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SUMMARY

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Summary of the report

Empowering National Courts in EU Law

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National courts are Community courts and as such they should do everything needed to make sure that the preliminary rulings procedure functions as efficiently as possible. The effectiveness of this system is obviously based on a healthy dialogue (discourse) between the two main protagonists: the Court of Justice and the national court. Notably in the Nineties, the existence of a *"spirit of cooperation"* between the Court of Justice and the national courts was thoroughly discussed by the doctrine in the light of the preliminary ruling procedure and the requirements of admissibility. In light of the foregoing discussion, it may be said that the *"spirit of cooperation"* has been reinforced in the last years. Besides, the case law related to Freedom Security and Justice reflects the importance given to enhanced judicial cooperation between the Court of Justice and the national courts. The successful introduction in 2008 of the *new urgent preliminary procedure* goes also in the sense of an increased and more effective judicial cooperation. Indeed, justice delayed may also be perceived as justice denied. Finally, the recent resolution on 9 July 2008 from European Parliament regarding the role of the national judge in the European judicial system, arguably, embraces *discursive legal* pluralism. It is extolling the merits of a reinforced judicial dialogue and the need to adopt a *green light* procedure which may improve the preliminary ruling procedure and will increase the responsibility of the national judges in the European system of judicial protection.

The General Courts and EU Law

The early results of the PPU (*procédure préjudicielle d'urgence*) system for references for a preliminary ruling relating to the 'area of freedom, security and justice' are encouraging. However, it is obvious that such a 'fast track' can only work if the number of cases being dealt with is kept to a minimum. *The national courts should therefore be mindful not to abuse the possibility of the urgent procedure* and it remains to be seen if, and in what way, the Court of Justice will cope with an increased demand for this procedure when the national courts become more aware of the procedure's existence.

It is true that the ECJs 'service' providing preliminary ruling is 'free of charge' to the parties involved in the national proceeding. The parties will nevertheless incur legal costs for 'bringing the case to Luxembourg' and it is the referring national court that will decide on the question of costs. It is our opinion that the Government ought to *carry out a general review of the current rules on legal costs*, which certainly have not been designed with references for preliminary rulings in mind.

The case law of the Court of Justice suggests that – as long as the requirement of Article 234 EC is fulfilled – it is for the national court to decide whether to make a reference for a preliminary ruling and to formulate the questions for the reference. The referring court enjoys a large degree of autonomy *vis-à-vis* the parties in the national proceedings. Our study shows that there are no clear domestic statutory rules in Sweden regulating the parties' involvement in the proceedings relating to a reference for a preliminary ruling. In our opinion, *the relationship between the referring court and the parties should be clarified in a more detailed study*, in particular with regard to civil cases in which out-of-court settlement is permitted.

The Labour Court and EU Law

Recently, the Swedish Labour Court had to decide upon EU law, most significantly, in cases of transfer of undertaking and non-discrimination. Since the EU law does not represent a full coverage of the labour market regulations, these two different areas will form good examples for the balancing between national and EU jurisdiction and also different perspectives on dressing legal matters in EU law clothing. Where the Labour Court, in cases dealing with transfer of undertaking, clearly correlates the national cases and the national statutes to the case law of the Court of Justice, in the field of discrimination cases, the Court has not put forward in the same prominent manner using European examples and connections.

It is striking that the Labour Court have submitted so few cases to preliminary rulings pursuant to Article 234 EC and, even more, that the overall picture of when and how EU law in general is explicitly applied and related to the national provisions, is vague. In some of the cases that had to do with interpretations of EU law or subjects closely related to EU law, none of the parties asked for such a ruling, but yet in other cases one of the parties did. In some situations the Labour Court concluded that the case was subject to '*acte clair*', but again in others such discussions were never really outspoken.

It is our belief that the current situation, where preliminary rulings are submitted only very seldom and references in the Labour Court to EU law and EU general principles appear somewhat randomly or at least not in an exhaustive

manner, could be improved. Especially since the development and enlargement of the social dimension of the European Union unveils numerous aspects of labour law in a European context that might challenge national labour provisions and labour market standards, conditions that have recently been subject to discussion in a series of cases at the Court of Justice lately, age discrimination and industrial action in relation to posting of workers being the most obvious.

