

Colophon

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1. From the president's desk

Before you lies a special edition of the Newsletter, containing a document drawn up by Dutch Councillor of State Ernst Hirsch Ballin in his capacity as general rapporteur for the 2004 colloquium. The working document is to be used at a meeting of national rapporteurs due to take place in Trier on 24-25 March this year.

The subject of the colloquium is "The legal quality of Community law, and its transposition into and application in national law". The working document analyses problems in the European constitutional system and in EU legislation itself, and national mechanisms to improve the quality of European legislation; it also studies problems in the transposition and application of European legislation and reviews national mechanisms to solve them.

The national rapporteurs have been asked to help prepare for the meeting by answering the questions enclosed with the working document.

The problems described and the answers received will be analysed and discussed at the meeting, after which the general rapporteur will compile a further questionnaire for the national rapporteurs. He will then draw on the ensuing national reports to prepare his general report for the colloquium to be held in The Hague on 15-16 June 2004.

The point of publishing this working document in the Newsletter is to familiarise as many as possible of the magistrates and staff of the Councils of State and Supreme Administrative Jurisdictions that are members of our Association with its content, so that they can pass on their experience, additional information, suggestions and comments to their national rapporteur or to Mr Hirsch Ballin. This will ensure that as many people as possible are involved in preparing the colloquium. There is much to be gained from such broad-based preparations, given the complexity of the problems involved and given that the purpose of the colloquium is to recommend practical improvements to both EU and national authorities. The ultimate aim is to produce better Community and national legislation, while making courts' work easier.

I would therefore urge you to study the working document carefully and to pass on your comments to your national rapporteur or to Mr Hirsch Ballin, the general rapporteur. For practical reasons I would ask you to send responses intended for the latter by e-mail to Mr Molle Eisma of the Dutch Council of State, at m.eisma@raad-vanstate.nl.

Herman Tjeenk Willink

2. List of rapporteurs

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3. Discussion paper

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".

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1. Introduction

The subject chosen for the 2004 colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union is "The quality of Community law and its implementation and application in the national legal order". Such a wide-ranging theme obviously requires further specification. What we have in mind is to identify the specific problems that the Association's members face (as advisors on legislation and as judicial bodies) in converting, interpreting and applying European legislation, to analyse the causes of these problems and to take stock of possible solutions, both existing and new ones. We shall often be adopting the explicit perspective of the highest judicial bodies whose responsibilities include the application of national law in accordance with EU law. In other words, the idea is not to explore general aspects of the quality of EU legislation (see point 2), but to chart certain specific problems relating to Community law and the European Constitutional system and the various methods that have been devised of dealing with them. By doing so, this paper can hopefully provide an initial impetus for the colloquium.

In the light of this objective, the specific problems generated by Community legislation¹ can be divided into two categories: first, those that are related to the EU system as such and to the creation of legislation in that framework; and second, the problems of implementing and applying the legislation thus created in the national legal order.

Where problems of the first type are involved, it is important to note that European legislation comes about by way of a different procedure than national legislation. Key stages in the decision-making process take place behind closed doors, which sometimes makes it hard to trace the underlying intentions. This is particularly true of amendments made within the Council of the European Union to proposals submitted by the European Commission. The preamble does not always provide sufficient clarification. This sometimes presents an obstacle to interpreting European legislation. Furthermore, as commented at the Helsinki colloquium on 20-21 May 2002, the language regime within the European Union creates practical problems. All language versions possess equal validity. Differences may naturally occur between them, which regularly causes problems of interpretation. Such cases will multiply with the forthcoming enlargement of the European Union (point 3). The second category consists of specific problems related to implementing and applying this European legislation in the national legal order. This includes issues

concerning national legislation to implement European legislation (which play a key role, for instance, in advisory reports on proposed legislation), and issues concerning the way in which national courts apply this legislation and examine decisions for compatibility with it (points 5 and 6).

At the level of legislation, attention will focus on the way in which the various actors involved in the national legislative procedure respond to the obligations devolving from Community law, and how procedures are organised. For instance, what different implementation techniques are used, and how do they deal with the system and terminology of Community legislation? In particular, what principles should national legislators adopt in this regard? It is also worth taking stock of problems of interpretation, and looking at how Member States deal with provisions of European legislation that leave them a certain margin of discretion.

One practical problem regularly encountered by both parliaments and courts is that of deadlines. Failure to implement directives by the set deadline leads to certain consequences. Issues relating both to advising on legislation and to administrative jurisdiction are both involved here, although the main problems will differ. For instance, problems of interpretation may be expected to figure more often and more prominently in jurisdiction than in advising on legislation. It is hence important to keep these two areas separate.

Where advising the Government on legislation is concerned, the focus will be on the mechanisms devised in the different Member States to improve the quality of European legislation; how has the contribution of Member States to the adoption of European legislation been organised, and what is the role of the Council of State? It is also important to look at techniques that have been developed to streamline the transposition and application of European legislation in the national context (point 4). Here attention will focus on the ways in which Member States deal with differences of system and terminology between their own national legislative systems and legal order and the European legislation to be transposed. It is also important to look at the way problems of interpretation are approached when implementing European legislation (point 5).

Some of the problems encountered in advising on legislation crop up in a different form in relation to jurisdiction. Specifically, there are the problems that

¹ The emphasis here is on directives, regulations and framework decisions.

arise when implementation has not taken place (the potential consequences of "uncontrolled" direct application may be unacceptably far-reaching). There is also the problem of how to deal with differences in the system and terminology of national and European legislation in legal practice. In addition, building on the findings of the Helsinki colloquium on 20-21 May 2002, we can look at techniques used to resolve questions of interpretation and direct applicability independently instead of asking for preliminary rulings. More in general, it is worth looking at ways of ensuring that the system of preliminary rulings functions as smoothly as possible (points 6 and 7).

The findings of the present study, culminating in the 2004 Colloquium - in particular the findings regarding the legislative process or preliminary proceedings - could be incorporated, if it is deemed appropriate, into the preparations for the Intergovernmental Conference due to take place in 2004, and into the work being done in this connection in the European Convention. Interested parties have therefore been invited to take part in the preparations for the colloquium.

2. Quality

As noted in the introduction, the aim of this colloquium is to define the specific problems that Association members encounter in their advisory and judicial capacities when transposing, interpreting and applying European legislation, to analyse the causes of these problems, and to take stock of existing or new solutions.

This pragmatic approach means that we shall not be dealing with all aspects of the quality of legislation - in particular, we need not consider problems that occur at both European and national level.² It is worth adding that it is unclear whether European legislation does in fact give rise to more concern than national legislation; that it displays more flaws, relatively speaking, has never been demonstrated.³ When considering quality, this paper will therefore focus on the aspects of European legislation that influence this clarity and manageability in the practice of advising on legislation and of jurisdiction: that is, the system it is based on and the terminology it employs.

It should be added that the concept of "quality" in this context is highly subjective: it makes a great difference whether you approach the issue from a European viewpoint, or from the perspective of a national parliament adopting implementing legislation or a national court having to apply it. These two vantage points need to be brought as close together as possible if workable solutions are to be achieved. Given the great variety

of national legal systems, however, it is inevitable that European legislation will not always be geared towards each specific national situation. Furthermore, European legislation could never dispense with its own system and terminology. It would be an illusion to think it could ever be fitted smoothly into national legal systems.⁴

The quality of European legislation has been exercising minds for some time now,⁵ within as well as outside the EU institutions. The present study is in no sense an isolated case. For instance, some of the features of the system used for adopting and applying European legislation have come under scrutiny because of doubts concerning their adequacy to safeguard manageability. This scrutiny has sharpened with the ever-widening scope of European legislation - both aliens law and criminal law, for instance, are undergoing Europeanisation. The forthcoming enlargement of the European Union will also tend to exacerbate some existing problems. One is the language regime (if current policy is retained, the EU will soon have more than twenty official languages) and the system of preliminary rulings at the Court of Justice (throughput time is already very long). Many forums are now considering these issues in particular with a view to the Intergovernmental Conference scheduled for 2004. These developments will be outlined presently, following a survey of the key problems.

² For a detailed discussion of general problems of quality and ways of tackling them in relation to both national and European legislation, see H. Xanthaki, "The problem of quality in EU Legislation: What on earth is really wrong?", *CMLRev.*, vol. 38 (2001), no. 3 (June), p. 615.

³ For a more general overview of problems related to quality, reference may be made to the symposium organised by the T.M.C. Asser Institute on the quality of European legislation in 1997. See A. Kellermann et al., *Improving the Quality of Legislation in Europe*, Kluwer, 1998.

⁴ See M. Van Damme, "Naar een Europese Raad van State?", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2001/8, p. 519, and J.P.H. Donner, "De kwaliteit van de Europese regels," *RegelMaat* 2001/6, p. 216.

⁵ See e.g. "Rapport Public van de Franse Conseil d'Etat, *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.

3. Problems related to the European constitutional system and European legislation

Certain features of the European constitutional system and European legislation itself can cause problems in practice. The following paragraphs will start by discussing features relating to the enactment of legislation, before focusing on the implementation and application of this legislation in the national legal order.

3.1 Procedure for the adoption of legislation

3.1.1 National decision-making

Each Member State enacts legislation in its own way. Still, countries share certain basic features: openness of decision-making and quality assurance mechanisms.

The decision-making on proposed legislation takes place largely in public, at least where key aspects are concerned that have not been delegated. The passage of a bill through parliament therefore provides a good picture of the legislature's intentions in drafting it. It therefore provides a significant interpretive aid (though not the only one) to courts that have to apply this legislation.

Besides this, all Member States have quality assurance mechanisms for proposed legislation. The ministries responsible for drafting bills often perform quality checks at an early stage. Austria, Belgium, France, Germany,⁶ Italy, the Netherlands, Portugal, Spain and the United Kingdom have all in some way adopted quality guidelines or standards to be applied in this context.⁷ Many Member States also have a Council of State, which provides the Government with advice on proposed legislation in some form or other (Belgium, France, Greece, Italy, Luxembourg, Portugal, and the Netherlands).⁸ Sweden has a special "Legislation Council" (*lagrådet*), consisting of four judges (all drawn from the Supreme Court and the highest administrative appeal court). The most significant body in the UK in this context is the Cabinet Legislation Office, which examines bills before they are submitted to parliament. In Denmark the Ministry of Justice plays a role in quality assurance. Germany, Finland, Ireland, Austria and Spain do not, as far as is known, make any special provision for quality assurance. It is significant here that several Member States can review the constitutionality of acts of parliament, generally retrospectively.

It should be noted that these systems are not always watertight. For instance, in the Netherlands, the Council of State advises the Government on draft legislation. But when it comes to major amendments that are made to these bills afterwards, for instance as a result of an amending memorandum, the Government is under no

obligation to submit these to the Council of State for its advice. It does have the power to do so, however, and uses it with some regularity.

3.1.2 Public nature of decision-making in the EU

The EU's decision-making mechanisms have been shaped in a unique way that is bound up with the EU's own origins and its constitutional structure, which differs from that of a state. The Intergovernmental Conference in 2004 and the European Convention leading up to it, combined with the enlargement of the EU, are likely to result in dramatic changes to these structures.

That the EU's origins and foundations are in international law emerges most clearly in the rules on public access that are applicable to European decision-making. Where primary Community law is concerned, little of the decision-making on Treaty provisions and amendments to them takes place in public. This is reinforced by the fact that neither the European Parliament nor national parliaments have much involvement in this process. Although this is normal practice in the conclusion of bilateral or multilateral treaties, it causes more resentment in the case of the EC Treaty because of the Treaty's dramatic impact on the national legal order (Treaty law takes precedence and has direct effect). Also noteworthy is the fact that many of these provisions subsequently become part of the Community legal order⁹ or of EU law in the wider sense,¹⁰ hence acquiring their own significance, independent of national law. This means that the national courts, acting within their own jurisdiction, cannot simply apply the methods of interpretation that are customary in a national context to determine the scope and significance of these treaty provisions, which makes it more important to know the history of the text.

