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Empowering National Courts in EU Law

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FOREWORD

The present report is a summary of a recently concluded research project funded by SIEPS, with the overall aim to analyze the role of Swedish courts in the European Union. The project has been carried out by a research team at the Faculty of Law at the University of Lund. This report examines the empowerment or disempowerment of the national court in the context of the Swedish systems of general courts, administrative courts and the Labour court.

The role of national courts in the European Union has always been of fundamental importance for the functioning of the European legal order. National courts are seen as Community courts and must make sure that the preliminary rulings procedure – the referral of questions to the European Court of Justice – functions as efficiently as possible. To this end, a healthy dialogue (discourse) between the two main protagonists: the Court of Justice and the national court, is needed. The role and responsibility of national courts was also emphasized in the resolution from the European Parliament on 9 July 2008 where the Parliament observed that Community law remains a dead letter if it is not properly applied in the Member States, including by national judges, who are therefore the keystone of the European Union judicial system and who play a central and indispensable role in the establishment of a single European legal order.

The report contains unique empirical data as regards the application of Community law in Swedish courts. The authors argue that much can be done to improve the situation and stress that education is the key for an effective application and enforcement of EU law. Moreover, the authors believe that the newly-established Domarakademin should play a central role in the dissemination of "EU knowledge" to national judges.

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EXECUTIVE SUMMARY

Introduction

The project examines the empowerment or disempowerment of the national court in the context of the Swedish systems of general courts, administrative courts and a special court. In this project these jurisdictions are exemplified by studies in, respectively, civil and criminal law, tax law and labour law.

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. Indeed, this assertion appears to be true when looking at the Court of Justice jurisprudence concerning preliminary references on interpretation and validity. It appears also that the jurisprudence on procedural admissibility, reformulation of the question or even *acte clair* is marked by a wide degree of latitude given to the Court of Justice and the national courts. Flexibility seems to be necessary in order to ensure a prolific judicial dialogue. 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. The three cases completed during

2008 have taken, respectively, 58 days (C-195/08 PPU *Rinau*), 40 days (C-296/08 PPU *Santesteban Goicoechea*) and 87 days (C-388/08 PPU *Leymann & Pustovarov*) from the receipt of the request of the national court to the judgment of the Court of Justice. 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. In *NJA 2008 s. 259* the Swedish Supreme Court has drawn up some general principles for the assessment of what costs are reasonable. Whilst these principles do provide some guidance, they can be made more precise. 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 study shows that a basic infrastructure exists that enables judges to access EU law and Swedish judges, *qua* individuals, have in many cases exhibited deep knowledge of EU law. However, it is important that the entire *corps judiciaire* possess an adequate level of competence in EC law. To this end, *judges should continuously receive training in EU law* and the newly-established *Domarakademi* in Sweden could play an important role.

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, even though they are most different in background and legal origin as well as legal-technical structure and implementation, form good examples for the balancing between national and EU jurisdiction and apparently 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. One could relate this to the development at the ECJ, where a significant number of cases over the past few years have focused, primarily or secondarily, on questions of equal treatment and fundamental principles derived from the Treaty or other commonly recognized sources of influence.

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. As is discussed below, the possibility for a faster, 'green light' procedure, as is described in the Parliament resolution of the 9 July 2008, might be a prosperous and most welcome procedure for the empowering of the EC-perspectives in national courts. National labour courts would not differ from that picture.

The primary interpreters of EU labour law will however by necessity have to be the national labour courts, with or without any future 'green light procedure'. The Court of Justice would otherwise be swamped with labour related cases. An un-reflected call for numerous preliminary rulings in any EU-related labour case would not bring sufficient benefit for the development of a European labour law. Nevertheless, it is our belief that the current situation, where preliminary rulings are submitted only very seldom and the line of arguments 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 develop-

ment 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. An empowered position of the national labour courts in relation to the 'balancing' between domestic and European legal standards and provisions, more prominently established by an even more transparent, explicit and coherent approach to EU law would form a stronger base for interpreting EU related national provisions closer to their European origin.

The Supreme Administrative Court and EU Tax Law

From the point of view of the *Supreme Administrative Court,* the study shows that the Court in several aspects has acted as a powerhouse of Community direct tax law. Such conclusions has 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.* Consequently, the Court worked as a powerhouse for their claims of a more favourable tax treatment on the basis of Community law. At the same time, the Court acted as a powerhouse *against* the Swedish legislator by ruling that Community law should be given *precedence*.

As further regard the *substance* of the cases, no major differences were found in the reasoning regarding the concepts of discrimination and restrictions, possible justifications, and the principle of proportionality in the cases decided by the Court of Justice as compared to the cases decided by the Supreme Administrative Court. The Supreme Administrative Court also applied the *answers* within the preliminary rulings procedure in line with the reasoning and conclusions the Court of Justice. In the cases decided *without* a preliminary ruling, the Supreme Administrative Court further used similar reasoning as the Court of Justice in combination with frequent references to case law from the Court.

On the other hand, as *three fourths* of the cases were decided *without* a preliminary ruling, it can be doubted – in view of the complexity of the area and the sometimes inconsistent case law from the Court of Justice – if all of these cases fulfilled a strict application of the CILFIT-criteria. However, in light of now 27 Member States, there has been an increase not only in the number of national laws and legal cultures, but also in the number of national courts and national case law. There has also been an

increase of references for preliminary rulings and cases decided by the Court of Justice. In combination with now 23 – equally authentic – official languages and the length of proceedings at the Court of Justice, it may consequently be doubted if a strict application of the CILFIT-criteria is realistic and reasonable. Instead, the need for reform appears urgent. Such a need is also confirmed by the fact that it has frequently been pointed out that the primary needs of the national courts and parties are not only more speed, 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 t*ax acte clair*.

General conclusions

It appears clear from our research that the 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 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 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 no 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.

1 INTRODUCTION

The role of the national authorities in the application and enforcement of EU law has always been of crucial importance. As noted by A.G. Tesauro, the national courts are the *natural forum* for EC law.[1] A European Union composed of twenty-seven Member States can hardly function in the same way as a Union of fifteen Member States. Indeed, there is a need of delegation or *decentralization*. More precisely, it is argued that it is essential to confer more powers to the national authorities in order to improve the efficiency of EU law and increase the protection of subjective rights. This empowerment is, in fact, clearly visible in national as well as European jurisprudence.

This research examines both the recent case law of the Court of Justice of the European Communities (ECJ) and the new provisions of the Reform Treaty (not yet in force) in order to assess whether the national authorities are vested with greater powers. The research begins with a general topic which we call 'the variable' that constitutes the central idea. Then, in the second part, research questions and hypotheses are identified, which should then be finally tested against empirical evidence. The *variable* here is the interaction between national authorities and the ECJ. This interaction not only constitutes a form of cooperation between the ECJ and the national authorities, but will also, arguably, lead to a need of empowering the latter. The research questions will focus primarily on the rationale, existence, scope and limits of the national authorities' empowerment.

To exemplify this interaction, the *Maastricht decision* (also known as the *Brunner* case)[2] of the German Federal Constitutional Court shows the persistent interest of that Court in the issue of legislative competence and basic rights. Importantly, the Constitutional Court stated that it exercised its jurisdiction on the applicability in Germany of secondary EC legislation in a relationship of cooperation with the ECJ, under which the ECJ would guarantee the protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court could therefore restrict itself to a general guarantee of the constitutional standard that could not be dispensed with. In our view, this decision reflects the

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[1] G. Tesauro, "The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and National Court", in *Festskrift til Ole Due, Liber Amicorum*, Gad, Copenhagen 1994, pp. 355 ff, at p. 373.

[2] *Bundesverfassungsgericht,* 12 October 1993, *Brunner,* BVerfGE 89, 155, also reported in [1994] 1 CMLRep 57-109. See also *Bundesverfassungsgericht,* 22 October 1986, *Wünsche Handelsgesellschaft*, BVerfGE 73, 339 at p. 386 and *Carlsen v. Rasmussen* reported in [1999] 3 CMLRep 854 ('Danish Maastricht Case').

theory of *discursive legal pluralism* (contrapunctal law). In this respect, it is worth stressing that the project follows a legal-pluralist approach. According to Bellamy this model leaves the resolution of conflict between the bodies to negotiation between them.[3] In a similar vein, this study emphasizes the need of judicial dialogue between the ECJ and the national courts.

The project examines the empowerment or disempowerment of the national court in the context of the Swedish systems of general courts, administrative courts and a special court. In this project these jurisdictions are exemplified by studies in, respectively, civil and criminal law, tax law and labour law. By monitoring general courts, administrative courts as well as a special court the perspectives are broadened and the impact of the *study variable* is put in a more general environment. The material analyzed is most likely to bring about a discussion on implementation in the judicial system, the likelihood of decentralized legality and the empowerment and increased responsibilities of national courts. Also, it should be pointed out that Sweden, in contrast to many other Member States does not possess a constitutional court.[4] The issue to create a constitutional court was recently discussed and rejected. It is worth mentioning that a significant constitutional control is accomplished by this specific authority, the *Lagrådet* (Law Council).[5] However, the Law Council has never made a preliminary ruling to the Court of Justice.

[3] R. Bellamy, "Which Constitution for what kind of Europe? Three models of European Constitutionalism", *The Federal Trust Constitutional Online Paper Series*, Nº 2003/03, available at: http://www.fedtrust.co.uk/up loads/ constitution/03_03.pdf.

[4] See, SOU 2008:125, at p.373 and SOU 2007:85.

[5] This Council is comprised of Judges from the Supreme Court and the Supreme Administrative Court. The task of the Law Council is to examine the draft legislation submitted by the government to the parliament. The main task of the Law Council is to determine whether a draft is compatible with fundamental laws. Notably, the views are of an advisory nature, and are not binding on the government or Parliament. Nevertheless, it ought to be mentioned that its advisory opinions are generally followed.

2 ON DISCURSIVE LEGAL PLURALISM

2.1 Vous Avez Dit Discursive Legal Pluralism?

Legal pluralism has become very popular in the doctrinal vernacular and different *courants* of constitutionalism may be identified.[6] One of them, *multi-level constitutionalism* or *Verfassungsverbund* (compound of constitution) originates from Germany and more precisely from the theory of Pernice.[7] European and national constitutional law constitutes two levels of a unitary system. The essence of multi-level constitutionalism is based on the non-hierarchical relationship between the EU and national legal orders. Another branch can be called *liberal legal pluralism* and finds its roots in the writings of Kumm,[8] in which the author considers two scenarios where a national court would invalidate EU secondary legislation: the *Cassandra scenario* and the *Pangloss scenario*.[9] Whereas the *Cassandra scenario* is based on the prophecy and fear of a major constitutional cataclysm in such a situation, the *Pangloss scenario* views the risk of constitutional explosion as more or less inexistent and refutes the domino effect of such an attitude. Kumm considers that there are solid grounds to suppose that the second scenario would come closer to depict probable events than the first and argues for a residual and subsidiary role to be given to the national courts as ultimate arbitrators of fundamental constitutional commitments.[10]

By contrast, *discursive legal pluralism* offers a framework for preventing constitutional conflicts. Maduro has established a set of (contrapunctal) principles which forms the basis of this theory and aims at ensuring the coherence of the system.[11] The hallmark of his theory is based on dialogue: a horizontal discourse (between national courts) and a vertical discourse (between the Court of Justice and the national courts). In addition, *discursive legal pluralism* takes into consideration the so-called *institutional choice* and thus views the question of ultimate authority not only as a question of legal sovereignty but also as closely linked to political sover-

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[6] For an extensive classification of the different branches of constitutionalism, see M. Avbelj, 'Questioning EU Constitutionalism', 9 *German Law Journal* (2008), available at: http://www.germanlawjournal.com/pdf/Vol09 No01/PDF_Vol_09_No_01_1-26_Articles_Avbelj.pdf.

[7] I. Pernice, "Multilevel Constitutionalism in the European Union", 27 ELRev (2002) 511.

[8] M. Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", 11 ELJ (2005) 262.

[9] *Ibid.*, at pp. 291-293.

[10] *Ibid.*, at p.304. The author proposes that national court may give precedence to their specific and essential constitutional provisions for striking EU legislation.

[11] M. P. Maduro, 'Contrapunctal Law: Europe's Constitutional Pluralism in Action', in *Sovereignty in Transition*, N. Walker (ed.), Hart, Oxford and Portland, Oregon 2003, at p. 501.

eignty.[12] Finally, *discursive legal pluralism* takes very seriously the risk of constitutional cataclysm in the event of a national court invalidating a EU secondary legislation. We may call that the *Martin's scenario*. This pessimistic scenario appears to us as a more probable description of a likely event for multiple reasons.

First of all, there are no valid reasons to rule out that a *race to the bottom* would happen.[13] It is tenable to argue that the *EAW* cases demonstrate that a domino effect is highly probable. Furthermore, it would make no sense to base the source of validity of EU law at the domestic level when there is a bridge based on domestic constitutional arrangement permitting EU law to travel in order to play its (supreme) role in the national legal order.[14] Moreover, this situation will destroy the integrity of Article 234 EC by blurring the separation of functions between the Court of Justice and the national courts. Furthermore, it may be contended that if a national court invalidates EU secondary legislation, then the ECJ should have the possibility, in turn, to nullify national legislation. Symmetry ought to be respected in order to ensure the coherence of the system. This is, of course, an unworkable situation. Finally, the growing uses of qualified majority voting and EU enlargement have clearly increased the risk of constitutional frictions. As to the new Member States, it is not a secret that most of them boast very powerful constitutional courts using a system of ex-post constitutional review.[15] Concerning qualified majority voting, the German *"Banana"* case has offered a perfect example of the palpable tension. The risk of threat is great.[16] We should prevent the *Martin's scenario*. Conflicts on the meaning and range of primacy cannot be resolved by requiring the Court of Justice and the domestic courts to jettison their claim. Compromise is necessary and the dialogue is of essence.

2.2 On Vertical and Horizontal Dialogues

The dialogue is indispensable between the Court of Justice and the national courts. To begin with, it should be noted that the national courts are the

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[12] See for developments, A. Albi, 'Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Co-operative Constitutionalism', 3 EuConst (2007) 25; and J. Komárek, 'European Constitutionalism and the European Arrest Warrant – In Search of the Contrapunctal Principles' Limits', 44 CMLRev (2007) 9.

[13] *Ibid.*

[14] S. Weatherill, Memorandum, Select Committee on European Union, House of Lords, submitted on 5 October 2003.

[15] M. P. Maduro. *supra* n. 11, at pp. 508-509. According to the author, in a situation where ex-post constitutional judicial review is lacking, the possibility of conflict between EU legal acts (other than treaties) and national constitutions is, to a large extent, eliminated.

[16] See BVerfGE 102, 147.

preferred interlocutors of the ECJ, considering the special and crucial role given to the preliminary ruling procedure in the European legal order. In a similar vein, the national courts are the "powerhouse" of EU law.[17] Indeed, the local courts enforce Community law by applying the principle of construction (indirect effect) and Member State's liability and – more generally – are entrusted with guaranteeing the legal protection that citizens derive from the Community law, *e.g.* in the context of national procedural autonomy (effectiveness/equivalence) and human rights. This transfer of power is vital in order to ensure the efficacy of the system since the ECJ, obvioulsy, cannot bear all the 'enforcement' burden. This delegation also entails an increased discretion being given to the national courts in, for instance, the assessment of the proportionality of national measures in free movement or/and fundamental rights cases.[18]

The importance of this accommodating dialogue has been recognized by both the national courts and the ECJ. Already in the *Maastricht* decision, the German Federal Constitutional Court has pointed out the need of a *"relationship of cooperation"* in the context of fundamental rights.[19] As an aside, this case also shows that an indirect dialogue is established between the Court of Justice and the national constitutional courts even when no preliminary rulings procedure is made available.[20] The same remark applies to, for instance, Italy,[21] France[22] and Spain.[23] It is worth noting that the French *Conseil constitutionnel* justified the absence of direct dialogue by the nature of the *ex-ante* system of constitutional review which requires a ruling before the promulgation of the Act within the time frame of Article 61 of the French Constitution. Interestingly, the *Conseil constitutionnel* has also stressed that it depends on the ordinary national courts to refer, by way of preliminary ruling, to the ECJ, as the occasion arises.

In Sweden, the national courts and more particularly the Supreme Court (*Högsta Domstolen*) have been reluctant in some instances to apply cor-

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[17] D. Edward, 'National Courts – the Powerhouse of Community Law', 5 CYELS (2002) 1.
[18] M. P. Maduro, *supra* n. 11, at pp. 528-529.
[19] F. C. Mayer, 'The European Constitution and the Courts', in *Principles of European Constitutional Law*, A. von Bogdandy and J. Bast (eds.), Hart, Oxford and Portland, Oregon 2006, pp. 281-334, at p. 312.
[20] The FCC has never made a preliminary ruling to the Court of Justice. *Cf.* FCC, 5 August 1998, BvR 264/98. The situation is different with the constitutional courts in Austria (Case C-144/99 *Adria-Wien Pipeline* [2001] ECR I-8365) and Belgium (*Cour d'arbitrage Belge*, case N° 6/97, 19 February 1997). The Constitutional Court in Italy has, for the first time, made a preliminary ruling on 15 April 2008.
[21] Case N° 536/95, 29 December 1995.
[22] Case N° 2006-540 DC, 27 July 2006, *Loi transposant la directive sur les droit d'auteurs*.
[23] Case N° 28/1991, 14 February 1991.

rectly Community law.[24] In 2004, 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*).[25] 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.[26] In its Reasoned Opinion, the Commission considered that there was a breach of Article 234(3), which appears as the result of judicial practise of the Supreme Courts regarding leave to appeal and its absence of motivation.[27] As observed by the Commission, this practise has led the Swedish Supreme Courts referring too rarely to the Court of Justice. Therefore, it may be said that the system of leave to appeal creates a situation where there is no effective right to appeal. The Commission has insisted that the Supreme Court must provide reasons as to the decision not to provide leave to appeal so it would be possible for the Commission to examine the decision to protect the EU interests. In examining the reasons given by the Supreme Courts, it would be thus possible to determine whether there is a breach or not of the obligation to refer under Article 234(3) EC, e.g. whether the Supreme Courts have applied the doctrine of *acte clair* in good faith. In the case of a negative answer, it would be possible to apply the *Köbler* line of case-law and engage the Member State liability for breach of Community law by one of its Supreme Courts.

Between 1995 and January 2009, the Swedish courts have made more than 70 preliminary rulings to the Court of Justice. It is an average of around 5 cases a year. Though one may consider this statistic as quite insufficient, they are some recent rays of hopes emanating from the Supreme Court. 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 rulings sent to the Court of Justice.[28] Additionally, in 2005, the

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[24] *Data Delecta* Case, NJA 1996, 668 and *Volvo Service* Case, NJA 1998, 474. See also the attitude of the Supreme Administrative Court in the *Barsebäk* case, RÅ 1999, ref 76.

[25] Commission docket No 2003/2161,C(2004) 3899.

[26] See U. Bernitz, 'The Duty of Supreme Courts to Refer Cases to the ECJ: The Commission's Action Against Sweden', in N. Wahl and P.Cramer, *Swedish Studies in European Law*, vol.2, Hart, 2006, 37.

[27] 2003/2161, C (2004) 3899. *See* Bernitz, "No Need for Commission to be Heavy-Handed over Courts", European Voice, 25 November-1 December 2004, 8 and "Kommissionen ingriper mot svenska sistainstansers obenägenhet att begära förhansavgöranden", ERT 2005, 109.

[28] See, e.g. *Unibet*.

Supreme Court in the *Pastor Green* case 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 the traditional methodology based on preparatory works.[29] Also, the increasing acceptance of the general principles of Community law by the Swedish national courts clearly reflects legal pluralism.[30] To conclude, it is worth mentioning the recent inquiry on the Swedish constitution of December 2008. In this inquiry, it is made clear that Chapter 10:5 of the instruments of the government constitutes in fact a binding provision.[31] In other words, the national courts could make use of the Chapter 10:5 for judicial review in EU related matters and thus ensure that Community legislation does not affect the principles of the form of government. If this interpretation is followed, it would mean that the Swedish national courts have joined the Federal Constitutional Court in Germany or the *Conseil Constitutionnel* in France as regards the interpretation of the EU principle of supremacy as a non-absolute norm. This would represent another clear move towards constitutional pluralism.

A judicial discourse is also established or encrypted within the ECJ case-law relating to the (effective) judicial protection of individuals. In that respect, it is worth recalling the *UPA* case where the ECJ stated that:

> in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [new 10 EC], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.[32]

Notably, in the *Segi* case, the ECJ has delivered in 2007 the same type of (subliminal?) message in relation to the judicial protection of individuals under the Third Pillar.[33] The case established a duty of loyal cooperation for the national courts under European Union law. In addition, the *Unibet* case (2007), affirms once again the importance of the national courts in

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[29] NJA 2005, 805. See J. Nergelius, '2005 – The Year when European Law and its Supremacy was finally Aknowledged by Swedish Courts', in P. Cramer and T.Bull, *Swedish Studies in European Law*, vol.1, Hart 2007, 145.
[30] J. Hettne, *Rättsprinciper som Styrmedel,* Norstedts Juridik, 2008, 313-317.
[31] SOU, *En Reformerad Grundlag,* Del 1, Grundlagsutredningens betänkande, SOU 2008:125, Stockholm December 2008, 500.
[32] Case P C-50/00 *UPA* v. *Council* [2002] ECR I-6677, para. 42.
[33] Case C-355/04 P *Segi* v. *Council* [2007] ECR I-1657, para. 38.

the context of national procedural autonomy.[34] This new trend appears to reinforce the dialogue between the national courts and the Court of Justice. The spirit of conciliation resorts also from the jurisprudence of the ECJ in the field of fundamental rights. The Court of Justice appears ready to respect the specific constitutional identity of the Member States**.** At least, this is our reading of the *Omega case,* in which the Court balanced the right to dignity (Article 1 of the German Basic Law) against the freedom to provide services.[35] It is interesting to note that the ECJ in *Laval* (2007*)* made an explicit reference to the importance of the right to collective action enshrined in the Swedish Constitution.[36] It is not really the style of the Court to make such an observation in relation to the general principles of Community law. Moreover, it appears that the ECJ has given discretion to the national courts for applying the proportionality test.[37] As put clearly in *Viking Line*, 'it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements".[38] The domestic court is seen explicitly as the ultimate arbiter of the validity of national law in the context of EU fundamental rights. Besides, in *Advocaten voor de Wereld*, a preliminary ruling on the validity of the EAW Framework Decision, the Court has confirmed the need of dialogue and concession under the Third Pillar.[39] Indeed, it appears clear that the ECJ has given a wide margin of appreciation to the Member States under the Third Pillar and, in the same way, confirmed the importance of fundamental rights for limiting the Member State's action in this area. Put in the context of the *EAW* saga – which can be perceived in itself as a horizontal discourse between highest courts – this ruling of the ECJ may be seen as fitting perfectly the *discursive legal pluralism* model. Indeed, as outlined by Sarmiento, the decision of the ECJ confirmed the Czech approach and gave some support to the German and Cypriot cases by confirming the Member State's wide discretion in Third Pillar matters.[40]

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[34] Case C-432/05 *Unibet* [2007] ECR I-2271, paras. 38-39, '[u]nder the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law…it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law'.

[35] Case C-36/02 *Omega* [2004] ECR I-9609.

[36] Case C-341/05 *Laval* [2007] ECR I-11767, para.92.

[37] See e.g. Case C-438/05 *Viking Line* [2007] ECR I-10779, paras. 80-85. The Court of Justice may, however, provide guidance.

[38] *Ibid.*, para.85.

[39] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

[40] See D. Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence', 6 *International Journal of Constitutional Law* (2008) 171.

The upshot of all this is that a spirit of dialogue and compromise emerges from this multi-level system of European constitutionalism.

2.3 On Reinforced Judicial Dialogue

The preliminary rulings procedure provides for a form of dialogue or direct cooperation between national courts and the Court of Justice and serves a crucial function, particularly in ensuring the uniform interpretation of Community law and promoting its harmonious development throughout the European Union.[41] As put recently by the Resolution of the European Parliament of 9 July 2008, the preliminary ruling procedure is an essential guarantee of the coherence of the Community legal order.[42] The national judges play a chief role in ensuring respect for Community law, for example through the principles of the primacy of Community law, direct effect, consistency of interpretation and state liability for breaches of Community law.[43] Therefore, the national judges constitute the keystone of the European Union judicial system. Interestingly, the resolution called for an empowerment of the national judges, *i.e.* to involve them more actively in, and accord them greater responsibility for the implementation of Community law.[44]

It should be noted, in that respect, that the European Parliament resolution stressed explicitly the need of a *reinforced dialogue* and urges consideration of a 'green light' procedure whereby the national judges could include their proposed answers to the questions. This system would obviously enhance the dialogue between courts and allow the national courts to play a greater role. Yet, it necessitates a rather good knowledge of EU law.[45] Also, it results from the report of the committee of legal affairs that an important number of judges wanted to see closer involvement of the referring judge in all stages of the procedure. That can be done, for instance, by raising points of Community law *ex officio* or by closer cooperation in the reformulation of the question. In a similar vein, the

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[41] See *e.g.,* Case 62/72 *Bollmann* [1973] ECR 269, para. 4; Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 31; and Case C-2/06 *Kempter*, [2008] ECR I-411, paras. 41-42. The ECJ, in the *Kempter* case in paragraph 42, relying on A.G. Bot, has made for the very first time an explicit reference to a dialogue with the national courts.

[42] European Parliament resolution of 9 July 2008 *on the role of the national judge in the European judicial system* (2007/2027 (INI)), point 24.

[43] *Ibid.*, point 2.

[44] *Ibid.*, point 1.

[45] See Report of the Committee on Legal Affairs, *The Role of the National Judge in the European Judicial System*, (A6-0224/2008), 6 March 2008. This report was written by Diana Wellis and was based on a questionnaire sent to national judges. The judges mainly called for more training and better access to information on the procedure (42%).

resolution of the European Parliament considered that the national judges cannot adopt a passive attitude to Community law,[46] and it called on the Court of Justice to consider all possible improvements to the preliminary ruling procedure which would more closely involve the referring judge in its proceedings, including enhanced possibilities for clarifying the reference and participating in the oral procedure.[47]

An apparent majority of the judges (54%) regarded themselves as familiar with the procedure.[48] 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*). Four preliminary rulings concerning Sweden have been dealt with by the Court of Justice from January to September 2008.

The Length of the Procedure

Is the preliminary ruling becoming victim of its own success?[49] The average duration of preliminary ruling proceedings had risen from 12.6 to 23.5 months between 1983 and 2004. The 2007 *Annual Report of the Court of Justice* noted that the average time taken to deal with references for a preliminary ruling (19.3 months) was at its shortest since 1995.[50] However, it pinpoints that the number of references for a preliminary ruling is rising steadily. 580 (265 preliminary rulings) cases were brought in 2007. This is the highest number in the history of the ECJ.[51] If this trend continues, it will clearly have an influence on the duration of the preliminary ruling procedure. Taking into account the recent enlargement

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[46] *Ibid.*, point 22.

[47] *Ibid.*, point 30.

[48] Report of the Committee on Legal Affairs, *supra* note 45. 32% of the respondents were unfamiliar with the procedure. 14% were very familiar. There are huge differences between the different Member States. In Bulgaria, Belgium and France for instance, the vast majority of respondents (84%, 87% and 94% respectively) considered themselves unfamiliar with the preliminary ruling procedure. Austrian, Czech and German respondents considered themselves the least unfamiliar with the procedure (12%, 13% and 18% of 'unfamiliar' responses respectively). The judges specialised in tax law were more aware of the procedure (52% very familiar – 48% familiar – 0% unfamiliar).

[49] See T. Koopmans, 'La procédure préjudicielle victime de son succès', in *Liber Amicorum P. Pescatore*, Nomos Verlag, Baden-Baden 1987, at p. 347.

[50] *Annual Report of the Court of Justice*, 2007, available at: http://curia.europa.eu/en/instit/presentationfr/ rapport.htm.

[51] By comparison, the number of direct actions and appeals is rising or at least remains steady. 2007 is the year with the highest number of new cases ever: 580 (except for 1979, more than 1300 cases, but there was a huge flood of actions in annulment with the same subject matter). The Court of Justice dealt with 551 cases compared with 503 in 2006.

of the European Union, the integration of the Third Pillar (with the Lisbon Treaty) and the new urgent procedure, the prospects are not pointing towards a reduction of the length of the Article 234 EC procedure.

The length of the preliminary ruling procedure is a recurrent matter of concern. And it is a truism to say that a protracted procedure is counter-productive to the establishment of a healthy and attractive dialogue between the national courts and the Court of Justice. This was made clear both in the Report of the Committee of Legal Affairs and in the resolution of the European Parliament of 2008.[52] It is also worth emphasising that the Lisbon Treaty will add to Article 234 EC the provision that when a preliminary question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act 'with the minimum of delay' (new Art. 267(4) TFEU).

How to Reduce the Length of the Procedure?

Many (vain?) attempts have been made in the recent years in order to reduce the length of the procedure.[53] In this connection, Article 20 of the Statute of the Court of Justice has been amended and allows the Court, where it considers that a case raises no new point of law and after hearing the Advocate General, to decide that the case will be decided without an Opinion from the Advocate General. The use of this new procedure is significant in the recent years: 35% in 2005, 33% in 2006 and 43% in 2007. The amendment of Article 104(3) of the Rules of Procedure – to expand the scope for the use of the *simplified procedure* to cover cases in

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[52] See Report of the Committee on Legal Affairs, *supra* note 45. A very large number of respondents (24%) to the questionnaire criticized the length of the procedure. Also the resolution of the European Parliament (points 25 and 26) called on the Court of Justice and all parties concerned to further reduce the average length of the preliminary ruling procedure, thus making this crucial opportunity for dialogue more attractive to national judges. The Parliament also urged the Commission to investigate whether any national procedural rules constitute an actual or potential hindrance to the possibility for any court or tribunal of a Member State to make a preliminary reference, as provided for in the second paragraph of Article 234 of the EC Treaty, and to pursue vigorously the infringements which such hindrances represent.

[53] Report of the Working Group on the Preliminary Ruling Procedure, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, The Hague, December 2007. The bulk of the working group would have been in favour of the inclusion in the Treaty of Lisbon of a provision enabling the Court of Justice to determine its own Rules of Procedure, *i.e.* without the approval of the Council. It points out, in this respect, that the European Court of Human Rights is already in this position. Also, the working group welcomes the dropping of the prerequisite of a qualified majority in the Council for amending the Rules of Procedure in the Treaty of Lisbon as a step in the right direction.

which the answer to the question can be clearly deduced from existing case law or admits of no reasonable doubt – has not been equally successful (21 cases in 2006). Even less successful is the introduction of the *accelerated procedure* through Article 104a of the Rules of Procedure. As put by Lenaerts, '[this procedure] has not been found to cut down sufficiently the duration of the proceedings and its acceleration is achieved at the expense of all the other cases pending before the Court, thereby explaining why it has been used by the Court only on a very exceptional basis'.[54] Moreover, the possibility for questions referred for preliminary ruling in specific areas to be heard by the Court of First Instance (Article 225 (3) EC Treaty) is perhaps not such a good idea since the CFI is overloaded. Finally, the recent introduction of a new urgent procedure in January 2008 (entered to force in the first of March) should be analysed in more details.

The New Urgent Procedure

The Council Decision 2008/79 has amended the Protocol on the Statute of the Court of Justice and allows for the possibility of an urgent procedure in the area of freedom, security and justice, *i.e.* areas covered by Title VI of the EU Treaty and Title IV of the EC Treaty.[55] The aim is to ensure that the procedures are completed in about three months. Article 104(b) of the Rules of Procedure of the Court of Justice sets out the new urgent procedure. The new procedure entered into force on 1 March 2008. The referring national court may request that the urgent procedure be applied or the Court of Justice may decide to apply it of its own motion in exceptional cases. The parties to the national proceedings, the Member State of the court making the reference and the EC institutions may submit written observations within the time fixed by the Court of Justice. Also, Article 9 of the Rules of Procedure is amended to the effect that a special chamber of five judges is specifically designated for a period of one year to be responsible for the screening and processing of such cases. If that Chamber decides to allow a request for the urgent procedure to be applied, it will go on to give its ruling shortly after the hearing, and after hearing the Advocate General. The procedure will, in practice, essentially be conducted electronically. Communication between the ECJ and the national courts, the parties to the main proceedings, the Member States and the Community institutions will, as far as possible, be electronic. Only the

[54] K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System in the European Union', 44 CMLRev (2007) 1625, at p. 1654.

