretation of EC law, the court has to act *ex officio* and does not depend on the wishes of the parties. If the parties have expressed and justified their wish of having a preliminary ruling by the European Court of Justice, the Administrative Court will either refer the question to the Court of Justice (if he thinks the conditions of Art. 234 EC are fulfilled) or give reasons why he did not do so in its decision. This normally is also necessary, when it shares the view of the parties that pleaded for a specific solution, as in this case the court does not follow the interpretation of the administrative authority. The Administrative Court is aware of the delay which may be caused by a reference for preliminary ruling to the Court of Justice, but this generally does not influence the decision whether the question is referred or not.

As, in general, the applicant will be interested that a question of Community law is solved in another way than the administrative authority did, the question of delay will not play a dominant role as the applicant in many cases will benefit from the delay, if the Court of Justice ascertains his opinion.

But, of course, there have also been cases, where the Administrative Court had to follow the opinion of the applicant and quash an administrative act without referring the question to the Court of Justice.

2.2.2 Do you see the point of the prejudicial procedure notably in ensuring the general interest of uniform application of community law or in the - individual – interest of legal protection?

Theoretically speaking the point is to ensure the uniform application of Community law.

As one does not know, what the answer of the ECJ will be, the outcome of the procedure might be favourable for the applicant or not. So it is not sure, whether a reference really serves the interest of the legal protection of the party to the case (at least, it will not always be in the interest of the applicant; but the reference can be

understood as a means of protection of the rights of individuals, when the validity of Community provisions is at stake.

Therefore, the institute also serves this aim, as in many cases there is no other possibility for the parties to have the question of validity of a decision of the Commission decided. Therefore, the institute clearly also serves the interest of legal protection, as otherwise the system of court protection on European level was incomplete.

If you look at a case from the point of view of legal protection, there might well be cases where the court could quash an administrative act on the basis of a certain opinion on Community law; if the question is not clear in the sense of the CILFIT case law, the court is not entitled to do so. As the ECJ might be of another opinion, a reference procedure primarily serves the uniform application of Community law. If you see it this way, you might come to the conclusion, that there is a preponderance of the aspect of the uniform application of community law.

2.2.3 The national court may informally consult contact persons, both at national and community level before posing prejudicial questions to the European Court of Justice. Could you indicate whether and to what extent this is already done in your member state?

According to the character of informal contacts, there cannot be given a satisfactory answer. But it might well be, that it could be helpful to get some background information with respect to a specific provision of Community law and therefore such contacts will occur now and then. Knowing the facts behind a provision might enlighten the sense or the aim of it and can clarify the meaning or the reasons of a certain action of the Commission.

2.2.4 An – informal or institutionalised – network of contacts between (the highest) national courts and the European Court of Justice.

An informal network of contacts between the highest national courts and the European Court of Justice might be useful for the national courts as this system could enlarge the appreciation of the legal aspects of a certain problem and could allow to answer the question whether to refer the problem to the Court of Justice in consideration of these new aspects.

2.2.5 With regard to the CILFIT judgement some flexibility could be appropriate for example by a kind of de minimis rule. Perhaps this is risky in connection with the fundamental nature of the prejudicial procedure, both for

the effect and effectiveness of community law and for the legal protection of private individuals.

First of all, it had to be clarified, what is meant by such a rule in this connection. 'De minimis' could indicate, that the case itself is not of a high importance (as the sum at stake is not very high, the project has no severe impact on its surroundings, etc.) or the question of Community law at stake is not very important. As the case law of the Court of Justice shows, many important developments of the case law have had their origin in cases that could be understood as of minor importance (cf. judgement of the Court of Justice of 15 July 1964, COSTA/E.N.E.L., case 6/64).

According to the idea behind the preliminary proceedings, it should not matter whether the case itself is of high importance or not. If there is a question of Community law of general interest, the solution of which is not clear and that has not been solved in the case law of the Court of Justice, it is of interest for (all) the national courts to get to know the opinion of the Court of Justice. As long as the system of the Treaty provides for a monopoly of the Court of Justice in the solution of questions of Community law, it cannot be decisive, whether the single case, in which the question arises, is of more or less importance to the parties. The effect of the preliminary ruling is the clarifying of the question so that in future cases (and there might be "bigger ones") the national courts can decide along the lines of the judgement of the Court of Justice.

