Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union
19th colloquium, The Hague, 14 and 15 June 2004

General Report

The Quality of European Legislation and its Implementation and Application in the National Legal Order

by Dr Linda Senden

Preface

Reflections on the Quality of European Legislation and its Interpretation

I am proud to present the General Report for this year's Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, written by Dr Linda Senden, Professor of European Law at Tilburg University. I am grateful for the thoughtful and clearly structured findings in this report, and for the quality of the underlying national reports. It is entirely appropriate to dedicate an Association colloquium to the quality of European legislation, viewed from the perspective of its implementation and application in the national legal orders, a perspective that the members of the Association share.

Quality of legislation in the interplay between European and national law

The quality of legislation is often viewed from above, from the perspective of an authority that wishes to regulate a particular subject. But it is also important to view it from the perspective of those who have to work with the legislation, including the courts. The effectiviness of the legislature is dependent on interpretation, application and enforcement. This is not a new insight.

That the continent of Europe was divided into many different states, each with its own legal order, became clear in 1313, when Holy Roman Emperor Henry VII tried – unsuccessfully – to claim general legislative powers as 'ruler of the world'. It was universally acknowledged that without effective application and enforceability, such powers were meaningless. Pope Clement V wrote in a decretal of 1314 that the jurisdiction of a prince extended no further than his power to enforce it, and Philip of Leyden (d. 1382), legal adviser to the Count of Holland, came to the same conclusion in his treatise *De cura rei publicae et sorte principantis.* "Every duke, count or baron may be called a prince within his own jurisdiction and on his own territory."[1] This meant that the political and legal unity of Europe was a lost cause for many centuries to follow.

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[1] Armin Wolf, *Gesetzgebung in Europa 1100-1500, Zur Entstehung der Territorialstaaten*, Munich: Beck 1996, p. 23.

In the movement towards European integration, the reverse process is now under way: when courts in the EU member states are applying European legislation, the European Union is a genuine source of public authority. That is why it is now important to view the quality of legislation from the perspective of implementation and application, particularly in the courts. The rapporteurs of the members of the Association all answered the questionnaire on the basis of their own experience and from the perspective of bodies that work with European legislation, either in implementing it in national law (in the case of the Councils of State) or in their judicial capacity.[2] In addition, both the Court of Justice of the European Communities and the Court of First Instance will submit their reports prior to the Colloquium

Assessing the quality of *national* legislation, from the perspective of practical implementation, relates to the legitimacy, consistency, clarity and completeness of laws. These criteria do not automatically apply when assessing the quality of *European* legislation, however. That is because of the nature of European legislation compared with national public law. The national legislator's natural ambition is to provide standard norms governing legal relationships, but this is not the central focus of European legislation. European legislation does nevertheless have force of law within national legal systems and takes precedence over national law. However, even when European legislation – particularly regulations – has direct effect in the sense that individuals may derive rights directly from these laws, their effect is complementary to provisions of national law that are not incompatible with them. In general therefore, European legislation does not aim at full regulation of a particular subject but at interaction with national and subnational rules.

This is an important point in assessing the quality of European legislation. In the field of European integration much is dependent upon the effect of legal instruments, particularly legislation, judicial process and decisions of the administration. Gráinne de Burca has pointed out that European law cannot build on an 'underlying social solidarity' – which in Emile Durkheim's view is the normal state of affairs. "The process in the Community sometimes appears as the reverse, in which an attempt is being made to *create* solidarity through law, by declaring common principles and rights in the hope that these will influence the legal systems of the member states as an integrating force."[3] This view assumes even

[2] Some member states did not reply in time. Their reports will be incorporated in the definitive version of the General Report after the colloquium.

[3] Jo Shaw & Gillian More (eds.), *The New Legal Dynamics of European Union*, Oxford: Clarendon Press.

greater importance in the light of the expansion of the EU's sphere of operation and of enlargement to include a considerable number of new member states. The most important quality requirement for European legislation is therefore not that it be complete, but that it be capable – where necessary – of coordinating and harmonising a multiplicity of national systems that will continue to exist in all their diversity.

Constitutional provisions relating to European legislation

The draft treaty establishing a Constitution for Europe introduces new terminology and a more uniform procedure for enacting EU legislation. Article I-32 distinguishes between *European laws* (previously regulations) and *European framework laws* (previously directives and framework decisions) and, to implement these laws, *European regulations* (previously non-legislative acts of general application).

The relationship of European legislation with national legislation leads to an extremely specific quality requirement for European legislation, namely that it has to have sufficient 'normative flexibility'. To adapt the words of the preamble to the draft Constitution, European legislation has no other aim than to ensure that the powers of national legislatures are 'united in [..] diversity'. This applies of course to framework laws as well. Article I-32, paragraph 1 (3) describes them thus: "A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result." At first sight, the situation is different when it comes to *European laws*. Article I-32, paragraph 1 provides in respect of a European law: "It shall be binding in its entirety and directly applicable in all Member States", but even these instruments hardly ever operate completely separately from a variety of national laws. They must therefore be both clear and accessible. While the Constitution itself confers joint legislative powers on the European Parliament, the Protocol on the application of the principles of subsidiarity and proportionality (to be attached to the Constitution) will allow national parliaments to demand a review of a proposal that in their opinion constitutes a breach of the principle of subsidiarity, provided the dissenting opinions represent one third of all the votes allocated to national parliaments.

European decision-making processes with regard to legislation are still not uniform. In particular, the role played by the participating member states can differ: although a qualified majority in the Council of Ministers is usually sufficient, in some cases the right of veto still

exists. Despite having become part of an independent, supranational legal order, European legislation is still largely regarded by member states from the perspective of their own national legal system. This is why the emphasis continues to be on limiting the EU's say in various matters, instead of on establishing a common order based on interplay between the EU and the member states in one single process of legislation.

The specific quality of European legislation

The driving force for many member state representatives participating in the decision-making process is the desire to derive the greatest possible benefit and the least possible inconvenience from EU legislation. Their frame of reference is their own national legislation, and the concepts and system with which they are used to working. According to their estimate of the forces at work and their own need for synchronisation, they strive to make the normative content of EU legislation reflect as far as possible their national legislation, or to restrict that content as much as possible.

But European legislation needs its own frame of reference. A better approach might be to determine the degree to which the European common good requires statutory regulation in the policy areas at issue. What should be decisive for European legislation is how the coexistence of a multiplicity of national legislators in a single market and a single area of freedom, security and justice can be assured. This is no small task. It requires efforts to ensure convergence between the normative activities of at least 25 legislative authorities and governmental bodies – often even more than 25, since in federal and decentralised states EU law will largely have to be implemented at subnational level.

This particular quality requirement is highly relevant to both the creation and interpretation of European legislation. While national laws often aim to cover all aspects of a matter, that is not usually the objective of European laws. However, the normative flexibility required by the European common good demands clarity as to objectives and methods, as well as the ability to respond to a variety of national systems where possible.

Two perspectives from below

The quality requirements that European legislation has to meet are clear when seen 'from below', i.e. from the perspective of the national legislator and the national courts that have to interpret the legislation. It is through their legislation and judicial activity that European

legislation is applied. The requirements affect the independent state organs that are members of this Association both in terms of their judicial function and – to the extent that this is part of their tradition as Councils of State – their role in advising on legislation and governance.

Where the creation of legislation is concerned, it is true that the Councils of State of the member states – where they have such a body – only become involved in European legislation as advisors at the implementation stage. There are exceptions: in a small number of member states advice may also be asked on proposals for European laws. However, only incidental use has been made so far of this option. After the implementation stage, it is too late to have any influence on the wording of a European law or framework law. At that point what really matters is how such a law or framework law is interpreted and put into effect. So once again the question arises of the perspective from which European legislation is viewed (which is also of relevance to advice from the Councils of State). The normative flexibility required of European legislation in many areas strengthens the need for clear objectives and methods. A step on the way to such clarity is transparency in the legislative process. The General Report shows how useful insight into the travaux préparatoires is considered to be.

The draft Constitution supports efforts to achieve greater transparency. Article I-37, paragraph 2 of the Constitution, like paragraph 4 of the Protocol referred to above, requires proposals for European laws to state the reasons on which they are based. The clearer the objectives of an instrument are, the easier it is to deal with differences in terminology. Equivalence is not always necessary, although some national rapporteurs indicate that it would be preferable.

The interpretation of European legislation with a view to application is one of the core responsibilities of the Association's member courts. This is an unusual position for national administrative courts in that although they of course derive from the national constitutional order, they are also Community courts. Two members of the European Convention suggested that the Constitution should state that national courts are Union courts, in line with current legal opinion.[4] This suggestion was never followed up, but that does not of course affect the 'symbiosis between the European Court and its national counterparts'.[5]

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[4] Contribution from Alfonso Dastis and Gijs de Vries, CONTRIB 277, CONV 620/03, of 13 March 2003, part 9.

[5] J.H.H. Weiler, The Constitution of Europe, Cambridge: Cambridge University press 1999, p. 197.

Preliminary rulings

The preliminary ruling procedure links the work of national courts with regard to the application of EU law with that of the Court of Justice and Court of First Instance (in the terminology of the Constitution, the High Court). The importance of this procedure is enormous and it is an excellent gauge of the quality of European legislation. The EC/EU legal orders and those of the member states are becoming increasingly entwined, a process that will inevitably continue. Their constitutional orders however are still distinct, each having its own structure, institutions and method of operation.

But the meshing of legal systems makes it necessary to create connecting links. The preliminary ruling procedure is an essential link, and actually dates back to the inception of the European Communities. Others include the representation of the member states *as such* as voting actors in the legislative process in the Council of Ministers, and the subsidiarity test that can be applied by national parliaments under the Protocol to the Constitution referred to above.

The preliminary ruling procedure is not a simple one, for the referring court, for the parties or for the Court of Justice. Both sides - the referring court and the Court of Justice -have to immerse themselves in the relationship between European legislation and the national legal system – and in such a way that the interpretation given by the Court of Justice can be used in relation to other member states. The national reports provide a mine of information on the way in which interpretation of European legislation takes place and is incorporated into questions and answers. Discussions during the colloquium will complete and clarify this information.

The long duration of the preliminary ruling procedure is a source of concern, particularly now the number of member states is about to increase substantially. New questions will arise concerning the incorporation of European legislation in these new member states. At the same time, the sustainability of the present institutional arrangements guaranteeing the functioning of the Court of Justice will be put to the test, and ideas on changes to the procedure mooted. This makes prudent and selective use of the procedure by national courts all the more important.

The bodies that are members of the Association, including since this spring the highest administrative courts of the new member states, want to share their knowledge and experiences. This too may contribute to better links between the different constitutional orders of the EU and its member states.

Those involved in preparing the colloquium hope that discussion of the present report will contribute both to better use of the preliminary procedure and to a clearer understanding of the quality requirements for European legislation.

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Preface

Contents

I. Introduction

I.1 The Chosen Approach

I.2 Defining the Quality Issues in Relation to European Legislation

II. Interpretation of European Law in the Member States

II.1 Mapping Out the Interpretation Problems

II.1.1 Nature and causes of interpretation problems

II.1.2 The new hierarchy and typology of EU legal instruments

II.1.3 Implementation techniques; relation between transposition and application

II.1.4 Case study: transposing and applying the Habitat and Sixth VAT Directives

II.2 Handling and Solving of Interpretation Problems

II.2.1 *Ex ante* examination of European legislation

II.2.2 The use of interpretation aids

II.2.3 The recourse to different language versions

II.2.4 The recourse to consistent interpretation and reliance on direct effect

II.2.5 The use and aims of the preliminary reference procedure

II.2.6 What - informal or institutionalised - cooperation and consultation?

II.3 Attaching Consequences to Interpretation Errors

II.3.1 *Ex post* examination of legislation

II.3.2 National repair mechanism: the liability of national legislatures and courts

II.3.3 Revision possibility in the case of liability of the national court

II.3.4 European repair mechanisms

III. Conclusions, Solutions and Subjects for Debate
III.1 The Main Conclusions
III.2 Improving Transparency of and Advice on European Legislation
III.3 Establishing Best Practices and Cooperation on Implementation
III.4 Effective - Preliminary - Cooperation on Interpretation

Annex 1: questionnaire
Annex 2: Articles I-32 to 36 of the Draft Treaty establishing a Constitution for Europe

I. Introduction*

I.1 The Chosen Approach

The quality of European legislation has been exercising minds for some time now, within as well as outside the EU institutions. European legislation itself as well as different features of the Community system for adopting and applying European legislation, have been increasingly criticised in terms of their adequacy and manageability.[6] This scrutiny has sharpened with the ever-widening scope of European legislation. Both immigration law and criminal law, for instance, are undergoing Europeanisation. The forthcoming enlargement of the European Union will also tend to exacerbate certain existing problems, such as the language regime (if current policy is retained, the EU will soon have more than twenty official languages) and the functioning of the system of preliminary rulings at the European Court of Justice (throughput time is already very long). Many forums are now considering these issues in particular with a view to the ongoing Intergovernmental Conference and the proposed adoption of the Draft Treaty establishing a Constitution for Europe,[7] drawn up by the European Convention. Against this background, one can also understand the dedication of the 19th colloquium of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union to the theme of 'The quality of European legislation and its implementation and application in the national legal order'.

Obviously, the preparation of the colloquium and of this draft general report has required a further definition and delimitation of this wide-ranging theme. With a view

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* Please note that the English of this draft version has not yet been revised. The author thanks dr. E.M.H Hirsch Ballin (general rapporteur) and mr. M. Eisma of the Dutch Council of State for his suggestions to improve the text. Naturally, any mistakes are only to be blamed on the author. Comments in this regard are very much welcomed.

[6] See e.g. Rapport Public du Conseil d'Etat français, Considérations générales sur le droit communautaire", 1992, *Etudes & Documents* no. 44; the Molitor report (COM(95)288, 21 June 1995); the Koopmans report, 1995; the Report by the Anglo-German Deregulation Group, "Deregulation Now", 1995; and the UNICE regulatory report, 1995.

[7] CONV 850/03, 18 July 2003.

to this, a discussion paper was drawn up at the beginning of 2003.[8] This set out as the main aim of the colloquium, the identification of the specific problems that the Association's members face - as advisors on legislation and as judicial bodies - in transposing, interpreting and applying European legislation, to analyse the causes of these problems and to take stock of possible solutions, both existing and new ones. The topic has thus been approached in particular from the perspective of the highest judicial bodies and the emphasis has been put on those aspects of European legislation that influence its clarity and manageability in the practice of jurisdiction and of advising on legislation. In other words, the idea has not been to explore on a rather abstract level what are the 'good' and 'bad' characteristics of European legislation, but to chart on a more practical level certain specific problems of that legislation and the various methods that have been devised to deal with these in the national legal orders.

With a view to further identifying the main problems and questions which the issue of quality of European legislation poses in the Member States, a small questionnaire was drawn up on the basis of the discussion paper and next discussed at a meeting of the national rapporteurs in Trier on 24-25 March 2003. This has resulted in a more elaborate questionnaire[9] and the national reports that have been drawn up pursuant to this questionnaire form the basis of the present General Report, which naturally also takes account of the preparatory work. By the very nature of the subject, the questionnaire has also focused on questions relating to the legislative process as such and on issues which European legislation raises for - its implementation by - the national legislatures. Since in a number of Member States the Council of State or Supreme Administrative Court does only or mainly have a judicial function, it must be noted that these questions have not always been answered (Denmark) or been answered in particular from the own point of view of the national rapporteur (Austria). Apart from that, the General Report also builds upon a number of findings of the Helsinki colloquium of 2002.

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[8] Discussion paper for the session to be held in Trier on 24-25 March 2003 in preparation for the 2004 Colloquium, "The quality of European legislation and its implementation and application in the national legal order", published in Newsletter 2003, no. 4 of the Association. To be found on www.raadvst-consetat.be

[9] See annex I to this Report.

The following Section of this first Part of the report will start with a brief reflection on the definition of quality of European legislation for the purposes of this report and in particular on the issues that the quality of European legislation poses for national legislatures and jurisdictions. As such, it will present the general framework for the discussion of the separate topics in Parts II and III. It will also make clear why in those Parts of the report the emphasis is laid on 'interpretation problems' rather than 'quality problems'. In Part II, the main national findings will be presented, largely following the tripartition of the questionnaire (but not necessarily in the order of its questions) on the prevention and causes of interpretation problems, the handling and solving thereof and the reparation of interpretation errors. In Part III, the main conclusions will be presented and a number of subjects for debate and possible solutions for solving interpretation and quality problems are put forward.

Parts I and III have been drafted in such a way that, read in conjunction, they give an overview of the main issues the quality and interpretation of Community legislation raise for the highest national courts, whereas Part II gives more detailed information on the situation in the different Member States.

I.2 Defining the Quality Issues in Relation to European Legislation

Defining 'quality of legislation' is not an unequivocal matter.[10] Evaluating legislation in terms of being of high or poor quality presupposes at least that one has a clear picture of what can or must be expected from legislation, what its (most important) purposes and functions are, what its outcome or effectiveness should be and what - drafting and democratic - standards this legislation must meet.[11] The outcome of such an evaluation for the national legislations of the Member States may differ, depending also on what particular aspects the emphasis is put (for instance more on the aim of flexibility of the law than on equality or legal certainty of the law) and the angle one takes (for instance that of the legislature or that of the individual affected

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[10] Following the discussion paper, the issue of defining 'quality of legislation' was discussed already at the meeting of rapporteurs in Trier and will not be repeated here in detail.

[11] See also the speech delivered by H. Tjeenk Willink, Vice-President of the Dutch Council of State, at the European law conference in Stockholm, on 11 June 2001. Available on www.raadvanstate.nl, under Toespraken.

by the law). Yet, overall, it can be said that such assessments will show many similarities, as the framework within which legislation operates and is developed in the various national legal systems is quite comparable. Furthermore, the functions and purposes of legislation in these systems can be said to be rather similar as well. The case is different for European legislation.

Since the colloquium takes the angle of the quality of *European* legislation and in particular its consequences for the *national* legal order, it has thus been necessary to first identify closer what issues are actually at stake. To start with, it must be understood that the issue cannot be simply approached in the same way as that of quality of 'pure' national legislation. For only to a limited extent are the problems which present themselves in the European and the national legal orders comparable, regarding the more technical aspects of legislation, such as its complexity, transparency, vagueness, consistency, use of terminology etc. In fact, these are problems that can be said to occur in any legal system and are therefore not specific problems of European legislation. Moreover, these problems do not seem to be (so much) worse in the case of European legislation than of national legislation.[12] In the light of the above theme and aim of the colloquium, the specific problems that European legislation[13] generates can be distinguished in problems relating, on the one hand, to the EU system as such and to the creation of legislation in that framework and, on the other, problems of its implementation and application in the national legal order.

Regarding the first type of problems,[14] the particular features of the European constitutional system make that the framework and decision-making process within which European legislation is developed, is very different from and in fact far more complex than that of 'pure' national legislation. As a result, European legislation has gained not only its own particular nature, but it has also a purpose and function that differs from national legislation. The aims of European legislation are actually more limited, in that it is (still) geared mainly towards the establishment of the internal

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[12] For the initiatives that have been developed at the European level to improve such aspects of the quality of European legislation, see in particular Section 3.1.3 of the discussion paper, o.c. note 3.

[13] The emphasis here is on directives, regulations and framework decisions. For more complete references and titles of those mentioned in the report, see the national reports.

[14] See more in detail on this Section 3 of the discussion paper, o.c. note 3.

market and the approximation of national legislation to the extent necessary for realising this. This affects the nature of European legislation in the sense that it does often not aim at establishing uniformity of law and policy in the Member States and does often touch upon and regulate only certain aspects of the law (for instance tax law or environmental law), leading to piece-meal legislation which is difficult to fit in the framework of the existing national law. This means that European legislation leaves in fact considerable scope for differentiation in the national (transposition) law. Apart from that, European legislation triggers its own particular problems because of the lack of a(n) (explicit) hierarchy of sources, the multi-language regime, the development of a proper legal language and its high compromise nature, given the multiplicity of actors involved in the European decision-making process. In addition, key stages of the decision-making process still take place behind closed doors, which can make it even harder to trace the underlying intentions of a particular piece of legislation.

As regards the second type of problems, things obviously get yet more complicated because of the fact that European legislation has to be transposed and applied in the national legal systems, whereas it has in fact been developed outside those systems. In this regard, the discussion at the preparatory meeting of the national rapporteurs in Trier made it very clear already that the quality problems which European legislation poses in the national legal orders, actually boil down to interpretation problems, occurring both in the framework of drawing up national transposition legislation and of its application by the national courts. The later findings of the national rapporteurs confirm the view that at the heart of these interpretation problems lies the own, different nature of Community legislation and the fact that the European and national legal systems still do not tie up very well.[15] The most crucial question can therefore be considered to be how the tie-up of the European and national legal systems can be improved and how uncertainties in the law can be removed, thus contributing to a facilitated and improved transposition and application of Community legislation in the Member States. In this respect, it should also be remembered that there is an obligation on the Member States to implement and apply European legislation, but that its interpretation is ultimately to be decided by the European Court of Justice.

[15] See further on this Section II.1.

In dealing with the above question, there are two important limitations one should be aware of and which will even be reinforced after enlargement of the EU. Firstly, given the great variety of national legal systems represented in the EU, it is inevitable that European legislation will not always be geared towards each specific national situation. Secondly, at least to a certain extent, the particular features of the European legal system as described above are inherent to this system and cannot or are not likely to be changed. Consequently, European legislation will always be characterised by its own system and terminology and it would thus also be an illusion to think that it could ever be fitted smoothly into (all) national legal systems.

Focusing then on the ways and means as to how to deal best with the problems European legislation entails for national legislatures and courts, the attention is drawn to the way in which the various actors involved in the national legislative process respond to the obligations devolving from European law, and to how procedures are organised. In particular, what different implementation techniques are used and how is being dealt with the system and terminology of European legislation in implementation? What is the role of interpretation aids, such as travaux préparatoires, in this respect? What principles should national legislatures adopt on this? Does the way of transposition relate in any way to the - number and nature of - interpretation problems the national courts face? Further, when it comes to advising on legislation, what mechanisms have been devised in the Member States to improve the quality of European legislation, what ex ante and ex post examination of European legislation takes place and what is the role of the Councils of State and supreme administrative jurisdictions in this regard? What room is there for improvement?

Naturally, the problem of how to deal with differences in the system and terminology of national and European legislation also presents itself for the national jurisdictions. What attitudes have they developed in this respect, regarding also the use of interpretation aids and other language versions of European legislation? Furthermore, national courts face problems when transposition has not taken place or only belatedly: what consequences do they attach to this in terms of direct applicability of European legislation and consistent interpretation of national law? In addition, building on the findings of the Helsinki colloquium, what other techniques and mechanisms are used or can be devised to resolve questions of interpretation

and direct applicability before having recourse to the preliminary procedure, such as possible forms of informal or institutionalised cooperation between courts? What role can the Association play in this regard? Last but not least, how can it be ensured that in an enlarged EU the system of preliminary rulings of Article 234 EC functions as smoothly as possible? This latter question is the more important, given that the ECJ has exclusive power to decide questions of interpretation of European law and the preliminary procedure is the most important tool for national courts to get such questions solved. So, insofar the interpretation of European law is clear or has become clear, the competence of the national courts to decide on questions involving the interpretation of European law is limited to determining whether or not it is necessary to refer questions for preliminary rulings before giving judgment. In short, in the light of the developments that take place as regards the adoption of a European Constitution and the enlargement of the EU, the urgency of changing the present use of Article 234 is put on the agenda.

It will now be turned to the national responses given to the various questions raised above.

II. Interpretation of European Law in the Member States

In Part II, the interpretation problems that European legislation raises in the national legal orders will first be mapped out and the causes thereof identified (II.1). Next, it will be considered how and by what means the national legislatures and courts try to overcome these problems (II.2). Following on that, the consequences of interpretation errors are looked at and in particular the ways to remedy these, both at the Community and the national level (II.3).

II.1 Mapping Out the Interpretation Problems

This first Section focuses on the nature and causes of the interpretation problems as such (1.1-1.2) and in particular also on how the national legislatures are confronted and deal with these in their transposition of European legislation, generally (1.3) and more in specific as regards the Sixth VAT Directive and the Bird and Habitat Directives (1.4).

II.1.1 Nature and causes of interpretation problems

What kind of specific interpretation problems occur in what areas of law, both in the framework of transposition of European legislation by the national legislature and of its application by the national courts? To what extent are they actually attributable to the poor quality of European legislation and to what extent can other causes for these interpretation problems be identified? (questions 1.2.4 and 2.1.1 of the questionnaire).

The national reports make clear that there is a broad range of factors that cause interpretation problems of European legislation, which can partly be traced back to the European and partly also the national legal order. Only to a limited extent, these factors can actually be said to concern the quality of European legislation, relating to 'technical' aspects such as the definition and use of ambiguous, complex and vague concepts, terminology and problems of translation. Other elements which are very characteristic for the European legal system and which are considered as

problematic are its important judge-made nature, the (perceived) lack of balance between the case law and the general nature of the legislation and the lack of travaux préparatoires. More in general, the picture that emerges from the national reports is that the main problem lies in the rather bad tie-up of and consistency between the different legal systems and the different layers of law-making. Most obviously, this concerns the European legal system vis-à-vis the national legal systems and cultures, but also the national legal systems vis-à-vis the European legal system, in-between the national legal systems and the case law and/or EC Treaty vis-à-vis the legislation. Yet, it is also clear that it is impossible to link European rules perfectly up with all national legal systems.