[55] The Brussels European Council of 4-5 November 2004 decided that 'thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court'.

parties to the main proceedings, the Member State of the court making the reference, the European Commission and, if appropriate, the Council and the European Parliament (if one of their measures is at issue) are authorized to lodge written observations in the language of the case within a short period of time.[56] The Court of Justice has delivered its first judgment using the urgent preliminary reference procedure in Case C-195/08 PPU *Inga Rinau*.[57] The case, referred by Supreme Court of Lithuania, involves the interpretation of the Brussels IIA Regulation (Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. It took two months to hand down the case. This is clearly effective.[58] But in the long run?

Green Light Procedure

As mentioned earlier, the European Parliament has in a resolution called upon the ECJ to consider all possible improvements to the preliminary ruling procedure which would more closely involve the referring judge in its proceedings. In this respect, it is pointed out that national judges should be given more responsibility in a decentralised Community legal order. Therefore, the Parliament recommended a 'green light' system whereby national judges could include their proposed answers to the questions they refer to the Court of Justice, which could then decide within a given period whether to accept the proposed judgment or whether to rule itself in the manner of an appellate court.[59] This procedure was already proposed in the Reflection document of the Court as well as in the 'Due Report'.[60]

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[56] The other interested persons and, in particular, the Member States other than that of the referring court, do not have that opportunity but are invited to a hearing at which they may, if they wish, submit their oral observations on the questions referred by the national court and on the written observations lodged.

[57] See also, for a second illustration, Case C-296/08 PPU *Santesteban Goicoechea* [2008] n.y.r. These cases carries the suffix "PPU". That suffix indicates that the case will use the urgent preliminary reference procedure.

[58] The Supreme Court of Lithuania seized the Court of Justice of a preliminary reference on 14 May 2008 and requested on 21 May 2008 that the urgent preliminary reference procedure be applied, the request reaching the Court of Justice the following day. The Court of Justice agreed to apply the urgent procedure on 23 May 2008 –one day after it received the request. The parties, six governments of Member States and the Commission made written or oral submissions on 26 and 27 June 2008. And finally, judgment was given on 11 July 2008. Two months for a rather complicated case, translated into so many languages too!

[59] European Parliament Resolution, *supra* note 42, points 30-31.

[60] Respectively, Report on the Future of the Judicial System of the European Union, May 1999 and Report of the Working Party on the Future of the European Communities' Court System, January 2000 ('Ole Due Report').

Accordingly, the national courts – when referring a case for a preliminary ruling – would be encouraged, but in no way compelled, to include their suggestion for the answers to be given. Consequently, a substantial number of cases could be simply disposed of by the Court of Justice. This option would seem to be in line with the aim of the preliminary ruling procedure as a dialogue between courts. The national courts, on their part, would be stimulated to play a greater role. This suggestion was already integrated in the guidance given to national courts in 2005.[61] The ECJ considered that, 'in so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred",[62] which was reiterated in March 2008, following the implementation of the urgent preliminary ruling procedure in the context of freedom, security and justice. In this regard, it is worth noting that Article 104b (1), of the Rules of Procedure of the Court of Justice prescribes that the national court or tribunal should indicate in so far as possible the answer it proposes to the questions referred.

In our view, for the 'green light' system to be efficient, it requires a very good knowledge of EU law on the part of the national judge. Perhaps, this task could be carried on by the highest courts. But is it realistic for the lower national courts? Also, it is in no way sure that this procedure will reduce the length of the preliminary ruling procedure. The Court of Justice will have, in any case, to give some comprehensive consideration for deciding whether the question can be answered in the terms specified by the national court.

2.4 Acte Clair, Reformulation and Raising EU Law ex offico

The Acte Clair and the CILFIT criteria

At first blush, it should be noted that the *acte clair* doctrine is derived from French administrative law and that the national courts in France have abusively had recourse to this doctrine in order to circumvent the application of EU law.[63]As a result, it was necessary for the Court of Justice to

[61] [2005] OJ C143/01.

[62] See, 'Information note on references from national courts for a preliminary ruling', following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice of 3 March 2008, point 9.

[63] Under the doctrine no question of interpretation arises from a provision where the meaning is clear. It was usually invoked in the context of international Treaties where, if the meaning was clear, there was no need for the *Conseil d'Etat* to refer a question of interpretation to the government.

give meticulous guidelines (the *CILFIT* criteria) – for circumscribing the scope of the doctrine – and to interpret the *acte clair* doctrine restrictively in order to avoid abuses. In that respect, the Court of Justice ruled that a national court, using *acte clair*, must be convinced that the interpretation would not lead to divergences in other Member States' courts and the Court of Justice. Importantly, the existence of this possibility must be assessed on the basis of the characteristic features of EU law regarding interpretation, *i.e.* comparison of the different language versions, specificity of the Community law terminology and recourse to contextual/teleological interpretation.

The restrictive interpretation of the *acte clair* doctrine has often come under attack. For instance in 2000, a group of experts set up by the Commission to reflect on the future of the judicial system concluded in their report (the so-called 'Ole Due Report') that the national courts should be encouraged to apply Community law more regularly and that the courts of last resort should refer a question only if it is of sufficient interest.[64] Another notable proponent of the relaxation of the *acte clair* doctrine is A.G. Jacobs. In its powerful Opinion in the *Wiener* case, he proposed the references to be limited to cases where there is a genuine need for uniform application of the law throughout the Community because the question is one of general interest.[65] To put it differently, the national court must refer only when the reference is truly appropriate to achieve the objectives of Article 177 (234 EC). The main reason advanced for such relaxation is based on the need to preserve the effectiveness of the preliminary ruling procedure. Indeed, it may be argued that too many questions referred would prejudice the quality of the preliminary ruling procedure. In addition, the national courts may appear mature enough to apply correctly the body of case law developed by the Court of Justice.[66] Such a type of relaxation amounts, as lucidly put by Hettne and Öberg, to a "*de facto* regionalization".[67]

In December 2007, the working group on the preliminary ruling procedure considered that a literal interpretation of the *CILFIT* criteria is no longer

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[64] Report of the reflection group on the future of the judicial system of the European Communities, January 2000.
[65] Case C-338/95 *Wiener* [1997] ECR I-6495, para. 50.
[66] *Ibid.*, paras. 60-64.
[67] J. Hettne and U. Öberg, *Domstolarna i Europeiska unionens konstitution* (SIEPS, 2003:15), at p.33.

possible.[68] In particular, the original requirement to compare the text of all language versions (which is now 23 languages) is no longer realistic or feasible. Therefore, the criteria should be interpreted in a reasonable way. The opinion of the working group is that the national court should consider whether the problem under consideration is worth the burden of a reference for a preliminary ruling. Interpretation with common sense entails that the lesser the problem the more the national court can convince itself that it is capable, at first sight, to solve the question on the basis of its own knowledge and understanding of EU law, as the Court should not be bothered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way. The majority of the working group recommended that the ECJ should seize a suiting opportunity to clarify its position in a judgment, taking into account that since *CILFIT* the number of member states and languages has increased.

The ruling of the Court of Justice in *Intermodal,* a case concerning the interpretation of the Common Customs Code, already reflected the need to clarify the scope of the *CILFIT* criteria in a rather relaxed way.[69] Here, the ECJ confirmed that the national court has the sole responsibility for determining whether the correct application of Community law is so obvious as to leave no scope for any reasonable doubt and for deciding, and as a result, to refrain from referring to the ECJ a question concerning the interpretation of Community law which has been raised before it. It made also clear that that the obligation to refer imposed by Article 234(3) EC is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. Finally, the ECJ held, referring to paragraph 16 of *CILFIT,* that before the national court or tribunal comes to the conclusion that the correct application of a provision of Community law is so obvious that there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved and therefore refrains from submitting a question to the Court for a preliminary ruling, it must in particular be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. How-

[68] Report of the Working Group on the Preliminary Ruling Procedure, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, The Hague, December 2007, at p.11. See also, M. Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member Sates: "Don't Do as I say"?', 10 *Cambridge Yearbook of European Legal Studies* (2007-2008). The author stressed the disrupting effect of a faithful observance of the *CILFIT* criteria.

[69] Case C-495/03 *Intermodal* [2005] ECR I-8551.

ever, the ECJ stressed that a national court cannot be required to ensure that the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities.[70]

A.G. Tizzano follows in *Lyckeskog* a very restrictive interpretation of the *acte clair* doctrine and recommend to follow very carefully the criteria of interpretation set up in *CILFIT*. [71] The future of European law definitely passes through a *de facto* regionalization and an empowerment of the national courts. However, the counter-arguments are still substantively strong for a broad loosening of the *CILFI*T criteria.[72] It is also a s*ecret de polichinelle* that the national courts have never carefully check the interpretation in other Member States as required by *CILFIT.* Finally, it is important to remark that the Grand Chamber in *Gaston Schul* has confirmed the scope of the *CILFIT* doctrine and also, in a way, refused a wild regionalization of the preliminary ruling on validity.[73] The main question at issue was whether the interpretation adopted in the *CILFIT* judgment, referring to questions of interpretation, could be extended to questions relating to the validity of Community acts in order, *inter alia*, to reduce the length of proceedings. In other words, can national court declare Community law to be invalid? The Court of Justice gave a clear negative answer by relying heavily on the forceful reasoning of the *Foto-Frost* case based on the unity of the Community legal order, the coherence of the system of judicial protection the Statute of the Court of Justice putting the Community Courts in the best position to rule on the validity of Community acts.[74]

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[70] *Ibid.*, paras. 37-39.

[71] A.G. Tizzano, in Case C-99/00 *Lyckeskog* [2002] ECR I-4839, para 76.

[72] Firstly, it should ways be kept in mind historically the *CILFIT* criteria were established to avoid the actual abuses of national courts applying the *acte clair* doctrine. Secondly, the number of preliminary questions referred by the courts of last instance cannot be considered, at this time, as impairing the effectiveness of the preliminary procedure. A.G. Tizzano, in this respect, remarked that, from 1960 to 2000, 1 173 preliminary rulings out of 4 381 result from the national courts of last instance. Thirdly, the *CILFIT* criteria constitute an exception to the text of the Treaty. And as any exception, they must be thus interpreted restrictively. Fourthly, the only possible solution, consequently, would be to modify the text of the Treaty. Notably, new Art. 267(3) TFEU does not alter the wordings of Article 234(3) EC. Fifthly, there are still many examples where the national courts apply Community law wrongly. Finally, the national courts from the new Member States are not mature enough. The conclusion to which we are inescapably drawn is that the relaxation of the *acte clair* doctrine is unfortunately not for today.

[73] Case C-461/03 *Gaston Schul* [2005] ECR I-10513.

[74] *Ibid.*, paras. 21-24.

Raising Point of Community Law of Its Own Motion

The recent *van der Weerd* case provides significant findings as to the duty for national courts to raise points of Community law *ex officio*.[75] In this case, a number of measures taken by the Dutch authorities to restrain the spread of foot and mouth disease were contested before a Dutch court. In the main proceedings, the applicants did not raise the issue of the compatibility of the Dutch measures with EC law, a point that had been raised in another lawsuit which gave rise to the ruling of the Court of Justice in Case C-28/05 *G.J. Dokter*.[76] The domestic court was hesitant on the question whether EC law compels it to take into account arguments based on EC law which had not been raised by the parties. Is there an obligation for a national court, when examining the legality of an administrative measure, to raise of its own motion a point of Community law? The Court of Justice held that, in the circumstances of the present cases, the national court was under no obligation to consider arguments of EC law not raised by the parties. Recalling its settled case law related to the context of national procedural autonomy, the Court stated that in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[77]

As regards the principle of equivalence, the Court of Justice considered that it was clear from the order for reference that the Dutch court is competent to raise of its own motion issues relating to the infringement of rules of public policy, which are construed in Dutch law as meaning issues concerning the powers of administrative bodies and those of the court itself, and provisions as to admissibility. However, the provisions which are at issue do not occupy a comparable position within the Community legal order. Indeed, they govern neither the conditions in which procedures relating to the control of foot-and-mouth disease may be initiated nor the authorities which have the power, within their area of responsibility, to determine the extent of the rights and obligations of individuals. Therefore,

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[75] Joined Cases C-222/05 to C-225/05 *van der Weerd and others* [2007] ECR I-4233.
[76] Case C-28/05 *Dokter and Others* [2006] ECR I-5431.
[77] The Court of Justice recalled *Van Schijndel* (Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705, para. 17).

those provisions cannot be considered as being equivalent to the national rules of public policy.[78]

As regards the principle of effectiveness, the ECJ reiterated that the national provision must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. And it is also necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[79] Then it compared the situation in *van Schijndel* with the present case. In *van Schijndel and van Veen*, the Court examined the compatibility with the principle of effectiveness of a principle of national law which provided that the power of the court to raise pleas of its own motion in domestic proceedings was limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it. In this previous case, the Court of Justice held that the national provision was justified and found no breach of Community.[80] Notably, in *van der Weerd*, the Court of Justice considered that those two procedures differ only in so far as the national court is not ruling as a court of last instance, as in *van Schijndel*, but as a court of first and last instance. The reasoning used in *van Schijndel* was thus declared applicable. Finally, the Court of Justice concluded that Community law does not oblige the national court, in the circumstances of the case, to raise of its own motion a plea alleging infringement of the provisions of Community legislation, since neither the principle of equivalence nor the principle of effectiveness require it to do so.

Reformulation of the Preliminary Question

The questions referred by the national courts are often reformulated by the Court of Justice. Unfortunately, there is no official statistics in the Annual Report on the percentage of questions reformulated by the ECJ. In practice, the Court usually employs the same phrasing: 'by its question the national court asks essentially whether Community law,…must be interpreted as…'. According to an inquiry reported in March 2008, 11 % of the judges have experienced a reformulation.[81] Two judges' questions were completely reformulated and one judge from the United Kingdom con-

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[78] *Ibid.*, paras. 29-32.

[79] See Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14; and *Van Schijndel* and *van Veen*, *supra* note 77, para. 19.

[80] *Ibid.*, paras. 34-36.

[81] Report of the Committee on Legal Affairs, *The Role of the National Judge in the European Judicial System*, 2008, *supra* note 45.

sidered this reformulation excessive. In that respect, a labour court judge proposed a compulsory consultation of the referring judge before the ECJ could reformulate any part of the reference. It is true that a closer involvement of the referring in the reformulation of the question would enhance the dialogue with the Court of Justice. But would it be so effective?

In the recent *Promusicae* case the Court of Justice reformulated the question put by the national court.[82] Using its regular phrasing, it considered that by its question the national court asks essentially whether Community law read also in the light of Articles 17 and 47 of the EUCFR, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings. Also, the Court of Justice extended the scope of the question to the Privacy and Electronic Communication Directive 2002/58, which is clearly not mentioned by the national court. It stressed, referring to settled case law, the importance to provide the national court with all the elements of interpretation of Community law which may be of use for de-ciding the case before it (See Case C-392/05 *Alevizos* [2007] ECR I-3505, para. 64; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, para. 16; Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, para. 7 and Case C-241/89 *SARPP* [1990] ECR I-4695, para. 8). In this respect, it is considered that Directive 2002/58 is crucial to the interpretation of Article 12 LSSI. Indeed, this Directive concerns specifically the protection of privacy in the electronic communications sector. Therefore, before looking at the three directives mentioned by the national court, it is first ascertained whether Directive 2002/58 precludes the Member States from laying down an obligation to communicate personal data in the context of civil proceedings. This specification of the question amounts, arguably, to another reformulation touching upon the very substance of the question. In the circumstances of the case, the three directives mentioned by the national court (Directive 2000/31, Directive 2001/29 and Directive 2004/48) which ensure especially in the information society, effective protection of industrial property, cannot affect the requirements of the protection of personal data.

[82] Case C-265/07 *Promusicae* [2008] n.y.r.

3 EMPOWERING NATIONAL COURTS OF GENERAL JURISDICTION

3.1 Introduction

This Chapter will examine some themes concerning the relationship between Community law and the empowerment of the Swedish courts of general jurisdiction. Of the references to the ECJ for a preliminary ruling requested by the Swedish courts of general jurisdiction, by far the most have hitherto been concerned with criminal proceedings. Some of these matters may be rather technical and pertain to very specific areas of Community law, but many of the cases having an exterior guise of a criminal proceeding have in fact been concerned with genuinely fundamental principles of Community law such as those dealing with the free movement of goods and where the criminal responsibility as such merely constitutes a subsidiary issue. Besides the criminal proceedings, the cases at the courts of general jurisdiction that most frequently have given rise to a question of EC law being raised have been – judging from the number of references to the ECJ for a preliminary ruling –concerned with trade marks and private international law. However, it would be difficult to draw any conclusion based on the small number of cases so far, not to mention the fact that Community law issues could well have been settled without a reference to the ECJ.

The discussion of this Chapter will take the concept of empowerment of the national courts as a point of departure. In this respect, 'empowerment' can be seen in three different perspectives. *Firstly*, the national courts have been empowered through EC law simply because the sources of law available to the national courts are enriched by the inclusion of norms with a Community origin. With this enrichment, the ability of a national court to choose between conflicting norms is enhanced and this is particularly important in the Swedish context as the power of the courts to carry out judicial review is extremely limited. The Swedish Constitution contains a provision which prescribes the following:

> If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.[83]

[83] Ch. 11, Art. 14 of the Instrument of Government (*Regeringsformen*). On this provision see also *Les juridicions des États Membres de l'Union européenne: structure et organisation*, published by the Cours de Justice des Communautés Européennes, Luxembourg 2008, at pp. 697-698.

At first sight, it appears that that Swedish courts and other public bodies enjoy an extremely wide power of judicial review since they may 'disapply' any provision that conflicts with a rule of fundamental law, *i.e.* a constitutional provision (*e.g.* provisions concerning fundamental rights and freedoms under Chapter 2 of the Instrument of Government). Yet, this power can be exercised only if the error found in the suspect provision is 'manifest', when the latter has been approved by Parliament or the Government, which of course constitutes the overwhelming majority of binding norms. In practice, therefore, it is extremely rare that a statute enacted by Parliament is 'disapplied' by a Swedish court.[84]

Seen against this background, Community law can be used by the national courts to remedy defects in the national law enacted by Parliament. The requirement of a manifest error is relevant only when the judicial review is performed against the background of the Swedish Constitution; it has no bearing whatsoever *vis-à-vis* provisions of Community law which enjoy supremacy over national law.[85] Here, the direct effect of Community law has given rise to individual rights that the national courts have a duty to protect.

Through the use of EC law – in particular through the use of the procedure of reference for a preliminary ruling by *any* national court – the lower courts can also be said to have been empowered *vis-à-vis* the superior courts; rather than being bound (in practice) by precedents of the superior courts[86] the lower courts can through the use of EC law directly engage in a dialogue with the ECJ.[87]

Secondly, national courts can in some sense be seen as being empowered also *vis-à-vis* the ECJ in that it increasingly considered seen as unrealistic to adhere strictly to the criteria laid down in *CILFIT*.[88] The *CILFIT*-criteria have already been discussed elsewhere in this report and need not be

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[84] See Erik Holmberg, Nils Stjernquist *et al*., *Grundlagarna*, 2nd ed., Norstedts, Stockholm 2006, pp. 516-522.

[85] The principle of the supremacy of Community law was confirmed, early on, by the Supreme Administrative Court (*Regeringsrätten*) in the case RÅ 1996 ref. 50. There is no doubt that this principle is applicable also to the courts of general jurisdiction.

[86] In Sweden, precedents are not strictly binding but they are recognized as a source of law that *should* be used in legal argumentation, see Gunner Bergholtz & Aleksander Peczenik, 'Precedents in Sweden' in *Interpreting Precedents: A Comparative Study*, D.N. MacCormick & R.S. Summers (eds.), Ashgate, Aldershot 1997, pp. 298 ff.

[87] Incidentally, there is a rarely used 'leapfrogging' procedure pursuant to ch. 56, sec. 13 of the Swedish Code (1942:740) of Judicial Procedure (*Rättegångsbalk*) which enables a district court to refer a 'preliminary question' to the Supreme Court in civil cases where settlement out-of-court is permitted.

[88] Case 283/81 *CILFIT* [1982] ECR 3415.

repeated here.[89] It suffices to say that national courts will increasingly be called upon to decide for themselves questions of Community law. However, empowerment comes with responsibility. In this respect the national courts must take the task seriously and responsibly; for this cooperative enterprise between the ECJ and the national courts, the latter must be able to produce judgments of such good quality that national judges can properly be characterized as the 'first judges of community law'.

Thirdly, the national courts can also be empowered through a horizontal cooperation between these courts.[90] This will be the case, in particular, if the supreme/constitutional courts of the Member States were able to lead a European discourse on questions of Community law. It may be mentioned that in the area of private international law, beside the judgments of the ECJ on matters referred to it, national courts have for some time been able to take notice of the case law of the other State Parties to the Brussels and Lugano Conventions. The fact that a national court refers and gives weight to the arguments of a foreign national court does not merely strengthen its own reasoning by adducing external support; in doing so the court also engages in a practice of judicial dialogue across borders, a practice which ultimately also enhances the position of all courts.

The obligation under Article 234 EC to refer a case to the ECJ will be discussed as well as the perceived non-compliance of this obligation by Swedish courts, to the extent that the Commission took steps towards an action against Sweden according to Article 226 EC. This has led to the introduction of a statutory requirement to provide reason when the courts of final instance decide not to make a reference for a preliminary ruling. I shall then provide a survey of the cases in which Swedish courts have made an Article 234 reference and cases in which the courts have refrained from making such a reference. In this respect, it is more interesting to focus on the cases when a reference is not made. Article 35 EU provides a

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[89] See *supra* note 53 with reference to the Report of the Working Group on the Preliminary Ruling Procedure.

[90] On the theoretical underpinning of this type of empowerment, which goes far beyond the present context, see Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *American Journal of International Law* (2008) 241-274, which argues 'that for courts in most democratic countries – even if not for U.S. courts at present – referring to foreign and international law has become an effective instrument for *empowering* the domestic democratic process by shielding them from external economic, political, and even legal pressures. Citing international law therefore actually bolsters domestic democratic processes and reclaims national sovereignty from the diverse forces of globalization. Stated differently, most national courts, seeking to maintain the vitality of their national political institutions and to safeguard their own domestic status vis-à-vis the political branches, cannot afford to ignore foreign and international law' (at p. 241).

procedure parallel to Article 234 EC for preliminary rulings on matters coming under the 'Third Pillar'. The particular problems concerning these Article 35 EU-references will be discussed in its own section. Two matters of general relevance to all proceedings involving a question of EC/EU law will then be considered, *viz.* legal costs and the competence of the judges in the national courts. This chapter will conclude with some final remarks on the current contribution made by the Swedish courts of general jurisdiction in the enforcement of EC/EU law and how this can more effectively be achieved through the empowerment of the national courts.

3.2 The Requirement to Provide Reason Not to Make a Reference and Swedish Procedural Rules

According to the 2007 *Annual Report* of ECJ, a total of 69 references for a preliminary ruling have been made by the Swedish courts up to the end of 2007 (*i.e.* some 12 years after Sweden became a Member State of the EU).[91] The corresponding figure for the period up to the end of 2003 is 45.[92] This was considered by the Commission as a low figure and in 2004 the Commission took the first steps towards an action against Sweden for failure to fulfil an obligation according to Article 226 EC. In its reasoned opinion, the Commission held Sweden responsible for not fulfilling the obligation stipulated in Article 234(3) EC through the failure to take any measure to remedy the observed practice of the Swedish courts of final instance not to make references to the ECJ for a preliminary ruling.[93] Although the Swedish Government did not share the Commission's view, it did eventually introduce proposals for new legislation concerning the Swedish courts' possibility and obligation to request a preliminary from the ECJ.[94]

The Government proposed that an obligation to give reason would arise when a party has made a motion that the court should request a preliminary ruling, if that court or tribunal is one against whose decisions there is no judicial remedy under national law, *i.e.* those courts and tribunal that are obliged under Article 234(3) to make a reference to the ECJ. This proposal was adopted by Parliament through Act (2006:502) on reference for a preliminary ruling by the ECJ.

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[91] See *Annual Report 2007 of the Court of Justice of the European Communities*, p. 103.

[92] See *Annual Report 2003 of the Court of Justice of the European Communities*, p. 231. The 45 references are distributed as follows: the Supreme Court – 4 cases, the Market Court – 3 cases, the Supreme Administrative Court – 13 cases, and other courts and tribunals – 25 cases.

[93] See the Commission's reasoned opinion of 19.10.2004 (docket number 2003/2161, C(2004) 3899).

[94] See Government Bill prop. 2005/06:157.

In the early years following Sweden's entry into the European Union, there was doubt whether the lower courts could be treated as a court of final instance for the purpose of the application of Article 234(3) EC. This doubt has, however, definitively been removed after the judgment of the ECJ in Case C-99/00 *Lyckeskog*.[95] In its ruling, the ECJ reiterates that the obligation to refer under Art. 234(3) EC has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court.[96]

This obligation, according to the ECJ, 'is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State'.[97] In the view of the ECJ this objective is secured so long as the courts of final instances are bound to make a preliminary ruling even a leave of appeal is required for the case to be heard at the courts of highest level. Thus, the ECJ concludes that decisions of a national appellate court which can be challenged by the parties before a supreme court are not considered decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.[98]

Thus, it is clearly established law that within the system of courts of general civil and criminal jurisdiction, the Supreme Court is the only court in Sweden that is bound by Article 234(3) EC to refer a relevant question of Community law to the ECJ. The fact that the lower courts are not obliged to make a reference for a preliminary ruling does not normally constitute a problem, as these courts *may* always, according to Article 234(2) EC, make a reference when a relevant question of Community law arises in a pending case. Another question that can be raised with regard to the national courts' possibility and obligation to make a reference to the ECJ concerns the national courts' ability to raise a question of EC law *proprio motu*. This is a different question from that of whether the national court may *ex officio* refer a question of Community law to the ECJ after that

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[95] For a commentary on *Lyckeskog*, written in English, see Juha Raitio, 'What is the Court of Final Instance in the Framework of Article 234(3) EC in Sweden? – Preliminary Ruling in the Criminal Proceedings Against Kenny Roland Lyckeskog', [2003] *Europarättslig tidskrift* 160-166.

[96] Case C-99/00 *Lyckeskog* [2002] ECR I-4839, at para. 14.

[97] *Ibid.*

[98] Case C-99/00 *Lyckeskog*, at para. 16.

question has been raised by a party. Both of these questions are controversial and the second question is related to the first one because a party – who having raised a question of Community law, and then realizing that the national court may *ex officio* refer the question to the ECJ – is able to, in most civil litigations permitting settlement out of court, subsequently withdraw a claim based on a certain legal ground.[99]

However, in our opinion, once a question of EC law has been raised (and is not withdrawn), it follows from the wording of Article 234(2) EC and the case law of the ECJ, that it is for the referring national court to determine whether a preliminary ruling is necessary.[100] The parties to a case cannot, therefore, prevent the national court from making a reference to the ECJ. It is another matter that the court ought to take the parties' view into consideration when assessing the necessity of a preliminary ruling. Usually, one of the parties would be in favour of the preliminary ruling even though the other party may oppose to this;[101] in such a case, the court need not make a reference *ex officio*.

Returning now to the question whether the court at the main proceeding can raise a question of EC law *proprio motu* we need to consider two situations. *Firstly*, a claim in a civil suit can be based on different and alternative legal grounds and it may be the case that the claim can satisfactorily be settled with reference merely to a ground that does not have any implication or is dependent upon Community law. In this case, a preliminary ruling on EC law is not strictly necessary for the national court to give a judgment on the pending dispute and therefore will not justify a reference to the ECJ. *Secondly*, the national court may recognize a relevant point of EC law that may affect the outcome of the case and that point of EC law has not been invoked by any of the parties. The ruling of the ECJ in *van Schijndel & van Veen*[102] can be taken to imply that, as a matter of Community law, it is for the national courts to decide when it is appropriate to 'abandon the passive role assigned to them' in civil proceedings. On this reading, the Swedish courts should follow the normal rules of

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[99] The terms *proprio motu* and *ex officio* refer to the main proceeding only; the parties to the main proceedings are of course, technically, parties to the proceeding at the ECJ.

[100] See, for example, C-145/03 *Keller* [2005] ECR I-2529, para. 33.

[101] This may be due to the fact that a national provision is favourable to a party's position, which may be lost on a 'correct' interpretation of Community law. A party may, however, oppose to a reference for a preliminary ruling simply because of the delay involved in this procedure.

[102] Joined cases C-430-431/93 *van Schijndel & van Veen* [1995] ECR I-4750. For a more recent case confirming *van Schijndel & van Veen*, see C-234/04 *Kapferer* [2006] ECR I-2585.

civil procedure concerning which claims – and in which order – are to be considered in the judgment. A Swedish court is thus precluded from raising a point of EC law *proprio motu* in a normal civil proceeding. The judgment of the ECJ in *Kraaijeveld*[103] also confirms that Community law does not confer a general power on national courts to raise of their own motion a point of EC law, if they do not have such a discretion or duty to do so with regard to a point of national law. However, in Swedish proceedings, it is within the power of the judge to present the question of Community law to the parties and to ask whether they would like to raise a claim on such a legal basis.

The ECJ's decision in *van Schijndel & van Veen*[104] can be used as a demonstration of the ECJ's respect of the autonomy and integrity of national procedural law. In a wider perspective, however, subsequent case law of the ECJ has shown another trend in which Community law has been given precedence over national procedural autonomy. In a series of judgments culminating in *Lucchini*,[105] the ECJ appears to have tipped the scale towards effective judicial protection of Community rights to the detriment of national procedural rules.[106] However, this national report is not the appropriate forum to discuss these wider issues of EC law.[107]

3.3 Cases in which the Swedish Courts have Made an Article 234 Reference

In most cases where a reference for a preliminary ruling has been made, there exists clear questions on the interpretation of substantive provisions of EC law. The following provides a sample of the questions often dealt with in such cases. The *Lyckeskog*[108] case has already been discussed above. According to the ruling of the ECJ in this case, an appellate court which is not a court of last instance is not obliged to make a reference for a preliminary ruling, even if appeal against its decision to a superior court is subject to a prior declaration of admissibility. The Supreme Court is,

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[103] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

[104] See note 102 above.

[105] Case C-119/05 *Lucchini* [2007] ECR I-6199.

[106] See, for example, C-126/97 *Eco Swiss* [1999] ECR I-4599, C-240-44/98 *Océano* [2000] ECR I-4491, C-453/00 *Kühne & Heitz* [2004] ECR I-837 and C-224/01 *Köbler* [2003] ECR I-10239.

[107] On the conflict between effective judicial protection and the autonomy of national procedural law, in particular with respect to the principle of *res judicata*, see Petr Bfiíza, '*Lucchini SpA* – Is there anything left of *res judicata* principle?', 27 *Civil Justice Quarterly* (2008) 40-50; also relevant is Xavier Groussot & Timo Minssen, '*Res judicata* in the Court of Justice Case-law: Balancing Legal Certainty with Legality?', 3 *European Constitutional Law Review* (2007) 385-417.

[108] Case C-99/00 *Lyckeskog*.

therefore, the only court in Sweden that is bound by Article 234(3) EC to refer a relevant question of Community law to the ECJ.

In a case originating from the Gothenburg District Court,[109] the Public Prosecutor brought criminal proceedings against 52 persons (*inter alia* Mr Klas Rosengren) for alleged "smuggling" – through a post-order service – of alcoholic beverages from Spain into Sweden. The Public Prosecutor also applied to the District Court for a seizure and confiscation order of the alcoholic beverages shipped to Sweden. The Supreme Court decided to make a reference for a preliminary ruling concerning questions regarding Articles 28, 30 and 31 EC raised during the appeals against the seizure order.[110] The question remains, however, whether the seizure order should be set aside pending the reply of the ECJ. On this question, the Supreme Court found that, at that stage of the proceeding, it did not appear so improbable that the criminal proceeding would eventually result in the confiscation of the seized goods, that the conditions for seizure as an interim measure should be deemed lacking. Consequently, in *NJA 2005 s. 595* the Supreme Court dismissed the claimants' application to set aside the seizure order.[111] These cases constitute thus an illustration of the general relationship between the staying of the main proceeding after a reference is made for a preliminary ruling and the interim measures applicable in the main proceeding.

