

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”

RESPONSE ON BEHALF OF
THE JUDICIARY OF ENGLAND AND WALES

1. PREVENTING INTERPRETATION PROBLEMS

1.1 The set of Community instruments: hierarchy, simplification, travaux préparatoires and transparency

- 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?

The fact that the words “regulation”, “directive” and “decision” do not currently distinguish between legislative and delegated instruments does not pose significant problems for the courts. Since the adopting body is always stated in the title of the instrument, and since its legal basis (whether in the Treaty or in another legislative instrument) is always stated in the preamble, it is not difficult to identify the power under which the instrument was adopted should it be necessary to do so. As the European Communities Act 1972 gives direct effect to all Community Regulations, they do not have to be further implemented by national legislation. It is therefore only Directives which have to be implemented by further national legislation. Accordingly, in the UK many of the problems mentioned in the questionnaire concern the implementation of Directives rather than European Regulations.

- 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?

The proposed reduction in the types of Community acts, the proposed distinction between legislative and non-legislative acts and the attempt to match legal acts to appropriate legislative procedures are welcomed from the point of view of public and judicial understanding of Community legislative procedures, even if some aspects of the proposed changes (e.g. implementing powers - Art I-36) do not seem entirely clear.

We do not anticipate however that the proposals are likely to have a significant impact on the implementation or application of Community instruments in the national legal order.

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

We are not familiar with these proposals.

- 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?

English courts will sometimes have regard to the travaux préparatoires of Community instruments, in circumstances where they believe that the European Court of Justice would itself do so: see, e.g., the account of such circumstances in (2003) 28 ELRev 149-171, and the order for reference of the High Court in Case C-453/03 R (ABNA) v S./S Health.

We suspect however that the use of travaux préparatoires will always remain a tool whose uses are limited, particularly with the spread of co-decision which makes it difficult to assume that views expressed by either the Commission, the Council or the Parliament (or its Committees) necessarily express the will of the Community legislature.

There may be good political reasons for greater transparency in the legislative process, but we doubt that making a verbatim record of Council debates will be of significant assistance in interpreting Community instruments. The experience of the English courts is that recourse to national parliamentary debates rarely discloses sufficiently clear and unambiguous evidence of the legislative intent behind a provision whose interpretation is disputed. We would be surprised if the outcome were much different where Community instruments are concerned.

- 1.1.5 What contribution would the availability of systematic and complete *travaux préparatoires* make to preventing interpretation problems?

See under 1.1.4 above. Such travaux préparatoires as are already available are occasionally useful in interpreting Community instruments or, as in Case C-453/03, assessing the strength of a challenge to validity; but we doubt that significant extra assistance would be derived from the publication of other documents e.g. the transcripts of Council debates.

1.2 Implementation techniques: what is the method adopted for transposition?

- 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?

The “copy-out” method of implementation is now widely used in the United Kingdom. It allows courts and advocates to concentrate their attention on one instrument rather than two, and avoids disputes over whether a national measure properly implements the Community instrument. Judges have occasionally suggested, where copy-out has not been used, that it might have been simpler to use it.

*The attractions of copy-out are however less when it is used to supplement pre-existing national provisions (health and safety; unfair contract terms). The result is the appearance of over-regulation (usually blamed on Europe) and potential damage to legal certainty: see *R (Junttan Oy) v Bristol Mag Ct* [2003] UKHL 55.*

Furthermore, copy-out will not always be a practicable solution. In areas where Community instruments have only a limited impact on matters governed by national law (e.g. the licensing of credit institutions, or the content of national laws governing direct taxation or intellectual property rights), amendment of an existing national scheme may be the only realistic option.

- 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? Does the one or the other choice in practice result in problems?

Where Community law largely governs the relevant subject-matter (e.g. the authorisation of medicinal products), the second choice is plainly preferable. Where the impact is more marginal, the reverse may be true.