Apart from that, a number of state-specific factors add to the problems of implementing and interpreting European legislation and for which European legislation can also not be held responsible. These concern in particular the different levels of internal decision-making in federal or decentralised systems (Germany, Spain), but also the accession of Member States at a later stage than European legislation was adopted (Finland).

Looking more closely at the last-mentioned issue, since Finland implemented the *acquis communautaire* in a very short period of time in the beginning of the 1990's, it is considered difficult to specify any field where there would *not* have emerged interpretation problems. Interpretation problems are actually deemed more difficult during the pre-accession implementation, as the candidate country was not involved in the decision-making process that led to the adoption of a particular European act. It has thus been rather difficult to implement and apply the EC directives on bathing water, because of the fact that the geographical, environmental and climatic conditions of Finland greatly differ from those of other - southern - EU countries. Most difficulties of interpretation occur in the area of indirect taxation and especially as regards VAT (see II.1.4), but also as regards agriculture, competition law, environment and public procurement. The latter is a new area of law which European law brought to Finland and which was very little regulated. So, it is not so much that difficulties of interpretation present themselves in this respect, but problems of adopting a new legal framework. Interpretation problems are of a terminological nature (ambiguous terminology or legal concepts, not corresponding to national terminology), linguistic nature because of the differences between

different language versions or concern a certain imbalance between casuistry and generality in EC legislation. 'Constructive ambiguity' may even be intended, because of the lack of political will to arrive at a more precise text.

The German legislative system is said to be characterised by four hierarchical levels: the constitutional, federal and Länder levels and that of local/public law authorities. Generally speaking, European legislation occupies the federal law level, non-constitutional. So, the problem is not so much how to classify European law, but rather how to fit it correctly into the framework of national legislation. Sometimes namely it is difficult to establish what level is competent to transpose a certain matter or part thereof, of which numerous proceedings in respect of Directive 88/409/EEC testify.[16] This transposition problem may occur in every area since it is of a procedural and not a substantive nature. At the judicial level, certain directives in the environmental protection area raise particular interpretation problems, as they are ambiguous or even contradictory and not sufficiently precise. Linguistic problems may also occur. The transposition of procedural European norms sometimes appears difficult as well.

Since Spain is a decentralised state in which the Comunidades Autónomas have own legislative competences in the areas mentioned in Article 148 of the Constitution, the transposition of directives is rendered more complex because of the plurality of the authorities involved. There are thus numerous areas (such as health and environment) in which the state approves framework legislation and the Comunidades adopt further legislation. The latter are not obliged to transmit to the Ministry of Foreign Affairs the transposition measures they have adopted, as a result of which the central administration cannot proceed to an effective control and cannot include these measures in the list of transposition measures communicated to the Commission. Interpretation difficulties often concern the question whether transposition legislation transposes European norms correctly or not.

The problem for the Austrian Administrative Court concerns in particular the question of ensuring compliance of national law with European law. Problems in the transposition of European law arise in the field of environmental law, social law, tax law or others. Besides problems with respect to the Sixth VAT Directive and the Bird

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[16] Cf. the judgment of the Federal Administrative Court of 27 April 2000, BverwG 1 C 7.99 – BverwG 111, 143.

and Habitat Directives (see II.1.4), interpretation issues have thus arisen in the field of the agricultural market organisations,[17] state aid and isolated problems regarding residence clauses in the Trade, Commerce and Industry regulation Act. Problems may also arise with respect to provisional court protection. These problems are traced back to the difficult access to travaux préparatoires, bad definitions, translation difficulties, the case law nature of European law when it comes to primary European law rules such as those on state aid and the limited amount of case law in other areas such as that of the common market organisations,[18] meaning that there is no comprehensive Court clarification of questions of general interest but only a selective examination of specific problems.

The Dutch report points to the substantive fine-tuning of secondary European rules with the EC Treaty and of secondary rules in between themselves as being problematic. Yet, this problem also arises in relation to national legislation. The more specific the legislation is and the more it is embedded in a systematic complex, the smaller the interpretation problems become. Examples of this are customs law and pharmaceutical legislation. The more general the legislation is and the more loose ends it contains, the more questions are likely to arise regarding its scope, the possibilities for additional national policy etc. Examples of this are environmental law and energy law.

The Italian rapporteur observes that interpretation difficulties are often similar to those occurring in the internal legal order, such as whether a legal rule has a specialised nature that prohibits its amendment by a posterior general rule.[19] Particular interpretation problems have occurred, however, in the area of public procurement as regards the determination of abnormal low tenders. This concerns the interpretation of Article 21, paragraph 1 bis of the Law no. 109 of 11 February 1994 implementing Article 30 of Directive 93/37. On the basis of the Italian Law, it could be concluded more readily to abnormal low tenders - and thus to excluding these - than on the basis of the directive as interpreted by the ECJ. The reasons for

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[17] Cf. the examples given in Section II.2.2 and the problems with respect to the concepts of the producer and holdings in Regulation 3950/92/EEC of 28 December 1992 establishing an additional levy in the milk and milk products sector or other provisions.

[18] Cf. Case C-268/01 *Agrargenossenschaft Alkersleben* ECR [2003] I-4353.

[19] Cf. Council of State, 4th Section, no. 1313 of 11 March 2003.

this somewhat divergent transposition are said to lie in the traditional suspicion of the Italian legal order towards too low price offers and to the tradition of preeminence of the administration over individuals.

The Portuguese rapporteur points to the articulation and harmonisation of two legal systems that have to be applied simultaneously, as a source of interpretation and application difficulties. In particular Regulation 2950/83 concerning professional training in the framework of the ESF has given rise to such problems, as regards the determination of the final payments for the initiators of training activities. In the end, the ECJ established that the final decision on this belongs to the competence of the Commission and that the national administration can only take provisional immediate measures with a view to preventing irreparable damage. As a result, national courts have had to declare void the national decisions and reimbursement orders. So, it is foremost the relation between a European regulation and national implementing regulations and their co-ordinated interpretation and application that caused problems.

In the Greek report, three main reasons are given for the interpretation difficulties: (a) the quality and peculiarity of European legislation, (b) the differences between the system and terminology of national law and European law, in particular in the case that the area concerned was object already of detailed and complex national regulation, whose characteristics have not been taken sufficiently into account in the adoption of the European legislation and (c) the conflicts between the national interests or the interests of certain social or professional categories and the European interests, in particular in the case that no clearly articulated compromises have been reached on these conflicts. The transposition and application of the directives on the mutual recognition of diplomas (in particular Directive 89/48/EEC) provides a good illustration of these difficulties, because of the peculiarities of the Greek constitutional regime of higher education.

The Belgian rapporteur has given numerous examples of interpretation difficulties of European legislation that may occur in the national legal order,[20]

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[20] Relating to different European law provisions in the area of immigration and free movement of persons, Directive 75/442/EEC, Directive 76/160/EEC, Directive 76/464/EEC, Directive 81/851/EEC, Directive 85/203/EEC, Directive 85/337/EEC, Directive 89/105/EEC, Directive 89/552/EEC, Directive 91/263/EEC, Directive 90/388/EEC, Regulation 2081/92, Directive 92/96/EEC, Directive 95/26/EC,

relating for instance to the exact scope of certain European law notions and the binding nature of certain aspects of directives. Yet, he concludes that these do not seem to be of a very fundamental nature, at least not more than the interpretation difficulties one comes across in the development of any other legal order. These difficulties may even be considered relatively marginal, given the complexity and technicality of European law and the amount of players that are involved in its drafting. Some problems go, however, beyond simple interpretation problems and concern frictions between European legislation and constitutional requirements. The Belgian report gives examples of this, which relate inter alia to the obligation contained in some directives to enable control of the legality of administrative acts adopted in application of national transposition measures before independent instances; the retroactivity of national transposition legislation which may be imposed in the case of belated implementation; and the allocation in some directives of certain types of proceedings to an non-judicial body (such as on the execution of contracts),[21] which is prohibited by Article 144 of the Belgian Constitution. The legislation section of the Council of State may give advice on how to reconcile the secondary European law provisions and constitutional requirements and other provisions on fundamental rights.[22] The Court of Arbitration as well, is very watchful as to how to maintain the respect of constitutional provisions in the framework of transposing a directive.[23]

The French rapporteur observes that at the stage of transposition, interpretation difficulties may occur as a result of the fact that the scope of certain provisions has been underestimated at the time of their negotiation or because the compromise that has been achieved in the framework of the co-decision procedure goes beyond the initial objectives of a provision. Problems may also occur in respect of the transposition of very specified notions. Apart from that, it is considered that the present system of drafting European legislation does not suffer that much from a lack of transparency but more from the difficulty to reconcile, within one single text,

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Decision 96/449/EC, Directive 97/33/EC, Directive 2001/20/EC, Directive 2001/42/EC and Directive 2001/55/EC.

[21] Cf. Article 8(1) of Directive 92/44/EEC.

[22] See for instance its Advice 33.409 of 26 June 2002.

[23] Cf. C.A., 118/2003, 17 September 2003.

the different national legal traditions, which affects the clarity of the rules. A complication is how to express in all official EU languages one and the same legal concept.

The Swedish rapporteur does not see any particular interpretation problems and considers that the interpretation and application of European law is by now an everyday affair and that the courts can often solve the problems themselves.

II.1.2 The new hierarchy and typology of European legal instruments

To what extent are interpretation problems attributable to the current system of European legal instruments and the lack of a clear hierarchy of European norms? Will the new typology of European acts, proposed in Article I-32 of the draft Constitutional Treaty facilitate the interpretation and application of European law?[24] *Will the differentiation of European legal instruments create new legal problems (e.g. the use of the open method of coordination)? (questions 1.1.1 - 1.1.4 of the questionnaire)*

Overall, the lack of a(n) (explicit) hierarchy of sources in EC law is not perceived as very problematic and does not appear to have posed particular problems for the interpretation and application of European law by national courts. In view of this, it may not come as a surprise that the national rapporteurs do not express very high expectations either as regards the changes the draft-Constitutional Treaty proposes to the current system of legal instruments. Moreover, a number of flaws in this new typology of acts are also mentioned.

Problems connected to the present system of European legal instruments

As regards the issue of hierarchy of European norms, the Swedish rapporteur observes that the lack of clarity concerns only the different forms of secondary legislation, which has seldomly raised problems for the Swedish legislature and courts. If a conflict between European norms arises, it has to be solved in the same way as for national norms that are incompatible. The Danish rapporteur sees no specific problems regarding the present level of clarity on the hierarchy of European

[24] See Annex 2 for the provisions I-32 to 36 of the draft-Constitutional Treaty.

legal norms. The distinction between binding and non-binding instruments is kept in mind, when applying non-standard legal instruments such as resolutions. The Finnish rapporteur is not aware of any major problems in this respect either, stating further that the principle of supremacy of European law obliges the legislature to implement any European legal act requiring national legislative measures, regardless of its position in the hierarchy of European law.[25] In Germany, no specific problems regarding the hierarchy issue have occurred, also given the fact that most interpretation and application problems have a national cause (see Section II.1.1). In Portugal, the principle of primacy of European law directs legislative activity as well as its application, without its hierarchy posing any specific problems in this regard. The practice of the Belgian Council of State does not reveal any particular difficulties with the lack of clarity of the hierarchy of European legal instruments either. It is thus deemed fairly easy to establish whether a regulation or directive executes another one or not.

The Spanish rapporteur also deems the difficulties that are expressed as regards the existing system of secondary legal instruments more theoretical than real. Although there is undeniably a blurring of the distinction between regulations and directives and a lack of distinction between fundamental and implementing legislation, these circumstances have not complicated the application of European norms; it is rather easy to see whether a directive or regulation is adopted with a view to implementing another one or not. Furthermore, second and third pillar instruments have not in practice produced the dreaded problems, as two Supreme Court decisions show that it is aware of the kind of instruments it is dealing with and how to understand their legal status.[26] The Greek rapporteur deems the distinction between primary and secondary European law to be similar to the national distinction familiar to the national judge, i.e. between the Constitution and laws, and

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[25] See for example the decision of the Supreme Administrative Court in the case *Chiquita Finland*, KHO 1996 A 30.

[26] Tribunal Supremo, judgment of 8 July 2002, concerning in particular Council Framework Decision of 28 May 2001 (2001/413/JHA) combating fraud and counterfeiting of non-cash means of payment;

Tribunal Supremo, judgment of 14 June 2002, concerning the Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.

in practice a distinction reveals itself between framework regulations and implementing ones. The French rapporteur states that the problems which France faces in the transposition of directives concern foremost problems of French administrative organisation to deal with the amount of directives and their aptitude, than their interpretation or lack of clarity regarding their hierarchical position. It is foremost the objectives of directives that need clarification, rather than the legal nature of the texts themselves.

Nonetheless, the French rapporteur also observes that in a number of situations the absence of a lack of hierarchy of European norms may entail difficulties within the French legal order. For the legislature, the fact that no distinction is made between the legislative and the implementing levels makes it thus difficult to assess what transmission of acts to parliament actually has to take place and what the position of the parliament is in implementation. Parliament has criticised the detailedness of directives, but the main problem is the huge amount of directives that has to be transposed. As regards the Council of State, the government has assigned it the task to sort out what proposals for European acts fall within the competence of the parliament and those who do not. The Council of State has developed the principle that legislative European acts must be understood to be those acts that in France have to be regulated by laws. The nature of the transposition act depends on the legislative or implementing nature of a directive, the determination of which is considered to depend on its contents.[27] At the jurisdictional level, problems may occur as regards the application of European law[28] and the direct effect of European norms. In particular, the lack of clarity concerning the nature of European acts prevents the national courts from relying on their denomination for determining their direct applicability or not. A more profound examination of the nature of the act at issue is called for in this respect.

According to the Austrian rapporteur, the lack of a hierarchy of sources does not raise specific problems and the problem of hierarchy of norms will persist, no matter how sophisticated or 'simple' the hierarchical structure of the legal system will be.

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[27] Conclusions of M. Lamy, commissioner of the government, on EC Section, 3 December 1999, *Association ornithologique et mammalogique de Saône et Loire*, no. 164789, p. 380.

[28] See the conclusions of M. Séners, commissioner of the government, 11 July 2001, *FNSEA et autres*, no. 219494 et seq., p. 340.

Many questions that now arise are considered to result more from the relation of norms regulating different fields of European law than from their hierarchy. It is referred in this respect to the regulation of the common market organisation and the state aid rules, in the framework of which the relation between primary and secondary law however also arises.[29] In Italy, the lack of clarity on hierarchy of European sources raises difficulties, both as regards the interpretation of similar but not identical norms contained in European law rules of a different level and as regards the direct effect of European rules in the national legal order. The occasional cases in which the hierarchy of European norms caused problems on the judicial level in the Netherlands, relate to Regulation 259/93 on the supervision and control on the shipments of waste within, into and out of the European Union and the various general and specific waste directives. This has also led to preliminary questions.[30] Problems have also occurred as regards Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.

Introduction of a new hierarchy of norms and typology of legal acts

Introducing an explicit hierarchy of norms in European law is welcomed for a variety of reasons such as clarity, simplicity and certainty and its possible contribution to the facilitation and improvement of the transposition and application of this law in the national legal order (Sweden, Italy, the Netherlands, Finland, Germany, Portugal, Belgium). Furthermore, it is also deemed that the binding or non-binding status of any new forms of legal instruments is made clear (Denmark). The proposals contained in the Draft Constitutional Treaty may also be favorable to the division of work within the European institutions (Germany), and possibly also lead to an increased focus of the European Parliament on the legal preparation of legislation (Belgium). Furthermore, they could help to make the European citizen understand better the mechanism of EU legislation. Unification of all pillar instruments and the distinction between legislative,

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[29] See the judgment of the Administrative Court of 20 March 2003, 2000/17/0084, where the question of the relation between the common market organisation of beef and the EC state aid rules arose.

[30] Cases C-307-311/00 *Oliehandel Koeweit BV and others,* order of 27 February 2003, ECR [2003] I-1821.

implementing and delegated instruments are also seen as advantages (Spain, Belgium), as well as the exclusion of the use of atypical instruments when legislative acts are in the pipeline (Spain). The proposals have also obtained a positive response in the Finnish Government Report of 2 September 2003 to Parliament,[31] which was shared by the Grand Committee opinion and the Foreign Affairs Committee.[32] They are seen as a possibility to restrict EU legislation to the most important and general issues and to leave the technical details of regulation to be decided by Commission acts.

At the same time, however, a number of drawbacks of the new typology of acts have been mentioned as well. Thus, the Spanish rapporteur deems that framework-laws may still be drawn up in a very detailed way, leaving virtually no room of manoeuvre to the Member States and that it is strange that the instrument of the regulation is used both for delegated and implementing acts. The Belgian rapporteur also, regrets that no clear criterion has been introduced to distinguish between legislative and implementing acts. Furthermore, the fact that the future ‘regulation’ will be of a very different nature than the present ‘regulation’ adds to the confusion. The Swedish rapporteur considers the language used in Article I-32 to be more confusing than enlightening and that the distinction between legislative and non-legislative normative acts serves no purpose. In the Dutch report it is considered problematic that the scope of legislation has not been materially defined, especially since the relationship between delegated legislative powers and implementing competences is not clearly set out therein. It is also wondered how European laws and framework laws - as being legislative acts - can be adopted in those areas in which the Treaty explicitly excludes harmonisation of national legislation. As such the new typology will not really solve the questions surrounding the substantive consistency of European acts. The Italian rapporteur deems that the new typology proposes to specify the status of each European act in the national legal order, yet without specifying explicitly whether and if so, what the scope is of direct effect of the framework-law. The Austrian rapporteur doubts whether greater clarity can be

[31] VNS 2/2003 vp.

[32] Respectively SuVL 2/2003 vp and UaVM 4/2003 vp.

achieved in this respect at all,[33] and whether the proposed reduction of instruments could actually lead to a reduction of the interpretation problems. He considers in particular that the question whether a specific norm is in line with primary law can always arise, no matter how many layers there are of a hierarchical structured system. The proposed system is considered fairly close to the system in Greece, where many questions and case law have arisen regarding the application of the constitutional rules on legislative delegation. It is thus expected that the new classification of European acts and the separation which is made between legislative and implementing power, will also be at the origin of new interpretation questions, at least initially, with respect to: the definition of the essential and non-essential elements of the law and framework-law; the control of the contents of delegated regulations in relation to aims of the law and the framework-law; and the distinction between delegated regulations and implementing regulations. The German rapporteur also considers that the proposed model largely corresponds to the German system, which makes a distinction between laws, framework laws and regulations. However, it will (logically) not solve the interpretation problems relating to the German federal legal system, as discussed in Section II.1.1. The French rapporteur observes that the proposed reform boils down in essence to a change of denomination of legal acts, without modifying the nature or the adoption procedure thereof. Furthermore, no material criterion for classifying the various acts has been proposed. In view of this, he deems it preferable to maintain the specificity of the Community system and not to try to synthesise the various national systems, which do not in the same way distinguish between legislative and implementing areas.

Problems connected to the use of other instruments

Even though Article I-32 aims at reducing the number of European legal instruments, it is clear at the same time that the Constitutional Treaty allows for a certain differentiation of European instruments (as does the present EC Treaty), involving in particular the use of the open method of coordination (OMC), self-regulatory instruments such as collective agreements and soft law instruments. It may therefore be wondered what consequences this use has for the correct

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[33] In this respect it is also referred to the Lamfalussy report; Report of the Committee of wise men on the regulation of European Securities Markets, Brussels, 15 February 2001.

interpretation and application of European law. Only rather exceptionally, the use of such other instruments is being rejected (see Finland below), but a number of rapporteurs raise the point of - clarification of - their legal status.

Some rapporteurs do not see what problems this use could create (Sweden) or in what respect these problems may differ from those occurring now already (Austria). The French rapporteur also deems that OMC, applicable only in areas outside EU competence and based on the idea of peer pressure, affects the national legal orders only in a very limited way. Selfregulation and coregulation are deemed to have a more direct influence and to be closer to a number of national legal systems. Even though they may entail the establishment of (informal) rules that may be easier applicable because attuned more to day-to-day practice, they do not contribute to a more coherent, transparent, democratic and simplified system of Community legal instruments.

Others have declared themselves rather in favor of the use of such instruments. The Italian rapporteur thus deems that OMC, co-regulation and selfregulation all boil down to the use of soft law instruments, which facilitate the achievement of consensus, express a certain sensibility in areas in which more binding rules can not be established, and testify of a search for consensus and legitimacy with a certain category of persons. OMC is deemed a harmonisation instrument, which can bring the national legal orders of the Member States closer together in areas outside EU competence. The non-legally binding status and functions of these instruments should be clarified. The German rapporteur deems that the use of OMC outside the Union's competences does not pose legal problems, as long as no strict obligations are imposed. Self-regulation and co-regulation are considered to have political advantages, but they may also create situations that lack clarity and create lacunae in the regulation when they do not have a strict (legal) effect. The Greek rapporteur also sees advantages to the use of OMC, but is also of the opinion that its use cannot be generalised, given that its control mechanism does not have legally binding force. The use of collective agreements[34] is considered legitimate, as this concerns a method which conforms to national tradition[35] and is provided for in an area in respect of which the EU has to take national diversities into account. New

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[34] In the draft-Constitutional Treaty provided for in Articles II-28, III-103, 104 and 106.

[35] E.g. Article 22 of the Greek Constitution.

interpretation and application problems may occur in respect of soft law instruments, since the use of such instruments is not common administrative practice in Greece. Therefore, they should be demystified and their advantages and disadvantages should be considered before using them. More in general, recourse to instruments that depart from traditional unilateral lawmaking presupposes the clarification and consolidation of general principles of European law as well as the development of mechanisms for ensuring the conformity of new methods with these principles. The Portuguese rapporteur is of the opinion that OMC should be introduced into the Treaty with a view to framing these policies into the European legal system and that it could have a more useful and effective application in the Member States, if it were to have an obligatory nature in a number of previously defined areas. Self-regulation and co-regulation are deemed adequate - limited - means of regulation in economic and social sectors involving a European implanting. Co-regulation in particular enables cooperation between interested sectors and the European institutions, which can lead to the adoption of a European legislative act, laying down the objectives to be realised by the concerned parties.

Both the Finnish Government and Parliament have taken rather negative standpoints concerning OMC as a regulatory method, expressing the fear that the use thereof may lead to unintended expansion of EU competences and confusion as to the limits of the powers of the EU institutions. The use of collective agreements by management and labour has been actively supported. Yet, it is also pointed to the fact that self-regulation and co-regulation without a clear constitutional or legislative framework could create specific problems, both as sources of European obligations of the Member States as well as means for creating and ensuring European rights of individuals in the national legal systems. The Belgian rapporteur also deems that the use of methods such as OMC may produce interpretation and implementation difficulties in the Member States, whenever this entails the use of instruments that fit in more with the Community method, such as framework directives. Such a use cannot be excluded since it is deemed that OMC may also be applied in areas in which the EU has competence. He further considers the unclear legal status of ‘guidelines’ problematic, as well as the fact that the use of such instruments escapes the judicial control of the ECJ. The Dutch rapporteur also considers the proliferation of policy instruments with an obscure legal status problematic. Even though they

play a role particularly in the process of national policy development and legislation and in the framework of the evaluation of the effectiveness and opportunity of proposed policy and legislation, it is also clear that they do not have a direct legal impact in the national legal order. On a case by case basis, it has to be considered what significance to give to these instruments both from a legal and policy point of view.

II.1.3 Implementation techniques; relation between transposition and application

How is European legislation transposed into the national legal order; what are the most frequently used transposition methods? How does the way of transposition by the national legislature affect the application of European law by the national court: do some transposition methods entail more/less interpretation problems than others? (questions 1.2.1 - 1.2.3 of the questionnaire)

It appears that national practices may vary to quite some extent when it comes to choosing the way of transposing European legislation. Literal transposition may thus be very common in one Member State (Italy) and hardly ever considered an appropriate solution in another one (Germany). Some rapporteurs state that it is difficult or even impossible to categorically choose for one or the other transposition method, and to express a preference for full alignment of the national legal system to the European one or for merely ad hoc adaptation thereof. There is not one general technique for solving the problems that arise; this may depend inter alia on the area at issue (Austria), the general need for modernising the legislation and the extent of the required reform (Sweden). Furthermore, adapting the whole national legal system in a certain area is not always possible, even if perhaps deemed preferable, because of the fact that deadlines are too short for doing this (Germany, Finland, the Netherlands, Sweden).

The recourse to accelerated methods of transposition, including transposition by referral and by delegation, also varies quite considerably from one Member State to another. In particular transposition by referral - meaning that EC provisions are not literally implemented, but that the national legislation merely refers to these provisions - is not applied at all in some Member States (Italy, Portugal, Greece),

rarely in others (Germany) and increasingly in yet other states, even if only under certain conditions (the Netherlands, Finland). Its less labour-intensive and time-consuming nature is seen as advantages of this method (the Netherlands). Flaws are deemed to be the partial lack of parliamentary control, disrupting the coherence of the national system and less transparency of the national legal system (the Netherlands, Finland). Transposition by delegation concerns the empowerment of a lower rulemaker, for example a Minister, to take the necessary transposition measures by lower rules. Most Member States seem to allow for this, under the same conditions as apply to 'pure' national legislation. More generally, transposition takes place at the same level as prescribed for or chosen for the adoption of 'pure' national legislation in a certain area and according to the same rules or conditions (cf. Sweden, Germany).