The Supreme Administrative Court and EU Tax Law

The Supreme Administrative Courthas in several aspects acted as a powerhouse of Community direct tax law. Such conclusions have been drawn from the findings that the Court found Swedish law *incompatible* with Community law in the vast majority of cases. In these cases the Court also ruled in *favour* of the *taxpayers* and decided that Swedish law should be *set aside*.

However, as *three fourths* of the cases were decided *without* a preliminary ruling, it can be doubted if all of these cases fulfilled a strict application of the CILFIT-criteria. At the same time, it may be doubted if a strict application of the CILFIT-criteria is realistic and reasonable. Instead, the need for reform appears urgent. It is important for the parties not only to have more speed in the preliminary ruling procedure, but also greater clarity and consistency in the case law of the Court of Justice. Possible reforms could include measures to restrict the *input* to the Court of Justice, as well as measures to increase the *output*. One possible measure to restrict the input is to let national courts decide more cases without preliminary rulings from the Court of Justice. This would be in line with the current practice of the Supreme Administrative Court, but would also require that those areas of settled case law, which can be relied on by national courts, are identified. There would, in other words, be a need to further develop a *tax acte clair.*

General conclusions

National judges cannot adopt a passive attitude to Community law. A more active approach is required. This can be done, for instance, by raising points of Community law *ex officio* or by closer cooperation in the reformulation of the question. An apparent majority of the national judges (54%) regard themselves as familiar with the preliminary ruling procedure. Denmark, Austria and Sweden are the countries where the largest proportion of judges considered themselves to be very familiar with the procedure. In Sweden, from 1995 to January 2008, 69 preliminary rulings were made to the Court of Justice (10 from *Högsta Domstolen* and 20 from *Regeringsrätten*). However, it clearly resorts from our inquiry that there is still too few preliminary rulings made to the Court of Justice. We have in Sweden an average of around 5 cases a year.

In the past, the Swedish national courts and more particularly the Supreme Court (*Högsta domstolen*) have been reluctant to apply correctly Community law. And, to a certain extent, it was not a surprise that the Commission started an action against Sweden and sent a Reasoned Opinion to the Swedish government for the lack of preliminary references made by the Supreme Court (only 2 preliminary rulings between 1995 and 2004) due allegedly to the leave of appeal system (*prövningstillstånd*). This Reasoned Opinion has led Sweden to amend its legislation in 2006 on the leave to appeal which includes now an obligation of motivation in (only!) Community law matters.

Though one may consider the average of 5 preliminary rulings per year as quite insufficient, they are some recent rays of hopes emanating from the national courts. Indeed, the Supreme Court has demonstrated more willingness to cooperate and to respect Community law in the aftermath of the Reasoned Opinion by increasing substantially the number of preliminary ruling sent to the Court of Justice. Additionally, the Supreme Court has shown some signs of constitutional pluralism by interpreting the constitutional provisions of freedom of expression and religion in light of the European human rights regime and thus has departed from its traditional methodology. Also, the increasing acceptance of the general principles of Community law by the Swedish national courts clearly shows that constitutional pluralism is making its way, slowly but surely in Sweden. Yet, it appears clear to us that the situation can still be and should be improved.

Furthermore, it is important to keep in mind that Sweden does not boast a constitutional court. Though the creation of this constitutional court was under discussion, it is now clear that this new judicial institution will not be elaborated. Therefore – due to inexistence of this constitutional court and the absence of preliminary ruling from the *Lagrådet* – it is argued that the Supreme Court and Supreme Administrative Court have a heavier burden on their shoulders to establish a constitutional dialogue with the Court of Justice through the preliminary ruling procedure. The national courts are also Community courts. Interestingly, a comparative analysis of the situation in Europe demonstrates that there is a general trend of intensive cooperation between the supreme courts/constitutional courts and the Court of Justice in the Member States of the Community. The Swedish judges should be vigilant here not to take a "lonely ride" that may lead to judicial isolation.

Finally, in our view education is the key for an effective application and enforcement of EU law and it is argued that the newly-established *Domarakademi* in Sweden must play a central role in the dissemination of "EU knowledge" to national judges.

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