As far as secondary Community Law is concerned, the transparency of its adoption depends on the

⁶ See also P.-C. Müller-Graff, "The Quality of European and National Legislation". German Experiences and Initiatives, vol. 11/1998, *EuZW*, p. 325.

⁷ See Xanthaki 2001, op. cit. note 2, p. 660. Cf. also W. Voermans, "Wetgevingsbeleid in de landen van de EU", *RegelMaat* (2000), no. 5, pp.193-196.

⁸ It should be noted that the extent of this advisory role differs greatly from one Member State to the next, both as regards the range of subjects about which advice is requested and the nature of the advice that is given.

⁹ Where the first - EC - pillar is involved.

¹⁰ I.e. including the second and third pillars.

decision-making procedure concerned. Although there has been more openness in recent years,¹¹ the decisions made in the Council of the EU require special attention, since it is there that the European decision-making process differs from equivalent processes at national level - no small matter, since this is the most crucial phase of EU decision-making. One important practical consequence is that provisions added at that stage, which often depart from the primary rules laid down in the legislation concerned, are not furnished with any clarification. This means that national bodies that have the task of implementing and applying this European legislation have little to go on.¹²

It should be noted, however, that Article 207(3) EC lays down that when the Council acts in its legislative capacity, not only the results of voting and explanations of vote, but also statements included in the minutes must be published. In this connection, Article 7 of the Rules of Procedure states that the Council acts in its legislative capacity when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions. The Council sometimes adopts statements on interpretation at the same time as adopting a directive or other legislative decision, which may be included in the minutes. The Council itself is of the opinion that although such statements should be incorporated into the text of the decision wherever possible, their use is compatible with Community law, provided they do not contradict the piece of legislation concerned and have been published.¹³

3.1.3 Quality assurance in the EU; towards a European Council of State?

The European decision-making process includes a variety of quality assurance mechanisms. Prominent among them is the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, adopted by the European Parliament, the Council of the European Union, and the European Commission.¹⁴ The legal departments of these institutions elaborated these guidelines into a manual for general use. To implement the agreement it was agreed that institutions would train their staff in legal drafting and alert them to the implications of the EU's multilingualism for drafting quality.¹⁵ The Agreement also states that the institutions should promote cooperation with Member States with a view to improving understanding of the points requiring particular attention when drafting texts.¹⁶

The guidelines as can be inferred from the Agreement and other reports and texts drafted by the different institutions¹⁷ do not seem to differ essentially from

those that exist in most Member States. Xanthaki concludes in this connection that the EU's "drafting style" can be viewed as a collage of the different national approaches to drafting legislation and a reflection of the modern drafting style evolved jointly by the Member States.¹⁸ She therefore concludes that the problem is not an absence of rules to safeguard the quality of legislation, but rather a failure to apply them, or to apply them properly.

It can be stated, however, that quality assurance as it exists in the European decision-making context of today relates primarily to internal consistency and compatibility with primary and secondary Community law. Many features that undergo scrutiny in decision-making at national level, such as effectiveness, feasibility and so forth, as well as the implementation aspects of European

¹¹ Further to the Treaty of Amsterdam, Reg. 1049/2001 regarding public access to documents was adopted on the basis of Article 255(2) EC; OJ 2001, L 145/43. In accordance with Article 255(3) para. 3, the regime concerning access to documents has now also been laid down in Articles 8 and 9 of the Rules of Procedure of the Council (see Council Decision of 22 July 2002 adopting the Council's Rules of Procedure, OJ 2002, L 230/7).

¹² See also point 4.

¹³ See the statements of the Council that are attached to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ 1999, C 73/01. The EP has made a statement to the effect that each piece of Community legislation should be self-explanatory and that the use of statements of interpretation is incompatible with the nature of Community law. It should be noted in this connection that according to the case law of the Court of Justice, the use of such statements is inadmissible where their substance is not contained in the text of the provision, in which case they have no legal force (see e.g. cases C-292/89, Antonissen, European Court Reports 1991, pp. I-745 and C-375/98, Epson Europe, European Court Reports 2000, pp. I-4243).

¹⁴ Op cit. note 13. For the policy on improving the quality of European legislation that preceded this, see the discussion in Xanthaki 2001, op. cit. note 2, 653-656, and T. Blanchet, "Transparence et qualité de la législation" RTD 33(4), 1997.

¹⁵ By now EP members, in any case, have undergone training of this kind. See W. Voermans, *RegelMaat* 2002, no. 2, pp. 42-54.

¹⁶ See also point 3.1.4 on the launch of a legislation network.

¹⁷ E.g. the manuals for legislative drafting, drawn up by the Commission and Council.

¹⁸ Op cit., note 2, p. 666.

legislation, have inevitably received little attention to date. In this connection, the substantial influence of Member States on the end result presents a major stumbling block. In particular, the decision-making process in the Council may not be a suitable arena for pondering factors such as the effectiveness and feasibility of legislation, since the far wider national weighing of interests that takes place there tends to obliterate such considerations.¹⁹

This situation reinforces the need for a body operating independently of this process that could help identify possible problems. In this connection, the legislation network that the Commission proposes setting up between the EU institutions and Member States (see point 3.1.4 below) could gain in significance from the involvement of a relatively independent body. It may be recalled that it has been suggested before, by the French Conseil d'État in 1992,²⁰ and by the Koopmans group in 1995,²¹ that there is a need for an independent advisory body to issue recommendations on European draft legislation. This body could be composed either of independent experts or of experts mandated by the Member States and the EU's institutions. Other suggestions include the idea of creating a special "advisory division" of the Court of Justice of the European Communities,²² or a special directorate at the Commission.²³

Van Damme rightly points out in a recent report that a thorough examination of several different avenues should be performed before deciding to set up an advisory body of this kind at European level.²⁴ He focuses particularly on the idea that the future body would supposedly help to flesh out policy. He believes that as the emphasis shifts away from formal to substantial recommendations on legislation, such a body's assessment of policy would automatically gain in importance. This, more than anything else, bolsters the objection that is sometimes made to setting up an advisory body at European level - that it would jeopardise the balance that exists within the legislative process, for instance because of the risk of reopening discussion after compromises have been achieved between Member States.²⁵

Van Damme's article also reflects on the composition of such a body. On the one hand, the Member States should take part, because otherwise there would be a risk of taking insufficient account of the diverse cultures and national legislative traditions. A Council of State could then no longer avoid the adoption of European rules that were to some extent ill-adjusted, making them harder to apply in practice. Conversely, the quality of European legislation could no longer be looked at from

the viewpoint of national legal systems, given the special criteria and features that apply to Community legislation. It would be necessary to strike a balance between these two approaches. He concludes that the best way to foster the quality of European legislation would perhaps be to make better use of the decision-making structures and procedures that already exist at European level, to try to improve the coordination between the institutions' quality assurance policies, and to ensure that Member States make more efficient use of the existing structures and instruments through which they can influence the adoption of Community legislation where necessary, through liaison between those involved in the European decision-making process and those whose task it is to implement and apply that legislation.

Question:

What ideas do the various Member States have concerning organisational measures to improve the quality of European legislation?

3.1.4 Recent developments in the framework of the Laeken European Council, the European Convention, and the White Paper on European Governance

Various forums at Community level are considering how the quality of European legislation could be improved. Certain proposals have been already made and measures taken for this purpose, which will also facilitate the implementation and application of this legislation in the national legal order.

The European Convention

One of the issues raised by the Laeken European Council, which was held on 14 and 15 December 2001, was the proliferation of Community instruments and the need for simplification. A working group was established specifically for this theme under the European

¹⁹ See also point 4.

²⁰ Rapport public 1992, Etudes et Documents, no. 44, "Considérations générales sur le droit communautaire".

²¹ "The quality of EC legislation: Points for Consideration and Proposals", spring 1995 ("Koopmans Report").

²² Kortmann, "Goede Raad over Gemeenschapsrecht", SEW 1996, p. 38.

²³ UNICE Regulatory report, 1995.

²⁴ M. Van Damme, "Naar een European Raad van State?", Tijdschrift voor Bestuurswetenschappen en Publiekrecht 2001/8, p. 519.

²⁵ Problems of this kind already arise now, in relation to the European Parliament, a case in point being the problems encountered in drafting the European arrest warrant.

Convention. This working group has now proposed a new typology and hierarchical classification of instruments.²⁶ It recommends making a clear distinction between legislative and executive action and suggests, in particular, three levels for the adoption of legal instruments:

- 1 Legislative acts. These comprise the present regulations and directives, which, it proposes, should be renamed 'laws'²⁷ and 'framework laws' respectively. Their definition would not differ from the present definitions of regulation and directive in Article 249 of the EC Treaty. They would be adopted on the basis of the Treaty and would contain the basic principles and fundamental policy choices in respect of a given topic. The scope and extent of the detail would be determined by the legislator from case to case.
- 2 Delegated acts. This category would consist primarily of 'delegated regulations'. The acts would flesh out the detail or amend certain elements of a legislative act within the framework of delegation described by the legislator in the legislative act itself (which would therefore indicate the purpose, content and scope of delegation and describe the control mechanisms).
- 3 Implementing acts. These would be 'implementing regulations' or 'implementing decisions', i.e. acts applying or implementing legislative acts, delegated acts or instruments for which the Treaty itself makes provision.

This new typology should be applied not only to the sectors that come under the EC Treaty, but also to the sector which at present comes under Title VI of the EU Treaty (police and judicial cooperation in criminal matters). The 'framework decisions' and 'decisions' referred to in Title VI would then become 'framework laws' and 'laws' respectively. The question remains whether a framework decision (or, as the case may be, framework law) should or should not have direct effect in the future.²⁸

The working group does not propose any changes to the non-binding instruments referred to in Article 249 of the EC Treaty (recommendations and opinions). As regards the other non-standard legal instruments such as resolutions, declarations and conclusions, the working group recommends the inclusion of a rule in the Treaty to the effect that the legislator (Council/Parliament) should abstain from adopting them if legislative proposals on the same subject have been submitted to it. The use of non-standard acts might otherwise give the erroneous impression that the European Union legislates through the adoption of non-standard instruments. It is also stated that the open method of coordination

which, according to the working group, 'involves concerted action by the Member States outside the competences attributed to the Union by the treaties', should be assigned a constitutional status. There is also a large measure of support within the working group on 'economic governance' for including, for the sake of clarity, the basic objectives, procedures and limits of the open method of coordination in the Constitutional Treaty.²⁹ This working group also recommends that a provision be included for a wide-ranging consultation process, in particular with the social partners.

The above proposals have not yet been adopted by the Convention, and Article 24 of the preliminary draft of the Constitutional Treaty, which will concern the legislative instruments of the EU, does not therefore yet contain a precise text.³⁰

The working group on simplification has described the quality of legislation as a matter which 'goes beyond even the amendment of the Treaties', but it nonetheless draws the attention of the Convention to the following questions in particular: the need to intensify consultation with interested circles throughout the legislative process, the provision of an impact assessment sheet with legislative proposals, the need to have more frequent recourse to 'self-regulation' and 'co-regulation', the need to intensify efforts to recast and codify Community law, and the need to improve the drafting of legislation, in the sense of clarity of language and consistency with existing legislation. As regards the transparency of the legislative process, the working group recommends to the Convention that it should study this theme very closely when it deals with the

²⁶ See the final report of Working Group IX on Simplification, CONV 424/02, 29 November 2002. For the previous deliberations, see also CONV 363/02, 22 October 2002.