Therefore, a kind of "de minimis-rule" could only make sense if "de minimis" is to be applied only with respect to the importance of the question of Community law. It could be thought of not obliging national Courts to refer questions of Community law, that are not of a 'general nature', that only arise in a specific constellation that will not happen again in many other cases, and that have no effect for the effectiveness of Community law. To give an example: if there is a question of interpretation of a Community directive that could influence the amount of contributions to be paid by certain enterprises, this will clearly be a matter of general importance, as it might influence the outcome in all the other cases concerning this contribution. If, on the other hand, there is a problem of interpretation of a transitional clause in one of the last cases that fall within the scope of the clause, the need to refer the question to the ECJ will be seen as not so urgent. On the other hand, a question concerning the capacities of a foreign legal person will have to be referred to the ECJ anyway, no matter whether it is raised in a case that might be the last one concerning a transitional clause, as the question at stake was not one concerning the interpretation of the transitional clause, but the general question on the capacities of foreign legal persons (cf. ECJ 5 November 2002, Case C-208/00, *Überseering*).

If, on the other hand, there is - fictitious - one specific enterprise that potentially can rely on an exception based on Community law and the national court is not sure, whether the exception applies or not, it could be seen as a question of minor importance for "Community level", whether (only) this single enterprise has to, let us say, pay more or less tax or some parafiscal charge, or whether it falls within the scope of a certain provision (that implements a directive) or not (unless there is a problem of competition law).

What should be decisive is the importance of the question for the implementation of Community law.

2.2.6 The national courts can keep down the number of prejudicial questions to a minimum by only posing prejudicial questions if this is inevitable for the decision in the case.

There is nothing to add to this statement.

2.2.7 The highest national courts could monitor access to the prejudicial procedure by assessing cases before they are submitted to the European Court of Justice. They themselves could then handle other cases. Change of the Treaty would be necessary.

It is doubtful whether such a system could work. Supremacy of Community law also means that lower courts are not bound any longer by the rulings of higher courts when there is a breach of Community law. An assessment procedure for references, therefore, also meant that the higher court had to decide whether a reference that seeks to clarify a question the court itself already has solved (without referring the question) has to be made.

2.2.8 The referring national court could be obliged in the prejudicial referral to give an analysis of the case itself and to formulate an answer. Change of the Treaty would be necessary.

I wonder whether such changes could speed up the procedure. An analysis of the case and an evaluation of the consequences of the Court's decision is presented by courts even now in several cases. A concise analysis and the formulation of an answer is the task of the Advocate General. It can be assumed, that orders for reference will take longer, if the national court has to present a complete analysis, including the case-law of the Court of Justice and the relevant questions at stake, as the real tricky thing with respect to Community law is to find the relevant question. A

generally formulated reference so far is accepted by the Court of Justice and answered, as far as possible, in a way that the relevant questions of Community law are dealt with (cf. the opinion of the Advocate General in case C-9/02, concerning a question with respect to Art. 43 EC; the Advocate General comes to the conclusion, that it is not Art. 43 EC that is at stake - as the referring body had thought -, but Art. 39, but obviously favours to give an answer, as the deliberations with respect to Art. 43 also are applicable with respect to Art. 39).

2.2.9 A system in which decisions of the national court are made and subsequently the European Court of Justice has the opportunity during a certain period of time to take a decision on the verdict. A system of leave to appeal could also be considered.

In this case it had to be decided, whether the courts should be obliged to notify every decision which might concern a question of Community law or only those, that concern questions in the sense of Art. 234 EC. The Court of Justice would consequently have to re-examine all these notified cases. Even if one chose the second solution, it does not seem that this measure might help to reduce the pressure on the ECJ, because the number of cases which the Court would have to examine would increase (as the courts probably would come to the conclusion, that there is no clarification of the question in the case-law more often than today).

2.2.10 What role could the Association play in improving mutual cooperation and cooperation with the European Court of Justice such as setting up a databank, setting up networks of specialists, organising meetings etc.