*The problems tend to come when an area of law is gradually taken over by Community principles and yet its original structure has not been revised. One example identified by the English courts has been the law relating to excise duty. Attempts to adapt 1970s legislation to more recent directives with a different conceptual starting-point led to a complex and confusing statutory regime, which the courts have held in some respects did not properly implement those directives: *R (Hoverspeed) v CCE* [2002] EWHC 1630. See further VAT, the subject of question 1.2.6.*

- 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?

Section 2(2) of the European Communities Act 1972 authorises the Government to use secondary legislation in order to amend primary legislation where it is necessary to do so in order to implement a Community obligation. There are exceptions, principally for measures increasing tax or imposing serious criminal penalties. Section 2(2) is used frequently, either on its own or as a shared legal basis for secondary legislation. By removing the need to find parliamentary time, it constitutes a useful and indeed essential way of ensuring the timely implementation of Community obligations in the United Kingdom.

Constitutional challenges to the propriety of using section 2(2) have occasionally been raised but have not generally been accepted by the courts: see, e.g., R v S/S Industry ex p Orange [2001] 3 CMLR 781. Detailed guidelines for the use of section 2(2) have been developed by the government; and all such measures are laid before Parliament in order to give MPs a chance to object.

- 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?

From the perspective of the courts, three types of problem come to mind.

The first type concerns the application of a particular form of words to a particular factual situation. For example:

- *Does car hire fall within the “transport services” exemption from the consumer protection requirements of Directive 97/7 (referred by the High Court as Case C-336/03).*
- *When are two medicines “essentially similar” for the purposes of the abridged authorisation procedure now contained in Directive 2001/83 (the subject of three references from the UK and one from Denmark: C-368/96, C-106/01, C-36/03, C-74/03).*

Such problems are standard in any legal system, and are accentuated by the nature of the Community legislative process and by the need to phrase Community instruments in terms that can be given a meaning in all national legal systems and that may therefore be less precise than those used in national legislation. Whilst problems of this kind can to some extent be reduced by detailed definition clauses, or by a drafting technique which seeks to provide for all eventualities, such techniques can themselves cause problems when a purportedly exhaustive list or definition becomes out-of-date.

*Similar problems have arisen over the sixth VAT Directive 77/388. There are interpretational problems that arise because the VAT Directive, in common with directives in other areas perhaps, have been created by VAT specialists who live on a VAT island. "Economic activities" (roughly equivalent to "business") has one meaning in the VAT Directive and another in the competition law directive. "Insurance agent" and "insurance broker" are undefined in the VAT Directive. It came as a surprise to those responsible for tax compliance in the insurance industry that another Directive (the Insurance Intermediaries Directive 77/92) contains definitions of the words. See *Century Life –v- Customs and Excise Commissioners* [2001] STC 34 (CA). This Directive, 77/92 must have been in the course of creation when the VAT Directive, 77/388, was going through the system. Surely there could be some cross referencing to guide the users of the VAT Directive.*

*The second type is caused by (or at least rendered less easily soluble by) the existence of different meanings in the different language versions of the directive. See for example Case C-373/88 *MMB v Cricket St. Thomas*; Case C-296/95 *R v CCE ex p EMU Tabac*. We suspect that such ambiguities are difficult to avoid and do not know whether there is scope to improve the procedures for rendering Community instruments, once agreed, into each of the Community languages. The problem may increase with enlargement. Certainly the sixth VAT directive has given rise to interpretational problems, because some concepts of European law get lost in translation. Take article 5.4(c). The term "contract of commission" (which we understand to be a civil law term of art) has been translated into English as "a contract under which commission is payable". Take article 13A.1(1) which exempts "organizations with aims of a trade union nature": was that phrase a faithful translation of the phrase "organizations du nature syndicale"? The matter had to be referred to the European Court in *Institute of the Motor Industry –v- Customs and Excise Commissioners* [1998] STC 1219. Then the expression (loosely translated from the French) "organizations recognised as having a social character" has been translated by the official translator into the English language version of the 6th Directive as "organizations recognised as charitable" in Article 13A.1(g).*

