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On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?

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I. INTRODUCTION

In the classical narratives of the story called European integration, national judges are said to have a 'mandate' under European law: they are 'empowered' by EC law or, in the less thrilling versions of the story, they simply become 'Community judges'. Not only are national judges obliged to apply substantive EC law, they are also requested to apply it in the way required by the Court of Justice. How, precisely, national judges are asked to apply EC law in domestic courts has traditionally been portrayed through the case law of the Court of Justice; not much attention has been paid to the reality in national courts. Over the years, the case law of the Court of Justice has created an image of a veritable European judicial Hercules: a judge who reads in many of the official languages of the European Union; who knows not only all the relevant national and European law, which he or she applies *ex officio*, but also engages in comparative interpretation of the law; who identifies him- or herself with the European *telos* which he or she is applying on the national level; and so on.

In every legal system, there is a difference between the normative requirements of the law and the day-to-day reality of its application. The question generally asked is how wide this gap is. The wider the gap, then (perhaps)

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the less efficient is the activity of the norm-setting body, as it is further away from the true application of those norms in practice. This contribution seeks to outline some of the areas in which the gap between, on the one hand, the requirements of the Court of Justice as far as the 'correct' methodology of the application of EC law by national courts is concerned, and, on the other hand, the practice and the realistic capacities of national courts, has become very wide. The primary focus (and the author's source of experience) is the judicial potential in the courts of the new Member States. However, most of the conclusions made here can legitimately be extended to the courts and judges of the 'old' Member States as well.

The structure of this contribution is dialectic. First, it summarises some of the requirements imposed by the case law of the Court of Justice upon national judges when applying EC law. Secondly, a realistic assessment of the judicial capacity in these areas is provided, with (where possible) some examples from the case law of the new Member States. Finally, broader conclusions are drawn concerning the capacities and strategies of national courts in the domestic application of EC law, including some of the inspirations which the European legal order may draw from game theory.

II. THE EUROPEAN HERCULES IN ACTION

When assessing the expectations which European law has of a national judge when interpreting Community law on the national level, four areas stand out: language, knowledge, comparisons and *telos*. Each of these areas will be examined in turn.

A. The Judge as a Linguist

The European Union currently has 23 official languages.[2] All of the languages are equally authentic. When interpreting Community law, national judges are asked to consider other language versions of the relevant Community legislation as well, in order to arrive at the correct interpretation

[2] With respect to primary law, see art 314 EC or 53 EU (and the respective final provisions in other EU Treaties), with respect to secondary law, see art 1 of the Regulation 1/58/EEC determining the languages to be used by the European Economic Community, Journal Officiel no 17 du 6 Oct 1958 at 390, English special edition: Series I, ch 1952–8 at 59. There are, however, temporal derogations in respect of Irish (Gaelic) and Maltese—see Council Regulation (EC) 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, [2004] OJ L169/1; Council Regulation (EC) 920/2005 of 13 Jun 2005 amending Regulation 1 of 15 April 1958 determining the language to be used by the European Economic Community; and Regulation N1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations, [2005] OJ L156/3.

thereof. The task of comparing various language versions[3] of Community law is governed by three basic principles:

(i) the prohibition of reading one language version in isolation;
(ii) the prohibition of majoritisation; and
(iii) overcoming possible discrepancies by taking into account other methods of interpretation, especially the logic, system and purposive reading of the normative text.

The prohibition of reading one language version in isolation[4] from the others is an extension of the principle of equal authenticity of all the official languages of the European Union. By establishing this principle, the Court of Justice tried above all to prevent a situation in which, for instance, an English court would seek to 'solve' the discrepancy between the English and French version of a Community legal measure by declaring that only the English version is relevant and binding on the territory of the United Kingdom.

The prohibition of 'majoritisation'—ie not allowing the majority of language versions to prevail over the minority[5]—is again a logical consequence of the equality of all the official languages. If all of the different language versions are equally authentic, then the meaning which is given by the minority, or even by just one, of them cannot automatically be outweighed by the meaning given by the majority of the different language versions.

The *Anglo-Polish Fishing* case[6] affords a classic account of this rule: the case concerned the determination of the precise moment when fish become 'goods' for the purpose of customs. Whereas the French, Italian, Greek, Danish and Dutch texts of the relevant Community legislation on the origin of goods referred to the decisive moment as 'extraction from the sea' (*extraits de la mer*)—ie the physical separation of the fish from its natural

[3] Generally on the topic, see, eg G Van Calster, 'The EU's Tower of Babel. The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language' (1997) YEL 363; Lutterman, '*Rechtsprachenvergleich in der Europäischen Union*' (1999) *EuZW* 154; and B Pozzo and V Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Alphen aan den Rijn, Kluwer Law International, 2006).

[4] Most recently in Case C-63/06 *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* [2007] ECR I-3239, para 13. For further examples, see: Case 26/69 *Stauder v Stadt Ulm* [1969] ECR 419, para 3; Case 55/87 *Alexander Moksel Import und Export GmbH & Co Handels-KG v Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845, para 15; or Case C-296/95 *R and Commissioners of Customs and Excise, ex p EMU Tabac SARL, The Man in Black Ltd and John Cunningham* [1998] ECR I-1605, para 36.

[5] *UAB Profisa*, above n 4; see also instructive Opinions of the Advocates General in Case C-227/01 *Commission v Spain* [2004] ECR I-8253 para 22–8; and Case C-371/02, *Björnekulla Fruktindustrier AB v Procordia Food AB* [2004] ECR I-5791 para 34–43.

[6] Case 100/84 *Commission v United Kingdom* [1985] ECR 1169. See also the very helpful and literarily rich Opinion of AG Mancini, 1170–6.

environment—the German version was satisfied with the moment when the fish is caught (*gefangen*). The English text—'taken from the sea'—appeared to lie somewhere in between these two meanings. The Court of Justice noted that the comparative examination of the various language versions did not enable a conclusion to be reached in favour of any of the language versions, despite the fact that a clear majority of the language versions would hint in the direction of determining the relevant factor to be the moment at which the fish is genuinely separated from its natural environment.[7]

The prohibition of majoritisation is absolute; it is applicable not only in situations such as that described above—ie where there is a genuine divergence in the meaning of a Community rule in various languages—but also in cases of evident shortcomings or mistakes in translation of Community legislation. After the 2004 Enlargement (and presumably also after the 2007 one), instances of both phenomena have been numerous. Shortcomings in translation are typically caused by disregard for the established legal terms already extant in legal language or by disregard for already established Community terminology in the language into which the text is being translated.[8] Mistakes were caused by the hasty translation of tens of thousands of pieces of Community secondary legislation. However, even in cases of clear mistakes in the translation of secondary legislation, the prohibition of majoritisation remains.

The *UAB Profisa* case[9] provides the latest example: the case concerned the Lithuanian transposition of the Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages.[10] An erroneous translation of the Directive into Lithuanian considerably restricted the grounds upon which an importer of chocolate products containing ethyl alcohol could be exempted from excise duty. The national implementing law just copied the narrow definition from the wrongly translated Directive and denied the importer in question the possibility of exemption from duty. It appears that, in the particular case, the meaning in all other official languages was clear,[11] demonstrating that a translation mistake had occurred in the Lithuanian version. However,

[7] Opinion of AG Mancini, *ibid*, 1182 (para 16).

[8] See, eg Case 55/87 *Alexander Moksel Import und Export GmbH & Co Handels-KG v Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845, in which a similar problem arose because of a divergence in terminology in German translations of Community Regulations and the introduction of a new term '*Werktag*' without clarifying its relationship to the already extant '*Arbeitstag*'.

[9] Case C–63/06 *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* [2007] ECR I-3239.

[10] [1992] OJ L316/21.

[11] As was argued by the European Commission, which was perhaps the only subject which was genuinely able to compare, in its submission, all the then equally authentic 20 versions of the provision in question (written observations submitted on behalf of the European Commission of 22 May 2006 in Case C-63/06 *UAB Profisa*, ref JURM(2006)3084-FR, 5–8).

even in this case the Court of Justice maintained that one language version cannot be 'outvoted' by the contrary and clear meaning of the other 19.

