

The Finnish National Report for the 2004 Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

Supreme Administrative Court of Finland
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Note

The Supreme Administrative Court of Finland is not regularly involved in legislative business, though, according to the Constitution, it has the right to propose to the government that legislation is amended in some respect. The Court is also regularly consulted about proposals concerning central administrative or fiscal law or administrative jurisdiction.

In Parts I and III of the report, the information relating to legislative questions is either based on Finnish official documents or then reflects personal opinion and experience of the *Rapporteur*. Where necessary, the source of the standpoint concerned is indicated.

Answers to questions in Part II are prepared by Justice *Heikki Kanninen*.

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 *Rapporteur* is not aware of any major problems. Unclear normative hierarchy mainly creates problems at the level of the EU decision-making, especially concerning the powers of different institutions and the applicable procedures. These problems should not be reflected at the national level unless the Court of Justice has declared a certain act invalid because of lack of competence of the institution that enacted the act. Therefore, and pursuant to the principle of supremacy of Community law, the national legislator is obliged to implement any Community legal act requiring national legislative measures regardless of the position of the act in question in the normative hierarchy of Community law.

Consequently, the national courts must apply all Community acts appropriately promulgated in the OJ, and they can proceed on the presumed validity of the Community act concerned (cf. C-314/85, *Foto-Frost*). If there are doubts concerning the validity of the act in question, the national court must refer the case to the Court of Justice for preliminary ruling. For example, the Supreme Administrative Court

concluded in its decision *Chiquita Finland* (KHO 1996 A 30) that a national court does not have competence to declare a Commission Regulation invalid and that it can, bearing in mind the *Foto-Frost* decision, base its decision on the presumed validity of the Regulation as the court had not found any reasons to suspect grounds leading to invalidity of the Regulation in question.

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?

In the Government Report of 2 September 2003 to Parliament on the results of the Convention (VNS 2/2003 vp) the proposals referred to in the question received positive response, which was also shared by the Grand Committee (SuVL 2/2003 vp) opinion and the Foreign Affairs Committee Report (UaVM 4/2003 vp) on the matter. The Finnish Parliament had already in 1995 supported the idea of creating a clear normative hierarchy of Community legislative acts. At a general level, the proposals of the Convention were seen as contributing to greater transparency and clarity of the EU legal system. It was also emphasised that these proposals would enhance the possibilities of restricting the legislative business of the EU legislator to provisions on more important and general issues only, whereas the technical details of regulation would be left to be decided by Commission acts.

The Grand Committee pointed, however, that it is a problem from the Finnish perspective that the scope of legislation has not been materially defined in the Constitutional Treaty, especially since the relationship between delegated legislative powers and implementing competences is not clearly set out therein. It was also regarded as problematic how European laws and European framework laws as categories of legislative enactments can be applied in those fields where the Treaty explicitly excludes harmonization of national legislation.

1.1.2_ To what extent would the differentiation of the legal instruments of the European which has also been proposed (open coordination, self-regulation and co-regulation) create problems for the implementation and application of Community legislation in the national legal order?

In Finland, both Government and Parliament have taken rather negative standpoints concerning open coordination as a regulatory method. It has been feared that the use of open coordination may lead to unintended expansion of EU competences and confusion as to the limits of powers of the EU institutions. Generally, Finland has emphasised the need to follow the Treaty-based procedures in all EU cooperation.

The *Rapporteur* is not aware of any specific Finnish standpoints concerning self-regulation and or co-regulation as Community regulatory methods, except for that Finland has actively supported the use of collective bargaining and agreements by the social partners in Community labour law and its implementation.

At an abstract level, it can be speculated that self-regulation and co-regulation without a clear constitutional or legislative framework could create specific problems both as sources of Community obligations of the Member States as well as means for creating and ensuring Community rights of individual in the national legal systems.

1.1.3_ 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. Many problems of the national implementation, interpretation and application of Community legislation could be avoided and/or corrected if information on the reasons for opting for a certain word or expression in the Community act in question during its preparations would be accessible to the national draftsmen and judges.

1.1.4_ What contribution would the availability of systematic and complete *travaux préparatoires* make to prevent interpretation problems? (See also point 2.1 below)

In the Finnish legal method it is taken as a starting point that legislation is purposive activity. Therefore, all information concerning the aims and objectives of those who drafted and decided on the applicable provisions is potentially valuable as interpretative material. It is then another question what interpretative value opinions expressed in *travaux préparatoires* have for the decisions in individual cases. In the application of Community law information about the drafting history of a provision could be useful as it might help to exclude certain interpretations or explain certain terminological choices in the act etc.

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?

In the Ministry of Justice *Legal Draftsman's Guide to the European Union - Guidelines for drafting national legislation* (originally adopted in Finnish in 1996, English translation by the Finnish Ministry for Foreign Affairs, Unit of Action Plan for Central and Eastern Europe, in 1997) is established as follows (p. 51):

“The language used in Community acts differs to a degree from that used in Finland. Nevertheless, the basic rules are that Finnish legal language is not to be changed because of accession and that the (national) Finnish legal language may undergo development regardless of the Finnish language used in the institutions of the Community.

