

# **The Interface between National and European Law**

## **Second Lecture in honour of Sir Jeremy Lever QC\***

**1 February 2013**

**Lord Mance**

### **Introduction**

1. The Treaty of Rome was not on the syllabus when I was at Oxford. My notes do not record why I crossed the High from University College for tutorials with Jeremy Lever, then Prize Fellow of All Souls. I believe it was for a different sort of Roman law. We undergraduates used – rather unfairly - to complain there was too much of that. Whatever the subject, it was valuable and, apart from direct memory, enduring. It has made Jeremy a source of friendship and encouragement since those long off days. It is a great pleasure to give this second annual lecture in his honour.
2. My first contact with European law came after leaving Oxford – on a course offered by the Faculté internationale de droit comparé. In 1965, with only six member states, Luxembourg was a sleepy place, or perhaps the summer vacation was not the best time. At all events, although I became an initial member of the Bar European Group, my practice at the bar brought me only modest quantities of EEC law issues, and only one court appearance in Luxembourg. But on the bench European law has come increasingly into focus. Its scope has of course greatly grown during the same period, to embrace hitherto jealously guarded areas of national law and to overlap significantly with the Strasbourg court's field of fundamental rights<sup>1</sup>.
3. Not surprisingly this growth has led to increasing public debate throughout the EU about the proper distribution of responsibilities between the Union and its constituent Member

---

\* A text based on this lecture is to be published in the European Law Review.

<sup>1</sup> In the Commercial Court the impact includes most famously the Brussels Convention and now Regulation, and a series of private international law measures, particularly the Rome Convention on the Law applicable to Contractual Obligations 1980, now subsumed into the Rome I Regulation 593/2008 and the Rome II Regulation 864/2007 on the law applicable to non-contractual obligations. But in the Court of Appeal, House of Lords and now Supreme Court, the field is far broader still, with issues arising about matters as varied as the internal market, rights of establishment and residence, employment, agency and equality as well as fundamental rights.

States. The debate is particularly hot, even if not particularly focused, in certain Eurosceptic British media and political circles<sup>2</sup>. The somewhat excited atmosphere extends to the European Court of Justice, though whether any particular protagonist is aiming at the Luxembourg or the Strasbourg Court is often unclear. Were the most extreme Eurosceptics to prevail, this evening's lecture might become completely irrelevant. "Drive you up the wall as the EU from time to time may" – so Ken Clarke said yesterday on the Today programme - I cannot believe in a Brexit.

4. I am convinced, first, of the UK's contribution and influence, which I have had some occasion to witness in the legal sphere when involved in the Committee work of the House of Lords, and, second, of the generally consensual way in which EU decision-making operates to accommodate the concerns of major EU players, among which the UK certainly is. The Euro crisis has generated a new and largely unforeseen centralising impetus, but how far and on what basis even core Euro states carry this remains open, and I remain an optimist that future developments will meet the concerns of all but the most extreme Eurosceptics and that the UK's relationship with the Court of Justice will continue.
5. Judging by the cheerful photo on Monkton Chambers website, last year's lecture from former Advocate General Poiares Maduro gave a perspective on the financial crisis lecture which was as lively and entertaining as it was probably philosophical and wide-ranging. This year's lecture is a more mundane view of the interface between national courts and European law – the view of a labourer at the coalface of ever-varying seams of European law. It divides into three sections, headed Dialogue, Discipline and Substance.

---

<sup>2</sup> The UK government is undertaking a review of the balance of competences. The Netherlands is apparently considering a similar review. Last week the Prime Minister argued that some powers should flow back from Brussels and Strasbourg to national capitals, and stressed his preference for renegotiated terms with the single market at the core of the UK's future membership. On the other hand, those wishing greater integration of the Euro zone have countered that life would be simpler if the UK would withdraw to a "privileged partnership", rather than remain a full member. This was gently suggested by Jacques Delors, former President of the European Commission. In similar vein the Union of European Federalists mooted a system of Associate Membership for the United Kingdom, in order that the process of further integration amongst the remaining Member States might proceed more speedily.

## Dialogue

6. The fundamental mechanism, as the Court of Justice with reason describes it<sup>3</sup>, is the preliminary reference procedure prescribed by Art. 267 TFEU. In any case said to raise a point of EU law, the national judge has to address four potential questions under what is now Art. 267 TFEU:
- a. First, is there a point of European law and is it necessary for the court's decision?
  - b. Second, does the point involve interpreting, or is it simply a question of applying European law?
  - c. Third, what is the correct European legal answer to the point?
  - d. Fourth, is the point such as should or must be the subject of a preliminary reference to the Court of Justice in Luxembourg?
7. As to the first question, unless the point is necessary for the court's decision, anything said will be no more than obiter dicta. Art. 267 TFEU only contemplates a reference when "a decision on the question is necessary to enable it to give judgment". The Court of Justice usually takes on trust the relevance of any question referred. But it occasionally reformulates<sup>4</sup> or combines questions. It may even decline to answer the question, e.g. if given too little context<sup>5</sup> or if other answers make this unnecessary.
8. What counts as a point of EU law under Art. 267? First, it can include the interpretation of the EFTA agreement to which the EU and its Member States are party to create an enlarged internal market. The Court can adjudicate upon a reference made by an EU Member State court with regard to the scope within that State of the agreement between the EU and its member states and EFTA states: *Margarethe Ospelt v Schlössle Weissenberg Familienstiftung* Case C-452/01, para 27. But it has no jurisdiction to rule on the interpretation of the EFTA agreement as regards its application in EFTA States: *Andersson and Wåkerås-Andersson v Sweden* Case C-321/97 [1999] ECR I-3551, paras

---

<sup>3</sup> In its helpful Recommendations 2012/C 338/01 in relation to the initiation of preliminary reference proceedings, para 1.

<sup>4</sup> See e.g. Case C-235/95 *AGS Assedic Pas-de-Calais v Dumon and Froent* and Case C-279/09 *DEB v Germany*.

<sup>5</sup> See e.g. Case C-320/90 *Telemarsicabruzzo SpA v Circostel*.

26 to 31, and *Salzmann* Case C-300/01 [2003] ECR I-0000, paragraph 65). The EFTA Court can on the other hand only adjudicate upon references from EFTA states.

9. Second, national law sometimes makes EU legal instruments applicable outside the area required under EU law. The UK not infrequently “gold-plates” EU measures in this way. An example is its extension of the application of Council Directive 2002/47/EC on financial collateral arrangements by Financial Collateral Arrangements (No. 2) Regulations 2003, SI 2003 No 3226, so as to cover not merely transactions involving public authorities, but also transactions between ordinary companies. If a case came before the Supreme Court between ordinary companies, could or should it refer? A line of Court of Justice starting with Cases C-297/88 and C-197/89 *Dzodzi v Belgium* and including Case C-267/99 *Adam*, Case C-306/99 *BIAO* and Case C-300/01 *Salzmann* suggest: yes, at least to the proposition that a domestic court “could refer”, and quite possibly also to “it should refer”. The Court’s usual starting point is that a reference has in fact been made to it. The question then is not so much whether the reference should have been made, but whether the Court can and should answer it. The Court’s first answer to that question is in practice to rely on a presumption that any issue of EU law referred by a domestic court is relevant for determination of the domestic proceedings, so that the Court is bound to respond to the reference without more. But the Court’s reasoning law also contains a second strand – that it should rule on any such issue in order that the consistency of interpretation of European legal provisions is preserved, in whatever context these arise for consideration. The concomitant of this concern could well be an obligation on the domestic court to refer any indirectly relevant issue of EU law, even in circumstances when only domestic law is directly in play.
10. It is however unclear how far this concern can be met. In one relatively early case the Court suggested that its jurisdiction to answer references relating to extended provisions was limited by two conditions: the extended provisions must *exactly mirror* European law and the Court of Justice’s ruling must *bind* the domestic court making the reference: Case C-88/91 *Kleinwort Benson v City of Glasgow D. C.*, The relevant Act of Parliament there provided that domestic courts should do no more than “have regard to” any relevant Court of Justice ruling. The Court held that it had no jurisdiction to hear a reference. The Court does not however appear to have held itself to the first condition, and has accepted

references in cases where Community law was not simply extended, but applied and adapted to quite different contexts which might potentially clothe its terms with different effect: see e.g. Cases C-28/95 *Leur-Bloem*, Case C-130/95 *Gilroy* and Case C-306/99 *BIAO*. In the last case, *BIAO*, the Court resisted a powerful plea by Advocate General Jacobs that it should revive the purity of its jurisprudence in *Kleinwort Benson*.