Opinions seem to differ as to what the correlation is between the chosen method of transposition and the subsequent interpretation/application problems of European and transposition legislation that national courts are confronted with. Thus, the Luxemburg and Austrian rapporteurs deem that the way of transposition does not matter and that none of the transposition methods can avoid problems in the administration of justice. The national court will have to try to solve these problems by relying on the direct effect of European legislation and by way of consistent interpretation. The Austrian Administrative Court thus had to reverse a number of decisions of public authorities, as a result of the fact that the Law on Foodstuffs which partly transposed Directive 79/112/EEC had not done so in a proper way, as preliminary rulings of the ECJ made clear.[36] But also in the case the entire national legal system has been changed, which may occur in particular with a view to the application of European regulations, interpretation problems often arise. For example, the direct application of Article 9 of Commission Regulation 3887/92, laying down detailed rules for applying the integrated administration and control system for certain European aid schemes, entailed interpretation problems because of its ambiguity, which the Administrative Court managed to resolve itself.

The approaches in the various Member States will now be considered in turn. In Austria, no preference is expressed for full or only partly alignment of the national legal system in implementation. This depends on the area at issue and the

[36] Joined cases C-421/00, C-426/00 and C-16/01 *Sterbenz and Haug* ECR [2003], I-1065.

differences between existing legislation and the European legislation (see also II.1.4 on the implementation of the Sixth VAT Directive). Problems arise both when the whole system of a directive is taken over in national legislation and when there are only adaptations to this. In some cases implementation can be carried out by means of regulations of the administration, for instance as regards the common organisation of the market of agricultural products. But there are constitutional restrictions to this method, as there is a strict principle of legality in the Federal Constitution.[37] The Austrian rapporteur further deems that the national court must always examine whether the national rule is in compliance with European law, no matter whether the national law uses the terms of a directive or not. Therefore, interpretation problems will normally not depend on the chosen method of transposition. It is thus not considered to matter whether the national legislation says "bank" or "credit institute", when implementing an EU norm that speaks of "banks" or "credit institutes". What counts is that each body affected by the European law provision is also covered by the national provision. Interpretation problems can arise with respect to the notion "bank" as well as with respect to the notion "credit institute", even when the same expression as in the European provision is used.

In Finland, the basic rule is that the terms used in European acts should also be adopted for national legislation. Where national terminology differs from European terminology, it must be assessed on a case-by-case basis whether to retain or to alter the national terminology. Clear legal language and a correct and effective transposition of European legislation may sometimes require additional explanation or specification of the directive in the national legislation. The three main forms of implementing directives in Finland are rewriting, incorporation and referral. Rewriting national legislation so that it complies with the requirements of the directive can be considered the standard method of transposition. (Partial) incorporation means the direct insertion of the text of a directive into national law, which is advisable in the case a directive is very detailed or contains technical specifications and the Member

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[37] Cf. Constitutional Court, 6 June 1998, V 6/98, V 7/98 and V 8/98, CCR 15.189/1998; against Öhlinger, *Legalitätsprinzip und Europäische Integration*, in: 75 Jahre Bundesverfassung, Österreichische Parlamentarische Gesellschaft (Hrsg.) - Austrian Parliamentary Society - 1995, 645, the Constitutional Court held, that it is necessary to have a determinate basis in an Act of Parliament, even when there is a directive the contents of which is to be transposed into domestic law.

State has little or no latitude in its implementation. This technique makes it easier to ensure a clear complex of rules, in which the directive and the national law are integrated in a smooth and coherent way. The referral method should only be used in cases where the text of the directive is specific or technical, again not leaving latitude in implementation, and where the other methods for some reason are difficult to use.[38] Delegation of legislative competence is possible on the same conditions that normally govern delegation pursuant to the Constitution, which excludes implementation of more significant legal issues by delegation. If the matter at issue requires an Act of Parliament, this also goes for the implementation of directives in this area. Quantitatively, a huge amount of European legislation was implemented by making a combined use of the delegation and referral or incorporation methods. This use was inspired by the need to implement the old approach TBT (?) directives, that are more comparable to technical standards than to legal provisions. The same applies to technical rules in areas such as environment and agriculture.

In its legislation advisory function, the Dutch Council of State takes as point of departure that in implementation the terminology and system of European legislation should be maintained as far as possible, especially when it covers the basic characteristics of a regulatory system. Examples of this are VAT, environmental law and intellectual property. Since this approach may be problematic when the European and Dutch terminology and system differ and European legislation only covers a small part of the national system (and adapting the whole national system to the European one may not be desirable or feasible), the system of the directive will then be adopted for only part of the legislative complex or the directive provisions inserted in the national system. This approach was adopted for the transposition of the Merger Directive, which covers only a certain aspect of corporate tax law. Yet, sticking to the own system and terminology can lead to ever increasing discrepancies between the national and European system, if European legislation is adopted which builds upon previous legislation. This has occurred in environmental

[38] In so observing, the Finnish rapporteur shares the views expressed in the Legal Draftsman's Guide to the European Union - Guidelines for drafting national legislation. Originally adopted in 1996, in English version available since 1997 and drawn up by the Finnish Ministry of Foreign Affairs, Unit of Action Plan for Central and Eastern Europe, pp. 34-35.

law, legislation on pharmaceuticals, equal treatment legislation and as regards VAT. In more recent years, use is often made of the transposition methods of referral and delegation. Referral can be static, meaning that it is referred exclusively to the existing European rules,[39] or dynamic, meaning reference to European rules including future changes.[40] The Council of State does not reject this, but has stipulated a number of conditions for its use: provisions regarding entry into force have to be adopted, it must concern subjects in respect of which no choices can be made or no discretion is left as to its implementation (technical annexes), referral provisions must be specifically formulated and they must be published in the *Staatscourant*. Transposition by delegation also occurs with some regularity and the Council of State has no objections to this either, as long as it concerns technical (implementation) matters. In other cases, however, it is deemed to go against the primacy of the legislature and to erode the position of Parliament. The Council rejects the creation of the possibility to deviate from the law by lower (ministerial) rules (temporary or not). There is no unanimous view on these points of departure; the government has a stronger preference for the use of accelerated implementation methods, which leads to discussions with the Council of State and with both Chambers of Parliament.[41]

The technical assistance staff of the Portuguese Supreme Administrative Court (which has no legislation advisory function) has established that in the case of technical matters, there is a consistent practice of copying the system and contents of the European rules completely. In the case of issues that were already legally regulated in some way before the adoption of European rules or that are considered to have an impact that goes beyond a limited or technical sector, the tendency is to

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[39] For instance Article 1, paragraph 1 and Article 3 of the *Warenwetbesluit etikettering van schoeisel*.

[40] For instance Article 4, paragraph 1 / 2 of the *Besluit fysieke belasting* […] which relates to Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers. Amendments have to be published in the Dutch *Staatscourant*, making mention of the date as from which they have to be observed.

[41] E.g. the proposal to amend the General Equal Treatment Act and some other laws with a view to implementing Directives 2000/43/EC and 2000/78/EC, Kamerstukken II 2002/03, 28 770.

transpose European legislation by introducing national regulation that has an own system and rules, or the occasion is seized to reformulate significantly the national legislation. In the case of directives that have a more important application as well as a social visibility, transposition implies the establishment of a new systematised body of regulation in which the required European law changes are introduced, while maintaining the national rules that are deemed compatible with European law. An illustration of this is the transposition of Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings. The Portuguese rapporteur deems that this way of transposition contributes to clarity and legal certainty, as maintaining the former national rules with some amendments would raise more doubts and interpretation difficulties. Sometimes, transposition measures are not deemed necessary, either because the existing national legislation guarantees already the aims of the directive or because the directive establishes exclusively obligations for the Member States towards the EU. Its implementation then flows from regular administrative action or from the relations of state organs with the EU. Yet, this entails the risk of having ill-founded confidence in the existing internal legal instruments for guaranteeing objectives of directives. This was established in relation to Council Directive 89/665/EEC relating to the application of review procedures to the award of public supply and public works contracts, which was not implemented in time and in respect of which it was held that specific transposition measures were not necessary. In the end, however, the Portuguese government admitted the necessity to adopt legislation in order to ensure the availability of (new) procedural means to effectively guarantee the effect of definite, posterior decisions of administrative tribunals. It is further observed that national jurisdictions, albeit wrongly, often have a different attitude towards directly applicable European legislation and national transposition legislation; the tendency is to interpret the latter rather as 'pure' national texts, whereas the former are interpreted in the light of the European law objectives to be achieved. The more transposition boils down to a reformulation of rules, the more it will be clung to national law concepts and oriented towards aims that are considered implied in the national law. It will then be difficult to remember to compare them to the aims of the underlying European legislation.

In Italy, literal transposition of directives occurs very often, which at first sight facilitates transposition and entails less risks, but in the longer run complicates

interpretation and application of the transposition legislation, also by making the national legal system less coherent. The Council of State has consistently opposed this mechanical transposition, of which its advice on the draft transposition act of the telecommunications directives provides an illustration.[42] It observed in particular that the transposition technique could be improved by translating the European texts into national texts, in such a way as to ensure the result and take into account the peculiarities of the internal administrative law.

The Swedish rapporteur observes that adoption of the terminology of European legislation is always problematic, since the European legislature seldomly enters upon virgin soil and that the need for approximation of national legislation springs from this very fact. An additional problem occurred in particular at the beginning of Sweden's membership, concerning the fact that negotiations on European legislation are normally based on documents in a foreign language, as translations of the very latest version of a new directive - the one that is of interest to the negotiators - come very late. This can lead to a lack of interest in the own language version during the negotiations, which is hard to remedy at a later stage.

In Germany, the federal government, the Länder or both of them may be responsible for transposition. Transposition requires the adoption of a law whenever an issue touches upon fundamental rights. Furthermore, the Constitutional Court has held that parliament has to assume the responsibility for all regulations of a certain importance, which it can only do by way of a law. Actually, transposition through the adoption of an administrative regulation is often not easier than through a law, as according to Article 80 of the Constitution the competence to adopt such a regulation has to be based on a law setting out explicitly the contents, aims and limitations of the regulation. This also requires the approval of the *Bundesrat* (second chamber of parliament reuniting the governments of the Länder) and to obtain this, the federal government has to apply the same administrative process that is required for the adoption of a law. When a directive affects all Länder in the same way, the competent ministers usually sit down together and decide to elaborate a joint proposal for legislation. They do so on a voluntary basis and have even agreed on specialising in certain matters. Sometimes, it is actually the local communities, regions or other public authorities that have to transpose a directive, in which case numerous

[42] Advice no. 58/97 of 30 June 1997.

difficulties arise. In the case of shared competences of the federal government and the Länder, serious difficulties may have to be overcome in order to achieve satisfactory results. Since the federal government is involved in the different stages of the European legislative process, it can determine whether transposition legislation is needed. Often, the existing national legislation corresponds already partly or entirely to the European rules. Literal transposition of a whole body of European legislation is hardly ever considered appropriate transposition, as this may require the use of different notions as well as a different structure. Partial literal transposition may occur whenever this is compatible with the aim of the operation, for instance when a very detailed norm of European law is at issue. As much as possible, transposition must respect the usual legal language, which may only be left aside in the case that correct transposition within this linguistic framework is not possible. Within the same limits as apply to national legislation, it is possible that regulations and laws provide for a dynamic reference to European legislation, but in practice this is very rare. In the case of belated transposition, the federal government communicates written advices to the responsible authorities on how to deal with cases affected by the directive, with a view to protecting the rights of individuals. Even if not compulsory and not corresponding to transposition requirements, these advices have shown their utility for 'softening' the consequences of belated transposition. Finally, other explanations have been given for the rather slow transposition of directives, in particular: the aim to do better or more than a directive actually requires[43] (in view of the bad quality of European legislation or because existing legislation covers already a broader range of issues), maintaining the balance of the national legislative system, the quantity of legislation which goes beyond the administrative capacity to deal with its transposition, and the time that may be required to find a solution that is coherent and compatible with an already elaborate existing legal system.

The Spanish rapporteur also points to the fact that it must first be established what authority is competent to transpose and apply a directive and that other decisions regarding the internal organisation of the state have to be taken. Furthermore, he doubts the legal admissibility of detailed directives that exclude a true normative intervention of the Member States. In areas such as health and

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[43] For instance, the aim of the federal government to establish a Federal Bureau for Nature Protection in the framework of the transposition of the Directive on the protection of singing birds.

consumer protection, it occurs regularly that transposition is coupled with the adoption of rules the directive does not prescribe, with a view to improving the clarity of the system and the legislation. This is made clear then in the preamble of the legislation. Transposition can take place by way of the adoption of (organic) laws approved by parliament, or by legislative decree and decree-laws approved by government. The latter does not occur very often. Most legislative decrees originate in the Framework-Law 47/1985, which has delegated the competence to the government to transpose a number of specified directives with a view to accelerating the adaptation of the Spanish legal order to the acquis communautaire. Decree-laws may only be adopted in cases of extraordinary necessity and urgency, such as of infringement proceedings against Spain for not having transposed a directive, of transposition delays and of obligations to act immediately in conformity with a Commission decision. The parliamentary procedure may be speeded up by applying a legislation urgency procedure, by legislative delegation to a parliamentary commission and by the approval of a draft proposal in one reading.

In Greece, the system and terminology of European legislation are in principle respected in implementation. This has occurred in particular in respect of areas in which Greek legislation was fairly basic before its accession to the EC, such as environmental law, consumer protection, competition, transports, energy and health care. This has the advantage of speeding up the transposition process and of reducing the risk of a 'protectionist' interpretation by administrative authorities that sometimes discover, at wrong, margins of discretion in the use of different terminology. Yet, for reasons of clarity, legal certainty or uniformity one may sometimes prefer to stick to national legal terminology. This also occurs in respect of the transposition of very generally framed directive provisions or which explicitly leave discretion to the Member States. In the case that European legislation touches upon an area in which there exists already a national system and terminology of its own, it is either tried to transpose the directive into the national legal system or to reform the entire legislation. Evidently, these situations create most difficulties. Apart from that, it flows from the Laws 945/1979 and 1338/1983, enacted with a view to accession to the EC, that the instrument par excellence for the transposition of directives is the regulatory decree, adopted by the President of the Republic on the proposal of the competent ministers. This possibility of legislative delegation is provided for by Article

43, par. 2 of the Constitution. Yet, certain issues fall within the exclusive competence of the legislature, requiring the adoption of a formal law, and some fall within the competence of the *Chambre des Députés* and cannot be the subject of delegation, such as the creation of taxes. Implementation by way of circulars does not occur. The scope of possible delegation may not always be clear, for instance as regards regulating the protection of public freedoms. The Constitution itself does not reserve certain issues to the regulatory power of the President or to other administrative authorities. This has also led to a judgment of the Council of State in a case in which it was called upon to assess the refusal of the administration to establish a decree for the transposition of Directive 89/48/EEC concerning the mutual recognition of diplomas, before the deadline of transposition was passed. Contrary to what was held by the claimants, the Council of State considered that, on the basis of the principle of institutional autonomy and thus of their own constitutional rules, the Member States may themselves choose the instruments to transpose a directive. So, the competence given to the President to transpose directives by way of a decree does not mean that the legislature may not adopt a law with a view to this, even after the deadline for implementation has passed. In the case of a regulatory decree, the Council of State indicates the provisions that have been taken for the transposition of European rules and invites the administration to show their European law origin between parentheses. This practice is not followed in the case of formal laws.

The Belgian Council of State deems that the use of terminology in national transposition legislation must stick as closely as possible to the European terminology,[44] in particular as regards technical texts.[45] Such advice is induced by the concerns of comprehensibility and of acting in conformity with higher rules. The Council is yet more watchful in the case that national legislation uses a terminology which differs from the directive and which has a precise meaning already in national law.[46] In the case of vague European terminology, it is inevitable to be more specific in national transposition legislation.[47] The coexistence of numerous language versions

[44] See for instance the Advice of 7 July 1994 and more recently that of 4 February 2004 in respect of Directive 2001/105/EC.

[45] Cf. the Advices 35.982/1 to 35.985/1 of 30 October 2003.

[46] Cf. the Advice 34.361/4.

[47] Cf. the Advice 23.624. For concrete examples, see the Belgian report.

and the fact that in Belgium laws have to be adopted in the two national languages are considered complications in this regard. The Council of State generally also recommends that transposition come about by adapting the existing legal provisions, rather than by adopting an autonomous text leaving the existing provisions in force, and possibly incompatible with European law, which may lead to legal insecurity.[48] Autonomous legislation may only be called for because of the importance and scope of the subject at issue, touching upon various pieces of legislation.[49] Yet, ultimately this is a political choice to be made. This also goes for partial transposition of directives, which is inevitable in the case a directive concerns issues which belong to the competence of the federal authorities, each having their own responsibility to transpose it into their legal order. The partial nature of the transposition should, however, be clearly indicated. The advice of the Council of State on the proposed transposition of Directive 2003/87/EC[50] illustrates that it does not encourage this kind of transposition, as this may affect the effet utile of the applicable legislation and the competences of the different federal authorities. Sometimes, the Council of State may even propose that in the transposition of a certain directive, account be taken of European acts for which the deadline of transposition has not yet passed.[51] Rather exceptionally, the Belgian authorities seize the transposition of a directive as an opportunity to replace the old legislation by a new one.[52] In some cases, it has also appeared that they have assumed too easily that the adoption of transposition legislation was not necessary at all.[53] As regards accelerated transposition methods, the Council of State has rejected the use of the referral method;[54] in particular in the case discretion is left to the Member States or when vague concepts need clarification. It has only admitted it with a view to establishing provisions exclusively

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[48] See the Advice of the Council of State on the proposed transposition law of Directive 97/81/EC concerning the framework agreement on part-time work.

[49] It was recommended for instance in respect of Directive 2001/42/EC.

[50] Advice 36.057/4 of 24 November 2003.

[51] An example provides Advice 34.911/4 of 20 February 2003, concerning transposition of Directive 1999/31/EC and the subsequent adoption of Decision 2003/33/EC.

[52] An example is the transposition of the Directives 90/531/EEC and 92/50/EEC (public markets).

[53] This has occurred in the area of telecommunications, in respect of the Directives 91/263/EEC and 93/97/EC.

[54] Advice 20.563/8 of 7 February 1991.

addressed to the Member States. Public authorities do not have recourse to it. As regards transposition by delegation, the executive may already be empowered in a certain area, which then also includes the right to draw up transposition measures. Most often, however, specific empowerment are created geared towards the transposition of specific matters of European law, which may be done for reasons of technicality, the abundance of rules to be transposed, the blockage of the legislative process and the need for flexibility. Empowerment may be limited or unlimited in time and either concern specific directives or not.[55] According to the rapporteur, in view of constitutional requirements and requirements of effectiveness, it would be advisable to have precise empowerments concerning the implementation of certain directives by administrative act and in the case of directives leaving a margin of discretion and requiring the intervention of the legislature, the empowering act should contain the relevant indications for this. Legal concerns that the delegation of transposition powers to the executive entails relate in particular to the fact that numerous empowering acts require a confirmation by law within a certain time limit.

The French rapporteur deems it best to convert Community legal concepts into national terms, with a view to taking account of national legal traditions and existing specific terminology. The French authorities also tend to maintain the existing legislation and to introduce only the required modifications in the separate acts. This has been done for instance in respect of Directive 89/48/EEC introducing a general system for the recognition of diplomas. The legislature makes sure in particular that transposition does not affect the logic and coherence of the national law and that it respects common terminology, which is considered an essential element of legal certainty. Even though there is a preference for putting the internal law completely in conformity with Community law, the problem remains that the administrative organisation must be able to do so. Practice shows that the problems this organisation is confronted with and the coordination between the different actors involved, are important reasons for the French delay in transposing directives. A more complete and systematic alignment of French rules to European rules would only aggravate this situation. The tendency to do more in implementation than a directive

[55] See for concrete examples, the Belgian report which is very detailed on the question of transposition by delegation.

actually requires, is also a cause of delay.[56] This has occurred for instance in respect of Directives 1999/5/EC (telecommunications), 2000/52/EC (financial relations) and 90/167/EC (medical products for animals). Article 38 of the Constitution provides for the possibility to apply an accelerated transposition method in areas that are normally covered by laws, in the form of government decrees adopted on authorisation by the parliament during a limited period of time. Until recently, the use thereof was exceptional, but the Law 2001-1 of 3 January 2001 has empowered the government to transpose 46 directives in this way. A short while ago, the Council of State has also been asked advice on a law that will empower the government to transpose another 20 directives in this way. Because of its expeditiousness and simplicity, this procedure has clearly been resorted to with a view to reducing the delay in transposition. Even though it seems to be applied foremost in the case of technical directives which are not politically sensitive (but see also the next Section), the use of this procedure has been heavily criticised because it excludes Parliament from the (control of the) transposition process.

II.1.4 Case study: transposing and applying the Bird and Habitat Directives and the Sixth VAT Directive

What problems have arisen in the framework of the transposition and application of the Sixth VAT Directive and the Bird and Habitat Directives? What were/are the causes for this and, if solved, how has this been done? By what factors can the different national experiences with these Directives be explained and for what conclusions does the comparison of the situation in the different Member States allow? (questions 1.2.5 - 1.2.7 of the questionnaire)

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[56] See on this also the study of the Council of State of December 1989, attached as an annex to the information report no. 182 of 11 January 2001 and the report on the state of transposition of Community directives, drawn up by Christian Philip, member of parliament, on behalf of the EU-affairs delegation of the National Assembly, no. 1009 (2002-2003).

The Sixth VAT Directive[57]

The transposition of the Sixth VAT Directive seems to have encountered problems in particular in those Member States, that have chosen to retain at least to some extent, the system, structure and terminology of the national law on this type of taxation (Finland, Austria, the Netherlands, Italy).

The problems which have occurred in Finland, have to do with the fact that the VAT Act was drafted some years before Finland acceded to the EU. Even though this Act was based on the directive, in many cases the legislature did not want to follow the European system, partly because of different policy choices, partly because Finland was not expected to participate fully in the internal market. After Finland's accession, the conflicts between the national act and the directive had to be eliminated.[58] Since the Finnish act differs from the directive as to its structure as well as many of its expressions, there is constant tension between them and the directive is often relied upon as a basis for deliberation and is frequently referred to in the decisions of the Supreme Administrative Court.[59] On the whole, however, there is considered to be no conflict between the VAT Act and the directive and the directive has been directly applied only exceptionally. The impact of European law and the ambiguous nature of the national act have increased the number of VAT cases, the fiscal treatment of financing and real estate transactions turning out to be the most ambiguous area. For those decisions, application of European law has become the rule rather than the exception. So far, the Supreme Administrative Court has referred one single VAT case to the ECJ.[60]

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[57] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ 1977, L 145/1.

[58] Cf also the judgment in the infringement Case C-169/00 *Commission* v *Finland* ECR [2002] I-2433.

[59] European law played an important part in one out of four of the approximately 80 VAT decisions published by the Court between 1 January 1997 and 30 June 1999. After that period, the importance of European law has increased rather than decreased.

[60] Case C-101/00 *Tulliasiamies and Antti Siilin* ECR [2002] I-7487, concerning primarily car tax, but containing also a question about the VAT payable on car tax. *[Question: why so little references then?]*

The Austrian report points first of all at the fact that in adopting the new VAT Act 1994[61] which implements the Sixth VAT Directive, the structure and the terminology of the VAT Act of 1972 was upheld and not that of the directive. An example of the problems this may give rise to, relates to the fact that Articles 5 and 6 of the directive define as taxable transactions the supply of goods and the supply of services. The VAT Act 1994 provides that the supply of goods, the supply of services and self-consumption are chargeable events. Self-consumption is defined as the use of goods that are or until then were used for the assets of the business for private means or if the taxable person supplies goods or services in the context of his business for private use. In its judgment in Case *Seeling*[62] the ECJ clarified that the private use - the self consumption - of a building is not covered by Article 13B(b) of the directive which grants tax exemption for the leasing or letting of immovable property. A draft amendment of the VAT Act 1994 is now supposed to eliminate the exemption for the self-consumption, adopts the system of the directive on this point and follows the wording of the directive. Secondly, it is pointed to the problems that may result from the same wording being used in an EC directive and in national legislation, but having another meaning than in national legislation. This has revealed itself for instance as regards the meaning of the term "leasing or letting", which the ECJ clarified in the Cases *Goed Wonen* and *Sinclair Collis*.[63] In its decision of 30 October 2003, the Supreme Administrative Court pointed out that for the purpose of VAT the administration was wrong in assuming "leasing or letting" was to be understood according to the applicable national law.[64] Thirdly, questions may arise when national legislation refers to other national legislation.[65] As far as there has not been a solution provided for by the legislature, the Federal Ministry of Finance issues instructions on all relevant questions arising in the application of tax

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[61] Federal Gazette N° 663/1994.

[62] Case C-269/00 *Seeling* ECR [2003] I-4101.

[63] Respectively Case C-326/99 *Goed Wonen* ECR [2001] I-6831and Case C-275/01 *Sinclair Collis* ECR [2003] I-5965.

[64] 2000/15/0109.

[65] See for an example the decision of the Austrian Supreme Administrative Court of 19 December 2002, 2001/15/0093, concerning Section 12 of the VAT Act 1994 in relation to Article 17 (para 6) of Directive 77/388/EEC.

law. In this context, the most important questions relating to European law are dealt with, too.

In the Netherlands, the Sixth VAT Directive was implemented while maintaining as far as possible the system of the law as set up in 1968. Choosing this - wrong - point of departure for implementing this directive has caused interpretation and application problems, for instance regarding the concept of taxpayer which is systematically different from that contained in the Sixth VAT Directive.[66] As a result, the concept of entrepreneur in turnover tax law has gained a very different meaning in the case law than in other parts of Dutch law. Since this concerns a politically sensitive area and the basic principles of the Dutch VAT-legislation are at issue, amendments are difficult to realise and thus no national legislative measures have been announced.