An issue of general interest arising from the case *NJA 2005 s. 764* is concerned with the standing of a third party in an administrative or a criminal proceeding against another in a national court. The Supreme Court found that the appellant had made a claim that related to the effective protection of rights under Community law and requested a preliminary ruling by the ECJ. As formulated by the ECJ, the relevant question here was whether the principle of effective judicial protection required that it 'be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other legal remedies permit the questions of compatibility to be determined as a preliminary issue'.[112]

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[109] See *B 7097-01*, *Rosengren* et al. *v. Public Prosecutor*, Interim Judgment of the Gothenburg District Court of 3 January 2002, not reported; but partly reported in *NJA 2004 s. 137* and *NJA 2005 s. 595*.

[110] Decision of the Supreme Court of 26 March 2004. According to the Swedish law of criminal procedure, seizure of a certain property is justified as an interim measure, *inter alia*, if that property can be the subject of a confiscation order upon conviction. See *NJA 2004 s. 137*.

[111] Order of the Supreme Court of 26 July 2005.

[112] Case C-432/05 *Unibet* [2007] ECR I-2271, at para. 36.

Answering this question, the ECJ stated that:

> [a]lthough the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law…[113]

Accordingly, it is in principle for the national law to determine an individual's standing so long as the national law does not undermine the right to effective judicial protection. The ECJ concluded thus:

> … the detailed procedural rules governing actions for safeguarding individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of right conferred by Community law (principle of effectiveness) …[114]

Applying the above principles to the facts, the ECJ found that *Unibet* must be regarded as having available to it legal remedies under Swedish law that would ensure effective judicial protection, albeit not in the form of a free-standing action.

3.4 Cases in which the Swedish Courts have Refrained from Making an Article 234 Reference

There is no systematic way of identifying the cases in which a question of Community law has arisen and where a reference to the ECJ has been possible, but no reference has ultimately been made. For the purpose of this study a database search has been carried out of the decisions of the Supreme Court from 1 January 1995 to 30 September 2008 that have been reported in *Nytt Juridiskt Arkiv*, the official report of the Swedish Supreme Court's decisions.[115] Decisions of the lower courts can be considered only occasionally, usually due to the fact that the unreported decisions of the lower courts have nevertheless received attention in the media for other reasons.

The remainder of this section will give some examples of Swedish court decisions in cases where no reference has been made to the ECJ for a pre-

[113] *Ibid.*, para. 40.
[114] *Ibid.*, para. 43.
[115] A more comprehensive approach would include a study of all the applications for leave of appeal which normally are not reported in *Nytt Juridiskt Arkiv*. Such a study would perhaps reveal the extent to which questions of EC law remained undecided in the national proceedings that terminated at the appellate level because leave of appeal is denied. Such an extensive empirical survey is obviously not possible within the framework of the present study.

liminary ruling. These examples are intended to serve as illustrations of the situations when the Swedish courts have considered a preliminary ruling unnecessary and the reasons, if any, given by the Swedish courts for not making a reference.

It is perhaps suitable, firstly, to deal with the special group of cases in the field of competition law due to the special character of the simultaneous application in this field of Community law and national law. The new system of competition law enforcement in the EC laid down in Council Regulation N° 1/2003[116] requires that the competition authorities and courts of the Member States would have the power to apply not only Article 81(1) and Article 82 EC, which have direct applicability already by virtue of the case law of the ECJ, but now also the power to apply Article 81(3) EC concerning exemptions to the prohibition stipulated in Article 81(1) EC.[117]

The case *NJA 2008 s. 120* is concerned with a dispute between *on the one hand* Denmark (through the state-owned company 'BornholmsTrafikken', which operates, *inter alia*, ferry services between Ystad in southern Sweden and Rønne on the Danish island of Bornholm in the Baltic Sea) and *on the other hand* Ystad Hamn Logistik AB (hereafter 'Ystad Hamn'), which is a company wholly owned by the Municipality of Ystad in Sweden, providing various port services at the harbour and ferry terminals of Ystad. The question of Community law that has arisen in this case is concerned with the alleged abuse of dominant market position by Ystad Hamn when it established the tariff for its services. The Supreme Court took the step of *ex officio* requesting the Commission to give an opinion on questions concerning the application of Community competition rules, pursuant to Article 15(1) of Regulation 1/2003.[118] The Court did not find it necessary, however, to request a preliminary ruling by the ECJ. In the end, the Supreme Court arrived at the conclusion that Ystad Hamn occupied a dominant market position. The above case illustrates that the Swedish courts have not shown a propensity to actively seek the opinion of the ECJ when the Community law issues are clear;[119] the application of the law to the factual circumstances of the case is the task of the national courts and the arguments before these courts were focused on the factual issues.

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[116] Council Regulation (EC) N° 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1-25.

[117] *Cf.* recital 4 and Art. 1(2) of Regulation 1/2003.

[118] *Ibid.* at pp. 218-219.

[119] The actual composition of judges sitting at the District Court and the Court of Appeals in this case may however explain why

The second example of a case in the field of competition law is *NJA 2004 s. 804* in which the Swedish company Boliden Mineral AB (hereafter 'Boliden') claimed that the standard contract clause on price adjustments applied by AB Fortum Värme, an energy company supplying, *inter alia*, electricity to the claimant (hereafter 'the supplier'), constituted an illegal agreement distorting competition. During the proceeding before the Supreme Court, Boliden requested that the Court refer the relevant questions of Community law to the ECJ for a preliminary ruling. On the question of a preliminary ruling, the Supreme Court found, to begin with, that EC law would not be applicable *as such* when the dispute was concerned with the local supply of electricity which could hardly have an effect on the common market. However, as the Swedish provisions in question are structured in the same way as Article 81 EC and as a result of the simultaneous applicability of EC law and national law mentioned earlier in this section, the Supreme Court did consider whether a reference to the ECJ is nonetheless motivated. Referring to Case C-28/95 *Leur-Bloem*,[120] the Supreme Court found that the ECJ was competent to give a ruling on EC law even in situations that did not fall directly under the area of application of Community law if the national legislator had decided to treat purely domestic situations in the same way as the situations falling under EC law. In the instant case, the Supreme Court found that the *travaux préparatoires* to the Competition Act[121] indicated that the legislators did not intend that EC law be applicable unconditionally in purely domestic situations. For this reason, the Supreme Court dismissed Boliden's motion to request a preliminary ruling from the ECJ. Having dealt with some examples in the field of competition law with its special system of parallel application of Community law and national law, we may now turn to the small number of examples of Swedish court decisions in other fields of law.

We may begin with a case in which the Supreme Court considered that the outcome of the case was so obvious that it refrained to make a reference to

[120] Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, esp. para. 27. The Supreme Court appeared, however, not to have put too much weight on para. 32 in the same judgment in which the ECJ stated: 'In those circumstances, where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply'.

[121] See Government Bill prop. 1992/93:56 pp. 18 ff. resulting in the enactment of Competition Act (1993:20), which was the applicable law during the proceedings.

the ECJ. In *NJA 2006 N 48*, a person was convicted of murder and the Svea of Court of Appeals had ordered the convicted person's expulsion from Sweden with a prohibition from re-entry that was not limited in time. The Supreme Court identified Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[122] as the relevant Community law that would apply in the instant case. However, the Supreme Court concluded that, since under Swedish law it was possible for the Government to set aside the court order, the content of Community law on the question of expulsion was so obvious that no reference for a preliminary ruling by the ECJ would be necessary.

In *ÖH 8593-06*,[123] the Svea Court of Appeals dismissed the claimant's motion to request a preliminary ruling from the ECJ. The Swedish court found that the claimant had only in rather general terms challenged the compatibility of the system as such under Swedish law for the determination of rents and that she had not made a precise statement, nor put forward any investigation, concerning the flats under dispute. Consequently, the Court found that there was no need to request a preliminary ruling.

NJA 2008 s. 92 deals with an appeal against the decision of the Svea Court of Appeals not to grant a leave of appeal against the Stockholm District Court's judgment in a criminal proceeding against Otto Sjöberg for the insertion of advertisement marketing illegal gambling services.[124] In this case, the Supreme Court dismissed the applicant's motion to make a reference to the ECJ on the technical ground that the Supreme Court only needed to consider the appeal against the decision not to grant a leave of appeal, and for the purpose of that appeal a preliminary ruling from the ECJ was unnecessary.

NJA 2004 s. 735 deals with an application to annul an order of the Supreme Court. In this case, the Supreme Court has laid down some basic principles concerning the relationship between the requirement of a leave of appeal under Swedish procedural law and the obligation to refer a question to the ECJ for a preliminary ruling when such a ruling is necessary

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[122] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, pp. 77-123. The Supreme Court referred, in particular, to Articles 27 and 32 of the Directive.

[123] *ÖH 8593-06*, *Björnsson v. Molander and Nilsson*, Order of the Svea Court of Appeals of 18 December 2007, not reported. In this case the Court is sitting as the final court of appeal in rent and tenancy disputes against whose decision there is no judicial remedy under Swedish law and would thus be obliged to refer a relevant question to the ECJ.

[124] The facts of *NJA 2008 s. 92* are related to those of Case C-432/05 *Unibet*, *supra* note 112.

for deciding the case pending in the national court. It is worth reiterating the Supreme Court's points of view:

> According to ch. 54 sec. 10 Code of Judicial Procedure, leave of appeal may be granted by the Supreme Court only if it is of precedential value that the appeal be heard by the Court or where extraordinary reasons exist for the appeal […].
>
> Since Article 234 is applicable as a part of Swedish law, the said rule on leave of appeal much be read in conjunction with this article. In a case where the Supreme Court is under an obligation to request a preliminary ruling from the ECJ, it would usually also be of value to hear the appeal for its precedential value […]. Even if a situation should arise in which ch. 54 sec. 10 Code of Judicial Procedure does not give any direct support for granting a leave of appeal in a case where a question of EC law must be answered in order to reach a judgment, the Supreme Court should nonetheless follow the obligations pursuant to Article 234. In such a case, the Supreme Court may request a preliminary ruling before making a decision on the granting of leave of appeal.
>
> It may also happen that a court of appeal has, through a judgment which has been appealed against, decided a case in breach on a provision of Community law and either this breach is apparent through a comparison of the case law of the ECJ or that the correct application of the provision is obvious. Following […] CILFIT, the Supreme Court is not under an obligation to request a preliminary ruling by the ECJ as there is no unclear questions that need interpreting. Despite this, there are still reasons to grant a leave of appeal […] as, under these circumstances, extraordinary reasons must be deemed to exist for hearing the appeal by the Supreme Court.[125]

Finally, *NJA 2007 s. 227*[126] is another interesting case in which the Swedish courts have decided *not* to refer a question of Community law to the ECJ. This case is concerned with three persons who were the owners/directors of a Swedish company (hereafter 'the Company') that had for some years been carrying out the business of import to Sweden of compact low-energy fluorescent lamps manufactured in the People's Republic of China. In July 2001 the Council of the EU decided to impose a definitive anti-dumping duty on the import of certain integrated electronic compact fluorescent lamps (CFL-i).[127] Following this decision, the Swedish Company had made

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[125] *NJA 2004 s. 735*, at p. 738.

[126] I shall refrain from providing page references to the official law report *Nytt Juridiskt Arkiv* (NJA) in the following account of this case as the issues raised are rather complicated and some of these pertain only to domestic Swedish law. I have chosen to take up only issues that are of special relevance to the present discussion. For a detailed analysis in the perspective of substantive customs law see Christina Moëll, *Rules of Origin in the Common Commercial and Development Policies of the European Union*, Juristförlaget i Lund, Lund 2008, pp. 187-201.

[127] Council Regulation (EC) N^{O} 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China, OJ L 195, 19-7-2001, pp. 8-14.

arrangements so that the lamps originating in China were first shipped to Vietnam before they were subsequently imported into the EU. In the import documents, Vietnam was declared as the country of origin of these fluorescent lamps. This practice appeared to have continued for a number of years.

A criminal proceeding was lodged at the Stockholm District Court. The defendants in this case raised several arguments against the prosecution's charges, but in the present context one can focus on the argument hinging upon the character of anti-dumping duties. The criminal liability according to Swedish law hinges therefore entirely on the interpretation of EC law. In this respect it may be noted that the Stockholm District Court and the Svea Court of Appeals had arrived at diametrically different conclusions concerning whether anti-dumping duties are to be treated as customs duties. In a parallel proceeding through the administrative court system, the Administrative Court of Appeals in Stockholm[128] delivered a judgment based on a different interpretation of EC law than that of the Svea Court of Appeals. Thus, two appellate courts in Sweden had held different views on an issue of EC law. This conflict was resolved only after the Supreme Court finally ruled on the case.[129] Fortunately, for the Swedish Supreme Court, the controversial question was exactly the subject of a reference for a preliminary ruling raised in Case C-247/04 *Transport Maatschappij*[130] – decided after the judgment of the Svea Court of Appeals but before the main hearing at the Supreme Court. Consequently, the issue of the legal character of anti-dumping duties was considered as an *acte éclairé* and the Supreme Court would be justified for not referring the question for a preliminary ruling by the ECJ.

3.5 Third Pillar Instruments

Constitutionally speaking legislation of the Third Pillar differs fundamentally from that of the First Pillar as the Member States have not transferred to the European Union their decision-making powers in Third-Pillar matters. The legal instruments available within the Third Pillar differ also

[128] Judgment of the Administrative Court of Appeals in Stockholm of 30 September 2005 in Case 153-05, not reported.

[129] Only the criminal proceeding was heard by the Supreme Court as the leave to appeal against the judgment of the Administrative Court of Appeal in Stockholm was not granted by the Supreme Administrative Court. It may also be noted that, during the proceeding at the Supreme Court the Legal Service of the Commission submitted its 'comments' on the 'error of law' made by the Svea Court of Appeals, see letter from the Commission's Legal Service to the Prosecutor-General of Sweden, JUR(2005) 10307, dated 25 July 2005.

[130] Case C-247/04 *Transport Maatschappij*, [2005] ECR I-9089, judgment of the Court (2nd Chamber) delivered on 20 October 2005.

from those of the First Pillar – compare Article 34(2) EU with Article 249 EC.

One of the new legal instruments for cooperation in police and criminal matters created through the Treaty of Amsterdam is the *framework decision*. Such framework decisions 'shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods'. Pursuant to Article 35(1) EU, the Court of Justice of the European Communities shall have jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions subject to a declaration by a Member State of acceptance of this jurisdiction.[131] In practice, however, a request for a preliminary ruling under Article 35 EU would follow the same procedure as a request under Article 234 EC.[132] As Title VI of the EU Treaty falls under the regime of intergovernmental cooperation, there has been some doubt whether instruments adopted under Title VI should be interpreted using only the general method established by the Vienna Convention on the Law of Treaties, or if the ECJ can apply the same method that the Court has developed for the interpretation of Community instruments. This doubt has been removed through the ECJ's judgment in C-105/03 *Pupino*.[133] Despite the explicit statement in the Treaty that framework decisions shall not have direct effect, the Court held that the principle of harmonious (or conform) interpretation is also applicable to instruments adopted under the Third Pillar, but the national court is not required to interpret the national transposition provisions *contra legem*. To put this mildly, after *Pupino*, framework decisions can be said to have 'quite direct' effects even though Article 34(2)(b) says that it should have none.

One of the most important instruments adopted under Title VI of the EU Treaty is the Framework Decision on the European arrest warrant.[134] It may

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[131] Art. 35(2) EU. A Member State making such a declaration of acceptance may, according to Art. 35(3) also choose between letting any court or just the courts of final instance to request a preliminary ruling. Sweden has accepted the jurisdiction of the ECJ under Art. 35 EU and has chosen to let any court or tribunal to request a preliminary ruling (OJ L 114, 1.5.1999, p. 56).

[132] *Cf.* Art. 46(b) EU concerning the power of the ECJ and see C-105/03 *Pupino*, [2005] ECR I-5285, paras. 19 and 28 and C-467/05 *Dell'Orto*, [2007] ECR I-5557, para. 34. In C-296/08 PPU *Santesteban Goicoechea*, [2008] ECR n.y.r., the ECJ went so long as to accept a request for a preliminary ruling on the framework decision on the European arrest warrant even when only Art. 234 EC was cited as the legal base for the reference (see para. 38).

[133] Case C-105/03 *Pupino* [2005] ECR I-5285.

[134] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-20.

be said that the national courts have been empowered through the European arrest warrant system as the decision on surrender is now made by a judicial authority in accordance with law and no longer by organs that were essentially political (*e.g.* the Government or a Government Minister) and whose decisions are ultimately based on foreign policy or other discretionary considerations.[135] On the other hand, the national courts can also be said to have been disempowered as the system of surrender pursuant to a European arrest warrant is based on the principle of mutual recognition; a judicial authority in one Member State must recognize and enforce the decisions made by a judicial authority in another Member State. The national court has also been used as a medium in an indirect challenge to the very validity of the Framework Decision on European arrest warrant. In *Advocaten voor de Wereld VZW*,[136] the Belgian legislation transposing the Framework Decision was challenged at the Arbitragehof on the ground that the Framework Decision itself is invalid.

The principle of mutual recognition actually presents a special problem for the application of the framework decision on European arrest warrant. This principle entails that certain determinations made by the issuing Member State[137] cannot be challenged by the executing Member State. Thus, even if the executing Member State doubts the conformity with EU law of the determination made by the issuing Member State, the executing Member State cannot really make a reference for a preliminary ruling by the ECJ, since a ruling on that question will not be necessary for making a decision on the surrender. On the other hand, one may argue that the determination by the issuing Member State can perhaps be challenged in that State, and a reference for a preliminary ruling be made therefrom. But here one may encounter a range of procedural problems such as the fact that a prosecutor who issues the European arrest warrant is not a court or tribunal within the meaning of Article 35 EU, that a reference for a preliminary ruling can only be made during the main proceeding, or that the Member State has not accepted the jurisdiction of the ECJ. However, it is not inconceivable

[135] The final 'political' decision in an extradition case is, however, normally preceded by an 'advisory' judicial process.

[136] Case C-303/05 *Advocaten voor de Wereld*, [2007] ECR I-3633. For comments on this case see, for example, Daniel Sarmiento, 'European Union: The European Arrest Warrant and the quest for constitutional coherence', 6 *International Journal of Constitutional Law* (2008) 171-183 and Florian Geyer, 'Case Note on *Advocaten voor de Wereld*', 4 *European Constitutional Law Review* (2008) 149-161.

[137] In the following, 'the issuing Member State' and 'the executing Member State' are abbreviations of 'the competent judicial authority of the issuing (resp. executing) Member State'.

that, following *Lucchini*,[138] precedence be given to the protection of individual rights over some of the adverse consequences of the principle of mutual recognition.

Another problem raised by the framework decision on European arrest warrant is that the persons arrested under the warrant would usually be remanded in custody, *i.e.* being deprived of his/her liberty. Therefore, a reference for a preliminary ruling by the ECJ will not be an attractive option for the person deprived of liberty. Fortunately, a new urgent preliminary ruling procedure (*procédure préjudicielle d'urgence*, abbr. 'PPU') has been in place since 1 March 2008, which is applicable to references for a preliminary ruling that raise a question in the areas covered by *inter alia* Title VI of the EU Treaty.[139] Within the Third Pillar, the PPU was first applied in *Santestaban Goicoechea*.[140] However, it is also possible that a person be deprived of liberty in a proceeding that does not concern matters under Title VI EU. As mentioned above, there is a preponderance of criminal proceedings when Swedish references for a preliminary ruling are concerned. Unfortunately the PPU is not available to those cases only involving a question of Community law. It may be pointed out, nevertheless, that an accelerated procedure is also available pursuant to Article 23a of the Statute of the Court of Justice and Article 104a of the Rules of Procedure.

3.6 Legal Costs

In the foregoing discussion, it is maintained that the national courts have been empowered by EC law as there has been a tremendous augmentation of the sources of law that the courts – and parties – now have at their disposal. In order fully to make use of these sources of law, extra costs will arise not only by the courts in terms of the time spent analyzing this at times unfamiliar source of law, but also by the parties who would require legal counsel in order to defend the rights that EC law.

It is the truth – but not the whole truth – that the ECJ delivers its preliminary rulings free of charge.[141] Certainly, neither the referring court nor the

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[138] Case C-119/06 *Lucchini*, see esp. paras. 60-63.

[139] See Council Decision (2008/79/EC, Euratom) of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24, 29.1.2008, pp. 42-43 *and* Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 15 January 2008, OJ L 24, 29.1.2008, p. 39.

[140] Case C-296/08 PPU *Santesteban Goicoechea*. The very first PPU-case was case C-195/08 *Rinau* [2008] ECR n.y.r., which however is concerned with Regulation (EC) ? 2201/2003 falling under the area for judicial cooperation in civil matters.

[141] See Article 72 and Article 104(6) Rules of Procedure of the Court of Justice.

parties in the main proceeding are required to pay any fee to the ECJ. Other Member States, the Commission or other bodies referred to in Article 23 of the Statute of the Court of Justice, who in one way or another have participated in the procedure for a preliminary ruling, shall bear their own costs. As the Article 234 procedure constitutes a dialogue between the ECJ and the referring national court, none of the parties in the main proceeding can be regarded as either successful or unsuccessful in *the proceedings before the ECJ*. Hence the rules on the liability[142] of the unsuccessful party to pay the costs of the successful party are not applicable. However, legal costs are still an important consideration for a party who intends to argue its case before the ECJ. *In the first place*, a party in the main proceeding will undoubtedly incur own costs for its written submissions to and, where applicable, also oral hearing before the ECJ. The quality of the legal argument may very well depend on the party's ability to bear the costs. This raises, in turn, two questions: *viz.* whether legal aid is available according to the national law governing the main proceeding and whether the legal costs incurred are recoverable in the main proceeding if that party's claim ultimately is successful in that proceeding. *In the second place*, a party will need to consider the implications for being unsuccessful, if it is liable to pay the costs of the other party in the main proceeding. This last matter is governed exclusively by the law of the country of the main proceeding. In the following I shall examine some of the Swedish case law concerning the award of costs following a reference for a preliminary ruling to the ECJ.

According to the main principles of Swedish procedural law, the losing party in a civil proceeding shall pay the legal costs of the other party.[143] However, the liability is limited only for costs that 'reasonably are called-for' in the exercise of the right of the party.[144] This principle is applicable also in cases where the parties have incurred costs for the proceedings at the ECJ. For instance, in *T 310-97*,[145] the Court of Appeals for Skåne and Blekinge has ordered the respondent party (*Riksskatteverket*, the National Tax Board) to pay the legal costs of the claimants when judgment is given in favour of claimants subsequent to reference for a preliminary ruling. For an example of a case involving only purely private parties, see the order of

[142] Article 70 Rules of Procedure of the Court of Justice.

[143] Ch. 18 sec. 1 Code (1942:740) of Judicial Procedure (*Rättegångsbalk*). It must be emphasized that this in only a main principle subject to a considerable number of exceptions.

[144] Ch. 18 sec. 8 para. 1 Code (1942:740) of Judicial Procedure.

[145] *T 310-97*, *Soghra Gharehveran* et al. *v. Riksskatteverket*, Judgment of 9 June 1998. This judgment of the Court of Appeals was subsequently appealed to the Supreme Court (see *NJA 1999 s. 694* and *NJA 2002 s. 75*); however, the appeals do not pertain to legal costs.

the Supreme Court in *Ö 536-04* concerning a question of Swedish court's jurisdiction in accordance with Brussels-I Regulation.[146]

In criminal cases, the costs for the work of the public defence counsel is borne by the State and are calculated on the basis of the time spent on the case having regard to its nature and extent.[147] Thus, there will not be any cost implications for an accused if he/she is represented by a public defence counsel and is ultimately acquitted in the Swedish court following a reference to the ECJ for a preliminary ruling. In fact, the accused may – upon acquittal at the main proceeding – even be awarded costs for a (private) defence counsel and other expenditures that are 'reasonably justified' in the defence of the case.[148] However, the position of the accused is different if he/she is found guilty at the main proceeding. In this case, the convicted person may be liable to reimburse to the State the defence costs that the person previously has received from State funds, and that includes not only the costs of the proceedings in Sweden but also the costs for making submissions to or representation at the ECJ.[149]

In *NJA 2008 s. 259*, the Supreme Court has made a ruling that has implications for the Swedish courts' assessment of the reasonableness of costs incurred in proceedings involving a reference for a preliminary ruling. Although this Supreme Court decision is concerned with a criminal proceeding, the reasoning would for most parts be equally applicable in civil proceedings and it is worth some comments. The Supreme Court began by stating that the reference for a preliminary ruling was a part of the main proceeding and it was for the national court to decide on matters of legal costs, even when these costs concerned the proceedings at the ECJ.[150] Hence the national courts were to apply the domestic legislation, according to which a person who was found not guilty might be awarded costs incurred for the defence of the case. The Supreme Court laid down the following guidelines on the role of the parties in the main proceeding:

> A party who would like to influence the questions to be referred to and the material to be presented to the ECJ should, in the first place, make use of the opportunities afforded by the national court to influence the formulation of its decision on the reference for a preliminary ruling […]. This does not mean that the parties in the main proceeding are deprived of the possibility of participation in the proceeding before the ECJ. In particular, when it is a party who has

[146] *Ö 536-04*, *Freeport plc v. Arnoldsson*, Order of the Supreme Court of 28 December 2007, decision on cost unreported but see *NJA 2007 s. 1000* regarding the substantive law.
[147] Ch. 21 sec. 10 Code (1942:740) of Judicial Procedure.
[148] Ch. 31 sec. 2 Code (1942:740) of Judicial Procedure.
[149] Ch. 31 sec. 1 para. 1 Code (1942:740) of Judicial Procedure. See, however, further rules in sec. 2-5 on a upper limit and other adjustments and modification of the amount payable.
[150] *NJA 2008 s. 259* at p. 279.

> initiated the issue of a preliminary ruling […] it would naturally have a strong interest in being heard and in presenting its points of view. As far as the reasonableness of the costs incurred for the proceedings before the ECJ is concerned, the assessment must be based […] on the same criteria as those applicable for the proceeding in Sweden. What is decisive in this respect is whether the party, when the work was carried out, had reason to believe that it was needed so as to maintain his rights in the main proceeding. The general nature and complexity of the case, as well as the need of particular specialist knowledge of the area of EC law in question or of the procedure at the ECJ are some of the factors that ought to be taken into consideration.[151]

3.7 Competence of the National Judges in Matters concerning EC/EU law

As illustrated above, the Swedish courts – regardless of which instance – have often tried to resolve a question of EC law without making a reference to the ECJ. The reason for not making a reference is often that the issue of Community law is clear. However, in order to make an assessment of the clarity of Community law, the judge must possess a considerable knowledge of Community law. It is therefore a reasonable question to ask, whether the Swedish judges in fact have the competence needed to sit as the 'first judge of Community law'.[152]

To begin with one should note that most of the ordinary judges with full tenure who are in service today would have received their university education in law when Sweden was not a Member State of the EU and Community law would not be studied in any great depth. Most of these judges must therefore acquire their knowledge of EC law through vocational training. In this connection it may be pointed out that according to the plan of the Swedish National Court Administration (*Domstolsverket*), Community law should be included in the curriculum of the newly established Magistrates' Academy (*Domarakademi*) responsible for the training of judges, albeit that Community law will not feature prominently.[153] Some judges participate in the courses and other training activities offered by different European bodies (*e.g.* Europarechtsakademi in Trier and the European Judicial Training Network). Some judges would also have studied Community law at post-graduate level or even carried out advanced research, usually before they are appointed judges as paid leave to pursue studies towards an academic degree in Community law is a luxury

[151] *Ibid.*

[152] On the notion of the national judge as the 'first judge of Community law', see the Report of the Committee on Legal Affairs of the European Parliament on the role of the national judge in the European judicial system, A6-0224/2008, 4.6.2008, at pp. 37-40.

[153] See *Domstolsverkets rapportserie 2008:1 Domarskola*, esp. pp. 33-34 and Appendix 3 (Schedule for courses in 2009).

not known among the full-time working judges in the Swedish courts. One other comment on the practical experience of Swedish judges can be made: it is not unusual that after the initial training at the courts, a qualified jurist in Sweden will spend a number of years working at the a government ministry or as a secretary for a public enquiry. In this way, the jurist may come into direct contact with EC law before he or she returns to the courts after an appointment as ordinary judge.

Finally, it may also be mentioned that a qualified jurist may sit as a co-opted member (*adjungerad ledamot*) of a court and in this way exercise the same judicial power as the ordinary judges. Thus, experts in Community law may sometimes actually be acting as judges. For instance, in the case *NJA 2008 s. 120* referred to earlier, one of the three judges sitting at the District Court was Carl Michael von Quitzow – who was once a Jean Monnet professor of European law at Lund University and author of books on the internal market and state measures distorting competition within the EU. At the proceeding at the Court of Appeals, one of the five judges of appeals was Sten Pålsson who was an author of books on EC law and had been an expert in a Swedish national commission on the EC inner market; another judge on the appeals panel was Nils Wahl, a former professor of European law at Stockholm University and since October 2006 a judge at the Court of First Instance of the European Communities. With this gallery of judges, it would be difficult to criticize the competence in EC law in the courts. However, one cannot on this basis alone draw any conclusion on the general level of knowledge of EC law for the average judge in the courts of general jurisdiction in Sweden.

As far as material on Community law is concerned, the Swedish judges would have the same access to the extensive content offered by EUR-Lex as any member of the general public. The National Court Service also publishes a monthly Newsletter (in Swedish)[154] on EC law with news on the following main sections: (1) decisions of the Swedish courts with a Community law element, (2) *selected* decisions of the ECJ and Court of First Instance including report on *all* cases concerning Sweden, (3) new cases and (4) miscellaneous news on legislation and other relevant activities of EU relevance. At the website of the Supreme Court, a special page[155] with direct links to the Court's judgments with EU relevance is now under construction. There is thus a good basis from which any judge who wishes to keep *à jour* with Community law can draw his/her material.

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[154] http://www.dom.se/templates/DV_Listing____2216.aspx, accessed 30 September 2008.
[155] http://www.domstol.se/templates/DV_InfoPage____8843.aspx, accessed 30 September 2008.

4 EMPOWERING NATIONAL LABOUR COURTS, DISEMPOERING NATIONAL LABOUR LAW?

4.1 Introduction

This chapter monitors the National Labour Court's (*Arbetsdomstolens*) position in the perspective of a emerging EC-labour law. The situation with well-defined national labour market regulations and no – or only a few – corresponding EU provisions may be about to change. One could argue that the internationalization and Europeanization of the 'Social Dimension' will bring about a disempowerment of national *labour law*, or at least a period of re-structuring and re-focusing of the field, particularly so after the recent enlargement of the European Union.[156] On the other hand, one could also argue that the national labour courts might gain a new and more potent role while actively promoting the impact of the general principles expressed and developed in the ECJ case law. There are, however – especially in the most recent development – reasons to believe that such an empowerment of national labour courts will be, or currently is, preceded by a period of disempowering of these courts as a result of an overall increasing influence of EC labour law, and the articulated application of EU general principles in labour market regimes.

Whether the ongoing Europeanization of labour market regulations is disempowering *vis-à-vis* national labour regulations or not, the current situation can be characterized as a re-focus of the labour market arena in an increasingly European perspective, a shift that previously made its way through other areas of law, and indeed an expansion of judge-made law.[157]

When it comes to labour market regulations and the relation between these regulations and EC-law and the case law of the ECJ, some observations can be made. First of all, labour market regulation is still a primarily national legislative interest, since the jurisdiction in many areas are limited to legislation at national level. This has not, however, totally prevented the ECJ from recently applying general principles of EC-law when examining national labour legislation such as collective bargaining and industrial action, even though this application of EU-principles in national jurisdic-

[156] A recent discussion about the challenge to national social welfare regimes, where labour law and national labour standards forms a vital part, is recently expressed in H. Verschuferen, 'Cross-Border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law?', in 24 *The International Journal of Comparative Labour Law and Industrial Relations* (2008) 167-199.