11. The second condition in *Kleinwort Benson* is arguably circular, since a common law court might say (like Parliament in *Kleinwort Benson*) that no domestic court is bound by the Court of Justice outside the area of EU law. That would, I think, anyway be the view of Laws LJ: see *Thorburn v Sunderland C.C.* [2002] EWHC 195 (The *Metric Martyrs* case) and *R (G1 (Sudan)) v Secretary of State for the Home Department* [2012] EWCA Civ 867. It may be that all the Court of Justice meant was a reference would be permissible, if the referring court agreed in advance to be bound. But, if references in gold-plated areas are in this way optional, then, in view of the not entirely infrequent uncertainty about what the Court of Justice's answers mean and how to apply them and in view of the time and cost involved in any reference, I do not predict many UK references in gold-plated areas.
  
12. A third consideration also tends to undermine the rationale of certainty and consistency of interpretation of EU law issues on which the *Dzodzi* line of authority is in part based. Recently it was in fact necessary to consider the extended effect of Council Directive 2002/47/EC on financial collateral arrangements. But this was sitting as the Privy Council<sup>6</sup> on an appeal from the British Virgin Islands: *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2. In parenthesis, the case's subject-matter - the future of Turkey's largest telecom company, Turkcell - illustrates the remarkable resilience of Privy Council jurisdiction, here associated with off-shore financial centres. The parties had contracted subject to English law, and so had incorporated the Regulations gold-plating the Directive, The Privy Council sitting as the final court of appeal of the BVI is, by no stretch of the imagination, a Member State court within Art.

---

<sup>6</sup> Sitting as a Board consisting of five members of the UK Supreme Court.

267 TFEU<sup>7</sup>. No reference is possible in such a case. The Privy Council had to do its best to understand EU law by itself.

13. As to the second question, Art. 267 TFEU expressly only provides for references on questions of interpretation of European law or the validity or interpretation of acts of European institutions. The application of EU law is for national courts. The limitation is not always recognised in references framed to or answers given by the Court of Justice<sup>8</sup>. *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* Case C-237/02, [2004] 2 CMLR 291 is an example of an inappropriate reference. The BGH asked whether a particular standard term<sup>9</sup> was to be regarded as unfair within the meaning of Art. 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?" The Court declined to answer on the grounds that, while it could "interpret general criteria", it should not rule on their application to a particular term in particular circumstances<sup>10</sup>.

14. The Court had, however, then to explain its previous decision in *Océano Grupo Editorial SA v Murciano Quintero* Cases C-240/98 to 244/98, [2002] 1 CMLR 1226. There the domestic issue was whether a Barcelona jurisdiction clause imposed on consumers from all over Spain was unfair. The Spanish court posed a perfectly proper question: whether it was obliged to consider the question of unfairness of its own motion. But the Court of Justice not only said: yes. It also volunteered the view that the jurisdiction clause

---

<sup>7</sup> Contrast, perhaps, Gibraltar in so far as it is part of the EU. The Privy Council's practice directions do not at present cover this possibility.

<sup>8</sup> Happily, it has recently been underlined by the Court itself in the Recommendations referred to in preceding footnote 1. Para 7 reads:

".... under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law."

<sup>9</sup> Requiring the purchaser of an as yet to be constructed building to pay the total price in full against a credit institution guarantee in respect of non- or defective performance.

<sup>10</sup> It said (para 22) : "the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question."

“satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive”, and “must be regarded as unfair within the meaning of Art. 3 of the Directive”<sup>11</sup>.

15. This was a descent into the national arena. The Court of Justice is not known for disagreeing in public with its previous jurisprudence, so instead it distinguished *Océano Grupo*<sup>12</sup>. It espoused a sort of reverse *acte clair* doctrine. If in the Court’s eyes it is clear what the national result should be, it need not leave the matter to the national court or restrain itself from telling the national court the answer. As Craig and de Burca observe in their impressive work on EU Law, Text, Cases and Materials (5<sup>th</sup> ed) pp 473-474, the dividing line between interpretation and application can be very thin.

16. In *Tariq v Home Office* [2011] UKSC 35, the Supreme Court picked up the decision in *Freiburger Kommunalbauten*. Mr Tariq was complaining that he had been discriminated against on grounds of race or religion and denied effective legal protection, because of the closed material procedure which applied by statute to his claim. The Court rejected his submission that there should be a reference, saying (para 61):

“61. The principles of European Union law which arise for consideration in this case are clear. There must in particular be effective legal protection in respect of the rights not to be discriminated against which Mr Tariq invokes, and, so far as guidance is necessary, it is to be found for the relevant purposes in the European

---

<sup>11</sup> The Court’s reasoning was that the clause gave the seller (whose principal place of business was Barcelona) an advantage; and that to oblige “the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile .... may make it difficult for him to enter an appearance” in circumstances where “the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence” (paras 21-24).

<sup>12</sup> It said (para 23) that it had involved an “assessment .... reached in relation to a term which was solely to the benefit of the seller and contained no benefit in return for the consumer” and that:

“Whatever the nature of the contract, it thereby undermined the effectiveness of the legal protection of the rights which the Directive affords to the consumer. It was thus possible to hold that the term was unfair without having to consider all the circumstances in which the contract was concluded and without having to assess the advantages and disadvantages that that term would have under the national law applicable to the contract.”

Convention on Human Rights and the case law of the European Court of Human Rights. .... There is on this basis no question of interpretation of the European Treaties which calls for a reference under Art. 267 .....

17. However, EU law may involve applying principles of European Human Rights

Convention law which are less clear than they were in *Tariq*. The position then concerns me. The Court could have to refer to the Court of Justice the question what the appropriate principles were, and would be bound by the answer. Contrast the position where only the Human Rights Act and not EU law applies. A UK court's only obligation in that context is to "take account" of Strasbourg authority. If it disagrees with it, it can do so, hopefully with the effect of achieving a rethink in that court<sup>13</sup>. A well-known instance is *R v Horncastle* [2009] UKSC 14. The House of Lords there rejected a line of section decisions which ruled out conviction in any case in which hearsay evidence played a "sole or decisive part". This Strasbourg court then took a more nuanced and favourable attitude towards hearsay evidence in its later Grand Chamber decision in *Al-Khawaja v United Kingdom* (766/05).

18. Once the intended adhesion of the EU to the ECHR occurs, Court of Justice decisions in the field of the Human Rights Convention will be open to review in Strasbourg. This perhaps increases the risk that the Court of Justice might tend to go further than Strasbourg would itself go. National courts would then have no chance of taking a more modest line and awaiting a challenge in Strasbourg. There may be a case for refashioning the relationships during the negotiations about EU accession to the Convention, so as to give both sides a right to take a Court of Justice ruling on the Convention to Strasbourg.