The preceding two principles are only capable of detecting problems between the various language versions of the text. They are, however, unable to answer the question: what is the 'correct' meaning? In reality, they have quite the contrary effect: after considering other language versions, a difference in the various texts is detected. This divergence cannot, however, be solved on the basis of simple reassertion of how many languages lean in one direction and how many in the other, ie by some form of language 'voting'. If the two preceding principles were to be left on their own, they would create an impasse. The divergence is bridged by resorting to a third principle, which allows us to overcome the stalemate: one is allowed to disregard the conflicting language versions in favour of the systematic or purposive reading of the statute, which is independent of the conflicting texts. In the words of the Court of Justice:

> Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[12]

This particular approach meant, for instance in the already discussed case of *Anglo-Polish Fishing*, resorting to the intention of the Community legislature and to systematic interpretation of the rules on the origin of goods in Community law.[13] In the *UAB Profisa* case, the decisive aspect was the objective pursued by the exemptions and the systematic reading of the Directive,[14] which meant that the exemption from duty of those products covered by the provision was the rule, and refusal to exempt was the exception.

Theoretically, the principles of comparative linguistic interpretation, together with the principle of equal authenticity of all the linguistic versions could, if taken to the extreme, be interpreted as meaning that the content of a Community legal norm is not contained in, for example, its French or English version, but only in the aggregate of all the authentic language versions. Correct literal interpretation[15] of any single piece of Community

[12] Case C-1/02 *Privat-Molkerei Borgmann GmbH & Co KG v Hauptzollamt Dortmund* [2004] ECR I-3219, para 25; Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co HandelsgesmbH v Oberösterreichische Landesregierung* [2000] ECR I-1157, para 42; or Case C-372/88, *Milk Marketing Board of England and Wales v Cricket St Thomas Estate* [1990] ECR I-1345, para 19.

[13] Above n 4, paras 18 and 19.

[14] Above n 4, paras 17 and 18.

[15] One should be mindful that the comparison of the various language versions of the Community legislation forms a part of literal interpretation of the rule. It is not, for which it is commonly mistaken, comparative reasoning as such.

legislation which is drafted in more languages[16] must thus involve the parallel reading of all of the language versions.

B. The Judge Knows the Law

Most of the continental civilian systems are based upon the assumption expressed in the old Roman maxim '*iura novit curia*'—the court knows the law. It means that a judge is obliged to apply valid laws *ex officio*, ie of his or her own motion. If he or she disregards this obligation, a decision may be quashed on appeal and/or the state may incur liability. The correlative privilege of the parties to the dispute is not to have to argue points of law: instead, they may simply deliver the facts of the case before the judge.

This maxim is still present in the Central European legal systems and the legal theory of the new Member States. For instance, both the Czech and Slovak procedural rules, the Code of Civil Procedure, are based upon the assumption that the parties to the dispute are obliged to prove only their factual statements. Conversely, they are not obliged to prove the valid law published in the official collection of laws.[17]

The Court of Justice's case law concerning the knowledge of the national judge in respect of the Community legislation is basically an extension of these national principles. When assessing the duty of the national judge to apply Community law *ex officio*, the Court of Justice examined the issue and sent it back to the national level: national courts are not obliged to raise issues concerning a breach of Community law of their own motion, provided that national regulations do not require them to do so with respect to national law.[18] If the question were to be returned to the national level, and the principle of equality applied, the conclusion would be that judges

[16] But not necessarily all: there are now linguistic regimes in Community law which reduce the number of official languages to, for instance, five. See Art 115 of Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark, [1994] OJ L11/1, which limits languages of the OHIM to English, French, German, Italian and Spanish. See also Case C-361/01 P *Kik v OHIM* [2003] ECR I-8283, especially paras [88]–[94].

[17] Art 121 *zákon č 99/1963 Sb, soudní řád správní* (Code of Civil Procedure). The Czech version of the provision, which has remained the same for both countries from the times of the Czech and Slovak Federation, refers only to the Czech Collection of Laws, whereas the Slovak provision, which has been in the meantime amended, expressly also includes the Official Journal of the European Communities.

[18] Joined Cases C-430 & 431/93 *Jeroen Van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, paras 13–15; Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599, paras 12 & 14; and Case C-72/95 *Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paras 58 & 60. Most recently, see Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, judgment of 12 February 2008, para 45. See further, eg S Prechal, 'Community Law in National Courts: The Lessons from *Van Schijndel*' (1998) 35 *CML Rev* 681.

in most new Member States are indeed obliged to raise points of EC law of their own motion, and actively to seek and apply the relevant EC law.

C. The Judge as a Comparative Lawyer

Comparative methodology plays, at least again in the official narrative, an important role in the development of the Community legal order, both before the Court of Justice itself[19] and also in national courts. There is no doubt that reference to the decisions of the courts of other Member States interpreting and applying Community law can be a valuable source of inspiration. Moreover, Article 10 EC and the duty of sincere and loyal cooperation entail not only a diagonal dimension (Community institutions–Member States), but also a horizontal dimension, which involves the authorities of the Member States, inclusive of courts. References in Member State courts to the decisions of the courts of the other Member States applying EC law would thus border on the advisable use of comparative legal reasoning before national courts.[20]

The duty of national judges in matters of comparative methodology, however, does not stop at the level of the 'advisable'. At least for national courts of last instance when relying upon the *acte clair* doctrine, there is a duty to use comparative reasoning and to compare their interpretation of Community law with the interpretation reached in the courts of other Member States. In the words of the Court of Justice, national courts of last instance shall make sure that a matter of interpretation of Community law 'is equally obvious to the courts of the other Member States and to the Court of Justice'.[21]

The Court of Justice has never specified precisely how the national courts are to ensure that their interpretation is equally obvious to their counterparts in other Member States. Is this to be achieved by a detailed comparative study of the decisions of other European courts of last instance? Or by considering at least some of them? Advocate General Poiares Maduro, writing extra-judicially, recently offered a 'milder' interpretation of this particular obligation imposed upon national courts by

[19] See further K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *ICLQ* 873.

[20] See, eg U Drobnig and S Van Erp (eds), *The Use of Comparative Law by Courts. XIVth International Coungress of Comparative Law, Athens 1997* (The Hague/London/Boston, Kluwer Law International, 1999); or U Uyterhoeven, *Richterliche Rechtsfindung und Rechtsvergleichung. Eine Vorstudie über die Rechtsvergleichung als Hilfsmittel der richterlichen Rechtsfindung im Privatrecht* (Bern, Verlag Stämpfli, 1959). In Drobnig's classification, this type of use of comparative argument would fall into the 'advisable' category.

[21] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 16.

the Court of Justice. In his view, the core of the *CILFIT* doctrine is the obligation of the national judicial body to justify its decisions in a universal manner by reference to the EU context. The decision must, furthermore, be grounded in an interpretation that could be applied by any other national court in similar situations.[22]

The most recent opportunity for the Court of Justice to clarify (or perhaps substantially to reformulate) this aspect of the *CILFIT* decision came in the *Intermodal Transports* case.[23] In this case, the Court of Justice was asked by the Dutch *Hoge Raad* (Supreme Court) what persuasive value a national court of last instance is to place on an administrative decision concerning the same issue, but originating from another Member State, which runs contrary to the interpretation which the national court is otherwise minded to adopt. In the case at hand, a Dutch company was involved in a dispute before the national customs authorities regarding the classification of tractors in the combined nomenclature of the Common Customs Tariff. In the course of the judicial proceedings regarding the argument about the proper sub-heading under which the tractors were to be put, the Dutch company submitted to the Dutch court a binding tariff information issued by Finnish authorities, concerning the same type of tractor, but issued to a third party, a Finnish company. The question asked by the *Hoge Raad* in respect of this document was whether or not the production of such a document in the course of judicial proceedings before a national court of last instance, which wants to give ruling running counter to that document, automatically triggers the *CILFIT* scenario and thus means that the issue is not equally clear to the courts of other Member States, with the ensuing duty to refer the question to the Court of Justice.