²⁷ These would also include certain matters which are currently the subject of *sui generis* decisions. It is desired to reserve the name 'decision' for non-legislative acts.

²⁸ As regards the 'joint actions, common positions and common strategies' which are adopted in the context of Title V of the EU Treaty, the working group proposes that their specific characteristics be retained, but that they be renamed 'CFSP decisions'.

²⁹ Final report of Working Group VI on Economic Governance, CONV 357/02, 21 October 2002. The views of the members of the working group are somewhat divided on the subject of whether or not the existing system of broad economic policy guidelines should be continued.

³⁰ See the preliminary draft of the Constitutional Treaty, CONV 369/02, 28 October 2002.

institutional questions. More specifically, it recommends that the institutions should sit in public when they are exercising legislative functions, in other words when they are determining fundamental policy choices.

Finally, the working group on the principle of subsidiarity refers to the need for strict observance and application of the principle by the institutions participating in the legislative process.³¹ On the assumption that the principle of subsidiarity would be applied all the better the earlier it is taken into account in the legislative process, this working group stresses the importance of consultation; the Commission should consult as soon as possible all the players (particularly the Member States, economic operators, local and regional authorities and the social partners) who may be affected directly or indirectly by the legislative act being planned or drafted. In addition, each legislative proposal should contain a subsidiarity sheet setting out the financial consequences of the proposal and, in the case of a directive, its implications for the rules to be put in place by the Member State. This working group also refers to the necessity of simplifying legislative acts and clarifying their effects in order to promote the application and monitoring of the principle of subsidiarity (i.e. which acts should be implemented by the EU and which acts by the Member States).

The European Commission

In implementing the Declaration of the Laeken European Council and its own White Paper on European Governance, the Commission has already in fact addressed a number of the issues identified above by the various working groups of the European Convention. For example, in mid-2002 the Commission adopted an action plan for simplifying and improving the regulatory environment, which is intended as the basis for a future institutional agreement.³² In this action plan, the Commission proposes measures relating to the activities of the various institutions involved in the legislative process and also of the Member States in so far as the transposition and application of Community legislation is concerned.

In order to enhance the quality of its legislative proposals, the Commission refers in particular to the need to improve the consultative process. For this purpose, it has established minimum standards and principles in a recent communication, in which it emphasises the need for better participation and a greater contribution of interested parties and civil society in the consultation process, increasing transparency and ensuring that all the Commission's departments adopt a consistent approach to the consultation process. The communica-

tion contains clearer guidelines for cases in which a consultation procedure must be started, the deadlines that apply, the representativeness of the players consulted, and mechanisms for feedback, evaluation and assessment.³³ It is, however, questionable whether the form in which these minimum standards and principles are cast is adequate; the Commission itself expressly states in the communication that the principles and minimum standards are not legally binding and that an 'over-legalistic approach' should be avoided.

In a communication adopted at the same time as the action plan,³⁴ the Commission states that it intends to draw up an integrated and proportionate instrument for assessment of the impact of legislative and policy initiatives. This communication provides a format for a preliminary assessment statement and a format for an extended impact assessment. Among the points that should be dealt with at some length in such an assessment are identification of the issue which the proposal is intended to address, the objective of the proposal, the main policy options available to achieve the objective, the impacts (positive and negative) expected from the different options identified, the consultations which have taken place or are yet to take place, and evaluation of the proposal after implementation. This impact assessment and its results should be included from the start of 2003 in the explanatory memorandum that accompanies legislative proposals. The explanatory memorandum will also be expanded to include an account of the consultation process, the choice of instrument and the financial implications of the proposal.

The Commission therefore intends to monitor the adoption and application of Community legislation more strictly, in particular by making more intensive use of its right to withdraw legislative proposals and by formulating priorities for tackling possible breaches of Community law (e.g. recurrent problems associated

³¹ See Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 23 September 2002.

³² Communication from the Commission of 5 June 2002, Action Plan 'Simplifying and improving the regulatory environment' (COM(2002) 278 def.).

³³ Communication from the Commission of 11 December 2002, 'Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 def. For the proposal for this communication, see COM(2002) 277 def.

³⁴ Communication from the Commission of 5 June 2002 on impact assessment (COM(2002) 276 def.).

with the transposition of a particular legislative instrument in a Member State). For this purpose the Commission has adopted a communication concerning improvement of the monitoring of the application of Community law.³⁵ In this communication, the Commission emphasises the need to prevent breaches by strengthening cooperation with the Member States and by supervising and facilitating the transposition of directives. To this end, the transparency and knowledge of Community law should be improved, cooperation should be intensified before the transposition term has expired, and the transposition measures should be communicated better. In so far as breaches still occur, the Commission proposes measures for making effective use of the available instruments, depending on the seriousness of the breaches, and for preventing recurrence of breaches.

The action plan calls on the European Parliament and the Council to make more appropriate use of legislative instruments, to simplify and reduce Community legislation and to ensure the quality of legislation which has been adopted. More specifically, the Commission proposes that directives be general in nature and limited to the essential aspects, and that the technicalities and details be regulated in executive measures. Scope should be expressly created in the procedures for thorough analysis of amendments. The Commission is therefore in favour of making greater use of alternatives to legislation, in particular co-regulation, but also self-regulation, open coordination, voluntary sectoral agreements, financial interventions and information campaigns.

The Commission also believes that consultations and impact assessments should take place in the Member States in respect of the supplementary national provisions introduced at the time of implementation. The Member States must also arrange for internal procedures which ensure that the central, regional and local authorities concerned with the implementation and application of Community legislation are involved in the legislative process at the earliest possible stage.

As regards the organisational aspects, the Commission proposes the establishment of an internal network for better lawmaking. The aim would be to ensure the greater coherence of the Commission's legislative proposals and coordinate the activities of the existing networks and working groups. In addition, an inter-institutional network should be established to function as a permanent mechanism for implementation of the action plan and for monitoring the quality of European legislation. Moreover, the Commission advocates the creation of a network between the institutions and the

Member States in order to improve coordination and the exchange of information between the Commission and the national authorities; this would allow more effective monitoring of the transposition of legislation, ensure ongoing evaluation of the application of directives and regulations in practice, improve feedback from the Member States and exchange information on good practice. There is also a proposal to appoint 'transposition and application correspondents'.

Questions:

To what extent can the above proposals 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?

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?

To what extent and on what terms could a strengthened consultation process help to improve implementation and application of Community legislation in the national legal order?

3.2 The application and interpretation of European legislation

The specific nature of the European constitutional system gives rise to various problems involving the application and interpretation of European legislation. These problems are connected with the lack of autonomy of national courts in interpreting provisions of Community law (3.2.1), the Community methods of interpretation (3.2.2) and the rules governing the languages used in the Community (3.2.3).

3.2.1 Lack of autonomy of national courts

Since the European Union has its own supranational legal order, the judicial body that has ultimate jurisdiction to decide on questions concerning the validity and interpretation of rules of Community law is the Court

³⁵ Communication de la Commission sur l'amélioration du contrôle de l'application du droit communautaire, COM(2002)725 final/2, 13 December 2002. See also the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM(2002)141 final, 20 March 2002, which contains procedural rules for the transmission of a complaint to the Commission about infringements of Community law.

of Justice of the European Communities (EC Court of Justice) and not the national courts. The system of preliminary rulings, as contained in Article 234 of the EC Treaty, is the hub of the system.

Under this provision, the autonomy of the national courts in relation to questions involving interpretation of Community law is limited to determining whether or not it is necessary to refer questions for preliminary rulings before giving judgment. This means that preliminary rulings given by the EC Court of Justice on questions referred to it are deemed decisive for the outcome of the case in question. If the supreme national court or a court against whose decision there is no judicial remedy under national law considers that there is indeed a question of interpretation, it is obliged under the CILFIT judgment³⁶ to refer the question to the Court of Justice for a preliminary ruling. The only circumstances in which this obligation does not apply is if the Court of Justice has already ruled on the point in question in a similar case or other case law of the Court of Justice is already available (*acte éclairé*), or if there can be no reasonable doubt about how the question should be answered (*acte clair*). Account should be taken in this connection of the special characteristics of Community law (such as the different authentic language versions) and the interpretation difficulties.

According to established case law, the obligation to refer a matter to the Court of Justice under Article 234 of the EC Treaty must be seen in the context of cooperation between the national judicial authorities (in their capacity of *juge communautaire*, charged with the application of Community law) and the EC Court of Justice, in order to ensure the correct application and uniform interpretation of Community law in all Member States.³⁷ This obligation is specifically intended to prevent a situation in which national case law develops in a Member State in a way which is not in keeping with the rules of Community law.³⁸ The problems connected with the application of the preliminary rulings procedure will be dealt with under point 7 below, where various suggestions will be made for possible adjustments and alternatives.

3.2.2 Community methods of interpretation

Under the case law of the EC Court of Justice, the general rule on the interpretation of Community law is that a provision of Community law which does not make express provision for its meaning and scope to be determined by reference to the law of the Member States must be interpreted autonomously and in a uniform manner throughout the Community. For this purpose, account must be taken of the context of the

provision and the object of the rule concerned.³⁹ The aim is to ensure the uniform application of Community law and observance of the principle of equal treatment.

The usual methods of interpretation, in particular the method of grammatical interpretation, also play an important role in the case law of the EC Court of Justice. If a provision is clear, there is no need to search further unless that interpretation would produce an absurd result.⁴⁰ However, the importance of the usual methods of interpretation is limited by the fact that different language versions of texts are all equally authentic and by the special context of Community law.

According to the case law of the EC Court of Justice, the interpretation of a provision of Community law requires a comparison of the different language versions, since they are equally authentic.⁴¹ It follows that an interpretation cannot be based on a single language version as a matter of course. An extra complication is the question of what language versions should actually be compared in a given case: the versions in languages which were the official languages at the moment when the legislative instrument in question was adopted, the versions in languages which were authentic at the time of the facts of the case, or the versions in languages which are authentic at the moment when judgment is given. The Court of Justice does not yet appear to have adopted a clear position on this point.⁴²

Given the necessity of uniform interpretation of the different language versions, the relevant provision must,

³⁶ Case 283/81, *Cilfit*, European Court Reports 1982, p. 3415.

³⁷ See, *inter alia*, the following cases: *Cilfit et al.*, 283/81, European Court Reports 1982, p. 3415 and C-337/95, *Parfums Christian Dior*, European Court Reports 1997, p. I-6013.

³⁸ See, *inter alia*, cases 107/76, *Hoffmann-La Roche*, European Court Reports 1977, p. 957, and 35/82 and 36/82, *Morson and Jhanjan*, European Court Reports 1982, p. 3723.

³⁹ See, *inter alia*, cases 327/82, *Ekro*, European Court Reports 1984, p. 107 and C-278/98, *Linster*, European Court Reports 2000, p. I-6917, point 43)

⁴⁰ See, for example, case 64/81, *Corman v Hauptzollamt Gronau*, European Court Reports 1982, p. 13.

⁴¹ For a survey of the relevant case law, see Schermers / Waelbroeck, *Judicial protection in the European Union*, Kluwer, 6th ed. 2001, p. 12.

⁴² For the identification of these three views in relation to the Sixth VAT Directive, see J.J.P. Swinkels, *De belastingplichtige en de Europese BTW (The taxpayer and European VAT)*, 2001, p. 78.

in the event of differences between the versions, be interpreted in accordance with the purpose and general scheme of the rules of which it forms part.⁴³

This teleological interpretation plays an important role in practice. Even if the language versions are in complete agreement, account should be taken of the fact that Community law has its own terminology. Moreover, the legal concepts in Community law do not necessarily have the same meaning as in the different national legal systems.⁴⁴ Each provision of Community law must be viewed in context and interpreted in the light of this law as a whole, its objectives and its state of development at the time when the relevant provision has to be applied.

