

**The quality of European legislation and its implementation  
and application in the national legal order**

**Denmark**

The Supreme Court's answers to the questionnaire submitted for the 2004 Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. The questions relating to the legislative process are left unanswered as the Supreme Court has an exclusively judicial function.

**1. Preventing interpretation problems**

*1.1. The set of community instruments: hierarchy, simplification, travaux préparatoires and transparency*

**1.1.1.** To the knowledge of the Supreme Court the present level of clarity on the hierarchy of European legal norms does not pose specific problem to Danish courts. When applying "non-standard legal instruments" such as resolutions, declarations and conclusions (cf. point 3.1.4 of the discussion paper) it is important to bear in mind the distinction between binding and non-binding legal instruments.

**1.1.2.** -

**1.1.3.** As indicated in the reply to question 1.1.1. it is important that the binding or non-binding status of any new forms of legal instruments is made clear.

**1.1.4.** Transparency of the drafting process - as well as an effective consultative process - is useful, since it may

bring problems of interpretation to the attention of the drafters, which might otherwise pose problems in national application.

**1.1.5.** The availability of *travaux préparatoires* could prevent problems of interpretation, as it would be possible to explain - in more detail than in the preambular provisions - the purpose and scope of the European legislation in question. To achieve this goal it is necessary that the *travaux préparatoires* go beyond a mere presentation of the proposed act and face possible problems arising out of the proposed text. Ultimately, the effect of *travaux préparatoires*, as a factor preventing problems of interpretation, may depend on to what extent the Court of Justice takes them into consideration.

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

1.2.1. -

1.2.2. -

1.2.3. -

1.2.4. -

1.2.5. -

1.2.6. -

1.2.7. -

1.2.8. -

**1.3.** *Ex ante checking of European legislation*

1.3.1. -

1.3.2. -

1.3.3. -

## **2. Handling and solving interpretation problems**

### *2.1. Interpretation methods and aids to interpretation*

**2.1.1.** -

**2.1.2.** Danish courts interpret national legislation in conformity with directives or community law as developed through the practice of the Court of Justice. For instance, the wording of a directive may be relevant to the interpretation of implementing national provisions. This is in conformity with the general principle according to which Danish legislation, giving rise to doubts of interpretation, must be interpreted in a manner which is best suited to bring the rule into harmony with Denmark's international obligations.

If the provisions of the directive are immediately applicable, and there is a discrepancy between them and the implementing provisions, or no implementation has been affected under Danish law, a Danish court will base its decision on the provisions of the directive.

An example of the importance of a directive to the interpretation of national Danish rules of law is a judgment (U 2003, p. 1826), where the Supreme Court in a case concerning repacking of parallel imported pharmaceutical products interpreted section 6, para. 2, of the Danish trade mark law in accordance with article 7 of the First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks.

**2.1.3.** In interpreting European legislation, use may be made of available *travaux préparatoires*. For instance, in a case (U 2001, p. 2524) concerning the interpretation of article 16, subsection 1, of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention) the Supreme Court made use of the Schlosser Report (OJ 1979 C 59, p. 71).

**2.1.4.** In interpreting European legislation, documents drawn up by the Commission at a later date may be taken into consideration. It is for the court to decide the weight to be attached to such subsequent source of interpretation. However, the documents are not - like *travaux préparatoires* - regarded as an original source of law.

**2.1.5.** The preamble is considered when interpreting European legislation. In a case concerning the legality of construction work on the Oresund Bridge (U 1995, p. 634) connecting Denmark and Sweden, Greenpeace claimed that the Danish Minister of Traffic had violated Directive 85/337/EEC on environmental impact assessment. The Supreme Court made a specific reference to the preamble of the Directive when determining the scope of the Directive.

**2.1.6.** Reference may be made to statements in the minutes of Council of Ministers when interpreting European legislation, if such statements are presented to the court.

**2.1.7.** When interpreting national legislation implementing European legislation, reference may be made to *travaux préparatoires* of Danish legislation. The Eastern High Court referred to the *travaux préparatoires* of the Danish employment contract law - which implemented Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relation-

ship - when assessing whether the law was applicable in the case at hand (U 2003, p. 932).