In a nutshell, the decision of the Court of Justice stated two things. First, it restated the *CILFIT* criteria. Secondly, it noted that the *CILFIT* criteria do not apply in respect of the decisions of administrative authorities of other Member States:

> [A] court cannot be required to ensure that, in addition, the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities.[24]

It would thus appear that, as far as the requirements of the Court of Justice are concerned, lower courts would be well advised to use the argumentative help and inspiration from the decisions of their colleagues in other Member States, whereas Member States' courts of last instance are under a

[22] M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 18.

[23] Case C-495/03, *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151.

[24] *Ibid*, para 39.

duty to consider the judgments on the same matters handed down by *their* counterparts in other Member States.

D. The National Judge and the European *Telos*

Much has been written about teleological reasoning in European law: from praising it as the key method in the interpretation of Community law, characteristic of the treaties establishing the Communities,[25] to calling it the cause of the Court of Justice 'running wild'.[26]

Teleological reasoning in (not only) Community law is a sort of consequentialist reasoning, ie reasoning from a positive or negative consequence.[27] The extensive use of teleological reasoning in Community law is a necessary consequence of the nature of the European legal order. Within a system of attributed competence and limited regulation which merely adds to the national legislative framework without, however, creating a complete regulatory system of its own, Community law, if viewed as a normative system of its own, is by definition incomplete. It often also differs in regulatory style: especially in primary law, one often encounters just result-oriented norms, which do not specify the way in which the aim is to be achieved. Moreover, as has been shown above, the multilingual character of Community norms also fosters the need for greater recourse to purposive or systematic reasoning which helps to smooth out the discrepancies between the respective language versions. All of these factors contribute to the rise of the teleological reasoning; absence of a clear text must be supplemented by reasoning out of consequence.

Although there is a very close link between teleological reasoning and the '*effet utile*' argument, they are not the same.[28] The rule of effectiveness constitutes a value choice within teleological reasoning itself: the identified purpose ('*telos*') is the effective functioning of Community institutions and

[25] P Pescatore, '*Les objectifs de la Communauté européenne comme principes de l´interprétation dans la jurisprudence de la Cour de justice*', quoted from F Dumon, '*La jurisprudence de la Cour de justice—Examen critique des methods d'interprétation*' in *Rencontre judiciaire et universitaire 27–28 septembre 1976* (Luxembourg, Office for Official Publications, 1976) III-80.

[26] H Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff Publishers, 1986).

[27] The reasoning employed by the Court of Justice provides ample examples of both. For reasoning from a positive consequence see, eg Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECR English special edition 1 ('[t]he Community is a new legal order of international and it thus must have the following characteristics'); for reasoning from a negative consequence see, eg Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297 ('[i]f we do not allow for damages for private breaches of Community competition rules, the effective enforcement of EC competition rules on the national level will be compromised').

[28] See H Kutscher, 'Méthodes d´interprétation vues par un juge à la Cour' in *Rencontre judiciaire et universitaire 27–28 septembre 1976* (Luxembourg, Office for Official Publications, 1976) I-39 *ff*.

the exercise of their powers. The argument from *effet utile* thus constitutes a certain type of teleological reasoning.

In interpreting and applying Community law in the national legal order, judges should consider Community objectives and the purpose which the relevant piece of Community legislation seeks to attain. This requirement is strongly visible in many areas of the case law of the Court of Justice, most notably perhaps as concerns the principle of the effective protection on the national level of individual rights derived from Community law; in following this purpose (and seeking to achieve this consequence), national judges are entitled and also required to do pretty much anything, including the disapplication of over-restrictive provisions of the national constitution.

III. THE PRACTICE IN THE NATIONAL COURTS: MISSION IMPOSSIBLE?

Now let us turn back to the national level and try to paint, perhaps, a more realistic picture of what national judges do, and what they can reasonably be expected to do, when interpreting and applying EC law on the national level.

A. Judicial Linguistics

Following the 2004 enlargement, the language of Community legislation has become partially a nightmare, partially a rich source of cynical amusement and, above all, the cause of considerable legal uncertainty. As early as 1985, Advocate General Mancini famously noted:

> I doubt whether Marguerite Yourcenar or Graham Greene would be prepared to read each morning a piece or two of Community legislation '*pour prendre le ton*', as Stendhal used to read articles of the Code Civil.[29]

It is, however, submitted that following hasty translations of tens of thousands of pieces of Community primary and secondary law into the languages of the new Member States, these language problems have reached new depths and have acquired a completely new dimension.

To start with, there were no official translations of the Community legislation available in the new Member States at the moment of the 2004 Accession.[30] The Court of Justice has so far addressed this issue in two

[29] AG Mancini's Opinion in Case 100/84 *Commission v United Kingdom* [1985] ECR 1169, 1173.

[30] See further M Bobek, 'The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States' 9 (2006–7) *CYELS* 43.

decisions,[31] admitting in both cases, directly or indirectly, that there were actually no binding and duly published versions of Community legislation in the languages of the new Member States. As far as the position of individuals is concerned, in the recent *Skoma-Lux* judgment the Court of Justice observed that Community law,

> precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State, where that language is an official language of the European Union, from being imposed on individuals in that State.[32]

Taking into account the considerable impact the decision could have upon the decisions already adopted on the national level, it appears that in the *Skoma-Lux* ruling the Court of Justice sought to limit the temporal application of its decision. It stated that its decision should not applicable to national decisions adopted prior to the decision, with the exception of 'decisions which had been the subject of administrative or judicial proceedings at the date of this judgment'.[33] It added that Member States are not, under Community law, obliged to call into question decisions which have already been adopted.

However, this approach (of acknowledging an 'already closed chapter') is in fact negated in the following paragraph of the judgment in *Skoma Lux*, where the Court of Justice reopened the door to the potential litigants by stating that there still remained a possibility of reopening final decisions on the national level in cases of,

> exceptional circumstances where ... there have been administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights: it is for the competent national authorities to ascertain this within those limits.[34]

It remains to be seen what national practice makes of this statement when applying EC law. The exception is framed very broadly: almost any decision by which national authorities imposed financial penalties for disregarding unpublished Community legislation could be said to be an administrative measure of coercive nature, which touches upon a fundamental right—the right to property.[35]

[31] Case C-161/06 *Skoma Lux sro v Celní ředitelství Olomouc*, judgment of 11 December 2007; and Case C-273/04, *Republic of Poland v Council* [2007] ECR I-8925.

[32] Case C-161/06, *Skoma Lux sro v Celní ředitelství Olomouc*, *ibid*, para 74.

[33] *Ibid*, para 71.

[34] *Ibid*, para 73.

[35] It appears that the approach of the Czech administrative judiciary following the *Skoma-Lux* judgment would be to consider any penalty imposed upon an individual on the basis of unpublished EC legislation as infringing fundamental rights and reviewable by the court of its

The enduring problem, however, is the quality of the translations of the Community legislation: inconsistency in terminology, mistakes in translation, parts of legislation which are incomprehensible. These problems, unfortunately, concern not only the pre-accession *acquis*, which had to be translated *en bloc*, but extend to secondary legislation published after the accession.

Mistakes and inconsistencies are gradually being detected and removed by corrigenda published in the Official Journal of the European Union. One would nonetheless assume that the issue of a corrigendum is designed for correcting typing or typesetting mistakes, not substantively changing and in fact rewriting the content of the legal measure. This is often not the case: for instance, Commission Regulation (EC) 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) 338/97 on the protection of species of wild fauna and flora by regulating trade therein was published in the Czech version of the Official Journal on 19 June 2006.[36] It entered into force 20 days later and the administrative authorities started applying it. More than a year later, in August 2007, a corrigendum of the Czech version of the Regulation was published in the Official Journal of the EU.[37] The corrigendum contains no fewer than 122 corrections in a Regulation composed of 75 articles: ie more or less every article is amended twice, including the title of the Regulation itself. The corrections are no mere typing mistakes, but de facto substantive amendment of the entire Regulation. They include changing singular forms into plural, turning positive statements into negative ones, and changing the nature of a list of conditions to be fulfilled—from requiring at least one of the criteria to be met into the requirement that all of the criteria must be met. What now for the tens or perhaps already hundreds of administrative decisions which have been issued by the Czech authorities in reliance upon the text of the Regulation as originally published in the Official Journal and which are now not in conformity with the 'corrected' version of the Regulation?