19. This brings me to the third and fourth questions. Where it is necessary to interpret

European law, what is the correct answer, and when can or should a reference be made to the Court of Justice? These two questions commonly interlink. A reference can of course be made without expressing any view on the correct answer. But the Court of Justice tells

---

<sup>13</sup> Generally, of course, a UK court will keep pace with Strasbourg jurisprudence, doing "no more, but certainly no less", as Lord Bingham said in *R v Special Adjudicator (ex p Ullah)* [2006] UKHL 26, para 20 or "no less, but certainly no more", Lord Brown put it in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, paras 105-106.



us it likes to see national courts' views – limited, however, to ten pages, or they will be summarised. But a reference is not presently open to a UK court in respect of Third Pillar measures (under the old European Union Treaty) relating to cooperation in criminal matters. So in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22 there could be no reference on the difficult issues of interpretation of the Framework Decision on the European Arrest Warrant 2002/584/JHA. For good measure, the Supreme Court also held that, under the European Communities Act 1972 UK courts are not currently bound by rulings of the Court of Justice in respect of such Third Pillar measures. These Third Pillar measures are those in respect of which the Government has broadcast its intention to opt out in late 2015, with a view then to renegotiating and selectively opting back into some of them, as contemplated by Protocol No 36, added to the TEU and TFEU by the Treaty of Lisbon. In relation to those it opts back into, Court of Justice jurisdiction will have to be accepted<sup>14</sup>.

20. A national court may, and a final court must, refer to the Court of Justice any point of EU law which is not *acte clair* – clear beyond reasonable doubt. Who is the final court in the UK is complicated by the requirement to obtain permission to appeal to the Supreme Court. Normally, the Supreme Court only gives permission when the matter is one of general importance. It is normally open to us to refuse permission on the basis that a matter may well be arguable, but of no general importance. That will hardly do with an EU law issue. Nor do the Supreme Court, normally, take such an approach<sup>15</sup>.

21. According to the Court's famous decision in *CILFIT* Case 283/81, paras 16-18, a point is *acte clair* only if "The correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved". But "before it comes to the conclusion that such is the case, the national court

---

<sup>14</sup> Protocol No 36 states, in relation to opting back in, that the Union institutions and the UK are to seek to re-establish the widest possible measure of cooperation of the UK in the EU's *acquis* in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence. That sets quite a positive tone for any renegotiations.

<sup>15</sup> On a recent PTA application, we indicated that our normal approach to EU issues would be to ask simply whether the matter was *acte clair*: *Bowen-West v Secretary of State for Communities and Local Government* UKSC 2012/0095. Supreme Court Practice Direction 3.3 on PTAs is being amended to make more explicit the relevance of the *CILFIT* test already mentioned in PD 11.1.2.

or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”, and “the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise” which “to begin with” include the fact that “Community legislation is drafted in several languages and that the different language versions are all equally authentic” and “interpretation of a provision of Community law thus involves a comparison of the different language versions.”

22. The Court in *CILFIT* made a request very similar to, though less dramatic than, that with which Cromwell addressed the General Assembly of the Kirk of Scotland on 3rd August, 1650: “I beseech you, in the bowels of Christ, think it possible that you may be mistaken.” Cromwell was addressing the Kirk about its own faith, so the Kirk could with justice reply: “Would you have us to be sceptic about our religion?” European law is in contrast the faith of the Court of Justice, so it would be foolish for national judges to reply in like terms as the Kirk. In any event, even the Kirk was foolish, since its forces proved no match for Cromwell’s New Model Army at the ensuing Battle of Dunbar.
  
23. Nonetheless, taken literally, the *CILFIT* test poses some practical problems – both for national courts and for the Court of Justice. Despite the latter’s best endeavours, EU law is a new and autonomous system which is particularly prone to throw up contentious issues. European legislation is the subject of compromises of substance and language across a whole variety of national and legal traditions. Dialogue by preliminary reference, with its dichotomy between interpretation and application, is not the easiest way to resolving difficult issues. The Court of Justice speaks with authority, but its reasoning is condensed and often limited, even though it has over the years become less so than formerly. Its committee style of judgment restricts the Court’s ability to introduce nuance or to express itself always with absolute clarity. Consensus may only be achievable at a relatively low common denominator. The basis and boundaries of some of the Court’s answers are not infrequently unclear. In a not inconsiderable number of cases, after a reference has been made to and answered by the Court of Justice, parties disagree about who has won. The House of Lords had this experience in *Celtec v Astley* [2006] UKHL 29, the Supreme Court in *Aventis Pasteur* [2010] UKHL 23, even after a second

reference, as well as in *British Airways v Williams* [2012] UKSC 43. In these cases, both sides contended that they had really won.

24. This is not the occasion to revisit in any depth the discussion on the advantages and disadvantages of single and ostensibly unanimous judgments<sup>16</sup>. Charles Evans Hughes (Justice of the US Supreme Court from 1910 to 1916 and Chief Justice from 1930 to 1941) said that “A dissent in a court of last resort is an appeal .... to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed”. Transparency and a belief in the virtues of individual freedom of expression make me support that typically common law approach. But collegiality in a court of last resort should ensure wherever possible that dissent remains a last resort.

25. Arriving at what one believes to be the correct or better legal analysis is one thing. Concluding that the answer is *acte clair* is another. Judges are trained to make up their own minds. The very act of doing so can impart a beguilingly dangerous certainty<sup>17</sup>. On the other hand, an over-literal application of the *CILFIT* test could inundate the Court. The test postulates a superhuman capacity to envisage what may or may not seem obvious to all other courts of the Union. The difficulty has increased. When *CILFIT* was decided, there were ten member states with seven languages. There are now twenty-seven members with twenty-three official and equally authentic languages<sup>18</sup>. A national court

---

<sup>16</sup> I discussed the subject in a Holdsworth lecture at the University “*The Common Law and Europe: differences of style or substance and do they matter?*”: <http://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth06-07-mance.pdf>.

<sup>17</sup> As Mark Twain said: “It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so.”

<sup>18</sup> In *BCL v BASF* [2012] UKSC 45, para 20 the Supreme Court achieved the greatest number of language citations that I recall – seven in all (English, French, German, Dutch, Portuguese, Spanish and Italian) and in *X v Mid-Sussex Citizens Advice Bureau* [2012] UKSC 59, para 32 we reached five (English, French, Spanish, Dutch and German – the last of which seemed to provide unequivocal support for the view that the relevant equality directive did not cover unpaid volunteers). In *Cooper v HM Attorney General* [2010] EWCA Civ 464, [2011] 1 QB 976 the Court of Appeal said, rather impressively, that it was unnecessary to rely on a Greek language text – from which one deduces that it knew enough Greek to judge its relevance.

must do the best it can to examine such foreign texts as are put before it, or are reasonably accessible. At the end of the day, however, the question is whether it has to ask itself whether the answer is “so obvious as to leave no scope for any reasonable doubt. The chimera of unseen language versions or unforeseeable future decisions by other national courts should not oblige a court to make a reference<sup>19</sup>.

26. Counsel often argue that, if courts at different levels or judges within the Supreme Court itself have reached different conclusions, a point cannot be *acte clair*. In A. P. Herbert’s fable, four Law Lords reporting their views on the floor of the House in the old fashion each announced a result differing from that of the immediately preceding speaker and starting with the words “My Lords, the law is clear”. The fifth started with the same words, had a heart attack and died. At least in that situation, a reference might be appropriate. But in *Office of Fair Trading v Abbey National* [2009] UKSC 6 the Supreme Court overruled the Court of Appeal, yet concluded that the answer was *acte clair* and that no reference was required. This conclusion has been criticised by Professor Hein Kötz with reference to German and Dutch authority to which we were not referred<sup>20</sup>. On the other hand, in *OB v Aventis Pasteur SA* [2008] UKHL 34 four out of the five members of the House of Lords thought the effect of the answers given by the Court of Justice on the first reference to it to be clear. Nonetheless, in deference to a dissenting opinion of Lord Rodger, made a second reference - and how right it proved to be to do so<sup>21</sup>.