As regards terminology, the basic rule is that the terms used in Community acts should be adopted also for national legislation. Where established national terminology differs from that used in the Community, it should be assessed on a

case-by-case basis whether to retain or to alter the national terminology. Community law does not necessitate terminological change as such, if the EC acts can be appropriately implemented nonetheless.

A specific problem arises when the directive to be implemented is obscurely worded. This is even more so when the obscurity is not a result of translation difficulties, but rather arises from political compromise. In such cases the questions of implementation must be even more carefully thought out than what usually is the norm. The basis must always be that nothing of the linguistic obscurity remains in the national provisions. Of course, the directive must also be implemented correctly and effectively. When aiming at clear legal language, these sometimes conflicting objectives mean that, at times, the text of the directive needs to be explained and/or made more specific. Care must be taken not to restrict the freedoms enshrined in Community law more than what is required by the directive. It should also be kept in mind that Community regulations are directly applicable in the member States and cannot therefore be explained or interpreted by means of national legislation.

The *Rapporteur* shares the views expressed in the above-mentioned official guide.

- 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.

According to the *Rapporteurs* experience it is, perhaps unfortunately, seldom possible to bring the entire system of national legislation in a given field into line with European legislation. In most fields the Community law does not provide a complete framework of legislative regulation but is restricted to approximation/harmonization of certain aspects of the sector concerned. There may be some counter-examples to this but even then the general national legal system (general private, criminal, administrative and procedural law principles) must taken into account. It is a different question how deeply the infiltration of Community law into the existing national law is allowed in the course of national implementation. In that respect, the political and legal importance of the field in question clearly has some significance. In technical or purely economic regulation the openness of the national system to Community law is obviously much greater than in such central fields of the legal system as the law of contracts, torts, company law, criminal law, fundamental rights etc.

From a static point of view, the choice between the above-mentioned alternatives clearly represents a trade-off between fitting well into Community law and fitting well into established national law. From a more dynamic perspective it is possible that the ongoing silent approximation of the more fundamental aspects of the national legal systems taking place and inherent in the EU legal system may mitigate this choice. In

this context, the development of a EU fundamental rights system and a common core of European administrative law may be of special importance.

- 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?

The three main forms of implementation of directives are *rewriting*, *incorporation* and *reference*. In the first mentioned alternative national legislation is rewritten so that it complies with the requirements of the directive. Such rewriting can be considered as the standard method implementation. Consequently, it cannot be used for the purposes of accelerated implementation unless it is used in the context of delegation of legislative powers (*see below*).

So far as *incorporation* and *reference* are concerned (*see Legal Draftsman's Guide to EU*, p.34-35)

“incorporation means the direct insertion of the text of a directive into national law. This method of implementation is advisable in cases where the directive is very detailed or contains technical specifications and where the Member State has little or no latitude in its implementation. It should, however, be noted that incorporation is possible only where the text of the directive lends itself to direct application. If it presents alternatives or other forms of latitude for the national legislator, the required specifying provisions must be adopted nationally. At times it is possible to make use of *partial* incorporation, so that only selected parts of the directive are inserted into national law as such. This technique makes it easier to compile a clear legislative whole, where the directive and the national law ‘flow’ together smoothly and coherently.

If an incorporated directive is amended, the national implementing legislation must be amended in a corresponding manner.

It is also possible to implement a directive simply by referring to it in national legislation. However, this is usually not to be recommended. For a start, directives are addressed to the member States and require national implementation, which means that mere reference is not necessarily a sufficiently effective method. In addition, reference makes it more difficult to keep up to date with new legislation, even though directives are published in the Official Journal of the European Communities.

Accordingly, the reference method should only be used in cases where the text of the directive is specific or technical and where the other methods for some reason are difficult to use. Thus, a reference could be used e.g. where implementation takes place by means of an administrative order and the directive itself can be annexed to the order. Of course, the reference method cannot be used if the directive contains alternatives or provides for other latitude in implementation.”

So far as *delegation* is concerned, according to the Guide, the appropriate level in the national legislative hierarchy is chosen in accordance with the national law. If the matter

is one that is nationally regulated by Act of Parliament, also the implementation must take place at that level. Alternatively, a delegation may be given in an Act so that the more detailed material provisions can then be given by a lower-level norm, such a governmental Decree. Such delegation of legislative competence is possible on the conditions that also normally govern delegation pursuant to the Constitution.

Quantitatively, in Finland a great bulk of Community legislation has been implemented by using a combination of the delegation of legislative powers and reference or incorporation method. This has been the case especially because of the need to implement the old approach TBT directives that are more comparable to technical standards than legal provisions. The same applies to technical rules in other fields such as environment and agriculture. On the other hand, the Constitution effectively precludes implementation of more significant legal materials by delegation.

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 should be noted that Finland implemented the *acquis communautaire* in a very short period of time in the beginning of 1990's. The negotiations on EEA agreement started in 1990 and Finland acceded to the EU in 1995. Therefore, it is difficult to specify any field where there would *not* have emerged interpretation problems. In this context, it should be noted that interpretation problems are more difficult during the pre-accession implementation as the candidate country has not had recourse to the decision-making process that has led to the adoption of the EC act in question.