Such measures would be very useful, indeed, although they might not directly help to improve the quality of legislation. But they could help to solve problems arising of the legislation (for the courts in the member states the contact with the ECJ could clarify especially the opinion of the ECJ also with respect to general questions, e.g. concerning the four freedoms, competition law or State aid; a better understanding of the principle positions of the ECJ might avoid uncertainties with respect to specific questions raised in the cases pending before the courts).

The role of the Association amongst others could be to function as a centre that channels the needs identified by the courts of the member states and as a platform for communication. It has to be kept in mind, that it will be difficult for the ECJ to keep in close contact with all the member jurisdictions. It therefore could be thought of organising regular meetings (once a year or every second year) dedicated to specific

topics. Those topics could be filtered out by the Secretariat according to the wishes of the member jurisdictions.

2.2.11 Do you have any other suggestions?

3. Attaching consequences to interpretational errors

Ex post examination of legislation

3.1.1 How can we provide for an improved correction of shortcomings in implementation legislation? If the Council of State or the national court has noted certain shortcomings in implementation is this picked up by the national legislator and are consequences attached. If so, what are the consequences?

It may be assumed that the competent administrative authorities will draw the necessary conclusions of the decisions of the Administrative Court. As the administrative authority which has taken a certain decision or - if the authority whose decision is subject of the proceedings is a subordinated authority - the highest administrative authority (for the federation the responsible minister) participate in the proceedings and are served the decision of the Administrative Court, it is ensured that the competent authorities are informed about the indicated shortcomings in implementation.

By mentioning the shortcomings in its annual report the Administrative Court could point out these shortcomings to the National Diet. So far, nevertheless, shortcomings in implementation have not been mentioned in the annual reports.

3.1.2 To what extent and how is note taken in the administration of justice of shortcomings in national implementation legislation, observed by the European Commission or in some other way, for example, incomplete implementation? Do you see any possibility of improving this? Can an authority or agency be designated with periodically reports on this so that shortcomings can be remedied?

When there are observations "by the European Commission", the court is obliged to deal with the problem, especially with regard to the principle of supremacy of Community law. The decision then can only be taken in compliance with the CILFIT case-law on the question of preliminary rulings according to Art. 234 EC. The problem will be, in which way the court gets to know of the observations of the Commission.

Of course, there are also cases, where the parties to the case refer to some Community legislation or the court has doubts on the conformity with Community law *ex officio*. They are handled in the same way.

As far as conclusions from the case law of the Administrative Court are concerned there has to be pointed out the following:

There are serious doubts whether an "institutionalised" control or in some way a periodically report on shortcomings in implementation would be possible and functional. Such reporting could only mention really outstanding problems (in the individual case), but could not guarantee the revelation of all existing shortcomings, because these shortcomings will normally just concern details which only become evident by means of the individual case (cf. the judgment 20 February 2003, 2001/07/0171, concerning the implementation of the Environmental Impact Assessment and the need for an Environmental Impact Assessment for the plant at stake in these proceedings, described below).

Some examples of the case-law of the Administrative Court might illustrate this situation:

In its decision of 20 February 2003, 2001/07/0171, concerning the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Administrative Court held that the Council Directive 97/11/EC of 3 March 1997, amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, had not been correctly implemented by the national legislation until 14 March 1999 as required by Article 3 paragraph 1 of the Directive 97/11/EC.

The decisive point in the case was, that the plant at stake was not subject to an Environmental impact assessment according to national law, although it should have been (even according to the earlier version of the EC-directive). The Court came to the conclusion that there was an obligation for an Environmental impact assessment according to Community law (because of the need of direct application of Community law).¹⁴

¹⁴ The court accepted, that according to the case law of ECJ, esp. in the judgement 11. August 1995, case C-431/92, Großkrotzenburg, it would have been sufficient to apply the rules of the directive *de facto*, but it concluded, that such an application (in Austria) had to be done by the competent authority according to the UVP-Gesetz (Environmental Impact Assessment Act); as the decision in the administrative procedure was taken by another authority, the court quashed the administrative act because of the lack of competence of the deciding authority.