In Italy, the transposition of the Sixth VAT Directive[67] has raised definition problems as to the principle of territoriality applicable to the payment of VAT on the provision of services. The rule that VAT is paid in the state in which the service is performed knows numerous exceptions, provided for in the directive. Yet, it may be difficult to establish the contents of the services at issue. For example, the definition of 'professional services' in the national law seems to differ from that in the directive. The ECJ has made clear that the list of professional services contained in its Article 9(2) is exhaustive and excludes arbitrators,[68] whereas on the basis of the wording of the national law these are included. Another interpretation issue relates to the translation of 'fixed establishment' by stable organisation in the national law, terms which do not coincide in their meaning. On the judicial level, interpreting the national law in the light of its aim, which is transposition of the directive, solves these problems.

In France, the initially proposed transposition act of the Sixth VAT Directive was rejected because of the loss of sovereignty it was considered to entail for the French legislature, resulting from the fact that the directive was too detailed and looked in

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[66] According to the Directive: "Taxable person" shall mean any person who independently carries out in any place any economic activity. In the Dutch law: de ondernemer (the entrepreneur).

[67] Through the legislative decree provided for by the Ministerial Decree no. 633 of 26 October 1972.

[68] Case C-145/96 *Von Hoffman/Finanzamt Trier* ECR [1997] I-4857.

fact like a regulation. Later, notably Law 92-667 of 17 July 1992 transposed it. Yet, there is a structural difficulty in the transposition of this directive, namely that the French interpretation of this directive meets with an evolving case law of the ECJ in a direction with goes counter to the French legal tradition on which the text of the directive was based.

In Portugal, the transposition of the Sixth VAT Directive has not entailed specific problems, since it was possible to introduce the European law aspects in the general rules of this taxation that was being newly established. Yet, preliminary questions have been posed on its interpretation. In Greece, no specific problems seem to have occurred either, the directive having been transposed by formal Law 1642/1986, as Article 78 of the Constitution requires for the creation of taxes. Since the Comunidades Autónomas in Spain have no legislative power as regards this kind of taxation, transposition of the Sixth VAT Directive has occurred by a state law.[69] An interpretation problem has occurred pursuant to an error in the official translation into Spanish; what was thus by some considered to be a general exoneration clause in the directive, was transformed into a specific exception clause in the national legislation. The judgment of the ECJ in the Case *Amengual/Far*[70] is said to have made clear that the directive left the choice open for the Member States to choose for the one or the other possibility.

The Bird and Habitat Directives[71]

In quite a number of Member States, the transposition of the Bird and Habitat Directives has been seriously delayed or encountered problems. It appears that both internal reasons may account for this and reasons of a substantive nature. It is thus clear that the (federal) state structures of Germany, Austria and Italy have complicated their transposition.

Focusing first on the latter aspect, the omission of the German federal government to adopt a framework law thus made it impossible for the Länder to do

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[69] Law 37/1992 of 28 December, BOE, no. 312.

[70] Case C-12/98 *Amengual/Far* ECR [2000] I-527.

[71] Respectively Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979, L 103/1 and Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206/7.

their part of the job. More general, transposition delays appear often not long enough to deal with all the problems resulting from Germany's federal structure. In the Austrian legal system, the competence for implementation of the two directives generally lies with the provinces, but the directives also pertain to questions that are regulated in the Forestry Act - which falls within the competence of the Federation - and to the hunting and fishing regulations, which falls again within the competence of the Länder.[72] In Italy also, the transposition of these directives has foremost raised problems as to the delimitation of the competences of the state and the regions and the form of transposition itself, which has led to some decisions of the Constitutional Court.[73] Yet, in the decentralised system of Spain it seems that such particular problems have not occurred, the directives having been transposed in particular by way of framework-legislation adopted by the state.[74]

In Finland, another state-specific matter has complicated the transposition of these directives. That is, a major problem was that not only had the Finnish legislation to be adapted to the European directives, but the European system had to be adapted to the circumstances of Finnish nature as well. The annexes of the directives had thus to be supplemented with references to boreal and arctic species and nature types. The directives were implemented by amendments to the Nature Conservation Act and certain other acts, which entered into force in 1997, after the deadline for implementation had expired. The Finnish legislation had to be amended so that the legal effects of the protection were extended also to areas surrounding

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[72] For a very short survey on the implementation cf. Weber, *Stand und Entwicklung des Osterreichischen Naturschutzrechts*, Juristische Blätter 2000, 701 (703). A comprehensive description can be found in Ennöckl*, Natura 2000, Die Vogelschutz- und Fauna-Flora-Habitat-Richtlinie und ihre Umsetzung im Osterreichischen Naturschutzrecht* (Vienna, Verlag Österreich, 2002). For a survey on the legal aspects of transposition of those two directives, see V. Mauerhofer, *Zur Umsetzung der Vogelschutzrichtlinie in Österreich - rechtliche Aspekte*, in: Karner/Mauerhofer/Ranner, Handlungsbedarf für Österreich zur Umsetzung der EU-Vogelschutzrichtlinie, Umweltbundesamt (ed.), Report N° 144, 2nd ed., 1997, 112

[73] As regards the Habitat Directive (transposed by Article 4 of Law no. 146 of 1994 and Ministerial Decree no. 357 of 8 September 1997), decision no. 425 of 1999. As regards the Bird Directive (transposed by Law no. 157 of 11 February 1992), decisions no. 226 and 227 of 4 July 2003.

[74] Royal Decree 1497/86 of 6 June, BOE, no. 173, p. 26224 and Royal Decree 4/89 of 27 March, BOE, no. 74, p. 8262, both transposing the Bird Directive. Royal Decree 1997/95 of 7 December, BOE, no. 310, p. 37310 transposing the Habitat Directive.

Natura 2000 sites, whereas according to the national legislation the conservation had legal effects only as regards the area that had been designated as protected. This also entailed an expanded use of environmental impact analyses. The most important consequence of the directives is the establishment of Natura 2000 areas. 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, the joint area of which corresponds to the combined area of Belgium and the Netherlands. In May 2002, the government proposed 289 new areas or re-definitions of old areas to the network. The Supreme Administrative Court received 1241 appeals involving some 750 different sites, most of which 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, including owners of the land and water areas concerned, local authorities and certain organisations representing the interests of nature conservation. The provisions on species and natural habitats of the directives were of key importance, as the selection criteria were not transposed into national law and the Court had to directly apply the relevant provisions of the directives. The total number of decisions issued (mainly on 14 June 2000) was 694. Their aggregated text comprised over 40000 pages. In about seven per cent of all decisions, the government decision was annulled either in whole or in part. The government decision of 2003 to supplement the Natura 2000 network has led to 68 new appeals to the Supreme Administrative Court. These cases are still pending. Finally, a special implementation problem was connected to Article 12(1)(d) of Directive 92/43/EEC and the protection of flying squirrel (a Siberian species living in the present EU only in Finland).

In Greece, the directives have been transposed by way of ministerial decrees, adopted on the basis of the authorisation given by Article 2 of Law 1338/1983, but the constitutionality of this delegation may be questioned. In France also, the Bird and Habitat Directives have been transposed in particular by way of Decree 2001-321 of 11 April 2001, adopted on the basis of the empowering Law of 3 January 2001, discussed above in Section I.3. Law 2003-591 of 2 July 2003 explicitly confirmed the decree. The establishment of Natura 2000 areas has raised most problems and led to three infringement procedures of the Commission against

France. The reasons for the delay in implementation are traced back to the wide protests that the Natura 2000 project has raised and the fact that the Commission has required the classification of such areas, without being able to specify the future legal consequences of such classification. The transposition by way of decree has been fiercely criticised, given that the parliament has not been involved on issues that affect many people because of the many sectors of activity concerned.

According to the <u>Austrian</u> report, the problem as regards the implementation of the Habitat Directive arises also mainly from the complicated system of nominating potential areas for the protection by the Member States and the fixing of the definitive list of protected areas by the Commission. Member States have to comply with a lot of obligations in the period before a site is finally listed as a site of European importance.[75] Those obligations also apply when the Member State failed to name a site but should have done so, or classified an area that is not large enough. It is hard to establish these obligations in a general way in the Nature Protection Act of the provinces, which entails the necessity of direct application of European law.[76] The province of Lower Austria nominated one third of its territory. In its judgment of 27 June 2002, the Administrative Court had to apply the Styrian Nature Protection Act in the version before its amendment, in order to comply with the obligations arising from the two directives. The administrative authority and the Court had to examine whether the designation of areas by the government of the Land complied with the directive requirements. In this decision, the Administrative

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[75] Cf. Case C-57/89 *Commission v. Germany (Leybucht)* ECR [1991] I-883, Case C-355/90, *Commission v. Spain (Santona)* ECR [1993] I-4221 and Case C-166/97 *Commission v. French Republic* ECR [1999] I-1719.

[76] On the discussion concerning the possibility of direct application in cases where this leads to disadvantages for citizens, see Ennöckl, *Natura 2000*, 59, Madner, *Naturschutz und Europarecht*, in: Potacs (ed.), Beiträge zum Kärntner Naturschutzrecht, 17 [56], Mauerhofer, *Das Schutzgebietssystem "Natura 2000" nach den Richtlinien 79/409/EWG ("Vogelschutz-Richtlinie") und 92/43/EWG ("Fauna-Flora-Habitat-Richtlinie")*, RdU (environmental law) 1999, 83. In the implementation of the directives at stake the ECJ seems to follow the approach of an "objective effect" of directives, thus deviating from the line that directives cannot produce effect detrimental to the citizen.

Court accepted the necessity of direct application of the directives,[77] thus following the case law of the ECJ. Yet, it held that the specific question whether the Habitat Directive is directly applicable in "potential habitat-areas" was not yet sufficiently clarified in the case law.[78] It concluded that the administrative authority was obliged to examine whether the area at stake fulfilled the criteria for a special protection area. As the administrative act lacked sufficient reasoning on this, the Court quashed the act.

The Spanish and Portuguese rapporteurs point to other substantive problems of the directives. In particular, the vagueness of certain terms and concepts in these directives have led to divergent interpretations of the Commission and various Member States, which has also led to infringement procedures.[79] In Portugal, the transposition of the Bird and Habitat Directives came about by establishing new legislation,[80] since there was no national legislation yet on this matter. Consequently, the framework of the national legislation practically coincides with that of the directives. The application of the Habitat Directive has caused practical difficulties, because of its use of excessively vague concepts. Being more concrete, the concepts of the Bird Directive were more easily integrated in national law and applied, despite the fact that a more complete and systematic protection regulation was adopted only in 1999.

In the Netherlands, until recently virtually no implementation measures were taken with a view to protecting the areas concerned, which leads not only to substantive questions of interpretation, but also of consistent interpretation and

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[77] In a decision of 23 October 1995, 95/10/0108, the Administrive Court denied the direct applicability of the Habitat Directive (because the time limit for the classification of areas had not expired) and did not examine the case in the light of the Bird Directive, which was criticised in Austrian literature; cf. Ennöckl, *Natura 2000*, 58; in the decision of 27 June 2002, 99/10/0159, the Court stresses that the question at stake in the former decision was the prolongation of the validity of a licence granted before the Austrian accession to EU, and therefore not being the same as in the latter case.

[78] Cf. Gellermann, *Natura 2000, Europäisches Habitatschutzrecht und seine Durchführung in der Bundesrepublik Deutschland*, 121.

[79] Case C-355/90 *Commission v. Spain* ECR [1993] I-4221, in which Spain was held to have infringed the Bird Directive.

[80] Decree-Law no. 75/91 of 14 February transposes the Bird Directive and Decree-Law 280/94 of 5 November transposes the Habitat Directive. Decree-Law 140/99 of 24 April contains a revision of this transposition legislation, reuniting the transposition of both Directives.

direct effect. A proposal for legislation, induced also by an infringement procedure of the Commission against the Dutch State, aims at transposing the provisions at issue quite literally and is now pending at parliament. Since this way of transposition will lead to an accumulation of rules, the proposal has been criticised and its discussion stagnates.

II.2 Handling and Solving of Interpretation Problems

After considering first how it is tried to prevent interpretation and implementation problems by way of ex ante examination of European legislation, the main aim of this Section is to establish the attitude of the (highest) national courts towards European law and to find out how they deal with the uncertainties in that law. With a view to this, the relevance of travaux préparatoires and other possible interpretation aids will be discussed, the recourse to different language versions, the considerations behind the use of the preliminary reference procedure and its aims and the existing forms of cooperation in this regard. A preliminary observation, made by the Italian rapporteur, is that even though uniform interpretation and implementation of European law plays a central role in the national legal orders and is a fundamental value that is tried to be achieved, interpretation is not a purely mechanic but partly a creative process. Hence, a differentiated interpretation and thus transposition of one and the same rule must in his view be accepted to a certain extent, as being a physiological characteristic of even a system such as the European one, in which the national courts must try to bring the different national rules back to a uniform interpretation of the European legal rule from which they ensue.

II.2.1 Ex ante examination of European legislation

What possibilities are there in the Member States of ex ante examination of European legislation? What contribution may this make to the prevention of interpretation and implementation problems? (questions 1.3.1-1.3.4. Suggestions regarding advice on European legislation are discussed in Section III.2)

Not all national reports contain information on the existing possibilities for ex ante examination of European legislation. Yet, it appears that in some states there are very developed structures for this (Finland), whereas in others these are far more limited (Greece) or at least less used (Italy).

In Finland, an intensive dialogue between parliament and the government takes place as early as possible of the European legislative process, and it is continued until the matter is finally decided at the Council. Within parliament, specialised committees and the Grand Committee acting as the European affairs committee are involved in this dialogue. This process provides for transparency in the national position on the development of European legislation and gives interested parties such as management and labour and NGO's a possibility to participate in it. The system also forces the government to analyse transposition problems already at the beginning of the negotiations at the European level and thus contributes to avoiding or mitigating legislative quality problems at the national level. 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.[81] Furthermore, negotiation positions of the ministries at the EU Council and its preparatory organs are co-ordinated by a special structure under the Office of the Prime Minister. In this co-ordination process legal questions relating to Commission proposals are discussed and analysed in a special legal working group, for which the Unit of European Law of the Ministry of Justice provides secretariat. Ministries can also independently seek legal opinion of the Ministry of Justice on Commission proposals. In the working group and in the written opinions of the European Law Unit, the Commission proposals are analysed not only from a national point of view but also in the European law context.

In Austria as well, the competent ministries have to inform the parliament - de lege lata - on legislative EU initiatives. Moreover, the Constitutional Service of the Federal Chancellery is usually involved in the legislative process and must look at the legislative quality of proposed European rules. Upon accession, the 'Legislative

[81] *Question: can one say that this process truly leads to less implementation problems?*

Guidelines' were also amended with a view to the transposition of European law.[82] Yet, a centralised national institution can only sufficiently deal with the huge amount of legislative proposals, if it has an adequate staff.

If the Swedish Law Council observes errors in the implementation of a directive when scrutinising a proposal for a transposition act, the governments' proposal to parliament is almost always rectified in order to comply with the directive.

The Italian Council of State may examine, upon request of the President of the Council of Ministers, draft legislative EU proposals,[83] but this does not occur often. Article 1 bis of Law no. 86 of 9 March 1989 provides that the draft EU proposals are sent to the chambers of parliament and to the regions and that they can formulate their observations to government. This provision has not had much effect either.

In Greece, no mechanism of facultative or compulsory ex ante examination of European legislation has been established. The Council of State is not consulted during the legislative process, as the Constitution limits its consultative function to a control ex ante of the legality of regulatory decrees. The recent revision of the Constitution has not led to the acceptance of the proposal to have its consultative function extended to proposals of European legislation, but has explicitly provided for informing the parliament on such proposals. In practice there are also some interministerial committees that examine proposals for European legislation, but they do not deal in detail with the legal aspects thereof. In checking the legality of regulatory decrees - which are most often used for the transposition of European legislation -, the Council of State looks at the interpretation questions that the European text entails, as well as at the quality of the national transposition legislation. This control elucidates the various problems that have to be solved, such as terminology problems, compatibility with national law etc. and may influence the drafting of the decree. Yet, it is also noted that interpretation difficulties often occur only in a concrete situation and that the facts of the case enable the discovery of the different aspects of a legal rule.

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[82] EU-Addendum zu den Legistischen Richtlinien 1990, to be found at www.bka.gv.at ("Legistik"). Cf. also Obenaus, *Gemeinschaftsrechtlichen Anforderungen an die Osterreichische Legistik*, JRP 1999, p. 111 and Bußjäger/Kleiser (eds), *Legistik und Gemeinschaftsrecht*, 2001.

[83] Provided by Law no. 127 of 15 March 1997, Article 17, para. 28.

The German rapporteur deems that if the national legislature would have sufficient time during the negotiation process to consider details, the legal control exercised by the legal services of the Union and by the national experts would be sufficient to maintain an adequate level of quality of European legislation. The influence of the Federal Administrative Court on (European) legislation is rather marginal, given that none of its five branches plays an active role in the legislative process and that it has no consultative section comparable to that of the Councils of State in other countries. Nonetheless, the supreme courts do have some indirect influence on the legislative process, as they may call upon the government and the legislature to take action when they consider that (the lack of) existing legislation may lead to unreasonable or unacceptable results. Such an influence may even flow stronger from the case law of the Constitutional Court, which often appeals directly to the legislature to find a solution to a specific problem, sketching the contours of the solution in order to be in conformity with the constitution, while respecting the discretion left to the legislature. The Federal Minister of Justice may also ask advice on a particular piece of proposed legislation and the Federal Administrative Court may submit remarks or observations to the Minister on certain law proposals, of which it has gained knowledge in an informal way.

Law does not prescribe consultation of the Spanish Council of State on Commission proposals. The rapporteur considers that imposing such an obligation would not only slow down the definition of the national position, but also entail an increased workload for the Council of State.

According to Article 88-4 of the French Constitution, introduced pursuant to constitutional Law 99-49 of 25 January 1999, the government has to submit all proposed legislative Community acts to parliament. Other kind of documents may be submitted to them. This brings with it that the Council of State has to examine first whether a proposed Community act is of a legislative nature or not. As a result of the time involved in this exercise, parliament receives the Community proposals only when they have been adopted already or will be very soon. As was observed already, the main reason for belated transposition[84] is of and administrative nature. On the one hand, the effects of proposed directives on national law are not taken into account in the negotiations. On the other, the interministerial coordination is not

[84] On 30 June 2003, 84 directives had not been transposed within the prescribed delay.

sufficiently effective and disagreement between administrations leads to considerable blockages. Numerous ministerial circulars aim at improving this situation, for instance by drawing up a legal impact study for each proposed directive,[85] but these have been without result. Two proposals of the Senate - enable parliamentary control of the transposition of directives and organise a monthly meeting on this issue – were rejected by the government, which instead installed a working group for improving transposition procedures. The suggestions this working group has put forward have not been given any follow-up until now. The delegation of the National Assembly dealing with EU-affairs has decided to publish an annual report on belated transposition of directives and the causes of this.[86] As a result of a fairly recent circular[87] of the Prime minister, the Council of State may be called upon to give advice on all legal, essentially constitutional questions that may occur regarding European acts that are being negotiated. Such an advice has been given in respect of the proposed European arrest warrant.

II.2.2 The use of interpretation aids

In interpreting European legislation, what relevance is given to and what use is made of travaux préparatoires - both of the European and the national transposition legislation -, preambles, statements in the minutes of the Council, Commission documents drawn up subsequent to legislation or possible other documents? (questions 2.1.3 - 2.1.7 of the questionnaire)

In most Member States some use is made of the available travaux préparatoires and preambles, in particular in the case of serious interpretation problems or when the law is not clear. The preamble seems to play the most important role in this regard, but also Commission documents may sometimes be used for interpretation purposes. Statements in the Council minutes can be said to play a negligible role in

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[85] See the circular of 9 November 1998 concerning the follow-up procedure of transposition of Community law directives into national law.

[86] See the report of Christian Philip, no. 1009 (2002-2003), o.c. note 51.

[87] Circular no. 4, 904/SG of 20 January 2003, not published.

this regard.[88] Overall, the national reports show broad agreement on the necessity of more transparency of the European decision-making process and of more availability of and better access to travaux préparatoires, in order to facilitate and improve the transposition, application and interpretation of European law and of national transposition legislation. Transparency is considered to mean that the main ideas behind the rules, the reasons why a specific clause is used or why a provision has been changed etc. can be traced by those who have to apply the norms (Austria, the Netherlands). As such, it is also considered to improve the quality of the legislation itself (Sweden). The concrete suggestions that have been made with a view to realising this will be discussed further in Section III.2. At the same time, a number of rapporteurs have also underlined that the transparency of the European decision-making procedure has already considerably improved over the past few years (Belgium) and that one should not overestimate the relevance of travaux préparatoires, in particular in view of the limited relevance the ECJ has attached to these (Spain, Greece, the Netherlands).

Transparency and travaux préparatoires

The Austrian rapporteur deems that travaux préparatoires contribute to clarifying the meaning of clauses, by explaining the substance of the provision at stake, in particular when this has been changed in the legislative procedure. Detailed explanations concerning an amended proposal of the Commission are considered very helpful in this regard. Greater availability of systematic and complete travaux préparatoires would speed up the interpretation process and in many cases help to exclude one or the other possible hypothesis on the meaning of a clause. In one of the few cases in which the Administrative Court has referred to travaux préparatoires, it held that a certain interpretation of EC law was not acceptable because it lacked confirmation in the travaux préparatoires.[89] Travaux préparatoires

[88] But cf. the Finnish preliminary reference Case C-233/97 *KappAhl Oy* ECR [1998] I-8069, in which the question was put forward whether individual positions and a joint declaration adopted 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 interpreting a provision of that Act.

[89] Decision 98/17/0100 of 30 August 1999.

of national legislation have also been used, in order to know whether or not EC law had to be considered for the interpretation of the national legislation.[90]

The Finnish rapporteur also considers that since legislation is a purposive activity, all information concerning the aims and objectives of those that drafted and decided on the applicable provisions is potentially valuable as interpretative material. It may help to exclude certain interpretations or explain certain terminological choices in the act, etc. The fact that in the Finnish courts preparatory documents have been only of minor significance in interpreting European legislation is not attributable to a reluctance to do so, but to their limited availability, the general thought that they should not been given great importance, if any, and the absence of detailed statements of reasons. In interpreting national (transposition) legislation, Finnish courts give great importance to travaux préparatoires and as such they are familiar with using preparatory works as a source for interpretation.

In Luxemburg, recourse to travaux préparatoires is only being had in the case the scope, aim or meaning of a text is not clear. Travaux préparatoires may then be useful with a view to establishing the aim and a full understanding of the scope of the European text at issue. Until now, the case has not presented itself yet. Examples of the use of travaux préparatoires of national transposition legislation are not known either, but such a use is considered possible.

The Dutch rapporteur deems that travaux préparatoires may be particularly useful with a view to the transposition of European legislation in the national legal order, since there is then no case law yet on a certain issue. In implementation it is important that a tenable approach is taken and the drafting history of an act provides a useful yardstick for this. At the judicial level, the (limited) use of the European travaux préparatoires occurs foremost when a directive provision raises questions and has for instance been introduced in the course of the legislative process. When the interpretation of a European norm itself is at stake, no use is made of the travaux préparatoires of national transposition legislation. This occurs only when this

[90] E.g. decisions of 18 March 2002, 99/17/0136, of 26 June 2000, 99/17/0450, of 30 August 1999, 98/17/0100, and of 21 December 1998, 96/17/0079.

legislation itself is at issue, concerning for example the question whether a reference provision is of a static or dynamic nature.[91]

On the Danish jurisprudential level, use may be made of travaux préparatoires, which is illustrated by the fact that the Supreme Court[92] made use of the Schlösser Report in a case concerning the interpretation of Article 16, subsection 1, of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention).[93] When interpreting national transposition legislation, reference may be made to travaux préparatoires of the Danish legislation.[94]

In Germany, recourse will only be had to explanatory documents in the case that the national norm that aims at transposing European law produces incoherent results. The judge will try to find an interpretation that respects both the European and the national norm, giving priority to the European one in the case they are not compatible. The explanatory texts are indispensable for doing so and the national court will use it with a view to avoiding the reference of preliminary questions. The only problem is the limited availability of these documents. National travaux préparatoires may also prove to be useful, but they are considered an auxiliary instrument inferior to the text itself, which has to be interpreted literally and in its context while respecting the primacy of European law. More general, is it considered that the historical interpretation method is an option only in the case that neither the text nor the context permits appropriate conclusions. It is also pointed in this respect to the fact that a certain ambiguity of the text is often the result of a compromise or deliberately wanted, leaving a certain margin of discretion to the national legislature. Furthermore, in certain cases the use of travaux préparatoires may even render the uniform application of European law more difficult, as each Member State could invoke its particular notion of the text.

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[91] Cf. the judgment of 10 April 2003 in case 2000050000/1 (RTL) concerning reference to Directive 89/552/EEC. On implementation by static and dynamic referral, see Section II.1.3.

[92] U 2001, p. 2524.

[93] OJ 1979, C 59/71.

[94] For instance, the Eastern High Court referred to the travaux préparatoires of the Danish employment contract law which implemented Directive 91/533/EEC, when assessing whether the law was applicable in the case at hand, U 2003, p. 932.