The problem which the multiplicity of languages creates for the correct and uniform interpretation of Community law may be illustrated by reference to Council Directive 93/13/EEC on unfair terms in consumer contracts and the interpretation of the term 'goods' which is used in Article 4 (1) of the Directive.⁴⁵ According to this provision, 'the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded, and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'. A question which arises in this connection is whether 'goods' within the meaning of this provision also includes land. As far as the Dutch version is concerned, the term *goederen* would have the same (limited) meaning under the old Dutch Civil Code as 'goods' in the English version and would not therefore extend to land. Under the new Dutch Civil Code, however, land could come within the scope of this term. The references in the German text to *Waren* and in the Danish text to *varer* have the same meaning as the English term 'goods'. By contrast, the French term *biens*, the Italian term *beni* and probably also the Spanish term *bienes* have a wider meaning and include land. This means that it could be concluded on the basis of the English, German and Danish texts that land does not come within the scope of the Directive (and the implementing legislation) whereas this probably would be the case on the basis of the French, Italian and Spanish versions.

Examples can also be given in relation to tax law. The first example is the exemption granted for the provision of medical care under Article 13A (1) (c) of the Sixth VAT Directive. In the English and Italian versions of this Directive there is no reference to the fact that the medical care is for human beings. The impression could therefore be given that the exemption for medical care as contained in this provision also applies to medical

care for animals and, consequently, to veterinary surgeons. It is evident, however, from other language versions that the provision is expressly intended to cover only the care of human beings.⁴⁶

Another example is the interpretation of Article 4 (1) (a) of Council Directive 77/799/EEC concerning mutual assistance by the authorities of the Member States in the field of direct taxation. Under this provision, the competent authority of a Member State is required to afford information of which it has knowledge to the competent authority of any other Member States concerned if it has grounds for supposing that there may be 'an abnormal exemption or reduction of tax' in the other Member State. In the case of *W.N. v. the Dutch State Secretary for Finance*, the Dutch Council of State referred the question of how the word 'abnormal' in this provision should be interpreted. The Court of Justice pointed out that the Danish, Spanish, French, Dutch, Finnish and Portuguese versions refer to an abnormal exemption or reduction of tax, whereas the Greek, Swedish, English and German versions refer instead to a loss of tax (by using the terms [...] *förlust av skatt*, loss of tax and *Steuerverkürzung* respectively). The Court of Justice concluded that the provision should be interpreted in the sense of 'an unjustified saving in tax in another Member State'.⁴⁷

The combination of the obligation to refer and the specific rules governing the interpretation of Community law mean that the national courts must be very cautious when interpreting Community legislation. Provisions of Community law may not be as clear as they perhaps appear when viewed from the national context. At the same time, strict application of the CILFIT criteria could result in the referral of a large number of questions for preliminary rulings; after all, doubt is possible in almost all cases. The differences between the Community and national systems and terminology of legislation and how

⁴³ See, *inter alia*, cases C-449/93, *Rockfon*, European Court Reports 1995, p. I-4291, and C-72/95, *Kraaijeveld*, European Court Reports 1996, p. I-5403.

⁴⁴ Case 283/81, *Cilfit*, European Court Reports 1982, p. 3415; *Schermers/Waelbroeck*, *op.cit.* p. 20.

⁴⁵ This example is taken from T. Hartley, "The Uncertainty Problem in Community Law", in: *Constitutional Problems of the European Union*, 1999, pp. 68-71.

⁴⁶ Case 122/87, *Commission v. Italy*, European Court Reports 1988, p. 2685, finding 9. This example is taken from J.J.P. Swinkels, *op.cit.*, p. 83.

⁴⁷ Case C-420/98, *W.N. v. State Secretary for Finance*, European Court Reports 2000, p. 2847, findings 20-22.

these are dealt with in relation to implementation (by the legislator) and application (by the national courts) are dealt with below at 5.1 and 6.1 respectively.

3.2.3 *The language regime*

Originally, Community law had four official languages, namely French, German, Italian and Dutch. The number is now 11. After enlargement there will be more than 20 official languages within the foreseeable future if no measures are taken. The present system will therefore become increasingly unwieldy and costly.⁴⁸

A distinction must be made in relation to the language regime between the drafting of legislation, correspondence with citizens, and the use of languages within the institutions (in particular the Council, the Commission and the Court of Justice).

The official language rules based on Article 290 of the EC Treaty and Council Regulation No. 1 apply to legislation.⁴⁹ The basic principle is that the various official languages are of equal status. This is strictly observed in respect of all documents published in the Official Journal. It follows that legislation of general application is always published in all languages. Decisions are, in brief, issued in the language of the person for whom they are intended.

The same rule formally applies within the institutions, but in practice certain working languages have come to be used. This also applies to some discussions in which third parties are involved, although this depends on the circumstances. English and French tend to dominate in this connection.

From a historical perspective and in view of the fact that Article 290 of the EC Treaty requires unanimous voting in the Council for determination (or amendment) of the rules governing the languages of the institutions, there is a logical explanation of why all (or, rather, almost all) official languages of the Member States have been maintained as official languages of the Community. In view of the forthcoming enlargement, however, such an approach can be sustained only by dint of a disproportionate effort. Although retaining all languages as official languages might perhaps ensure greater clarity in the national context, the risks of divergence between the language versions and the inability to check this would increase.

The problem could be alleviated to some extent simply by reducing the number of working languages used for the written documents and discussions in the decision-making process on European legislation within the

Commission, Council and European Parliament. This is already done informally on a regular basis, but a permanent measure of this kind would substantially reduce the burden on the translation services. A limitation on the number of languages used for official documents, as introduced in the European Patent Office (EPO), would also simplify practice. The official languages of the EPO are now English, French and German.

Reduction of the number of official languages in which European legislation is drawn up would be a more far-reaching step. Such a limitation would simplify the position but also produce legal complications. For example, cases have occasionally occurred in the Netherlands in which criminal liability provisions that refer to international instruments which have not been officially translated into Dutch could not be applied by the Dutch courts. This precedent does not seem to apply to criminal liability provisions relating to failure to comply with Community measures that refer to such - untranslated - instruments. It should be noted that international instruments published in the Dutch Treaty Series are usually translated into Dutch. Possible problems of this kind could be avoided in the Community by providing in European rules that the fact that a provision is not available in the official language of a Member State does not detract from its validity or mean that proceedings cannot be brought for its infringement.

Comparison with international law shows that the language regime under most treaties and of most international organisations is much more limited than that of the European Union. For example, the General Assembly of the United Nations has six official languages (Arabic, Chinese, English, French, Russian and Spanish). This is also customary in the case of UN treaties. In the Council of Europe authentic treaty texts are drawn up only in English and French. Translations into a country's own official language are often (but by no means always) made by the national authority concerned, but have no binding legal force. In many cases the decisions of international organisations are not translated by the national authorities. Situations therefore regularly occur in which treaties or decisions of international organisations which have not been translated into the official national

⁴⁸ The extent of the problem is evident from the fact that, according to Barents/Brinkhorst, *Grondlijnen van Europees Recht* (Outline of European Law) 2001, p. 115, the services of the Commission already translate one and a half million pages a year.

⁴⁹ Regulation No. 1/58 determining the languages to be used by the European Economic Community (OJ EC p. 358).

language or languages are applicable. This is also true of the judgments of the courts of international organisations, even in cases where private individuals have a right of appeal. For example, judgments of the European Court of Human Rights are drawn up in English and French.

It is therefore normal for international rules that have been drawn up in a language other than a country's own language to have effect in its national legal order. The obvious question is to what extent European legislation not available in the official national language would be legally binding. Since it is not unusual for international rules that have not been drawn up in the national language to have effect in the national legal order, this would also seem legally acceptable for Community rules. The same applies in relation to proceedings before the courts. However, the question arises of whether it is possible to identify special characteristics of Community law that could lead to a different conclusion. Examples are not only the supranational character of the EC and the direct effect of both treaty provisions and secondary legislation but also the importance of the uniform application of Community law and the sheer volume of Community legislation.

Questions:

How are international rules which have not been drawn up in the official language or languages of the Member State dealt with in legal practice?

How are the different language versions of European legislation dealt with in practice?

What would be the consequences (particularly legal consequences) of reducing the number of official languages for European legislation? Does European legislation differ in this respect from international legislation?

4. National mechanisms devised to improve the quality of European legislation

4.1 Ex ante evaluation: problems encountered

Since the implementation and application of European legislation takes place largely at national level, a purely Community approach to improving the quality of European legislation, as discussed at 3.1.3 and 3.1.4 above, would not be sufficient. Measures should also be taken at national level to deal with possible flaws in Community legislation. Not only would the implementation and application of Community legislation in the Member States therefore benefit from a strengthened process of prior consultation and assessment of the impact of legislative proposals by the Commission, but

ex ante evaluation in the national context would also be of great help in properly assessing the impact and transposition of European legislation in the national legal order.

National governments can naturally play an important role in the context of the Council since they have knowledge of the implementation aspects and are also better placed than the European institutions to mobilise such knowledge within the Member State concerned. This is because they are close to the national implementing authorities, organisations and so forth (and also the national parliaments). Moreover, they can make use of the existing national structures for the drafting and scrutiny of national legislation. However, the European constitutional system as such poses a number of problems in this connection. These have already been partially identified at 3.1.2 and 3.1.3 above.

First of all, the negotiating process within the Council can accelerate to such an extent that there is no further opportunity for ex ante evaluation by those concerned. Second, there is only very limited information about amendments made in the Council, since the decision-making is for the most part not public. These amendments are often of great importance to a proper assessment of the texts. Ex ante evaluation is therefore bound to be of a limited nature. Third, it is the substantive, policy and political aspects that take precedence in the Council. The more technical aspects connected with the quality of legislation (suitability for implementation, readability, transitional provisions, etc) quite often come off second best in this process. What may also happen is that technical obstacles are seen as hindering the decision-making process and therefore excluded from the discussion.

In addition, however, problems also occur at national level, since the procedures and activities of government ministries are still not properly geared to the European legislative process; the European perspective is still not a sufficiently integral part of the mindset and procedures of national civil servants and of the organisational structure as such. This is also one of the findings of the Legislation Review Committee, established in the Netherlands in 1998 to study the preparation of legislation by the government ministries,⁵⁰ which also

⁵⁰ This committee was established in response to the 'Securitel affair', which occurred in the Netherlands as a consequence of the judgment of the Court of Justice in case C-194/94 CIA Security International SA v. Signalson SA and Securitel SPRL, European Court Reports 1996, p. I-2230.

examined the European aspects of the Dutch legislative process.⁵¹

First of all, it should be noted that, as seen above at 3.1.1, various safeguards designed to ensure the quality of legislation are incorporated into the national legislative processes. Although the safeguards differ from country to country, the common factor is that all Member States make some provision for this.⁵² However, the safeguards often do not apply to the preparation of the contribution made by the national government to decisions on draft European legislation.

As a corollary, the process by which European legislation is negotiated is quite often too remote from the later implementation process. More specifically, there is still insufficient contact and coordination between the negotiators and the legal drafters, in any event in the Netherlands. Although the civil service structures in the Member States all make provision to some extent for working groups, committees, secretariats or other bodies that act as an interface between the European and the national legislative process,⁵³ it is questionable whether they function completely satisfactorily and are sufficient for the proper transposition of the European component into the national legislative process. Although the Review Committee referred to above indicated that the New Commission Proposals Evaluation Working Group, the Coordination Committee for

European Integration and Association Problems and the Interdepartmental Committee on European Law were useful bodies in themselves, it also found that the average civil servant in the various ministries had a substandard knowledge of European law and thus naturally had difficulty in gauging the implications of the legislative process for European law.