---

<sup>19</sup> We expressed this thought recently in *X v Mid-Sussex Citizens Advice Bureau* [2012] UKSC 59: “... the starting point, consistent with the principle of mutual trust between different national jurisdictions which is fundamental in European law, is that other national courts will not entertain unreasonable doubts or arrive at an unreasonable conclusion”. Whenever a court appeals to the objective standard of a reasonable person, whether on the Clapham omnibus or not, there is always a risk that it may be appealing to its alter ego, but I hope that our formulation will not be seen or applied too much in that sense.

<sup>20</sup> Schranken der Inhaltskontrolle bei den Allgemeinen Geschäftsbedingungen der Banken [2012] Zeu P 332

<sup>21</sup> The issue was whether it was open to the English court to substitute the producer of a product as defendant, after the expiry of a ten year time limit, in circumstances where the action has been brought against an associated distribution company in the mistaken belief that it was the producer. The Court had said that substitution was a matter for national procedural law, provided that “due regard is had to the personal scope of the Directive, as determined by Art.s 1 and 3 thereof.” Lord Hoffmann and other members of the majority thought that

“what the Court of Justice was saying was that in some circumstances, proceedings which are obviously intended to be proceedings against the producer but which use the wrong name can properly

27. Agreeing, with evident reluctance, to make the reference, Lord Hoffmann had said:

“It is particularly unfortunate for the claimant in this case, who has been trying for over seven years to litigate the question of whether he is entitled to any compensation, that there should be further delay before the case can be decided and, speaking for myself, I would not regard the effect of the judgment as doubtful. But since I understand that all of your Lordships do not share this view, a reference will have to be made. It may be that the Court of Justice will be able to shorten the proceedings by giving a summary reasoned order under Art. 104.3 of its Rules of Procedure, but that is a matter for the Court to decide.”

28. Lord Hoffmann’s final sentence was a hostage to fortune. Far from making the summary reasoned order he envisaged, the Court of Justice (Case C-358/08) (2 December 2009) arrived at an opposite conclusion to the majority. Or so at least a later House of Lords decided in the second *OB v Aventis Pasteur SA* hearing, after the extensive further argument to which I have already referred [2010] UKHL 23) This time Lord Rodger wrote the judgment for a unanimous court.

29. The relationship between national courts and the Luxembourg court is described in Luxembourg as a “dialogue”. In reality, the relationship has become increasingly hierarchical. This is in part because of the authority of the Court of Justice. But it also seems so in part, I think, because that Court does not usually engage directly with or refer to national jurisprudence. This is a pity, and I do not believe for a moment that it would make Court of Justice authority less European or less authoritative. On the contrary, it might encourage an appreciation that domestic and supra-national Courts are all part of a broad European legal community. Both the European Court of Human Rights and the

---

be treated by national procedural law as having been proceedings against the producer. But the national court must take care that the proceedings can plausibly be regarded as having been proceedings against the producer.”

Lord Rodger disagreed. The ten-year limit was in his view intended as a final backstop, applicable unless proceedings had actually been begun against someone counting as the producer.

International Court of Justice have admirable records in engaging with and using national jurisprudence<sup>22</sup>. Advocate Generals' opinions, which do refer very effectively to national jurisprudence, are often relied upon as filling the lacuna left by the Court of Justice's present approach. But they do so only partially. The differences between the comprehensive reasoning of an Advocate General's opinion and the more assertive and limited style of the Court's judgments as often as not lead to argument. The first *Aventis Pasteur* decision in the House of Lords turned on the very question whether the Court was or was not accepting the Advocate General's approach.

30. There is a third factor evidencing a hierarchical relationship. That consists in the constraints which the Court of Justice has felt it necessary to impose on national courts. Somewhat, paradoxically, while establishing more hierarchical relationship at European level, they diminish the hierarchical nature of domestic judicial systems. This therefore brings me to my second topic: discipline.

#### *Discipline*

31. As long ago as 1974 the Court of Justice determined in *Rheinmühlen-Düsseldorf*<sup>23</sup> that a lower court must be free to make a reference on any point of European law that it considered might be decisive, even though there existed a decision of a higher court otherwise binding on it on that very point. In that case the facts were particularly striking. The higher court's decision, which the lower court wanted to refer, was a decision in the very same case, by which the higher court had set aside a previous decision of the lower court and remitted the case to the lower court for it to reconsider.
32. The Court of Justice developed its approach in *Cartesio Oktató és Szolgáltató bt* Case C-210/06, [2009] Ch 354. A court of appeal posed the (more than a little hypothetical) question whether the possibility of an appeal against its decision to make a reference on a point of company law was compatible with the Treaty provisions regarding preliminary

---

<sup>22</sup> See e.g. copious references to e.g. UK, USA, German, Italian, Belgian, Greek, Serbian, Egyptian and Brazilian case law in the ICJ's very interesting judgment on state immunity in *Germany v Italy* 3 February 2012 (General List No 143).

<sup>23</sup> *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 166/73).

references (now contained in Art. 267 TFEU)<sup>24</sup>. The Court ruled that “where the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal,” Art. 267 precludes an appeal court from calling into question a reference upon which the lower court has resolved (para 98).

33. The dialogue upon which the Court of Justice lays such weight is therefore between it and whatever domestic court has charge of the substantive point of EU law. It is not between legal systems as a whole. The sub-text is that the Court of Justice is concerned about the consequences if final appellate courts were to have sole responsibility for determining whether a reference was necessary. Some final courts have not been as enthusiastic as others about making references. But, as the Court made clear in *Cartesio*, it was only dealing with situations “where the main proceedings remain pending before the referring court in their entirety”. In many cases, other questions, besides the question whether there should be a reference, go to appeal. An appeal court may then decide a point of domestic law or a question of fact, in a manner which renders a reference unnecessary. *Cartesio* presents no obstacle to that.

34. More directly challenging to final appeal courts is the Court of Justice’s decision in *Köbler v Austria* Case C-224/01, [2003] ECR I-10239. This concerned a failure by a supreme administrative court to make a reference on an arguable point of EU law. The Court held that this could under EU law attract state liability enforceable through the domestic legal system. It applied familiar principles of state liability derived from the *Brasserie de Pêcheur/Factortame* litigation.<sup>25</sup> The failure must involve (a) a sufficiently serious breach (b) of rights conferred on individuals and (c) damage must have been caused to the individual claimant as a result of such breach. But the Court also took into

---

<sup>24</sup> The obvious objection was made that this reference seemed to be purely hypothetical, especially when the Court was about to answer the substantive question of company law. The Court of Justice, in dismissing the objection, satisfied itself with the not entirely persuasive thought that “neither that decision [the order for reference] nor the file sent to the court permit the inference that there has been no appeal against that decision or that there can no longer be an appeal against it” (para 85). It spoke in familiar terms of “dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference is appropriate and necessary” (para 91).

<sup>25</sup> *Brasserie de Pêcheur SA v Germany and R v Secretary of State, ex p Factortame Ltd* (Cases 46/93 and 48/93) [1996] ECR I-1029

account “the specific nature of the judicial function” and the legitimate requirements of legal certainty, and went on, importantly, to emphasise that liability could be incurred only “in the exceptional case whether the court has manifestly infringed the applicable law” (para 53). In judging this, all the circumstances must be considered - including, “in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or non-excusable, the position taken, where applicable, by a Community institution, and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Art. 234 EC” (para 55).