In its decision of 20 November 2002, 2001/17/0180, concerning credit institutions, the Administrative Court held that the national legislation had made use of the authorisation provided by Art. 4 paragraph 6 Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions (now Article 49 paragraph 6 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions) in a way which was contrary to Articles 12, 56 and 58 paragraph 3 EC. So in order to the precedence of the provisions of the Treaty over the concerned national provisions, these national provisions could not be applied.

These examples should demonstrate that such shortcomings concern questions of details in a way that a general "monitoring" of shortcomings in implementation need not necessarily be able to avoid those problems.

It has to be admitted that such a monitoring could help to improve the application of Community law, when it is possible to point out structural shortcomings. In this case it was possible to initiate structural changes that help to avoid a lot of problems in different cases (there could be made general changes).

But it seems to be illusory to think, that such monitoring can take into account all possible shortcomings. Also in national legislation can be found a number of "legistic" or "technical" shortcomings, although there exist instruments like the "Legistic Guidelines" in Austria (1990) or the "Handbuch der Rechtsförmlichkeit" (freely translated: "Handbook on the legistic form of Norms") in Germany (1991) or the manual "Proper drafting of Norms" in Finland (1993).

All those instruments and theoretical treatments of the topic cannot avoid, that there might be shortcomings in the substance of the implementation (like in the above mentioned case concerning the environmental impact assessment, Council Directive 85/337/EEC of 27 June 1985; the type of plant at stake had not been added to the list of projects for which an environmental impact assessment was necessary, although according to the directive this should have been the case; monitoring of the implementation in this case could have prevented the shortcoming only when it had been carried out by an expert in all the fields, covered by the directive, as it is impossible for someone that has no experience in the respective field to check within reasonable time, whether all the possible plants, that could fall within the scope of the directive are covered by the draft he has to check).

Finally, such a monitoring can hardly contribute to a clarification of the Community law itself.

But it is clear, that a good "managerial" process for regulatory decision-making could help to avoid some of the (typical) shortcomings in the national implementation of Community law.¹⁵

Moreover, a comprehensive survey of such individual cases that could allow the deduction of certain structural weaknesses or which could advert of similar cases could be a good idea.

As to the situation in Austria, there are existing approaches for such a reporting in the form of the periodically reviews of the decisions of the Administrative Court regarding community law. It could be thought of adding adequate hints to the problems discussed here (in order to facilitate the identification of these problems). Up to now, these reviews are mainly a compilation of the court's decisions provided with the indication of the concerned provisions of community law. Even if there is a category for "implementation" or "application or non-application of a directive", there are no further indications if the Administrative Court has not regarded a national provision in an individual case and has directly applied community law. For these aspects the reviews would have to be amended in order to enforce their explanatory power.

Furthermore one could think of establishing an "agency" that could analyse the court's decisions (for example on the basis of the reviews of the jurisprudence in community law matters). This task could also be carried out by the Constitutional Service of the Federal Chancery.

3.1.3 In your view what contribution can ex post examination of both European legislation and the national implementation legislation make to an improved implementation and application of European legislation? In the light of this do you think that the present examination, that takes place both at community and national level is satisfactory?

An intensified ex post-examination could improve the information of the responsible authorities and the legislator of eventual shortcomings in implementation: The authorities by remedying to these shortcomings could then prevent interpretation and application problems due to incorrect or missing implementation. The present examination by the courts takes place at a moment when specific problems in

¹⁵ Cf. the proposals in the UNICE Regulatory Report, 1995, 5.4.6. (concerning a separate independent government body, responsible for managing the process; this idea perhaps could be applied also for implementation process).

individual cases have already arisen, so it would be deserving if previous measures could prevent these shortcomings in implementation.

3.2 Community and national mechanisms

3.2.1 Ought the European Commission in the case of errors of interpretation by the national courts make use of the possibility of launching an infraction procedure against a member state for infringement of community law by virtue of Article 226 EC?