The third type is uncertainty concerning the legal consequences that are intended to follow from a Community instrument. To take four examples that have recently been litigated in the UK:

- *Do provisions of a directive have direct effect in given circumstances?*
- *Is it intended that a failure to regulate a bank in accordance with the standards required by a directive, or a failure to ensure particular standards of environmental protection, should give rise to a remedy in damages?*

- *Is it legitimate to implement an apparently absolute obligation to achieve animal health by a provision which requires all reasonable endeavours to be taken, and imposes penal sanctions if they are not?*
- *Is an excise duty directive intended to regulate the incidence of the burden of proof in national enforcement proceedings?*

It is unrealistic to suggest that the Community legislature, operating under the inevitable constraints of a political process, should seek to anticipate and answer all such questions in the text of the instrument. Where however there is the necessary consensus that certain legal consequences should follow from an instrument, there may be scope for saying so.

- 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)?

The implementation of Directive 77/388 was considered by Parliament in 1977, when the Government majority was slender and defeat on a the Finance Bill would have precipitated a General Election. Whether for this reason or because of departmental inertia, Ministers sought to make the minimum possible changes to the pre-existing system. The result has been confusing, and productive of much litigation.

Our lawyers and accountants are highly sophisticated and perhaps more inventive than their counterparts in other parts of Europe. There are two main reasons for the difficulties of interpretation. The first stems from the fact that a number of legal concepts have different meanings in Member States with civil law jurisdiction on the one hand and Member States with common law jurisdictions on the other, concepts like "consideration", "agency" and "tax avoidance" as examples. It is likely that the drafters of European legislation will be lawyers from civil law jurisdictions and the concepts they use cannot always be directly translated to equivalent common law concepts.

The second difficulty stems from the differing approaches to the drafting of tax legislation. In the United Kingdom tax legislation has always been strictly construed and is, therefore, drafted in precise form; UK tax lawyers and judiciary have become used to this. The European Directives, on the contrary, are of a more general nature and have to be construed purposively; this is less instinctive for UK tax lawyers and judiciary who are, nonetheless, conscious of the need for a uniform interpretation across the Community.

These difficulties cannot be blamed on incorrect or incomplete national implementation legislation because it has become increasingly

common for taxable persons here to rely directly on the Directives rather than on the national implementing legislation.

The Bird Directive (79/409) was implemented by a modern and comprehensive piece of legislation, drafted with the specific aim of giving effect to the directive and to the Council of Europe Convention on which it was based. Implementation of this directive and of the species protection provisions of Directive 92/43 has not given rise to significant difficulties.

Where habitat protection is concerned, there is a contrast between the traditional British approach of balancing conflicting interests and the Community approach which requires conservation to have the highest priority. That contrast was brought home to the Government and to environmental lawyers by Case C-44/95 R v S/S Environment ex p RSPB (Lappel Bank). Directive 92/43 has been implemented by Regulations which preserve the pre-existing legal framework (based on the exercise of administrative discretion) but requires those discretions to be exercised in accordance with the specific requirements of Community law.

To summarise:

- *Implementation of the Sixth VAT Directive is an unsuccessful example of the first type of implementation referred to in question 1.2.2.*
- *Implementation of habitat protection is a more successful example of the first type.*
- *Implementation of species protection is a good example of the second type.*

1.2.6 Did the implementation of these directives encounter obstacles? What do you think were the reasons for this?

See under 1.2.5, above.

1.2.7 If the problems have been solved, how was this done?

See under 1.2.5, above.

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

We are not aware of the extent (if any) to which Government departments have regard to the practice of other Member States in determining how to implement a Community instrument.

English courts sometimes express interest in seeing how a given provision has been implemented in other Member States. The existence of divergent interpretations in national implementing legislation can be relevant e.g. to the issue of whether a particular interpretation is arguable, or whether a question should be referred to the European Court of Justice for a preliminary ruling, It is difficult however to see how the implementing measures of other Member States could assist in interpreting the underlying provision of Community law.