Interpretation problems can be *terminological*, *i.e.* that terminology or legal concepts used in the Community act in question are ambiguous or do not correspond to established national terminology. They can also be *linguistic* problems based on the differences between different language versions. Often there also exists a certain imbalance between casuistry and generality in EC legislation. At times the provisions in an EC act can be unclear or inexact because the political will to arrive at a more exact text has not existed in the negotiations. Such 'constructive ambiguity' may even be intended. On the other hand, political compromises may also lead to complicated compromises resulting in technically casuistic and complex provisions.

It should also be added that the geographical, environmental and climatic conditions of Finland greatly differ from those of other EU countries. This has caused implementation problems especially concerning EC acts adopted before Finland's accession. For instance, it has been rather difficult to apply the EC directives on bathing water in a country with c. 200 000 lakes and tens thousands of islands and where the waters are yearly covered by ice for several months as the directives have been drafted with the circumstances of South and West European sea-shores in mind.

1.2.5 - 1.2.7 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).

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

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

VAT

Value added tax in the European Union is harmonised by directives, in the first place by the Sixth VAT Directive (77/388/EEC). The Finnish VAT Act, however, was drafted some years before Finland's EU membership and it was based on the assumption that Finland would belong to EEA where there was no obligation to approximate the VAT legislation. The national act was based on the directive but in many cases the legislator did not want to follow the Community system. This was based partly on different policy choices, partly on that Finland was not expected to participate fully to the internal market.

After Finland's accession the conflicts between the national act and the directive had to be eliminated in so far as the Act on Accession did not provide for special arrangements or exceptions. In one case this was done only after the Court of Justice had found Finland guilty of infringement of the Directive. (See *C-169/00*, ECR 2002 I-2433, *Commission v Finland*, where the ECJ declared that, by maintaining in force legislation exempting from value added tax the sale of a work of art by the artist, either directly or through an agent, and the importation of a work of art by the owner-artist, the Republic of Finland has failed to fulfil its obligations under Article 2 of the Sixth Council Directive 77/388/EEC.)

However, the Finnish act differs from the directive as to its structure as well as many of its expressions. There is therefore constant tension between the national act and the directive.

The directive is often relied upon as a basis for deliberation, and it is frequently referred to in the decisions of the Supreme Administrative Court. A study shows that Community law played an important part in one in four of the approximately 80 VAT decisions published by the Court between 1.1.1997 and 30.6.1999. After that period, the importance of Community law has increased rather than decreased. On the whole, however, there is no conflict between the VAT Act and the directive, and the directive has been directly applied only exceptionally, whereas its interpretative effects are relied upon quite frequently.

The impact of Community law and the ambiguous nature of the national act have increased the proportion and perhaps even the emphasis of VAT cases as compared with income tax cases. The fiscal treatment of financing and real estate transactions has turned out to be the most ambiguous area of VAT. For those decisions, application of Community law has become the rule rather than the exception. There is friction between the directive and the national act. Many appeals concern advance rulings of the Central Tax Board. This is another manifestation of the ambiguity and economic impact of the fiscal treatment in these areas. Moreover, tax decisions concerning financial services

have a wider international scope than is customary both within the EU and in relation to third countries. This is another reason why it has been surprising to note that practices relating to financial services within the Union are inconsistent on many points. So far, the Supreme Administrative Court has referred one single VAT case to the Court of Justice of the European Communities. It was lodged on 15 March 2000 and concerned primarily car tax, but contained an accessory question about the VAT payable on car tax (cf. C-101/2000, *Tulliasiamies and Antti Siilin*).

Bird and habitat directives

The bird directive (79/409/EEC) and habitat directive (92/43/EEC) were implemented by amendments to the Nature Conservation Act and certain other acts. This legislation entered into force in 1997, *ie* after the deadline for implementation had expired. A major problem relating to implementation was that not only had the Finnish legislation to be adapted to the Community directives but the Community system had to be adapted to the Finnish nature as well. This meant that especially the annexes of the directives had to be supplemented with references to boreal and arctic species and nature types.

In the implementation the Finnish legislation had to be amended so that the legal effects of the protection were extended also to areas surrounding Natura 2000 sites whereas according to the earlier national legislation the conservation had legal effects only as regards the area that had been designated as protected. This also entailed expansion of the use of environmental impact analyses. In addition, special provisions concerning the establishment of Natura 2000 sites had to be added to the national act.

A special implementation problem was connected to flying squirrel (*Pteromys volans*) which is a Siberian species living in the present EU only in Finland.