These and other instances of language incomprehensibility create an overall perception of considerable legislative instability, even chaos, in relation to Community legislation in the new Member States. But let us return to the original motive of this section: the judicial interpretation of

own motion—see the judgment of the Supreme Administrative Court of 24 January 2008, case no 9 As 36/2007 available at <http://www.nssoud.cz> accessed 13 August 2008. The case concerned a penalty imposed upon a lorry driver for the disregard of the compulsory rest periods defined by Council Regulation (EEC) 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, [1985] OJ L370/1. In the course of the proceedings, the court noticed of its own motion that the Regulation had only been published in Czech on 1 September 2004, whereas the penalty was imposed following a police control conducted on 12 May 2004.

[36] [2006] OJ L166/1.
[37] [2007] OJ L211/30.

Community law by consulting more (or perhaps all) language versions of the Community legislation. What is the reasonable potential of a national judge in such situations?

Of course, national judges do not normally read any language versions other than their own; not even (or perhaps especially not) the judges of last instance courts, upon whom the Court of Justice has laid a specific duty in this sense.[38] One can only reasonably expect a judge to look into another language version of a piece of Community legislation where the degree of incomprehension of the national version reaches the stage at which the interpretation of the piece of legislation in the national language alone would lead to absurd results. Comparing language versions could thus be conceived of as an alternative to a 'mischief rule' or a 'rule against absurdity'.

Conventionally, one understands methods or 'canons' of legal interpretation as the way of eliminating uncertainties in the interpretation of a legal provision. In other words, the methods of interpretation are there to help the interpreter to arrive at a reasonable reading of the norm, not to create additional problems. The requirement of a comparative linguistic exercise in 23 languages (or even in any lower, more manageable number of languages) does little but create problems. Considered from this perspective, the comparative language exercise is often not a 'method of interpretation', but instead a 'method of obfuscation' of a legal provision.

The comparison of the various language versions typically leads to greater confusion and legal uncertainty. Its impact is to release the interpreter from the text of the rule itself: the interpreter detects, with the reference to divergence between the various language versions, an inconsistency in the various language versions; the only way of overcoming the inconsistency is by setting aside the wording and, by relying upon a systematic or purposive reading of the text of the law, to reformulate the rule. The requirement of the comparative language exercise thus can, in some instances, operate as a tool for defiance of the text of the legal provision.

That may be one of the main reasons, obviously apart from linguistic competence itself,[39] why national judges virtually never follow the Court of Justice's guidance as far as the comparison of the various language versions is concerned. On the rare occasions when national courts actually attempt to conduct anything which could be called a comparison of the various language versions: first, they limit themselves to one or only few

[38] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 18.

[39] Which is more assumed than real; the proof of knowledge of at least one foreign language is not a condition for the appointment to the judicial office in either the Czech Republic or Slovakia, nor, to the knowledge of the author, in any other of the new Member States. On the other hand, this is not anything in which the new Member States would deviate from the practice in the old Member States.

of the more significant languages within the Community (English, French and German, occasionally Italian or Spanish); and secondly, the reference to other language versions is used as a confirming argument in support of the conclusion already reached via interpretation of the text in the national language.[40] Additionally, the depth of the argument tends to be quite far from genuine language comparison; the practice is just to place two or three notions in the foreign language in parentheses next to the word or notion in the original language. The persuasive value of such an enterprise is questionable.

What can be a realistic role of the comparison of the various language versions of the Community legislation in national court?[41] Its role should perhaps be limited to a 'mistake verification' exercise: ie to instances in which the judge or an attorney detects an obvious error in the national version of the Community provision and needs to verify whether or not it is a mistake in translation (or, euphemistically put, 'co-drafting'). Realistically, the comparative study will be limited to one, two or three major languages, typically English, French or German.[42]

B. The Limits of Knowledge

Out of all the requirements examined in this chapter which have been imposed by the Court of Justice on national courts concerning the application of EC law in national courts, this one is perhaps the least problematic. In cross-referring the issue back to the national procedural law, the Court of Justice appears genuinely to have remained faithful to the (often

[40] For instance, in a series of recent decisions concerning the interpretation of the Protocol on Asylum for Nationals of Member States of the European Union, [1997] OJ C340/103, the Czech Supreme Administrative Court used references to the English, German and French versions of a provision of Art 1 of the Protocol just to confirm that the meaning of the provision was equally vague in the other languages as well: see judgment of 19 July 2006, case no 3 Azs 259/2005, no 977/2006 Coll SAC. In another recent decision, *Krajský soud v Ostravě* (Regional Court in Ostrava) confirmed, by reference to the English, French, German and Slovak versions of the Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [1987] OJ L256/1, that a problematic listing in a provision is indeed supposed to be a non-closed list—judgment of 4 December 2007, case no 22 Ca 167/2007, unpublished.

[41] Or perhaps in the Court of Justice itself? See the surprisingly frank remark by AG Jacobs in Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6518, para 65 of the Opinion, in which he noted, with respect to the *CILFIT* requirements as far as comparing various language versions are concerned, that it is somehow exaggerated to require from Member States courts something that even the Court of Justice does not normally do itself.

[42] Which also makes sense because, as far as Community legislation of the last years is concerned, more than 70% of it is drafted in English, about 15% in French and the rest (15%) in other languages, out of which German is the strongest 'small' drafting language. This means that, if a court consults these language versions, there is a high chance that it is actually reading the 'original' text. (Figures originating from DG Translation Information Booklet 'Translating for a Multilingual Community' (Luxembourg, Office for Official Publications, 2007) 6.)

more rhetorical than real) 'procedural autonomy' of the legal orders of the Member States. Community law is to be applied in the same manner as national law: if the judge is obliged to know the national law and raise it of his or her own motion, so Community law must be treated in the same fashion by the national judge. The principle of equivalence seems not (yet?) to have been pushed to the side by the requirement of effectiveness.

The problem with the national knowledge of Community law is, at least in the judicial context of the new Member States brought in by the last two waves of EU enlargement, of a different nature: the assumption that judges know the law has been gradually eroded from within the national legal system, without, however, the necessary adjustment of the rules of procedure. The legislative frenzy of the past two decades, caused initially by the end of Communist rule and the need to reshape the entire legal system, and then later by the approximation of laws and the complete renewal of the legal order, has resulted in what one justice of the Czech Constitutional Court has called 'deconstruction'[43] of the legal order. Avalanches of amendments and new legislation cannot leave even the greatest legislative optimist with the conviction that judges still know the law. It is clear that the maxim *iura novit curia* is no longer tenable, not only with regard to Community law, but to national law as well. What might have been a workable procedural solution in the era of centuries-old legal codes and legislative and judicial stability is no longer possible, given today's tens of thousands of pages of Community and national legislation and case law.

This has a clear impact upon national judicial behaviour and the appearance of EC law issues before national courts. In the initial stage of the application of EC law in the new Member States, EC law arguments have been raised solely or primarily by the parties' legal representatives. This is perhaps no surprise to the legal systems of the old Member States, especially those where the judicial procedure is more adversarial. To require, however, greater activity on the part of the legal representatives in the new Member States is quite a novelty as far as the position of the parties and the conduct of proceedings is concerned, since *iura novit curia* has bred inertia among legal representatives. It remains to be seen whether such novelty may eventually spill over into purely domestic cases, where quality legal representation will no longer be a matter of simply reiterating the facts and leaving the court to determine the law.

There is, thus, perhaps little point in asking the frequently posed question of the domestic (non-)application of EC law, trying to speculate how many cases pass through the entire national judicial system without

[43] In this context, Justice Holländer was referring to the Czech Code of Civil Procedure, which, within one year, had undergone 18 direct and indirect amendments: P Holländer, *Ústavněprávní argumentace* (*Constitutional Legal Reasoning*) (Prague, Linde Publishing, 2003) 11.

the EC law angles in them being detected. In this respect, it serves to be mindful that, with the exception of few specialised (mostly administrative) jurisdictions, for a national judge EC law is just the proverbial 'cherry on the cake', which appears in perhaps only a few per cent of the total number of cases with which the judge is regularly faced. For these reasons, and taking into account the special post-accession situation in the new Member States,[44] one can hardly expect that judges will know European Community law.