Another important point is how provision is made at national level for interested parties to make known their positions and for account to be taken of these positions in the decision-making process. The question as regards the role of national parliaments is how they can actually influence the position taken by their government in the Council. This differs quite markedly from country to country,⁵⁴ as does the involvement and interest of national MPs in European legislative developments as such.

The parliaments of the Scandinavian Member States, for example, appear to play a greater role since they have special committees that function as advisers to the government on European affairs. The Finnish government is obliged to inform parliament about every important EU topic and must immediately supply it with legislative proposals of the Commission and other EU proposals which affect parliamentary powers. Various committees then assess whether parliament agrees, in political terms, with the negotiating stance the government intends to take.⁵⁵ In the Netherlands, the Dutch

⁵¹ *Regels en risico's (Rules and risks)*, report of the Legislation Review Committee, January 2000. For a detailed discussion of the findings of the committee in respect of European law, see the theme issue of *RegelMaat on the European aspects of the Dutch legislative process*, vol. 2001/4, pp. 2-43.

⁵² See also the following articles in the theme issue in *RegelMaat on legislative policy in the countries of the EU*, vol. 2000/5: U. Karpen, "Reduzierung der Normenflut und Verbesserung der Gesetzgebung in der Bundesrepublik Deutschland", pp. 197-203; R. Pagano, "The Italian approach of rationalising the regulatory system", pp. 204-209; J. A. Sweeney/H. van Schooten, "The Quality of Legislation in England and Wales: A Comparison with the Netherlands", pp. 210-224; M. Adams/P. Popelier, "Van hoop naar verwachting: het wetgevingsbeleid in België" (From hope to expectation: legislative policy in Belgium) pp. 225-236; W. Konijnenbelt, "Wetgevingskwaliteit in Frankrijk: codificatie en hercodificatie" (Legislative quality in France: codification and recodification) pp. 237-243.

⁵³ As regards Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, see: S.A. Pappas (ed), *National Administrative Procedures for the Preparation and*

Implementation of Community Decisions, EIPA. 1995.

⁵⁴ For a more general discussion of this subject, see P. Norton, "National parliaments and the European Union: where to from here?", in: P. Craig en C. Harlow, *Lawmaking in the European Union*, 1998, p. 209. As regards individual Member States, see the articles listed in the previous footnote.

⁵⁵ In this respect, see N. Jääskinen, "The application of Community law in Finland: 1995-1998", 36 *CMLRev.* 36, 1999, p. 407, at pp. 414-416. As regards Denmark, see M. Jarvad, "The Committee of European Affairs of the Danish Parliament (the Folketing): How to maintain some parliamentary control of the legislative power of the Combined Executives in the Council of Ministers", in P. Craig and C. Harlow, *Lawmaking in the European Union*, 1998, p. 223. As regards Sweden, see U. Bernitz, "Sweden and the European Union: on Sweden's implementation and application of European law", *CMLRev.* 38, 2001, p. 903, at p. 915. As regards Austria, see H. Schäffer, "The Participation of Parliament (National Council and Diets) in the Formation of the European Law Rules - the Austrian case", in: U. Karpen en E. Wenz, *National Legislation in the European Framework*, 1998, p. 368.

government prepares a microfiche for every Commission proposal. This microfiche contains a summary of the proposal, an assessment of its consequences and a preliminary position. In this way, parliament is given the opportunity to debate the proposals with the government.

4.2 Ex ante evaluation: new initiatives?

Measures have been taken in various Member States to address these problems and to involve other players in the decision-making process from the outset. For example, the French Conseil d'État advises to a limited extent on Commission proposals.⁵⁶ In the United Kingdom the government consults the House of Lords Select Committee on the European Communities about proposed EU legislation. In the Netherlands a trial was carried out on a very limited scale in 2001 in which the Council of State advised on certain Commission proposals at the request of the government.⁵⁷ In these cases, the Council of State gave its opinion on the basis of the proposed legislation and its (potential) practical consequences in the Netherlands. The requests for an opinion were accompanied by a number of specific questions, so that the opinion could focus on the points that had given rise to problems when the Dutch position in the negotiations was formulated.

Such an opinion should be provided within a very short space of time so that the involvement of the Council of State or any other advisory body does not delay the decision-making. The provision of advice in this way can help to identify in good time legal issues that require discussion and the consequences of a Commission proposal and also help the negotiators to formulate a position. However, the significance of such advice is limited in view of the large number of proposals submitted annually: without far-reaching organisational changes it would be impossible to advise on all proposals (nor is there any evidence that this is actually necessary). However, the significance of this form of advice is limited in terms of its content too: although the angle is indeed European, the advice focuses in particular on the impact in the country concerned. If such opinions were to be given in all Member States, this could shed light on possible problems that can be expected in these countries in the case of implementation and application, but this would still not amount to a framework for evaluating the legislation as such. As European legislation must be applied in all Member States and must also comply with the requirements of each Member State, it is inevitable - as indicated previously - that problems concerning the relationship with national law will arise if national practice fails to adjust sufficiently.⁵⁸ In this

sense, this manner of providing advice is therefore nationally oriented.

In order to promote the involvement of national parliaments in European decision-making, the European Convention's working group on subsidiarity recently proposed the inclusion of an ex ante monitoring mechanism in the Constitutional Treaty. In particular, it recommended that the Treaty should contain special procedures for an early warning system: the Commission would address its legislative proposals directly and simultaneously to each national parliament and to the Community legislator and all national parliaments should be able to issue an opinion within six weeks. The opinion should relate exclusively to the question of compliance with the principle of subsidiarity (and not to the substance of the proposal in question), and could be of a general nature or concern only one particular provision of the proposal in question. The idea is that this early warning system would enable the Community legislator to take greater account of any objections on the part of national parliaments.

⁵⁵ In this respect, see N. Jääskinen, "The application of Community law in Finland: 1995-1998", 36 CMLRev. 36, 1999, p. 407, at pp. 414-416. As regards Denmark, see M. Jarvad, "The Committee of European Affairs of the Danish Parliament (the Folketing): How to maintain some parliamentary control of the legislative power of the Combined Executives in the Council of Ministers", in P. Craig and C. Harlow, *Lawmaking in the European Union*, 1998, p. 223. As regards Sweden, see U. Bernitz, "Sweden and the European Union: on Sweden's implementation and application of European law", CMLRev. 38, 2001, p. 903, at p. 915. As regards Austria, see H. Schäffer, "The Participation of Parliament (National Council and Diets) in the Formation of the European Law Rules - the Austrian case", in: U. Karpen en E. Wenz, *National Legislation in the European Framework*, 1998, p. 368.

⁵⁶ On this subject, see N. Questiaux, "Implementing EC law in France: the role of the French Conseil d'État", in: Craig and Harlow, *Lawmaking in the European Union*, 1998, p. 479.

⁵⁷ See also H.M.B. Breunese, "De Raad van State en het EG-recht" (The Council of State and EC law) *RegelMaat* 2001/1, p. 32.

⁵⁸ See also M. Van Damme, "Naar een Europese Raad van State?" (Towards a European Council of State?), *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2001/8, p. 519.

Questions

What mechanisms (the provision of advice by the Council of State, special (ministerial) committees or other bodies) have been developed in the Member States for the purpose of ensuring that views and positions held in the Member State are heard in the European decision-making process on draft legislation?

To what extent could greater involvement of the national parliaments help to improve the implementation and application of Community legislation? What contribution can the proposed early warning system make in this connection?

5. Problems relating to the implementation of European legislation by national parliaments

As already explained above, an important characteristic of Community law is that it is implemented and applied to a large extent in a national context. Moreover, national statutory measures are also often necessary to give effect to European legislation. This applies not only to directives but also to regulations. The question then arises of what steps should be taken in practice to deal with the differences in systems and terminology between the relevant European legislation and the national legislative system into which the European legislation must be transposed by the national legislator (point 5) and applied by the national courts (point 6). Another question is how vague or unclear terminology in European legislation should be approached. The following section will focus on directives, although the same problem also occurs in connection with regulations and framework decisions.

5.1 Dealing with the system and terminology of EU legislation

A basic requirement of directives is that they must be transposed into national law by statute or subordinate legislation.⁵⁹ Article 249 of the EC Treaty provides in this connection that directives are binding as to the result to be achieved, but leaves the choice of form and methods to the national authorities. It is evident from the case law of the EC Court of Justice that the freedom to choose the form and methods is not unlimited. For the sake of legal certainty, the national rules that serve in part to implement a directive must, in principle, be of a peremptory nature and suitable for completely achieving the useful effect of the directive.⁶⁰

This raises the question of how these obligations affect the system and terminology of the implementing legislation. It should be noted at the outset that directives generally regulate aspects which are already covered in

some way by a national rule and that it is therefore always fairly likely that a directive and the existing national legislation will diverge in terms of system and terminology. It follows that the national legislation will often have to be adapted in some way.

An example is provided by Dutch environmental legislation. This has a clear system based not only on clear delimitation, coherence and links between the various statutes but also on a structured process that runs from policy to legislation via problem analysis, choice of instruments, implementation, enforcement and evaluation. Needless to say, the introduction of an EC directive which cuts across this system and often necessitates legislation can cause many problems and delay the implementation process. Although the object of the directive concerned (transparency in the environmental field) was not at issue and the implementation legislation as such posed no problems, the directive did tend to undermine the system created by the Government Information (Public Access) Act. Insufficient communication in advance between the negotiators and the legislative draftsmen delayed implementation by five years. When the directive was subsequently amended, communications were better and fewer implementation problems were expected.⁶¹

When national legislation is amended in this way, the Dutch Council of State takes the position that it is advisable to follow the system and terminology of the directive wherever possible in order to minimise friction between the national legislation and the directive.

⁵⁹ As regards the implementation of directives in the various Member States, see, inter alia, U. Karpen and E. Wenz (eds.), *National Legislation in the European Framework*, Proceedings of the Second Congress of the European Association of Legislation (EAL) in Rome, March 24-29, 1995, Nomos, Baden-Baden, 1998. See, in particular, the articles it contains by: M. Rabelo de Sousa, "The Transposition of Community Directives into Portuguese Law", p. 70; T. Bates, "The Implementation of European Union Directives in National Law: a United Kingdom Perspective", p. 84; V. Guizzi, "The Implementation of Community Directives in Italy", p. 244.

⁶⁰ For a survey see Kapteyn/VerLoren van Themaat, *Introduction to the Law of the European Communities*, 1998, pp. 326-331, and Wyatt/Dashwood, *European Union Law*, 2000, pp. 89-92.

⁶¹ This example is taken from J.M. van der Voet, *Haagse juristen in Europese zaken. Vorderingen van een ministerie in de inbedding van het Europese recht in de organisatie (Hague lawyers in European cases)*.

As a result, the Council of State quite often clashes with the government, which prefers to emphasise the freedom to choose the form and methods as long as the intended result is achieved. This approach is largely dictated by a wish not to jettison unnecessarily practices that have often been in place for many years.

This problem is particularly apparent in cases where it is necessary to implement vague terms in directives. The drawback of transposing such vague terms literally into national implementing legislation is that their meaning and scope can then be determined only over a relatively long period. This is all the more frustrating if it has been necessary to set aside an existing term with a settled meaning. It is therefore understandable if preference is given to a method of implementation that seeks to maintain the existing national practice as far as possible. Nonetheless, such a method entails the risk that a term used in the directive may be given a different meaning in the course of implementation and that full implementation will therefore not occur.