According to Article 12(1)(d) of directive 92/43/EEC “Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range prohibiting (d) deterioration or destruction of breeding sites or resting places.” The Government, relying on a then interpretation by the Commission, proposed to the national act a restricted wording, according to which the prohibition of deterioration and destruction applied only to breeding sites or resting places that were clearly perceptible in the nature. The idea behind this was to prevent situations where completely unintended deterioration and destruction would lead to sanctions. In the Government Bill this was seen as necessary, not because of the living habits of flying squirrels, but so as to prevent that unintended destruction of resting places on ice of *Saimaannorppa* (*Phoca hispida saimensis*), a seal living in the Lake Saimaa, would lead to prosecution.

Breeding sites and resting places of the flying squirrel are normally not clearly perceptible; the animal lives in abandoned bird nests and holes of trees and moves normally only at the night-time. Therefore, normally only an expert can conclude the existence of flying squirrels within a territory. This has led several legal cases relating to woods, concerning which it is established that flying squirrels live there but their individual breeding sites and resting places cannot be identified. In summer 2003, the Commission issued a reasoned opinion where it was found that insertion of the words “clearly perceptible in nature” to the national provision was contrary to the

directive. The Supreme Administrative Court had come to the same conclusion in June 2003 in its decision KHO 2003:38. A bill to amend the Nature Conservation Act in this respect has been introduced to Parliament by the government in autumn 2003.

The most important consequence of the two afore-mentioned directives is the establishment of Natura 2000 areas in Finland. Natura 2000 is the common network of nature reserves in the European Union consisting of sites chosen in accordance with the Habitats Directive and the Bird Directive. On 20 August 1998, the government decided to propose and notify 439 sites under the Birds Directive and 1325 sites under the Habitats Directive to be included in the Natura 2000 network. Some of these sites were included in both categories. The area of SCI sites in Finland is 47000 square kilometres and of SPA areas 28 000 square kilometres. By comparison, the joint area of the Finnish SCI and SPA sites corresponds to the combined area of Belgium and the Netherlands.

A decision to supplement the Finnish Natura 2000 network was decided by the government in May 2002. The government has proposed 289 new areas or re-definitions of old areas to the network.

The government decision of 1998 on Finland's proposal was a challengeable administrative decision under the Nature Conservation Act. Among others, the owners of the land and water areas concerned, the local authorities and certain organisations representing the interests of nature conservation or landowners had right of appeal. The appeals were based on illegality of the decision. In that respect, the provisions on species and natural habitats of the Habitats and Birds Directives were of key importance as the selection criteria were not transposed to national law but the Court had to directly apply the relevant provisions of the directives.

The Supreme Administrative Court received 1241 appeals involving some 750 different sites. One appeal could involve several sites and parties, whereas one site could be the object of several appeals. Most appeals consisted of demands for sites to be withdrawn or reduced, but there were also many appeals requesting sites to be expanded or added. Totally, the number of appellants exceeded 5000. Some of the appeals concerned the government decision as a whole.

Despite their specific character, the Natura 2000 cases were handled regularly by the chambers in benches of five members. In addition to statements either of a general nature or relating to specific sites issued by the Ministry of the Environment and to reports of the parties involved, other evidence necessary for the proceedings was obtained. Seven locations of various types were inspected *in situ* by the members of the Court in different parts of the country. The appellants were heard on each statement submitted by the ministry, and they were given access to the accumulated material. Controlling the exceptional amount of material required the Court as a working team to introduce novel solutions in the process of preparation, involving a versatile use of information technology. Nevertheless, each case was settled individually.

Since the areas proposed for the Natura 2000 network are interconnected, most decisions were issued simultaneously, the main part on 14 June 2000. The total number

of decisions issued in Finnish or Swedish was 694. Their aggregated text comprised over 40000 pages. Most decisions concerned single Natura 2000 sites. In about seven per cent of all decisions, the government decision was annulled either in whole or in part. Sustained were appeals lodged by owners of land and water areas as well as by nature conservation organisations.

The government decision of 2003 to supplement the Natura 2000 network has lead to 68 new appeals to the Supreme Administrative Court. These cases are still pending.

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

In principle yes. In practice the draftsmen responsible for the implementation may gain a more direct and prompt access to similar information though their direct contacts with their homologues in other Member States' administrations.

1.3 *Ex ante checking of European legislation*

In Finland, the government is obliged to communicate to Parliament without delay all the Commission proposals that touch issues belonging nationally the remit of Parliament. The government also regularly informs Parliament of other proposals and pre-legislative documents such as Green and White papers. The EU proposal or document concerned is annexed to a government memorandum where *inter alia* the legislative effects of the proposal at the national level are described and analysed.

In Parliament, these proposals and other documents are first studied by the competent specialised committee(s). In the specialised committee the European proposal are handled according to similar procedures as national proposals. This means that the committee hears in addition to the government representatives also other authorities, NGO's and independent academic experts. Then the specialised committee concerned prepares a written opinion on the proposal to the Grand Committee that acts as the European affairs committee of Parliament. The Grand Committee assesses on behalf of Parliament and on the basis of the opinion of the competent specialised committee whether the negotiation aims of the government in the matter politically represent a majority view of Parliament or whether they should be amended. According to the principle of parliamentary accountability it is understood that the government follows the opinion of the Grand Committee so far as questions within the constitutional competence of Parliament are concerned.