[157] S. Sciarra, 'Integration though courts: Article 177 as a Pre-federal device', in *Labour Law in the Courts – National Judges and the European Court of Justice*, S. Sciarra (ed.), Hart, Oxford 2001, at p. 9.

tion has been under heavy debate.[158] Secondly, it must be stressed that the application of these general principles is most prominent in relation to equal treatment, non-discrimination and the principle of free movement,[159] which obviously are core areas of the European Community.

This chapter examines the recent development of EU labour law at a national labour court level. Furthermore, it also looks into the current application of general principles in labour law cases at the ECJ and sheds some light on the relation between this national development and the parallel European development.[160] There is not a very heavy case load of EC-related cases from the Swedish Labour Court. In fact, the Labour Court has only twice requested a preliminary ruling from the ECJ, but it has delivered final judgments on EU-related perspectives of labour law in a number of cases, often with brief or even no reference to EC-law or general principles as they are expressed in the Court of Justice.

In order to illuminate this situation this chapter will highlight some recent cases of the Labour Court and consider to what extent this Court has developed the EC-aspects of the specific cases in the national setting.

The focus lies on the ongoing and most relevant legal debate on the setting-aside of national law under the influence of EC-law and the establishment of general principles with direct effect in some areas of labour law (even horizontal direct effect). The examination of this development is related to the development of the implementation of the principle against age discrimination after *Mangold*.[161]

4.2 The Swedish Labour Court and the Application of EC-law in Recent Case Law, Acte Clair and Article 234 EC

As described in many places elsewhere, the influences of the ECJ have developed significantly in the field of labour law, national industrial rela-

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[158] In the *Laval*-case (*infra* note 164) the internal Swedish debate prior to the decision of the ECJ was influenced by this perspective and one of the lay-members of the Swedish Labour Court – overruled by the majority, though – did not vote in favour of asking the ECJ for a preliminary ruling in the case at all.

[159] See for instance Case 149/77 *Defrenne III* [1978] ECJ 1365, Case C-144/04 *Mangold* [2005] ECR I-9981, Case C-415/93 *Bosman* [1995] ECR I-4921, but more recently also C-144/04 *Mangold*.

[160] Since the article is written as a part of a more extensive project monitoring the empowering of national courts through the case law of the Court of Justice, the over-arching understanding is that there is, or might be, such an 'empowerment', at least when it concerns the labour law. However, as will be discussed later, this article also stresses areas where the development in the ECJ has rather disempowered the national labour courts.

[161] Case C144/04 *Mangold* [2005] ECR I9981.

tions standards and other parts of social dimension law over the past 15 years.[162] Indeed, some of the most heavily debated cases from the Court of Justice in recent years have had a labour market or social dimension background.[163] Some of these cases have brought about an understanding that the influences of Community legal standards and principles have a much broader impact than is regulated in specific Community legislation. We will look into that later in this text, when examining the cases from the ECJ. In a general perspective, the possibility – and indeed the obligation – under Article 234 EC to request a preliminary rulings has not, so far, convinced the Swedish Labour Court to direct its cases to the Court of Justice more than on two separate occasions: the case of *Laval*[164] and the case of *Jämställdhetsombudsmannen*.[165, 166]

The Swedish legal procedures in labour law cases differ to some extent from the procedures in other Member States. Contrary to the situation in most countries the Labour Court of Sweden constitutes the first and only court in the majority of labour disputes.[167] Basically, only when the applicant (employee) is not represented by a trade union, or if the employer is not bound by a collective agreement, will the ordinary District Court (*tingsrätten*) hear the case with appeal to the Labour Court.[168] Thus, the Labour Court will hear the majority of Swedish labour disputes as the court of first and only instance. This certainly underlines the importance of an advanced knowledge and acceptance of EC-principles in the Labour Court and stresses the relevance of preliminary rulings from the ECJ.

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[162] See for instance (in Danish), R. Nielsen, *EU-arbejdsret*, 4 udgave, Jurist- og Økonomforbundets forlag, Copenhagen 2006. The term 'Social Dimension' is commonly used to described legislation and regulations on labour market and the social security, especially social insurance, equal treatment and labour standards, which partly are covered by Community legislation.

[163] See N. Bruun & J. Malmberg, 'Finska och svenska domstolar som arbetsrättsliga gemenskapsdomstolar', in *Liber Amicorum Reinhold Fahlbeck*, Juristförlaget i Lund, Lund 2005. In this article, the authors address the position of the Labour Court in relation to the numerous cases related to EU law, especially corresponding to the EC directive on transfer of undertaking and directives on equal treatment.

[164] Case C-341/05 *Laval* [2007] ECR I-11767. (The Swedish preliminary ruling is *AD 2005 N^o 49*.)

[165] Case C-236/98 *Jämställdhetsombudsmannen* [2000] ECR I-(The Swedish preliminary ruling is *AD 1998 N^o 66*.)

[166] Statistically there is a general reluctance on the part of Swedish Court to request preliminary rulings from the ECJ. *Cf.* U. Bernitz, 'Kommissionen ingriper mot svenska sistainstansers obenägenhet att begära förhandsavgöranden', [2005] *Europarättslig tidskrift* 109.

[167] The proceedings are regulated by law, *viz.* the Labour Disputes (Judicial Procedure) Act (SFS 1974:371)

[168] See the ch. 2, paras. 1-8, Labour Disputes (Judicial Procedure) Act

Despite these circumstances, the Labour Court seems somewhat reluctant to seize this opportunity.

In some recent cases the Labour Court addressed, and discussed, an interpretation of the national provisions in light of certain EC-directives and the case law of the ECJ. None of these cases really stretched the issue of setting aside the national legislation in favour of EC-law. Instead they were all about interpreting national law developed out of EC law, and interestingly, a great number of the cases relates to the national provisions (derived from EC law) on the transfer of undertakings.[169]

The case *AD 2008 Nº 39* is concerned with the interpretation of national legislation, here the Working Time Act, which is based on or supposed to implement Directive 2000/34/EC.[170] In this case, three employees at a Swedish hospital questioned, through their trade union the employer's application of the collective agreement and the interpretation of the Working Time Act as it is developed after the full implementation of the Working Time Directive. The employees had employment which included time on call as well as time at work. In respect of the 11 hour daily-rest provisions of the Working Time Act, the employer refused to let the employees work full days directly after a night shift when they had been called in to work and their salaries was reduced accordingly. After concluding that the question of pay was outside of the scope of the Working Time Act and therefore subject to the contractual relations between the parties, the Labour Court decided, with no reference to the EC-legislation, that the employer had the right to deny the employees pay for the hour they were obliged not to work.

In case *AD 2005 Nº 88* the issue of a preliminary ruling in accordance with Article 234 EC was put explicitly on the table.

The question was at a first glance somewhat similar to the situation in *Laval*, with foreign workforce working at a Swedish building and construction site. In case *AD 2005 Nº 88*, the workforce was, however, self-employed and organized through a contractor and the legal issue for the Labour Court was to examine the legality of the industrial actions taken by

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[169] The development of the case law related to EU requirements on transfer of undertakings has long been recognized as a well-established field of EU labour law, with numerous cases from the ECJ – see for instance the description in P. Davies, 'Transfer of Undertakings', in *Labour Law in the Courts – National Judges and the European Court of Justice*, *supra* note 157, at p. 149.

[170] See also the corresponding provisions in Directive 2003/88/EC and the earlier Directive 93/104/EC.

the trade union at the site in relation to the contractor contracting out the work to self-employed persons. There was a duty for the contractor to inform the trade union about the use of sub-contractors and, under Swedish legislation, trade unions may object to the use of self-employed sub-contractors at a workplace.[171] Regarding the question whether the Labour Court should ask request a preliminary ruling, the Labour Court concluded that it did not have to. Even though the case included a letter from the trade union to the contractor stating that the trade union objected to the sub-contractor based on the fact that the sub-contractor used self-employed of 'foreign origin',[172] the Labour Court found that there was no support in the case for a position that neither the foreign origin (Polish) of the director of the sub-contractor nor the national origin of the self-employed workers had any consequences for the activities undertaken by the trade union. The Labour Court arrived, therefore, at the conclusion that there was no reason to request a preliminary ruling, not even when one of the parties (the sub-contractor) had asked explicitly for such a procedure.

In a number of cases the questions of preliminary rulings were articulated by one of the parties, but dismissed by the Labour Court. The case *AD 2007 Nº 2* is concerned with the validity of a collective agreement entered into by a Cypriote corporation and a Swedish trade union regarding a ship registered in the Bahamas. Regardless of the explicit call for a preliminary ruling by one corporation, the Labour Court concluded that the case did not consist of any application of EC-law and therefore dismissed the motion to request a preliminary ruling.[173] In a number of cases the Labour Court came to the conclusion, with more or less emphasis in its reasoning, that there were no need for a preliminary ruling following the *acte clair* doctrine.[174] The cases show great individual differences, and in some of

[171] See further R. Eklund, T. Sigeman & L. Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Iustus, Uppsala 2008, pp. 238-249.

[172] *AD 2005 Nº 88*. The Swedish wording was: 'på grund av att företaget använder sig av utlänsk [sic] arbetskraft med F-skattesedel'.

[173] *AD 2007 Nº 2*.

[174] The very notion of '*acte clair*' is not in use by the Labour Court, but the references to the *CILFIT*-criteria and the wording of the Labour Court's judgment obviously points in this direction. See *AD 2005 Nº 88* (discussed in more detail above), *AD 2002 Nº 45* (on sex discrimination, the respondent wanted a preliminary ruling, but neither the applicant, nor the Labour Court agreed), *AD 2002 Nº 15* (Air Force pilot), *AD 2001 Nº 76* (Sex discrimination, again the respondent wanted a preliminary ruling, but the applicant did not due to arguments of '*acte clair*'. See also *AD 1997 Nº 69* (together with *AD 1999 Nº 103*).

these cases the discussion about the reason not to request a preliminary ruling has been more explicit, in others not.[175]

Reflections on Recent Cases on 'Transfer of Undertaking'

Two recent cases address the issue of transfer of undertaking, with an obvious connection to EC law and the earlier case law of the ECJ. In these cases, the Swedish Labour Court has clearly relied on the EC cases, especially the well-known *Spijkers* case (infra note 176).

In *AD 2008 Nº 51* the structure of the business somewhat complicated. A timber company (A) had contracted out the truck (forklift) part of the business for more than 10 years. The primary contractor (B) had sub-contracted to another company (C) to man the trucks, only providing for and maintaining the trucks remained with the primary contractor (B). When the sub-contractor (C) made their truck drivers redundant and the primary contractor (B) did instead arrange with drivers from a second provider, the staffing company (D). When this company employed some 10 (out of 23) drivers earlier employed with the sob-contractor (C), the question whether this was a situation of transfer of undertaking emerged. The Labour Court argues forcefully in the decision that the interpretation of the transfer-of-undertaking provision in the Swedish legislation (sec. 6b of the Employment Protection Act, 'LAS'), must be in line with the case law of the Court of Justice and relates directly to this case law, primarily *Spijkers*[176], but also *Rygaard*,[177] *Süzen*[178] and *Jouini*[179]. The Labour Court finds in this case that the contractual relation between the different companies shows that (D) only served as a staffing provider to (B) and that the question of transfer of undertaking fell therefore within the scope of the *Jouini*-case and that the circumstances in the Swedish case – where no administrative functions from the sub-contractor (C) had past over to the staffing provider (D) – did not result in a transfer of undertaking-situation.

Another recent transfer of undertaking case is *AD 2008 Nº 61*, where the Labour Court also discussed the case law of the Court of Justice.

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[175] See also *AD 2001 Nº 67* where the Labour Court found that a request for a preliminary ruling would have been unnecessarily time-consuming, even though the District Court had approved such a request from the applicant, a person employed by the European Commission, but stationed in Stockholm, who had been summarily dismissed (Sw. *avskedad*). The question in this particular part of the case concerned whether the employer could be forced to present certain documents in the court proceedings.

[176] Case 24/85 *Spijkers* ECR [1986] 1119.

[177] Case C-48/94 *Rygaard* REG [1995] I-2745.

[178] Case C-13/95 *Süzen* REG [1997] I-1259.

[179] Case C 485/05 *Jouini* REG [2007] I-7301.

In *AD 2008 Nº 61* the new employer respected the collective agreement in force under the stipulated 12 months' period after a transfer of undertaking. Since this, however, brought about a situation where some employees in the transferred undertaking received less favourable benefits than according to the collective agreement already in place with the new employer, the question of breach of collective agreements with regards to this situation came up. The employees of the transferred undertaking had the same benefits as before the transfer, but less favourable than the employees of the new employer, since there was a different collective agreement in place in this enterprise. The Labour Court relied in this case heavily on the case law of the ECJ, primarily the cases of *Daddy's Dance Hall*, *Rask* and *Werhof*.[180] According to section 27 of the Swedish Co-determination Act (*Medbestämmandelagen*) an employer who is already bound by a collective agreement may not enter into legally binding agreements with less favourable conditions than is stated in the collective agreement. In the present case, the Labour Court found that this never happened, since the new employer never entered into any new agreements, he only madder alignments with the conditions already in place at the transferred entity and neither the Swedish Act nor the EC Directives have provisions that enforce an upgrading of the conditions – an indeed, the Labour Court does not find any such requirements in the case law of the ECJ either.[181] Finally the Labour Court recognizes that the interpretation and application of the Swedish provisions in the case does not – contrary to what is argued by the applicant – contradict the principles of self-regulation for the industrial parties expressed in international labour market conventions.

In a third similar case the Labour Court had to decide whether there had been a transfer of undertaking in relation to the implemented Directive 2001/23/EC.

In case *AD 2008 Nº 64*, the cleaning service at a hotel (A) was contracted out to a contractor (B) who after only some months cancelled the agreement and, as a result of this, served notice of redundancy to some of its employees. The hotel, however, concluded a contract with another service-provider (C) for cleaning services at the hotel. The complaining employee

[180] Case 324/86 *Daddy's Dance Hall* ECR [1988] 739, case C-209/91 *Rask* ECR [1992] I-5755, case C-499/04 *Werhof* REG [2006] I-2397.

[181] In *Daddy's Dance Hall* the Court of Justice expresses the fundamental purpose of the Transfer of undertaking-directive in the following: '[to] ensure that the rights resulting from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded' (para. 14). The Labour Court also raises the points addressed by the ECJ in *Werhof* where the Court states that the employees' rights at the day of the transfer, not any other future, hypothetic right, are protected under the directive.

had been employed with the cleaning duties first at the hotel (for some 30 years) and after the cleaning services was contracted out with the first service provider (B). When the second service provider (C) took over the cleaning services at the hotel two out of a total of four of the cleaning personnel were employed with this contractor (C). The dispute at the Swedish Labour Court concerned the question if these activities were to be considered transfer of undertaking and, if so, whether the complaining employee should have been offered employment by (transfer to) the new contractor (C). The Labour Court discussed the seven *Spijkers*-criteria and related the situation to those of *Ayse Süzen* and *Temco*.[182]

Interestingly, the majority of these cases did not lead the Labour Court to discuss if they had a duty to request a preliminary ruling pursuant to Article 234 EC, or to contemplate whether the cases were *acte clair* or if there were indeed some other reasons not to ask for a preliminary ruling.[183] It should be noted that neither the applicants nor the respondents in these cases called for such a ruling, though. In *AD 2008 N^o 61*, the Labour Court did address the issues, but concluded that, on the basis of the European case law examined, that it 'has to be considered shown [Sw. '*framgå*'] from the EC law that the purpose of the directives' provisions regarding the acquirer's duties under the transferor's collective agreement do not reach beyond avoiding deteriorated conditions for the employees at a transfer of undertaking'.[184] That is as close to a statement of *acte clair* that the Labour Court expresses in these recent cases.[185]

None of these cases had to do very much with the Labour Court setting aside national provisions in order to enforce EC law or general principles. On the contrary the cases exemplify situations where implemented directives are interpreted in a national context – with occasional references to EU law. A number of further cases from the Labour Court – concerning for instance indirect discrimination in relation to ethnic origin and language skills as well as parental leave and sex discrimination – were never related to their EC-law origins.[186]

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[182] Case C-13/95 *Süzen* REG [1997] I-1259 and case C-51/00 *Temco* [2002] ECR I-969.

[183] In some older cases the Court, however, did reflect upon the *acte clair*-doctrine, see *AD 2002 N^o 45* where the EC law on sex discrimination with respect to pregnancy was considered clear to the extent that a preliminary ruling from the ECJ was not permitted, even though the respondent had asked for such a ruling.

[184] AD *2008 N^o 61*, my translation from the Labour Court decision. The decision is only available in Swedish.

[185] See for references and discussion on the *acte clair* and *CILFIT*-criteria, see the introductory chapter of this report.

[186] See *AD 2008 N^o 47* on discrimination and language skills and *AD 2008 N^o 14* on right to parental leave and sex discrimination.

Reflections on Recent Discrimination Cases

In line with the expansion of EC discrimination law and the ongoing implementation of the directives under art. 13 EC, did the Labour Court in recent years hear a number of cases on different kinds of discrimination. Equal treatment between men and women under art. 2 EC and more generally under art. 13 EC has developed rapidly as an important aspect of European labour law, indeed somewhat more in focus than other areas. Davies is probably correct in his analysis that the relevance of the non-discrimination law is to a large extent dependent on these articles being places "outside the social policy chapter" and directly at the core functions of the Treaty.[187]

The Labour Court decision in *AD 2005 N^o^ 87* on indirect sex discrimination is concerned with the implemented EC-concept of indirect discrimination in a situation where the car producer Volvo applied restrictions regarding body lengths of the employees when working with certain manufacturing in the car production. In the case the employer had used a qualification interval between 163 cm and 193 cm when employing staff for the manufacturing. The applicant in the case was less than 160 cm tall and complained to the Labour Court, with the support of *Jämställdhetsombudsmannen*, that the practice of the employer was indirectly discriminatory against women since they, typically, more often than men, would be less than 163 cm tall. In this particular case the Labour Court found that the employer had been indirectly discriminating women; it had explicitly relate this case to the case law of the ECJ in *Seymour-Smith and Perez*[188] when it (the Labour Court) allowed itself to examine the comparable group (men) and make a judgement applying the EC-concept of indirect discrimination, which, however have for some years been well-established in the Swedish Equal Opportunities Act (*Jämställdhetslagen*, SFS 1991:443) and the corresponding provisions in other national legislation under Article 13 EC.[189]

Contrary to the judgment in *AD 2005 N^o^ 87* the Labour Court made no explicit connection with EC law or general principles derived from the case law of the ECJ in *AD 2005 N^o^ 32* (on disability discrimination) and in

[187] See P. Davies, 'Transfer of undertakings', supra note 169, at p. 133 and L. Waddington, 'Testing the Limits of the EC Treaty Article on Non-discimination', 28 *Industrial Law Journal* (1999) 133.

[188] The well known indirect discrimination case C-167/97 *R. v Secretary of Sate for Employment, ex parte Seymour-Smith & Perez* [1999] ECR I-623.

[189] The national discrimination legislation has before 1 January 2009 been scattered in a number of different Acts of law, in the labour market organized by the different grounds of discrimination (sex, ethnic origin and religious beliefs, disability, sexual orientation as well as fixed term and part-time). The new Discrimination Act (SFS 2008:567) codifies the different grounds of discrimination under one single act.

AD 2007 N^o 16 (on discrimination on the ground of ethnic origin). None of the parties called for a preliminary ruling, neither did the Labour Court address the issue of a European connection, even though the disability discrimination case (at least) certainly included issues where the hierarchy of norms and the impact of disability discrimination law under influence of Article 13 EC and Directive 2000/78/EC could have been raised.

In *AD 2005 N^o 32*, the Labour Court had to apply the provisions containing exemption from the Employment Protection Act (*Lagen om anställningsskydd*, SFS 1982:80) and the equal treatment provisions of the Disability Discrimination Act (*Lagen om förbud mot diskriminering i arbetslivet på grund av funktionshinder*, SFS 1999:132). The Labour Court summarized that even if the employers had dismissed the applicant (the disabled employee) in accordance with the provisions in the Employment Protection Act (*lagen (1982:80) om anställningsskydd*), the overall picture of the dismissal led to the conclusion that the dismissal had a *prima facie* connection to the employers disablement and that, with respect to the shared burden of proof, the employers could not show that there was no such connection.

The case *AD 2005 N^o 32* is of vital importance for a number of reasons, particularly from a domestic legal, but, to some extent also from a European perspective. First of all, the case represents a view of the Swedish concept of disability, the broad concept, which could be argued as having been laid down in Directive 2000/78/EC. Even though the Court does not need to make a decision on the issue of what constitutes a disability – in this case multiple sclerosis in an early stage, the fact that the case is brought at all to the Labour Court, and decided upon under the EC-related disability discrimination provisions is important. In a recent, corresponding Danish case from Vestre Landsret,[190] the same illness, MS, was excluded from the concept of disability.[191]

In two cases in 2007 concerning discrimination of the ground of ethnic origin the Labour Court addressed the issue of employer responsibilities and indeed how to define an employer when a number of persons with no direct corporate responsibility acted potentially discriminatorily against

[190] Vestre Landsrett (Denmark), judgment of 11 October 2007, UfR 2008.306 V.

[191] See also case C-13/2005 *Sonia Chacón Navas* [2006] ECR I-6467 in which the difference between ordinary illnesses and disability is discussed. This certainly draws some attention to the coherence of EC-provisions under national law and in national (labour) courts. To some extent Directive 2000/78/EC allows the national legislator to address certain definitions differently, but, as in *Chacon Navas*, the ECJ could, and should, define the core of these definitions (such as disability) in a EC perspective.

applicants on grounds based on the ethnic origin of these applicants. Even though the notion of 'employer' must reasonably be decided primarily with respect to national law, the interpretation of 'employer' in unclear situations related to the EC-influenced discrimination law (under Article 13 EC) would, or a least could, have benefited from an discussion with relations to the EC legal body.[192] These two referred cases do not, however, include any discussion on the meaning of 'employer' under the Directive, nor do they correspond to any general principles of EC law in relation to ethnicity. Instead the Labour Court stayed at the domestic law as it was given, and did not introduce any new thoughts on interpretations in line with EC law or EC principles.

In *AD 2002 Nº 45*, the Labour Court made a rather explicit investigation of EC Sex Equality law and concluded that there was no need, contrary to the perception of one the parties, to request a preliminary ruling. This case is concerned with the discrimination of a pregnant women applying for a position as midwife at the Public Health Authority (*Landstinget*) in Västmanland. The Court found that the employer had discriminated against the woman in the sense of 'discrimination' in Directive 76/207/EEC, under provisions that had direct effect in the case regardless of the somewhat unclear implementation of the wording of the Directive. The discriminated applicant was not appointed for the employment but another woman was and the Labour Court appeared to have concluded that the employer probably circumvented the pregnant woman due to the potential inconvenience her pregnancy might cause in the future. The Labour Court especially considered the arguments of the Court of Justice in *Dekker*[193] but also the ECJ in *Handels- og Kontorfunktionaerernes Forbund i Danmark*[194] along with *Habermann-Beltermann*[195] and *Webb*,[196] and applied the EC law principles of equality before the (then) legislative equality provisions of the Swedish Equal Opportunities Act (section 25, *jämställdhetslagen* 1991:433).

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[192] Hypothetically, a domestic legislation stating that the concept of 'employer' did not exist in the national law and, as a consequence hereof, that the very idea of discrimination law on labour market situations would be invalid, would most certainly infringe Directive 2000/78/EC and, probably, would be rejected by the Court of Justice. One could therefore easily argue that the concept of 'employer' will not lack total interest when examining the implementation of the framework directive on discrimination.

[193] Case C-177/88 *Dekker v.Stichting Vormingcentrum voor Jong Volmassenen Plus* [1990] ECR I-3941.

[194] Case C-179/88 *Kontorsfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening* [1990] ECR I-3979.

[195] Case C-421/92 *Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband* [1994] ECR I-1668.

[196] Case C- 32/93 *Webb v. EMO Air Cargo (UK) Ltd* [1994] I-03567.

The internationally most well known Swedish labour case ever (?), the *Laval*-case has been heavily debated and commented in a number of articles and corresponding cases,[197] and it is not the intention here to go very deep into the *Laval*-case here, but it is nevertheless of some importance to recognize that the question of a preliminary ruling was not all that clear even in this most "European" case and it is important to notice that the principles of equal treatment and non-discrimination form a base for the Court of Justice in the judgement in *Laval*.[198]

4.3 Recent EC Case Law – Fundamental Rights and National Labour Law

A number of recent cases from the ECJ relates to the theme of this presentation, the correspondence between EC law and national law and the empowerment of national courts to set aside national provisions in respect for general principles in EC-law.

The setting aside of national law based on Community law raises a number of interesting issues, such as the direct effect of directives and horizontal effect of general principles and general rights. How national courts should address situations such as the heavily debated case of *Mangold*[199] is certainly not a easy question to answer. The presentation in the present chapter will primarily discuss these situations.

The Questions of Setting Aside National Labour Law with respect to European Law – Laval, Rüffert, Mangold and beyond

The Court of Justice has in a number of cases stated that national labour market regulations that are not compatible with EC-directives can, and will

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[197] See further: J. Malmberg & T. Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', 45 CMLRev (2008) 1115-1146; B. Nyström, 'Stridsåtgärder – en grundläggande rättighet som kan begränsas av den fria rörligheten', 20 *Juridisk Tidskrift* (2007-2008) 865-872; C. Barnard, 'Employment Rights, Free Movement under the EC Treaty and the Services Directive', in *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives*, M. Rönnmar (ed.), Kluwers Law International, Alphen aan den Rijn 2008, 137-168; Ö. Edström, 'The Free Movement of Services and the Right to Industrial Action in Swedish Law – In the Light of the Laval Case', *EU Industrial Relations v. National Industrial Relations*, *op. cit.*, 169-191; T. van Peijpe, 'If Waxholm Were in Holland: Interest Conflicts and EU Labour Law in Comparative Perspective', *EU Industrial Relations v. National Industrial Relations*, *op. cit.*, 193-216. See also C-427/06 *Bartsch*, A.G. Opinion, note 83, C- 346/06 *Rüffert v. Object und Bauregie GmbH & Co. KG*, paras. 31 and 33.

[198] Even though the internal Swedish labour market debate relating to the ECJ's judgment of 18 December 2007 has been more about other aspects than non-discrimination.

[199] Case C144/04 *Mangold* [2005] ECR I9981.

be, overruled and set aside in order to uphold Community law. These procedures have established the doctrine of direct vertical effect in relation to direct horizontal effect.[200]

As discussed briefly above, the regulation of the labour market has traditionally been left to the national law, and the development over the past ten or fifteen years, with an emerging EC-legal body in the field must be said to be a very loose construction, not supposed to cover more then some, but surprisingly vital, parts of the labour market. The comparably low numbers of cases concerning labour market provisions must be seen in relation to this development. This also affects, quiet naturally, the character of the cases submitted to the Court and a brief look at the cases handled by the ECJ in the past four years shows that the Court has followed a distinct path in most situations.

Setting Aside National Labour Law for a General Principle, such as Free Movement, or a General Right, such as Equality in relation to Nationality

The Swedish labour market – the representatives of all the industrial parties as well as the political parties – held their breath the morning of 18 December 2007 before the decision in *Laval* was published.[201] After the judgment from the Court of Justice a number of arguments of different significance were circulated in Swedish, and indeed European debate. Now, more than one year after this event, the debate is calming down and turning into a more modest climate.

However, the *Laval* case raises a number of questions in relation to national labour law, EC law and general rights, and also on the topic empowering national courts to set aside national legislation in respect to the European law. Contrary to the decision in *Mangold* discussed below, *Laval* represents a situation where a fundamental right, the right to take industrial action, appears to be in conflict with the principle of free movement, a principle which is closely related to the general right to equality regardless of national or ethnic origin.

In brief, the case is about a construction site in Vaxholm outside Stockholm in which a Latvian construction corporation (Laval un Partneri) refused to sign Swedish collective agreements for their posted, Latvian, workers

[200] Much has been said and written about this in general terms, see for instance P. Craig & G. de Burca, *EU Law – Text, Cases, and Materials*, 4th ed., Oxford University Press, Oxford 2007, chapter 8: 'The Nature of effect of EC law: Direct effect and beyond'.

[201] For some reason the *Laval* case was delivered a week later than the initially corresponding case of *Viking*.

while building a school.[202] Swedish trade unions initiated industrial action against Laval, blockading all vital electric installations at the site through 'sympathy measures' undertaken by Swedish trade unions[203] and the company seized the Labour Court asking it to declare the industrial actions inappropriate in relation to free movement and equal treatment.[204] During the proceeding, the undertaking performing the work in Vaxholm had to shut down the site and indeed suffered a bankruptcy thereafter since the work was not carried out. The ECJ addressed a number of issues in its judgment, and, most significantly, found that even though the right to industrial action was a fundamental right under EC law as well as international law,[205] such actions did not fall outside the scope of EC law when the rights to industrial action are incompatible with the fundamental principle of free movement and equality in relation to nationality on a posting enterprise.[206] The Swedish law on posted workers – in combination with the provisions on industrial action – allows such actions with the aim to fulfil not only a minimum standard (and there is no statutory minimum wage in Sweden). It is this that the ECJ has found to be contrary to the right of free movement (under Article 49 EC) and only acceptable if the legal provision serves, objectively, an 'overriding reason of public interest'.[207]

The outcome of the *Laval* case was somewhat surprising to most commentators, most of whom had guessed that the ECJ would primarily argue in lines of proportionality, as in the corresponding *Viking Line* case which was delivered a week before *Laval*. The judgment in *Laval* is clearly in conflict with the domestic labour law development of Sweden and questioned in general, we would say, the very idea that national legislation emerging out of even well-known international standards but re-shaped in

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[202] Laval did, in the course the escalating conflict on the Swedish market, sign a Latvian collective agreement with representatives of the Latvians trade unions and the dispute in the Swedish Labour Court did only relate to a situation where Laval had a valid collective agreement in Latvia.

[203] Such sympathy measures are permissible under Swedish law as long as the original dispute is lawful, see, R. Eklund, T. Sigeman & L. Carlson, *supra* note 171, at pp. 31-33.

[204] For a brief discussion on the case in Swedish, see B. Nyström, 'Stridsåtgärder – en grundläggande rättighet som kan begränsas av den fria rörligheten', 20 *Juridisk Tidskrift* (2007-2008) 865-872.

[205] Case C-341/05 *Laval*, paras. 90-94.

[206] See Case C-341/05 *Laval*, para. 90 and para. 95. This is not the exact wording of the Court of Justice, but, indeed the author's interpretation of para. 95 in the Courts decision.

[207] C-341/05 *Laval* para. 102 and para. 110. See also the discussion before the judgment in the *Laval* case was delivered, in R. Inston & T. Sigeman, 'The Freedom to Provide Services and the Right to Take Industrial Action – An EC Law Dilemma', 18 *Juridisk Tidskrift* (2006-07) 365-374.

domestic law in total absence of influences from Community law, such as the Swedish provision of 'lex Britannia',[208] which eventually was overruled by the Court of Justice. 'Lex Britannia' constitutes a statutory exemption to the general principle of collective labour law that industrial action in order to provide for the signing of an collective agreement would not be allowed against an employer who was already bound by a collective agreement.[209] Even though 'lex Britannia' came into force prior to 1 January 1995 when Sweden became a Member State, it has been considered a vital aspect of the protection of workers' wages and the collective agreements in Sweden. A governmental committee ('the *Laval*-committee')[210] is currently undertaking an investigation on the changes needed to comply with the decision by the ECJ and, indeed, the changes to the provisions (primarily 'lex Britannia') required after the judgement. As pointed out by Nyström, the Court of Justice, with its detailed and far-reaching judgement, leaves no real space for the national court in the case. The final court proceedings in the case will be held early 2009.[211]

The legal outcome and discourse in the recent case of *Rüffert* also demonstrates the impact of EC-standards and principles in national legislation and indeed for the reference in national (labour) courts. In *Rüffert*,[212] the Court of Justice had to consider a posting of workers situation in which national regulations 'of a legislative nature' (in Land Niedersachsen, Germany) forced contractors to the contracting authority to guarantee, when they submitted their tenders, to pay the posted workers at least the remuneration that was prescribed in the collective agreement at the place –

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[208] The 'lex Britannia' is a special provision in the Co-Determination Act, primarily sec. 31 a of the Act, see also sec. 25 a and sec. 42 para. 3 MBL (SFS 1976:580), regulating the situation where the trade unions want to take industrial action in order to imply a domestic collective agreement with priority over a foreign collective agreement already in force, covering the conditions of the workers carrying out work in Sweden.