The decision whether or not to launch an infraction procedure against a member state for infringement of community law should always be up to the Commission. It does not seem appropriate that the Association should give any recommendation on this issue. It might be sufficient, when the Commission makes use of the possibility of a communication where it has the impression that there are shortcomings in more than one member state with respect to a certain directive or specific field of administration.

It has to be added, though, that there is also the possibility of different opinions on certain aspects of Community law of the Commission on the one hand and the ECJ on the other hand.

3.2.2. What are the possibilities of obtaining compensation in the case of an erroneous interpretation of community law, both by the court and by the legislator?

The Austrian legal system (Amtshaftungsgesetz) provides that public-law corporations such as for example the Bund (federation) and the Länder are liable for damages caused by the persons acting as their organs. As far as only national matters are concerned, this liability, however, does not include damages caused by legislation or by the supreme courts. It is up to the civil courts to decide on the liability of the public-law corporations. There is no specific rule on the competence to hear cases on State liability for breach of Community law.

Due to the case-law of the European Court of Justice in cases where community law has been infringed it is generally accepted that public-law corporations are also liable for damages caused by legislation or by the supreme courts.¹⁶ Discussion on this topic has begun more intensively after the decision of ECJ in the case *Köbler* and the decision of the Constitutional of 7 October 2003, A 11/01, in

¹⁶ ECJ *Brasserie du Pêcheur, Factortame*, and 30 September 2003, case C-224/01, *Köbler*.

which the court held, that in cases of a failure of the legislation (when the claim can be based on the lack of a provision as the legislator failed to issue a norm that should have been issued in implementation of Community law) the Constitutional Court is competent to decide on State liability (Art. 137 of the Federal Constitution, which is a subsidiary clause for claims against public law corporations). In another decision of 10 October 2003, A 36/00, the Constitutional Court came to the conclusion, that this competence also applies in cases where the claim is based on a decision of the Supreme Court, the Administrative Court or the Constitutional Court.

3.2.3 Ought there to be a possibility, apart from the existing applicability of Article 234 EC, of a specific or higher provision with the European Court of Justice to adjudicate on such issues?

Given, that in cases in which the infringement of community law is evident, the decision will be possible without referring it to the ECJ, and that in other cases there is the possibility to refer a question to the ECJ, no.

Along the lines of the *Köbler* decision the present system seems to be sufficient.

Annex 1

The influence of Community law on national administrative law,
administrative procedure and the administrative judiciary

by the example of
contributions for the marketing of agricultural products
("Agrarmarketingbeiträge")

1. The general principles of Community law, especially the principle of direct effect and supremacy of Community law have severe impact on national administrative law.

They lead to important changes in the application of national administrative law, as can be shown by a case that had to be decided by the Austrian Administrative Court recently (VwGH 20 March 2003, 2000/17/0084).

2. According to the Federal Law on the Establishment of a Board for the organisation of the agricultural markets "Agrarmarkt Austria" (AMA-Gesetz 1992), Federal Gazette 1992, N° 376, as amended by the law Federal Gazette I N° 154/1999, the "Agrarmarkt Austria" (AMA) has to levy a compulsory charge on different agricultural products. The money levied is used to finance the promotion of agricultural goods. In the case of meat the contribution has to be paid by the runners of slaughterhouses.

A great number of persons liable to pay the tax lodged an appeal with the Administrative Court, claiming that the levying of the contribution was against Community law, especially as according to the use of the money the system constituted State aid (that had not been notified to the Commission) and, moreover, the use of the money for the promotion of meat falling within the national quality label scheme led to an infringement of Art. 28 EC. The decision cited above was the decision in the leading case (meanwhile the Court has decided in a great number of similar cases along the lines of the decision cited above).

3. The question at stake was:

Are the national provisions concerning the said contributions compatible with Community law, especially

- a) with Community law on State aid and
- b) with Art. 28 EC (free movement of goods)

and which obligations follow from the described questions of Community law

- a) for the administrative authority and
- b) for the procedure before the Administrative Court?