The Swedish rapporteur also points to the fact that it is not always possible to find a consistent will behind a European legal act, given its compromise nature. In the Swedish legal tradition the travaux préparatoires play an important role in the interpretation of unclear laws. If preparatory works are easily accessible to all, the knowledge that they will be used to clarify uncertainties increases legal certainty. Since European travaux préparatoires are very scarce, they are not considered an important factor for interpretation. The national travaux préparatoires are not used to ascertain the meaning of the European rule but could be useful for determining whether the solution made by the national legislature is in conformity with the European rule or not.

In Italy, travaux préparatoires are used when interpretation difficulties present themselves pursuant to, for example, contradicting national judgments or in relation to judgments in other Member States. In such cases, it may be useful to have recourse to Commission documents. Yet, only rarely recourse will be had to the travaux préparatoires of the national transposition legislation, as it is considered more appropriate to rely on the original European text itself and to possibly examine other language versions.

Quite a different approach is followed in Portugal, where the tendency of the administration and of national courts is to interpret national transposition legislation in conformity with national laws, assuming that the national legislature has done a good job in transposing European legislation. In that framework, recourse may also be had to the travaux préparatoires thereof. Usually, it is only pursuant to a complaint of one of the parties alleging that European law has not been respected, that it is examined whether the transposition into national law has been satisfactory. In that case, courts sometimes look at the text of the directive, travaux préparatoires, the preamble or other explanatory texts.

The Greek Council of State has often recourse to travaux préparatoires of national laws, in particular the explanatory memorandum, the scientific report of *the Chambre des Députés* and the parliamentary debates. Although they are certainly an important source of information, their relevance should not be overestimated since judge often resorts to interpretation methods which depart from a literal, textual interpretation and the will of the legislature, and gives preference to systematic and teleological interpretation. As regards European legislation, it is

pointed at its difficult accessibility, the limited significance of these documents in the interpretation process and the risks that go along with a plethora of information.

The Spanish view differs from those expressed above, in the sense that it is not considered certain that more transparency of the legislative process will entail a better implementation and interpretation of European legislation. In particular, it is deemed that all acts that may have an influence on this interpretation are being published already in the Official Journal, with the exclusion of declarations of the Council, Commission or Member States issued during Council meetings, which are recorded in the minutes and in the monthly compilations drawn up by the Secretariat-General of the Council.[95] However, given the limited relevance which may be attached to these declarations as a result of the ECJ's case law (merely confirming an interpretation which already ensues from other elements)[96] and the danger that publication in the OJ might actually lead national organs to award them a normative value which they do not have, changes are not deemed advisable in this regard. It is further noted that in principle travaux préparatoires are not used.

In the same line of thinking, the Belgian rapporteur concludes in particular that the degree of transparency of European legislation that results from Article 207(3) EC and the Council's Rules of Procedure,[97] seems to strike the right balance between the requirements of efficacy and transparency. The public nature of preparatory European documents is considered at least equivalent to that of similar national documents. Furthermore, Article 49(2) of the draft Constitutional Treaty provides that not only the EP but also the deliberations of the Council on legislative proposals will be public. Remaining difficulties relate in particular to the availability of internal documents of working groups, both at the stage of the preparation of legislative acts as of their implementation.

In France, travaux préparatoires are used and even though their availability through devices such as Prelex remains limited, the rapporteur is also of the opinion

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[95] Since the adoption of the *Code de conduite du Conseil concernant la publication des procès-verbal et des déclarations inscrites aux procès-verbaux du Conseil lorsqu'il agit en qualité de législateur*, in October 1995

[96] See e.g. Case 136/78 *Auer* ECR [1979] 437 and Case C-292/89 *Antonissen* ECR [1991] I-505.

[97] Contained in Council Decision 2002/682/EC, OJ 2002, L 230/7.

that the European decision-making process meets the transparency requirements of a democratic legal system. Nonetheless, increasing transparency could benefit the application of European legislation. The administrative judge deems that recourse to parliamentary travaux préparatoires is only acceptable in the case the text is ambiguous, which can be said to apply also to European legislation. Since directives are often considered to be very technical and difficult to understand, it seems that travaux préparatoires are often used. A problem is, however, that the main interpretation difficulties occur in respect of acts which have been modified in the Council, on which travaux préparatoires are often lacking. Moreover, the room of manoeuvre for the national judge is narrow, since in the case of serious interpretation difficulties he may have to ask preliminary questions. Since travaux préparatoires of national legislation are for French courts one of the major means for teleological interpretation, the same can be said to go for national transposition legislation.[98]

Preamble

In most Member States, the preamble is considered a very important aid for the interpretation of European law, as it is deemed to be of the same legislative quality as the text it precedes and fixes the framework of interpretation and its limits (Germany); considered an integral part of the piece of legislation (Sweden); seen as an element that sheds light on the reasons behind and the aim of a particular provision (Italy, Germany, Luxemburg); serving as explanatory memorandum (Greece); and is frequently had recourse to in the case law (the Netherlands).[99] The Danish Supreme Court has determined the scope of Directive 85/337/EEC on environmental impact assessment, by making a specific reference to its preamble in a case in which Greenpeace claimed that the Minister of Traffic had violated this directive.[100] The Spanish Supreme Court also looks quite frequently at the preambles of European acts with a view to establishing their meaning.[101]

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[98] See for instance the report no. 322 (1996-1997) of senator Balarello.

[99] Cf the judgment of the Administrative Jurisdiction Division of the Council of State of 10 April 2001, nr. 2000050000/1 (RTL), AB 2002, 5, m.nt. CG. This case concerned the interpretation of the amendment of Article 2 of Directive 89/552/EEC (Television without frontiers) by Directive 97/36/EC, which concerns the delimitation of supervisory competences of the Member States.

[100] U 1995, p. 634.

Rather in contrast with these views, the Finnish rapporteur observes that, in general, it is felt that the legal status and the importance of the preamble remain somewhat unclear and that its wording between a legal rule and an explanatory memorandum makes it difficult to understand. As a result, the preamble has not been given great relevance in interpretation, although there are some examples where the courts have referred to it. The Austrian Administrative Court every now and then tries to draw conclusions from the preamble, which, however, seldomly allows the deduction of a precise answer to a specific question, for being of a too general nature.[102] In France also, this use seems very limited.[103]

Statements in the minutes of the Council

Statements in the minutes of the Council are not frequently used for interpretation purposes. Some rapporteurs observe that there is no recorded use of this (Portugal, Sweden, the Netherlands), that such use would not be very useful (France) or that reference may be made to such statements, if they are presented to the court (Denmark). The German rapporteur points to the fact that these statements are usually inaccessible for national courts, that there is a linguistic problem and that their use is limited because they may reflect the position of only one Member State and not the objective will of the legislature. The Greek Council of State takes a position close to that taken by the ECJ in the Antonissen Case. Although they may be considered to form part of the travaux préparatoires, no statement of a Member State issued during the adoption procedure of a European act can affect its application. Likewise, a declaration cannot be used for the interpretation of a directive, if the contents itself of such a declaration has not been in any way expressed in the directive.

Commission documents

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[101] Cf. its judgments of 18 October 2002 (concerning Regulation 404/1993), 12 December 2002, 18 March 2003 (concerning Regulation 2677/1985), 21 March 2003 (concerning Directive 84/253) and 12 June 2003.

[102] E.g. decisions of 28 January 2002, 99/17/0407 and of 20 December 1999, 99/17/0375.

[103] For an example, see however the report no. 348 (1994-1995) of senator Hugot, concerning the draft-law for the transposition of Directive 93/7.

Generally speaking, it appears that most Member States do not exclude the use of Commission documents that have been adopted at a later stage than the legislation itself, but that usually they are not given that much weight.

It is thus observed that the court will make use of such documents if it has knowledge of them, but that one cannot speak of an established routine in this regard (Germany) and that they are a source of information amongst others but do not in any way bind the national judge (Greece, Luxemburg). The Danish rapporteur observes that it is for the court to decide what weight to attach to such source of interpretation, but that, unlike travaux préparatoires, they are not regarded as an original source of law. The Swedish rapporteur makes a similar observation, stating further that to his knowledge the Supreme Administrative Court has never relied on such documents. In Portugal, courts refuse to have recourse to such Commission documents, considering that if they were to be part of the legislative text there would be no use in issuing them and if they go beyond the legislative text, they are not binding. In Luxemburg, it has occurred that documentation of the Commission concerning its position in an infringement procedure was produced before the Court and that this has been admitted to the file of the case. In the Netherlands, interpretative Commission notices are taken into consideration only when the Commission has discretionary powers, for instance as regards the determination of protected areas on the basis of Directive 92/43/EEC. Annual Commission reports and answers from the Commission to questions of the EP may also contain useful background information. Finnish courts will not systematically search for or study Commission documents, such as notices or guides. However, if the case is important or difficult from the point of view of European law, all available material will be acquired *ex officio* if not produced by the parties. Commission documents can then give factual information useful for 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 the Interpretation Manual of European Union Habitats,[104] so far as the Natura 2000 cases are concerned. According to the Austrian rapporteur such Commission documents can contribute to the conclusion that there is no room for doubt as to how a European law provision has to be

[104] Version EUR 15, of 24 April 1996.

interpreted, referring to a decision of the Administrative Court in which it abstained from referring preliminary questions to the ECJ as several of its assumptions were shared by Commission documents.[105] In Spain, recourse is had in particular to Commission communications, such as those adopted in the area of competition law. The French rapporteur has found just one example of a councillor referring to a Commission report.[106] The national legislature seems to make more use thereof, as parliamentary documents show references to Commission acts and contacts with the Commission in order to clarify notions contained in directives.

II.2.3 The recourse to different language versions

Are different language versions used in interpreting legislation? Are the different language versions regarded as a threat for the correct and uniform interpretation of European law or do they contribute to this? (question 2.1.8 of the questionnaire)

It appears that, as a rule, national courts only use the own language version of European legislation and may have recourse to other language versions only in order to solve serious interpretation problems. Overall, it seems that comparison of language versions serves in particular the elimination of interpretation problems in practice. In Sweden, the different language versions are thus deemed very useful for determining the proper interpretation of a certain concept and for establishing whether the expression used in the national language version is the correct one. Yet, some rapporteurs deem themselves not in a position to indicate whether different language versions are a threat to the correct interpretation of European law or not (Denmark) or have no knowledge of an evaluation of the possible benefits and disadvantages thereof (Portugal). The Finnish rapporteur observes that given the limited number of situations in which the interpretation difficulty is mainly to be attributed to differences in language versions, it is difficult to estimate the global impact of these differences.

The foregoing is not to say that the national courts have a common approach to recourse to other language versions. In some states the use or comparison of

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[105] Decision of 20 March 2003, 2000/17/0084.

[106] Conclusions on CE 8/3 SSR, 5 June 2002, *Société Havas interactive*, no. 232392.

language versions other than the national ones seems thus more or less excluded (Luxemburg) or such use is unknown (Portugal). Spanish courts only look at other language versions when one of the parties draws the attention to differences between them or when the court itself observes a 'strange' element.

In a larger number of Member States, recourse to other language versions appears rather usual. In Germany, recourse may thus be had to other language versions already at the transposition level, in the case that the final legislative text does not correspond to the results of previous negotiations in the working languages. At the judicial level, this use is limited because of the limited knowledge of judges of other languages. Yet, there are some examples of such comparison.[107] The Greek Council of State has often recourse to the French, English, German and Italian language versions, which are seen as an element that contributes to solving interpretation problems. The Austrian Administrative Court as well, frequently uses the French and English versions with a view to confirming one or the other possible interpretation of a term or clause[108] and hence the existence of different language versions is not seen as a threat to the uniform interpretation and application of European law. In Finland, the comparison is normally limited to the three biggest EU languages and Danish, Swedish and Finnish. Often the comparison helps to clarify an ambiguous provision. If the text in one language is clear, the other languages are not necessarily studied, but if this is done, the clear provision in one language version may actually become obscure. In the Netherlands, the English, French and German language versions may be compared to the Dutch one. In some cases, this has elucidated the meaning of a particular provision, for instance whether the provision 'met name' ('particularly') in Article 5(d) of Directive 79/409/EEC was meant as limitation or not. In isolated cases, however, comparison may reinforce existing questions, occurring for instance in respect of Directive 89/552/EEC concerning the term 'televisie-omroep' ('television broadcasting'). In other cases, comparison may

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[107] Case [...] decided by the FAC, regarding the interpretation of Decision 1/80 adopted by the Association Council created by the EEC-Turkey Association Agreement, involving comparison of the German, French and English versions.

[108] E.g. decisions of 23 October 2000, 2000/17/0058, of 17 December 2002, 2002/17/0047, of 21 December 2001, 99/19/0185, and of 4 September 2003, 2003/17/0094.

not provide a solution.[109]

II.2.4 The recourse to consistent interpretation and reliance on direct effect

(Question 2.1.2 of the questionnaire)

Virtually all national reports point to consistent interpretation as being the - very important - tool for the national court to solve interpretation problems, even though the national court may not always state this explicitly. Reliance on direct effect (and the issue of primacy of European law as such) appears to play a less prominent role in this regard (Finland, Greece, the Netherlands). The Luxemburg rapporteur observes that national courts take the primacy of European law as the point of departure and that, if need be, they will logically try to interpret national law in conformity with it.

The same goes for Denmark, where this approach fits in with the general principle according to which Danish legislation giving rise to doubts of interpretation, must be interpreted in a manner which is best suited to bring it into harmony with Denmark´s international obligations.[110] Similarly, in Finland, with some rare exceptions, questions related to the relationship between European law and national law are solved through consistent interpretation. Only in two cases concerning indirect taxation, the Supreme Administrative Court has clearly given precedence to European law instead of conflicting national law. The preparedness to rely on consistent interpretation can partly be explained by the fact that since the Constitution does not give a special hierarchical status to international agreements, the Finnish courts are used to interpret national legislation in conformity with Finland's international obligations, which has in fact become established legal practice in the national courts. So, in case of a conflict between an international

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[109] Cf. Case C-72/95 *Kraaijeveld* [1996] I-5403, in which the meaning of 'canalization and flood-relief works' was at issue, contained in Directive 85/337/EEC.

[110] This is illustrated by a case concerning repacking of parallel imported pharmaceutical products, in which the Supreme Court interpreted section 6, para. 2, of the Danish trademark law in accordance with Article 7 of the First Council Directive 89/104/EEC on the approximation of the laws of the Member States relating to trade marks. U 2003, p. 1826.

norm and a national norm, the international one shall not have primacy as a matter of principle.

The Spanish rapporteur underlines that the national judicial and administrative organs have no difficulties in assuming the primacy and direct effect of secondary European law and that the Supreme Court has held that national implementing legislation has to be interpreted in conformity with the terms of the underlying directive.[111] Consistent interpretation also occurs in respect of national laws adopted anterior to a European directive.[112] Furthermore, third pillar framework decisions have been used to interpret the Penal Code, not only before the deadline for transposition had expired[113] but also even when only proposed.[114]

In Germany, European legislation is said to enjoy primacy of application, not legally but in practice. When a national provision is not in accordance with a European provision, the court will try to find an interpretation to the national norm that conforms to the European one. Yet, he raises also more fundamentally the issue of the limits to this obligation, by pointing at the fact that the Federal Administrative Court has put aside the hypothesis that consequences have to be attached to directives before the deadline for implementation has passed, even if it is clear that the legislature will not be transposing the directive in time and that the directive will then be capable of having direct effect.[115] The rapporteur is aware of other views in legal doctrine, according to which an interpretation in conformity with the directive imposes itself already before the deadline has passed. Yet, in the aforementioned Court judgment, a limit has been found to lie in the principle of legal certainty. The obligation has to be fulfilled only at the moment the deadline passes and the Member State may profit from this until the last moment. Until then, its room of manoeuvre is not yet definitively limited. In this regard, the situation is deemed similar to that of modification of national law independently from a European law obligation, which will only obtain the status of law as from its moment of entry into

[111] Judgment of 16 October 1995. E.g. in its ruling of 21 May 2003 it interpreted the national Law 19/1996 in the light of Directive 84/253.

[112] Cf. the judgment of the Supreme Court of 12 December 2002, concerning Directive 98/59.

[113] Cf. the judgment of the Supreme Court of 8 July 2002, concerning the Framework Decision on the fight against fraude.

[114] Cf. the judgment of the Supreme Court of 26 February 2002.

[115] BverwG 4 NB21.92 - NVwZ 1992, 1093, order of 5 June 1992.

force. It is also pointed to the fact that consistent interpretation may not lead to a contra-legem interpretation of the national law. These limits do not impose themselves in the case that a European law provision has direct effect, in which case the internal rules cannot oppose themselves to this. Consistent interpretation is considered the only way of 'harmonising' the European law and the national law in the case that direct effect is lacking and it can lead to favourable but also unfavourable outcomes for the interested party.

Although the Austrian Administrative Court has frequently recourse to the method of consistent interpretation,[116] it is also pointed to the problems that persist in its relation to the doctrine of direct effect; among other things, can the result of consistent interpretation really be that in fact the effect of direct application is achieved? Furthermore, the Administrative Court has also held that consistent interpretation cannot lead to going beyond the meaning of the wording of the national law.[117]

In France, consistent interpretation is accepted as regards national transposition legislation and also in respect of national laws that touch upon matters covered by European rules.[118]

As regards Portugal, see Section II.2.2.

II.2.5 The use and aims of the preliminary reference procedure

To what extent do not so much legal but policy considerations - such as delay, wishes of the parties etc. - affect the use of the preliminary procedure? Is the aim of the preliminary reference procedure considered to be foremost the protection of the general interest of the uniform application of European law or that of the individual interest of legal protection? (questions 2.2.1-2.2.2 of the questionnaire)

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[116] E.g. decision 99/10/0159 of 27 June 2002, concerning Directive 92/43/EEC and decision 98/10/0250 of 22 March 1999 concerning the Austrian Law on Foodstuffs. Cf. the decision of 20 November 2002, 2001/17/0180 for an example of direct application of European law.

[117] Decision 95/10/0108 of 23 October 1995.

[118] E.g. CE 20 October 2000, *Cambon*, no. 204129, p. 454; CE 8/3 SSR, 5 June 2002, *Société Havas interactive*, no. 232392; CE 6/4 SSR, 8 December 2000, *Commune de Breil-sur-Roya*, no. 204756, p. 582 and CE 6/4 SSR, 30 July 2003, *Association 'avenir de la langue française'*, no. 245076.

II.2.5.1 Use

Not only legal considerations - based on the terms of Article 234 EC and the CILFIT-criteria – determine the decision to refer preliminary questions to the ECJ, but also a number of policy considerations may play a role in this respect. Yet, the relevance thereof appears to differ from one Member State to another. Some states (such as Italy, Portugal, Greece and Austria) seem to apply the legal criteria imposed by Article 234 EC and the CILFIT case law more strictly than others, who do take policy considerations (more) into account as well. These concern inter alia the delay of the proceedings (e.g. Spain, Denmark, Finland), the consequences of a judgment in intra-EU-relations (the Netherlands, France), the fact that a similar question has been put forward by a judge from another Member State or that there are similar cases pending at the same time (Finland), the relevance of the answer to a question for other cases; if the interest is high and the case suitable, questions will be posed more readily (the Netherlands). If it is expected that certain questions will arise in many cases, posing preliminary questions will be postponed until the picture of the (scope of the) problem is clear to a certain extent (the Netherlands). The Italian Supreme Court will deem a preliminary reference necessary in the case that the interpretation of a European law provision given by a lower judge differs from that which the higher courts intend to follow.

As regards the issue of delay of proceedings, the Danish rapporteur considers that the opinion of the parties and the urgency of the matter will be of importance. Thus, in a criminal case on violation of national provisions of indirect taxation, the Supreme Court did not refer the case in order to avoid prolongation of proceedings, despite the fact that the case involved questions regarding Article 95 EC requiring a preliminary ruling. Instead the defendant was acquitted.[119] The German rapporteur deems that it is not excluded that delay of proceedings may affect the decision to refer, but this is not considered to be of significant influence since the number of preliminary references actually gives proof of the contrary. According to the Swedish rapporteur, the time involved for a preliminary ruling is a serious problem and it can be argued that the national court ruling based on it, comes too late to be in conformity with Article 6 of the European Convention of Human Rights. For a court whose main task is to give rulings which have effect of precedent, it is however

[119] U 1994, p. 86.

sometimes inevitable, that the interest of a correct ruling has priority over the interest of a rapid handling of the case. The parties are heard both on the question whether a preliminary ruling should be requested and on how the question should be formulated. Their opinions are considered but not given decisive importance. The Finnish Supreme Administrative Court also deems that the wishes of the parties or the fact that many similar cases are pending may have some influence on the decision to refer, but the Court also actively takes up *ex officio* European law points. In some matters, the Finnish legislation provides that the case has to be handled urgently and in other situations the legal protection of the individual may also require urgent solution of the case. So far, however, this has not occurred with respect to the use of the preliminary procedure. The problem of the effects that a pending preliminary reference made by another court may have on cases before the Supreme Administrative Court presented itself in connection with the so-called Natura 2000 cases (see on these II.1.4). More than 1200 appeals against the government decision establishing the lists of protected areas were pending before the Supreme Administrative Court, when a British court referred a preliminary question on the interpretation of the Habitat Directive. Relying on the preliminary ruling issued by the ECJ on a similar interpretative question in the context of the Birds Directive, it was deemed possible to make the final decisions without waiting for the judgment of the ECJ.

The Portuguese rapporteur is not aware of any policy considerations that may have induced the use of the preliminary procedure, even though parties may have suggested referring questions with a view to delaying proceedings. It is the judge who decides whether to refer or not and although the Portuguese courts make a modest use of the preliminary procedure, it is deemed sufficient and effective. Similarly, in Luxemburg, parties may suggest to refer or not to refer questions, but it is the court that decides on this. The Greek rapporteur observes also that it has not been able to establish that the preliminary procedure has been used for delaying purposes. Generally speaking, the Council of State conforms to the CILFIT-criteria. However, in some cases the court has been too restrictive in its use of the preliminary procedure, which is illustrated best by a series of cases in which the compatibility of Directive 89/48/EEC concerning the mutual recognition of diplomas

with some provisions of the Constitution was at stake.[120] Notwithstanding the opinion of a number of members of the Council of State that there was no question of acte clair in these cases, the Council decided that it was and that there was no need to refer questions. The same occurred in another series of cases concerning some big public projects and whether a national provision was in conformity with Article 1(5) of Directive 85/337/EEC.

The French Council of State refers preliminary questions only in the case of serious interpretation problems. In the absence of such a problem or when the existing case law of the ECJ permits it to settle the case, it applies the acte clair doctrine. To illustrate, between 1978 and 2001 the Council posed 18 preliminary questions and applied the acte clair doctrine 191 times. Lower administrative courts may ask the Council of State for advice, which may relate to European law. The Council can either give an own answer to the question, or may deem that the question is of a serious difficult nature and should be referred to the ECJ. Sometimes national courts do not consider it necessary to refer a preliminary question, whereas the case makes clear that there is a serious problem of interpretation.[121] Interestingly, the rapporteur also observes that the preliminary procedure may sometimes be used out of a concern that France is the only state to apply a certain legislation, such as in the fiscal area, whereas the solution given by the ECJ is imposed upon all Member States.[122] However, in its decisions the administrative judge always bases itself on the traditional criteria for reference.[123]

II.2.5.2 Aims

The relevance of the question of what is considered to be the (primary) aim of the preliminary procedure – i.e. the general interest of uniform application of European law or the individual interest of legal protection – may not seem to be so straightforward. Yet, the answer to this question may certainly have an impact on what scope there is considered to be for possible future amendments of the

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[120] *[Question: could you please give references of these cases?]*

[121] E.g. Section of 6 January 1997, *Chambre syndicale du transport aérien*, no. 162553, p. 1.

[122] See the conclusions of 14 December 2001 of M. Goulard, commissioner of government, *de Lasteyrie du Saillant*, no. 211341.

preliminary procedure or on the direction these amendments would have to take. That is to say, if the main aim is considered to be ensuring individual legal protection, this might lead to a different evaluation of, for instance, the proposal to introduce a 'filter' mechanism for referring questions to the ECJ, than if the main aim is considered to be ensuring uniform application. (see further on this Section III.4).

A number of rapporteurs observe that the preliminary procedure aims at ensuring both the general interest of uniform interpretation and application of European law as well as the individual interest of legal protection (Denmark, Luxemburg, the Netherlands). The German rapporteur points in particular to the protection of individual interests. In Finland, the national courts' primary task is to give legal protection to the parties, but the preliminary procedure is mainly seen as serving the uniform application of European law. In the last resort, it can also serve the legal protection of the individual. There is considered to be no contradiction between these two objectives.

Italian courts as well as the Portuguese Supreme Administrative Court, the Greek and French Council of State and the Austrian, Spanish and Swedish rapporteurs can be said to perceive the function of the preliminary procedure foremost to be the guarantee of the uniform application of European law. The Spanish rapporteur points in this respect at the structural limits of the Article 234 procedure, inter alia the inevitably limited capacity of the ECJ. The Swedish rapporteur adds to this that the system of preliminary rulings has definitely been established in the abstract interest of a uniform application of European law, since the courts of last instance are obliged to ask, whereas others have the possibility to ask. In that way, incorrect rulings with effect of precedent can be avoided. He considers that the founding fathers of the Treaties cannot have been so naïve, as to believe it possible to avoid any wrongful decision or ruling by national courts. The French rapporteur points to a case in which the validity of Directive 2002/2/EC was questioned and asked for the reference of preliminary questions on this.[124] With a view to preventing damage to French companies, the Council of State decided to suspend application of the decree that had been adopted for implementing this

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[123] In the case in the aforementioned footnote, the Council of State thus simply referred to 'serious difficulty'.