The above-mentioned dialogue between Parliament and the government takes place as early as possible during the course of the European legislative process, and it is continued until the matter is finally decided at the EU Council. This process provides for transparency in the national position forming relating to European legislation and especially gives the interested social partners and NGO's a possibility of participating to the process. The system also forces the government to analyse implementation problems already in the beginning of the negotiations at the European level and thus contributes to avoiding or mitigating legislative quality problems at the national level.

The Finnish negotiating positions defended by the ministries at the EU Council and its preparatory organs are co-ordinated by a special structure under the Prime Minister's Office. In the course of this co-ordination legal questions relating to the Commission proposals are discussed and analysed in a special legal working group. The Unit of European Law of the Ministry of Justice provides secretariat for this group. Ministries can also independently seek legal opinion of the Ministry of Justice on Commission proposals. At the working group and in the written opinions of the European Law unit of the Ministry of Justice the Commission proposals are analysed not only from national point of view but also in the Community law context. Hence, there are at the national level some possibilities to address quality problems relating to European legislation.

So far as the possibilities of creating *ex ante* checking of European legislation at the European level are concerned, the *Rapporteur* is of the opinion that the problems should to the extent possible be rectified at the source. Therefore, the emphasis should be directed to raising consciousness about the importance of the legislative quality at the relevant Commission, Council secretariat-general and EP services. It should be underscored that the legislative quality is not solely a concern of the legal service and jurist-linguists but a responsibility shared by everybody taking part in the legislative process.

From the quality point of view, the critical moments in the legislative process are obviously conciliation between EP and the Council and final stages preceding common positions and decisions of the Council. The *Rapporteur* finds it unlikely that any external advisory body could challenge the political imperative to reach decisions and compromises at these stages.

2. Handling and solving interpretation problems

Note

The answers under chapter 2 are mainly based on information and experience from the Supreme Administrative Court. This court issues yearly a final decision in about 3.500 - 4.000 cases. The role of Community law is relatively important. It may be estimated that Community law has some impact on about one third of the cases heard by the Supreme Administrative Court. The number of cases where the role of Community law is essential is of course considerably lower. The impact varies a great deal depending on the nature of the case. The fields of law where Community law has most significance are indirect taxation, public procurement, agriculture, competition and environment.

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?

The problems of interpretation of national legislation implementing EU legislation are not so infrequent before Finnish courts and particularly administrative courts (see also answer to the next question). The field of law where the application of national law raises most difficulties of interpretation is, undoubtedly, indirect taxation and especially the

VAT. The reasons for this situation are explained under 1.2.7.

In this context, public procurement may also be mentioned. This is a new area of law which Community law brought to Finland. Before the accession to the EU, public procurement was very little regulated. The problems occurred are not so much difficulties of interpretation but problems of adoption of a new legal framework.

As explained under the next question, it has been possible to solve most of the difficulties through the technique of conform interpretation.

Two cases concerning indirect taxation are so far the only ones where the Supreme Administrative Court has clearly given precedence to Community law instead of conflicting national law. The Supreme Administrative Court has made four preliminary references to the EC Court of Justice in the fields of indirect taxation and public procurement out of ten references in total.

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

While the question of primacy of Community law and direct effect of EC directives has been of rather small importance in the national case law the method of interpreting national legislation in conformity with Community law has been extensively used in the Finnish courts. It seems clearly that questions related to the relationship between Community law and national law have concerned mainly the interpretation of national law in the light of Community law or, at least, have been, with some rare exceptions, able to be solved in this way.

The preparedness to rely on this type of interpretation can partly be explained by that, already before the Finnish membership in the EU, the Finnish judges were used to interpret national legislation in conformity with Finland's international obligations. The Finnish Constitution does not give a special hierarchical status to ordinary international agreements, including the human rights agreements. Consequently, in case of a conflict between an international norm and a national law rule contained in an ordinary act, the international norm shall not have primacy as a matter of principle. This situation as well as the practice to interpret ordinary parliamentary law in the light of the Constitution have largely contributed to the readiness for flexible interpretation of the national enactments ensuring as far as possible the consistency of their application with Finland's international obligations. This method of interpretation has become established legal practice in the national courts.

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

Preparatory documents have had only a minor significance when interpreting European legislation before the Finnish courts. However, there is no principle reluctance to refer to these documents; on the contrary, as Finnish courts give great importance to *travaux préparatoires* in interpreting national legislation, they would be familiar with using

preparatory works as source for interpretation.

Some factors explain the small use of EU preparatory documents. Firstly, as already indicated in the question, the *travaux préparatoires* are not always available. Secondly, Community law has the reputation that the *travaux préparatoires* should not be given great importance, if any, in the interpretation. Thirdly, the proposals for EU legislative acts do not include such detailed statements of reasons that we are accustomed to in respect of our national legislation.

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

There is neither systematic search for nor study of documents prepared by the Commission (for example notices or guides). However, if the case is important or difficult from the point of view of Community law, all available material, including the Commission documents, will be acquired *ex officio* if not produced by the parties. These documents can give factual information useful for the interpretation but they are not given any more qualified importance (unless this results from the status of the document itself). In competition law cases, the Commission documents have had a particular significance. The same applies to *Interpretation Manual of European Union Habitats, version EUR 15*, of 24 April 1996, so far as the Natura 2000 cases are concerned.