As far as the varying levels of knowledge of the new legal system in the new Member States is concerned, a rather anecdotal example may be provided with reference to the Slovak Republic. Under Slovak law, there is a special category of registered legal experts who may be called to provide expert evidence before the national courts on European law. These experts are registered with the Slovak Ministry of Justice.[45] The area of expertise for legal experts in Community law is classified as discipline '330000—Foreign Law', branch '330300—European law'.[46] This means that for the purpose of legal expertise, European law in Slovakia is still considered, more than three years after the Slovak accession to the European Union, to be 'foreign law'. One need only contrast this with the basic tenets of the Court of Justice, which not only presumes that the European legal system is 'integrated into the legal systems of the Member States',[47] but, as described above, also requires the courts of the Member States to apply Community law in the same way as they would apply national law. This would, in the case of Slovakia, mean the application of the entire body of EC law *ex officio*, ie by applying the principle that the judge knows the law.

As already mentioned, this is just an anecdotal example with little practical significance (or at least with no empirical evidence of its significance to date). The Slovak courts have already started applying EC law directly and of their own motion, some of them actually expressly acknowledging their duty to know European law, which is imposed not only by virtue of Community law and the case law of the Court of Justice, but also by the

[44] Especially the linguistic factors sketched above, which do not comprise only the absence of, or incorrect, translations of EC legislation: for instance, the entire pre-accession case law of the Court of Justice, which could provide some guidance, is inaccessible in the languages of the new Member States.

[45] Further see *zákon č 382/2004 Zz, o znalcoch, tlmočníkoch a prekladateľoch* (Law 382/2004 Coll, on legal experts, interpreters and translators) and *č 490/2004 Zz vyhláška, ktorou sa vykonáva zákon č 382/2004 Zz o znalcoch, tlmočníkoch a prekladateľoch* (Regulation 490/2004 Coll, regulation carrying out the law 382/2004 Coll, on legal experts, interpreters and translators).

[46] The registry of these experts is accessible online at <http://jaspi.justice.gov.sk/jaspiw1/htm_reg/jaspiw_maxi_regz_fr0.htm> accessed 13 August 2008.

[47] Eg Joined Cases C-6 & 9/90, *Andrea Francovich and Danila Bonifaci v Italy* [1991] ECR I-5357, para 31.

provisions of Slovak law.[48] After some hesitation,[49] the lower Slovak courts in particular have started to raise European law issues and apply EC law directly as well as indirectly, via the interpretive obligation (or 'indirect effect').

The remaining issue is whether the absence of such knowledge is only temporary or whether the maxim that 'the judge knows the law' begs the question: what is the reasonable knowledge of European law which one may expect a national judge to have?

The national case law of some of the older Member States could provide some guidance as to what might be a reasonable standard of knowledge of EC law for national judges. For instance, the German *Bundesverfassungsgericht* (Federal Constitutional Court) has declared itself ready to assess, via the individual constitutional complaint, whether or not ordinary courts of last instance have violated their duty to make a preliminary reference to the Court of Justice.[50] In doing so, it also indirectly examines whether or not the courts of last instance actually applied EC law correctly. The standard which the *Bundesverfassungsgericht* has applied when reviewing the decisions of the ordinary courts is, perhaps, somewhat lighter than a categorical obligation that judges should know all EC law. For instance, a 2001 decision[51] of the *Bundesverfassungsgericht* concerned a surgeon in Hamburg who wished to apply for the qualification of self-employed practitioner. For that, she had to have at least 12 months of full-time practice. Because of maternity leave, the surgeon sought to replace a part of the full-time practice requirement with the part-time one. Her requests in this respect were rejected and applications to the administrative courts, including the *Bundesverwaltungsgericht* (Federal Administrative Tribunal) acting as the court of last instance, were unsuccessful.

[48] Apart from the constitutional level, the duty to know the applicable Community legislation can be inferred from the provision of § 121 *zákon č 99/1963 Zb, Občiansky súdny poriadok* (Code of Civil Procedure) which provides that before the court, the parties are not obliged to prove 'legally binding acts, which were published in the Official Journal of the European Communities and the Official Journal of the European Union'.

[49] In a first instance decision, the *Okresný súd Bratislava II* (District Court for Bratislava II), for instance, refused to take into (any) account Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L382/17, which was invoked by the applicant, stating that '[t]he European Community Treaty provides for the binding force and the direct applicability, not necessitating any further implementation, only in the case of regulations and not in the case of directives. A non-transposed directive does not directly create any obligations. The invoked directive cannot thus be considered to be a legally binding act with any application on the territory of the Slovak Republic, as the directive cannot be found in the list of transposed measures': judgment of 11 October 2005, case no 42Cb/67/2005, accessible at <http://jaspi.justice.gov.sk> accessed 13 August 2008.

[50] BVerfGE 73, 339 (366); BVerfGE 82, 159 (194); Order of 21 May 1996—1 BvR 866/96—NVwZ 1997, 481; Order of 5 August 1998—1 BvR 264/98—DB 1998, 1919.

[51] BVerfG, 1 BvR 1036/99 of 9 January 2001, accessible online at <http://www.bverfg.de/entscheidungen/rk20010109_1bvr103699.htm> accessed 13 August 2008.

The *Bundesverfassungsgericht* quashed the final decision of the *Bundesverwaltungsgericht*, holding that the approach taken by the administrative court was unacceptable for two reasons: first, the *Bundesverwaltungsgericht* had not dealt with the recognised conflict between the national law and the relevant Community Directives and did not identify or apply any case law of the Court of Justice. Secondly, the administrative court had not taken into account a fundamental principle of Community law, namely the prohibition of discrimination on the basis of sex.[52]

It may be submitted that the view taken by the *Bundesverfassungsgericht* represents a more realistic view of what knowledge of EC law may be reasonably expected from national judges. They should be aware of the basic principles of EC law, such as the prohibitions of discrimination on the basis of nationality and sex, basic rules of consumer protection, the duty of loyal and sincere cooperation, etc. If these matters are raised by the parties, national judges are of course obliged to deal with the more detailed regulatory issues. This is perhaps what might (one day) be reasonably required of domestic judges: to be aware of the principles and if asked, to be able to navigate within the system of Community law.

C. Why Compare?

Despite the numerous recent doctrinal calls for judicial dialogues, judicial conversations or even a global community of courts,[53] national judges are not comparative lawyers and never will be. From all the requirements on the methodology of national courts, presented in this chapter, this one is perhaps the most distant from reality. There are as good as no examples in which a national court of last instance would at least try to ascertain the opinion of other national courts. It is only a slight exaggeration to say that, simply, there is no European Community of courts: there are just 27 national clusters, each rooted in their national system and methodology.

This is not to say that there is no comparative law exchange. This exchange, however, is typically indirect: ie through the doctrine and academic writings, which do take into account the issues and practice of the implementation and application of EC law in other Member States. The rather rare instances of any direct and express comparative

[52] *Ibid*, para 20.

[53] From the vast literature see, eg A-M Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 4 *OJLS* 499; and VC Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 1 *ICON* 91.

argument in the judgments of the higher courts[54] tend to follow the already established historical patterns of comparative authority; for instance, traditionally the Central European states have been, as far as legal theory and comparative law are concerned, under a strong German influence.[55] If any comparative argument is attempted, the traditional point of inspiration has been German law and especially the case law of the *Bundesverfassungsgericht*.

It is highly unlikely that any of the decisions of national courts would satisfy even the comparative core of the *CILFIT* doctrine: ie last instance decisions of national courts are to be placed in an EC law context, so that they could be applied by any other national court in a similar situation.[56] National courts follow their particular interests and national methodology; it is difficult to see how, for example, a Slovak Supreme Court decision could be freely transferable to the reasoning conducted by the English Court of Appeal.