[124] Council of State, 29 October 2003, *Société Techna S.A. et autres*, no. 260768.

directive and to await the outcome of preliminary questions the British High Court of Justice had already posed on this subject matter.

II.2.6 What - informal or institutionalised - cooperation and consultation?

To what extent does the national court informally consult other persons or organs, both at the national and the European level? To what extent can one speak of an - informal or institutionalised - network of contacts between the (highest) national courts and the ECJ? (questions 2.2.3 and 2.2.4 of the questionnaire)

Practices vary slightly from one Member State to another, regarding the question whether and what forms of - informal or institutionalised – cooperation or consultation occur between courts on interpretation issues relating to European legislation, before posing preliminary questions. Overall, however, it seems that this kind of cooperation is not very developed as yet. The national reports show that there is a sufficient basis of support for intensifying this cooperation, even though the form in which this cooperation would have to get shape is still a matter for debate (therefore to be further discussed under Section III.4).

In some Member States, informal consultation or networks, both at national and European level, are (virtually) non-existent (Denmark, Italy, Germany, France). The Finnish Supreme Administrative Court may contact other national courts in order to know whether they have similar cases pending, but there is not an established system of exchange of information on European law matters. The ECJ has also been consulted with a view to obtaining information on the cases pending before it. In Portugal, exchange of views takes place with university professors or colleagues having previous experience with a certain matter. It is also observed that the direct contact between national jurisdictions and the ECJ is now more intense than before, in particular as a result of electronic means which allow national judges not only to follow final ECJ judgments but also, step by step almost, the development of interesting pending cases. In Spain as well, informal consultation of other judges occurs and sometimes the Commission is contacted in the framework of state aid or competition law cases. A network of contacts is certainly considered beneficial, but cannot replace the Article 234 procedure. In Austria, informal contacts are said to occur now and then. In Sweden, no formal consultation of other instances outside

the court takes place before posing questions. In the Netherlands, judges from different courts come together to discuss cases afterwards (kind of peer pressure). The Greek rapporteur observes also that there are no formal ways of consulting the ECJ, but that in some rare instances members of the Council of State contact persons in the Court with a view to obtaining information which is not available on the Internet.

II.3 Attaching Consequences to Interpretation Errors

II.3.1 Ex post examination of legislation

How to ensure correction of shortcomings in transposition legislation which the Council of State or other national courts may have noted? Is this picked up by the national legislature and are consequences attached? (question 3.1.1 questionnaire).

It appears that in some Member States more than in others, the national legislature is inclined to attach consequences to national court findings of shortcomings in implementation. The Finnish rapporteur thus observes that correction of shortcomings in transposition legislation is partly a question of information, partly a question of political will. The Finnish political system is relatively well informed and aware of such shortcomings, as there is a special co-ordination system uniting all ministries for the preparation of Finland's positions in infringement proceedings and ECJ cases. The Ministry for Foreign Affairs also biannually prepares a report concerning all ECJ cases and Commission proceedings involving Finland, which are sent to Parliament. Naturally, if the supreme courts find that a certain European act has not been transposed or has not been transposed correctly, the relevant ministry takes note of the decision and this may lead then to a legislative reaction. After either of the national supreme courts or the ECJ has established the shortcoming, the government is obliged to take the necessary legislative measures. An example of this provides the reform of the car tax regime after the Supreme Administrative Court found the regime to be incompatible with the EC Treaty,[125] following the

[125] KHO 2002:85.

preliminary ruling of the ECJ in the Case *Tulliasiamies and Antti Siilin*.[126] Likewise, the German federal government takes note of the judgments of the Federal Administrative Court and in the case this Court has noted certain shortcomings in the transposition of European law, the federal government will take the appropriate action which may include legislative proposals. This is facilitated by the appointment of a representative of the federal interest at the Federal Administrative Court. In the Netherlands also, judgments of national courts on the unlawfulness of national legislation often lead to a reaction of the legislature. Yet, since discussions on incomplete or incorrect transposition of national rules with European rules occur along different tracks - through national court procedures and European infringement procedures -, the court procedure is regularly being caught up with an amendment procedure of the legislation. According to the Austrian rapporteur, it may be assumed that the competent administrative authorities will draw the necessary conclusions from the decisions of the Administrative Court and the shortcomings in implementation, which are indicated therein. Up to now, these shortcomings have not been published in its annual reports. When the French Council of State has noted a shortcoming in transposition, it makes sure that the administrative authorities and the legislature conform to European law. Case law shows numerous examples of this requirement, in particular as regards directives.[127]

The Greek rapporteur observes that there is no mechanism in force, which allows for systematic information of the government on the judgments and advices the Council of State issues and which signal a defect in respect of European law. The annual report on the Council's of State activities could fill this gap. Only in cases in which the government (a ministry) is directly involved - in legal proceedings or because a regulatory decree has been submitted for advice - the judgment or advice of the Council of State will be notified to it. Yet, a commission of legal experts, attached to the Secretariat-General of the government, and the scientific service of the *Chambre des Députés* examine proposals for legislation and also their compatibility with European law. Furthermore, by Law 3133/2003 a central Commission for codification has been established, which has to review the existing,

[126] O.c. note 55.

[127] See for instance the judgment of 29 June 2001, *Vassilikiotis*, no. 213229, p. 303 and CE 6/4 SSR, 27 July 2001, *Titran*, no. 222509.

expanded body of legislation. Within this framework, national rules that are not compatible with European law can be drawn to the attention of the government as well. Nonetheless, the rapporteur deems that the creation of a central organ, charged with the coordination and control of the transposition and application of European legislation, would facilitate and accelerate the harmonisation efforts. Since the Portuguese Supreme Administrative Court does not have a legislation advisory function, it can only in a concrete case state that the transposition legislation falls short of the European law requirements and attach consequences to this.[128] Such court decisions are considered to have no effect whatsoever on the national legislature, which may even persist in not remedying the established shortcomings in the transposition process without this leading to any consequences. In Spain, the legislature will remedy shortcomings in national transposition legislation only after an infringement procedure or a preliminary ruling has brought these to light. Yet, in the area of penal law, Article 4 of the Penal Code enables the judge to communicate to the government alleged omissions in the law, possibly in the light of European law.

What note is taken in the administration of justice of shortcomings in national transposition legislation, which have been established by the European Commission or otherwise? Can an authority or agency be designated which periodically reports on this, so that shortcomings can be remedied?(question 3.1.2 questionnaire)

In addition to what was observed above as regards Finland, it can be noted that the Finnish Supreme Administrative Court studies the correctness of national implementation *ex officio*, when it applies the relevant national implementation legislation for the first time. If it is satisfied with this implementation, the issue is not raised in later cases, unless the parties challenge the implementation or the Court has become aware of possible shortcomings. The rapporteur finds it excluded that the Supreme Administrative Court would be unaware of claims concerning possible shortcomings in national implementation legislation. The situation of lower administrative courts is probably worse in this respect. In the aforementioned car tax case, the Supreme Administrative Court declared the national legislation inapplicable in so far as it was incompatible with the EC Treaty. Yet, there may also

[128] See for instance the judgment of the Supreme Administrative Court of 7 January 2003, no. 34368.

be cases in which the Court takes note of incomplete or incorrect implementation, but where this does not influence the outcome of the case.[129] The Dutch rapporteur deems that although a certain pattern may arise over a number of procedures, the judge is not in a position to report on that in a general way to the legislature. There is no institutionalised framework for ex post evaluation of legislation. The ministries and legal writing fulfil this function. The Swedish rapporteur has made a similar observation, stating that it could not be the task of national courts to adjust or complete faulty implementation of European law, in any other way than to ensure that individuals are able to enjoy the rights they have on the basis of European law. The rapidity with which the legislature reacts to such cases differs, although normally the fault will be corrected. He further deems that the fact that the Commission criticises national implementation does not mean that the implementation is wrongful and should not as such influence the national courts.

The Portuguese rapporteur observes that in the case the Commission has started infringement procedures for shortcomings in implementation, the national court will analyse the question and where necessary draw the required consequences. It is also pleaded for better information on the stage in which infringement procedures are, because national courts often lack this information.[130] The Greek Council of State may inquire about this at the special legal service of the Ministry for Foreign Affairs. In Spain, there is no official channel for communicating information on infringement procedures engaged against the Spanish State. Yet, Article 226 judgments facilitate the work of national courts, as a preliminary reference with a view to finding out whether national legislation is in conformity with European law is then not necessary anymore. The French rapporteur notes that the annual report which is now being drawn up by the EU-affairs delegation of the National Assembly on non-transposition and incomplete transposition of directives,

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[129] Cf. case KHO 2003:38, in which the Supreme Administrative Court established that Art. 12(1)(d) of Directive 92/43/EEC had been 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 and as a result this shortcoming did not have material effects on the decision.

[130] See also the suggestion made in Section III.3.

takes the implementation record drawn up by the Commission as its main basis. It also appears that the threat of the Commission initiating an infringement procedure puts pressure on both the legislature and the courts to act in conformity with EC law. The Austrian rapporteur also observes that it may be a problem as to how the court gets to know the observations of the Commission. If there are such observations, the court can take a decision only in compliance with the CILFIT-criteria. Furthermore, he expresses serious doubts as to whether an institutionalised control or a periodical report on shortcomings in implementation would be possible and functional, pointing in particular to the fact that individual cases often reveal questions of detail[131] which may not result from a general monitoring of shortcomings. It is considered illusory to think that general monitoring will lead to the identification of all possible shortcomings, yet it could be helpful in revealing and avoiding structural shortcomings. A comprehensive survey of individual cases that could allow the determination of certain structural weaknesses could also be a good idea. With a view to this, existing periodical reviews of the decisions of the Administrative Court could be extended, for instance by establishing a kind of agency that analyses the court's decisions. In Italy, the Minister for the coordination of European policies is responsible not only for transmitting the normative EU acts to parliament, but also for verifying the conformity of the internal legal order with European law and for transmitting in due time the outcome of these verifications to parliament, while suggesting or putting forward measures or initiatives to be developed (see also Section II.1.3). As a result, notification by the Council of State or other national courts of particular shortcomings in the implementation or application of a European norm, possibly identified by the Commission or another institution, obliges the Minister to act and engages its political responsibility. As regards Germany, see the observations made already in Section II.2.4.

What contribution can ex post examination of both European and national implementation legislation make to an improved implementation and application of European legislation? Is the present examination that takes place both at European and national level satisfactory? (question 3.1.3 questionnaire)

[131] Illustrations of this are the decisions of 20 February 2003, 2001/07/0171 concerning environmental impact assessment and of 20 November 2002, 2001/17/0180 concerning credit institutions.

It follows from a number of national reports that the control performed by judges, both at national and European level, is considered quite satisfactory. More in general, the Finnish rapporteur deems that ex post examination improves the legislative standards applied in implementation and provides useful information for courts and others having to apply European law. He expresses the fear that on the European level, the examination is too much focused on the legislative failures of the Member States and not enough on the reasons of these shortcomings and whether they could be reduced by raising the quality of European legislation and the decision-making procedures leading to its adoption. The Swedish rapporteur observes that we all, including the legislature, learn by our mistakes and that therefore the ex post examination of implementation measures is of value for the future, both at the national and the European level. The German rapporteur considers that ex post control is an effective instrument for improvement. The control judges perform both at the national and European level, is in fact a control which occurs by hazard, but which is perfectly capable of drawing the attention of the legislature to the truly important issues. The Luxemburg rapporteur deems also that the present system of judicial and administrative control is satisfactory, as it allows among other things for checking the conformity of national transposition legislation with European law, possibly after having referred preliminary questions. Likewise, the Italian rapporteur is of the opinion that the ECJ has actually created a fantastic system of ex post control of the transposition and application of European law, by establishing the possibility of state liability in the case of legislative, executive or judicial failure in respect of European law obligations. Ex post control can thus be exercised by those immediately concerned by the application of European law.

The Dutch rapporteur deems that the structuring and organisation of the input of national courts, resulting from their experience with the application of European and national legislation, could have an added value. The Austrian rapporteur deems that the examination by courts takes place at a moment when specific problems in individual cases have already arisen. An intensified ex-post examination could contribute to preventing these problems in the first place. The Portuguese rapporteur deems that the Commission already conducts a certain ex post examination of European legislation and national implementation legislation. Yet, national courts'

findings that transposition legislation has shortcomings should also be communicated to the Commission and to the ECJ and an accelerated injunction mechanism should be put into place with a view to making Member States adapt the national legislation, if the finding of the national court has been considered well-founded. The Greek rapporteur deems that there should be qualified organs for examining in a systematic way the problems that arise in respect of the application of European law and between European law and national law, and which are able to take both the European and national perspective. More reflection should take place on how the control on the application of European law can be generalised. The French rapporteur deems that a closer scrutiny of Community legislation could be compatible with the principle of subsidiarity. Yet as regards national transposition legislation, he suggests that a true policy of evaluating the quality of transposition be developed, uniting the Community institutions, governments and parliaments. The delegation of the National Assembly dealing with EU-affairs has asked, without success, for putting this question on the agenda of the Conference of organs dealing with European affairs, held in Rome on October 2003.

II.3.2 National repair mechanism: the liability of national legislatures and courts

What are the possibilities of obtaining compensation in the case of an erroneous interpretation of European law, both by the court and the legislature? (question 3.2.2 of the questionnaire)

One can conclude from the national reports that, overall, the possibility of obtaining compensation for erroneous interpretation of European law by national courts and the legislature, is provided for by national law or recognised on the basis of the Francovich and Köbler case law of the ECJ, which is not to say that concrete cases have occurred. Furthermore, the conditions under which this compensation can be claimed may differ.

In Portugal, individuals can claim damages from the government if they have become the victim of a lack of transposition, incorrect transposition or erroneous interpretation by the national court, by starting a procedure for wrongful act under the usual conditions.

Article 121 of the Spanish Constitution explicitly confirms the possibility of compensation in the case of a judicial error, which may be claimed whenever the judicial error has not been repaired upon appeal and has caused effective damages that can be quantified and individualised. The claim for compensation must be preceded by a decision of the Supreme Court, recognising the existence of an error.[132]

The Danish Supreme Court is not aware of any such case having occurred as yet, but if it does, it would have to be judged on the basis of the normal conditions for obtaining compensation in case of faults made by a public authority. The basic condition is that it has acted negligently, so an erroneous interpretation will not in itself be sufficient. Liability in case of erroneous interpretation of European law by parliament is not considered thinkable.

In Greece, a claimant can avail itself of the ordinary - appeal or cassation - procedures, if it is an administrative court that has given a wrong interpretation of European law. If it is the Council of State, the Court of Auditors or the administrative court ruling in last instance that has done so, then a special procedure is provided before a court which consists of the President of the Council of State, a Councillor of State, a judge of the Court of Cassation, a Councillor of the Court of Auditors, two university professors and two lawyers. Yet, it is very difficult to obtain compensation, since an intentional fault on the part of the judge has to be proven, a condition that is rarely fulfilled in practice. In view of this, the rapporteur deems it necessary to provide for an extraordinary procedure, in order to enable claimants to obtain compensation in the case of irrevocable judgments, which are based on an erroneous interpretation of European law.

In Luxemburg, state liability and the right to compensation for wrongful application of a legal rule can be based on the Law on civil liability of public authorities. Yet, the Law on civil liability of the state contains a reservation as regards the authority of judgments.

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[132] In two cases state liability for infringement of European law was established, yet not attributable to the judiciary: judgment of the '*Audience Nationale*' of 7 May 2002 (non-transposition of Directive 94/47) and judgment of the Supreme Court of 12 June 2003 (national laws contrary to Articles 28 and 49 EC and Directive 83/189/EEC). In both cases, the courts apparently deemed the one year delay for starting the liability procedure to be in accordance with the European principle of effectiveness.

In France, liability of national courts can be established on the basis of Article 11 of the Law of 5 July 1972, which requires the establishment of a serious fault. In fact, the refusal to put final judgments to the test again and the requirement of serious fault make that up to now, it has never been able to conclude to the liability of the state for a bad interpretation of – national or European – law.[133]

Dutch liability law is stricter than the Francovich case law; when the national court annuls an administrative decision, its unlawfulness and ensuing liability are a fact for the civil court. The same goes for Dutch legislation that is held to be unlawful. More strict conditions apply, however, for liability because of unlawful case law. This possibility is actually limited to situations in which the national court infringes fundamental rights when dealing with a case, in particular Articles 5 and 6 ECHR. As such, this concerns the way of acting of the court, and not the contents of the judgment. So, the Köbler case law may have more far-reaching consequences for Dutch legal practice.

In Finland, liability of the legislature for erroneous interpretation of European law is covered by the Francovich case law, but so far there have not been any concrete cases tried. Actions raised against the State on this ground in the late 1990's were all dropped even before the court of first instance gave its ruling. Erroneous interpretation of European law by national courts is covered by Chapter 3 of the Torts Act, which contains the obligation to pay damages because of erroneous exercise of public authority. This Chapter excludes compensation if the person concerned has not appealed against the judicial decision and the decision has not been amended or repealed because of the appeal. Furthermore, if a person has appealed against an administrative decision because of erroneous interpretation of European law and lost its case, but the interpretation of European law of the administrative courts turns out to be erroneous (e.g. because of a new ruling of the ECJ), then their judgments can be reversed. In most cases the economic damage is already corrected when the erroneous administrative or fiscal decision is corrected.

Some national reports raise the impression that the entitlement to compensation for wrongful implementation and interpretation of European law in their Member State relies foremost on the ECJ's case law on state liability (Sweden, Austria,

[133] See the French report for a more detailed discussion of this and also of possible liability of the administration and the legislature.

Germany, Italy). The Austrian rapporteur thus notes that the discussion on liability for damages has become more intense after the Köbler judgment and the later decisions of the Constitutional Court, in which it held that in the case of a European law failure of the legislature the Constitutional Court is competent to decide on state liability[134] and that this competence also applies in cases where the claim is based on a decision of the Supreme Court, the Administrative Court or the Constitutional Court.[135] Under German law, damages can only be obtained in the case of unlawful infringement of the law, which can not be concluded upon in the case it is a national court that has committed an interpretation error. Yet, the German rapporteur deems the strict conditions under which the ECJ has created this possibility in the Köbler Case acceptable. The Italian rapporteur is of the same opinion, considering that, on the one hand, the Court has confirmed the responsibility of the state for acts of the legislature and the decisions of the highest national jurisdictions, while on the other, leaving the establishment of the existence of a 'manifest violation' of European law to the judgment of the national court. In doing so, the ECJ has remained respectful of the national legal orders, demonstrating that the aim of its case law is not to sanction or to repair, but only to establish an instrument that usefully contributes to the uniform application of European law.

II.3.3 Revision possibility in the case of liability of national courts

Ought there to be a possibility, apart from the existing applicability of Article 234 EC, of a specific revision possibility or higher provision with the ECJ to adjudicate on such issues? (question 3.2.3 of the questionnaire)

There appears to be no basis of support for the introduction of a revision possibility on the level of the ECJ in the case of liability of a national court for erroneous interpretation of European law, albeit different arguments for the rejection of this idea are put forward. The German, Danish, Dutch, Austrian and Swedish rapporteurs deem it not necessary to introduce a specific or higher provision with the Court of Justice to adjudicate on such cases; national courts are capable of handling

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[134] Decision of 7 October 2003, A 11/01.

[135] Decision of 10 October 2003, A 36/00.

these or at least the required revision possibilities should be created pursuant to the Köbler judgment. The Italian rapporteur deems it unnecessary not only because it would prejudice the authority of national courts, but also because of introducing an additional and inappropriate remedy at the European level in the framework of a national procedure. The Dutch rapporteur adds to this that it would also undermine the preliminary procedure. In the opinion of the Finnish rapporteur, every legal system has to cope with the fact that the courts may issue erroneous judgments and that some of them may remain final. Every reform that would increase the workload of the ECJ should be opposed. The Greek rapporteur also points to the latter risk. It is deemed preferable to adopt a directive that obliges the Member States to adopt the necessary rules with a view to the matter at issue, while respecting their procedural autonomy. The Portuguese rapporteur deems it preferable to reinforce the mechanism of the infringement procedure with a view to this and to promote the use of liability actions. Only the Luxemburg rapporteur sees advantages, from the viewpoint of uniform application of criteria and solutions.

II.3.4 Possible European repair mechanism(s)

Ought the European Commission in the case of errors of interpretation by the national courts, to make use of the possibility of launching an Article 226 EC infringement procedure against a Member State for infringement of European law? (question 3.2.1 of the questionnaire)

The general impression is, that it is not considered excluded that the Commission starts an Article 226 EC procedure in such an instance, but that it should do so only in very serious cases and that anyway it will be of limited, even symbolic importance only. Some rapporteurs also advice against this use. Furthermore, it is pointed to the risk of damaging the cooperation relationship between the national courts and the ECJ, which is the real corner-stone of the efficacy of European law, and of possibly causing constitutional crisis in the Union (Finland, France). Yet, it must be noted that, meanwhile, the ECJ has rendered judgment in the Case *Commission v. Italy*,[136]

[136] Case C-129/00 *Commission v. Italy,* judgment of 9 December 2003. See also the Spanish report on this case.

which the Commission initiated inter alia because of the way in which certain Italian courts applied and interpreted Law 428/1990. The Court held that this Law is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer. Consequently, Italy has failed to fulfil its obligations under the EC Treaty. More recently, the Commission has also started an infringement procedure against the Netherlands for wrongful interpretation of Regulation 1408/71 by the Dutch Hoge Raad.[137]

The Swedish rapporteur observes that there is nothing that formally prevents the Commission from starting an infringement procedure. Whether that should be done, must depend on the gravity of the infringement and it must be up to the Commission to decide if and how it should be done. It is also spoken in this regard of a structural or very fundamental infringement of European law (the Netherlands) and of manifest interpretation errors (Greece). The Austrian rapporteur does not deem it appropriate for the Association to give any recommendation on this issue, as the decision whether or not to start such proceedings is always up to the Commission. The Finnish rapporteur strongly advises against this use, considering that given the number of cases in which European law is applied in the Member States, there are probably hundreds or thousands of interpretation errors yearly. So, Commission reaction would be realistic only in cases in which one can speak of a very erroneous interpretation made by a *mala fides* supreme jurisdiction. The Italian rapporteur considers that it concerns an instrument of foremost emblematic value, a too frequent use of which would reduce its scope. The Portuguese rapporteur also deems it a remedy in last resort, after having first tried to solve the issue of erroneous interpretation by the national court through the use of internal procedures and to use it only when national courts persist in a wrongful interpretation. The German rapporteur states that the possibility of having a wrong judgment, originating in an interpretation error, cannot be avoided in any legal system. When all appeal possibilities have been used, the *Rechtsstaat* demands that the case be ended. Initiating an infringement procedure at that point is considered to go against the principle of respecting the authority of the final judgment (in a similar sense France).

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[137] See IP/04/178, 9 February 2004.

Furthermore, the German State would be in a difficult position in executing such an infringement judgment, as it would oppose it to the national jurisdiction. It is also considered difficult to understand why a claimant which has suffered a violation of its European law rights, would necessitate a higher level of legal protection than a claimant that has suffered the violation of a right protected by national law.

III. Conclusions, Solutions and Subjects for Debate

III.1 The Main Conclusions

In this final Part, the lines of the preceding Sections will first be drawn together, presenting the main conclusions regarding the various quality casu quo interpretation issues that European legislation poses for national courts and legislatures, which were briefly identified in Section I.1.2.

It has appeared in particular that the problems that arise in the national context as regards the implementation and application of European legislation originate both in the European and the national legal systems and in the fact that these systems are still not very well geared to one another. So, these problems are attributable to poor quality of European legislation only to a limited extent, relating to rather technical aspects such as the definition and use of ambiguous, complex and vague concepts, problems of translation, consistency etc. The Habitat Directive has thus been criticised for its vagueness and complicated system of nominating potential areas for protection.

Other aspects the national rapporteurs have considered problematic at the European level, are the important judge-made nature of European law, the (perceived) lack of balance or inconsistency between the case law and the general nature of the legislation and the lack of travaux préparatoires. Problems of alignment have become very clear for instance in the case of the same terminology being used in European and national legislation, but having a different meaning in the national legislation. The transposition of the Sixth VAT Directive also shows that problems have appeared in particular in those Member States, which have chosen to maintain the system, structure and terminology of the national law on this type of taxation. Rather surprising in view of the recent proposals of the European Convention on reforming and introducing a hierarchy of the European legal instruments, the lack of a(n) (explicit) hierarchy of sources has not been perceived as very problematic and does not appear to have posed any particular problems for national courts and legislatures.

At the national level, state-specific factors which add to the problems of implementing and interpreting European legislation - and can thus not be remedied at the European level -, concern the different levels of internal decision-making in federal systems (such as the Spanish, German, Austrian and Belgium ones) and the accession of Member States at a later stage than European legislation was adopted (Finland). The transposition of the Bird and Habitat Directives provides a clear illustration of this, as in federal systems this was seriously delayed and/or complicated. Furthermore, for a recently acceded state like Finland, it meant that not only had the Finnish legislation to be adapted to the European directives, but the European system had to be adapted to the circumstances of the Finnish nature as well.

On the basis of the national reports, it is difficult to establish a correlation between the chosen method of transposition and the - magnitude and nature of the - interpretation/application problems the national courts are later confronted with. More generally, it appears that national practices may vary quite a bit as to the choice of transposition method. This choice depends on factors such as the area at issue, the extent of the required reform, available time etc. Furthermore, it is clear that the accelerated transposition method of referral is not in all Member States considered an appropriate method, whereas transposition by delegation is more generally accepted.