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

In general, it is felt that the legal status and the importance of the preamble remain somewhat unclear. The wording of the preamble that is something between a legal rule and '*exposé des motifs*' renders the preamble difficult to understand. These reasons, among others, have led to that the preamble has not been given great value in the interpretation. However, there are some examples where the national court has referred to the preamble.

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

To our knowledge, there are no cases where a Finnish court would have done such reference. In the Finnish preliminary reference case C-233/97, *Kappahl Oy* (judgment of the Court of Justice of 3.12.1998, ECR 1998 Page I-8069), there was, *inter alia*, question of whether individual positions adopted and a joint declaration made by the Member States in the course of the negotiations which led to the adoption of the Act of Accession could be used for the purposes of interpretation of a provision in that Act.

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 of great importance in interpreting national legislation. If the text of the relevant provision is not clear and if there is no earlier case law, the judge first tries to find out the legislative intent. For this purpose (s)he uses the *exposé des motifs* contained in the Government bill to Parliament and Parliamentary documents such as the reports and opinions on the matter of parliamentary standing committees. This also applies to legislation implementing EU legislative acts. Of course, the other sources significant for the interpretation of EU legislation (notably the case-law of the EC Court of justice) are taken into account when pondering the relative importance of the national preparatory documents.

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?

It would be exaggerated to say that in all cases of interpretation a comparison of different languages is made. But in face of a serious problem of interpretation such operation is made. As Finland has two official languages, Finnish and Swedish, Finnish judges were not completely unfamiliar with using several languages. The comparison is normally limited to the three biggest EU languages and Danish, Swedish and Finnish.

As the number of such situations is small where the difficulty of interpretation is mainly due to differences in language versions, it is difficult to estimate the global impact of these differences. Often the comparison helps to clarify an ambiguous provision. On the one hand, if the text in one language is clear, the other languages are not necessarily studied, and on the other hand, if this is done, the clear provision in one language version may become obscure.

2.2. Cooperation on interpretation

2.2.1. Can you indicate to what extent not so much legal as policy consideration 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?

In the practical application of Article 234, no special policy has been established within the Supreme Administrative Court. The text of this provision as well as the criteria set out in the CILFIT judgment form the basis for assessments by a national supreme court concerning its obligation to submit references for preliminary rulings. The Supreme Administrative Court is perfectly aware of the discussion which turns around, on the one hand, the strict criteria of the CILFIT judgment and, on the other hand, the need to monitor the cases sent to the Court of Justice. The Supreme Administrative Court has understood that it has a responsible role when using the preliminary reference procedure. Therefore in all cases, where the question of making a preliminary reference has been seriously considered, the need for such a request has been studied carefully.

Article 234 or CILFIT judgment does not take account of such subsidiary factors as urgency, the wishes of parties or pending of many similar cases. As to the wishes of the parties, they have not influenced the decision on the preliminary reference since the

Supreme Administrative Court actively takes up *ex officio* Community law points. Some of our preliminary references have been made without that a party had asked it. However, the attitude of the parties could have some influence, if there are several similar cases pending at the same and the national court should decide which of the cases is the best to be sent to Luxembourg or if there are also other doubts on the necessity to make a reference.

The Finnish legislation provides in some matters that the case has to be handled urgently by the court. There may also be other situations where the legal protection of the individual requires urgent solution of the case. So far, there has not been any particularly serious matter where it had to be considered the coordination with urgency and the respect of the obligations under article 234.

However, the problem of the effects that a pending preliminary reference made by another court of law may have on cases before the Supreme Administrative Court presented itself in connection with the so-called Natura 2000 cases described above. More than 1200 appeals against the Government decision establishing the lists of sites were pending before the Supreme Administrative Court when a British court made a preliminary question on the interpretation of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora. Finally and relying on the preliminary ruling issued by the ECJ on a similar interpretative question in the context of the Birds Directive, it was judged possible to make the final decisions without waiting for the judgment of the Court of Justice.

In addition, the question of handling time was important in a case from 1996 (1996 A 35) concerning the application of Article 22(3) of Council Regulation 4064/89 on the control of concentrations between undertakings. The national competition authority had made a request to the Commission provided for in Article 22(3) of the Regulation. The question that came up was whether already this decision could be challenged before the national court taking into account, among others, the short time limits set out in the Regulation.

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?

The national courts' primarily task is to give legal protection to the parties. It is capable to fulfil this duty in Community law matters as well. The preliminary reference procedure is mainly seen as serving the uniform application of Community law. In the last resort, the preliminary reference procedure can also serve the legal protection of the individual. Thus there is no contradiction between these two objectives.

2.2.3. - 2.2.9 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?

The study of the Community law questions is done purely internally within the Supreme Administrative Court. Other national courts may be contacted in order to know whether

they have pending similar cases. But there is no established system of exchange of information on Community law matters between Finnish courts. The Court of Justice has also been consulted in order to have information on the cases pending before it.