This can be illustrated by the way in which the different Member States have dealt with the implementation of the public procurement directives. Arrowsmith mentions, for example, that Ireland, Denmark and the Netherlands in particular have chosen to implement these directives 'by reference'. In other words, the national legislation merely provides that the entities covered by the directives must comply with the obligations laid down in the directives. Other Member States such as the United Kingdom have chosen to transpose some of the terms of the directives into national legislation and to record other terms in their own words, whether or not as an integral part of existing public procurement legislation. As regards the aspects of the directives which give rise to the most uncertainty, the majority of Member States have, according to her, decided simply to adopt the wording of the directives. In cases where this has not been done, the question therefore arises of whether the national legislation is in accordance with the directive.

Arrowsmith refers in this connection to the rules adopted in the UK for determining the threshold for the application of the procurement directives to individual contracts. Generally speaking, entities should add up purchases of similar products or services in order to ascertain whether the thresholds have been reached, even if the purchases are made under separate contracts. By contrast, the British regulations on discrete operational units specify that the purchases should be totalled on a unit-by-unit basis rather than by reference to the buying entity as a whole. In its Policy Guidelines on Contracts Awarded by Separate Units of a

Contracting Entity under Directive 90/531/EEC, the Commission indicated that consolidation at the level of discrete units is acceptable, but it is debatable whether the EC Court of Justice would take the same view since the directives do not provide any clear ruling on this.⁶²

Environmental and wildlife protection law provides an example of the risk which Member States run if they choose to use their own national concepts in the implementing legislation rather than transpose the concepts used in the European legislation itself.⁶³ The Court of Justice held in the case of the Commission v. Germany⁶⁴ that since the concept of 'deliberate' breach in Article 5 of Council Directive 79/409/EEC on the conservation of wild birds had been translated in the German text in such a way as to allow for an exception where the acts take place in the course of 'the normal use of the land', this did not constitute a correct interpretation of the Directive.⁶⁵ It therefore held that there had been derogations from the requirements laid down by Article 9 of the Directive.

A comparable problem arises where a given interpretation is used to elaborate vague terms or generally formulated provisions in the implementing legislation. Although a vague term or a provision of this kind must be clarified in practice in the national situation, only the EC Court of Justice is empowered - in retrospect - to give an authentic interpretation. A method of dealing with this is to assess whether the government has taken an 'arguable position' in interpreting concepts from the directive. This can be determined by reference to the case law of the EC Court of Justice and, in particular, by reference to the methods of interpretation used by the Court of Justice. A similar problem involving the interpretation of provisions of European law occurs in national jurisdiction, although the courts always have the fall-back of requesting a preliminary ruling.

An illustration of the above can be found in the uncertainty that exists in France about the scope which the Directive on the conservation of wild birds (70/409/EEC) referred to above actually leaves for moving the dates

⁶² S. Arrowsmith, "Legal techniques for implementing Directives: A case study of public procurement" in: P. Craig and C. Harlow, *Lawmaking in the European Union*, 1998, p. 498 ff.

⁶³ This example is taken from J.J. Jans, *European Environmental Law*, 2000, pp. 152-155.

⁶⁴ Case 412/85, *Commission v. Germany*, European Court reports 1987, p. 3503.

⁶⁵ In this regard, see Jans, *op. cit.*, p. 153.

for the opening and closing of the shooting season.⁶⁶ Draft legislation attempting to alter the period of the shooting season, which runs from 1 September to 31 January, was defeated in 1994 and 1998. A new Act of Parliament on hunting and shooting of 26 July 2000 appeared to end the stream of litigation on this point, since Section 24 of the Act simply adopted the text of the Directive both as regards the duration of the shooting season for wild birds and the exceptions to the prohibition on shooting outside the season. However, the debate about whether French law is compatible with Community law has now shifted to the implementing decree, which was adopted on 1 August 2000 and provides for the shooting of certain birds both before and after the prescribed season. The question is whether these possibilities are in accordance with the exceptions permitted on the basis of Article 9 of the Directive. The Conseil d'État has declared the decree partially void, but has at the same time left open the possibility of extending the shooting season for particular species of bird. To obtain certainty, the Conseil d'État has referred questions to the Court of Justice for a preliminary ruling, in particular whether the exceptions permitted by the Decree in respect of the closure of the shooting season are in accordance with Article 9 of the Directive.⁶⁷ The French government seems to be aware that it has not really adopted an 'arguable position' in this case since it amended the Decree on the very day that the Conseil d'État gave judgment.⁶⁸

Another problem that occurs in relation to implementation is that the development of a system of European legislation often takes place step by step. Initially, only a single aspect is regulated. In such circumstances, it is logical that the national system should not be adjusted in its entirety. However, the question concerning adjustment of the system will recur on each occasion that it is necessary to implement subsequent directives. After all, these directives will build on the system already established, although this does not necessarily mean that the system is clear. In such a situation, the friction between an as yet unadjusted national system and the Community directives will steadily increase, although the implementation of an individual directive may often be an insufficient reason to overturn the entire national system. Nor is it feasible to adapt the national system in its entirety at an early stage (when implementing one of the first directives) since it is often impossible to know how the European legislation will evolve.

The European legislation on equal treatment of men and women provides a good illustration of 'phased' legislation of this kind. As ex Article 119 of the EC Treaty relates only to equal pay for men and women, it

is hardly surprising that the first directive on this subject (75/117/EEC) relates only to pay. Over the years, however, a good many other directives have been introduced, in particular concerning equal treatment in respect of terms and conditions of employment, statutory social security, supplementary social security, pregnancy and maternity leave, part-time employment and the burden of proof and, more recently and on the basis of Article 13 of the EC Treaty, the directive establishing a general framework for equal treatment in employment and occupation (and also the race discrimination directive). These legislative developments have taken place gradually and could hardly have been foreseen at the time the equal pay directive was adopted. Although the directives do indeed build on one another in a certain sense and therefore constitute a logical progression, a phased approach of this kind also creates implementation problems, for example in the form of differing definitions of the term discrimination, the use of different systems for permitted exceptions and difficulties of delimitation between the various directives.⁶⁹ Naturally, this is an obstacle to clear and systematic implementation at national level.⁷⁰

The discussion in the Netherlands concerning the implementation of the framework directive and the racial discrimination directive has largely focused on whether these directives should be incorporated into the Equal Treatment Act or, in part, into a separate Act (as regards discrimination on the grounds of age). The Dutch Council of State has recommended that the government opt for 'unity of implementation' in the Equal Treatment Act, whereas the government considers that separate legislation is necessary not only because the nature of

⁶⁶ This example is taken from E. Saulnier, "Le Conseil d'État, la chasse et le droit communautaire", *AJDA*, July/August 2002, pp. 623-630.

⁶⁷ Conseil d'État, Assemblée, 25 January 2002, Req. n° 224850, 225596, 225693, 225769.

⁶⁸ Saulnier, *op. cit.*, p. 630.

⁶⁹ Cf., for example, the recurrent proceedings before the Court of Justice relating to the question of whether benefits under a given social security system should be treated as 'pay' within the meaning of Article 141 and Directive 86/378 or as a statutory social security benefit within the meaning of Directive 79/7. The latter directive allows many more exceptions to the principle of equal treatment.

⁷⁰ Cf. J. Goldschmidt, "De hete adem van Europa. Implementatie van nieuw gelijke behandelingsrecht in Nederland" (The hot breath of Europe on our neck. Implementation of new equal treatment law in the Netherlands), *NJB* vol. 21, 25 May 2001, p. 983.

discrimination on the grounds of age differs from that of racial discrimination, but also because legislation on this subject was being prepared even before the adoption of the framework directive and the government does not wish the legislation to be delayed on this account.⁷¹

In some cases, however, clear indications do exist for the national legislator. An example is the Sixth VAT Directive (Directive 77/388/EEC), which contains a uniform system for the levying of turnover tax. This provides a clear basis for the legislator to overhaul the national system in its entirety and bring it into line with the Sixth Directive.

Questions:

What practices exist in the various Member States for dealing with the system and terminology of European legislation in the course of implementation?

What implementation techniques are preferred?

5.2 Implementation deadlines and the consequences of failure to meet them

Although increasing efforts are being made to implement directives within the deadlines, instances of late implementation still occur. If the legislation is already late when advice is sought, there is no longer any opportunity to remedy the situation since the damage has already been done. Nonetheless, the Dutch Council of State regularly comments on the lateness of implementation and its consequences, in particular any obligation of the State to pay compensation. In this way, the Council of State draws attention to the importance of timely implementation and invites the government to examine ways of mitigating any damage.

6. Problems encountered by national courts in applying EU legislation

6.1 Dealing with the system and terminology of EU legislation

The lack of autonomy of the national courts in interpreting European legislation and their obligation to refer is dealt with above at 3.2.1. The specific difficulties of interpreting European legislation have also been discussed. This means that the courts face practical problems in applying and interpreting European legislation or national implementing legislation. Naturally, some doubt is always bound to exist about the interpretation of terms used in legislation.

The problems of interpretation are exacerbated by the fact that the various language versions that exist are equally authentic, that the terms may never be assumed to have the meaning usually accorded to them in the national context, and that there is little information about the history of the legislation which can be consulted. Strict application of the CILFIT criteria would therefore very soon compel the courts to submit questions for preliminary rulings. In addition, comparable cases would have to be stayed pending the judgment by the EC Court of Justice.

An interesting example of the different ways in which the problems of interpreting Community law can be tackled by national courts is provided by a recent German case which concerned the overlapping of two Community directives. The case also illustrates the difficult position in which national courts may find themselves when deciding whether to dispose of the case themselves or to refer questions for preliminary rulings.

The case concerned Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment and Council Directive 86/457 on medical training. Under the latter directive the right to practise as a 'general practitioner' is dependent, among other things, on completion of six months' full-time training in a general practitioner's surgery. The application of a female German doctor was refused on this ground, since although she had worked in a general practitioner's surgery for 12 months she had worked only on a part-time basis. When hearing the case on appeal, the Federal Administrative Court (Bundesverwaltungsgericht) held that the applicable directive was clear and unambiguous. In particular, it ruled that the relevant provision of Directive 86/457 was not only *lex specialis* but also *lex prior* in relation to Directive 76/207.

Moreover, even if the requirement of full-time working could be treated as indirect discrimination, this did not mean, according to the Federal Administrative Court, that the principle of equal treatment had been infringed, since the requirement could be justified. The doctor then appealed on a point of law to the Federal Constitutional Court (Bundesverfassungsgericht), which felt it necessary to refer questions for a preliminary ruling and did not therefore proceed on the basis of an 'acte clair'. The Federal Constitutional Court pointed out in respect of the obligation to refer that account should

⁷¹ Opinion of the Council of State of 31 August 2001 on the memorandum concerning the equal treatment implementation guidelines (Parliamentary Proceedings II 2001/02, 21 187, A).

be taken of the fact that the special nature of EC law is determined in part by the choice of methods of interpretation. According to the Federal Constitutional Court, the Federal Administrative Court should not have resolved the problem of the overlap between the two directives simply by applying the principles of *lex specialis* and *lex prior*, and should instead have taken account of the general principles of Community law and the interpretation principle of practical concordance.

