Common Market Law Review **34:** 1341–1347, 1997.

EDITORIAL COMMENTS

Judicial activism of national courts in applying Community law

Many years have been required to make national courts aware of their role as Community Courts and to enlist their cooperation with the European Court of Justice through the preliminary ruling procedure.[1] This cooperation has now gathered its own momentum; its results are impressive. That is not to deny that courts in some Member States have a better "score" in this respect than others, nor that occasionally a court fails to make a reference where it should have done so. However national courts have, on the whole, grown familiar with their obligation to apply and to enforce Community law. Use of the preliminary ruling procedure has become a fact of judicial life in most Member States. As a result new problems have arisen, problems of a new generation as some would call them.

The first problem is that of seeing the Court overburdened with Article 177 references and a corresponding increase in the average length of the preliminary ruling proceedings. The problem is well-known and various possible solutions have been suggested in the literature, most of which would require an adaptation of the judicial structure or procedures and therefore an amendment of the Treaties. Of course, the Court itself has already taken modest steps to prevent abuse or frivolous use of the preliminary ruling procedure. References to the Court will be declared inadmissible when the factual and / or legal context of the national proceedings to which they relate are so unclear as to prevent

1. See Barnard and Sharpston, "The changing face of Article 177 references", 34 CML Rev., 1105–1111.

the Court from answering them adequately.[2] Moreover the Court has declined jurisdiction to answer questions which raise problems of a theoretical nature or where it is obvious that the interpretation of Community law sought bears no relation to the actual facts or purpose of the main action.[3] One can only salute the elegance of the Court's denial of its own jurisdiction instead of that of the national Court to refer such questions. Thus, in these respects the Court has already developed a limited form of docket control.

Advocate General Jacobs has recently suggested a much more drastic approach to curb the inflow of references with a view to reserving the use of (and the capacity of the Court for) the Article 177 procedure for cases raising important problems of interpretation and implying real risks for a uniform application of Community law (Case C-338/95, *Wiener*). Where the case law for a specific sector of Community law (e.g. on custom tarifs classification, or the definition of transfer of undertakings under Directive 77/187/EEC) has clarified principles and methods of interpretation to a sufficient degree, national courts should be encouraged to refrain from referring questions of interpretation related to cases of application of the relevant rules and to decide these matters for themselves. When the Court is confronted with such questions, it should not give, as it normally does, a detailed interpretation in view of the particularities of the case in hand, but should simply refer to the principles and methods of interpretation developed in its earlier case law which should be applied by the referring court to decide the matter. Why should the Court still answer a question as to whether garments must be regarded as nightdresses for the purposes of their classification under the Common Customs Tarif, even though they may be used for other purposes, if it has already decided in an earlier case regarding the classification of pyjamas that the determining criterion is the objective characteristic of pyjamas, which can be sought only in the use for which they are intended? Would it not be sufficient to refer to this test, of the objective characteristic in connexion with the intended

2. See Barnard and Sharpston, op. cit. *supra* note 1, and for a recent Decision C-191/96, Modesti [1996] ECR I-3939.

3. See for a recent Judgment C-291/96, Grado of 9 October 1997.

use, to solve what is not so much a problem of interpretation as of the application of an already established principle of interpretation? However the Court did not follow its Advocate General and answered in its usual, detailed manner.

Nonetheless, the approach of the Advocate General merits further analysis and discussion. A first preliminary comment. The approach of the Advocate General would go further than the present case law on *acte éclairé* and the earlier answers to similar questions which is as old as Case 28–30/62, *Da Costa en Schaake* or the more far-reaching but still fairly restrictive test under Case 283/81, *Cilfit*. One obvious objection is that it could risk jeopardizing the basis for cooperation between the national courts and the European Court. A national Court might feel it had been shown the cold shoulder by such an answer, which might sound like: "If you had read my case law, you would have found the answer, so please do so!" The national court might think twice before referring questions a second time. The application of the *acte éclairé* exception so interpreted might quickly become too generous. Moreover, if the answer could be so easily found by applying existing case law, why not give the detailed answer straight away?

A second, entirely different problem has arisen since the cooperation between national courts and the European Court has come of age, which concerns the attitude of the national courts and their perception of their responsibilities when assuming their role as Community courts. Well-known problems result from the approach of national courts when applying or enforcing Community rules to apply similar standards of legal protection, particularly regarding respect for fundamental constitutionally guaranteed rights or general principles of law, to those they are bound to ensure under national law. A reference to the case law of the German *Bundesverfassungsgericht* (Maastricht-Urteil) and the Banana saga[4] will suffice to illustrate this problem, which is, unfortunately, not limited to Germany (and Italy), but appears to be spreading to other Member States (e.g. Belgium, Sweden). Other problems have arisen with regard to the granting of interim relief where Community

4. See Everling, "Will Europe slip on Bananas: The *Bananas* judgment of the Court of Justice and national courts", 33 CML Rev., 401.

legislation is involved because of the exclusive jurisdiction of the European Court to pronounce the invalidity of a Community act. The Court has found a balanced solution in allowing national courts to grant interim relief, and to that end provisionally to disapply Community acts, subject to strict conditions: preliminary questions as to the validity of such acts must be referred to the Court and the same conditions as to urgency, irreparable damage and balance of interests must be applied as those followed by the Court itself when granting interim relief.[5]

The rationale for this case law is that when private parties seek legal redress through the national courts, legal protection by way of interim relief should be available to the same extent as that available before the European Court.