[209] The distinctive provisions of 'lex Britannia' is described as 'A peculiarity of Swedish labour law' in R. Inston & T. Sigeman, *supra* note 207, at p. 373.

[210] The mandate and tasks of the '*Laval*-committee' is given in committee directives 2008:38. The Committee delivered its report in mid-December 2008, SOU 2008:123 (available with an English summary at http://www. regeringen.se). The Committee recommends slightly modified provisions focusing on providing clear and foreseeable rights under the (Swedish) collective agreement, but that the changes shall not reach beyond the borders of the European Union. The suggestions by the committee will, as usual, be circulated for comments to the industrial parties, universities and others (*remiss*).

[211] For an narrower discussion on Laval, posting of workers discussion and EU provisions, ee C. Barnard, 'Employment Rights, Free Movement under the EC Treaty and the Service Directive', *op. cit. supra* note 197, but also Ö. Edström, 'The Free Movement of Services and the Right to Industrial Action in Swedish Law – in the Light of the Laval Case', *op. cit. supra* note 197.

[212] Case C-346/06 *Rüffert v. Land Niedersachsen*, [2008] n. y. r.

and section – of the forthcoming work. At issue in the case was whether the national provisions violated the right to free movement under Article 49 EC and Directive 96/71/EC on posted workers.[213] In this case, A.G. Yves Bot considered the legislation in Niedersachsen to be in line with the directive on posted workers and Article 49 EC, an opinion that the Court of Justice, however, disagreed with in its final judgment. The ECJ found – with respect to, *inter alia*, the limited impact on the business area in total the provisions had, and further, by referring to *Laval* – that the level of protection that must be 'guaranteed' to the posted workers is limited under Article 3.1 (a)-(g) in Directive 96/71/EC,[214] indicating that further standards might be considered contrary to the right under Article 49 EC.

As we understand it, *Rüffert* could, and still can, appear in some form even in Sweden. Provisions in the Public Works Contracts Act (lagen (2007:1091) om offentlig upphandling) opens up for the application of social standards for the workforce involved and these standards may include the conclusion of collective agreements or at least the establishment of social (mainly payment) standards in accordance with such collective agreements – even if the undertaking is foreign and the workers are posted on the Swedish labour market.[215] Now, as in *Rüffert*, the question about reasonable level of standards would appear, and the answer, after *Rüffert*, would most reasonably be that only standards which do not discriminate undertakings from other (Member) States and who do not intervene with the rights to provide services regardless of national origin (within the EU) will be possible to uphold. As discussed in *Rüffert* that would not cover a certain, local, level of standards provided for by a particularly strong trade union (such as the Swedish Building Workers Union – *Byggnads*) in an industrial sector where the situation is most likely to occur. In the future, given the accelerating importance of posting of worker in the service sector, the situation could easily arise in sectors like health care or social areas such as elderly care (where the labour standards for many reasons are not as prominent as in construction work). In these sectors, one might find that the difference between some sort of 'minimum wage' standard and the actual standards offered would not be 'overriding reason of public interest'.[216]

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[213] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provisions of services.

[214] C-346/06 *Rüffert*, paras. 33 and 34, with reference to C-144/04 *Laval* para. 80 and 81 respectively.

[215] See ch. 6 sec. 13 Public Works Contracts Act (*lagen (2007:1091) om offentlig upphandling*) which implements Directive 2004/18/EC.

[216] C-341/05 *Laval*, para. 102 and para. 110.

Setting Aside National Law for a General Right…such as 'Age'?

In the *Mangold* case, Mr Mangold was employed for a fixed term contract under a labour law provision in Germany allowing employers to use fixed term employment more extensively when employing people of a certain (higher) age.[217] To put it very briefly, the Court of Justice was asked by the first level Labour Court in Munich to address *inter alia* the groundbreaking issue of the application of the principle of equal treatment, expressed in (at that time in Germany not yet fully implemented) Directive 2000/78/EC, especially the provisions on age discrimination.[218] The ECJ stated that the principle of equality was not originally laid down in Directive 2000/78/EC; the Directive had the 'sole purpose […] to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation'.[219] The principle of non-discrimination on the ground of age 'must thus be regarded as a general principle of Community law'.[220] Applying this argument to the case the ECJ proceeded without really touching upon the doctrine of horizontal direct effect and found that the result of the German case was that Community law, and Article 6(1) of Directive 2000/78/EC in particular, precluded age discriminatory provisions such as the one examined in the present case. The decision obviously raises more questions than it answers and a number of authors have debated the application of horizontal direct effect in regard to this case.

Now, is that really true or has the Court of Justice been blinded by the co-existence of age discrimination in the legal document among other – more widely recognized – grounds of discrimination? The case of *Bartsch* stretches,[221] as put forward by A. G. Sharpston, two important questions, to what extent the principle of equal treatment under the Treaty also covers age discrimination and the corresponding questions of whether the principles of age discrimination in the provisions of Directive 2000/78/EC has direct, horizontal effect.

In *Bartsch* the German Bundesarbeitsgericht asked the ECJ for a preliminary ruling in a case concerning the conditions in an employment-related

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[217] At the time of the dispute the legislation § 14 p. 3 mom 4 and mom. 1 of Teilzeit- und Befristungsgesetz (TzBfG) and the age limits were (for a period of time) reduced from 58 to 52 years of age.

[218] Pursuant to Art. 6, Directive 2000/78/EC on age discrimination and the legislation on disability discrimination, the Member States were given an optional three years for implementation. That optional period ended December 2006,

[219] Case C144/04 *Mangold* [2005] ECR I9981, para. 74.

[220] Case C144/04 *Mangold* para. 75.

[221] C-427/06 *Bartsch* [2008] n.y.r. See A.G. Sharpton's opinion.

agreement of retirement benefit for surviving widows or widowers to a privately employed person. The conditions of the particular agreement in the case stated clearly that a surviving spouse more than 15 years younger than the deceased employee could claim no benefit whatsoever under the arrangement. When her 21 year older husband had died aged 60 in 2004, Birgit Bartsch, nevertheless claimed the benefit and argued that the provision of the retirement benefit was contrary to the EC-principle of equal treatment. Bundesarbeitsgericht relates to the uncertainty of the direct horizontal effect indicated in *Mangold* when asking for a preliminary ruling from the Court of Justice.

As discussed above, the most recent question of age discrimination under Article 13 EC and Directive 2000/78/EG is bringing about a, to some extent, new and in many ways most delicate perspective of the effect of EC general principles and EC law and the enforcement of such legislation in national provisions and courts.

Looking at *Mangold* and the recent case law under age discrimination, one must indeed ask, again and again, whether there is a fundamental right not to be discriminated against in relation to age. To us, that is the most interesting part of all these cases, well put in the opinion of A.G. Sharpston in *Bartsch*.[222] Tobler argues, as we understand the text, that the Court had been more convincing if it had focused its reasoning on the 'special nature' of age discrimination and not relaying on the traditional arguments of equal treatment.[223] What is further discussed by Tobler, and indeed the A.G. Tizzano, is that age discrimination, contrary to other ground of discrimination, will be subject to justification to a much larger scale than other areas of discrimination. As a matter of fact, it is already embedded in Article 6(1) of Directive 2000/78/EC that even direct age discrimination can be justified.[224] The final conclusion by Tobler is, however, that the special circumstances of the *Mangold* case narrows down the impact of the decision, since only cases on age and disability discrimination established before the end of the extended implementation date (December 2006) will suit the criteria used by the Court of Justice in *Mangold*.[225] What Tobler also addresses, nevertheless, is that the Court of Justice may instead follow

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[222] C-427/06 *Bartsch*, Opinion of A.G. Sharpston, paras. 42 – 65.

[223] C. Tobler, 'Putting Mangold in perspective: in response to *Editorial comments,* Horizontal direct effect – A law of diminishing coherence?', 44 CMLRev (2007) 1177-1183. Tobler connects to the arguments brought forward by A.G. Tizzano in his Opinion. See Case C-144/04 *Mangold*, note 2, para. 84 of the Opinion of the Advocate General.

[224] Art. 6(1) of Directive 2000/78/EC provides a number of examples were national law might establish justifiable exceptions *prima facie* acceptable under Community law.

[225] See further C. Tobler, *supra* note 223, at pp. 1182-1183.

the more questionable path of 'general principle' and applying the outcome of *Mangold* to other cases concerned with direct vertical and indeed even horizontal effect.[226]

Is the Court of Justice correct in *Mangold* in treating the prohibition of age discrimination as a fundamental right under the Treaty? If so, from what priority date would that right occur and would it be the same 'priority date' on both vertical and horizontal relations? A corresponding issue is concerned with the question raised by Germany in the *Bartsch* case concerning the consequences of the '*Mangold*-doctrine' on age discrimination not limited in time.[227]

The Swedish labour market covers also a number of direct age discriminating provisions and standards. Until recently the Employment Protection Act (*lagen (1982:80) om anställningsskydd*) provided extra employment protection for employees aged over 45. The Act was amended as of 1 July 2007 in order to comply with Directive 2000/78/EC but did up until then provide special provisions in favour of employees 45 years or older in cases of redundancy.[228] A great number of employees are employed under collective agreements with directly discriminatory regulations based on age. Regardless of any implementation of the Directive, the collective agreement for civil servants and others employed by the State includes, very clearly, special provisions that base rights only on age. A most flagrant example is how to calculate the right to vacation. The calculation is simply focused only on the employees' age, providing some more annual days of vacation for employees when they turn 30 and four extra days at 40.

If Tobler's prophecy is correct and the Court of Justice returns to the arguments on general rights in relation to age discrimination under the indirect scope of Framework Directive 2000/ 78/EC, it would be of great benefit for anyone analyzing the case law to see a confrontation with the distinction of general rights, especially if the intention of the Court of Justice is to further hammer in the horizontal direct effects described in *Mangold*. For a number of reasons, one may convincingly argue that even though the idea of equal treatment in relation to many grounds – most certainly gender, nationality, sexual orientation, ethnic origin and religious beliefs – would constitute general rights, age discrimination – and perhaps even disability discrimination – are not among them. A general right must have

[226] C. Tobler, *supra* note 223, at p. 1183.
[227] See C-427/06 *Bartsch*, Opinion of A. G. Sharpston, note 117.
[228] The change of the sec. 3 of Employment Protection Act was implemented 1 July 2007 through the act SFS (2007:389), Sweden implemented the age provisions of Directive 2000/78/EC as late as 1 January 2009, by the new Discrimination Act (SFS 2008:567).

a solid and clear feature and, we would say, must be constituted in a way that provides some sort of coherent interpretation of the basic issues of the right.[229] We are not convinced this is (yet) the situation with age discrimination, even if one could argue, along with Jans[230] and what we have said in the introductory chapter to this report that the establishing of age discrimination in Article 13 EC provides a fair reason for a legal-dogmatic opinion on the contrary. Jans is very outspoken and clear about the situation: '[W]hat the Court did in *Mangold* is in fact not that special, at least if we accept that something like a *general principle of Community law prohibiting discrimination on grounds of age exists*'.[231] And this is in our opinion the most fundamental and often bypassed question here. Is there really a general principle of Community law prohibiting discrimination on grounds of age?[232]

Now, first of all, the general principle of equal treatment does not correspond to all and every aspect of selecting among or promoting individuals, at least not as an overall perspective in *all* areas of life in the Member States. It is apparent, for instance through Article 13 EC, that there are certain grounds for (mis)-treatment that will need special focus.[233] The equal treatment legislation is *not* constructed as an overall fair treatment obligation. Some distinctions must be made, and these will vary from time to time in line with the concept of law in modern society.

When looking at age discrimination in this light one could – despite the discussion by Jans and the Court of Justice in *Mangold*[234] – really ask if age discrimination is a general right laid down in the Treaty. Already the list of exemptions available in Article 6 of Directive 2000/ 78/EG pinpoints some serious criticism of the idea of age discrimination as a *general* right.[235] Without going into to much depth here, in order for it to be classi-

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[229] Davies touched upon the transformation of social rights into fundamental rights under Art. 13 EC in P. Davies, *supra* note 169. See, especially, p. 133.

[230] J. Jans, 'The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of Community law', 34 LIEI (2007) 53.

[231] J. Jans, *ibid.* (emphasise added).

[232] The outcome in the ECJ would be different in *Mangold* if the Court did not accept such a general principle, since the Court did not primarily base its decision upon any horizontal effect of Directive 2000/78/EC. See further, J. Jans, *supra* note 230.

[233] Sex, ethnic origin, religious or other beliefs, sexual orientation, disability and age. Notably issues like political opinion and socio-economic background (class) are left outside the very scoop of equal treatment legislation.

[234] J. Jans, *supra* note 230.

[235] According to Art. 6 of Directive 2000/78/EC the Member States may exclude from the concept of discrimination measures such as 'special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions for young people, older workers […] in order to promote their vocational training'. Art. 6(1)(a), Directive 2000/78/EC.

fied as a general right, the right at hand must be applicable in a somewhat universal way. Putting up a variety of exemptions, opens up for a good number of divers implementations and weakens, in our opinion, the very position of age discrimination as a general right.

Secondly, the very classification of age as a ground for discrimination along with a relatively weak definition of what needs to be protected under the "principle" leaves some uncertainty when found or implemented in legal documents on different level. Looking at the definition of the ILO Convention on Discrimination from 1958, it becomes obvious that the different grounds for discrimination vary from time to time and from instrument to instrument.

> ILO Convention 111 Discrimination (Employment and Occupation) Convention, 1958.
> Article 1
> 1. For the purpose of this Convention the term *discrimination* includes–
>
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

Some aspects that are not mentioned or included under Article 13 EC, primarily 'political opinion' and 'social origin' are covered by the Convention, but age is not directly mentioned, even though the Convention in Article 1(b) opens up for the signatory States of the Convention to apply the principle of discrimination in a wider perspective after consultation with the industrial partners.[236]

Turning to the European level, the Charter of Fundamental Rights of the European Union, signed by the EU-parliament, the Commission and the Council, addresses the rights of 'the elderly' in art. 25.[237] The Charter states;

> The Union recognises and respects the rights of the *elderly* to lead a life of dignity and independence and to participate in social and cultural life.[238]

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[236] ILO Convention N° 111 has been ratified by 168 states, including all of the EU Member States.
[237] Charter of Fundamental Rights of the European Union 2000/C 364/01, of 18 December 2000.
[238] Art. 25 of the Charter, emphasize added.

There is certainly a significant difference between 'elderly' and 'age'. We do all have some 'age', but we are definitely not 'elderly' whatever the meaning of that expression, not all of us – at least not yet.[239] The difficulties to form a coherent definition among legal instrument emerging from more or less the same source, regardless of these instruments being binding or not,[240] also sets back the likelihood of age discrimination already being a general right.

Turning our focus to the national legislation and collective agreements in the Member States, the picture of age discrimination as a general right will be even further diluted. In Sweden a number of 'prominent' collective agreements, especially in the public sector, contain directly discriminatory provisions on vacation where the calculation is based only on age.[241] Employees aged under 30 are entitled to a number of days of paid vacation per year (28), while employees aged between 30 and 40 are granted another number (31) and people 40+ have an even higher number of days off (35).[242] Now, one could argue that these directly discriminatory arrangements based on age are exemptions based on Article 6(1) of Directive 2000/78/ EC, but to define a general right more or less from the exemptions available in secondary law does not convince one in a deeper sense. When the collective agreements entered into by the public employers still embraces a treatment directly based on the age, without considering the direct vertical effect of Directive 2000/78/EC, at least after the implementation period was due in December 2006, the concept of a general right based on age discrimination loses some of its significance. Other legislations, such as the German statutes examined in *Mangold*[243]*, Palacios*

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[239] The Directive (2000/78/EC), as well as the Treaty holds on to the definition 'age' opening up for an equal treatment principle covering all individuals.

[240] The Charter is not a legally binding document, but, which must be pinpointed, it is still a part of the EU legal body and might be considered to have some impact as will other soft law instruments.

[241] Now, this falls outside the scope of direct *horizontal* effect since it is a case of direct *vertical* effect. However, this has, to our knowledge, not yet resulted in any legal complaints from younger public employees, against their employer, the Kingdom of Sweden.

[242] Collective agreement ALFA between the Swedish Public Employers and the Trade Unions in this area (civil servants), see chapter 5 § 3 ALFA-agreement where the entitlement to paid vacation is 28 days. Also the collective agreements covering city councils and local and regional councils show similar calculations directly based on the employees age, AB chapter 6 § 27 mom. 5 says that employees 39 year and less are entitled to 25 days of vacation, employees aged 40-49, 31 days and those above 50 are entitled to 32 days of paid vacation, This should also be seen in relation to the statutory minimum paid vacation of 25 days per year, see 4 § Vacation Act (*Semesterlagen* SFS 1977:480).

[243] Case C144/04 *Mangold* [2005] ECR I9981.

de la Villa[244] and *Bartsch*[245] expose the same attitude. Yet, the extraordinarily complicated discussion of wage discrimination, direct as well as indirect, has not yet been brought to the surface. Scrutinising pay (and even position) without any connection to age, not even indirectly, will certainly call for an awakening in many areas, and the justifications of established regimes would be under heavy – and not yet foreseeable pressure.[246]

4.4 Empowering National Labour Courts – at Work?

As discussed above, the Swedish Labour Court had to decide upon EU law in a number of recent cases, most significantly cases of transfer of undertaking and non-discrimination.[247] Since the EU law does not represent a full coverage of the labour market regulations, these two different areas will, even though they are most different in background and legal origin as well as legal-technical structure and implementation, form good examples for the balancing between national and EU jurisdiction and apparently 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. One could relate this to the development at the ECJ, where a significant number of cases over the past few years have focused, primarily or secondarily, on questions of equal treatment and fundamental principles derived from the Treaty or other commonly recognized sources of influence as is discussed in the EU-part of this chapter.

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.[248] In some of the cases that had to do

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[244] Case C-411/05 *Palacios de la Villa* [2007] I-8531, where a Spanish court asked for a preliminary ruling on the application of directive 2000/78/EC in relation to domestic Spanish provisions allowing Collective agreements to regulate obligatory retirement age – automatic retirement at a certain age.

[245] Case C-427/06 *Bartsch* [2008] n.y.r.

[246] To offer employees a certain salary in relation not to productivity but anciennity (time within the organization) might establish situations of indirect discrimination, and justification will have to be made, based on productivity or other objectively justifiable reasons, not age.

[247] The recognition of these two main areas of EU labour law cases has been made before, see in particular ch. II by C. Kilpatrick and ch. III by P. Davies in *Labour Law in the Courts, National Judges and the European Court of Justice*, *op. cit. supra* note 169.

[248] In relation to sex equality law, this was monitored in a European context by C. Kilpatrick, in 'Gender Equality: A Fundamental Dialogue', in *Labour Law in the Courts, National Judges and the European Court of Justice*, *op. cit. supra* note 157, especially p. 41-42.

with interpretations of EC law or subjects closely related to EC 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.[249] As is discussed below, the possibility for a faster, 'green light' procedure, as is described in the Parliament resolution of the 9 July 2008, might be a prosperous and most welcome procedure for the empowering of the EC-perspectives in national courts. National labour courts would not differ from that picture.[250]

The primary interpreters of EU labour law will however by necessity have to be the national labour courts, with or without any future 'green light procedure'. The Court of Justice would otherwise be swamped with labour related cases.[251] An un-reflected call for numerous preliminary rulings in any EU-related labour case would not bring sufficient benefit for the development of a European labour law. Nevertheless, it is our belief that the current situation, where preliminary rulings are submitted only very seldom and the line of arguments and references in the Labour Court to EC law and EU general principles appear somewhat randomly or at least not in an exhaustive manner, could be improved, rendering the Labour Court an empowered position, not necessarily in relation to the Court of Justice, but in balancing national provisions and European ditto. 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. An empowered position of the national labour courts in relation to the 'balancing' between domestic and European legal standards and provisions, more prominently established by an even more transparent, explicit and coherent approach to EU law would form a stronger base for interpreting EU related national provisions closer to their European origin.

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[249] See also the discussion by N. Bruun & J. Malmberg, 'Ten Years within the EU – Labour Law in Sweden and Finland following EU Accession', in *Swedish Studies in European Law*, N. Wahl & P. Cramér (eds.), Harts, Oxford 2006, at p. 85

[250] The impact of European Parliament resolution of 9 July 2008 *on the role of the national judge in the European judicial system* (2007/2027 (INI)), is elaborated further below.

[251] This is naturally the same for any legal area.

5 THE SWEDISH SUPREME ADMINISTRATIVE COURT: A POWERHOUSE OF COMMUNITY DIRECT TAX LAW?

5.1 Introduction

According to former Judge David Edward national courts may be described as "the powerhouses where the electricity of Community law is generated."[252] However, he has further emphasized that "if national courts are the powerhouse of Community law, because it is there that Community law really happens for the individual, they are also where it doesn't happen when those who should have done so have failed to spot the point or failed to raise it."[253] (emphasis added).

The quotations above may serve as a good illustration for the following part which will focus on the *empowering*[254] of the Swedish Supreme Administrative Court (Regeringsrätten)[255] and the extent to which this court brings light to the development of Community law[256] in direct tax cases.

At the outset it should be noted that the Supreme Administrative Court is *not* a *specialised* court, dealing only with tax cases. It is instead the highest Swedish general administrative court and deals with approximately 500 types of cases[257] relating to public administration. Tax cases are, however, the most common cases.[258] In this context, it should further be pointed

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[252] Edward (2004): `National Courts – The Powerhouse of Community Law´, pp. 3-5.

[253] *Ibid.*, p. 13.

[254] As the study is part of the project mentioned above, it has been inspired by different aspects of the roles and responsibilities of national courts in the Community legal system, see further below and Groussot (2008):`Empowering National Courts in EU Law´, pp. 25-27.

[255] For recent studies of direct tax cases in *lower* Swedish courts, see for example Brokelind and Kanter (2007): `Sweden´, pp. 240-259, Brokelind (2007): `The ECJ's Case Law on Direct Taxation in Swedish Tax Courts´, pp. 36-49 and Ståhl (2006): `Direct tax rules and the EU fundamental freedoms – Swedish report´, p. 373.

[256] Since this study is limited to the EC Treaty and the so called *first pillar* issues of the EU Treaty, references will be made to `Community law´ throughout the study. However, as the EU Treaty introduced the `European Union (EU)´ as the official collective title for the three European Communities, reference will in relevant cases be made to the European Union. Since the study further is confined to Community law presently in force, the proposed changes through the Treaty of Lisbon will not be taken into consideration. Furthermore, the study will not specifically deal with issues involving the European Convention on Human Rights.

[257] See further Swedish Ministry of Justice (2006): *The Swedish judicial system – a brief presentation*, p. 10 and Domstolsverket (2008): *The Supreme Administrative Court*, p. 1.

[258] For example, on average 30 % of all cases decided by the Supreme Administrative Court between 2003 and 2007 were cases concerning direct and indirect taxes. See further Domstolsverket (2008): *Domstolsstatistik 2007*, (Court Statistics 2007, Official Statistics of Sweden), p. 30.

out that taxes may be defined and categorised in different ways.[259] In a Swedish context, there is no explicit constitutional definition of taxes. Even so, a tax is commonly described as an involuntary contribution to the state, where nothing specific is provided in return to the payer of the contribution.[260] Furthermore, the classification of taxes as *direct* or *indirect* on the basis of their incidence is often criticized. This since economic theory is inconclusive and holds that taxes might be shifted to different degrees and in different circumstances.[261] Commonly, the distinction is however based on the concept of tax subjects and the incidence of taxes, i.e. if the *taxpayer* and the one who *bears* the tax are the *same*, the tax is considered to be *direct*.[262] In a Community law perspective, there is further no general meaning of the concept of tax and the EC Treaty is silent on the meaning of taxes in general, and direct taxes in particular.[263] However, cases considered as direct tax cases by the Supreme Administrative Court and the Court of Justice will – for the purposes of this study – form the basis for the forthcoming analysis.

Accordingly, the study covers cases where the issue of Community law has been raised[264] by the tax authorities or the taxpayers as compared to the Supreme Administrative Court in cases concerning direct taxation.[265] However, the analysis will be limited to cases published in the Yearbook of the

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[259] See for example, Barassi (2005): `The notion of tax and the different types of taxes: Comparative approach´, p. 32. A tax is, however, commonly described as a levy requiring a "compulsory payment pursuant to the authority of a… country to levy taxes" for which the payor receives no "specific economic benefit.", see for example Rosenbloom (2000): `The David R Tillinghast Lecture: International Tax Arbitrage and the "International Tax System"´, p. 138, Barker (2005): `The relevance of a concept of tax: Normative considerations´, p. 7 and Moëll (2006): `Skatterättslig forskning – till vilken nytta?´, p. 198.

[260] See further Vogel (1985): *Finansrätt och finansvetenskap – En introduktion*, p. 34 and Dahlberg (2005): The *Concept of Tax in Europe – A Swedish Perspective*, p. 4.

[261] See for example Thuronyi (2003): *Comparative Tax Law*, pp. 54-55 and Musgrave and Musgrave (1989): *Public Finance in Theory and Practice*, p. 387.

[262] See further Vogel (1985): *Finansrätt och finansvetenskap – En introduktion*, p. 38.

[263] See Heidenbauer and Piscopo (2007): `Report on the conference: 'EU Taxes'´, p. 653 and Herrera (2005): `Methodological premises´, p. 3. Different Community concepts are used in primary and secondary Community law and some have been developed by the Court of Justice, see further Herrera (2005): `Methodological premises´, p. 3 and Herrera, Meussen and Selicato (2005): *The Concept of Tax in EU Law*, pp. 1-18.

[264] Consequently, the study does not cover cases where the issue of Community law *might* have been raised, but never was.

[265] However, a few cases decided in other areas of law will be discussed in relation to the primacy of Community law below.

Supreme Administrative Court (Regeringsrättens Årsbok)[266] from the Swedish accession on the 1 of January 1995 to the 31 of December 2008 where the Court has ruled on the compatibility of Swedish direct tax law with Community law.[267] Within this time frame, *twenty-three* cases were found to match the selection criteria.[268] Admittedly, the cases are too few to enable any more decisive or general conclusions. However, the cases

[266] The study includes cases considered more important by the Supreme Administrative Court (referat-mål) and shorter cases considered less important (notis-mål). Regarding this distinction between cases, see further Skatteverket (2008): *Handledning för beskattning av inkomst vid 2008 års taxering: Del 1*, p. 62. Consequently, the study does not cover cases where the full text of the case was not yet available or cases not yet published in the Yearbook. The cases have been selected through searches in the database `Rättsbanken´ with supplementary searches in the Yearbook of the Supreme Administrative Court and earlier studies such as for example, Ragnemalm (2006): `EG-rätt i Regeringsrätten´, pp. 223-234, Brokelind and Kanter (2007): `Sweden´, pp. 223-259, Brokelind (2007): `The ECJ's Case Law on Direct Taxation in Swedish Tax Courts´, pp. 36-49 and Ståhl (2006): `Direct tax rules and the EU fundamental freedoms – Swedish report´, pp. 223-234.

[267] However, the analysis will *not* include cases *not* decided in *substance* for Swedish *procedural* reasons, such as *RÅ 2007 not. 50*, where the Supreme Administrative Court decided to *set aside* the ruling of the Council for Advance Tax Rulings with explicit reference to the proposed changes of the Swedish legislation – skr. 2006/07:47 – as a consequence of Case C-150/04 *Commission v. Denmark*. The Court further stated in *RÅ 2007 ref. 52* that it followed from Case C-436/00 *X and Y* that the Swedish rules were too far-reaching and incompatible with the freedom of establishment and the free movement of capital in the EC Treaty. However, this did not preclude actions against tax avoidance in *specific cases* according to the Court. Even so, the Court decided to *set aside* the ruling of the Council for Advance Rulings as it could be assumed that the transaction at issue would be followed by other transactions and this could create uncertainties regarding the range of the ruling. In a similar manner, the Court referred in *RÅ 2008 not. 169* to *RÅ 2002 not. 210* and stated that it followed from Case C-436/00 *X and Y* that the Swedish rules were incompatible with the freedom of establishment. However, the case was decided on the basis of the interpretation and application of Swedish law. The analysis below will further not include *RÅ 2005 ref. 21*, where the Court ruled that Swedish law was to be interpreted as only covering capital gains which were *subject to tax* in Sweden and stated – after raising the issue of Community law ex officio – that such an application of the Swedish rules could not constitute an obstacle to the free movement of capital or otherwise be in conflict with Community law, without any further elaborations. Moreover, the analysis will not include *RÅ 2008 ref. 11 I* where the Supreme Administrative Court stated that the activities relating to *trademarks* and – in *RÅ 2008 ref. 11 II* to *licensing* – would not be considered as financial activity according to the Annex of Section 39 a inkomstskattelagen (1999:1229) (the Income Tax Act (1999:1229)) and would not be subject to so-called Controlled Foreign Corporation (CFC) taxation. As a consequence, the Supreme Administrative Court considered that there was no need to review the compatibility with Article 56 of the EC Treaty. Finally, the study will not cover *RÅ 2008 not. 58* – also involving the so-called CFC rules – as the Court dismissed the application and decided to *set aside* the ruling of the Council with reference to *changed preconditions* for the ruling after the judgment of the Court of Justice in Case C-196/04 *Cadbury Schweppes*.

[268] For an overview of the cases, see the attached Annex. In this context it should be noted that *RÅ 2007 ref. 59* was counted two times since one part of the case was decided after a preliminary ruling to the Court of Justice and another part was decided without such a ruling. *RÅ 2000 ref. 47 I and II* were further counted as two cases as they concerned different taxpayers and were decided on partly different grounds.

provide interesting examples of the reasoning and approaches used by the Supreme Administrative Court and may also indicate tendencies and trends in this specific area of law. Furthermore, it illuminates the case by case development and the resulting fragmentation of the area. In this context, it should further be pointed out that the judgments of the Supreme Administrative Court in the majority of cases are short and without detailed reasoning, which makes the analysis and the possibilities to draw conclusions more difficult. The *lack* of cases may also pinpoint important gaps and future needs and may also have several important explanations, which will be further addressed in Section 5.4 below.

All twenty-three cases concern different provisions relating to *free movement* in the EC Treaty, i.e. *primary law*.[269] Consequently, issues regarding the interpretation and validity of *secondary* Community law will not be specifically addressed.[270] The study will further focus primarily on cross-border situations involving two or more of the Member States of the European Union, with the exception of a few cases also involving so-called third countries[271] in the area of free movement of capital.

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[269] More precisely, the cases involve Articles 39-41 EC (workers), Articles 43-48 EC (establishments), Articles 49-55 EC (services) and Articles 56-60 EC (capital).

[270] However, it could be noted in this context that the Supreme Administrative Court stated in *RÅ 2000 ref. 23* that even though the Merger Directive (Council Directive 90/434/EEC of 23 July 1990) was *not applicable* – as the case involved Sweden and a non-Member State, i.e. Switzerland – this did not mean that the Merger Directive was *irrelevant* to the case. Instead, the Court stated that the interpretation should start with what follows from the directive and that a request for a preliminary ruling might be necessary in accordance with Case C-28/95 *Leur-Bloem*. Even so, the Supreme Administrative Court further held that the directive was written in a general manner and did not give any guidance for this case. The Court therefore decided to interpret the *Swedish* legislation and preparatory documents in question. The Court ruled that the results of the interpretation of the Swedish legislation were compatible with the purpose of the Merger Directive, without any further elaborations. Furthermore, the technical issues related to the application of the Swedish rules at national level could not be answered through an interpretation of the Merger Directive, according to the Court. The Court therefore ruled that there was *no need* to request a *preliminary ruling* from the Court of Justice without any further justification for this decision. Furthermore, in *RÅ 2008 not. 22* the Supreme Administrative Court affirmed the ruling of the Council for Advance Tax Rulings where it was stated that the Swedish rules in question – as far as possible – should be interpreted as if the Merger Directive (Council Directive 90/434/EEC of 23 July 1990) also covered divisions between only *Swedish* companies with reference to *RÅ 2000 ref. 23*. However, the Council stated that it could not be excluded that shares in a subsidiary could be considered as a `branch of its activity´ within the meaning of the Merger Directive. Even so, the Council concluded that the wording of the Swedish provision could *not* be given such an extensive interpretation.