35. It is important to recognise that *Köbler* only deals with manifest errors of EU law. The application of EU law being for domestic courts, and there is, so far at least, no suggestion that the Court of Justice would regard even a manifest error in the application of correctly identified principles of EU law as a breach of EU law. But *Köbler* is radical enough in the prospect it holds out of the Hartlepool or any other excellent County or Sheriff’s Court around the UK being asked to rule that a decision of the Supreme Court has manifestly infringed EU law. In *Köbler* Advocate General Philippe Léger thought that a lower court might avoid embarrassment by itself making a reference to the Court of Justice. That runs into the possible objection that a reference is normally only appropriate where the position is *not* manifest, which would mean logically that there could be no *Köbler* liability, but, more realistically, one wonders whether a lower court would in the UK feel it necessary or appropriate to pre-empt the domestic appeal system in this way<sup>26</sup>.

36. In *Cooper v HM Attorney General* [2010] EWCA Civ 464, [2011] 1 QB 976 first the High Court and then on appeal the Court of Appeal had to consider the application of *Köbler* to two previous decisions of differently constituted Courts of Appeal. The previous decisions were to refuse a renewed application for judicial appeal and to refuse permission to appeal, and they were reached giving a limited meaning to the term “development consent” in Environmental Impact Assessment Directive 85/337. The

---

<sup>26</sup> In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet* [2000] 1 AC 119, the House of Lords set aside its own decision, confirming a jurisdiction which the Supreme Court has inherited and recently indicated its willingness to apply in an EU context: *R (Edwards) v Environmental Agency* [2010] UKSC 57.



Court was sitting as a final court from which there could be no further appeal<sup>27</sup>. By the date when *Cooper v HM Attorney General* was decided, there was Court of Justice authority showing that the Court of Appeal's restriction of the term "development consent" had been wrong<sup>28</sup>. But the question before the Court of Appeal was whether the previous Court of Appeal decisions were manifestly wrong at the earlier dates when they were given. In a comprehensive review, the Court of Appeal held that the failure to make such a reference had not, at those dates, involved a manifest breach of EU law.

37. The Court of Appeal also considered what the remedy would have been, had it concluded that a reference should have been made. Would the Court's failure to make a reference alone ground *Köbler* liability on the UK's part? Or was there only a relevant breach for *Köbler* purposes if the Court would, on a reference, actually have held that there was a breach of the Environmental Impact Assessment Directive, on which Mr Cooper was entitled to rely? A variant in short of an old conundrum: could Mr Cooper have claimed for loss of *the chance* of winning on a reference, or had he to persuade the court that he would *in probability* have won on a reference? The Court of Appeal left the question unanswered.

38. *Köbler* was followed by the Court of Justice in *Traghetti del Mediterraneo* (Case C-173/03). *Traghetti* ran a ferry service between Sardinia and Sicily. The ferry service failed, and it brought proceedings against a competitor for wrongful receipt of state aid and/or guilty of unfair competition. Its claim failed in the Corte Suprema di Cassazione (Italian Supreme Court of Cassation). *Traghetti* claimed that the Italian Supreme Court

---

<sup>27</sup> The decisions concerned what is now the Westfield Shopping Centre in Shepherd's Bush. In reaching its previous decisions, the Court of Appeal had restricted the term "development consent" in the European Environmental Impact Assessment Directive 85/337 as limited to the grant of outline planning permission. On that basis, the Directive's requirement for environmental impact assessment did not apply to matters which had been reserved by the outline permission for later consideration. Mr Cooper's application for judicial review had also been made three years outside the three month domestic time limit, by when preliminaries to the development were well under way.

<sup>28</sup> . Mr Cooper's application for judicial review had also been made three years outside the three month domestic time limit, by when preliminaries to the development were well under way. But by the time when *Cooper* was decided, there was also European Court authority suggesting that member states' duty to nullify the unlawful consequences of a breach of EU law might arguably extend to overriding such a time bar.

had incorrectly interpreted the relevant Community rules and wrongly refused to refer their interpretation to the Court of Justice. It brought *Köbler* proceedings against the Italian State in the Tribunale di Genova (Genoa District Court). The State relied upon Art. 2 of a Law No 117/88 This had three paragraphs: One said that claims for “unjustifiable damage as a result of judicial conduct, acts or measures” could only be brought if the judge was “guilty of intentional fault or serious misconduct in the exercise of his functions”, or there had been a “denial of justice”; a second that: “In the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability”; and the third defined “serious misconduct” as requiring “inexcusable negligence” or “the adoption of a decision concerning personal liberty in a case other than those provided for by law or without due reason”.

39. The Genoa District Court now made a reference. It asked the Court of Justice about the permissibility of national legislation on State liability for judicial errors “where it precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions and limits State liability solely to cases of intentional fault and serious misconduct on the part of the court”. The Court’s answers were that

“Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.

Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239.”

40. *Traghetti del Mediterraneo* has had a recent sequel in *Commission v Italy* Case C-379/10. The Italian Law No 117/88 remained unchanged. The Commission brought infraction proceedings against Italy. Italy responded that, under Italian law, the second paragraph (that “the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability”) could and would be read with as leaving unaffected any liability arising in circumstances defined in the first or third paragraphs. It pointed out that, in two subsequent Italian cases not involving European Union law, no reliance had been placed on the second paragraph as a defence, whereas, if the Commission complaint was right, that paragraph would have been a complete answer. As to the first paragraph, Italy said that could and would also be read consistently with the *Köbler* principle that a state should answer for manifest fault. It noted that there was no Italian authority to the contrary<sup>29</sup>.

41. But the Court of Justice upheld the Commission’s infraction complaint. It simply observed (para 37) that, in relation to explicit wording of paragraph (2), Italy had not provided any sufficient element demonstrating that paragraph (2) would be interpreted as a simple limit, which did not exclude responsibility (i.e. in circumstances falling within paragraphs (1) and (3)). As to paragraph (1), it simply said that - independently of whether, despite its strict delimitation in paragraph (3), the notion of ‘serious misconduct’ could be interpreted consistently with the condition of ‘manifest breach of the applicable law’ referred to in *Köbler* - it was relevant to note that Italy did not in any event produce any authority in that sense in a like situation and so did not bring the necessary proof that the interpretation of paragraphs (1) and (3) by Italian courts was consistent with the jurisprudence of the Court of Justice.

42. No doubt, it might have been wiser for the Italy legislator to amend Law No 117/88 following *Traghetti del Mediterraneo*. But the Court of Justice’s reasoning in *Commission v Italy* appears to reverse the ordinary onus of proof, and to hold the Italian state liable for failing to prove the consistency with European law of a provision which it accepted in the same breath might be interpreted consistently with such law - in circumstances, moreover, where the *Traghetti* decision clearly indicated that this should if

---

<sup>29</sup> Indeed, one might think that word “if” in the Court of Justice’s second answer in the *Traghetti* case recognised the possibility of just such an interpretation.

possible happen. And that, after all, is what Italy was saying would happen. Italy and its courts are, presumably, aware of the *Van Colson/ Marleasing/Pfeiffer* duty to interpret domestic law in conformity with EU law (or, in the case of directly applicable EU law, to disapply any inconsistent domestic law)<sup>30</sup>. I do not think that a British court would have had great difficulty in concluding that a general law phrased like Italian Law No 117/88 could and should be interpreted in the field of Union law in a sense consistent with *Köbler*.