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

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 prejudicial procedure, both for the effect and effectiveness of community law and for the legal protection of private individuals.

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 (see also point 7.2 of the discussion paper).

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.

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.

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.

The questions or rather statements under 2.2.4 - 2.2.9 are probably meant as elements for discussion on the modification or development of the Article 234 procedure.

There have been several official or unofficial proposals the amendment of the text of the provision of Article 234. Plans for developing the Court of Justice have suggested restrictions on the rights of courts of lower instance to refer matters for a preliminary ruling. This has been done in some special Conventions and in certain areas. Another alternative would be to give the Court of Justice discretionary powers to decide whether it will give an answer to the question presented or not (a permit system of a kind). This would transfer to the Court of Justice some responsibility for assessing the need for a preliminary ruling. A third alternative is to amend Article 234(3), obliging courts of last instance to refer matters for preliminary ruling.

The Treaty of Nice introduced the first major modifications to Article 234 but even these modifications did not change the essential features of the procedure. This stability shows how difficult it is to change a system that has been a success. The Draft Treaty establishing a Constitution for Europe does not either modify the preliminary reference procedure (Article III-274) except by inserting a provision stating that if a prejudicial question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice shall act with the minimum of delay.

All this leads to prudence as to modifications that would require amendment of the Treaty. A fundamental modification seems to be excluded in the short term. In any case, the new Member States entering the Union in spring 2004 will apply the present system. The functioning of the preliminary reference procedure in an Union of 25 Member States may give new reason to reconsider the present system.

As already today, it seems that the role of the national supreme courts is crucial and increasing in Community law matters. They are at present the only courts that have the power and also the obligation to filter the cases to be sent to the Court of justice. Since the highest courts normally have good capabilities to handle Community law cases, it would be advisable to strengthen their role if it will be necessary to unburden the Court of Justice.

At this moment, when there is not on view any change of the preliminary reference procedure, it is more important to focus on its practical improvements. The good contacts between the national courts on the one hand and, on the other hand, between national courts and the Court of Justice are of great importance.

The recently improved possibilities of the Court of Justice of handling rapidly urgent cases and giving preliminary rulings following a simplified procedure in simple cases are a good step forward. It would perhaps be possible to develop the consultation of the Court of Justice and dialogue with it in the phase where the national court is considering the necessity to pose a prejudicial question. As the preliminary reference procedure is a dialogue between judges, the procedure should not be characterized by too excessive formalities.

2.2.10. and 2.2.11. 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, organizing meetings etc. Do you have any other suggestions?

As the good functioning of the preliminary reference procedure depends largely on the good and flexible contacts between the national courts and the Court of justice (see above), the Association has and will have, in our assessment, an important role.

One of the most significant achievements of the Association has been the creation of channels enabling members to access each other's case law. We would like to stress the importance of the database and, especially, of all possibilities of improving it. It is essential that this database will be constantly replenished with new judgments and that the presentation of the decisions will be more complete and uniform. This requires efforts from the national courts to be active enough to collect and send the relevant decisions of their institution. It seems that on this point we members of the Association have some home -work to do.

The Association has been active with its relations with the Court of Justice. We would like to underline the importance of the efforts to improve the possibilities of getting more and quicker analysed information on pending cases and on the case law. It is in the interests of the national courts and the Court of Justice that national courts have easy

access to systemized information on Community case law. This is also important in respect of the correct use of the preliminary reference procedure.

3.1. Ex post examination of legislation

- 3.1.1 How can we provide for an improved correction of shortcomings in implementation legislation? (See also point 1.2 above). 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?

Correction of shortcomings in implementation legislation is, of course, a responsibility of the executive. This is partly a question of information, partly a question of political will.

So far as the information aspect is concerned, the Finnish political system is relatively well informed and aware of possible shortcomings in implementation of Community law. There is a special coordination system for the preparation of Finland's positions in infringement proceedings and ECJ Court cases. This system unites all ministries. In addition, the Ministry for Foreign Affairs biannually prepares a report concerning all ECJ cases and Commission proceedings involving Finland. These reports are also forwarded to Parliament. Hence, both the Cabinet and all relevant Committees of Parliament become regularly informed about instances where the Commission is suspecting Finland of an infringement or where the question of failing or incorrect implementation in Finland is being tried at the ECJ. It should be added that these reports also cover cases where Finland has intervened in the ECJ, which normally takes place when the outcome of the proceedings has special importance for Finland, *e.g.* because our national legislation is similar to the one that is being tried at the ECJ.

It is also a responsibility of the ministries to follow up the published case law of the Supreme national jurisdictions in their sectors. Such case law may lead to a legislative reaction, either so as to deviate from it or to codify it. The regular follow-up of case law also concerns cases where the Supreme Court or the Supreme Administrative Court applies Community Law. Naturally, if these courts find that the relevant Community Act is not implemented or that it is implemented incorrectly, the relevant ministry takes note of the decision.