[271] See further Kavelaars (2007): `The Foreign Countries of the European Union´´, pp. 268-273, Pistone (2006): `The Impact of European Law on the Relations with Third Countries in the Field of Direct Taxation´, pp. 234-244 and Ståhl (2004): `Free movement of capital between Member States and third countries´, pp. 47-56.

Empowering National Courts

The area of direct taxation lends itself particularly well to a study of the interpretation and application of Community law in national courts. Against the background of the lack of explicit references to direct taxation in the EC Treaty, it was for a long time widely thought that Community law had no influence on direct tax law. However, in 1983 the Commission brought an action against France to the Court of Justice and the Court ruled in 1986 – in the (in)famous *Avoir Fiscal* case[272] – that France had failed to fulfil its obligations under now Article 43 of the Treaty.[273] Since then the Court of Justice has repeatedly held that "although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law".[274] This fact, in combination with the unanimity requirement[275] and the inability of the Member States to agree on legislation at Community level[276], has given the Court of Justice – and the *national courts* – a central role in the development of Community law in the area of direct taxation.

This increased importance of national courts may further be seen against the background of the empowering of national courts in general. In a Swedish context, it has frequently been emphasized that Swedish courts have been *empowered* to review the *compatibility* of Swedish legislation with Community law through the membership of the European Union.[277] There are, however, also several interesting developments relating to the

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[272] Case 270/83 *Commission v. France* (*Avoir Fiscal*).

[273] By not granting branches and agencies in France the benefit of shareholders´ tax credits.

[274] To mention only a few examples: Case C-105/07 *Lammers*, para. 12, Case C-284/06 *Burda*, para. 66, Case C-101/05 *A*, para. 19, Case C-446/03 *Marks & Spencer*, para 29, Case C-436/00 *X and Y*, para. 32, Case C-35/98 *Verkooijen*, para. 32 and Case C-279/93 *Schumacker*, para. 21 all with further references.

[275] In Article 94 EC.

[276] This has resulted in only a few directives. The lack of consensus is often associated with the wish to retain sovereignty in the tax area for budgetary reasons, see for example Lodin (2003): `EU och inkomstbeskattningen – varför händer så lite?´, pp. 136-150 and Mutén (2003): `Skattesuveräniteten och det internationella samarbetet – några funderingar´, pp. 211-223.

[277] See for example, Abrahamsson (1999): `EU-medlemskapets influenser på dömandet´, p. 833 and Öberg (2003): `Tre lösa trådar: mer om förarbeten, statens processföring vid EG´, p. 514. This corresponds to the empowerment thesis, which commonly rests on the proposition that accepting supremacy and direct effect empowers courts in systems that previously did not have any power of judicial review of acts of the national legislator, see further Slaughter, Stone Sweet, and Weiler (1998): `Prologue – The European Courts of Justice´, p. xii, Claes (2006): The National Courts´ Mandate in the European Constitution, p. 255 and Dehousse (1998): *The European Court of Justice: the Politics of Judicial Integration*, pp. 138-141.

past and future empowering of national courts vis-à-vis the *Court of Justice*[278] and the judicial dialogue[279] between the courts, to be studied below.

The Swedish Court System in Tax Cases

Unless a tax case in Sweden involves criminal activities, it will fall under the jurisdiction of the general *administrative* courts. Decisions by the Swedish tax authorities (Skatteverket) may consequently be appealed to the first instance court, i.e. the county administrative court (länsrätten). The second instance is the administrative court of appeal (kammarrätten) and the court of last instance is the Supreme Administrative Court (Regeringsrätten).[280] However, a case will only be considered by the Supreme Administrative Court if *leave to appeal* is granted.[281] In some cases – where leave to appeal is not granted – the administrative courts of appeal are consequently in practice the *last instance*. Even so, the administrative courts of appeal are in these cases arguably *not* obliged to request a preliminary ruling from the Court of Justice in accordance with Case C-99/00 *Lyckeskog*.[282]

There is, however, a further possibility for taxpayers[283] to request an *advance tax ruling* (förhandsbesked) from the Council for Advance Tax Rulings (Skatterättsnämnden).[284] These rulings may be appealed directly to the Supreme Administrative Court (Regeringsrätten) without the need for

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[278] According to the Court, Article 234 EC *empowers* national courts to refer questions concerning the validity and interpretation of all acts of the Community institutions, see for example Case 41/74 *van Duyn*, para. 12.

[279] See for example, Case C-2/06 *Kempter*, para. 42. However, it should be emphasised that the notion of a 'judicial dialogue' may be used with different meanings and for various purposes, see further Rosas, Allan (2007): `The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue´, p. 6. The study will be limited to so-called *vertical* dialogues between national courts and the Court of Justice, see further Groussot, Xavier (2008): `Empowering National Courts in EU Law´, pp. 13-20. See also and Johansson (2007): `Artikel 234 EG – en del av det svenska rättssystemet´, p. 216.

[280] Section 33 of Förvaltningsprocesslagen (1971:291).

[281] Sections 35-36 of Förvaltningsprocesslagen (1971:291).

[282] The issue was raised in relation to the Swedish general court of appeal (hovrätten) in Case C-99/00 *Lyckeskog*, where the Court of Justice answered that there is no such obligation. Arguably, the same would apply to the administrative court system as corresponding criteria for leave to appeal are applicable.

[283] See Section 5 of Lag (1998:189) om förhandsbesked i skattefrågor. The tax authorities may on certain conditions also request an advance tax ruling in accordance with Section 6 of the same law.

[284] According to Section 1 of Lag (1998:189) om förhandsbesked i skattefrågor, an advance tax ruling may be requested for, *inter alia*, income taxes, VAT and excise duties.

leave to appeal.[285] It should also be noted that the Council may *not* request a preliminary ruling from the Court of Justice according to Case C-134/97 *Victoria Film*.[286] Instead, the Supreme Administrative Court may request a preliminary ruling when it *rules on an appeal* of an advance tax ruling.[287]

5.2 Primacy or Pluralism?

It is widely known that the Court of Justice has claimed that certain Treaty provisions may have *direct effect* and create *rights* that *national courts* must protect.[288] The Court has further held that the Member States must give *precedence*[289] to Community law and *disapply*[290] any incompatible national provision in accordance with the principle of *primacy*[291] of Community law. However, some of the highest or constitutional courts of the Member States have claimed some form of reserve of power over the primacy of EC law.[292] These competing claims of final authority may be solved in a hierarchical manner, through the submission of either national law or Community law. Still, taking a *pluralistic* view, it is possible for

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[285] Se further Melz (2004): `Sweden´, p. 109 and Ståhl (2006): `Direct tax rules and the EU fundamental freedoms – Swedish report´, p. 372. It should, however, be noted that there has been a proposal – `Regeringsrättens handläggning av mål om förhandsbesked i skattefrågor´, Fi 2008/3741 – to introduce leave to appeal also for decisions of the Council. This proposal has lead to debate, see for example Nyquist (2008): `Regeringsrättens handläggning av förhandsbesked i skattefrågor – Debatt´, pp. 559-564, Brokelind and Mutén (2008): `Prövningstillstånd i förhandsbeskedsärenden – Debatt´, Svensk Skattetidning, pp. 565-568 and Bergkvist (2008): `Prövningstillstånd i förhandsbeskedsärenden´, pp. 743-746.

[286] Case C-134/97 *Victoria Film,* paras. 15 to 19.

[287] Case C-200/98 *X AB and Y AB*.

[288] See further Case 26/62 *van Gend & Loos*, p. 12 and Joined cases 28 to 30/62 *Da Costa*, p. 31. In this context it should be noted that all the Treaty provisions covered by the cases in this study have direct effect according to the Court of Justice. For example, in Case 118/75 *Watson*, the Court of Justice stated that now Article 39 (workers), Articles 43 EC (establishments), Articles 49 EC (services) et seq., conferred on persons individual rights which national courts must protect and that they take precedence over any national rule which might conflict with them. The Court further recognised the direct effect of Article 56(1) EC (capital) in Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*. In Case C-101/05 *A*, the Court further stated that, as regards the movement of capital between Member and non-member States, Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question.

[289] Case 6/64 *Costa v E.N.E.L.*, pp. 593-594 and Case 11/70 *Internationale Handelsgesellschaft*, para. 3.

[290] See for example, Case C-198/01 *Fiammiferi*, para. 48 and Case C-118/00 *Larsy*, para. 52.

[291] For examples of differences in terminology between `primacy´, `supremacy´ and `precedence´ and criticism of the primacy concept as developed by the Court of Justice, see Mayer (2006): `The European Constitution and the Courts´, pp. 292-293 with further references.

[292] Mayer (2006): `The European Constitution and the Courts´, p. 301.

different legal orders to coexist in a non-hierarchical relationship.[293] There are, however, different forms and conceptions of what in the EU context often is referred to as *constitutional pluralism*.[294]

As regards the reactions of the Swedish Supreme Administrative Court to these developments and perspectives, no cases were found where the Court explicitly referred to the *primacy* of Community law in the area of direct taxation. This may partly be explained by the fact that the Court has decided some earlier cases in other areas of law.[295] In these cases the Court used different grounds for the conclusion that Community law should be given precedence. In some cases reference was made to the so-called *EU Act,*[296] which states that the enumerated Treaties and instruments are applicable with the effects *following from these Treaties* and other instruments.[297] Grounds for giving Community law precedence has also been found in Swedish *preparatory works*.[298] In the preparatory works to the Accession Treaty it was stated that if national law is incompatible with Community law, national courts are in principle under an obligation to apply Commu-

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[293] See for example, MacCormick (1999): *Questioning Sovereignty – Law, State, and Nation in the European Commonwealth*, p. 102, Maduro (2007): `Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism´, pp. 1-3, Baquero Cruz (2008): `The Legacy of the Maastricht-Urteil and the Pluralist Movement´, p. 412 and Kumm (1999): `Who is the Final Arbiter of Constitutionality in Europe?..´, p. 384.

[294] Some forms regard the supremacy question forever open, some take a neutral position, while others would accept Community primacy only within the limits required to safeguard national democratic processes and constitutional identities, see further Baquero Cruz (2008): `The Legacy of the Maastricht-Urteil and the Pluralist Movement´, p. 413 with further references. See also for example, Maduro (2007): `Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism´, pp. 1-3, Barber (2006): `Legal Pluralism and the European Union´, pp. 307-308 and Walker (2002): `The Idea of Constitutional Pluralism´, p. 413.

[295] See for example, *RÅ 1996 ref. 50* with references to Case 26/62 *van Gend & Loos* and Case 106/77 *Simmenthal*. A similar line of reasoning was used in *RÅ 2000 ref. 5* concerning VAT with references to Case 26/62 *van Gend & Loos* and *Case 6/64 Costa v E.N.E.L.* Compare also *RÅ 1997 ref. 65*, *RÅ 1999 ref. 8 RÅ 2003 ref. 96* and *RÅ 2006 ref. 11*.

[296] Lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen. The statute was enacted in accordance with the Swedish dualist tradition after the ratification of the Accession Treaty and was preceded by a comprehensive preparatory document, i.e. Prop. 1994/95:19 *Sveriges medlemskap i Europeiska unionen*.

[297] Lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen, Section 2 and 4. See also further Bernitz, Ulf (2001): `Sweden and the European Union: on Sweden's Implementation and Application of European Law´, p. 913 and p. 920.

[298] In Prop. 1994/95:19 p. 558 it was stated the principles of direct applicability; direct effect and precedence – as developed by the Court of Justice – have to be accepted by the Swedish legal system as this case law is a source of law in the Community legal system. In relation to direct taxation it has been stated that Community law shall be given precedence in cases where national legislation has been found incompatible with Community law, which means that the national rule shall *not be applied*, see further Prop. 2000/01:22 p. 58.

nity law, even if national law is part of the Constitution.[299] However, it was also emphasized that the Constitutions of the Member States set the outer limits for the Community.[300] In view of the above, it can be concluded that the Swedish position – as expressed in the preparatory documents – may lead to future conflicts with Community law. Yet, there are still no cases where the Supreme Administrative Court has questioned the primacy of Community law in principle.[301] Future open constitutional conflicts of this kind also seems unlikely. Still, the Swedish situation is compatible with several of the pluralistic views as described above.

Nevertheless, in a number of cases – decided without a reference for a preliminary ruling – the Supreme Administrative Court has stated that it follows from case law of the Court of Justice that the compatibility of Swedish legislation with Community law may have to be reviewed also in direct tax cases.[302] The Supreme Administrative Court has also explicitly stated that the rules on free movement in the EC Treaty have *direct effect* and that tax rules which are found *incompatible* with these rules must be *set aside*, unless they can be justified and there are no other less restrictive measures.[303] Accordingly, the Supreme Administrative Court has in principle accepted that direct taxation fall under the scope of Community law. In addition, in a number of cases the Supreme Administrative Court has indirectly accepted the primacy of Community law by giving precedence to Community law and rule that the Swedish rules found incompatible with Community law should be set aside, which will be further addressed below.

[299] Prop. 1993/94:114, p. 13.

[300] Explicit reference was made to the 1993 Maastricht decision of the German Constitutional Court, see Prop. 1994/95:19 p. 34. It should be noted that the Swedish Constitution – Article 10:5 of the Instrument of Government (RF 10:5) – was revised upon accession, see Prop. 1994/95:19 pp. 495-496 and Prop. 1993/94:114. For an overview of different statements in Swedish laws, preparatory works and the writings of legal scholars, see Johansson (2007): `Får svenska domstolar underlåta att tillämpa EG-rätt?´, pp. 532-544, also emphasizing that the case law concerning primacy had been decided *before* Sweden joined the European Union, which makes it impossible for national courts to deny the primacy of Community law due to the principle of *pacta sunt servanda*, see further *ibid*., pp. 540-541. See also Bernitz, Ulf (2006): `Det europeiska konstitutionsprojektet och den svenska grundlagen´, *ERT 2006 s. 66 ff*.

[301] For a similar conclusion, see Bernitz, Ulf (2001): `Sweden and the European Union: on Sweden's Implementation and Application of European Law´, p. 913. See also Johansson (2007): `Får svenska domstolar underlåta att tillämpa EG-rätt?´, p. 543.

[302] See cases *RÅ 2000 ref. 38*, *RÅ 2000 ref. 40*, *RÅ 2000 ref. 47 I och II* and Case *RÅ 2006 ref. 38*. The conclusion was drawn with explicit reference to Case C-35/98 *Verkooijen*, para. 32, where it was stated that "although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law."

[303] The Court further stated that it is not possible to disregard that certain measures would require changes of internal rules or tax treaties as a part of the proportionality test, see *RÅ 2008 ref. 30* with direct reference to Case C-436/00 *X and Y,* para. 59.

5.3 Compatibility of Swedich Direct Tax Law with Community Law

As already pointed out above, the Supreme Administrative Court has been empowered to review the *compatibility* of Swedish legislation with Community law through the membership of the European Union.[304] In the words of the Court of Justice, it is settled case-law that it is for the national court – to the full extent of its discretion under national law – to *interpret* and *apply national law* in *conformity* with the requirements of Community law.[305] Where such an application is not possible, the national court must apply Community law and, if necessary, *disapply*, any contrary provision of domestic law.[306] National courts are, in other words, under a duty to protect the rights of individuals[307] and give full effect to provisions of Community law, if necessary by refusing of its *own motion* to apply any conflicting provision of national legislation.[308] Accordingly, this part of the study will focus on different aspects of the review of Swedish legislation by the Supreme Administrative Court. A distinction will be made between cases referred to the Court of Justice for a *preliminary ruling* and cases decided *without* such a reference, to allow comparisons between the different approaches. The distinction is also justified by the fact that the two approaches raise partly different issues. The analysis will be divided into various subparts inspired by case law from the Court of Justice[309] and different aspects of the overall theme of the study.[310]

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[304] See further Section 5.1 above.

[305] See for example, Case C-262/97 *Engelbrecht*, para. 39, Case C-208/05 *ITC*, para. 68 and Case C-357/06 *Luigi*, para. 28.

[306] See, *inter alia*, Case 157/86 *Murphy and others*, para. 11, Case C-262/97 *Engelbrecht*, para. 40, Case C-8/02 *Leichtle*, para. 58, Case C-208/05 *ITC*, para. 69 and Case C-357/06 *Luigi*, para. 28. As pointed out in Section 2, all the Treaty provisions covered by the cases in this study have direct effect according to the Court of Justice.

[307] Case C-357/06 *Luigi*, para. 28, Case 157/86 *Murphy and others*, para. 11, Case C-198/01 *Fiammiferi*, para. 49, Case C-8/02 *Leichtle*, para. 58 and Case C-208/05 *ITC*, para. 69.

[308] See further Case 106/77 *Simmenthal*, para. 24 and Case C-118/00 *Larsy*, para. 51.

[309] The criteria and order of analysis will accordingly follow the approach commonly used by the Court of Justice in cases concerning free movement. Normally, the Court will – after trying the admissibility of the case – decide the applicable Treaty freedoms, unless a case is considered to concern a purely internal situation. The Court will then decide if any form of discrimination or restriction is at hand and, if so, try if the rules may be justified on any grounds and if they are in compliance with the principle of proportionality. Finally, the Court in principle concludes if the Treaty is to be interpreted as precluding the national legislation or not.

[310] It should be noted that in the extended version of the study, the cases are analysed in more detail. Furthermore, the cases referred – and not referred – to the Court of Justice are analysed separately and then compared in the final part. As such an approach is not possible due to the lack of space, the cases and findings are instead summarised and compared in this part of the study.

Moreover it should be noted that the majority of cases[311] originate from the Council for Advance Tax Rulings, where the taxpayers have asked questions concerning the possibilities to carry out specific transactions. In several cases the Supreme Administrative Court has only shortly *affirmed* the decision of the Council. Consequently, the decision of the Council has been further analysed in those instances. It is also interesting to note that from the decision of the lower instance, i.e. the Administrative Court of Appeal (Kammarrätten) or the Council for Advance Tax Rulings (Skatterättsnämnden), it took on average around *four years* to decide cases sent to the Court of Justice for a preliminary ruling[312] and on average around *two years* to decide cases without such a ruling.[313] This could partly explain why the Supreme Administrative Court only *referred* around one-fourth[314] of the cases to the Court of Justice. However, it should further be pointed out that in all six cases referred to the Court of Justice, neither the taxpayers nor the tax authorities had *requested* that the case should be referred to the Court. Instead, the Supreme Administrative Court acted *ex officio* and decided to request a preliminary ruling without any further discussions or elaborations.

As follows from the above, the majority of the cases were decided *without* any prior reference to the Court of Justice. In view of the complexity of the area[315] and the sometimes inconsistent case law from the Court of Justice[316], it can be doubted if all these cases were really clear enough to fulfil a strict application of the *CILFIT*-criteria.[317] Such an assessment is,

[311] More precisely, *twenty-one* of the twenty-three cases originate from the Council for Advance Tax Rulings and only *two* from the general administrative court system.

[312] In this context it should be pointed out that it took on average around *two years* for the Court of Justice to decide the Swedish cases referred to the Court for a preliminary ruling.

[313] For further details, see the Annex.

[314] More precisely, *six* of the twenty-three cases were referred to the Court of Justice.

[315] The complexities of 27 different tax systems and the interaction of complicated and disparate tax rules – often in combination with tax treaties – should not be underestimated.

[316] In the area of direct taxation, the Court has now decided close to 200 complex, not always consistent and easily accessible, cases and many are still pending. This has been the subject of extensive discussions, see for example Wattel (2004): `Red Herrings in Direct Tax Cases before the ECJ´, pp. 81-95, Lang (2007): `Limitation of the Temporal Effects of Judgments of the ECJ´, p. 245 and Pistone (2007): `The Need for Tax Clarity and the Application of the Acte Clair Doctrine to Direct Taxes´, p. 534. See also Vanistendael (2008): `European Union: In defence of the European Court of Justice´, pp. 89-98 and Ellis (2008): `European Union: In defence of the European Court of Justice: response to Frans Vanistendael´, pp. 98-100 for a summary of the criticism against the case law and arguments in favour of the Court of Justice.

[317] Case 283/81 *CILFIT*, para. 11. Confirmed in, for example, Case C-461/03 *Gaston Schul*, para. 16. Regarding the different elements of the CILFIT criteria and recent developments of the *acte clair* doctrine, see further Groussot (2008): `Empowering National Courts in EU Law´, pp.20-24. Regarding the implications in the direct tax area, see for example, Wattel (2004): `Köbler, CILFIT and Welthgrove: We can't go on meeting like this´, pp. 177-190.

however, difficult due to the fact that the Supreme Administrative Court in the majority of cases affirmed the ruling of the Council for Advance Tax Rulings *without mentioning* the possible need for a preliminary ruling.[318] In some of the other cases the Court only stated – *after* concluding that the Swedish rules were incompatible with Community law – that there were *no reasons* to request a preliminary ruling from the Court of Justice without any further elaboration or justification.[319] The same practice was used in the case where the taxpayer explicitly *requested*[320] that a reference should be made and in the cases where the Supreme Administrative Court raised the issue *ex officio*.[321] In this context it could also be noted that the lack of justifications for not referring cases has been criticised by the Commission in a *reasoned opinion*.[322] As a consequence, the Swedish legislation was changed in 2006. It is now stated that if a party in the national proceedings has *requested* that a Swedish court should refer the case to the Court of Justice – and this request is denied – the Swedish court must give reasons for the refusal.[323] However, it has been put forward that this provision may be too narrow as it only covers cases where the *parties* have requested that the case should be referred and that this is questionable, especially in light of the principle of *jura novit curia*.[324] In further light of the findings in this study, i.e. that the taxpayers only requested a reference in *one* of the

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[318] *RÅ 2004 ref. 84, RÅ 2005 not. 7, RÅ 2006 ref. 38, RÅ 2007 ref. 59, RÅ 2007 not. 61, RÅ 2008 ref. 24, RÅ 2008 ref. 30, RÅ 2008 not. 59, RÅ 2008 not. 61, RÅ 2008 not. 70, RÅ 2008 not. 71* and *RÅ 2008 not. 84*. Neither was the issue raised or discussed in the Council for Advance Tax Rulings. This should, however, be seen against the background of the fact that the Court of Justice ruled in 1998 in the Case C-134/97 *Victoria Film*, paras. 15 and 19 that the Council for Advance Tax Rulings may *not* request a preliminary ruling from the Court.

[319] See for example *RÅ 2000 ref. 38*, *RÅ 2000 ref. 47 I, RÅ 2000 ref. 47 II* and *RÅ 2004 ref. 86*.

[320] It should be pointed out that the Supreme Administrative Court acted *ex officio* in *sixteen* of the seventeen cases. In only one case – *RÅ 2000 ref. 40* – the taxpayer explicitly requested that a reference should be made, while the tax authorities did not make such a request in any of the cases covered by the study.

[321] See for example *RÅ 2000 ref. 38*, *RÅ 2000 ref. 47 I, RÅ 2000 ref. 47 II* and *RÅ 2004 ref. 86*.

[322] Commission's Reasoned Opinion No 2003/2161, C (2004) 3899. See also, for example, Bernitz, Ulf (2005): `Kommissionen ingriper mot svenska sistainstansers obenägenhet att begära förhandsavgöranden´, pp. 109 ff. and Bernitz (2006): `The Duty of Supreme Courts to Refer Cases to the ECJ: The Commission's Action Against Sweden´, pp. 37-59.

[323] Lag (2006:502) med vissa bestämmelser om förhandsavgörande från EG-domstolen (Act on Preliminary Rulings from the ECJ (2006:502)). See also further the preparatory works, Ds 2005:25 *Förhandsavgöranden från EG-domstolen*, Prop. 2005/06:157 *Vissa frågor om förhandsavgörande från EG-domstolen* and Bernitz, Ulf (2005): *Controlling Member State Courts under EU Law: The Duty to Refer Cases to the ECJ and the Köbler Doctrine on Member State Liability*.

[324] Brokelind and Kanter (2007): `Sweden´, pp. 230-231.

cases[325], this criticism seems reasonable. Increased clarity and transparency in the reasoning of the Supreme Administrative Court would therefore be desirable, not only for the possibilities of taxpayers to claim their Community rights, but also for the monitoring of the compliance with Community law in general and the *CILFIT*- criteria in particular.

According to the Court of Justice, national courts further have a duty to *raise* legal questions *ex officio*, i.e. on their own initiative.[326] In the six cases *referred* to the Court of Justice, the taxpayers raised the issue of Community law in two cases[327], while the Council for Advance Tax Rulings raised the issue *ex officio* in the other four cases.[328] Similarly, the taxpayers raised the issue in ten cases[329] and the Council acted *ex officio* in the other seven cases decided *without* a preliminary ruling.[330] Accordingly, in *none* of the cases the issue of Community law was raised for the first time in the Supreme Administrative Court. Additionally, the tax authorities did not raise the issue in any of the cases.

As further regards the cases *referred* to the Court of Justice, none of the cases were declared *inadmissible* by the Court. However, the Court of Justice *reformulated* the questions in a few instances. In two cases[331] the Court of Justice made some classifications of its own and narrowed down the questions, while the questions were developed into more detail in two cases.[332] The Court of Justice quoted the questions from the Supreme

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[325] *RÅ 2000 ref. 40*. It should, however, be noted that this case was decided before the entry into force of the Act on Preliminary Rulings from the ECJ (2006:502).

[326] Compare for example Case C-312/93 *Peterbroeck*, para. 21 and Joined cases C-222/05 to C-225/05 *van der Weerd et. al*, paras. 20-42. See also Temple Lang (1997): `The Duties of National Courts under Community Constitutional Law´, p. 10 ff and van Dam and van Eijsden (2009): `Ex officio Application of EC Law by National Courts of Law in Tax Cases, Discretionary Authority or an Obligation?´, pp. 16-28. However, the Court has pointed out that Community law *cannot oblige* a national court to apply Community law of its own motion, where this would cause the individual bringing the legal action to be placed in a *less favourable position* than if he had not brought that action to court, see further, Case C-455/06 *Heemskerk and Schaap*, paras. 45-47.

[327] *RÅ 2004 ref. 28* (Case C-422/01 *Skandia Ramstedt*) and *RÅ 2004 ref. 111* (Case C-169/03 *Wallentin*).

[328] *RÅ 2000 ref. 17* (C-200/98 *X AB and Y AB*), *RÅ 2002 not. 210* (C-436/00 *X and Y*), *RÅ 2007 ref. 59* (C-102/05 *Skatteverket v A and B*) and *RÅ 2008 ref. 44* (Case C-101/05 *A*).

[329] *RÅ 2000 ref. 40, RÅ 2000 ref. 47 I, RÅ 2005 not. 7, RÅ 2004 ref. 84*, *RÅ 2004 ref. 86*, *RÅ 2008 ref. 24, RÅ 2008 ref. 30, RÅ 2008 not. 59, RÅ 2008 not. 61* and *RÅ 2008 not. 71*.

[330] *RÅ 2000 ref. 38*, *RÅ 2000 ref. 47 II, RÅ 2006 ref. 38*, *RÅ 2007 not. 61*, *RÅ 2007 ref. 59*, *RÅ 2008 not. 70* and *RÅ 2008 not. 84*.

[331] *RÅ 2000 ref. 17* (Case C-200/98 *X AB and Y AB*) and *RÅ 2002 not. 210* (Case C-436/00 *X and Y*).

[332] *RÅ 2007 ref. 59* (Case C-102/05 *Skatteverket v A and B*) and Case C-101/05 *A* (*RÅ 2008 ref. 44*).

Administrative Court and proceeded to decide the cases without any changes or further remarks in two cases.[333] Furthermore, if the Court of Justice considers that a case raises *no new point of law*, the Court may decide – after hearing the Advocate General – that the case shall be determined without a submission from the Advocate General.[334] Opinions were, however, delivered in all the cases covered by the study except in one case[335] where the Court of Justice decided – after hearing the Advocate General – to answer by way of a *reasoned order*.[336]

As concerns the *substance* of the cases, *all cases* involved the interpretation and application of the rules concerning *free movement* in the EC Treaty, as already noted in the introduction above. Furthermore, when comparing the different aspects of the choices of *applicable freedoms*, no major differences were found between the cases referred to the Court of Justice and the cases decided without a preliminary ruling. For example, both the Court of Justice[337] and the Supreme Administrative Court[338] analysed the freedom of *establishment* before the free movement of *capital*. There were many examples where the Court of Justice used the *same*[339] provisions as the Supreme Administrative Court had asked about. Yet, in a few cases the Court of Justice *added*[340] or

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[333] *RÅ 2004 ref. 28* (Case C-422/01 *Skandia Ramstedt*) and *RÅ 2004 ref. 111* (Case C-169/03 *Wallentin*).

[334] In accordance with Article 20 of the Statute of the Court of Justice. About 43% of the judgments in 2007 were delivered without an Opinion (as compared to 33% in 2006), see further Skouris (2008): ¨The Court of Justice in 2007: changes and proceedings´, p. 2.

[335] *RÅ 2007 ref. 59* (Case C-102/05 *Skatteverket v A and B*).

[336] This is possible – in accordance with Article 104(3) of the Rules of Procedure of the Court of Justice – in cases when a question is identical to a question on which the Court has already ruled, the answers can be clearly deduced from the existing case-law or the answer admits no reasonable doubt, see further Court of Justice (2008): *Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991*.

[337] In the Order of the Court of 10 May 2007 in Case C-102/05 *Skatteverket v A and B*.

[338] C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*) and Case C-436/00 *X and Y* (*RÅ 2002 not. 210*). In many cases it was also stated that if the national rules had been found *incompatible* with the freedom of establishment, it was not necessary to examine whether the provisions of the Treaty relating to the free movement of capital precluded the national legislation, see for example *RÅ 2000 ref. 47 I* with reference to Case C-200/98 *X AB and Y AB*, para. 30 and C-251/98 *Baars*, para. 42.

[339] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*) and Case C-101/05 *A* (*RÅ 2008 ref. 44*).

[340] In the Order of the Court of 10 May 2007 in Case C-102/05 *Skatteverket v A and B* the Supreme Administrative Court asked if the unfavourable tax treatment was contrary to the provisions on free movement of *capital* between the Member States and third countries. The Court of Justice answered that since an examination of the freedom of *establishment* would make it superfluous to conduct a separate examination of the free movement of capital, it was necessary to first consider the freedom of establishment.

reduced[341] the number of freedoms in the answers. Such alterations were accepted by the Supreme Administrative Court when applying the answers from the Court.[342] Moreover, the Supreme Administrative Court frequently justified the choice of applicable freedom with direct references to *case law* from the Court of Justice in the cases decided *without* a prior reference to the Court.[343]

When further comparing the different approaches to the concepts of *discrimination* and *restrictions*, it may be concluded that both the Court of Justice and the Supreme Administrative Court sometimes used inconsistent terminology and that the arguments and grounds for conclusions were not always clear. In several cases it was, *inter alia*, not specified if the Swedish provisions resulted in any form of discrimination or restriction.[344] However, in the majority of cases the Court of Justice referred to either `restrictions´[345] or `discrimination´.[346] The Supreme Administrative Court further made references to `restrictions´ in several cases[347] and frequently referred to case law from the Court of Justice as a basis for the reasoning in the

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[341] In Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) the Supreme Administrative Court had asked about the interpretation of the freedom of movement for persons, services and capital, in particular Article 49 EC, in conjunction with Article 12 EC. The Court of Justice stated that the Treaty provisions relating to freedom to provide *services* applied to a situation such as that in the main proceedings, without any further elaborations.
n C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*) asked about freedom of establishment and the free movement of capital, but the Court of Justice answered that it was not necessary to examine whether the free movement of capital precluded the legislation.

