

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 elementary 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)?¹

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

¹ Particularly the Commission proposal and the documents and deliberations within the European Parliament and the Council.

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?
- 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?²
- 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?

² See also Case C-224/01, Köbler, pending.