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?
- 1.3.2 At what phase of the European legislative process would advice be most appropriate?
- 1.3.3 Do you have any suggestions for the setting up of an informal advisory procedure?

We assume that these questions relate to the checking of draft Community legislation either for compatibility with the Treaty and general principles of law, or for ambiguities that could cause interpretational difficulties in some or all language versions.

We would very much welcome any attempt to improve the quality and consistency of Community legislation, but have no specific ideas as to how the existing procedures of the legislative institutions could be improved. What might assist would be a common glossary of autonomous expressions. There should be a lexicon of defined terms, terms defined throughout the Directives, whatever the subject matter of the Directive. And when a Directive means to adopt a term defined in another directive, it should say so.

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?

See the examples identified under 1.2.2 and 1.2.4, above. The problems are either resolved by the English courts themselves or referred to the European 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?

The courts and tribunals are well aware that “so far as possible”, they must interpret national implementing legislation in accordance with the European legislation that it implements, and with Community law in general. They are also aware that directly effective provisions of Community law must be given precedence over inconsistent national provisions.

For these reasons, the courts will frequently take as their starting-point the terms of the directive rather than (to the extent that it may be different) the terms of the national implementing legislation.

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

See answer to 1.1.4, above.

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

It is difficult to see how such documents could be an admissible aid to the interpretation of prior legislation. However, if national authorities have taken a position that is inconsistent with such a Commission document, the divergence might be a factor in favour of making a reference under Article 234 EC: that was so in Case C-36/03 R (APS) v Licensing Authority.

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

The English courts seek to interpret Community legislation in accordance with its preamble, to the extent that the European Court of Justice does so (C-404/97 Commission v Portugal, para 41). Though it has no exact equivalent in United Kingdom legislation, the preamble is welcomed as a helpful and accessible guide to the intention of the Community legislator.

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

Two preliminary rulings on references from English courts are thought to have defined the circumstances in which reference may be made to statements in the minutes of the Council of Ministers: Case C-292/89 Antonissen and Case C-368/96 Generics. The English courts follow that guidance.

- 2.1.7 In interpreting national legislation to implement European legislation is references made to *travaux préparatoires* of that national legislation (explanatory memorandums etc.)?

The English courts may look at pre-legislative materials (e.g. White Papers) and at explanatory notes. Reference may also be made to statements made in Parliament for the purposes of construing a statutory provision where (a) the legislation is ambiguous or obscure, or leads to an absurdity, (b) the material relied on consists of statements by a minister or other promoter of the Bill (together with material necessary to understand such statements and their effect) and (c) the effect of such statements is clear.

Laws passed in order to give effect to Community obligations are no exception to these principles. The courts are however mindful that whatever the actual intention of the legislature, they must so far as possible interpret national implementing legislation in accordance with the European legislation that it implements: Case C-106/89 Marleasing. Where implementing legislation is concerned, therefore, the need for an interpretation compliant with Community law overrides the need to discern what the national legislator actually intended.

- 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 desirability of considering different language versions in cases of ambiguity or doubt has often been stressed by English judges. Lord Denning in *Bulmer v Bollinger* (1974) urged the English courts to consider all the authentic texts of a Community provision. Warner J (a former Advocate-General) stated in 1986 that it is generally unwise to look at the text of a Community measure in one language only. The possibility of divergences between language versions is treated as a factor in favour of a case being referred to the European Court of Justice under Article 234 EC.*

The French version of a Community instrument can usually be considered without formality or fuss.

*Where wider-ranging submissions are to be made on different language versions, the Court of Appeal has held that the parties should seek to agree in advance the meaning of the versions in question; that submissions based on disputed translations of foreign-language texts are unlikely to be productive; but that if such submissions are pursued, it should be on the basis of evidence from translators, followed if necessary by cross-examination: *R v CCE ex p EMU Tabac* [1997] EuLR 153.*

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

No.

2.2 Co-operation on interpretation

[NB we have avoided the phrase “prejudicial procedure” in favour of “preliminary ruling procedure”]

- 2.2.1 Can you indicate to what extent not so much legal as policy considerations affect the use of the preliminary ruling 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?