[342] It could further be added that the Supreme Administrative Court did not change the treaty freedoms used by the Court of Justice in any of the cases covered by the study.

[343] *RÅ 2000 ref. 38*, *RÅ 2004 ref. 86, RÅ 2006 ref. 38*, *RÅ 2008 ref. 24, RÅ 2008 not. 59, RÅ 2008 not. 61 and RÅ 2008 not. 84*. In *RÅ 2004 ref. 84, RÅ 2005 not. 7*, *RÅ 2008 ref. 30, RÅ 2008 not. 70* and *RÅ 2008 not. 71* the Supreme Administrative Court affirmed the ruling of the Council for Advance Tax Rulings.

[344] Instead, the Court of Justice in Case C-102/05 *Skatteverket v A and B* (*RÅ 2007 ref. 59*) used terminology such as making establishments `less attractive´ by placing taxpayers in a `less favourable tax position´ and a `difference of treatment´ which was `contrary to´ the freedom of establishment in C-200/98 *X AB and Y AB* (RÅ *2000 ref. 17*). The Supreme Administrative Court, on the other hand, used terminology such as `preferential treatment´ in *RÅ 2000 ref. 38*, `hindering´ Swedish nationals from establishing abroad in *RÅ 2000 ref. 47 I and II* and `obstacle´ in *RÅ 2004 ref. 86*.

[345] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-101/05 *A* (*RÅ 2008 ref. 44*).

[346] Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*).

[347] *RÅ 2000 ref. 40* and indirectly through reference to case law from the Court of Justice in *RÅ 2006 ref. 38* and earlier case law form the Supreme Administrative Court in *RÅ 2007 ref. 59* and *RÅ 2007 not. 61*. In *RÅ 2004 ref. 84*, *RÅ 2005 not. 7*, *RÅ 2008 ref. 30, RÅ 2008 not. 70* and *RÅ 2008 not. 71* the Supreme Administrative Court affirmed the terminology used by the Council for Advance Tax Rulings.

cases decided without a preliminary ruling.[348] It could also be added that the Supreme Administrative Court accepted the terminology and reasoning of the Court of Justice when the answers from the Court were applied within the preliminary rulings procedure.

Similar approaches were further used by the Court of Justice and the Supreme Administrative Court as regards different *justifications* for Swedish legislation found incompatible with the EC Treaty. In two of the cases referred to the Court of Justice, no grounds for justification were tried by the Court.[349] In the other three cases the Court of Justice tried – and *rejected* – a number of possible justifications, such as abuse[350], reduction of tax revenue[351] the need to safeguard the cohesion of the tax system[352], effective fiscal supervision[353], the risk of tax evasion[354] and competitive neutrality.[355] However, in one of the cases the Court of Justice in principle *accepted* the justification of effective fiscal supervision in relation to third countries.[356] The Supreme Administrative Court accepted all of these conclusions when the answers were applied.

The Supreme Administrative Court concluded that the Swedish rules could *not* be justified without any further details in a number of cases decided

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[348] *RÅ 2000 ref. 38, RÅ 2000 ref. 40, RÅ 2000 ref. 47 I and II, RÅ 2004 ref. 86, RÅ 2006 ref. 38* and indirectly through references to its own case law in *RÅ 2007 ref. 59* and *RÅ 2007 not. 61*. In *RÅ 2004 ref. 84, RÅ 2005 not. 7, RÅ 2008 not. 70* and RÅ 2008 not. 71 the Supreme Administrative Court affirmed the ruling of the Council for Advance Tax Rulings.

[349] C-102/05 *Skatteverket v A and B* (*RÅ 2007 ref. 59*) where Swedish law was found *compatible* with Community law and Case C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*) where the Swedish Government did not even attempt to justify the difference of treatment and openly acknowledged at the hearing before the Court that the legislation was *incompatible* with the freedom of establishment.

[350] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*).

[351] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*) and Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*).

[352] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*).

[353] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*) and Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*).

[354] Case C-436/00 *X and Y* (*RÅ 2002 not. 210*).

[355] Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*).

[356] More precisely, the Supreme Administrative Court stated in Case C-101/05 *A*, para.63 (*RÅ 2008 ref. 44*) that it is "in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country."

without a preliminary ruling.[357] Yet, in a few cases the Supreme Administrative Court tried some specific grounds for justification such as the cohesion of the tax system,[358] difficulties to calculate the tax[359] and additional permissions of Swedish authorities.[360] All of these justifications were, however, rejected. Consequently, the principle of *proportionality* was not applied in any of these cases. However, the principle was applied in three cases,[361] where the Supreme Administrative Court confirmed the findings of the Council for Advance Tax Rulings that the Swedish rules could be justified on grounds of the need to safeguard the *cohesion* of the tax system[362] and the principle of *territoriality*.[363] Neertheless, the Council concluded that the rules were *appropriate* to ensure the attainment of the *objective* pursued but went *beyond* what was *necessary* to attain it. Consequently, the Swedish rules were considered to be in breach of the principle of proportionality.[364]

Swedish tax law was further found *compatible* with Community law in *two* cases decided after a preliminary ruling to the Court of Justice[365] and in

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[357] *RÅ 2000 ref. 38*, *RÅ 2000 ref. 47 II, RÅ 2004 ref. 84*, *RÅ 2004 ref. 86*, *RÅ 2005 not. 7*. There are also cases where the Supreme Administrative Court has referred to its own earlier case law – such as *RÅ 2007 ref. 59* and *RÅ 2007 not. 61* – without any further elaborations. See also *RÅ 2004 ref. 84* where parts of the Swedish legislation were found compatible with Community law with explicit reference to case law from the Court of Justice. No grounds for justification were, however, specifically tried. The issue of possible justifications were further *not* addressed in *RÅ 2008 ref. 24*, *RÅ 2008 not. 59*, *RÅ 2008 not. 61* and *RÅ 2008 not. 84* as the Court concluded that the freedom of establishment may not be relied upon in relation to third countries and the free movement of capital was not applicable. Swedish law was consequently found *compatible* with Community law.

[358] *RÅ 2000 ref. 40*.

[359] *RÅ 2000 ref. 47 I*.

[360] *RÅ 2006 ref. 38.* In this case explicit reference was made to case law from the Court of Justice.

[361] *RÅ 2008 ref. 30*, *RÅ 2008 not. 70* and *RÅ 2008 not. 71*.

[362] The Council specifically stated in *RÅ 2008 ref. 30* that national rules may be justified by an overriding reason in the public interest in accordance with case law from the Court of Justice. However, the Council concluded that the rules could not be justified on grounds of public policy, public security or public health in Article 46 EC in this case.

[363] *RÅ 2008 ref. 30*, *RÅ 2008 not. 70* and *RÅ 2008 not. 71*.

[364] *RÅ 2008 ref. 30*, *RÅ 2008 not. 70* and *RÅ 2008 not. 71*.

[365] *RÅ 2007 ref. 59* (Case C-102/05 *Skatteverket v A and B*) and *RÅ 2008 ref. 44* (Case C-101/05 *A*) concerning *third states* were both decided in line with the answers from the Court of Justice. More precisely, the Court of Justice ruled in Case C-102/05 *Skatteverket v A and B* that the freedom of establishment within the meaning of Article 43 EC et seq. may *not be relied upon* in a situation involving a non-member country. Accordingly, the Supreme Administrative Court decided in *RÅ 2007 ref. 59* that it followed from the judgment of the Court of Justice that the Treaty rules on the freedom of establishment were *not applicable*. Moreover, in Case C-101/05 *A* the Court of Justice ruled that the answer to the question referred must be that Articles 56 EC and 58 EC were to be interpreted as *not precluding* the legislation. The Supreme Administrative Court quoted the conclusions of the

five cases decided without such a ruling.[366] In the other four cases *referred* to the Court of Justice, the Court ruled that Community law *precluded* the Swedish rules.[367] These conclusions were accepted by the Supreme Administrative Court when the answers were applied. The Supreme Administrative Court accordingly ruled that Swedish law was *incompatible* with Community law in all four cases. In a similar manner, the Supreme Administrative Court found Swedish law *incompatible* with Community law in the majority of cases decided *without* a preliminary ruling.[368] It could be added that the Court of Justice[369] and the Supreme Administrative Court[370] frequently referred to *case law* from the Court of Justice as a basis for their conclusions. Additionally, the Supreme Administrative Court made references to its own earlier case law[371] in a few cases.

It is further the national courts – responsible for deciding the *outcome* of the cases – that are faced with the challenges of deciding the *consequences* when national rules have been found compatible – or incompatible – with Community law. In the words of the Court of Justice, national courts must

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Court of Justice and stated in *RÅ 2008 ref. 44* that the tax authorities should examine the possibilities to collect information to ascertain whether the requirements under national legislation were satisfied in each specific case. However, a precondition for this ruling was that the requirement regarding *control* was *not* satisfied. Consequently, the Supreme Administrative Court could not try this condition and therefore ruled that the appeal by the tax authorities should be rejected.

[366] In *RÅ 2004 ref. 84* Swedish law was found `not incompatible´ with Community law in relation to another EU Member State and in *RÅ 2008 ref. 24*, *RÅ 2008 not. 59*, *RÅ 2008 not. 61* and *RÅ 2008 not. 84* the Supreme Administrative Court ruled that the freedom of establishment may `not be relied upon´ in relation to third states.

[367] Case C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*), Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*).

[368] More precisely, Swedish law was found incompatible with community law in *thirteen* cases. The terminology, however, varied. In most cases, such as *RÅ 2000 ref. 38, RÅ 2000 ref. 40, RÅ 2000 ref. 47 I, RÅ 2000 ref. 47 II, RÅ 2004 ref. 86, RÅ 2007 ref. 59* and *RÅ 2008 not. 71* Swedish law was found `contrary to´ Community law. In *RÅ 2007 not. 61, RÅ 2008 ref. 30* and *RÅ 2008 not. 70* Swedish law was further found `incompatible´ with Community law in However, in *RÅ 2004 ref. 84, RÅ 2005 not. 7, RÅ 2006 ref. 38* reference was only made to `restrictions´.

[369] Case C-102/05 *Skatteverket v A and B* (*RÅ 2007 ref. 59*) and *RÅ 2008 ref. 44* (Case C-101/05 *A*) where Swedish law was found *compatible* with Community law and Case C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*), C-436/00 *X and Y* (*RÅ 2002 not. 210*), C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*) where Swedish law was found *incompatible* with Community law.

[370] *RÅ 2004 ref. 84*, *RÅ 2008 ref. 24*, *RÅ 2008 not. 59*, *RÅ 2008 not. 61* and *RÅ 2008 not. 84* where Swedish law was found *compatible* with Community law and *RÅ 2000 ref. 38, RÅ 2000 ref. 47 I, RÅ 2004 ref. 84, RÅ 2004 ref. 86, RÅ 2005 not. 7, RÅ 2006 ref. 38, RÅ 2008 ref. 30, RÅ 2008 not. 70* and *RÅ 2008 not. 71* where Swedish law was found *incompatible* with Community law.

[371] *RÅ 2007 ref. 59* and *RÅ 2007 not. 61*.

set aside any provision of national law which may conflict with Community law.[372] However, the Court has further held that the incompatibility with Community law does not have the effect of rendering that rule of national law *non-existent*,[373] but has not specified the consequences of setting aside national provisions.[374] This should, however, be seen against the background of the statements of the Court that it is *not* the task of the Court to *apply* the Treaty to a specific case.[375] Instead, the Court has jurisdiction to supply the national courts with all the guidance as to the *interpretation* of Community law.[376] Even so, the Court sometimes gives quite detailed guidance on how to solve the cases as is illustrated by some of the cases covered by this study. For example, the Court of Justice ruled that now Articles 43 to 48 EC *precluded* a *tax relief* from being *refused*[377] and that the same Community provisions *precluded* a Swedish rule which *excluded* the transferor from the *benefit of deferral of tax*.[378] In another case, the Court of Justice stated that Article 49 EC *precluded* the conditions laid down in national law that the policy had to be issued by an insurance

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[372] Case 106/77 *Simmenthal*, para. 21. This has been reaffirmed in numerous cases, see for example joined cases C-10/97 to C-22/97 *IN.CO.GE*., para. 20 and case law cited therein.

[373] The national court is, however, obliged to disapply that rule, provided that this obligation does not restrict the power of the competent national courts to apply – from among the various procedures available under national law – those which are appropriate for protecting the individual rights conferred by Community law, see further Joined cases C-10/97 to C-22/97 *IN.CO.GE*., para. 21.

[374] As has recently been pointed out, it is uncertain if the setting aside of national law means that the rule *lose all force* and if there will be a *gap* in the rules or if the rules may be *replaced* or *modified* and applied in a manner compatible with Community law, see further Ståhl (2008): `National Courts' Treatment of Tax Rules that Conflict with the EC Treaty´, pp. 548-553 and Ståhl, Kristina (2008): `Hur ska svenska domstolar hantera fördragsstridiga skatteregler?´, pp. 123-132.

[375] Joined cases 28 to 30/62 *Da Costa*, p. 31, Case C-380/05 *Centro Europa*, para. 50 and Case C-443/06 *Waltraud*, para. 18.

[376] Case 6/64 *Costa v E.N.E.L*., pp. 592-593, Case C-380/05 *Centro Europa*, para. 50, Case C-275/06 *Promusicae*, para. 38 and Case C-443/06 *Waltraud*, para. 18. However, the difference between *interpretation* and *application* is not always clear as has frequently been pointed out, see for example Davies (2006): `The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure´ pp. 5-14 with further references.

[377] Case C-200/98 *X AB and Y AB*. The Supreme Administrative Court consequently stated in *RÅ 2000 ref. 17* that the judgment of the Court of Justice meant that it was incompatible with Community law to refuse the deduction of the group contribution and consequently ruled that it was possible to make a group contribution from *X AB* to *Y AB*.

[378] Case C-436/00 *X and Y*. Subsequently, the Supreme Administrative Court quoted the conclusions of the Court of Justice and ruled in *RÅ 2002 not. 210* that the shares should be considered to have been disposed of for a consideration equivalent to *cost*. Consequently, transfers to a foreign legal person were treated in the same way as transfers to *Swedish limited companies*.

company *operating* in the *national territory*.[379] Moreover, the Court specified in a later case that Article 39 EC *precluded* a Member State's legislation from providing that non-residents were not granted a *basic allowance* or *any other allowance* or *deduction* linked to the taxpayer's personal circumstances[380] when the taxpayer only had income which was not subject to income tax in the State of residence.[381]

In the majority of cases above, *specific* Swedish rules explicitly applied to situations involving *foreign* countries.[382] However, the Supreme Administrative Court decided to *set aside* and *not* apply these rules as they were found incompatible with Community law. Instead, the Supreme Administrative Court treated situations involving other Member States of the European Union in accordance with the rules applicable to *Swedish* taxpayers[383] or companies established in

[379] More precisely, the Court of Justice stated in Case C-422/01 *Skandia Ramstedt*, that Article 49 EC precluded an insurance policy issued by an insurance company established in another Member State from being treated differently in terms of taxation, with income tax effects which, depending on the circumstances in the individual case, may be less favourable. The Supreme Administrative Court ruled in *RÅ 2004 ref. 28* that the judgment of the Court of Justice meant that it was incompatible with Community law to deny the company (Skandia) immediate deduction of the premiums paid, irrespective of how the situation should be decided according to Swedish income tax legislation. The Court consequently ruled that the company should be given the right to immediate deduction.

[380] Whereas taxpayers *resident* in that State were entitled to such allowances or deductions at the time of ordinary assessment to tax on their income received in that State and abroad. The Court even specified that "the grant in the present case of the same tax allowance as that laid down for persons resident in Sweden throughout the tax year would not give Mr Wallentin an unjustified fiscal benefit since he has no taxable income in his Member State of residence which could confer entitlement to a similar allowance in that State.", see further Case C-169/03 *Wallentin*, para. 23.

[381] Case C-169/03 *Wallentin*. The Supreme Administrative Court quoted the conclusions of the Court in *RÅ 2004 ref. 111* and stated that – as a consequence of the judgment of the Court – it was incompatible with Community law to deny the taxpayer a basic allowance. The Supreme Administrative Court therefore concluded that Mr Wallentin had a right to the basic allowance *as if* he had been a *resident* in Sweden during the whole taxable year.

[382] The rules included both other EU Member States and third states. Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*).

[383] For example, in *RÅ 2002 not. 210* (Case C-436/00 *X and Y*) it was specifically stated that the transfer of an asset for a consideration which was less than the market value to a *foreign legal person* in which the transferor or his kin directly or indirectly had a holding should be treated as though the asset was disposed of for a consideration equivalent to the *market value*. However, the Supreme Administrative Court ruled that the shares should be considered to have been disposed of for a consideration equivalent to *cost*. Consequently, transfers to a foreign legal person were treated in the same way as transfers to *Swedish limited companies*. The same conclusions were reached in *RÅ 2007 not. 61* without a reference for a preliminary ruling, but with explicit reference to *RÅ 2002 not. 210*. Furthermore, in *RÅ 2004 ref. 111* a taxpayer *not resident* in Sweden was denied a basic allowance. Even so, the taxpayer was given the right to the basic allowance *as if* he had been a *resident* in Sweden during the whole taxable year.

Sweden.[384] There is also an example of a case where the Swedish rules did not mention how *foreign* situations should be treated. Instead, the Swedish provision only stated that group contributions were allowed if the companies were *Swedish*. Even so, the Supreme Administrative Court ruled that the group contribution was *allowed* even though the group included two companies in other EU Member States.[385]

In the cases found *compatible* with Community law, the Court of Justice ruled in one of the cases that the Swedish provisions fundamentally affected the freedom of establishment in Article 43 EC et seq. which, however, may *not* be relied upon in relation to a non-member country.[386] This conclusion was accepted – and quoted – by the Supreme Administrative Court when the case was decided.[387] In the other case, the Court of Justice ruled that Articles 56 EC and 58 EC were to be interpreted as *not precluding* the Swedish legislation in relation to states outside the EEA.[388] This was also accepted by the Supreme Administrative Court.[389] In one of the cases decided *without* a preliminary ruling, the Supreme Administrative Court further found Swedish law *not incompatible* with Community law in relation to another EU Member State.[390] In the other four cases, the Supreme Administrative Court ruled that the freedom of establishment may *not* be relied upon in relation to third states.[391] Consequently, the Swedish provisions did not have to be set aside or extended to cover also situations involving the other Member States[392] or third states in any of the

[384] In *RÅ 2004 ref. 28* (Case C-422/01 *Skandia Ramstedt*) the rules in question stated that the insurance premium could be deducted *immediately* if the employer took out an occupational insurance policy with an insurer *established in Sweden*. However, the Supreme Administrative Court extended the application to occupational pension insurance policies taken out with *Danish*, *German* and *English* assurance companies and ruled that the company should be given the right to *immediate* deduction.

[385] *RÅ 2000 ref. 17* (Case C-200/98 *X AB and Y AB*).

[386] Case C-102/05 *Skatteverket v A and B* (*RÅ 2007 ref. 59*).

[387] More precisely, the Supreme Administrative Court stated in *RÅ 2007 ref. 59* that it followed from the decision of the Court of Justice that the Treaty rules regarding the freedom of establishment were not applicable in relation to the Russian branch. Accordingly, the taxpayer was not allowed to include the remuneration paid to employees of the Russian branch since they did not form of the basis for calculating social security contributions or income tax under the Swedish legislation.

[388] Or states with which a taxation convention providing for the exchange of information had not been concluded, see further Case C-101/05 *A*.

[389] Consequently, the Supreme Administrative Court quoted the conclusions of the Court of Justice in and stated in *RÅ 2008 ref. 44* and ruled that the appeal by the tax authorities should be rejected.

[390] *RÅ 2004 ref. 84*. This conclusion was based on the findings of the Council for Advance Tax Ruling that the premiums in question were not deductible and the proceeds from policies were not subject to tax in accordance with the rules in the Swedish Income Tax Act (Inkomstskattelagen (1999:1229)).

[391] *RÅ 2008 ref. 24, RÅ 2008 not. 59, RÅ 2008 not. 61* and *RÅ 2008 not. 84*.

[392] *2004 ref. 84*.

cases.[393] Instead, the consequences of the compatibility followed from the wording of the Swedish rules.[394]

As regards the cases decided *without* a reference for a preliminary ruling, the majority of rules did not explicitly mention how *foreign* situations should be treated. Even so, the Supreme Administrative Court extended the application of the rules applicable to Swedish situations,[395] Swedish companies[396] or companies established in

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[393] *RÅ 2007 ref. 59* (Case C-102/05 *Skatteverket v A and B*), *RÅ 2008 ref. 44* (Case C-101/05 *A*), *RÅ 2008 ref. 24*, *RÅ 2008 not. 59*, *RÅ 2008 not. 61* and *RÅ 2008 not. 84*.

[394] In *RÅ 2007 ref. 59*, the Supreme Administrative Court declared that the taxpayer was not allowed to include remuneration as a consequence of the conclusions of the Court of Justice in Case C-102/05 *Skatteverket v A and B*, that the Swedish provisions fundamentally affected the freedom of establishment in Article 43 EC et seq., which, however, may not be relied upon in relation to a non-member country (in this case Russia). Moreover, in *RÅ 2004 ref. 84* the Council for Advance Tax Ruling found the Swedish provisions compatible with Community law and consequently ruled the premiums in question were not deductible and the proceeds from policies were not subject to tax in accordance with the rules of the Swedish Income Tax Act (Inkomstskattelagen (1999:1229)).

[395] For example, in *RÅ 2000 ref. 38* the Supreme Administrative Court decided that the taxpayer could include the remuneration paid to employees in companies within the European Union, despite the fact that the Supreme Administrative Court had ruled – after an interpretation of the rules in light of the preparatory works – that the remuneration in question could *not* be included in the basis for calculating *Swedish* social security contributions according to Swedish law. In *RÅ 2000 ref. 47 I* the taxpayer was further – in line with the conclusions in *RÅ 2000 ref. 38* – allowed to include the remuneration paid to employees in companies within the European Union. The same conclusion was reached in *RÅ 2000 ref. 47 II* where the taxpayer owned a Swedish company with *foreign subsidiaries*. Similarly, the Supreme Administrative Court concluded in *RÅ 2007 ref. 59* – with explicit reference to *RÅ 2000 ref. 47 I och II* – that the taxpayer could include the remuneration paid to employees of a Belgian *branch*. Furthermore, in *RÅ 2004 ref. 86* Swedish law stipulated that fees to unemployment schemes could only be deducted if they were paid to unemployment schemes *registered* with Arbetsmarknadsstyrelsen (Swedish Public Employment Board) and this did not include foreign unemployment schemes. Despite this, the Supreme Administrative Court that the taxpayer was allowed to *deduct fees* paid to a *Danish* unemployment scheme.

[396] In *RÅ 2000 ref. 40*, the taxpayer had to pay tax on received dividends since the company paying the dividends was *foreign* and Swedish law – according to the wording of the provision in question – required that the paying company should be *Swedish*. However, the Supreme Administrative Court explicitly stated that this condition should be *disregarded* and that the Swedish rules were *applicable* despite the fact that the paying company was *not* Swedish. The Court consequently ruled that the taxpayer did *not* have to pay tax on the dividends. In *RÅ 2006 ref. 38* Swedish law further stipulated that shareholders did not have to declare capital gains when *Swedish* companies decided to merge investment funds. The Supreme Administrative Court stated that the Swedish rules were *not directly applicable*. Even so, the Court ruled that the Swedish taxpayer did *not* have to declare capital gains for the purposes of income tax in relation to a company in *Luxembourg*. Moreover, the Council for Advance Tax Rulings ruled in *RÅ 2007 not. 61* that the shares should be considered to have been sold for the compensation agreed upon with explicit reference to *RÅ 2002 not. 210*. Consequently, transfers involving a *foreign* legal person were treated in the same way as transfers to *Swedish* limited companies.

Sweden[397] to situations involving other Member States of the European Union. In some cases, *specific rules* further explicitly applied to situations involving *foreign* countries. Even so, the Supreme Administrative Court decided to set aside these rules as they were found incompatible with Community law. Instead, the Supreme Administrative Court extended the more favourable tax treatment of Swedish taxpayers,[398] companies established in Sweden[399] or activities in Sweden[400] to the situations involving other Member States of the European Union.

As follows from the above, the Supreme Administrative Court only denied the claims of the taxpayers in the cases found *compatible* with Community

[397] In *RÅ 2004 ref. 84* the Council for Advance Tax Rulings explicitly stated that an insurance taken out with an insurance company established in *Great Britain* should be treated *as if* the insurance had been issued by an insurance company *established in Sweden*. Accordingly, the taxpayer was allowed to use the lower tax rate in the calculation of the yield tax and the insurance was treated as an asset exempt from tax for the purposes of the wealth tax.

[398] In *RÅ 2000 ref. 47 I* the taxpayers wanted to include the shares of the foreign subsidiaries in the calculation of the capital base despite the fact that it was *expressly stated* in the Swedish rules that they were *not* applicable to shares in *foreign* legal persons. Even so, the Supreme Administrative Court ruled that the taxpayer *could* include the shares of the foreign subsidiaries, but referred the question on how to take account of the shares in the calculations back to the Council for Advance Tax Rulings. The taxpayer was further – in line with the conclusions in *RÅ 2000 ref. 38* – allowed to include the remuneration paid to employees in companies within the European Union, see further above. Moreover, the Supreme Administrative Court ruled in *RÅ 2008 not. 70* that the employee stock options should not be taxed at the time of the transfer of residence. Instead, they should be taxed they were *used* or *sold* in accordance with the *general* rule. A similar result was obtained in *RÅ 2008 not. 71* where the Court ruled that the exchanged shares should be taxed when they were *sold* in accordance with the *general* rule, as the rule that the shares should be taxed at the time of the transfer of residence was found incompatible with Community law. However, the Court went in this case further and stated that the postponement of the time of taxation should also have a basis in the national tax provisions governing limited tax liability, see also further Ståhl, Kristina (2008): `National Courts' Treatment of Tax Rules that Conflict with the EC Treaty´, pp. 552-553.

[399] In *RÅ 2005 not. 7* the Swedish taxpayer wanted to reduce the yield tax – related to a capital life assurance taken out with a company established in *Ireland* – with an amount corresponding to the *Swedish withholding tax*. However, the wording of the Swedish provisions only included the possibility to reduce the yield tax with an amount corresponding to *foreign tax* for insurances taken out with companies not established in Sweden. After concluding that these rules resulted in a higher tax burden as compared to a corresponding assurance taken out with a company *established in Sweden*, the Council for Advance Rulings decided that the taxpayer should be allowed to reduce the yield tax with an amount corresponding to the *withholding tax*.

[400] In *RÅ 2008 ref. 30* the Supreme Administrative Court decided that the *periodization reserve* should be brought back to taxation under the *general rule*, i.e. six years after having been set aside. The Court further ruled that the assets should be taxed when they were *sold* and not at the time of the transfer of residence.

law.[401] In all the other cases, the Supreme Administrative Court ruled *in favour* of the *taxpayers*.[402]

5.4 Conclusions: A Community Powerhouse?

On the basis of the findings above, may it then be concluded that the Swedish Supreme Administrative Court has been a powerhouse of Community direct tax law? With the reservations regarding the possibilities to draw any general or more decisive conclusions on the basis of only *twenty-three* cases, some tendencies in the case law can be highlighted. From the point of view of the *taxpayers*, it may be concluded that the Supreme Administrative Court in the vast majority of cases indeed worked as a powerhouse for their claims of a more favourable tax treatment on the basis of Community law. At the same time, the Court acted as a powerhouse *against* the Swedish *legislator*, by stating that Swedish law was incompatible with Community law and should be set aside in the same cases. The *lack* of cases is however also interesting in this context.[403] Even though it is difficult to estimate how many cases could – or should – have been decided on the basis of Community law and this is actually outside the scope of the study, a few points will be made below.

Apart from explanations related to insufficient knowledge or unawareness of the possible impact of Community law[404], the lack of cases may be the result of conscious choices. From the point of view of the *Supreme Administrative Court*, there may, for example, be a wish to retain the power to decide issues of direct tax law at the national level and on the basis

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[401] *RÅ 2007 ref. 59* (Case C-102/05 *Skatteverket v A and B*), *RÅ 2004 ref. 84*, *RÅ 2008 ref. 24*, *RÅ 2008 not. 59*, *RÅ 2008 not. 61* and *RÅ 2008 not. 84*. It should be noted that *RÅ 2008 ref. 44* (Case C-101/05 *A*) was not decided in substance.

[402] Case C-200/98 *X AB and Y AB* (*RÅ 2000 ref. 17*), Case C-436/00 *X and Y* (*RÅ 2002 not. 210*), Case C-422/01 *Skandia Ramstedt* (*RÅ 2004 ref. 28*) and Case C-169/03 *Wallentin* (*RÅ 2004 ref. 111*) were all decided on the basis of the findings of the Court of Justice. On the other hand, *RÅ 2000 ref. 38, RÅ 2000 ref. 40, RÅ 2000 ref. 47 I and II, RÅ 2004 ref. 84, RÅ 2004 ref. 86, RÅ 2005 not. 7, RÅ 2006 ref. 38, RÅ 2007 not. 61*, *RÅ 2007 ref. 59*, *RÅ 2008 ref. 30*, *RÅ 2008 not. 70* and *RÅ 2008 not. 71* were decided without a preliminary ruling from the Court of Justice.

[403] This since there are many ways for national courts to avoid the application of Community law by, *inter alia*, stating that Community law does not apply, avoid making a reference or make the issue of Community law disappear and solve the case on the basis of national law, see further Claes, Monica (2006): *The National Courts´ Mandate in the European Constitution*, p. 250.

[404] Which may be the result of the complexities of Swedish tax legislation in combination with the legislations of the other Member States, possible tax treaties and the close to 200 – sometimes inconsistent – cases from the Court of Justice.

of national law.[405] The lack of cases may further be explained by decisions of the *taxpayers* not to take cases to court or to appeal decisions by lower instances. This may be related to time and costs, but also to the risk of future changes of the Swedish rules that will be less beneficial for the taxpayers.[406] It may also be related to procedural aspects such as the need for leave to appeal.[407] The inactivity of the *tax authorities* in taking cases to court and to appeal decisions by lower instances may provide further explanations. However, it should be emphasized that the Tax Agency since the second half of 2004 has issued *guidelines*,[408] where the position of the Tax Agency has been made public. In these guidelines, the Tax Agency has found Swedish tax rules incompatible with Community law in several instances.[409] It should further be noted that the Swedish *legislator* has made some inventories of the compatibility of Swedish legislation with Community law.[410] However, despite some changes of the legislation it has been pointed out that areas of potential conflicts remain.[411] Finally, it should be kept in mind that Sweden did not join the European Union until 1995 and that it takes time to learn and to get cases through the system.[412]

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[405] Such a wish may come from the Court itself, but may also be more or less spelled out by the Swedish legislator in the preparatory documents. In this context it should be pointed out that an important explanation for not extending the Swedish rules to taxpayers and activities outside the Swedish territory is the risk of losing tax revenue.

[406] One example of this is the Swedish rules concerning *group contributions*. In this context it has been put forward that if the rules had to be extended also to companies operating *outside* the Swedish territory, the resulting loss of revenue could force the Swedish legislator to deny the possibility to make group contributions for *all* companies, i.e. also for companies operating *only* in Sweden. Purely internal situations and cross border situations would accordingly be treated in the same way to make the rules compatible with Community law. Apart from other Swedish examples there are also examples of such developments in other EU Member States.

[407] It should be pointed out that there is no need for leave to appeal in relation to decisions of the Council for Advance Tax Rulings. As already noted in Section 1.3 above there has, however, been a proposal to introduce leave to appeal also for decisions of the Council.

[408] In Swedish: `Ställningstaganden´ or `Styrsignaler´. The guidelines are binding on the tax authorities.

[409] It should be noted that some of these cases have been quite controversial and it has been pointed out that the Tax Agency has acted like a constitutional court or even as a legislator in this context, see for example Påhlsson, Robert (2006): `Skatteverkets styrsignaler – en ny blomma i regelrabatten´, pp. 416-418.