The reasons why national courts do not engage in any significant comparative exercise in the interpretation of Community law on the national level are multiple. To a great extent, they overlap with the reasons why municipal courts use comparative reasoning as such only very rarely: from the practical constraints (time, resources, accessibility of materials, language barriers, limited utility of the comparative exercise, etc) through the procedural ones (rules of procedure, absence of party intervention, absence of third-party briefs, etc) to political or economic ones.[57] As aptly captured

[54] In the Czech Republic, for instance, one has to mention the plenary decision of the Czech Constitutional Court on the European Arrest Warrant, in which the Court considered in its reasoning case law on the EAW from Poland and Germany: see *EAW Case*, judgment of 3 May 2006, case no Pl ÚS 36/05, published in Czech as no 434/2006 Coll; the full English translation is available at <http://www.concourt.cz> accessed 13 August 2008. Another attempt is the judgment of the Czech Supreme Administrative Court of 27 September 2006, 1 Ao 1/2005, which concerned the transferability of mobile telephone numbers between various operators and the domestic implementation of Council Directive 2002/22/EC of the European Parliament of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive'), [2002] OJ L108/51. In assessing the issue, the Court sought inspiration in the German, French and Belgian implementation of the Directive. Absent any useful comparisons, the entire intra-Community comparative element was discarded and did not appear in the reasoning itself.

[55] For the description of the situation in 1990s see, eg JA Frowein and T Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht. Band 130* (Berlin/Heidelberg/New York, Springer Verlag, 1998); more particularly on Hungary, see L Sólyom and G Brunner, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (Ann Arbor, The University of Michigan Press, 1999).

[56] Maduro, above n 22.

[57] For an introduction to this debate see, eg B Markesinis and J Fedtke, *Judicial Recourse to Foreign Law—A New Source of Inspiration?* (Abingdon, UCL Press and Taylor & Francis Group, 2006); or G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (London, BIICL, 2004).

by Sir Konrad Schiemann, when reflecting upon the academic calls for greater use of comparative methodology by national courts:

> I have the impression that academics tend not to be sufficiently conscious of the unremitting pressure a judge is under to produce an adequate judgment soon rather than a better judgment later. The lower down the judicial ladder a judge finds himself the greater that pressure is in general. But I was very conscious of it even in the Court of Appeal in England.[58]

There would perhaps be a realistic way of making national judges aware of parallel decisions rendered in the application of EC law in other Member States: by delegating to the legal representatives of the parties the task of identifying the cases from other Member States and bringing them to the attention of the national judge. This approach may already function in those jurisdictions where parties are to argue points of law as well; however, in the inquisitorial systems of procedure present in most continental countries,[59] the legal representatives of the parties tend to limit themselves to the restatements of facts.

From this perspective, the decision of the Court of Justice in the *Intermodal Transports* case[60] (described above) is not to be welcomed; it may actually dissuade the parties from becoming active and looking for themselves for cases in other Member States. After *Intermodal Transports*, why should an individual or his or her legal representative invest any time or energy in identifying relevant decisions from another Member States if the national court of last instance is not obliged to submit a request for a preliminary ruling if it wishes to deviate from the approach already taken elsewhere?

However, it should be admitted that nothing precludes the national judge to perceive an administrative decision from another Member State to be persuasive. It should also be stressed that *Intermodal Transports* only concerned the argumentative value of another Member State's national administrative decisions in the courts of that other Member State; the persuasive force of *judicial* decisions from that Member State should, and perhaps would, be assessed differently.

D. Whose *Telos*?

There is no reason to think that national judges would not be able to employ purposive reasoning in their decision-making. As a matter of fact,

[58] K Schiemann, 'The Judge as Comparativist' in B Markesinis and J Fedtke, *Judicial Recourse to Foreign Law—A New Source of Inspiration?* (Abingdon, UCL Press and Taylor & Francis Group, 2006) 369.

[59] See RG Fentiman, 'Foreign Law in National Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (London, BIICL, 2004) 13 and 15.

[60] Above n 23.

they sometimes do. The key question is whether, and where, the national '*telos*' overlaps with the European one. As will be examined below, the purposes and values of Community and national judges in a particular case may be identical. They may, however, differ. The question then becomes whether or not the values and purposes put forward by Community law are still within the realm of an acceptable compromise for the national court or whether they fall outside of it. Should the latter be the case, the rejection of purposive reasoning and the positivist exegesis of the (typically national) law serves as a useful and diplomatic way of saying 'no'.

The classical objection to the use of purposive reasoning is its unpredictability and lack of democratic legitimacy: judges are not called to place their normative preferences or values into the law; that is the task of the legislator.[61] In its Community guise, the problem with the use of purposive reasoning is not so much the unpredictability of the value choice of the judge; on the contrary, it is the fact that recourse to teleological reasoning by the Court of Justice almost always leads us on a journey to a well-known destination called '*effet utile*'. The problem with the case law of the Court of Justice for a significant number of national judges might well be the fact that purposive reasoning is often reduced to one and only one purpose: the full effectiveness of Community law, which is turned into the crucial principle not allowing for any balancing or opposition.[62]

Before and shortly after the 2004 enlargement, considerable scepticism had been expressed concerning the abilities of the 'new European judges', including inter alia their (in)ability to use purposive reasoning. The judges in the new Member States were said to be trapped in the realms of mechanical jurisprudence and textual positivism, unable to apply abstract legal principles; they were said to have a negative attitude towards teleological (purposive) argumentation and to be incapable of using comparative legal arguments.[63] Although the judicial standards in the new Member States could always be improved, these fears were perhaps too pessimistic. As is evident from the practice of Czech and Polish courts, the national courts are very well able to work with persuasive authority and to employ purposive reasoning.

As a matter of fact, the vast majority of judicial application of EC law has so far been within the framework of the persuasive, non-binding authority.

[61] For a classic account, see A Scalia, *A Matter of Interpretation* (Princeton, New Jersey, Princeton University Press, 1997) 3–48.

[62] See R Procházka, '*Prekážka rozhodnutej veci—judikatúra Súdného dvora ES a jej dopad na konanie vnútroštátnych súdov*' (*Res iudicata*—the Case law of the Court of Justice and its Impact on the Procedure before National Courts) (2007) 10 *Justičná revue* 1240, 1248.

[63] See Z Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions' (2005) 3 *German Law Journal* 565; similar remarks have been made, with respect to Croatia, by T Ćapeta, 'Courts, Legal Culture and EU Enlargement' (2005) *Croatian Yearbook of European Law and Policy* 23.

The area of greatest judicial application of EC law in the first three years following the accession has been the use of Community law in the form of the harmonious interpretation of national law with Community law. Here, I advisedly do not refer to this phenomenon as 'indirect effect', in order to avoid any confusion with the *obligation* of indirect effect, imposed upon national courts by the case law of the Court of Justice.[64] The key difference in this respect was the fact that, in most of the cases in which harmonious interpretation of national law with Community law has so far been used, the facts of the case arose before the accession. This meant that in these cases, even if they were being decided after the accession, the applicable (substantive) law was still domestic law as it stood before the accession (more precisely, at the moment when the relevant factual circumstances actually occurred).

At the same time, however, in quite a few areas of law, the duty to harmonise (or, more precisely, to approximate) national law with Community rules already existed before the accession itself. The candidate states had already assumed this duty well before the accession by virtue of the Association ('Europe') Agreements.[65] In a great number of areas of law relating to the internal market (competition, telecommunication, indirect taxation, consumer protection, company law, industrial property, etc), the necessary approximation steps were taken in the late 1990s or between 2000 and 2004. In many areas, the national law did not change on 1 May 2004, but had already been amended some months or even years before the accession.

Taking into account this normative reality, the Czech and Polish higher courts have formulated a doctrine of harmonious interpretation of the approximated national law with Community law. To take the example of the Czech Supreme Administrative Court, that Court has affirmed the possibility of using EC law as an instrument for interpreting approximated Czech legislation. It has applied Community legislation and the case law of the Court of Justice in a number of cases, now amounting to tens or perhaps already hundreds of cases. The Court, however, has made this 'self-imposed' consistent interpretation subject to two conditions:

(i) the interpreted national provision must have been adopted with a view to approximating the Czech law with the European model; and

[64] See, eg S Prechal, *Directives in EC Law* 2nd edn (Oxford, Oxford University Press, 2005) 180 *ff*.

[65] For instance, the key Art 69 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, [1994] OJ L360/2, read: 'The Contracting parties recognize that the major precondition for the Czech Republic's economic integration into the Community is the approximation of the Czech Republic's existing and future legislation to that of the Community. The Czech Republic shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community'.