Examining next the ways in which the Member States try to deal with and overcome the implementation and interpretation problems they are thus faced with, it has been looked at the existing possibilities for ex ante examination of European legislation, the use of interpretation aids, the recourse to different language versions, reliance on consistent interpretation and direct effect, the use of the preliminary procedure and existing cooperation between courts or consultation taking place otherwise. As regards ex ante examination of European legislation, the national reports show in this regard that in some states there are very developed structures for doing so, whereas in others these are far more restricted or at least less used. Travaux préparatoires are in most Member States considered useful tools to solve serious interpretation problems. Generally speaking, the preamble plays the most important role in this regard, but Commission documents may sometimes also be used for interpretation purposes. Statements in the Council minutes play a rather

negligible role. Other language versions are also used with a view to solving serious interpretation problems, but not otherwise.

Consistent interpretation has come to the fore as being the - very important - tool for the national court to solve interpretation problems and reliance on direct effect has appeared less prominent in this regard. As to the use that is made of the preliminary reference procedure to solve interpretation problems, some Member States can be said to cling more to the strict application of the legal criteria imposed by Article 234 EC and the CILFIT judgment, whereas others allow more room for policy considerations in the assessment to refer questions or not, such as delay of proceedings. As a means of solving interpretation problems and of avoiding the referral of preliminary questions, - formal or informal - cooperation between courts or consultation of courts or other persons or bodies seems not very developed as yet in the Member States.

No matter how many and how sophisticated tools there are or would be in a legal system to prevent or solve interpretation problems, erroneous implementation and interpretation of the law can never be totally excluded. The logical question that then arises, is what consequences should be attached to interpretation errors and what repair mechanisms or remedies should be provided for. Ex post evaluation of legislation may be one way to trace and repair such shortcomings. In this regard, some Member States appear to have more developed structures for gaining information on and giving follow-up to national judgments identifying certain shortcomings in the transposition legislation. Furthermore, some national legislatures may be more inclined than others to attach consequences to national court findings of shortcomings in implementation.

The possibility to obtain compensation for erroneous interpretation of European law by national courts and legislatures is either provided for by national law and/or recognised on the basis of the Francovich and Köbler case law of the ECJ. Yet, concrete cases are still quite rare. Furthermore, the national conditions under which this compensation can be claimed may differ. At the European level, the possibility for the Commission to start an infringement procedure for erroneous interpretation of European law by national courts has been considered as well. This issue seemed still fairly hypothetical at the moment the questionnaire was drawn up, yet current

events now demonstrate its reality.[138] The national rapporteurs have more or less agreed on the fact that the Commission may start an Article 226 procedure in such a case, but they are also of the opinion that it should do so only in very serious cases and that anyway it will be of limited, even symbolic importance only. Some rapporteurs also advice against this use.

Having thus mapped out the most important interpretation problems occurring in the Member States and their causes, the ways in which national authorities deal with these and the consequences that may be attached to erroneous implementation and interpretation of European law by national authorities, it will now be turned to the solutions and suggestions the national rapporteurs have proposed to improve matters and to achieve a better articulation and tie-up of the European and national legal systems. These can be brought under three different headings.

To begin with, how can the transparency of the European legal process and the quality of European legislation itself be improved; what are the possibilities for advising on European legislation with a view to achieving this (Section III.2). Next, when it comes to implementing this legislation, what can be done to reduce the implementation and interpretation problems of European legislation to a minimum; can we develop a system of exchanging best practices between the Member States or formulate starting points for the implementation of European legislation (Section III.3). Finally, what changes and improvements can be realised as regards the interpretation and application of European legislation by the national courts, in particular as regards the use of the Article 234 procedure? Different proposals with a view to this were contained already in the questionnaire and the reactions to these will be considered, as well as other suggestions that have been made in this regard (Section III.4).

III.2 Improving Transparency of and Advice on European Legislation

What ex ante examination of European legislation could be useful or desirable, what formal or informal advisory procedure could be useful and at what phase of the

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[138] See Section II.3.4 and the action the Commission has taken in respect of the interpretation of the Dutch Hoge Raad of Regulation 1408/71.

European legislative process would advice be most appropriate? What role for the Association in this regard? (questions 1.3.1-1.3.4 of the questionnaire)[139]

Different views have been expressed and suggestions made as regards the way in which ex ante examination of European legislation could be improved and on how structures for giving advice on European legislation could be developed. Some of these focus on establishing structures at the national level, others more at the European level. Not all rapporteurs see a role for the Association in this regard. More in general, the necessity is underlined of applying very strictly the subsidiarity principle and the fact that national legislative organs share a common interest with the legislative organs of the EU, with a view to maintaining a good balance between national and European legislation (Germany) and to ensuring legislative quality (Finland).

As regards the European level, the Finnish rapporteur further deems that problems should as much as possible be rectified at the source and the emphasis therefore put on raising consciousness about the importance of legislative quality in the Commission and Council secretariat-general and EP services. In the same line of thinking, the French rapporteur is of the opinion that the legal service of the Commission could well fulfil a legislation advisory role, considering also that its advices are quasi binding. The Spanish rapporteur points also to the necessity that the legal services of the European institutions (in particular that of the Commission) apply the rules contained in the Interinstitutional Agreement on the drafting of European legislation, in order to avoid those legislative problems which are not intrinsically linked to the European legal order. Furthermore, national experts whom the Commission consults in the pre-legislative stage should make sure that the terminology in Commission proposals coincides with that of the Member States.

At the national level, the Greek rapporteur proposes the setting up of a central national organ charged with the coordination and control of European legislation, both at the moment of its development and its transposition and application by the national authorities. National and European authorities should consulted this organ, drawing the attention to difficulties regarding compatibility and acceptability of the proposed legislation. The Belgian rapporteur deems that it would be advisable to

[139] On existing ex ante examination, see Section II.2.1.

have a mechanism which allows national consultative organs, comparable to the legislative section of the Belgian Council of State, to obtain information from the European Commission as to how to interpret certain provisions of European law. Such collaboration would also allow for taking account of those language versions which national organs cannot understand. The Dutch rapporteur deems that national courts with a legislation consultative function could have a useful input in the legislative process, through forms of advice to the national government and possibly even directly to the Council of Ministers or the Commission. This could best be developed first at the national level, given that not all Member States have such courts. In their judicial function, courts could collaborate with a view to enabling a joint input in the adoption process of European legislation. Since such advice on draft legislation raises constitutional concerns or at least is not common in certain Member States, it seems advisable to experiment with this on a national scale first as well. Such consultation should at the latest occur in the stage of the decision-making process in which the national governments play a role.

Some rapporteurs deem that the Association should seize possible opportunities to give advice on Commission proposals, but that thought should be given as to how to deal with the work load such an informal advice procedure would bring with it (Austria). According to the Greek rapporteur, such intervention would then have to occur at an advanced stage of the decision-making process. The Portuguese rapporteur considers that facultative consultation on questions that the Council would deem necessary could occur in an informal way and upon request for instance to the Association. The Italian rapporteur deems that the Association could play a role not only at the stage of elaboration of European legislation, as intermediary of the Commission, but also at the transposition stage, with a view to making transposition of European law in the Member States more homogeneous. As was pointed out also by the Commission representative at the meeting of the Association in Trier in March 2003, the Commission could consult the Association in an informal way in particular in controversial cases. Advice of the Association could be given either as the outcome of a meeting or of email contacts between all members of the Association or only a number of them, designated to do so pursuant to a division of competences.

Other rapporteurs have been more hesitant on the Association's role in this regard. The French rapporteur thus deems it difficult to conceive that the Association could play a legislation advisory function, given that a number of its members do not have such a function even in respect of national legislation. The Finnish rapporteur finds it unlikely that any external advisory body could challenge the political imperative to reach decisions and compromises at the crucial stages of the decision-making process (conciliation between the EP and the Council and the final stages preceding common positions and decisions of the Council). The Spanish rapporteur does not deem the creation of a European Council of State viable. Moreover, this would add to the complexity and length of the decision-making process and would arouse suspicion on the part of the Member States and institutions involved in that process. For the same reasons, it is considered difficult to see what role the Association could play in this regard, which does not prevent of course national Councils of State of giving advice on Commission proposals to their own governments. The German rapporteur is of the same opinion, considering that such advice of the Association presupposes understanding in between its members, which in their turn would have to contact their national organisations involved in the decision-making process. The fact that the existing procedures are already too short is deemed to put every initiative of a concerted approach of the members to an end. Furthermore, the Association is not and cannot be an advanced council of the Union.

Yet, both the German and the Austrian rapporteur have put forward the idea of having a group of highly qualified legal specialists or a multi-national body of experts (possibly including judges), which is involved in very demanding legislative projects and which could identify those points of a Commission proposal that are of general interest for most national authorities and courts. They could then try to find a European solution incorporating as much as possible the structural elements that the legal orders of the Member States have in common. Advice on fundamental questions could be given already before the Commission issues a legislative proposal and more detailed advice could be given when the Commission has to present an amended proposal or after its first reading in the EP.

The Portuguese rapporteur is also of the opinion that the quality of European texts could benefit from prior advice of a consultative organ, but the efficacy thereof

is deemed to depend on the creation of this organ in the Treaty and on the determination of the cases in which consultation would be compulsory. Requests for advice should emanate from the Council, on the basis of a proposal in an advanced preparatory stage, close to its final version. Giving advice would be most suitable after studies have been performed and the legislative proposal has been drafted and at the time of negotiating the approval between the different governments. The informal consultation would have to coincide with other time limits, so as not to prolong the decision-making procedure. Furthermore, it is deemed that the articulation of European law could be improved, by studying more the difficulties that will arise in its application in the Member States.

Only the Italian rapporteur goes a step further and expresses to be in favour of setting up a European Council of State, representing all legal traditions of the Member States, functioning independently and having a consultative competence regarding the quality of European legislation. This could be a meeting place for exchanging experiences and also have an added and symbolic value for the European legal order as a whole. This institution would have to maintain a dialogue with the Commission and give its advice at an advanced stage of the legislative process. The Swedish rapporteur points to the fact that the issue of a European Council of State has lately been touched upon by a member of the Supreme Administrative Court.[140] Apart from that, he deems it difficult to see what role the Supreme Administrative Court or the Swedish Law Council could play in the preparation of European legislation.

What suggestions have been made with a view to increasing transparency of European law and the use of travaux préparatoires? (cf. questions 2.1.3-2.1.7 of the questionnaire)

In Section II.2.2 it has become clear that transparency and travaux préparatoires are deemed of great relevance with a view to improving the interpretation and application of European law. The national reports also show broad agreement on the necessity of more transparency of the European decision-making process and of

[140] G. Sandström, *Knocking EU Law into Shape*, CMLRev. 2003, vol. 40, no. 6, pp. 1307-1314.

more availability of and better access to travaux préparatoires. The following concrete suggestions have been made.

The Greek rapporteur deems it useful to have a database, providing electronic access to the following multitude of information:

- the text of the European legislation in force, as well as its history (in case the text has been changed, the text of the old provision(s); if changes are on their way, the proposed new text);
- the preamble (of the legislation in force, the old text and the proposed text);
- available travaux préparatoires (of the legislation in force, the old text and the proposed text);
- opinions of organs such as the Economic and Social Committee and the Committee of the Regions;
- case law of the ECJ/CFI on the legislation at issue;
- preliminary questions or pending cases on the legislation at issue;
- other European texts/legislation adopted on the same legal basis;
- other European texts on the subject-matter at issue;
- in the case of directives, the national transposition legislation;
- case law of national courts/judicial instances on the issue;
- bibliographic references, in particular case notes.

In addition to this, the Austrian rapporteur puts forward the idea of drawing up a guide - possibly by the Association in cooperation with the Commission -, containing information for the courts on how to search for and get access to documents such as those connected to a Commission proposal.

According to the Portuguese rapporteur, transparency of the legislative process can be increased if an explanatory memorandum accompanies all legislative projects, especially when the Council makes amendments. Furthermore, with each project an impact evaluation assessment should go along, providing a synthesis of the outcome of studies and reports which have been drawn up and shedding light on the employed or affected resources and the foreseen results. The uniform application of European law could also be improved by creating a mechanism that allows for early information on the travaux préparatoires of new legislative acts the Commission is proposing to the national governments and parliaments. In the same line of thinking, the Danish rapporteur deems that availability of travaux

préparatoires could prevent problems of interpretation, if they would go beyond a mere presentation of the proposed act and face possible problems arising out of the proposed text. The Belgian rapporteur deems that the adoption of a final explanatory document, expressing and explaining the differences between the text submitted to the Council and the one that is finally adopted, could improve the comprehensibility of the Council deliberations. The French rapporteur suggests that the Commission publish in the Official Journal an overview of the different points of view it has received in respect of a legislative proposal. Apart from that, the Portuguese rapporteur also considers it useful to have a short summary of the - stage of - infringement procedures published monthly, on fixed dates, in the OJ, even if they have not led to an official procedure being started.

III.3 Establishing Best Practices and Cooperation on Implementation

How could cooperation on implementation between the Member States get shape, for instance with a view to establishing best practices and/or developing starting points for the implementation of European legislation? What role for the Association in this regard? What availability of national implementation data of other Member States through CELEX or otherwise should be provided for? (question 1.2.8 of the questionnaire)

The national reports make clear that there are different views on how to deal with the duty to transpose European legislation and with the lack of clarity in that legislation (in particular directives), and that implementation techniques may vary to quite some extent. To some extent this can be explained by the differences between the national legal systems and as a result an adequate synthesis between European rules and already existing national rules may require different solutions in different Member States. Nonetheless, the question arises whether it would be possible to formulate more general starting points or to establish best practices for the transposition of directives, with a view to improving this transposition. Furthermore, a more harmonised approach towards transposition might also be beneficial to a more uniform application of European legislation. The formulation of such starting points could also be useful for the acceding countries and possibly give guidance on how to

prevent certain implementation problems, such as those encountered by Finland in the area of environmental law (see II.1).

These best practices could concern in particular the issue of whether in implementation the system and terminology of the directive should be respected as much as possible, or whether it would be preferable to maintain the national system and terminology of which the transposition legislation will form part. One could also try to identify the do's and don'ts in implementation, for instance regarding the use of accelerated transposition methods such as transposition by referral or try to set the conditions for such use. Apart from that, best practices could possibly be established on how to deal with state-specific factors that may obstruct or complicate proper transposition (such as the existence of a federal structure), on the use(fullness) of travaux préparatoires for transposition and on the exchange of information on transposition.

The latter triggers the question of what exchange of national information could actually be useful. In general, the necessity of having more developed electronic databases and to have (more) access to information on the transposition of European legislation in other Member States is being welcomed. Yet, quite some rapporteurs have put the direct usefulness of this information into perspective, by pointing in particular to the limitation that the Member States are all at around the same time in the process of drawing up transposition legislation. Only when the deadline for transposition approaches, the database will be filled with information, which will for most Member States be too late to seek inspiration and will only benefit those who are in delay (Germany, Sweden, the Netherlands, Spain). The Finnish and Spanish rapporteurs also observe that in practice, the draftsmen responsible for transposition may gain a more direct and prompt access to similar information, through their direct and informal contacts with their homologues in the administration of other Member States.

At the same time, however, a number of advantages are mentioned as well. The German rapporteur thus deems that timely exchange of proposals for legislation could be useful notably as regards similar problems occurring in different Member States. The French rapporteur also deems that transposition will benefit from a facilitated access to this kind of information, given that French travaux préparatoires of transposition acts already often refer to the experiences of other Member States.

The Portuguese rapporteur considers that in the case other Member States run ahead in transposition, it is very useful to be able to study the solutions they have adopted. The Dutch rapporteur deems that making this data available can be useful as regards those aspects of transposition that Member States have in common, i.e. as to how other Member States have dealt with uncertainties or questions regarding the directive itself. Information on the way in which a directive has been implemented may be less useful.[141] The Austrian rapporteur has stated that the availability of such data could indeed give some hints on the understanding of European law, but that there will be many cases in which even such knowledge would not really solve the issue of whether a specific national provision is in conformity with European law. Moreover, it would also require deep insight into the other legal system to understand whether a certain notion has the same meaning as in the own legal language. Yet, in many cases the Austrian Administrative Court looks at German legislation to examine whether a specific solution might be in line with at least the legislation of one other Member State. Enlarging the scope of such an investigation is considered helpful. The Italian rapporteur deems that having access to information on the way of transposition in other Member States could at least attenuate, for instance, the transposition problems occurring in respect of the Sixth VAT Directive. It is also considered that harmonisation and uniform interpretation of European law requires permanent comparison and exchange of ideas and information between the Member States. Every mechanism or organ allowing for this is deemed useful.

III.4 Effective - Preliminary - Cooperation on Interpretation[142]

The preliminary reference procedure provided for by Article 234 EC is based on a notion of cooperation, which entails a separation of functions between the national courts and the Community courts. The national courts decide on the facts of a case, whereas the ECJ does not have jurisdiction to rule on these. The national courts do not have jurisdiction to rule on the interpretation of European law, which is the final

[141] But an exception in this regard is the implementation of the public procurement directives.

[142] Cf. the contribution of A. Meij to the colloquium held in the Hague on 30 January 2004, entitled *Effective preliminary cooperation: some eclectic notes*.

responsibility of the ECJ. The preliminary procedure thus forms the hub of the system for the correct and uniform application of European law in the national legal order.

The combination of the need for uniform application of European law and the exclusive power of the ECJ to rule on interpretation and validity of EC legislation, poses the problem for national courts to know when to refer preliminary questions. This was discussed during the colloquium in Helsinki in 2002. Two other developments were also identified at that colloquium, which are responsible for a continuous flow of references for preliminary rulings and are thus putting pressure on the preliminary procedure. First, there has been an enormous increase in the scope of EC/EU law, both in terms of the fields influenced by this law and in terms of the intensity of this influence (and hence also of the complexity of the law). Second, the enlargement of the European Union will result in even more cases being referred to the ECJ.[143]

The functioning of the preliminary procedure in a Union of 25 Member States gives new reason to reconsider the present system, given that throughput time of the procedure is now already (too) long.[144] The expectation seems justified that an unchanged use of the preliminary procedure will lead to unacceptable delays. So, in order to prevent that the preliminary procedure becomes a victim of its own success,[145] it is necessary to look at the possibilities for change or adaptation of its present use. Pursuant to the Nice Treaty, one modification has already been provided for and that is the possibility to declare the Court of First Instance competent to hear and determine questions referred for a preliminary ruling in respect of matters provided for in the Statute of the Court of Justice (Article 225 (3)

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[143] The findings of the previous colloquium show that Austria has referred almost 200 cases since it joined the EU in 1995. See the contribution of the Court of Justice to the Helsinki Colloquium, “Le renvoi préjudiciel à la Cour de justice des Communautés européennes”, p. 3.

[144] According to the report submitted by the CFI for this colloquium, in 2003 this was on average 25 months, the shortest treatment being completed within 3 months and the longest only after 44 months.

[145] This concern was already expressed during the colloquium in Helsinki and is also shared by the CFI, as appears from its response to the questionnaire to the present colloquium, drawn up by judge A. Meij. It must also be noted that since the mid-1990s, there have been 220-250 references each year, which amounts to half of the total number of proceedings brought annually before the Court of Justice.

EC). The possibility of review by the Court of Justice is left open in order to guarantee the uniform application of Community law. Even though such an internal division of tasks could be a useful filter in the sense that the Court of Justice need only consider the more fundamental issues of Community law, other options have to be explored as well.

In this respect, it has become increasingly clear that structural changes as a result of the 2004 IGC are not to be expected, as the draft Constitutional Treaty does not propose any modifications to the preliminary procedure.[146] Fundamental changes to the preliminary procedure system that require a Treaty amendment seem thus to be excluded in the short term. A more realistic approach would therefore be to focus on those options that the national courts and the Community courts can put into practice themselves and which contribute to a smooth cooperation between them and to an optimal use of the preliminary procedure, thereby reducing the workload of the ECJ.

In the questionnaire a number of such possibilities regarding the use of Article 234 EC was put forward, which will be discussed in more detail below. Yet, it is important to point out here already, that the responses of the national rapporteurs show that there are quite some differences of opinion as to the direction or form adaptation of the existing practice should take. Except for the proposition made in question 2.2.6 - that the national court only refers questions if this is inevitable for the decision to be taken -, there appears to be little agreement in the national reports on the other possibilities mentioned, such as more flexibility of the CILFIT-criteria or introducing a kind of system of leave to appeal. There is more basis of support for exploring how the '*dialogue des juges*'[147] can be improved in order to ensure that the national courts apply Community law as effectively and flexibly as possible, without having immediately to have recourse to the preliminary procedure.[148]

At a more fundamental level, the different views that the national rapporteurs have expressed raise the question of how much uniformity in the transposition and

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[146] See its Article III-274, which merely adds to the present wording of Article 234 EC that if a preliminary question is raised in a case with regard to a person in custody, the Court of Justice shall act with the minimum of delay.

[147] See the contribution of the Court of Justice, o.c. note 137, for the use of these words.

[148] The development of the Jurifast documentation system, operational since February 2004, can also be seen in this context.

application of European law is actually needed. Put differently, when is unity of the law in the EU endangered and what European law issues are worthy of interpretation by the ECJ?[149] Not only this question needs to be addressed before (re)considering the various options at the colloquium, but particular attention should also be given to the question whether the same approach should be adopted for both the present and the new Member States. To explain, the countries that will now accede to the EU have witnessed major political, social, economic and legal transformation processes in a very short period of time, hence it is unrealistic (and unfair) to think that they (would have to) adopt a reticent approach towards the use of the preliminary procedure. Yet, from courts of the present Member States one could possibly expect more reliance on acte clair and éclairé.

Flexibility of the CILFIT-criteria, for example by the introduction of a kind of de minimis rule (question 2.2.5)?

In continuation of the latter observation, it can first be reflected upon whether the CILFIT-criteria on the duty to refer preliminary questions to the ECJ could be liberalised in some way, which would logically entail that national courts assume a more important role in the application and interpretation of Community law.[150] Advocate-General Jacobs has suggested in this respect that the ECJ exercise restraint in dealing with details and that the national courts exercise greater restraint in referring questions for preliminary rulings.[151] From various sides, the proposition has also been put forward that a legal basis should be created in the

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[149] Cf. in this sense also A. Prechal, *De prejudiciële procedure: een kijk uit de wetenschap - een rol voor de wetenschap?*', contribution to the symposium organised by the Dutch Council of State on 'The uncertain future of the preliminary procedure', The Hague, 30 January 2004.

[150] See also Section 7.2 of the discussion paper, o.c. note 3.

[151] F.G. Jacobs, *The quality of Community legislation – what is to be done?*, in: Kellermann et al., Improving the Quality of Legislation in Europe, Kluwer, 1998, pp. 13-17. See also Court of Justice of the European Communities, information note on references by national courts for preliminary rulings, at http://ww.curia.eu.int/en/txts/others/txt8.pdf In point 7 of this note, national courts are asked not to refer until the national procedure has reached the stage that the factual and legal context of the question can be determined and both parties have been heard.

EC/Constitutional Treaty confirming the competence of national courts to act as *juge communautaire*.[152]

The Austrian rapporteur has first wondered what is to be understood by a de minimis rule. He deems that it should not matter whether the case itself is of high importance or not, and that a de minimis rule could only make sense if it is to be applied with respect to the importance of the question of Community law; what should be decisive is the importance of the question for the implementation of Community law. The question should be of a general nature and touching upon the effectiveness of Community law. As such, he raises in fact also the question of how much uniformity is required.

A number of rapporteurs have rejected this idea, yet for different reasons. The Greek rapporteur deems it a premature step for the moment. The Dutch rapporteur is of the opinion that there are already methods in practice that can be said to make the introduction of such a de minimis rule superfluous (see II.2.4.1). The Portuguese rapporteur deems that introducing this possibility would affect the legal protection of rights of individuals. Moreover, it is pointed to the fact that quite some important judgments touching upon fundamental European law aspects, have been rendered in cases in which the question in the concrete case could be considered of rather minor importance. The Swedish rapporteur observes that the CILFIT judgment makes it necessary for the national courts to handle the preliminary reference procedure with a fair amount of common sense. In the interest of not overloading the system, courts must abstain from asking questions that are not necessary for the adjudication of pending cases. The Spanish rapporteur deems it not necessary to loosen the CILFIT-criteria, as in practice this has already occurred; national courts do not always observe the limits of the acte clair theory and abstain from asking preliminary questions, even if other judges of the same Member State uphold a different interpretation of a certain European law provision. Given the practice of administrative judges in France, the French rapporteur does not see any scope for reducing the number of preliminary questions. The practice of referring to case law of the ECJ is considered a factor that contributes already to the reduction thereof, but only to the extent that the national judge is convinced that the ECJ would not come to a different conclusion if asked again.

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[152] See in this sense for example A. Meij, in the report of the CFI drawn up for this colloquium.

Others have been more receptive of this possibility. The Danish rapporteur deems that some flexibility would be appropriate, since preliminary references may cause substantial delays. In deciding whether or not to refer, the national court should consider the importance of uniform application of European law and of legal protection of private individuals, as well as the opinion of the parties who may want to avoid substantial delays. The German rapporteur does not think that loosening the CILFIT-criteria would loosen the cooperation of national courts with the ECJ, as the increasing 'interwoveness' of the economies of the Member States entails that a question posing itself in one Member State today, will present itself in another tomorrow. So, a looser preliminary procedure would not put its foundations in jeopardy.