[410] See for example, Prop. 2000/01:22 *Anpassningar på företagsskatteområdet till EG-fördraget, m.m.*, Persson Osterman, Roger (2001): `Sweden Submits to the European Court of Justice´, pp. 56-58 and Ståhl, Kristina (2006): `Skatterna och den fria rörligheten inom EU – svensk skatterätt i förändring?´, pp. 24-25.

[411] See for example, Ståhl, Kristina (2006): `Direct tax rules and the EU fundamental freedoms – Swedish report´, pp. 375-378 and Ståhl, Kristina (2006): `Skatterna och den fria rörligheten inom EU – svensk skatterätt i förändring?´, pp. 24-25.

[412] This is illustrated by the fact that the first four cases were decided in 2000 and the next case in 2002. Furthermore, from the decision of the lower instance, i.e. the Administrative Court of Appeal (Kammarrätten) or the Council for Advance Tax Rulings (Skatterätts-

By only referring around *one fourth* of the cases to the Court of Justice[413], it could also be concluded that the Supreme Administrative Court in some ways acted as a powerhouse *against* the Court. This since it may be doubted – in view of the complexity of the area and the sometimes inconsistent case law from the Court of Justice – if all the cases were really clear enough to fulfil a strict application of the *CILFIT*-criteria.[414] However, in view of now 27 Member States, there has been an increase not only in the number of national laws and legal cultures, but also in the number of national courts and national case law. There has also been an increase of references for preliminary rulings and cases decided by the Court of Justice.[415] In combination with now 23 – equally authentic – official languages and the length of proceedings at the Court of Justice, it may consequently be doubted if a strict application of the CILFIT-criteria is realistic and reasonable.[416] Instead, the need for reform appears urgent. Such a need is also confirmed by the fact that it has frequently been pointed out that the primary needs of the national courts and parties are not only more *speed*[417], but also greater *clarity* and *consistency* in the case law of the Court of Justice.[418] Possible reforms could include measures to restrict the *input* to the Court of Justice, as well as measures to increase the *output*.[419] One possible measure to restrict the input is to let national courts

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nämnden), it took, on average, around four years to decide cases sent to the Court of Justice for a preliminary ruling and, on average, around a year and a half to decide cases without such a ruling, as already noted above. See also further the Annex.

[413] More precisely, *six* of the twenty-three cases were referred to the Court of Justice.

[414] See further Section 3 above.

[415] In this context it could be noted that 580 *new cases* were brought before the Court of Justice in 2007 which was an increase of 8% compared with 2006 and 22.3% compared with 2005. However, an increase in the *output* of cases can also be observed as the Court completed 551 cases in 2007 as compared to 503 in 2006, see further Skouris (2008): `The Court of Justice in 2007: changes and proceedings´, p. 2.

[416] Commonly, the *CILFIT* criteria have also been the subject of extensive discussions and criticism in the past, see for example, Hettne and Öberg (2003): `Domstolarna i Europeiska unionens konstitution´, p. 33 and Fritz, Abrahamsson (2006): `The relation between National Courts and the European Courts´, pp. 293-296 and Hettne (2006): `Sverige inför rätta – Kontrollen av medlemsstaterna i Europeiska unionen´, pp. 61-62 with further references.

[417] It has in this context been pointed out that a possible consequence of the increased delays is that it may "seduce national judges to see the light when looking for an *acte clair*", see further Sevón (2005): `What Do National Judges Require of the Court of Justice of the European Communities´, pp. 288-289 further emphasizing that it might also influence the parties to refrain from raising issues of Community law before national courts.

[418] See for example, Sevón (2005): `What Do National Judges Require of the Court of Justice of the European Communities´, p. 288.

[419] A *combination* of different measures will, however, probably be needed, see further Sevón (2005): `What Do National Judges Require of the Court of Justice of the European Communities´, p. 288.

decide more cases *without* preliminary rulings from the Court of Justice.[420] This would, however, require that those areas of settled case law, which can be relied on by national courts, are identified.[421] There would, in other words, be a need to further develop a *tax acte clair*.[422]

In several other aspects it may, however, be concluded that the Supreme Administrative Court acted as a powerhouse of Community law in general, and in relation to the Court of Justice in particular. Such aspects include the loyal application of *answers* from the Court of Justice within the preliminary rulings procedure and *reasoning* similar to the Court of Justice – in combination with frequent *references* to case law from the Court of Justice – in the cases decided without a preliminary ruling. Yet, the Supreme Administrative Court did not have to *raise* the issue of Community law *ex officio* in any of the cases, as the issue had already earlier been raised by the *taxpayers* or the *Council for Advance Rulings*.[423] The role of the Council could further be highlighted in this context, as the *majority* of cases *originated* from the Council.[424] This may be explained by the fact that there are only *two* instances – as compared to *three* instances in the general administrative court system – and there is no need for leave to appeal at the Supreme Administrative Court.[425] Further possible explanations are that the Council is specialised in taxes and that the taxpayers may ask the Council *before* the transactions are carried out. It is, however, also interesting to note that the Supreme Administrative Court *changed* the conclusions of the Council in almost half of the cases,[426] even though the

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[420] Fritz and Hettne (2006): `Sverige inför rätta – Kontrollen av medlemsstaterna i Europeiska unionen´, p. 51.

[421] See further, van Thiel (2008): `Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts – Part 1´, pp. 279-290 and van Thiel (2008): `Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts – Part 2´, pp. 339-350.

[422] See for example, Pistone (2007): `The Need for Tax Clarity and the Application of the Acte Clair Doctrine to Direct Taxes´, p. 536.

[423] The Council for Advance Tax Rulings raised the issue ex officio in *four* of the six cases referred to the Court of Justice and in *seven* of the seventeen cases decided *without* a preliminary ruling. The taxpayers further raised the issue in *two* of the six cases referred to the Court of Justice and in *ten* of the seventeen cases decided *without* a preliminary ruling. Consequently, the tax authorities did not raise the issue in any of the cases.

[424] More precisely, *twenty-one* of the twenty-three cases were decided by the Council.

[425] However, as already noted in Section 1.3 above, there has been a proposal to introduce leave to appeal also for decisions of the Council.

[426] More precisely, the conclusions were changed in *eleven* of twenty-three cases. In *RÅ 2000 ref. 17* (C-200/98 *X AB and Y AB*) and *RÅ 2002 not. 210* (Case C-436/00 X and Y) the Council found Swedish law *compatible* with Community law. However, the Supreme Administrative Court ruled – in line with the conclusions of the Court of Justice – that the Swedish provisions were *incompatible* with Community law. In *RÅ 2000 ref. 38*, *RÅ 2000*

Court *affirmed* the conclusions in the majority of the cases.[427] This is also interesting in light of the fact that the Council has been denied the possibility to request preliminary rulings from the Court of Justice.[428] Moreover, the Supreme Administrative Court was in principle successful in identifying new and relevant points of law as none of the cases *referred* to the Court of Justice were declared *inadmissible* and only one case was decided by way of a *reasoned order*.[429] On the other hand, the Court of Justice *reformulated* the questions of the Supreme Administrative Court in the majority of cases and added or reduced the number of applicable freedoms in the answers in half of the cases. These alterations were, however, accepted by the Supreme Administrative Court when the answers were applied. As further Regarding the substance of the cases, no major differences were found in the reasoning regarding the concepts of discrimination

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ref. 40, *RÅ 2000 ref. 47 I, RÅ 2000 ref. 47 II* and *RÅ 2006 ref. 38* the Council also found Swedish law *compatible* with Community law, while the Supreme Administrative Court ruled that the rules were *incompatible* with Community law without any references for preliminary rulings. In two cases – *RÅ 2007 ref. 59* (Case C-102/05 *A and B*) and *RÅ 2008 ref. 44* (Case C-101/05 *A*) – the Council for Advance Rulings found the Swedish rules *incompatible* with Community law, while the Supreme Administrative Court ruled that the rules were *compatible* with Community law in line with the answer of the Court of Justice. This may be compared with *RÅ 2004 ref. 111* (Case C-169/03 *Wallentin*) where the *administrative court of appeal* found Swedish law *compatible* with Community law and the Supreme Administrative Court ruled – in line with the conclusions of the Court of Justice – that the Swedish provisions were *incompatible* with Community law. In *RÅ 2004 ref. 86* the administrative court of appeal further found Swedish law *compatible* with Community law, while the Supreme Administrative Court found Swedish law *incompatible* with Community law without a preliminary ruling. In this context it is further interesting to note that The Chancellor of Justice (Justitiekanslern) decided that the ruling of the Council for Advance Tax Rulings was incompatible with Community law and that the Council should have set aside the Swedish rule as the Court of Justice had ruled in Case C-436/00 *X and Y*, and the Supreme Administrative Court in *RÅ 2002 not. 210*, that Community law precluded the application of the Swedish rules. The taxpayer was consequently entitled to *damages* according to the Chancellor of Justice, see further JK beslut den 4 oktober 2005, dnr 2419-03-44. See also Persson Österman (2006): `Några synpunkter på JK:s beslut den 4 oktober 2005 att ge skadestånd till enskild på grund av att Skatterättsnämnden tolkade EG-rätten fel´, pp. 205-211, criticising the decision.

[427] The Supreme Administrative Court affirmed the conclusions of the Council in twelve of twenty-three cases. *RÅ 2004 ref. 84, RÅ 2005 not. 7, RÅ 2007 ref. 59* and *RÅ 2007 not. 61.* In *RÅ 2006 ref. 38* and *RÅ 2008 ref. 30* the Supreme Administrative Court affirmed the *conclusions*, but developed the reasoning. Moreover, in *RÅ 2008 ref. 24, RÅ 2008 not. 59, RÅ 2008 not. 61, RÅ 2008 not. 70, RÅ 2008 not. 71* and *RÅ 2008 not. 84* the Court affirmed the *conclusions* of the Council but decided the case on partly *different grounds.*

[428] Case C-134/97 *Victoria Film,* see further Section 1.3 above.

[429] Case C-102/05 *Skatteverket v A and B (RÅ 2007 ref. 59).* In this case it could consequently be argued that the reference to the Court was unnecessary as the Court found that the answers could be clearly deduced from existing case-law, see further Case C-102/05 *Skatteverket v A and B,* para. 19.

and restrictions[430], possible justifications, and the principle of proportionality in the cases decided by the Court of Justice and the Supreme Administrative Court. It also includes conclusions that Swedish law was found *incompatible* with Community law in the vast majority of cases where Community law also was given *precedence*.[431] Furthermore, it includes conclusions that the Supreme Administrative Court in principle has accepted the primacy of Community law and that direct taxation fall under the scope of the EC Treaty with explicit references to case law from the Court of Justice.[432]

All in all, it may consequently be concluded that the Swedish Supreme Administrative Court in several aspects acted as a powerhouse of Community direct tax law. Even so, some further Nordic light could be shed on the developments of this area of law by improved clarity and transparency in the reasoning of the Supreme Administrative Court.

[430] As already pointed out in Section 3 above, both the Court of Justice and the Supreme Administrative Court sometimes used inconsistent terminology and the arguments and grounds for conclusions were not always clear. However, in the majority of cases the two Courts referred to either `restrictions´ or `discrimination´.

[431] As already pointed out in Section 3 above, the Supreme Administrative Court found Swedish law incompatible with Community law in *four* of the *six* cases referred to the Court of Justice and in *thirteen* of the *seventeen* cases decided without a preliminary ruling. Swedish law was, in other words, found *incompatible* with Community law in *seventeen* cases. In all these cases, the Supreme Administrative Court also decided to give *precedence* to Community law. In this context it is further interesting to note that *six* of the seven cases found *compatible* with Community law involved *third states,* see further the Annex.

[432] See further Section 2 above.

COMPATIBILITY OF SWEDISH DIRECT TAX LAW WITH COMMUNITY LAW

Direct Tax Cases Referred to the Court of Justice:

Case Number in the Yearbook of RegR:	Decision by SRN or KamR	Reference to ECJ:	Case Number ECJ:	Decision by ECJ:	Decision by RegR:
1) RÅ 2000 ref. 17	1996-11-22 (S)	1998-04-29	C-200/98	1999-11-18 Preclude (MS)	2000-03-15 Incompatible (MS)
2) RÅ 2002 not. 210	1999-09-27 (S)	2000-11-01	C-436/00	2002-11-21 Preclude (MS)	2002-12-20 Incompatible (MS)
3) RÅ 2004 ref. 28	2000-02-01 (S)	2001-10-16	C-422/01	2003-06-26 Preclude (MS)	2004-05-04 Incompatible (MS)
4) RÅ 2004 ref. 111	2001-08-02 (K)	2003-04-10	C-169/03	2004-07-01 Preclude (MS)	2004-11-01 Incompatible (MS)
5) RÅ 2007 ref. 59	2003-02-19 (S)	2005-02-28	C-102/05	2007-05-10 *Not relied upon (TS)*	2007-10-26 *Not applicable (TS)*
6) RÅ 2008 ref. 44	2003-02-19 (S)	2004-10-15	C-101/05	2007-12-18 *Not precluding (TS)*	2008-05-15 *Compatible (TS)*

Direct Tax Cases Decided without a Reference to the Court of Justice:

Case Number in the Yearbook of RegR:	Decision by SRN or KamR:	Decision by RegR:
1) RÅ 2000 ref. 38	1998-06-23 (S)	2000-08-17 Contrary to (MS)
2) RÅ 2000 ref. 40	1999-11-22 (S)	2000-08-17 Contrary to (MS)
3) RÅ 2000 ref. 47 I	1998-06-23 (S)	2000-08-17 Contrary to (MS)
4) RÅ 2000 ref. 47 II	1998-06-23 (S)	2000-08-17 Contrary to (MS)
5) RÅ 2004 ref. 84	2004-02-17 (S)	2004-09-17 *Not incompatible* (MS) Restriction (MS)
6) RÅ 2004 ref. 86	2002-08-22 (K	2004-10-18 Contrary to (MS)
7) RÅ 2005 not. 7	2004-10-07 (S)	2005-02-14 Restriction (MS)
8) RÅ 2006 ref. 38	2005-06-30 (S)	2006-03-29 Restriction (MS)
9) RÅ 2007 not. 61	2006-02-06 (S)	2007-05-10 Incompatible (MS)
10) RÅ 2007 ref. 59	2003-02-19 (S)	2007-10-26 Contrary to (MS)
11) RÅ 2008 ref. 24	2005-04-04 (S)	2008-04-03 *Not relied upon* (TS)
12) RÅ 2008 ref. 30	2006-09-26 (S)	2008-04-24 Incompatible (MS)
13) RÅ 2008 not. 59	2005-07-08 (S)	2008-04- 03 *Not relied upon* (TS)
14) RÅ 2008 not. 61	2005-04-04 (S)	2008-04-03 *Not relied upon* (TS)
15) RÅ 2008 not. 70	2006-09-26 (S)	2008-04-24 Incompatible (MS)
16) RÅ 2008 not. 71	2006-11-24 (S)	2008-04- 24 Contrary to (MS)
17) RÅ 2008 not. 84	2006-08-31 (S)	2008-05-19 *Not relied upon* (TS)

ECJ = European Court of Justice (Court of Justice of the European Communities)
KamR (K) = Kammarrätten (Administrative Court of Appeal)
MS = Member State
RegR = Regeringsrätten (Supreme Administrative Court)
SRN (S) = Skatterättsnämnden (Council for Advance Tax Rulings)
TS = Third State

6 GENERAL CONCLUSIONS

It appears clear from our research that the national judges cannot adopt a passive attitude to Community law. A more active approach is required. That 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*). Four preliminary rulings concerning Sweden have been dealt with by the Court of Justice from January to September 2008. However, it clearly resorts from our inquiry that 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 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 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 no 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 *Domar-akademi* in Sweden must play a central role in the dissemination of "EU knowledge" to national judges.

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SAMMANFATTNING PÅ SVENSKA

Allmänt

I rapporten undersöks *empowerment* respektive *disempowerment* av nationella domstolar. De svenska domstolar som omfattas av undersökningen är de allmänna domstolarna, de allmänna förvaltningsdomstolarna och en specialdomstol (Arbetsdomstolen). I undersökningen beaktas dessa domstolars respektive jurisdiktion avseende civilrättsliga och straffrättsliga mål, skattemål samt arbetsrättsliga mål.

Nationella domstolar utgör även gemenskapsdomstolar och har som sådana en skyldighet att säkerställa att förfarandet med inhämtande av förhandsavgöranden fungerar så effektivt som möjligt. För detta förutsätts en väl fungerande dialog (diskurs) mellan EG-domstolen och de nationella domstolarna. Under 1990-talet förekom omfattande diskussioner i doktrinen om behovet av en ”samarbetsanda” mellan EG-domstolen och de nationella domstolarna inom ramen för förfarandet med förhandsavgöranden. Det finns mycket som tyder på att en sådan ”samarbetsanda” har fått ökad betydelse på senare tid. EG-domstolens kriterier för att ta upp mål till prövning, dess vilja att omformulera frågor från nationella domstolar samt principen om *acte clair*, som ger nationella domstolar möjlighet att själva avgöra EG-rättsliga mål, kännetecknas av en hög grad av handlingsfrihet för EG-domstolen och de nationella domstolarna. Denna flexibilitet verkar vara nödvändig för att säkerställa en fungerande judiciell dialog och samarbete. Värt att notera är även att den rättspraxis som har utvecklats inom området frihet, säkerhet och rättvisa tydligt visar på ett behov av utökat juridisk samarbete mellan EG-domstolen och de nationella domstolarna. Det under 2008 framgångsrikt introducerade nya förfarandet för brådskande förhandsavgöranden är ett ytterligare uttryck för ett sådant förstärkt och utbyggt juridiskt samarbete. Försenad tillgång till rättvisa kan nämligen betraktas som ingen rättvisa alls (justice delayed is justice denied). Avslutningsvis kan nämnas att Europaparlamentets resolution av den 9 juli 2008 om den nationelle domarens roll i det europeiska rättssystemet ger uttryck för en ”diskursiv juridisk pluralism” genom att särskilt framhäva förtjänsterna av en återuppväckt juridisk dialog mellan EG-domstolen och de nationella domstolarna och behovet av att anta en ”green light procedure” varigenom processen med förhandsavgöranden kan förbättras och öka de nationella domstolarnas ansvar för skyddet av den europeiska rättsordningen.

De allmänna domstolarna och EU-rätten

De tidiga resultaten av ett skyndsamt förfarande för förhandsavgöranden (PPU, procédure préjudicielle d’urgence) avseende området ”frihet, säker-

het och rättvisa" är positivt. De tre mål som avgjorts under 2008 har tagit 58 dagar (C-195/08 PPU *Rinau)*, 40 dagar (C-296/08 PPU *Santesteban Goicoechea*) respektive 87 dagar (C-388/08 PPU *Leymann & Pustovarov*), beräknat från tidpunkten då den nationella domstolen begärde ett avgörande till dess att EG-domstolen meddelade dom i målen. Det är emellertid uppenbart att ett sådant "snabb-förfarande" endast kan fungera om antalet mål som ska hanteras hålls till ett minimum. *De nationella domstolarna bör därför vara ansvarstagande och inte missbruka möjligheten till en skyndsam process*. Det återstår att se om och på vilket sätt EG-domstolen kan hantera ökade krav på ett sådant förfarande när de nationella domstolarna i högre grad blir medvetna om att förfarandet existerar.

EG-domstolens förhandsavgöranden är "avgiftsfria" för parterna i den nationella domstolen. Parterna få emellertid räkna med ökade kostnader för att "ta målet till Luxemburg" och i slutändan är det den nationella domstolen som kommer att ta ställning till fördelningen av dessa ökade kostnader. I NJA 2008 s. 259 drog Högsta Domstolen (Sverige) upp generella riktlinjer för bedömningen av skäligheten hos sådana kostnader. Även om dessa riktlinjer ger viss vägledning förtjänar de att ytterligare preciseras. Det är vår bedömning att regeringen bör initiera en allmän översyn av befintliga bestämmelser om rättegångskostnader, eftersom det är uppenbart att dessa bestämmelser inte är utformade med beaktande av de särskilda förhållanden som föreligger när förhandsavgörande begärs från EG-domstolen.

Enligt rättspraxis från EG-domstolen är det den nationella domstolen som skall avgöra om det föreligger behov att inhämta förhandsavgörande och därtill även formulera de frågor domstolen vill ställa till EG-domstolen i målet, förutsatt att kriterierna i artikel 234 EG är uppfyllda. Den frågande nationella domstolen har härvidlag ett stort mått av autonomi i relationen till parterna i den nationella processen. Vår undersökning visar att det inte finns några tydliga nationella lagstadgade bestämmelser som reglerar parternas roll och delaktighet i förfarandet med förhandsavgörande. Det finns anledning att *tydliggöra förhållandena mellan den frågande domstolen och parterna i det aktuella målet* i relation till förhandsavgöranden, särskilt i dispositiva tvistemål där förlikning mellan parterna utanför domstolen är tillåtet.

Undersökningen visar att det finns en fungerande infrastruktur som möjliggör för nationella domare att få tillgång till EU-rätt och enskilda svenska domare har många gånger en mycket omfattande och djup kunskap i ämnet. Samtidigt är det viktigt att hela domarkåren har tillräckliga kunskaper i EU-rätt. De *nationella domarna bör därför kontinuerligt erhålla utbildning i EU-rätt*. Den nyligen etablerade *Domarakademin* i Sverige borde härvid kunna spela en betydelsefull roll.

Arbetsdomstolen och EU-rätt

Under senare tid har Arbetsdomstolen avgjort mål med EU-rättslig anknytning i framförallt ärenden rörande företagsöverlåtelse respektive diskriminering. Eftersom EU-rätten inte omfattar en komplett, heltäckande, reglering av arbetsmarknaden utgör dessa två måltyper – även om de sinsemellan uppvisar betydande skillnader i relation till såväl rättlig bakgrund som juridisk-teknisk struktur och implementering – två bra exempel på balansen mellan nationell respektive europarättslig rättstillämpning. De åskådliggör uppenbarligen också två olika perspektiv på hur EU-rättsliga frågor kan hanteras i nationell tillämpning. Arbetsdomstolen relaterar exempelvis mycket tydligt i mål om företagsöverlåtelse de svenska reglerna till EG-domstolens praxis, medan den i mål om likabehandling och diskriminering inte alls i samma omfattning och med samma stringens hänvisar till EG-domstolens praxis och EU-rätten i övrigt. Det borde vara möjligt att i betydligt större omfattning koppla detta område till utvecklingen vid EG-domstolen, där en rad mål under senare år behandlat frågor om likabehandling och grundläggande principer härledda ur Fördraget eller andra gemenskapsrättsliga källor och influenser.

Arbetsdomstolen har i påfallande få mål begärt förhandsavgöranden under artikel 234 EG och den övergripande bilden av när och på vilket sätt EU-rätten uttryckligen appliceras på arbetsrättsliga mål är otydlig. I några mål där tolkningen av EU-rätten eller frågor kopplade till denna var aktuella yrkade inte någon av parterna på förhandsavgörande, medan det i andra motsvarande mål var åtminstone en av parterna som gjorde det. I några sammanhang fastslog Arbetsdomstolen att målet var föremål för *acte clair* medan detta i motsvarande sammanhang i andra ärenden inte tydliggjordes. Möjligheterna som nämndes ovan med en ”green light procedure”, som den är beskriven i Parlamentets resolution av den 9 juli 2008, öppnar möjligen för en fruktbar och välkommen process för att förstärka EU-perspektiven i nationella domstolar. Nationella arbetsrättsliga domstolar utgör härvidlag inget undantag.

De primära uttydarna av EU-arbetsrätten kommer oberoende av införandet av en ”green light procedure” med nödvändighet även framgent att vara de nationella arbetsdomstolarna. EG-domstolen skulle annars bli fullständigt översköljd av arbetsrättsliga mål. En oreflekterad önskan om ett våldsamt ökat antal förhandsavgöranden i arbetsrättsliga mål skulle inte rimligen medföra någon påtaglig förstärkning av utvecklingen inom EU-arbetsrätten. Däremot är det vår bedömning att den situation som nu råder, där förhandsavgöranden inhämtas mycket sällan och där hänvisningarna till EU-rätten och EU-rättens grundläggande principer förefaller förekomma i

avsaknad av en egentlig, uttalad, linje, kan förbättras. Med anledning särskilt av den utökade betydelsen för den sociala dimensionen av europasamarbetet, där en rad arbetsrättsliga aspekter på europeisk nivå kan komma att utmana nationella arbetsrättsliga regleringar och förhållanden, bör frågan hållas levande. Ett par mycket tongivande mål, bland annat med koppling till åldersdiskriminering och stridsåtgärder i förhållande till utstationering av arbetstagare ger stöd för denna uppfattning. En förstärkning av de nationella domstolarna med koppling till avvägningen mellan nationella och EU-rättsliga förhållanden och regleringar, särskilt utvecklad genom upprättandet av ett ännu mer transparent, explicit och koherent förhållningssätt till EU-rätten skulle skapa ett starkare fundament för en tolkning av EU-relaterade nationella regleringar närmare deras EU-rättsliga ursprung.

Regeringsrätten och EU-skatterätten

Från Regeringsrättens perspektiv, visar studien att denna domstol i flera avseenden har fungerat som en kraftkälla (powerhouse) när det gäller utvecklingen av gemenskapsrätt med anknytning till den direkta beskattningen. Denna slutsats grundas på det faktum att Regeringsrätten funnit att den svenska lagstiftningen *strider* mot gemenskapsrätten i den överväldigande majoriteten av avgjorda mål. I dessa fall har Regeringsrätten också dömt till skattebetalarnas fördel och beslutat att svensk lag ska åsidosättas. Regeringsrätten har följaktligen fungerat som en kraftkälla som verkat till förmån för skattebetalarnas krav på att bli mer gynnsamt behandlade på grundval av gemenskapsrätten. Samtidigt har Regeringsrätten fungerat som en kraftkälla mot den svenska lagstiftaren genom att ge gemenskapsrätten *företräde*.

När det sedan gäller enskilda domars *innehåll*, kan konstateras att inga större skillnader har identifierats avseende de resonemang som legat till grund för bedömningen av diskriminering och restriktioner, möjliga rättfärdigandegrunder samt proportionalitetsprincipen i fall som beslutats av EG-domstolen respektive av Regeringsrätten. Regeringsrätten har också tillämpat EG-domstolens förhandsbesked i överensstämmelse med domstolens resonemang och slutsatser. I de fall som har beslutats *utan* att förhandsavgörande har begärts, har Regeringsrätten också grundat sina bedömningar på liknande resonemang som EG-domstolen samt hänvisat i stor utsträckning till EG-domstolens rättspraxis.

Eftersom *tre fjärdedelar* av fallen beslutades *utan* förhandsavgörande, är det å andra sidan tveksamt – med tanke på områdets komplexitet och ibland inkonsekventa rättspraxis från EG-domstolen – om alla dessa fall

har avgjorts i överensstämmelse med en strikt tillämpning av CILFIT-kriterierna. Med tanke på att EU nu består av 27 medlemstater, har det under senare tid skett en ökning, inte bara av antalet nationella regler och rättsliga kulturer, utan också av antalet nationella domstolar och nationell rättspraxis. Det har därmed också skett ett ökat antal begäran om förhandsavgörande från nationella domstolar till EG-domstolen. Mot denna bakgrund samt med hänsyn till de nu 23 – likvärdiga – officiella språken och förfarandets längd vid EG-domstolen, kan man därför hysa tvivel om att en strikt tillämpning av CILFIT-kriterierna är realistisk och framgent rimlig. Snarare verkar behovet av en reform vara akut. Behovet av en sådan reform visar sig också i att det ofta påpekas att det primära behovet för de nationella domstolarna och parterna inte bara är att avgöranden från EG-domstolen ska komma snabbare, därutöver efterfrågas större tydlighet och konsekvens i EG-domstolens rättspraxis. Möjliga reformer kan bestå av åtgärder som både begränsar tillförseln av mål och som ökar domstolens avverkningstakt. Ett sätt att begränsa tillförseln är att låta de nationella domstolarna avgöra fler mål utan förhandsavgöranden från EG-domstolen. Detta skulle vara i linje med gällande praxis från Regeringsrätten, men skulle också kräva att de områden i rättspraxis, som nationella domstolar ska grunda sina bedömningar på, har identifierats. Det finns med andra ord ett behov av att utveckla en skatterättslig *acte clair*.

Övergripande slutsatser

Det framstår som klarlagt genom vår forskning att de nationella domarna inte kan förhålla sig passiva till gemenskapsrätten. Ett mer aktivt förhållningssätt erfordras om EU-rätten ska tillämpas korrekt i Sverige. Detta kan till exempel ske genom att nationella domstolar tar upp EU-rättsliga frågeställningar på eget initiativ (ex officio) eller genom ett tätare samarbete i samband med att tolkningsfrågor till EG-domstolen formuleras. En majoritet av de nationella domarna (54 procent) betraktar sig själva som familjära med förfarandet med förhandsavgöranden. Danmark, Österrike och Sverige är de länder där den högsta andelen domare har denna uppfattning. Mellan 1995 och 2008 gjordes sammantaget 69 framställningar om förhandsavgörande från svenska domstolar till EG-domstolen, varav tio från Högsta domstolen och 20 från Regeringsrätten. Från vår undersökning framstår det emellertid klart att det fortfarandet är för få fall i vilka svenska domstolar begär förhandsavgörande av EG-domstolen. Antalet förhandsavgöranden har i genomsnitt begärts i cirka 5 fall per år.

De svenska nationella domstolarna och särskilt Högsta domstolen var i början av Sveriges medlemskap i EU obenägna att begära förhandsavgöranden. Det kom därför inte som en fullständig överraskning att kom-

missionen inledde ett överträdelseförfarande mot Sverige och skickade ett motiverat yttrande till den svenska regeringen som delvis motiverades av brist på förfrågningar från Högsta domstolen (endast två förhandsavgöranden mellan 1995 och 2004), vilket påstods bero på det restriktiva systemet med prövningstillstånd. Detta motiverade yttrande medförde att Sverige ändrade sin lagstiftning rörande förhandsavgöranden under 2006, vilket innebär att de numera föreligger en skyldighet att motivera prövningstillstånd i (endast!) EU-rättsliga frågor.

Även om ett genomsnitt om fem förhandsavgöranden per år framstår som otillräckligt, är den senaste tidens utveckling hoppingivande. Faktum är att Högsta domstolen har visat större vilja att samarbeta och att respektera gemenskapsrätten sedan kommission lämnat sitt motiverade yttrande. Efter detta har väsentligt fler frågor ställts till EG-domstolen. Högsta domstolen har dessutom visat tendenser till konstitutionell pluralism genom att tolka de konstitutionella bestämmelserna om yttrandefrihet och religionsfrihet mot bakgrund av Europakonventionen om mänskliga rättigheter och därmed avvikit från traditionella tolkningsmetoder. Även den ökande acceptansen av EU:s allmänna rättsprinciper i svenska domstolar visar tydligt att konstitutionell pluralism gör sig sakta men säkert gällande i Sverige. Det framstår dock som klart att situationen fortfarande kan och bör förbättras.

Det är vidare viktigt att hålla i minne att Sverige inte har en författningsdomstol. Även om skapandet av en författningsdomstol har varit under diskussion, är det nu klart att en sådan inte kommer att inrättas. I avsaknad av författningsdomstol och då Lagrådet inte kan begära förhandsavgöranden, kan det hävdas att det vilar en särskilt tung börda på Högsta domstolen och Regeringsrätten att föra en dialog med EG-domstolen genom att begära förhandsavgöranden. De nationella domstolarna är som bekant också gemenskapsdomstolarna. Det är intressant att notera att en komparativ analys av situationen i Europa ger vid handen att det finns en allmän tendens av intensifierat samarbete mellan de högsta eller konstitutionella nationella domstolarna och EG-domstolen. De svenska domstolarna bör se upp med att agera alltför självständigt, vilket kan leda till rättslig isolering och att EG-rätten får ett alldeles eget innehåll i Sverige.

Det bör avslutningsvis betonas att utbildning framträder som en nyckel för en effektiviserad tillämpning och genomförande av EU-rätten. Den nyligen etablerade Domarakademin i Sverige bör kunna spela en central roll i förmedlandet av EU-kunskap till nationella domare.

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