**2.1.8.** When interpreting European legislation the Danish version is used. Ordinarily, the court will not compare the Danish version to other versions. In specific cases where the Danish version poses problems of interpretation, versions in other languages may contribute to the interpretation. The Supreme Court is not in a position to indicate, whether different language versions are a threat to the correct interpretation.

## **2.2. Cooperation on interpretation**

**2.2.1.** The Supreme Court, when assessing whether to request a preliminary ruling, is relying on the criteria set out in the CILFIT case and subsequent case law from the Court of Justice.

In a criminal case on violation of national provisions of indirect taxation (U 1994, p. 86) the Supreme Court decided not to refer a case to the Court of Justice - in order to avoid prolongation of proceedings - despite the fact that the case at hand involved questions of community law (article 95 EC) which would necessitate a preliminary ruling. Instead the defendant was - in accordance with the Prosecutor General's final submissions - acquitted. Thus, it cannot be excluded that the delay caused by a preliminary reference may be taken into consideration as a reason not to refer the matter. In this respect *inter alia* the opinion of the parties and the urgency of the matter will be of importance.

**2.2.2.** The prejudicial procedure ensures the general interest of uniform application of community law as well as the individual interest of legal protection.

**2.2.3.** Danish national courts rarely consult contact persons before posing prejudicial questions to the European Court of Justice.

**2.2.4.** An informal network of contacts between the highest national courts and the Court of Justice is preferable.

**2.2.5.** Some flexibility would be appropriate since preliminary reference may cause substantial delays (see 2.2.1.) In deciding whether to ask for a preliminary ruling, the national court should consider the importance of uniform application of community law and of legal protection of private individuals as well as the opinion of the parties who may want to avoid substantial delays.

**2.2.6.** As mentioned in 2.2.1., the Supreme Court, when assessing whether to request a preliminary ruling, is relying on the criteria set out in CILFIT and subsequent case law. If the Court finds that there is no reasonable doubt as to the interpretation of the Community law in question, the Court will refuse a request for reference. In order to avoid unnecessarily burdening the limited capacity of the Court of Justice, national courts should in appropriate cases be able to rely on their own interpretation of Community law.

**2.2.7.** A decision by a lower court on the question of reference may be separately appealed to the higher court by one of the parties. Monitoring outside such appeals raise substantial procedural problems, in particular as to the involvement of the parties in the procedure before the higher court.

**2.2.8.** It is not recommendable that the referring national court should be obliged, in the prejudicial referral, to formulate an answer to the prejudicial question. Under an adversarial procedure, the national court cannot give such

answer without having heard the opinion of the parties, and under Danish law courts do not give advisory opinions.

**2.2.9.** It is not recommendable to create a system in which the Court of Justice - after the decision of the national court - has the opportunity during a certain period to take a decision on the verdict, probably following an appeal from one of the parties. Under such system the national courts' verdict will not be final, thereby causing legal uncertainty for the parties. Such system may also raise constitutional problems.

**2.2.10.** The Association could be instrumental in improving the mutual cooperation with the Court of Justice by setting up a databank and organising meetings. A network of specialists may not be particularly needed at this point in time.

**2.2.11.** No.

### **3. Attaching consequences to interpretational errors**

#### *3.1. Ex post examination of legislation*

3.1.1. -

3.1.2. -

3.1.3. -

#### *3.2. Community and national repair mechanisms*

3.2.1. -

**3.2.2.** The Supreme Court is not aware of cases where a party has claimed compensation on the basis of an erroneous interpretation of community law by a court or by the legislator.

If such a situation should arise, the claim would be judged against the normal conditions of obtaining compensation in case of faults made by public authorities. The basic condition is that the public authority in question has acted negligently. An erroneous interpretation will not in itself be sufficient. With regard to the legislator, liability in case of erroneous interpretation of community law by Parliament is not thinkable.

**3.2.3.** It is not necessary to introduce a specific or higher provision with the Court of Justice to adjudicate in the case of erroneous interpretation of community law by the national courts and legislator.