In our jurisdiction it is only legal, and not policy, considerations which affect our decisions to request the Court of Justice for a preliminary ruling. We bear in mind the need for a uniform interpretation of the Directives throughout the Community and ask whether the existing jurisprudence of the Court of Justice enables us with confidence to reach our own decision.

The English courts are conscious that (save where no appeal is possible) they have an absolute discretion over whether to refer a question for a preliminary ruling, however difficult they may find the point of law to be. In exercising that discretion, they will have considerable regard to the wishes of the parties and to any adverse consequences that the delay occasioned by the reference could have for the parties or for the administration of justice.

No such discretion exists (save where the matter is acte clair) before a court against whose decision there is no judicial remedy: Article 234(3). As to this, see under question 2.2.5, below.

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

The procedure performs both functions but it is the first that is most important. Any national court has the power to protect the Community legal interests of individuals appearing before it (save where the validity of a Community instrument is at issue, and the Zuckerfabrik/Atlanta preconditions for suspension of that instrument are not satisfied). Nothing a national court says can, however, ensure the uniform application of Community law: this needs a ruling from the European Court of Justice.

- 2.2.3 We are unaware that such informal contacts take place. If they do, they must be very rare. It would generally be seen by English judges as contrary to the principle that judicial decision-making should be open and transparent and not be influenced by informal contacts of which the litigants are unaware and on which they cannot comment.

- 2.2.4 An – informal or institutionalised – network of contacts between the highest national courts and the European Court of Justice [question incomplete?]

The current UK Judge in the European Court of Justice was until recently a judge of the English Court of Appeal. Judges from other Member States have been frequent visitors to England and have good contacts with the academic and judicial communities in London. There is an active programme of judicial visits from England to the European Court of Justice, including at the most senior levels.

- 2.2.5 With regard to the CILFIT judgment 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 preliminary ruling procedure, both for the effect and effectiveness of Community law and for the legal protection of private individuals.

The CILFIT rule purports to relax the Article 234(3) obligation on courts from whose decisions there is no judicial remedy to refer questions of Community law to the European Court of Justice. In reality, however, it relaxes that obligation hardly at all. Article 234(3) courts are told that they may decide for themselves questions which are acte clair. But this will be so only if the national court “is convinced that the answer is equally obvious to the courts of the other Member States”.

We think there is force in the argument (floated in 2000 by the pre-Nice Reflection Group) that the CILFIT criteria are too strict, though we appreciate that on one view at least, their relaxation would require the repeal or amendment of Article 234(3). The obligation on Article 234(3) courts to refer all interesting or difficult questions of Community law may be considered objectionable because:

- *It prevents those courts from adjudicating in a timely manner in the full range of cases affected by Community law. If they had a discretion to refer, they could legitimately take into account such factors as the limited general importance of an issue, and the likely impact upon the parties of a delay that now averages over two years and can be substantially more. The latter factor will become particularly acute as Community law extends its reach further into the field of justice (including criminal justice) and home affairs.*
- *It prevents those courts from realising their considerable potential to contribute to the development of EC law. More subtly, by removing from supreme courts the task of adjudicating difficult issues of Community law, it diminishes the perceived importance of such expertise at lower levels of national judiciaries.*

The relaxation of the Article 234(3) obligation is presumably said to be “risky” because of the danger that without it, some national supreme courts might decide Community law cases in bad faith, or in defiance of established principle. We do not believe however that Article 234(3) – which lacks teeth of its own – would be capable of deterring a national supreme court which was set upon such a course. Now that substantively incorrect supreme court decisions can trigger both an action for damages (Case C-224/01 Köbler) and infringement proceedings against the Member State in question (Case C-129/00 Commission v Italy), it is difficult to see the necessity for Article 234(3) in its present form. Should further deterrents be thought necessary, see answer to 2.2.9 below.