So far as the political will side is concerned, the executive has to decide what to do when the suspect of shortcomings in implementation has been raised. At an early stage the Government can decide whether it will test the case in the ECJ or whether it corrects the situation voluntarily by proposing the necessary legislative amendments to Parliament or by issuing the necessary new provisions it-self, as the case may be. After either of the national supreme courts or the ECJ have established the shortcoming, the Government has no more room for manoeuvre but it has to take care of the necessary legislative measures. An example of this took place in December 2002 when the car tax regime of Finland was reformed after the Supreme Administrative Court (KHO 2002:85), following the preliminary ruling of the ECJ, had found the regime incompatible with the EC Treaty. (See C-101/00, ECR 2002 I-7487, *Tulliasiamies and Antti Siilin*).

- 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?

In so far as the Supreme Administrative Court is concerned, the correctness of national implementation is studied *ex officio* when the Court applies the relevant national implementation legislation for the first time. If the Court is satisfied with the implementation at that stage, the issue is not raised in later cases unless the parties challenge the implementation or the Court has become aware of possible shortcomings. The biannual reports of the Ministry of Foreign Affairs referred to in 3.1.1 are public documents. In addition, the Court follows academic legal debate in its fields of jurisdiction. The *Rapporteur* finds it excluded that the Supreme Administrative Court would be unaware of claims concerning possible shortcomings in national implementation legislation to be applied by it. The situation of lower administrative courts is probably worse in this respect.

As to the consequences, the Supreme Administrative Court follows the doctrines of supremacy, direct effect and/or interpretation in accordance with Community law, depending of the characteristics of the case. In the car tax case mentioned in 3.1.1 the Supreme Administrative Court declared the national legislation inapplicable in so far as it was incompatible with the Treaty. On the other hand there may be cases where incomplete or incorrect implementation is taken note of by the Court but it does not influence the outcome of the case. For example, in case KHO 2003:38 mentioned above (see 1.2.5-1.2.7) the Supreme Administrative Court established that Art. 12(1)(d) .of Directive 92/43/EEC was incorrectly implemented in so far as the applicable national legislation protected only clearly perceptible resting places and breeding sites of flying squirrels. In that case, however, the existence of such resting places and breeding sites in the wood concerned was undisputed wherefore this shortcoming in implementation did not have material effects to the decision.

- 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?

In so far as the national *ex post* examination is concerned, it is evident that such examination both improves the legislative standards applied in the implementation and provides information that may be useful for courts and other appliers of Community law. So far as the examination at the Community level is concerned, the *Rapporteur* fears that the examination is too much focussed to the legislative failings of the Member States and too little to the reasons of these shortcomings and whether their number could be

lessened by raising the quality of Community legislation or the decision-making procedures leading to its adoption.

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 *Rapporteur* strongly advises against this alternative. Bearing in mind the number of cases where Community law is applied in Member States, there perforce are numerous errors of interpretation in every Member State yearly. In the whole EU we can probably speak of hundreds or thousands of errors of interpretation per year. It is excluded that the Commission could consistently react to all these errors. Therefore, the option of reaction would realistic only in cases where there is at hand a grossly erroneous interpretation made by a *mala fides* supreme jurisdiction in a Member State. Bringing a Member State to the ECJ under such circumstances would damage the cooperation relationship between the national courts and the ECJ which is the real corner-stone of the efficacy of the Community law and possibly ignite constitutional crisis in the Union.

- 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?

Erroneous interpretation by the court

Chapter 3 of the Torts Act covers the obligation to pay damages because of erroneous exercise of public authority. According to that Chapter it is not possible to obtain compensation because of erroneous interpretation by courts if

- the person concerned has not appealed against the judicial decision in question, and
- the decision has not been amended or repealed because of the appeal.

So far as erroneous interpretation by the two supreme jurisdictions is concerned, the possibility of obtaining compensation is obviously linked to it that the same court has later repealed or amended its earlier decision in the procedure for reversal of a legally final decision.

According to the case law of the Supreme Administrative Court, interpretations of Community law at the level of administration that turn out to be erroneous do not lead to reversal if the person concerned has failed to appeal against the decision in due time. On the other hand, if the person concerned had appealed against the decision to an administrative court and the Supreme Administrative Court, and lost his case, but the interpretation of Community law of Finnish administrative courts turns out to be erroneous e.g. because of a new ruling by the ECJ, then their decisions can be reversed. In most cases the economic damage by erroneous interpretation is already corrected by it that the erroneous administrative or fiscal decision is corrected.

Erroneous interpretation by the legislator

This subject matter is covered by the Francovich case law. So far there have not been any concrete cases where the responsibility of the state for damages caused by failing or erroneous implementation would have been tried in Finland. There were some actions raised against the State on this ground in the late 1990's but they were all dropped before even the court of first instance gave its ruling.

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?

In the *Rapporteur's* opinion every legal system has to cope with the fact that the courts also issue erroneous judgments and that some of them may remain final. This is also the case in so far as the EU legal system is concerned. At presents, and even more after the enlargement, every reform that would increase the caseload of the ECJ should be opposed.