43. Dialogue and mutual trust are often emphasised as fundamental in EU law<sup>31</sup>. The Court of Justice's reasoning in *Commission v Italy* does not seem, at any rate to an outside observer, to give full credit to either. Maybe a more explicit discussion of the Italian legal position could have elucidated the Court's thinking<sup>32</sup>. But it might have been more tactful of the Court to deploy a different weapon from its abundant armoury. The principles of effectiveness and legal certainty could have enabled a more nuanced criticism of Italy. Even if the Italian State was right that all would be well in the end, the continued presence on the Italian legal scene of Law No 117/88 - on which Italy itself had itself relied in *Traghetti del Mediterraneo* – could well have been seen as capable of misleading potential claimants about their rights, or deterring them from exercising them effectively.

## Substance

44. I turn finally to the substantive relationship between domestic and EU law. Treaties, Regulations and, as against the State, Directives are capable of direct effect. In other contexts, in relation to legislation implementing directives which are not directly applicable, the *Van Colson/Marleasing/Pfeiffer* principle of conforming interpretation has

---

<sup>30</sup> The former principle is well-established by *Von Colson and Kamann v Land Nordrhein-Westfalen* Case 14/83, [1984] ECR 1891, *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89, [1990] ECR I-4135 and *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshute* Cases C-397-403/01.

<sup>31</sup> United Kingdom jurisprudence and practice has been severely censured in the field of the Brussels Regulation for suggested failure to honour the latter: see e.g. *Erich Gasser GmbH v Misat Srl* Case C-116/02, [2003] ECR I-14693 and *Turner v Grovit* Case C-159/02.

<sup>32</sup> I understand that Italian law may take the view that any changes required by EU law to the law governing state liability would have to be replicated at the domestic level. But there is nothing in the Court of Justice's judgment to suggest that this was part of its thinking, or that, if it was, the necessary changes would not be made at the domestic as well as the EU law level.

proved a powerful tool on the United Kingdom scene. It matches an equivalently phrased obligation in the human rights field under section 3(1) of the Human Rights Act 1998<sup>33</sup>. United Kingdom courts have treated the principle in each field as giving them a freedom far beyond any which they possess under conventional rules of interpretation. I summarised the position in *Assange* (para 203):

“In relation to European Treaty law falling within the scope of the European Communities Act 1972, the European legal duty of conforming interpretation has been understood by United Kingdom courts as requiring domestic courts where necessary to depart ‘from a number of well-established rules of construction’.... and ‘to go beyond what could be done by way of statutory interpretation where no question of Community law or human rights is involved. .... Pursuant to the resulting duty, domestic courts may depart from the precise words used, e.g. by reading words in or out. The main constraint is that the result must “go with the grain” or “be consistent with the underlying thrust” of the legislation being construed, that is, not “be inconsistent with some fundamental or cardinal feature of the legislation.”<sup>34</sup>

45. It is possible that UK courts may have been more catholic than the Pope in their understanding of this interpretive duty. The European Court has always qualified the interpretive duty by phrases such as “in so far as [the court] is given discretion to do so under national law” (*Von Colson*, para 28), “as far as possible” (*Marleasing*, para 8) and “the principle requires the referring court to do whatever lies within its jurisdiction” (*Pfeiffer*, para 118). Others, particularly Advocate General van Gerven, have noted that domestic courts are not expected to act “*contra legem*”: see e.g. *Marshall v United Kingdom (No 2)* Case C-271/91, para 10.

---

<sup>33</sup> Section 3(1) reads: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

<sup>34</sup> The passage concludes: “In this light, considerable significance may attach to whether the European legal duty of conforming interpretation applies or whether the case is subject only to the common law presumption that Parliament intends to give effect to the United Kingdom’s international obligations.”

46. Common law courts are of course masters of their own principles of interpretation. So in a sense all might be said to be possible for them. Further, even apart from the Human Rights Convention, courts recognise a presumption (of “legality”) that general statutory words are not intended to affect fundamental principles of constitutional and administrative law, such as individual liberty or access to justice, and adopt restrictive interpretations of wording which, read literally, would otherwise impinge upon them<sup>35</sup>. A parallel presumption exists whereby, absent clear contrary intention, legislation is construed to conform with this country’s international obligations. Its force is evidenced by the decision of the majority in the *Assange* case, where study of the Parliamentary material appeared, at least to Lady Hale and myself, to reveal an intention the opposite of that which the majority held years later to be the probable EU law position. Nevertheless, the *Van Colson/Marleasing/Pfeiffer* principle is treated as going well beyond these presumptions, and as allowing quite radical reading in, out or down of words in legislation in the field of EU law. As I say, domestic courts may have gone further than the Court of Justice has explicitly required. It would be an interesting subject for comparative law study.

47. The potential downside, in relation to both Union and Convention law, is that free-ranging interpretive activity involves courts in decisions which ought to be taken by the legislature. This links with a more general reservation that may arise from the development of EU law. It relegates the efforts of Parliament to secondary importance. After serving on the House of Lords EU Select Committee until the Constitutional Reform Act 2005 intervened in 2009, I am aware of the detailed attention given to much legislation both in committee and on the floor of both Houses. But nowadays it is usually the EU law underpinning of such legislation that matters. In both *Assange* and *X v Mid-Sussex* the Supreme Court had to look closely at the history and text of implementing legislation<sup>36</sup>. But, ultimately, in both cases the wording and interpretation of the European

---

<sup>35</sup> The principle of legality is described in *R v Secretary of State for the Home Department, ex p. Pierson* by Lord Browne-Wilkinson and Lord Steyn [1998] AC 539 and in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 by Lord Steyn.

<sup>36</sup> *Assange* required the Supreme Court to look closely at the history of the Extradition Act 2003, giving effect to inter alia the Framework Decision on the European Arrest Warrant. *X v Mid-Sussex Citizens Advice Bureau* required the Supreme Court to look closely at the domestic Disability Discrimination Act 1995 and European

measure was decisive. The domestic measure might as well not have existed, except as the vehicle by which access to the European measure was obtained. Much of the labour of Parliament and of Parliamentary drafters in scrutinising the domestic measure might have been spared.

48. Where does this slightly downbeat comment lead? First, it underlines the importance of careful scrutiny and input at the EU level, when such measures are under preparation by the Commission and, after their initial proposal, when they are being considered in the Council of Ministers and by the European Parliament. Traditionally, the United Kingdom has been a very effective operator on the Brussels legal scene. Secondly, it underlines the importance of Parliamentary scrutiny of the progress of European legal proposals, as well as of the right of national Parliaments to make representations on subsidiarity introduced by Protocol No 2 under the Lisbon Treaty. Thirdly, it underlines the importance that attaches to the interpretation put on EU measures by the Court of Justice, and the desirability that this should respect the EU legislative intention. Legal certainty is an important theme of the Court of Justice, but legal certainty is only achieved if the outcome of litigation on EU legal themes is predictable.
49. Legal certainty is important both for the European legislature and for all those affected by EU law. The United Kingdom enjoys rights not to opt into European legislative proposals, particularly in the area of justice and home affairs, and is sometimes criticised for exceptionalism when it exercises them. But the general willingness of all Member States and their institutions to engage unreservedly in the development and implementation of EU law depends upon confidence that the outcome will be predictable: above all, that it will respect the EU legislators' apparent intentions. It is not the Court of Justice's role to act as a legislator, or to extend or "improve" legislation in respects which the actual EU legislators might have agreed, but evidently could not or did not in fact agree. The structure of the EU involves a balance of interests. State interests are represented in the Council of Ministers, which remains, though now with Parliament as a partner, the pre-dominant legislative body. The Court of Justice should not lightly discount the policy decisions, interests and compromises which have influenced the

---

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the "Framework Directive").