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

The English courts attempt to keep questions referred to a minimum, and to restrict them to issues which are (in the words of Article 234) necessary to enable them to give judgment. However:

- *A reference will occasionally be made notwithstanding that if the facts are found in a particular way, the point of law referred will not after all be necessary for the disposal of the case. Case C-453/99 Courage v Crehan was a reference on the short but important legal point of whether a party to an agreement contravening Article 81(1) EC can sue the counterparty for damages. Having received a positive answer, the national court concluded after a lengthy trial that the agreement did not in fact contravene Article 81(1) (a finding which is currently under appeal). Such references are submitted to be justifiable on the basis that had a negative answer been given by the European Court of Justice, no trial would have been necessary, (and perhaps also on the basis that the question referred was of considerable general importance).*
- *It can be counter-productive to restrict the number of questions referred in a given case. Sometimes, questions of Community law which are relevant to the case but did not form part of the original reference for a preliminary ruling turn out to be less obvious than had originally been thought. The undesirable consequence may be a second reference (as in CILFIT).*

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

We would be strongly opposed to such a suggestion, which would be wasteful of time and of the resources of the parties and of the courts.

- 2.2.8 The referring national court could be obliged in the reference for a preliminary ruling to give an analysis of the case itself and to formulate an answer. Changes to the Treaty would be necessary.

We doubt whether this should be an obligation.

Referring courts which wish to express a view on the questions referred already do so: Case C-414/99 Davidoff v A&G Imports. To require all national courts to express a view would be wasteful of time and resources in a case where the need for a reference is obvious but the answer to the questions referred is not. It would also expose national courts to the risk of criticism if their analysis was not followed by the European Court, contrary to the principle that the relationship between national courts and the European Court is co-operative rather than hierarchical, based on the recognition that each court has a different function.

- 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.

We see some limited merit in this suggestion, though only once national appeal rights have been exhausted without a reference, and only as a quid pro quo for the repeal of Article 234(3). Lord Slynn has suggested that the Commission could have a power to refer aberrant decisions, if sufficiently important, directly to the European Court. Alternatively the European Court itself could have the power within a short time scale to call in a case (in the same way that it will be able to undertake an "exceptional review" of preliminary rulings by the Court of First Instance under Article 225A EC), such a power to be exercisable on its own motion or on petition by the Commission, a Member State and/or a disappointed litigant. Petition by a disappointed litigant would equate to the "leave to appeal" system envisaged in the second part of the question.

Any such system would however increase the claims on the European Court's time, and could significantly diminish the desirable legal certainty that has until now been consequent upon a supreme court ruling. In view of the other remedies discussed in the last paragraph of the answer to 2.2.5, above, we are not convinced that the advantages of such a system would outweigh the drawbacks.

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

A most useful tool for judges and practitioners alike, not already available so far as we are aware, would be a database giving access to

full-text judgments on Community law of the higher national courts in all Member States. By searching on a provision (Article x of Directive y), one could find all cases in which that provision had been considered by national courts. Ideally, there would be at least a summary of each judgment in one or more widely-understood Community languages.

This would enable national courts not only to compare notes and learn from each other's approaches to a common problem, but also to identify those cases in which divergent interpretations have been given by the courts of different Member States, a factor which may point towards the making of a reference to the European Court.

The task of constructing such a database should become easier as more higher-court national judgments become available on-line. The Association could have a role to play in setting up or facilitating such a database.

2.2.11 Do you have any other suggestions?

No.

3. Attaching consequences to interpretational errors

3.1 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 consequences?

*In cases where judges have had to disapply provisions of implementing legislation in order to give effect to Community law (e.g. *Hodgson v CCE* [1997] EuLR 117), revised legislation will normally follow (once appeal rights have been exhausted) as a matter of course.*

Where judicial criticism is directed more to the complexity or obscurity of implementing legislation than to its illegality, a reaction from government cannot be guaranteed. The Law Commission - a body of legal experts, chaired by a High Court judge and responsible for keeping the law under review and recommending changes where necessary - may however have a useful role to play.