4. The applicants claimed, that

a) the contributions (although they had to be paid by all producers/slaughterhouses) were used mainly (or exclusively) for the promotion of products that took part in the national quality label scheme (the so called "AMA-Gütesiegel"). The contribution and its use by the AMA therefore constituted **State aid** in the sense of Art. 87 EC, as only a certain group benefited of the money, and

b) the quality label scheme itself was not compatible with **Art. 28 EC** as it led to the restriction of trade in the products concerned in the sense of the case-law of the European Court of Justice (ECJ) ("measures having equivalent effect" to measures which impose quotas or otherwise prevent imports).

5. The administrative authority (the Minister of Agriculture and Forestry¹⁷) had not dealt with the objections with respect to Community law on State aid thoroughly. It obviously at the beginning was of the opinion, that the objections were not to be taken seriously. By and by (in further administrative decisions also concerning the levying of the contributions at stake) it began to argue and added some arguments, why the levying of the contributions was not incompatible with Community law on State aid.

The administrative authority had concentrated in the reasons of its decisions on the point of the possible breach of Art. 28 EC (see below, 12.).

¹⁷ The Minister of Agriculture and Forestry now is bearing the title Minister of Agriculture and Forestry, Environment and Water Management; for reasons of simplification it is merely adressed as "Minister of Agriculture and Forestry" in the following.

6. The case clearly shows the general problem Community law raises with respect to administrative procedures on the whole:

To what extent are national authorities entitled to ("merely") apply national law?

or:

What are the obligations of national authorities, when a party to the case invokes rights derived from Community law?

(Supremacy of Community law; Community law takes precedence over national law; direct effect; an inconsistent national provision must not be applied)

7. In this case:

Is the administrative authority entitled to apply the Act of Parliament that provides for the levying of the charges just because this Act has been passed by the National Diet and is a valid national norm? Or is the authority obliged to abstain from applying this national provision as this would be incompatible with the obligations arising from Community law (prohibition on implementing according to Art. 88 para 3 EC)?

And concerning the consequences for the procedure before the Court: what is the consequence, if the relevant facts have not been established sufficiently?

8. The answer to this question in general is:

According to the case-law of ECJ national Courts as well as administrative authorities (see esp. the judgment in the case *Fratelli Costanzo*) are obliged to apply Community law that is directly applicable, or: they are not entitled to apply national law that is not compatible with Community law. As far as State aid is concerned, national authorities as well as national courts have to grant individuals the protection against state measures that are not in conformity with Community law; in particular, the authorities and courts must not apply national rules concerning unnotified state aid (prohibition on implementation; art. 88 para 3 EC).

9. In the case of the contributions for the marketing of agricultural products according to the AMA-Gesetz 1992 (AMA-Act 1992) the answer first of all depended on the question whether there really could be a problem of State aid. The Court, therefore, at first dealt with this problem in its decision.

The **agricultural sector** is defined as the trade in and the production of products listed in Annex I of the Treaty. Some of the general legal instruments of Community competition policy are not relevant for State aids in the agricultural sector such as the rules on De Minimis aid.

Although there are specific **guidelines** on the promotion of agricultural goods, the reason of which is the already mentioned problem of the freedom of movement of goods, the agricultural sector is not exempted by the general rules on State aid.¹⁸ This seems to have been the starting point of the lack of argumentation in the decisions of the Minister of Agriculture and Forestry.

According to the Commission and the guidelines mentioned in note 4, State aid which is simply intended to improve the financial situation of the recipient, without any counterpart from the beneficiary, can never be considered compatible with the EC Treaty.

The **concept of aid** according to Art. 87 and 88 EC, in general, encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect (ECJ Case C-387/92 Banco Exterior de España, paragraph 13, and 11. 7. 1996, C-39/94, *SFEI*, paragraph 58).

In short:

the fact, that a measure falls within the scope of the provisions on the common organisation of the agricultural markets does not mean, that Community law on state aid was not applicable.

It appears from the case-law of the ECJ that **parafiscal taxes** as the contributions at stake can constitute state aid, especially when they are used in a way that only certain recipients benefit from the measures.