Council to a particular legislative conclusion<sup>37</sup>; nor should it give the appearance that it attaches little significance to them<sup>38</sup>. These are points fundamental to confidence in European law and its administration. The Court of Justice has with good reason itself stressed the virtues of legal effectiveness and certainty. The Court of Justice commonly sits as a court of first and last resort and the effects of its decisions are difficult to reverse or change<sup>39</sup>. When changes involve Treaty interpretation, they even require Treaty amendment to achieve. The UK cannot be criticised if, when considering whether or not to opt into a measure proposed in Brussels, it takes account of the extent to which the measure's future interpretation in Luxembourg may - or may not – conform with the legitimate expectations of those who negotiated, sometimes with great difficulty, to agree upon the measure.

50. There have however been cases where certainty and predictability can be said not to have been achieved. A well-known example is the Court's decision in *Mangold v Rüdiger Helm* Case C-144/04. This concerned Art. 13(1) TEC (now replaced by Art. 19(1) TFEU). Art. 13(1) read:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

51. The Framework Directive 2000/78/EC was duly enacted to address discrimination on grounds relating to inter alia age and disability, in relation to which Art. 18(2) of the Directive permitted Germany an extra three years for implementation expiring in 2006. In

---

<sup>37</sup> The dearth of Court of Justice case law on the principle of subsidiarity may in this connection be regretted.

<sup>38</sup> The Court's brief oral procedures and the parties' inability in practice to respond to points raised in the subsequent Advocate General's opinion underline the need for such points to be fully and carefully ventilated before any judgment on them.

<sup>39</sup> The recent re-negotiation of the Brussels Regulation on Civil Jurisdiction and Judgments is a fairly rare example of a situation in which enough impetus developed across Europe to modify the position established by prior Court of Justice decisions.



*Mangold*, Mr Mangold claimed that he had been discriminated against on grounds of age under a contract made in 2003. Although under Art. 288 TFEU directives are only binding on member states as to the result to be achieved, and although the time for domestic implementation had not arrived, the Court held that a “principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law” and that it was for the Court to “provide all the criteria of interpretation needed by the national court to determine whether those [national] rules are compatible with such a principle” (para 75), that, consequently, “observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age” (para 76), and that “In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide .... the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law” (para 77).

52. That case has been followed in *Seda Küçükdevici v Swedex GrbH & Co KG* Case C-555/07, another case between individuals, albeit one where the time for implementing the relevant directive had expired. But *Mangold* was castigated in an article co-authored by Roman Herzog, a former President of the German Constitutional Court as well as of the Federal Republic of Germany. He saw *Mangold* as one of a number of judgments significantly interfering with the competences of Member States, and showing that the Court of Justice was not suitable as a subsidiarity controller or protector of Member States’ interests<sup>40</sup>. Subsidiarity is a highly judgmental and quite political concept<sup>41</sup>, but it

---

<sup>40</sup> “Stop the European Court of Justice!": see

[http://www.cep.eu/fileadmin/user\\_upload/Pressemappe/CEP\\_in\\_den\\_Medien/Herzog-EuGH-Webseite\\_eng.pdf](http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf)

The German Constitutional Court itself however accepted that *Mangold* was binding in German law, on the basis that it could only be ultra vires if it was manifestly in excess of the Court of Justice’s competence and involved a structurally significant shift in the allocation of competences: Beschluss 2 BvR 2661/06 of 6 July 2010. It also said that it would have been necessary before reaching any conclusion that such a decision was ultra vires to obtain the Court of Justice’s view on a reference under Art. 267.

<sup>41</sup> As the provisions for national parliamentary scrutiny and objections introduced under the Treaty of Lisbon by Protocol No 2 witness.

remains true that there is a striking absence of significant judgments expounding the Treaty principle of subsidiarity. In more moderate terms, later Advocate Generals' opinions also contain very sceptical - and, coming from the Plateau de Kirchberg, refreshingly self-critical - comments on the legitimacy and consequences for legal certainty of the Court's approach in *Mangold*<sup>42</sup>.

53. In my opinion, Advocate General Mázak was on strong ground when he said in one such case, *Félix Palacios* (para 95), that “the underlying intention [of Art. 13(1) TEC, now 19(1) TFEU] was ... to leave it to the Community legislature and the Member States to take appropriate action” to address discrimination, and that “if the reasoning in *Mangold* were followed to its logical conclusion, not only prohibition on grounds of age, but all specific prohibitions of the types of discrimination referred to in Art. 1 of Directive 2000/78 would have to be regarded as general principles of Community law” - potentially enforceable between individuals perhaps even before the Community legislature had agreed on any measure to address them.

54. Similar criticism has been levied at the Court's jurisprudence which, prior to the Treaty of Lisbon, recognised a competence at the Community level to require Member States to create and sanction criminal offences in respect of environmental damage and, under the Community competence in respect of transport, ship-source pollution: *Commission v Council - Environmental Damages* Case C-176/03 and *Ship-source Pollution* Case C-440/05. Here too, it is improbable that the Court's decisions were consistent with any intention imputable to the Member States as legislators. It is to be hoped that the position has now been regularised under the Treaty of Lisbon<sup>43</sup>.

55. A third example may be provided by “the Court of Justice's bold interpretative approach” to Regulation (EC) No 261/2004 providing air passengers with certain rights in the event

---

<sup>42</sup> See especially *Félix Palacios de la Villa v Cortefiel Servicios SA* Case C-411/05, paras 79 to 100, per Advocate General Mázak, with whose criticism Advocate General Ruiz Jarabo Colomer expressly agreed in *Othmar Michaeler v Amt für sozialen Arbeitsschutz und Autonomie Provinz Bozen* Cases C-55-56/07, paras 14 to 29.

<sup>43</sup> As a result of the new Art. 83(2) TFEU: see *The Treaty of Lisbon: an impact assessment* (House of Lords European Union Select Committee 10<sup>th</sup> Report of Session 2007-2008; HL Paper 62-I, paras 6.176 to 6.189.

of cancelled or delayed flights. (The description comes from the Supreme Court's judgment in *X v Mid-Sussex Citizens Advice Bureau*.) The Regulation provided in terms for financial compensation only in relation to cancellation. Delay in terms only entitled passengers to certain assistance. Nevertheless, in *Sturgeon v Condor Flugdienst GmbH* (Joined cases C-402/07 and C-432/07) [2009] ECR I-10923 and *Nelson v Deutsche Lufthansa AG and TUI Travel plc v Civil Aviation Authority* (Joined cases C-581/10 and C-629/10), the Court of Justice implied into the Regulation a right for passengers whose flights were delayed equivalent compensation to those whose flights were cancelled, on the basis that the situations were so closely comparable that no distinction could be drawn between them. In *Sturgeon* the Court had heard no argument on the potential impact of the principle of equal treatment, mentioned only in passing in the Polish Government's submissions. Advocate General Sharpston, who explored it after the oral hearing, advised that "Both the institutions and the Member States should have the opportunity to comment on the analysis I have advanced and put forward arguments relating to objective justification", with the oral procedure being reopened accordingly. The Court did not take this advice.

56. In *Nelson*, the Court did receive submissions on the issue which it had decided in *Sturgeon*, but simply reiterated its conclusions - citing *Sturgeon* as authority. Delay must therefore be treated as favourably as cancellation. The Court said that it reached this conclusion as a matter of interpretation and on the express basis that such an interpretation did not disregard the EU legislator's intention. The legislature must have been surprised, since the Commission's explanatory statement to the Regulation had stated that "in present circumstances operators should not be obliged to compensate delayed passengers". The Regulation was clearly drafted so as not to impinge on the sphere of the Montreal Convention. Art. 29 expressly provides for limited compensation in the event of damage resulting from delays in air transport, and makes the principle of the compensation of those passengers subject to precise conditions and limits not contained in Regulation No 261/2004. I am also unclear why, in this context, a conclusion that the Regulation involved discrimination should necessarily justify its expansion, rather than nullification.