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 which periodically reports on this so that shortcomings can be remedied?

Unlawful implementation identified by the European Commission, if not corrected, may generally be expected to lead to infringement proceedings under Article 226 EC. Unlawful implementation identified by national courts will normally result in revised legislation. The Law Commission, as already stated, can recommend changes to the law, including the law implementing Community obligations. This seems to be a broadly satisfactory framework, though we are open to other ideas.

- 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?

See above.

3.2 Community and national repair 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 European Court recently confirmed in Case C-129/00 Commission v Italy that the Commission may bring infringement proceedings against a Member State under Article 226 EC in respect of “a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it”. We have no difficulty with that ruling, though the remedy is a constitutionally delicate one and we would not anticipate that it will be frequently used. There are risks of confusing the separate responsibilities of the executive (the Commission), the legislatures (of the Community and at national level) and the judiciary of the national courts. A reference to a higher court is the usual mechanism for correcting errors of law by a lower court. However, in the United Kingdom it is left to the parties to make the decision about an appeal and there is no procedure for cases to be “called in” by a higher court. It is then left to the legislature to pass amending legislation if it does not agree with the judgments of the courts

- 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 possibility of obtaining compensation in the case of an erroneous interpretation of Community law by the legislator is illustrated by the well-known Spanish fishermen’s case, Factortame. After judgment in Case C-48/93, the Divisional Court followed by the Court of Appeal and House of Lords each found that the error of law in the Merchant

Shipping Act 1988, being both grave and manifest, was sufficiently serious to sound in damages. Damages were subsequently recovered.

The principle that Government may be liable for manifest errors of Community law committed by national supreme courts was established in the recent judgment of the Court in Case C-224/01 Köbler. At least one such claim for damages has already been brought in the United Kingdom, founded upon the refusal of the House of Lords to grant permission to appeal against an order of the Court of Appeal.

Two features of the English judicial system – its strict doctrine of stare decisis (meaning that lower courts are accustomed to treating the decisions of higher courts as strictly binding upon them) and its unitary nature (civil and administrative courts all forming part of the same judicial hierarchy) are likely to render it difficult for Köbler-type cases to be resolved in England. Indeed it has been questioned whether a lower court which is called upon to decide whether a higher court committed an inexcusable error of Community law would, in the context of the English legal system, have the requisite independence to satisfy e.g. Article 6 ECHR. Nevertheless there is no doubt that the English courts will loyally apply the principles of the jurisprudence in this area, even if the resolution of Köbler cases requires questions to be referred to the European Court of Justice so as to avoid or minimise the problems identified.

- 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?

The English courts have demonstrated their readiness both to award damages in respect of acts of the Government or the legislature in the UK, and to make references under Article 234 to the extent that this is considered necessary. As indicated above, the same result is likely to follow in relation to Köbler liability.

These possibilities are supplemented, under the existing scheme of the Treaty, by the opportunity for the Commission or another Member State to bring proceedings under Article 226 or Article 227 aimed at establishing an infringement on the part of the executive, legislative or judicial authorities of a Member State.

We do not know whether there is or will be any judicial reluctance in other Member States to award damages in respect of acts of their own governments or legislatures. If such a problem does or might exist, we doubt whether the solution lies in the invention of a new procedure whereby the European Court of Justice or Court of First Instance would have original jurisdiction in an action for damages at the suit of individuals against a Member State. Such a procedure would be cumbersome and could engender significant ill-will.

A more pragmatic solution would be for the Court of Justice, in deciding infringement actions, to state of its own initiative, in deserving cases, that the infringement in question would appear at least at first sight to meet the requirements for liability. The Court took this course in C-265/95 Commission v France, in which it held (despite the fact that damages were not directly in issue) that the national government in question “ has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts”. By the use of such language, the Court of Justice facilitates a subsequent damages action in the national court, should one be brought. Furthermore, if such a damages action were rejected by the supreme court, the conditions for Köbler liability in respect of that rejection would then be easier for the claimant to satisfy.