The main point at issue in this case was in fact whether the obligation to refer resulting from Article 101 (1) of the German Basic Law had been infringed.⁷²

The Austrian *Silhouette* case, which was referred by the Austrian Supreme Court (*Oberste Gerichtshof*) to the EC Court of Justice, shows that the largely literal transposition of the terms of a Community directive into national legislation creates the danger that the term will be interpreted by the courts in accordance with usual meaning in the national context. In this case it was not clear whether the term 'exhaustion of rights' in Article 7 of the Trade Marks Directive (89/104/EEC) referred to exhaustion of rights worldwide or in Europe. In the latter case, the trademark proprietor could oppose parallel imports from outside the EU. The Austrian case law and literature on section 10 of the Austrian Trade Marks Act (*Markenschutz-Gesetz*), which implemented Article 7 of the Directive, interpreted this as worldwide exhaustion. As a result of the referral for a preliminary ruling, however, it was established that the directive refers to the exhaustion of rights in Europe.⁷³

Overuse of the possibility of referring questions to the Court of Justice for preliminary rulings can paralyse the operation of the judicial system. This problem is becoming increasingly apparent in certain areas of administrative law, such as wildlife protection law, environmental law and tax law, where many similar questions arise in different cases. However, a decision not to refer for a preliminary ruling is not an effective solution either, since it does not prevent the same point from being repeatedly raised in other cases. Moreover, such an approach is not entirely without risks.⁷⁴ In a number of fields this problem has led to a large number of references for preliminary rulings from many different Member States. An example is VAT. At the same time, this is merely the tip of the iceberg in terms of VAT case law. The interpretation of terms in the VAT directives plays an important role in many of the cases heard by the national courts.

A particular problem is posed by the terms in directives which do not refer to national law and therefore have to be further defined at Community level.⁷⁵ Recent

examples are provided by the Portuguese case of *Ministério Público and Fazenda Pública* (the Portuguese tax authority) v. *Epson Europe BV* and the Greek case of *Athinaiki Zythopoiia AE v. Elliniko Dimosio*,⁷⁶ which centred on interpretation of the term 'withholding tax' in Article 5 (1) of Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries in different Member States.

An example of a term that gives rise to problems of interpretation in the area of environmental law is 'waste' in Article 1 (a), first paragraph of Directive 75/442, as amended by Directive 91/156/EEC. This became apparent again recently in the Finnish case of *Palin Granit Oy*.⁷⁷

⁷² This example is taken from the discussion by C.D. Classen, "German Bundesverfassungsgericht: Medical training, Decision of 9 January 2001", *CMLRev.* 39, 2002, pp. 641-652. See also Annex VI, "Survey of the application of Community law by the national courts and tribunals" to the 2000 annual report of the Committee on the application of Community law in the Member States, pp. 33-36.

⁷³ Case C-355/96, *Silhouette*, European Court reports 1998, I-4799. Discussed in P. Fischer/A. Lengauer, "The adaptation of the Austrian legal system following EU membership", *CMLRev.* 37, 2000, pp. 763-795, at pp. 783-784.

⁷⁴ Further to the example concerning the French Shooting Act at 5.1 above, it has been observed in the French literature that the *Conseil d'État* will not withdraw the references, first and foremost because it wishes to obtain certainty about the interpretation of Article 9 of the Wild Birds Directive. See Saulnier, *op. cit.* p. 630

⁷⁵ See case 51/76, *VNO*, European Court reports 1977, p. 113.

⁷⁶ See case C-375/98, European Court reports 2000, p. I-4243 and case C-294/99, European Court reports 2001, p. I-6797, respectively.

⁷⁷ Case C-9/00, *Palin Granit Oy v. Vehmassalon kansanterveysyön kuntayhtymän hallitus*, judgment of 18 April 2002. See also the joined cases 206 and 207/88 *Vessoso and Zanetti*, European Court reports 1990, I-1461; case C129/96 *Inter-Environnement Wallonie ASBL v. Waals Gewest*, European Court reports 1997, p. I-7411. Cf. also J.H. Jans, *European Environmental Law*, 2000, pp. 388-389.

Questions:

What techniques have been developed or what methods are used to enable the national courts themselves to resolve problems involving the system and terminology of European legislation?

Do the courts also refer in this connection to interpretive documents of the Commission, for example the circular referred to in Article 6 of the Habitat Directive?

6.2 Implementation deadlines and the consequences of failure to meet them

Failure to meet implementation deadlines regularly poses problems in legal practice. In addition to questions of interpretation, this failure gives rise to all kinds of additional questions, for example concerning the direct effect of the directive and the possibility of interpretation in accordance with the directive. Failure to implement in time can also result in unequal treatment: the application of the Community rule may become dependent on the chance factor of whether a private individual can invoke the rule in relation to the government authorities.

Problems in connection with failure to meet implementation deadlines may be limited by means of various instruments. The most obvious is compliance with the obligation to interpret in accordance with the directive. For example, the Dutch Council of State regularly interprets the law in accordance with a directive or, more generally in accordance with Community law. In doing so it applies both specific and general provisions. For example, the obligations under the Wild Birds Directive and the Habitat Directive to carry out examinations in connection with projects and plans are partly implemented by means of the general principle that an administrative authority is required, when preparing an order, to gather information concerning the relevant facts and the interests to be weighed, as provided for in section 3:2 of the General Administrative Law Act.

Reference may also be made in this connection to the different ways in which the consequences of a failure to implement correctly or in time are dealt with in the national context, for example where government liability for the resulting damage is concerned.

In an action brought for the failure to transpose Directive 89/48 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, the Greek *Symvoulio tis Epikrateias* recognised that the State is obliged to transpose the Directive, but held that it is up to the legislature and

the executive to choose the appropriate legal instrument for this purpose. Despite the plaintiff's claim that the State was liable for its failure to transpose the Directive and despite the fact that a ruling had been given against Greece by the EC Court of Justice for this failure, the *Symvoulio tis Epikrateias* ruled that there was no way in which the judiciary could hold the State liable for infringement of Community obligations.⁷⁸

In Ireland, by contrast, the Circuit Court applied the *Francovich* case law, in accordance with the report of the Commission, in an innovative way in the case of *Dublin Bus v. Motor Insurers' Bureau of Ireland (MIBI)*.⁷⁹ The second Motor Insurance Directive (84/5) was transposed in Ireland by means of an agreement with the MIBI, a private organisation which represented the insurance companies. It was established that this agreement contained a provision for an exception which was wider than its counterpart in the Directive and concerned cover for damage caused by unidentified vehicles. The Circuit Court held in particular that the Directive had been wrongly transposed and that the MIBI had to be treated as the representative of the State in view of the method chosen by the Irish authorities for transposition of the Directive. The Circuit Court also held that all conditions for liability had been fulfilled and that compensation had to be paid to the party whose interests had been prejudiced by the incorrect transposition of the directive.

Question:

How is the failure to meet implementation deadlines dealt with in legal practice? For example, what role does interpretation in accordance with the directive or Community law play in this connection?

⁷⁸ *Symvoulio tis Epikrateias, Olomeleia*, 26 February 1999, *Deltio Forologikis Nomothesis*, 1999, pp. 1783-1787; *EDDDD*, 2000, pp. 98-104; *European Current Law*, 2000, Part 6, no. 75. This and the following example are taken from Annex VI, "Survey of the application of Community law by the national courts and tribunals", to the 2000 annual report of the Committee on the application of Community law in the Member States, pp. 58-59.

⁷⁹ Judgment of 29 October 1999, *McMahon J.*

7. Mechanisms devised to improve the application of EU legislation

7.1 Preliminary proceedings under pressure

As already observed, preliminary proceedings form the hub of the system for the correct and uniform application of Community law in the national legal order. The combination of the need for uniform application of Community law and the exclusive power of the EC Court of Justice to rule on interpretation and on the validity of EC legislation, which results from the CILFIT judgment (see 3.2.1) poses problems for the national courts, particularly as regards whether or not to refer. This was discussed during the colloquium in Helsinki in 2002. Two other developments which are responsible for a continuous flow of references for preliminary rulings and are consequently putting pressure on the preliminary rulings procedure were also identified during the colloquium. 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 the complexity of the law). Second, the enlargement of the European Union will result in even more cases being referred to the EC Court of Justice.⁸⁰

To prevent the preliminary rulings procedure from becoming a victim of its own success,⁸¹ the EC Court of Justice itself studied a number of changes and amendments in the period prior to the Treaty of Nice. One of these was ultimately included in the Treaty, namely the possibility of declaring 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) EC, after ratification). The possibility of review (*réexamen*) by the Court of Justice is left open in order to guarantee the uniform application of Community law.

This internal division of responsibilities between the Court of Justice and the Court of First Instance can be a useful filter in the sense that the Court of Justice need only consider the more fundamental issues of Community law which are referred to the Community courts. This will naturally depend on the question of what cases the Court of First Instance is declared competent to hear.⁸²

However, even if structural changes in relation to jurisdiction are introduced by the 2004 IGC (e.g. in the form of 'filters' established in each Member State to sift through the questions raised by the courts and restrict references to the EC Court of Justice to important points

of law) it would be advisable now to consider at greater length the external separation of functions between the national courts and the Court of Justice and, by extension, cooperation between the national courts and the Court of Justice and among the national courts themselves. One question in particular that needs to be answered is whether the 'dialogue des juges'⁸³ can be arranged in any other way in the future in order to ensure that the national courts apply Community law as effectively and flexibly as possible, without the immediate necessity of resorting to the formal path of a referral for a preliminary ruling.

7.2. Separation of functions between national courts and the Court of Justice in preliminary proceedings

The national courts decide on the facts of a case whereas, under Article 234 of the EC Treaty, the EC Court of Justice does not have jurisdiction to rule on the facts in preliminary proceedings. The national courts do not have jurisdiction to rule on the interpretation of Community law, which is primarily the responsibility of the Court of Justice. The following passage from a judgment of the EC Court of Justice sheds light on this separation of functions.

31 So far as concerns the contesting of certain facts by Airport Bolzano-Bozen AG, it should be remembered that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see Case C-30/93 AC-ATEL Electronics Vertriebs v

⁸⁰ 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", *op. cit.*, p. 3.

⁸¹ 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. See the contribution of the Court of Justice, *op. cit.*, p. 3.

⁸² By virtue of Declaration 12 to the Treaty of Nice and under Article 225 of the EC Treaty, the Court of Justice and the Commission make appropriate proposals to the Council regarding the division of jurisdiction between the Court of Justice and the Court of First Instance.

⁸³ See the contribution of the Court of Justice, *op. cit.*, for the use of these words.

Hauptzollamt Munchen-Mitte [1994] ECR I-2305, paragraph 16, and Case 326/96 Levez v T.H. Jennings (Harlow Pools) [1998] ECR I-7835, paragraph 25).

32 It is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see Case 17/81 Pabst & Richarz v Hauptzollamt Oldenburg [1982] ECR 1331, paragraph 12, AC-ATEL Electronics Vertriebs, cited above, paragraph 26).⁸⁴

What is at issue here is in fact not so much a delimitation of powers as a job description in the context of the cooperation between the EC Court of Justice and the national courts. Article 234 of the EC Treaty is based on the notion of cooperation, which entails a separation of functions between the national and the Community courts in the interests of the proper application and uniform interpretation of Community law.⁸⁵ It has also been expressly pointed out in the literature that, as Community law stands at present, the aim of preliminary proceedings is not to provide a mechanism for the national courts to obtain information on European law but to ensure the uniform application of Community law.⁸⁶

In practice, the interpretation of Community rules and their application in a specific case are not easily distinguished.⁸⁷ In some cases, for example in tax matters, they virtually coincide. Examples are tariff classifications in customs cases and the interpretation of key terms in the VAT directives. In view of the foregoing, it would be appropriate in proceedings before the national courts in which questions of Community law arise to examine very critically whether they concern the rule itself or its application in a specific case. Although the two questions may be hard to separate, this should not mean that they are automatically referred to the EC Court of Justice for the sake of certainty. Nor is it in keeping with the notion of cooperation for such questions to be treated as factual questions as a matter of course. Furthermore, it is advisable to always examine whether questions about the interpretation of the rule can be avoided by reference to the facts.