57. An even more recent case, revisiting the area of non-discrimination, raises questions about the respect due to choices made by democratically elected Member State governments, after European Parliamentary involvement. The issue in *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* Case C-236/09 concerned the validity of Art. 5(2) of Directive 2004/113, allowing Member States to continue to permit “the use of sex as a determining factor in the assessment of risk based on relevant and accurate statistical data”, on the basis that Member States would gather statistics, on which the Commission would report after three years, leading to a review by Member States of the use of sex as a factor after five years, i.e. after 21 December 2012.
58. Advocate General Kokott proceeded on the basis that, once the legislature had decided to legislate against discrimination in a particular field, it must do so compatibly with the principle of equal treatment (para 39). In her view, the practical difficulties involved in the recording and evaluation of economic and social conditions and personal habits could not justify the use of a person’s sex “as a kind of substitute criterion” (paras 66-67). But, for reasons of legal certainty, Art. 5(2) should be maintained in force for a three-year transitional period from judgment (para 80).
59. The Court in a judgment issued 1 March 2011 derived from the Directive itself a “premiss” that, “for the purposes of applying the principle of equal treatment of men and women .... the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable” (para 30). The “risk” that Art. 5(2) might permit an indefinite derogation from equal treatment with regard to such premiums and benefits mean that it must be regarded as invalid upon the expiry of an appropriate transitional period” ending on 21 December 2012 (paras 31-34).
60. The Court’s reasoning is limited to a degree which positively invites speculation that the Court must have been divided or have found the issue so difficult that its members could not agree on anything more explicit. The decision, including the premises which the Court claimed to find in the Directive itself, has been trenchantly criticised: see e.g. *Equality, fundamental rights and the limits of legislative activity* by Professor Philippa Watson in [2011] E.L.Rev. 896 and *Three case studies on “anti-discrimination”* by Dr

Jakob Cornides<sup>44</sup> in [2012] E.J.I.L. 517<sup>45</sup>. The “premiss” is suspect<sup>46</sup> in the light of Recital (18), recognising that certain categories of risks may vary between sexes”, and of Art. 5(2) itself. It was on any view one for the Court to examine, not simply accept. The basis of Art. 5(2) was that the justification for the use of sex as a differentiating factor would be examined statistically and reviewed. The decision foreclosed a solution to a difficult issue reached (as it had to be) by the unanimous decision of the (then) twenty-five Member States. Member States had agreed to gather statistics, on which the Commission would report, and to review the position after five years. The Court substituted for a carefully devised legislative scheme, and without awaiting the results of Member States’ intended review, a bare assertion that 21 December 2012 was the longest period for which premiums differentiated by sex could be tolerated<sup>47</sup>. Professor Watson says – very pertinently - that:

“The value of derogations has been diminished and it remains to be seen what impact this will have on the legislative process: will it make the adoption of measures in the sensitive areas of social and employment law – in which Member States have traditionally been reluctant to cede competence – more difficult?”

---

<sup>44</sup> An administrator in the Directorate-General for Trade of the Commission.

<sup>45</sup> The slightly more enthusiastic critique by Professor Christa Tobler [2011] *Common Market Law Review* **48**: 2041-2060 acknowledges (p.2054) that, by taking the “unusual” approach of accepting a “premiss” which it claimed to find in the Directive itself rather than engaging in its own independent analysis, “the Court avoids such an analysis and thereby also the difficult issues arising in its context”. Professor Tobler also says no more than that it “is by no means excluded” that “the Court could have arrived at the [same] conclusion of comparability, if it had itself decided on this matter”.

<sup>46</sup> As the Council and Commission submitted.

<sup>47</sup> It is too early to know the practical effect of the Court’s ruling in *Test-Achats*. According to the AA, “young men represent 8% of all drivers, yet account for 23% of all those killed or seriously injured on Britain’s roads”. Between January 2012 and January 2013 premiums for 17-22 year old women have risen by 12.2% (4.7% in the last quarter), while premiums for men in the same age bracket have fallen by 0.4% (1.9% in the last quarter). Research reported by “Which” (in its March 2013 edition, pp.42-43) “suggests that, so far, the only real winners from the gender directive have been the insurance companies”, showing that in October 2012 average motor insurance premiums for 20-year old men and women were respectively £1402 and £1928, a spread which widened by December 2012 before disappearing on 21 December 2012, when the premiums for both were £2160.

61. Having drawn attention to the dangers of unpredictability, I am conscious that, in the course of a recent judgment in *BCL Old Co Ltd v BASF plc* [2012] UKSC 45, I cited a statement by Oliver Wendell Holmes: “Certainty generally is illusion, and repose is not the destiny of man”. The relationship between EU law and national law or between national courts and the Court of Justice is never likely to be one of complete repose. Europe has yet to find any sort of equilibrium between centralising forces and state powers. That members of the Court are not insensitive to the issues is also indicated by some extra-judicial speeches, for example that given by Judge Lenaerts recently on *The Concept of EU citizenship in the case law of the European Court of Justice*. In it, he notes that the principle of conferral applies in both a positive and a negative fashion, limiting the fields where EU action can be taken, and guaranteeing that the EU will not render the powers retained by the Member States devoid of substance.
62. The creation and operation of a supranational legal system by the Court of Justice has been a very considerable – indeed a unique – achievement, and one which has huge potential resonance on the future international scene. More public dialogue might be welcome, but at a personal level relations with the Court of Justice and its members are extremely good and are fed by frequent and fruitful judicial meetings outside court. The Court of Justice has played and will continue to have an absolutely key role in the consolidation and development of a single European legal space. That of course also underlines the importance that attaches to its procedures and jurisprudence continuing to encourage the loyalty and support of Member States and national courts.
63. I have left to the end a subject which has exercised most of the constitutional courts of Europe, the German Federal Constitutional Court as their leader. The UK has no written constitution. So there is no easy basis for asserting a conflict between EU and UK constitutional law. In *Thorburn v Sunderland City Council*, Laws LJ in the High Court affirmed Parliamentary supremacy as our basic constitutional principle. He said that it was only by virtue of the European Communities Act 1972 and only for so long as that remains in force, that our European Union legal commitments must shape and prevail over any Parliamentary legislation enacted before or after 1972 which otherwise *tacitly*

conflicts with them. Only by express legislation could Parliament be taken to have overruled the 1972 Act to any extent.

64. That formulation itself however witnesses the power of EU law to influence UK law. In other domestic contexts, a later inconsistent Act of Parliament may repeal an earlier Act more readily and by implication. The development identified by Laws LJ can be justified by a thought process similar to that underlying the *Marleasing* principle. The rules of common law and statutory interpretation must so far as possible be accommodated to the requirements of European Union membership and law. Laws LJ was at the same time asserting that Parliament has only conferred limited authority on the EU by the 1972 Act and could at any time, without any Treaty renegotiation, opt expressly to repeal that Act. Jurisprudentially, he was saying that membership of the European Union has not changed the *Grundnorm* or rule of recognition – involving the acceptance of Parliamentary sovereignty - by reference to which the existence and validity of law are assessed in the UK. Let us also be reasonably confident that matters will never come to a head calling for a test of that basic proposition in a UK court.

## **Conclusion**

65. In conclusion, therefore, I trust that the United Kingdom will continue to engage with Europe and European legal affairs. If there are occasionally criticisms on either side about the way in which the inter-relationship of European and domestic law has developed, we should recall both Cromwell's and Holmes' dicta. Constructive criticism is a part of a dialogue which is to be encouraged and which can lead to better and more harmonious understanding. In whatever way the EU may develop, I believe that the UK's contributions on both the legislative and the legal scenes has been and can in future continue to be pre-eminent.