A recent case in the Netherlands shows how far the vocation of a national court, in acting as a Community court, may go. The background to this case is formed by the relations between the EC and the so-called overseas departments and territories of Member States, covered by Part IV of the EC Treaty. These are dealt with at present in Decision 91/482/EEC, which is due to expire in 2000, based on Article 134 EC. Following the update of the Lomé Convention, the Decision was subjected to a so-called mid-term review in 1996. One of the sensitive issues of the review concerns the fairly generous rules of origin of the 1991 Decision, which allows agricultural products from Lomé countries to be imported into the EC free of duties and quantitative restrictions after minor processing in the overseas territories. As these imports, particularly of rice, had caused problems for the Community market and had been subjected to safeguard measures, Member States agreed within the framework of the mid-term review to reform this system, notably by subjecting these duty free imports to a quota system. The Netherlands, having blocked a Council decision along these lines for over a year, finally decided to accept a Presidency compromise, and expressed that position in the General Affairs Council of 6 October 1997. On the same day, however, the President of the District Court in The Hague granted interim relief to an Antillian sugar company that

5. Case C-465/93, *Atlanta*, and Joined Cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*.

feared bankruptcy if the generous import regime, which also applied to sugar, were to be so amended; it ordered the Dutch Government not to carry out the decision of the Council of Ministers of the Kingdom to consent to the envisaged EU Council decision. The President based his injunction on the provisional view that the envisaged Council decision would be illegal, because of its incompatibility with the principles of Part IV of the EC Treaty. He announced at the same time that he would refer preliminary questions on the issue to the European Court. Subsequently, when it became known that the Government might interpret the President's order so as not to exclude the possibility that the Netherlands would merely abstain in the Council, thus allowing the necessary unanimity to be achieved, the lawyers of the Antillian company immediately introduced a new request for interim measures. As a result the President issued a second Order on the 17 October prohibiting the Government from any form of *active or passive* cooperation with the envisaged decision-making of the EU Council, and subjecting failure to respect the order by the Government to a fine of half a billion guilders. This was an absolute *novum* in Dutch legal history. In order to comply with this order, the Dutch Government would have been obliged to vote against the decision, or not be present: in the latter case, under the relevant unanimity rules, the Council could not have taken the decision. The Council was effectively barred from enacting the Decision (and took the item off the agenda). Both Orders were appealed to the Appellate Court of The Hague, which acted with great expedition and annulled both orders on 20 November 1997. Equally expeditiously, the EU Council enacted the Decision relating to the midterm review on 24 November 1997.[6] This case raises a number of interesting legal questions, which will not however be considered by the European Court unless the decision of the Appellate Court were to be challenged before the *Hoge Raad* (Supreme Court) and the *Hoge Raad* were to feel required to make a reference to the Court.[7]

6. 0.J. 1997, L 329.

7. The Council Decision of 24 Nov. 1997 has triggered new litigation. The Antillian sugar company has introduced a request for interim measures with the District Court in the Hague asking for a suspension of the consequences for that company

This saga illustrates how far judicial activism may go, now that national courts take their role as Community Courts seriously. *Prima facie* it would seem rather amazing that a national court may block, albeit indirectly, Community decision-making, by ordering the government not to agree to an envisaged decision of the EU Council because in its provisional view this decision would be contrary to Community law itself. The President of the District Court obviously felt empowered to do so on the basis of the Court's case law referred to above allowing for a provisional disapplication of Community decisions by national courts. However the disapplication of a Community act in a specific case is a completely different matter from preventing a Community act from being adopted. What about the balance of interests, i.e. between the individual interest and the general Community interest, which is one of the criteria which should be applied under *Zuckerfabrik Süderdithmarschen*: the company in question only started up in 1997 and had engaged about 30 workers? There is also the time element to balance into the equation, in that the envisaged EU Council decision would have to await the outcome of the preliminary ruling procedure and the subsequent decision of the national court. A further principled argument relates to the rationale of *Zuckerfabrik Süderdithmarschen* and *Atlanta*: the national court should be able to ensure a similar level of legal protection in granting interim relief as the European Court. Does the Court of Justice have jurisdiction to order the Community legislator to abstain from enacting legislation that would, at first sight appear to be incompatible with Community law? This has not as yet arisen. Could such an order by way of interim relief be envisaged within the framework of an action for damages to prevent damage being caused by a Community act which once adopted would be illegal? In view of the strict criteria for liability in the case of normative acts (the rule in *Schöppenstedt*) this is not very likely. Moreover Article 215 EC is about damages. The possibility of granting provisional damages by way of interim relief has already been accepted by the European

of the quota regime of the Council Decision. The Dutch Antilles have lodged an appeal for annulment of the same Decision with the CFI, asking at the same time for a suspension of the Decision by way of interim relief.

Court.[8] A disruption of the legislative process however is quite a different matter. Yet more questions arise. Would the national court have jurisdiction to issue a similar order with regard to envisaged national legislation? If not, in view of the principle of equal treatment with regard to the application of national means and procedures of legal protection, would it not for that reason be contrary to Community law to take such action with regard to envisaged Community legislation?

The Appellate Court accepted the arguments of the Dutch Government that the exclusive jurisdiction of the European Court with regard to the legality of Community acts in an Article 173 action can only be exercised once the act has been adopted. The same applies with regard to its powers for granting interim relief under Articles 185 and 186 EC. Consequently, the limited powers of national courts to grant interim relief with regard to Community acts can only be accepted *a posteriori*, once these acts have been adopted.

These arguments may not answer all the questions. But it would certainly be preferable to reserve such a far-reaching interim jurisdiction, if any, exclusively to the European Court.

8. Decision of the President of the Court C-393/96P (R), *Antonissen* [1997] ECR I-444.