(ii) the Czech legislator must not have demonstrated an express wish to deviate, as far as the particular provision is concerned, from the European model.[66]

This harmonious interpretation has two significant features. First, it is formulated rather in terms of the 'advisable' and 'suitable', and not as a general duty of consistent interpretation. Secondly, the 'suitability' of such interpretation is derived from national law and the decision of the national legislator to approximate its own legal order with Community law. It is not framed as an obligation arising from Community law itself. One can thus safely claim that judges in at least some new Member States are very well able to work with persuasive authority and to use European law as a de facto comparative argument.

Equally, as is evidenced in the handful of requests for preliminary rulings from the new Member States, some of them have learned rapidly how to use the new procedural tool and the techniques inherent in the reasoning out of European law in order to disapply problematic or obsolete national legislation.[67]

However, it is true that there are still considerable reservations as far as purposive interpretation is concerned. Central and Eastern European judges appear to display scepticism towards the teleological and *effet utile* style of reasoning used by the Court of Justice. This might be caused by their negative historical experience. Heretical though it may sound, there are some striking similarities between the communist/Marxist and Community approaches to legal reasoning, and the requirements of judicial activism placed on national judges.[68] Marxist law required, at least in its early (Stalinist) phase, that judges disregard the remnants of the old bourgeois legal system in the interest of the victory of the working

[66] Judgment of the Supreme Administrative Court of 29 September 2005, case no 2 Afs 92/2005–45, published as no 741/2006 Coll SAC. The holding has been accepted and applied in numerous other cases, eg judgment of 22 March 2007, case no 9 Afs 5/2007–70; judgment of 26 September 2007, case no 5 As 51/2006–287; judgment of 12 July 2007, case no 9 Afs 25/2007–95; judgment of 31 January 2007, case no 3 As 41/2006–122; and judgment of 31 January 2007, case no 7 As 50/2006–262. All decisions are accessible at <http://www.nssoud.cz> accessed 13 August 2008. For further information and discussion on this, see M Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States' (2008) 1 *Review of European Administrative Law* 51.

[67] The second-hand car importation cases from Hungary and Poland being a prime example: Case C-313/05 *Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie* [2007] ECR I-513; and Joined Cases C-290 & 333/05, *Ákos Nádasdi v Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága and Ilona Németh v Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága* [2006] ECR I-10115.

[68] Or, moreover, any freshly established dictatorial system, which in its first stage, seeks to eliminate the remnants of the previous legal order via interpretation—see, with respect to the situation in the Nazi Germany, B Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Thübingen, Mohr Siebeck, 1968).

class and the communist revolution. Judges were supposed to apply the law in an anti-formalistic, teleological way, always directing their aim towards the victory of the working class and the dialectic approach.[69] EC law requires national judges to set aside all national law which is incompatible with the full effectiveness of directly effective Community law, via such open-ended principles and aims as the full effectiveness of EC law enforcement or the unity of EC law across the entire Union. In a way, both approaches are similar: open-ended clauses take precedence over a textual interpretation of the written law. Often the desired result comes first, with a backward style of reasoning being used to arrive at it. The only visible difference is that the universal 'all-purpose' argument has changed—from the victory of the working class to the full effectiveness of EC law.

This comparison is, of course, exaggerated; yet there is a grain of truth in it. The scepticism towards a teleological style of reasoning, which has been shown by post-communist judiciaries in the new Member States, clearly has its historical roots. During the last decades of communist rule in Central Europe, legal formalism and strict textual interpretation of the law become a natural line of defence against the anti-formalistic teleological style of judicial reasoning officially required by party policy.[70] After the Velvet Revolution, a slow, timid emancipation of the judiciary began, but the historical distrust remains.

For these reasons, teleological reasoning might perhaps not be overwhelmingly welcomed in the new Member States' courts. Whether this is good or bad is open to question; there might, however, be some benefits for the Court of Justice itself in having national judges who remain to a reasonable degree faithful to positivistic reasoning, especially if the purpose (*telos*) pursued by Community law conflicts with the national one. Somewhat cynically put, in these scenarios, the aim of the Community is better served if national judges are limited positivists, who, on the one hand, accept the normative value of Community law and the case law of the Court of Justice, but, at the same time, refuse to have recourse to purposive

[69] See, eg F Boura, '*K otázce výkladu zákonů*' (*On the Question of Interpretation of Laws*) (1949) *Právník* 292, who, shortly after the Communist take-over in the former Czechoslovakia, argued (at 297) that 'the fundamental canon of interpretation is that the interpretation of any legal provision must be in conformity with the nature and aims of the peoples' democratic order'. On the formalistic and purposive reasoning in Communist law, see Z Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' (2004) *American Journal of Comparative Law* 531.

[70] See Z Kühn, *Aplikace práva soudcem v éře středoevropského komunismu a transformace Analýza příčin postkomunistické právní krize* (*Judicial Application of Law in Central Europe in the Communist and Transformation Eras. An Analysis of the Post-Communist Legal Crisis*) (Prague, CH Beck, 2005) 86. The same patterns and tensions concerning methodology were also discernable in Fascist Italy: see G Calabresi, 'Two Functions of Formalism' (2000) *University of Chicago Law Review* 479.

reasoning. Provided that there is case law on the matter in question, they are more likely to follow it instead of questioning it and starting to look for their own '*telos*'.

The reservations of the new Member States' judges with respect to purposive reasoning are often also age-related; older, higher court judges appear to be more positivistic than their younger, first instance colleagues. However, the approach might also differ within one single institution. A vivid example of diverging opinions on the role of purposive reasoning is provided by the internal split of the Czech Supreme Administrative Court in a case concerning town and country planning. The question which arose in a case before the Court was whether or not town and country plans can be reviewed before administrative courts. The first chamber of the Court held that it could;[71] in doing so, it relied extensively upon indirect effect of the Åarhus Convention[72] and the related Community directives,[73] one of the main grounds being the reasoning against a negative consequence of denying legal protection to individuals and the purpose of the public participation in environment matters. The legal opinion of the other chambers diverged and the issue was eventually submitted to the grand chamber of the Court, which is called to arbitrate in cases of conflicts between the chambers of the Court. The grand chamber, composed of the more senior members of the Court, reversed.[74] Its reasoning followed the classical Central European bipolar logic of binding and non-binding sources of law, neglecting any possible indirect effect and disregarding the purpose of the legislation in improving public participation in decision-making and access to justice in environmental matters.[75]

[71] Judgment of the Supreme Administrative Court of 18 July 2006, case no 1 Ao 1/2006, no 968/2006 Coll SAC.

[72] (United Nations) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Åarhus, Denmark, on 25 June 1998, which is a 'mixed' treaty, as the European Community and the Member States are parties to it (see Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2005] OJ L124/1).

[73] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, [2001] OJ L197/30; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L41/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, [2003] OJ L156/17.

[74] Judgment of the SAC (Grand Chamber) of 13 March 2007, case no 3 Ao 1/2007 accessible at <http://www.nssoud.cz> accessed 13 August 2008.

[75] The case is currently pending before the Czech Constitutional Court, where it was submitted as a constitutional complaint: case no Pl ÚS 14/07.

IV. THE GENUINE FUNCTIONING OF THE EUROPEAN LEGAL ORDER—'DON'T DO AS I SAY'

The sketch provided above reveals some puzzles as far as the day-to-day functioning of European law in national courts is concerned. The entire system appears to function only because, in terms of methodology, the national judges disregard much of what the Court of Justice requires of them. To be more precise: the majority of them are blissfully ignorant of the genuine requirements which the Court of Justice has imposed upon their methodology in the application of EC law. The few who actually do know soon become resigned and resilient. It is apparent that, if the national judges were genuinely to adhere to the Luxembourg guidance, the entire Community judicial system would collapse within months.