It further follows from the case-law of the ECJ that the **prohibition on implementation of planned aid laid down in the last sentence of Art. 88 paragraph 3 has direct effect**. The ECJ has stated that the immediate applicability of the prohibition on implementation extend to all aid which has been implemented

¹⁸ As a topical development in this field it has to be pointed out, that the Commission at the moment is trying to revise, update and consolidate the rules followed by the Commission when assessing proposals from Member States to grant State aid in the agricultural sector and applying one of the exemptions established by art. 87 paragraphs 2 and 3 of the EC Treaty. In 1999, following multilateral consultations with the Member States, the Commission adopted new comprehensive Community Guidelines for State aid in the agricultural sector that entered into force on January 1, 2000.

without being notified (ECJ, case 120/73, *Lorenz*, paragraph 8, C-354/90, *FNCE*, ECR 1991 I-5505, and 11. 7. 1996, C-39/94, *SFEI*, ECR 1996 I-03547, paragraph 39).

The ECJ finally held that a Member State only has legitimate interest in being rapidly informed of the legal position where the State had notified a planned aid; this element was missing, according to the ECJ, where the Member State has implemented planned aid without having notified the Commission beforehand.

10. Remark on the **competences of the Austrian Administrative Court**:

For the understanding of the decision of the Court it is necessary to explain, that the Austrian Administrative Court has to decide on the facts established by the administrative authority (Section 41 paragraph 1 of the Act on the Administrative Court). It cannot establish facts itself. In case, that the facts have not been established sufficiently, the Court is entitled to quash the contested decision.

11. In this case, according to the above deliberations (9.), the question whether the provisions on State aid were applicable mostly depended on the way the money levied was used. The Court held, that according to the case-law of ECJ there could be a State aid, if the money really was used especially for a certain group of enterprises or a certain group of producers as had been alleged by the applicants. It had been decisive, as a consequence, whether there really was a measure constituting State aid in the described sense.

In this respect the facts had not been established sufficiently by the administrative authority.

The Court therefore held, that there was a breach of procedural rules (an **infringement of essential procedural requirements**) that led to the quashing of the contested act (cf. already VwGH 21. 6. 1999, 97/17/0501, 0502, 0503, concerning the financing of health inspections and controls of fresh meat).

12. Concerning question b) (Art. 28 EC) , the Court added, that there might be differences to the cases C-325/00, *Commission v. Germany*, and C-6/01, *Commission v. France*, recently decided by the ECJ.

The problem with respect to Art. 28 EC lies in the following:

According to the case-law of ECJ a publicity campaign to promote the sale and purchase of domestic products may, in certain circumstances, fall within the prohibition contained in Art. 28 EC (ECJ, 24. 11. 1982, c 249/81, *Comm. v. Ireland [Buy Irish]*, ECR 1982, 4005, and ECJ 13. December 1983, c 222/82, *Apple and Pear Development Council*, ECR 1983, 4083).

The ECJ in the judgment Apple and Pear also emphasized, that the levying of a charge as the one in question in that case (that was levied by the producers of apples and pears and used for the promoting of those products) would be contrary to community law to the extent to which it served to finance activities which were incompatible with Community law.

The criteria for the conformity of publicity campaigns with Community law according to the ECJ are:

It is possible to draw the attention to specific qualities of fruit produced within a member state or to organize campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical national production. On the other hand, it would be contrary to Art. 28 EC to engage in publicity intended to discourage the purchase of products from other member states or to disparage those products in the eyes of consumers or to advise consumers to purchase domestic products solely by reason of their national origin.

In the case C-325/00 the ECJ (following the opinion of General Advocate Jacobs) held, that there were differences between the German quality label and the advertising schemes in the above cited cases. The decision is not quite clear in this respect. The main point seems to be, that the aim of the German label was understood as being "dual", not only to enhance the quality of German agricultural products but also - through the ensuing improvements in quality - promoting the sale of those products. I wonder, however, whether this really is a difference to the aims of the Board the campaigns of which were at stake in the case Apple and Pears. The ECJ further stressed, that the German quality label was restricted to German products. This is a decisive difference to the Austrian quality label scheme.

The Administrative Court therefore gave the hint mentioned above, that the Austrian scheme need not necessarily be qualified in the same way as the German label. The administrative authority will have to deal with this question, too, in its new decision on the levying of the charges at stake.