The national court only refers questions if this is inevitable for the decision to be taken (question 2.2.6)

The national reports show a lot of agreement on the rule that only questions should be referred to the ECJ that are inevitable for the decision to be taken. The Portuguese courts and the Dutch Council of State apply this rule already in their practice.[153] The German rapporteur considers this rule to be perfectly in line with the German notion of a jurisdiction to the service of claimants. The workload of the ECJ also imposes such a practice. The Luxemburg and Spanish rapporteurs also deem this the way to proceed. The Greek rapporteur considers that if this rule were not being followed, in particular by lower judges, the solution would be to train the judges but not to reform the Treaty. In this regard, the Association could actually play a role. If the Danish Supreme Court finds that there is no reasonable doubt as to the interpretation of the European law provision at issue, it will refuse a request for reference. To avoid unnecessary burdening of the limited capacity of the ECJ, national courts should in appropriate cases be able to rely on their own interpretation of European law.

The Swedish rapporteur holds a somewhat different opinion and does not think that the national court should ask questions only when this is inevitable for the decision to be taken. It should also consider whether the answer could be of interest to other courts in other Member States. If the question concerns a strictly national

[153] See for examples, Section 7.2. of the discussion paper, o.c. note 3.

problem, it might not be so necessary to have the question answered. The Association could play an important role as a point of contact between national courts in assessing whether their problems are of common interest or not.[154] The French rapporteur also considers that this option means that not all contradiction in the case law can be avoided, which must be considered as one function of the preliminary procedure.

Introducing a 'filter' mechanism: the highest national courts assessing cases before submission to the ECJ? Would this entail a change of the Treaty? (question 2.2.7)?
The German, Portuguese, Spanish and Italian rapporteurs reject the possibility of a 'filter' mechanism, observing that it would increase the workload of the national supreme jurisdictions in turn for a very small profit for the ECJ and might even prolong proceedings (also France). The Austrian rapporteur expresses doubts as to whether such a system could actually work. The Portuguese rapporteur further observes that the present system already reveals itself capable of dynamising such form of collaboration between courts. It would also lead to an emphasis on the national points of view to appreciate the questions and would permit their entrance into the ECJ. With a view to reducing the number of the Court's judgments, it is deemed preferable that the ECJ itself applies a filter mechanism. According to the Danish rapporteur, this option may raise substantial procedural problems, in particular as to the involvement of the parties in the procedure before the higher court. The Luxemburg rapporteur is of the opinion that a reform of this kind would negate the very significance of the preliminary procedure, which is to guarantee uniform interpretation of European law, which can only be achieved by having one single instance for this. The Spanish rapporteur deems that it would affect the lower courts' awareness of having to act as 'juge communautaire'. Moreover, the preliminary reference procedure enables these courts to act with more confidence and authority when they have to propose solutions that are contrary to national law. The Greek rapporteur points to the fact that this solution was already rejected in the

[154] This observation also illustrates how the perceived aim of the preliminary procedure affects the evaluation of the proposals for adapting it; Sweden clearly holds the view that the main aim of the preliminary procedure is uniform application and not so much legal protection of the individual. See also Section II.2.5.

reflection document of the ECJ, transmitted to the Council on 10 May 1999, because of the risks it entails for the uniform interpretation and application of European law. The French rapporteur deems that this option would only be useful if it was demonstrated that numerous preliminary references made by lower courts are not in place. The French government has also issued a negative opinion on a limitation of the jurisdictions entitled to refer preliminary questions and to a filter system. Yet, lower jurisdictions can make use of the procedure provided for by Article L.113-1 of the Administrative Code, which allows for a (non-binding) advice of the Council of State on serious interpretation problems. The Council has three months for considering the issue and meanwhile proceedings are suspended.[155]

Only a few Member States see advantages of this solution. The Finnish rapporteur thus deems that the role of the national supreme courts is crucial and increasing in European law matters and that at present they are the only courts that have the power and also the obligation to filter the cases to be sent to the ECJ. Since the highest courts normally have good capabilities of handling European law cases, it is considered advisable to strengthen their role in order to unburden the Court of Justice. Under certain conditions, the Dutch rapporteur also considers it an option, in particular in the case that the highest national court would obtain a proper responsibility in the interpretation of European law. That is to say, if for the highest national court there would be no more duty to refer a preliminary question or only in relation to secondary legislation. It would then become a kind of extension of the ECJ. Only in very fundamental cases, preliminary questions would have to be posed, which would obviously lead to a decrease of the workload of the Court. It is deemed that the risks which this option involves of a certain 'nationalisation' of European law and hence for maintaining the uniformity of European law, could be mitigated if the highest national courts and the ECJ were to cooperate in an organ in which the ECJ has the possibility to correct the national courts or to invite them to refer preliminary questions. One could also look for inspiration to the procedures provided for by Article 225 EC - regarding the relation between the ECJ and the CFI -, with a view to ensuring unity and consistency of the law. A combination with the

[155] For an example, see EC Section, 26 February 1993, *Caisse régionale de crédit agricole mutuelle de Savoie*, no. 143039, p. 37 and Advice of 4 February 2000, M. Mouflin, p. 29.

option mentioned under question 2.2.9 of the questionnaire could also be considered (see below).

The referring court could be obliged to give an analysis of the case itself and formulate already an answer to the preliminary question (question 2.2.8)? Does this require a Treaty amendment?

Again, pros and cons have been put forward regarding this option. On the one hand, the Danish rapporteur deems it thus not recommendable that the referring court should be obliged to formulate an answer to the preliminary question it poses. Under an adversarial procedure, the national court cannot give such answer without having heard the opinion of the parties and under Danish law courts do not give advisory opinions. The Italian rapporteur deems that it would increase the workload of the national supreme jurisdictions in turn for a very small profit for the ECJ. It could only be useful if it would not be established as a legal obligation, but rather as forming part of the dialogue that takes place between national courts and the ECJ. The Austrian rapporteur expresses doubts as to whether such an obligation could speed up proceedings, as it is considered likely that orders for reference will take longer since finding the right question can be considered to be the real tricky thing with European law. It is also pointed to the Advocate General's task to provide a concise analysis of the case and to formulate an answer. Again under reference to the ECJ's document submitted to the Council on 10 March 1999 on the future of the legal system of the Union, the Greek rapporteur rejects this possibility for endangering the uniform interpretation of European law. The French government is also against such a reform, whereas the Council of State has not taken position on this as yet.

On the other hand, in some jurisdictions formulation of the possible answer is already practice to a certain extent. In Luxemburg, questions are thus formulated in a way that they can be answered by a yes or no, or they put forward two or more alternatives. This way of operating is perceived as satisfactory. In Germany, the judgment for reference may contain the own appreciation of the referring court, but most of them do not or are limited to some remarks on this. If the ECJ would desire a more profound appreciation, this is deemed possible without having a Treaty amendment. An explanation for the hesitation of courts to express their own point of view is deemed to possibly lie in a wrong comprehension of the role of the ECJ,

which is to be considered as an aid to and partner of national jurisdictions and not as a higher placed court. The Spanish rapporteur also thinks that this option does not require a Treaty amendment. Even if the Supreme Court prefers putting forward different possible solutions without taking position on these, nothing prohibits other national courts from doing so. Yet, it is considered uncertain what benefits this option entails. The Portuguese rapporteur considers that this option could be further explored, as it could self-regulate the reference of questions and facilitate the task of the ECJ. The Netherlands is in favor of national judges formulating answers to the case as well, but this does not always occur.[156] It may speed up cases, but 'precooking' them may also lead to a focus on certain aspects only and losing those pleading for a different approach out of sight. Moreover, if the national court expresses its view on the case, the party that has been ruled against will do anything to take the edge of the national court's viewpoint. The ECJ then runs the risk of becoming a kind of appeal court.

A system in which decisions of the national court are taken and subsequently the ECJ has the opportunity during a certain period of time to take a decision on the judgment. A system of leave to appeal could also be considered. (question 2.2.9)

This is considered an option only in the Portuguese and Dutch reports (as regards the latter, see the discussion of the option in relation to question 2.2.7 above). The Portuguese rapporteur deems this yet a better option than the one explored above, as it would not emphasise any dependence on or functional link between the national jurisdictions and the ECJ. The Luxemburg rapporteur deems that the second proposition of a system of leave to appeal is not different from the present system, in which the European jurisdiction is consulted prior to the national decision that has to be taken in conformity with it.

Opposite views are based on the thought that introducing such possibilities would create legal uncertainty (France) and constitutional problems (Denmark). The Greek rapporteur points here also to the risks for the uniform interpretation of European law. The Austrian, German and Spanish rapporteurs deem that these options would even increase the workload of the ECJ and that it could harm the

[156] Cf. Case C-418-419/97 *ARCO* ECR [2000] I-4475 and Case C-72/95 *Kraaijeveld* ECR [1996] I-5403.

dialogue between the national courts and the ECJ. The Spanish and Swedish rapporteurs take the view that any system in which the ECJ would give its ruling only after the national court has expressed its view on the issue in question, would change the relationship between the national courts and the ECJ. The latter would turn into a superior court within a hierarchy of courts comprising both national and European courts, whereas at present there is collaboration and division of labour but not a hierarchical relationship. This should or could not be changed. As to the first option, the Luxemburg rapporteur sees only disadvantages, inter alia longer delays and the insolvable problem of detecting the cases that require a posteriori intervention. The Italian rapporteur states that one must first wait whether the Köbler judgment will lead to an increased use of the preliminary procedure. If that were to be the case, then it might be useful to look at the idea of having national courts elaborate texts that could decrease the workload of the ECJ. Yet, the idea to leave it to the ECJ to choose the most important cases to deal with seems foreign to most of the European legal systems except for the common law systems. According to the French rapporteur a system of leave seems to contradict the aim of improving clarity and transparency of European norms. The solution for tackling the delay of proceedings should rather be sought in a structural reform of the Community courts themselves. Procedures could be rationalised inter alia by having cases of less importance dealt with by only one judge.

How to improve cooperation in-between the national courts and cooperation with the ECJ? (question 2.2.10) An informal or institutionalised network of contacts between the highest national courts and the ECJ? (question 2.2.4) What possible role for the Association in this regard?

In Section II.2.6 it was established already that, overall, informal or institutionalised forms of cooperation in-between national courts and between national courts and the Community courts do not appear very developed in the Member States. The national reports show a sufficient basis of support for intensifying this cooperation, but the form in which this would have to get shape is still a matter for debate. Different views have been expressed on the idea of establishing a network of specialists. The national reports agree on the necessity of regular meetings of the Association and it is also pointed to the necessity of improving its existing database.

Generally speaking, it seems that there is a preference for some form of an informal network over an institutionalised network (Luxemburg, Denmark, Portugal). The Austrian rapporteur further deems that such an informal network could broaden the legal evaluation of a certain problem and as such allow for the determination whether or not to refer it to the ECJ. The Portuguese rapporteur deems that the establishment of an informal network of contacts could be very useful and could take the shape of personal consultation. The Greek rapporteur expresses a preference for an institutionalised network between the national supreme jurisdictions and the ECJ/CFI, which could advance the dialogue between judges and facilitate not only the work of the national courts but also that of the European institutions. According to the Luxemburg rapporteur, an institutionalised network would require a Treaty modification. He also deems that there are reasons of principle which plead against institutionalising such cooperation, as the judge has to rely foremost on his own knowledge and experience of the law and on the elements which have been submitted by the parties. Informal consultation of those which are close to European legal practice, including the European institutions, should be possible however, with a view to facilitating the legal examination and to find out about possible precedents in the case law, making a preliminary question superfluous.

The Danish rapporteur deems that a network of specialists may not be particularly needed at this point in time.

Apart from that, the German Federal Administrative Court and the Greek rapporteur encourage the establishment of an informal system of information in-between national (including lower and supreme) courts with a view to exchanging information and knowing what preliminary questions are envisaged, in order to avoid another court asking the same questions. The Swedish rapporteur deems that a network of contacts between the national courts could be of value, with a view to determining the questions in respect of which there exists a common interest of having them answered. He is more doubtful about whether the national courts should discuss the question with the ECJ.

Regarding the possible role of the Association in this regard, the Portuguese, German, Greek, and Luxemburg rapporteurs start by underlining the importance of regular meetings of the Association, which might also organise meetings between national courts and European law experts dealing with general and specific

European law issues. More in specific, the French rapporteur observes that the Association seems willing to give shape to dialogue between judges, by facilitating already contacts between all the jurisdictions involved in the application of Community law. Recent case law of the French Council of State shows its willingness to cooperate in such a network.[157] The efforts of the Association concerning publications and database could be intensified. The German and Austrian rapporteurs also deem that the Association could serve as a 'clearing point' for all those who desire to get into contact with another court or council of state concerning a specific question. This could be done through regular meetings. The Portuguese rapporteur values the idea of having a network of specialised experts, but considers at the same time that this is difficult to realise because of the means that it would involve. Yet, it is suggested that the Association list specialists of different sectors and states, which could be contacted through the Internet. Lists could also be drawn up with addresses etc. of technical assistance services and information and documentation departments of the members of the Association and to have a responsible element for the exchange of information through the Internet with other jurisdictions. The Luxemburg rapporteur deems that a network of specialists could consist of a group of *référendaires* of the national jurisdictions in the area of European law. The German rapporteur points in this respect also to the necessity for the new Member States to get acquainted with the mechanism of the *dialogue des juges*. The quick and up to date dissemination of all European law questions and their interpretation by national courts will entail a decrease of the number of cases in which European law is applied wrongly and will also decrease the need for compensation means for violation of European law by a national jurisdiction.

The Dutch rapporteur considers decentralisation of maintenance of the uniformity of European law necessary with a view to overcoming the workload of the ECJ and to keep the system effective. The options discussed above in relation to questions 2.2.7 and 2.2.9 of the questionnaire are deemed adequate for this. In order to make such a system work smoothly in practice, a network in-between national courts and with the ECJ is deemed useful for the exchange of case law and other developments. The Association could play an instrumental role in this respect,

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[157] See the case *Société Techna S.A. et autres*, o.c. note 119.

even though it must be observed that not all (highest) national courts are involved in this. The Finnish rapporteur observes that since formal adjustments of the preliminary system are not feasible or desirable at this moment, it should be tried to improve the dialogue by developing the possibility to consult the Court of Justice at the stage in which the national court is considering the necessity to pose a preliminary question. As the preliminary procedure is a dialogue between judges, it should not be characterised by too excessive formalities. The Association could play an important role in this context. The Italian rapporteur as well is no advocate of formal changes to the system, but points to channels such as the Association. Reducing the work load of the ECJ should preferably be solved by reducing the number of preliminary references through the use of para-legal means, rather than through formally adjusting the Article 234-procedure - a system which up to now has functioned perfectly -, which would moreover also entail major difficulties. Those para-legal means include instruments that permit an improved exchange of information on the transposition and case law of the Member States and create a lively, intensive, continuous debate between lawyers, administrators and legal practitioners of the EU Member States.

Such instruments could naturally include the use of databases. In this respect, the Luxembourg Administrative Court and the Portuguese, German and Finnish rapporteur stress the importance of the database of the Association, and also of improving it by adding new judgments and presenting them in a more complete and uniform way. The latter also observes that the members of the Association could put in more efforts to collect and send the relevant decisions of their institution. More and quicker analysed information on pending cases and the case law of the ECJ should also be realised. It is in the interest of the national courts and the Court of Justice that national courts have easy access to this information, also with a view to a correct use of the preliminary procedure.

Other suggestions for possible solutions? (question 2.2.11)

The options discussed above are not meant to be exhaustive and other proposals for change can be thought of. At a colloquium on 'The uncertain future of the preliminary procedure', organised by the Dutch Council of State on 30 January 2004, a number of other ideas was thus discussed, including the following ones:

- reorganisation of the - procedures of the - Community courts;

- the introduction of specialised courts;
- regionalisation of the Community courts (having different courts throughout the EU dealing with preliminary questions);
- submit to the ECJ only questions relating to secondary legislation;
- replace the preliminary procedure by a direct appeal of the parties to the ECJ in standard procedures.

Annex 1: Questionnaire

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"

Preamble

The theme for the 2004 Colloquium was discussed on the basis of the discussion paper that had been distributed earlier at the meeting of rapporteurs in Trier on 24 and 25 March 2003. Following on from that meeting the discussion is currently focusing on a number of specific aspects. One particular point to emerge is that the quality problems arising with European legislation within national legal systems seems frequently to be a matter of interpretation. These problems are certainly not caused exclusively because the quality of the legislation as such is so much worse than that of national legislation. Rather it is a consequence of the individual character of community law. The nature and function of European law after all is different to that of national legislation. The European and national legislative and regulatory process is still mismatched. Problems which arise therefore are mainly problems of interpretation when drafting national implementation legislation and when applying or examining for compatibility by the national court. An understanding of the individual character of community law in comparison to national law is essential to bring national and European law cultures together.

To be able to tackle the problems that European legislation poses for national legislation and courts, national and European legal cultures will have to be brought closer together. This actually involves three successive stages:

- How can interpretation problems be prevented as such?
- How are interpretation problems handled and solved when they nevertheless occur?
- What are the consequences of errors of interpretation that have been made?

The questionnaire is taking these three items as the point of departure. They will also constitute the basis for the general report that will be drafted once the responses of the national rapporteurs have been received. The main aim of this is to contribute to an improved method of working with the national judicial bodies and an improved interaction of the national judiciaries with the Court of Justice.

This approach entails that some of the questions in the questionnaire which was discussed in Trier in March 2003 have no longer been included. Other questions are being posed again here with a view to ensuring that the final report is complete. Comments that have already been made will be incorporated in the general report. In addition a number of the questions build on the findings of the Association's colloquium in Helsinki in 2002.
The questionnaire will be sent to members of the Association and to the Court of Justice of the European Community including the Court of First Instance and to the European Commission. A number of questions specifically relate to the legislative process. Possibly the members of the Association who have an exclusively judicial task may want to leave these questions unanswered.

1. Preventing interpretation problems

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

The simplification of the system of Community legislation and regulations has been discussed in the context of the European Convention. It is proposed that a limited number of instruments be used and that a hierarchical distinction be made between legislative, delegated and implementary instruments (see also point 3.1.4 of the discussion paper). In addition it is being proposed that the debate in the Council on legislation in future should take place in public. At the moment the drafting of European legislation is not entirely public so that interpretation of that legislation is made more difficult. The following questions are designed to investigate whether the proposed changes can simplify the implementation and application of European legislation in national legal systems.

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?

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?

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

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?

1.1.5 What contribution would the availability of systematic and complete *travaux préparatoires* make to preventing interpretation problems (see also point 2.1 below)?[158]

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

The crucial question is how European and national systems of legal norms can be brought into line so that problems of interpretation are fewer. An inevitable fact is that in contrast to national legislation community legislation frequently does not require uniformity and is designed more to remedy national differences, notably in so far as these constitute an obstacle to the internal market. An important consequence of this - and at the same time a complication - is that national linking mechanisms and systems of implementation will continue to retain their individual character because European legislation allows scope for divergent national approaches to the implementation of European legislation.
Member states can play an important role in preventing problems in the implementation of European legislation. Crucially they must recognise the individual character of community law and respect it as much as possible. The fact is that many of the problems are rooted not so much in the European legislation itself as the way in which the legislation is dealt with in the national context. The aim of the questions below is to find out the kind of interpretation problems that occur in implementing European legislation in the member states and the reason for these. In particular we want to know to what extent the problems of interpretation actually arise as a result of a shortfall in the quality of European legislation or are the result of factors in the national domain. Take as an example the fact that in some member states quite a few problems arise with regard to interpreting the VAT directives (this emerges for one thing from the number of prejudicial questions submitted to the Court of Justice) while none whatsoever occur in other member states, though in these in turn there are problems with public tendering or environmental law. Certain problems are possibly be attributed to the inferior quality of European legislation which could more readily be blamed on a poor match between the European and national legislative systems and thus on (incorrect or incomplete) implementation legislation.

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?

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[158] Particularly the Commission proposal and the documents and deliberations within the European Parliament and the Council.

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?

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?

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).

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).

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

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

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

1.3 Ex ante checking of European legislation

During the meeting in Trier we looked at a number of ways of incorporating a legal quality test in the European legislative process. One of the ideas discussed which has been put forward earlier was the setting up of a European Council of State or another general advisory body for legislation. However, for this an institutional reform would be necessary which, as a result of the highly divergent national traditions, is not expected in the near future. Other possibilities are the greater involvement of national parliaments and national civil servants in the European legislative process and also of the national Councils of State

themselves. This could possibly be done by means of an informal group or by experts ad hoc.

1.3.1 What possibilities of ex ante examination for compatibility do you think are desirable/useful or necessary? (See for example the Dutch experiment of advice by the Council of State on Commission proposals for legislation discussed in point 4.2 of the discussion paper).

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?

2. Handling and solving interpretation problems

2.1 Interpretation methods and aids to interpretation

The next question that arises is how the national courts should deal with problems of interpretation once these occur in a concrete case. Quite a few differences emerged among the various member states at the Trier meeting, for example on the point of comparing different language versions of European legislation and the use of the interpretation documents drawn up by the Commission. The questions below relate to the way in which the national courts deal with European legislation or national implementation legislation and notably whether this differs from the method of interpretation or technique that is followed for the interpretation or application of 'purely' national legislation.

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?

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

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

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

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

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

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

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?

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

2.2 Cooperation on interpretation

On the subject of the administration of justice the cooperation of the members of the Association and of national courts with the European Court of Justice was discussed in Trier as was the cooperation between the members themselves and the mutual cooperation between national courts. The conclusion is that the prejudicial procedure is under pressure and that that pressure will increase in the future by expansion of the field of work of the European Union, the stepping up of community law and the expansion of the EU with ten new member states.
Improved mutual (informal) cooperation can reduce interpretation problems at an early stage. Various suggestions were put forward as well as suggestions for reducing the pressure of the prejudicial procedure. We would like to hear your opinion on these suggestions after first of all posing two general questions on the use of the prejudicial procedure as such.

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?

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?

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

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

2.2.5 With regard to the CILFIT judgement some flexibility could be appropriate for example by a kind of de minimis rule. Perhaps this is risky in connection with the fundamental nature of the prejudicial procedure, both for the effect and effectiveness of community law and for the legal protection of private individuals.

2.2.6 The national courts can keep down the number of prejudicial questions to a minimum by only posing prejudicial questions if this is inevitable for the decision in the case (see also point 7.2 of the discussion paper).

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

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

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.

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

2.2.11 Do you have any other suggestions?

3. Attaching consequences to interpretational errors

Despite the efforts to prevent problems of interpretation and to solve them when they do arise, errors of interpretation will always arise. This applies both in the field of legislation and in the field of the administration of justice. For example it may emerge in a case before the national court that, wrongly, no prejudicial questions were posed or that an interpretation followed by the national court in the course of implementation is incorrect. The question then is what consequences should be attached to the observation of such errors. Although there is no question of a hierarchical relationship between the European Court of Justice and the national courts, the priority of community law above national law must after all be assured. As to the administration of justice various national and community mechanisms were examined in Trier which could be used to remedy such errors. We would like to hear your opinion. In addition, in the legislation ex post evaluation of European and national implementation of legislation will have to be addressed. The questions below are intended to provide some insight into the importance of evaluation of legislation to combat problems of interpretation.

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?

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?

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?

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?

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?[159]

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?

Annex 2: articles 1-32 to 36 of the Draft Treaty establishing a constitution for Europe

Article 32: The legal acts of the Union

1. In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result.

A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as regards the result to be achieved, on all Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result.

A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions adopted by the Institutions shall have no binding force.

2. When considering proposals for legislative acts, the European Parliament and the Council of Ministers shall refrain from adopting acts not provided for by this Article in the area in question.

Article 33: Legislative acts

1. European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council of Ministers under the ordinary legislative procedure as set out in Article III-302. If the two Institutions cannot reach agreement on an act, it shall not be adopted.

In the cases specifically provided for in Article III-165, European laws and European framework laws may be adopted at the initiative of a group of Member States in accordance with Article III-302.

2. In the specific cases provided for by the Constitution, European laws and European framework laws shall be

[159] See also Case C-224/01, Köbler, pending.

adopted by the European Parliament with the participation of the Council of Ministers, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.

Article 34: Non-legislative acts

1. The Council of Ministers and the Commission shall adopt European regulations or European decisions in the cases referred to in Articles 35 and 36 and in the cases specifically provided for in the Constitution. The European Council shall adopt European decisions in the cases specifically provided for in the Constitution. The European Central Bank shall adopt European regulations and European decisions when authorised to do so by the Constitution.

2. The Council of Ministers and the Commission, and the European Central Bank when so authorised in the Constitution, adopt recommendations.

Article 35: Delegated regulations

1. European laws and European framework laws may delegate to the Commission the power to enact delegated regulations to supplement or amend certain non-essential elements of the European law or framework law.

The objectives, content, scope and duration of the delegation shall be explicitly defined in the European laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the European law or framework law.

2. The conditions of application to which the delegation is subject shall be explicitly determined in the European laws and framework laws. They may consist of the following possibilities:

– the European Parliament or the Council of Ministers may decide to revoke the delegation;

– the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council of Ministers within a period set by the European law or framework law.

For the purposes of the preceding paragraph, the European Parliament shall act by a majority of its members, and the Council of Ministers by a qualified majority.

Article 36: Implementing acts

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing binding Union acts are needed, those acts may confer implementing powers on the Commission, or, in specific cases duly justified and in the cases provided for in Article 39, on the Council of Ministers.

3. The European laws shall lay down in advance rules and general principles for the mechanisms for control by Member States of Union implementing acts.

4. Union implementing acts shall take the form of European implementing regulations or European implementing decisions.