An example of this approach can be found in the practice of the Dutch Council of State. When dealing with questions concerning the applicability and interpretation of Article 6 of the Habitat Directive, the Council of State also examines the facts. If the assessment of the facts would produce the same result regardless of the applicability or interpretation of a provision of the Habitat

Directive, it need not answer the relevant questions. The Austrian Administrative Court (Verwaltungsgerichtshof) too has refrained from referring questions for preliminary rulings in cases where the dispute centres primarily on the facts.⁸⁸

Consideration should also be given to the question raised some years ago by Advocate-General Jacobs, namely whether the national courts should be given a greater role in the application and interpretation of Community legislation.⁸⁹ He was suggesting that the EC Court of Justice exercise restraint in dealing with details and that the national courts exercise greater restraint in referring questions for preliminary rulings.⁹⁰ Reference may also be made in this connection to examples in the case law that might justify the assumption that the national courts could or indeed should have relied more on their own knowledge of Community law and the doctrines of *acte clair* and *acte éclairé* in order to avoid unnecessarily burdening the limited capacity of the Court of Justice.

A recent example is provided by the joined cases C-541/99 and C-542/99,⁹¹ in which the question referred to the Court of Justice was whether the term 'consumer' in Article 2 (b) of Council Directive 93/13/EEC on unfair terms in consumer contracts should be interpreted as

⁸⁴ Case C-435/97, *World Wildlife Fund v. Bozen*, European Court reports 1999, p. I-5613.

⁸⁵ Case 244/80, *Foglia v. Novello*, European Court reports 1981, p. 3045.

⁸⁶ See A.W.H. Meij, "National Courts, European Law and Preliminary Cooperation", in: Jansen/Koster/Van Zutphen (eds), *European Ambitions of the National Judiciary*, Kluwer Law International, 1997, p. 89.

⁸⁷ In this respect see also Meij, *op. cit.*, p. 88.

⁸⁸ Administrative Court judgment 96/11//0104 of 20 January 1998, mentioned by Fischer/Lengauer, *op. cit.* p. 777.

⁸⁹ 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.

⁹⁰ See also Court of Justice of the European Communities, information note on references by national courts for preliminary rulings, at <http://www.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.

⁹¹ Joined cases C-541/99 and C-542/99, *Cape Snc and Idealservice Srl and between Idealservice MN RE Sas and Omai Srl*, judgment of 22 November 2001.

referring exclusively to natural persons. In a judgment containing only very brief reasons, the Court of Justice held that it was clear from the wording of Article 2 (b) that a consumer was indeed 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession'. It could therefore be argued that this was an *acte clair*.

Another example is provided by the term 'pay' in the context of Article 141 of the EC Treaty and the Equal Pay Directive (75/117/EEC). The Court of Justice has indicated in many judgments that for the purposes of determining whether a given allowance, bonus etc should be treated as pay within the meaning of these provisions, the decisive factor is whether they are provided in the context of the relationship between employer and employee. In many cases the national courts should therefore be deemed capable of applying this criterion and themselves deciding whether a given allowance does or does not fulfil the criterion. Nonetheless, questions of this kind are often still referred to the Court of Justice. An example is the *Lewen* case, in which the Court of Justice was asked, among other things, whether a Christmas bonus came within the scope of ex Article 119 of the EC Treaty.⁹² The national court could arguably have treated this as an *acte éclairé*.

Of course, matters are not always so clear. For instance, in a dispute concerning the scope of certain provisions of Italian Decree no. 50 of 15 January 1992 transposing Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, the Italian Court of Cassation (*Corte di cassazione*) held that the Decree could not apply. The action related to a consumer credit contract that had been concluded between a financing company and a customer who needed the loan to enable her daughter to train as a beautician. The contract had been concluded on the premises of the training establishment. Although the dispute raised new questions about the interpretation of the terms 'consumer' and 'away from business premises', partly because the Decree was based on assumptions not explicitly contained in the Directive, the Court of Justice did not consider it necessary to rule on the preliminary questions. It held that the national legislation provided a sufficient basis for giving a clear answer to the questions that had arisen.⁹³

Question:

*What approach is taken to the CILFIT case law⁹⁴? In particular, what factors play a role in deciding whether or not there is an *acte clair* or an *acte éclairé*?*

7.3 Cooperation between national courts and the Court of Justice and among national court

It has already been indicated above that Article 234 of the EC Treaty is based on a notion of cooperation which entails a separation of functions between the national courts and the Community courts in the interests of the proper application and uniform interpretation of Community law. The subject of further cooperation between the national courts and the EC Court of Justice and among national courts was discussed during the meeting of documentation and research units in Trier on 14 and 15 November 2002. The results of these discussions are expanded upon below.

Cooperation between the national courts and the EC Court of Justice in preliminary proceedings is of a distinctly formal nature, since it takes place within the legal framework of Article 234 of the EC Treaty. Nonetheless, various forms of informal contact do exist, although they are not of a systematic nature. Cooperation between the national courts and the EC Court of Justice, particularly in relation to decisions on whether or not to initiate the procedure of Article 234, is of an 'all or nothing' nature: there is no middle course between referring and not referring questions for preliminary rulings. As the examples at 7.2 above show, the national courts will in principle refer a question to the Court of Justice for a preliminary ruling in cases where they are in even slight doubt about the interpretation of a Community provision if they consider this to be in the interests of the judgment to be given. The obvious question is therefore what steps can be taken to prevent unnecessary references to (or unnecessarily protracted proceedings before) the Court of Justice.

To start with, it is important to emphasise that the Court of Justice itself took a measure in 2000 which can

⁹² Case C-333/97, *Lewen*, European Court reports 1999, p. I-7243.

⁹³ *Corte di cassazione*, Sezione III civile, 4 January 2000, no. 372, *Il massimario del Foro italiano*, 2000, co. 32. This example is taken from Annex VI, "Survey of the application of Community law by the national courts and tribunals", to the 2000 annual report of the Committee on the application of Community law in the Member States, pp. 30-31. More generally, see A. Adinolfi, "The judicial application of Community law in Italy (1981-1997)", *CMLRev.* 35, 1998, pp 1313-1369.

⁹⁴ It became clear during the Helsinki colloquium that the CILFIT standard is applied, but that many courts see problems in this connection.

provide a solution in cases of slight doubt. This involved the introduction of a simplified procedure in Article 104 (3) of the Rules of Procedure of the Court of Justice. This provision reads:

'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case law or where the answer to the question admits of no reasonable doubt, the Court may, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 20 of the EC Statute [...] and hearing the Advocate General, give its decision by reasoned order in which, if appropriate, reference is made to its previous judgment or to the relevant case law.'

This means that a national court which doubts whether there is indeed an *acte clair* or *acte éclairé* and whether it should refer a question for a preliminary ruling is in less of a predicament since it can in this way obtain a decision more quickly from the Court of Justice. Regular use is already made of this possibility.⁹⁵

In addition, the Court of Justice has introduced an accelerated procedure for cases of exceptional urgency in Article 104a of the Rules of Procedure. The Court of Justice has also introduced certain measures of a practical nature, for example the possibility of issuing practice directions to the parties (Article 125a), waiving an oral procedure, requiring the parties to submit relevant information (Article 54a) and requesting clarification from the national court (Article 104 (5)).

These measures are evidence of the need felt to increase the effectiveness of preliminary proceedings and also of the fact that the procedure provided for in Article 234 of the EC Treaty is not suitable for every situation. As such, they provide a basis for further consideration of how the 'dialogue des juges' can be expanded without this necessarily resulting in a formal judgment. Clearly, there is scope for adjustments without the immediate necessity of an amendment to the Treaty.

In its contribution to the Helsinki colloquium, the Court of Justice has in fact already made a move to introduce less formal cooperation by pointing to the importance of a mutual exchange of information between the Court of Justice and the referring courts, to the possibility of contacting the documentation service before referring a question and to the fact that there is insufficient knowledge of cases already pending before the Court of

Justice.⁹⁶ If full use is made of the existing possibilities for the exchange of information this will itself help to reduce the number of questions referred for a preliminary ruling.

There have been examples in Denmark of cases in which the courts have decided not to proceed with the reference of a question for a preliminary ruling after the Court of Justice had given judgment in a similar case or in which proceedings have been suspended until the Court of Justice has given a ruling in a similar case. Afterwards, the court proceeded on the basis of an *acte éclairé*.⁹⁷

Another factor of importance in this connection is what information is exchanged among the courts and tribunals of the various Member States as such. In practice, such cooperation takes various forms. Often the cooperation is of a regional character. Only in a few cases is there systematic cooperation and coordination, as between the German Federal Administrative Court (Bundesverwaltungsgericht) and the Austrian Administrative Court (Verwaltungsgerichtshof). Until recently, there was no systematic exchange of information between the supreme national courts of all the Member States. A start was made on this during the meeting of the documentation and research departments of the members of the association at the Trier Academy of European Law in November 2002. This idea is now being developed.

An informal network of this kind can be of assistance in identifying similarities and dissimilarities between the approaches of the different national courts to interpreting and applying European legislation. In particular, the systematic exchange of information about judgments of national supreme courts can help to shed light on the application of European legislation in the various Member States. The exchange of information can also help to improve the methods by which questions of European law are dealt with and can be solved in the national legal order. Although the nature of the cases varies greatly from country to country, the problems are very similar.

⁹⁵ Contribution of the Court of Justice, *op. cit.*

⁹⁶ Contribution of the Court of Justice, *op. cit.*

⁹⁷ See P. Biering, "The application of EU law in Denmark: 1986 to 2000", *CMLRev.* 37, 2000, pp. 925-969, at pp. 945-946.

The exchange of information and experience, including information about the solutions chosen, can help to strengthen the best practices adopted by the courts in dealing with the problem.⁹⁸ Naturally, this does not amount to a form of coordination founded on a decision-making structure: the courts are independent and have their own responsibility. Improving the methods by exchanging information can produce an informal consensus. This can give the national courts a more solid basis and greater confidence in solving disputes in which questions of European law play a role.

It would seem appropriate to combine the measures already taken by the Court of Justice and those now being prepared by the Association. More specifically, cooperation in the form of a more systematic exchange of information among the national supreme courts and tribunals, which is now taking place within the Association, could in turn constitute the basis for systematic and informal cooperation between the national supreme courts and tribunals and the Court of Justice. As such, this can be a useful addition to the existing possibility for ad hoc consultation of the documentation service by individual national courts.

If the Court of Justice itself were to participate in this network of cooperation, this would not only help to reduce the number of references but also improve 'quality'. Basic questions about the interpretation and application of European legislation could be identified more easily and less important cases (or in any event cases on which there is in fact a broad consensus) could be sifted out. The aim would not be to bring about a partial replacement of the system of preliminary proceedings or otherwise to limit its operation by means of an alternative decision-making mechanism, but instead to identify cases of genuine importance and thereby to make more effective use of the preliminary rulings procedure. This informal network could even develop in due course into a network that acts as an informal filter for the reference of questions to the Court of Justice for preliminary rulings. This will naturally depend in part on the extent to which the Court of Justice will be able to participate in it.

Mention should be made in this connection of the suggestion made by A. Meijer, Judge of the Court of First Instance, during the symposium held on the occasion of the 10th anniversary of the Trier Academy of European Law on 2 December 2002. His suggestion was that national courts should themselves decide the case, after which the judgment could - in the event of doubt - be sent to the EC Court of Justice (this could also be made obligatory). The EC Court of Justice would then

be free to decide which cases to hear from the point of view of the uniformity and consistency of Community law. If a case were not selected, the judgment of the relevant national court would automatically have legal force. This far-reaching variant would dovetail neatly with the informal variant described above. However, it would be possible only if European legislation were amended.

⁹⁸ An approach of this kind is not new to the EC: there are various fields in which formal legislation has not always been chosen as the solution and in which the possibilities for an informal exchange of best practices, benchmarking, etc. are studied first.