For instance, let us imagine that all of those national courts which are in functional terms[76] courts of last instance were genuinely to start following the *CILFIT* guidelines and refer all the non *acte éclairé* or *acte clair* cases to the Court of Justice. As no national court is able to meet the *CILFIT* guidelines, especially given how the requirements for the existence of *acte clair* are currently set, the national courts of last instance would turn themselves into post offices, just sending cases to Luxembourg. The amount of cases referred to Luxembourg would also be quite different if the national judges were really to start raising EC law issues of their own motion and not only if forced by the parties to do so. Equally, the number of problems in the interpretation of Community law would rise exponentially were the judges to start reading the legislation in several languages and comparing the various language versions, and so on. An intriguing literary inspiration for such potentially destructive effects of faithful obedience could be drawn from the behaviour of a Czech classic icon, the brave soldier Švejk, who disrupted the functioning of the Austro-Hungarian Army by following exactly the orders issued by his superiors.[77]

Apart from the methodological differences and the natural constraints upon the activity of national judges examined above, additional reasons for some national resistance to the Court of Justice's case law are typically twofold: the ambiguity of the Court's case law and what one might term 'value unacceptability'.

A. Ambiguity

Absent any real enforcement mechanism, European case law functions as de facto precedents due to various factors, the most important ones being

[76] See F Jacobs, 'Which courts and tribunals are bound to refer to the European Court?' (1977) 2 *EL Rev* 119.

[77] See J Hašek, *The Good Soldier Švejk and His Fortunes in the World War* (London, Penguin Classics, 2005).

(apart from value compatibility, which will be assessed below) the persuasive force and quality of its reasoning, which is able to deliver a clear line of case law, to the maximum degree possible free of internal contradiction. This is of course an ideal, which all supreme courts, being the precedent-setting courts, seek to approach. It is, however, also clear that the more complex and contradictory the case law becomes, the more ability to follow that case law is reduced and the greater the space for it to be disregarded. It is also likely to lead to an increase in the number of cases being referred to the Court.[78]

There are areas of EC law in which even specialised EC lawyers get lost. To mention just a few: the detailed implications of the doctrines of direct and indirect effect are a mess;[79] the Court of Justice does not appear to have a clear vision of the notion of discrimination; hardly anyone is able to maintain the difference between Article 30 EC exceptions and the mandatory requirements exceptions in the area of free movement of goods; and what precisely national courts are supposed to do with respect to final decisions which turn out to be incompatible with EC law is a puzzle to everyone. If viewed in connection with the possible Member State liability for national *judicial* disregard of the Court of Justice's case law,[80] one cannot help but agree that the Court of Justice 'sometimes entertains a very optimistic view on the clarity of its case law'.[81] It is obvious that if, in these and other areas, not even the experts are able to ascertain what the law is, how could one ask the same of national judges, who have but a fraction of the time which experts and academics can spend in the study of the case law of the Court of Justice?

Obviously, some areas of law are 'fresh' and as such they are still being developed; others need an 'update' and perhaps a change of the case law. There is nonetheless only a certain degree of change which national courts are able to register and follow. An example of an area of law where (not only) national courts have considerable difficulties following the case law is the duty (mentioned above) to reopen final national decisions which are incompatible with EC law: in 2004, this duty seemed to mean that a national

[78] Statistically, there appears to be a proportion between the number of decisions a supreme jurisdiction renders and the number of cases it receives from lower courts; the more decisions and case law a precedent-setting jurisdiction produces, the less predictable its case law gets and the greater the demand for new decisions from lower courts. See M Bobek, 'Quantity or Quality? Re-Assessing the Role of Supreme Jurisdictions in Central Europe', EUI LAW Working Paper No 2007/36 (online at <http://cadmus.iue.it/dspace/handle/1814/7663> accessed 13 August 2008); for similar reflections in the context of the work of the Court of Justice, see J Komárek, '"In the Court(s) We Trust?" On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32 *EL Rev* 467.

[79] See recently A Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?' (2007) *CYELS* 81.

[80] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

[81] PJ Wattel, '*Köbler*, *CILFIT* and *Welthgrove*: We Can't Go on Meeting Like This' (2004) *CML Rev* 177.

court was required to set aside a national decision which was incompatible with EC law.[82] Later in 2004, Article 10 EC and the requirement of effective protection of individual rights amounted to the duty to *reopen* final national decisions, provided that the administrative authority had such powers under national law.[83] In 2006, the principle was interpreted as not requiring national courts to reopen final judicial decisions incompatible with EC law.[84] Just a year later, in 2007, the same principle meant the opposite.[85] In 2008, the Court of Justice appears to be retreating somewhat, perhaps heading back to the equivalence principle originally announced in 2004.[86] Some commentators have aptly called such areas of case law 'instruments of disorientation'.[87] In the face of such 'guidance' from the Court of Justice, the most common (and hardly surprising) reaction from the national courts is to ignore the EC law angles in the domestic dispute altogether.

There is perhaps another reason why the decisions of the Court of Justice might be losing some of their persuasive force. In an understandable need to cut down the length and cost of the translation of the decisions at the Court of Justice, several measures have been taken. One of them is the return of the magisterial style of the judgments, which now tend to be shorter and shorter, especially as far as the summary of the arguments of the parties is concerned, which are cut considerably or sometimes missing altogether. The quality of the reasoning of the judgments and their persuasive force suffer as a result.[88]

Finally, it remains to be seen whether the situation in respect of these lasting problems will get any better with the current Court of Justice composed of 27 judges.[89] A judicial body of such size is no longer able genuinely to

[82] See, eg Case C-224/97 *Erich Ciola and Land Vorarlberg* [1999] ECR I-2517; and Case C-201/02 *R on the application of Delena Wells and Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723.

[83] Case C-453/00 *Kühne & Heitz NV and Productschap voor Pluimvee en Eieren* [2004] ECR I-837.

[84] Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-258.

[85] Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] ECR I-6199.

[86] Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, judgment of 12 February 2008.

[87] See Procházka, above n 66.

[88] An extreme example of lack of any real reasoning is the recent decision in Case C-273/04 *Poland v Council* [2007] ECR I-8925, where the Court of Justice, instead of dealing with the hotly debated issue of the admissibility of the action simply stated in one sentence (para 33) that '[i]n the present case, the Court considers it necessary to rule at the outset on the substance of the case'. If such a decision were to be appealed in any of the national judicial systems, it would be instantly annulled for lack of reasoning. For further examples, see J Komárek, '"In the Court(s) We Trust?" On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32 *EL Rev* 467, 482–3.

[89] A (traditionally) sceptical view is offered by H Rasmussen, 'Present and Future European Judicial Problems After Enlargement and the Post-2005 Ideological Revolt' (2007) *CML Rev* 1661, 1668 *ff*.

meet and discuss as a body; instead, it is likely to turn into a classical civilian supreme court, with small chambers deciding the bulk of cases and the grand chamber being summoned only occasionally to adjudicate on the contentious disputes and to unify the strands of case law which might develop. If one is to learn any lessons from the functioning of continental supreme courts composed of tens of judges, predictability and a clear line of case law tend not to be the prime virtues of such a model.[90]

B. Value Unacceptability

In a pluralistic Community, the systematic compatibility of the values of the national and Community legal orders is generally presumed.[91] Every presumption constitutes, however, a certain generalisation about the reality. The aim at this stage is not precisely to define whether the instances of conflicts are value conflicts as such or conflicts in the realisation of a shared value, to which either of the players in the particular game accords different weight. In the practical terms of an individual case, the conflict boils down to the same disagreement irrespective of whether the conflict is described as one between values or one of the realisation of shared values. The assumption simply is that, in concrete individual cases, national and Community interests may collide. Out of this collision, it is possible that intentional disregard of Community law by national courts may occur. This typically happens in areas where the requirements of the Court of Justice are perceived as going 'too far' and thus as having created what one may call areas of 'virtual case law'. The term 'virtual' is used because these requirements or principles only find their reflection in very few references from national courts and in the case law of the Court of Justice, yet have experienced no real application in the practice of the national courts. Areas of virtual case law are typically born out of an unreserved and sweeping assertion of the *effet utile* of Community law over any other interests and values. Other interests are sacrificed for the greater veneration of the golden calf of full effectiveness of Community law. The only problem is, as has already been mentioned above in the context of teleological reasoning by the Court of Justice, that the idol(s) worshipped by national courts might be different.

A recent example of this approach might be the Court of Justice's decision in the *Lucchini* case.[92] The case concerned the duty of a national court to reopen final judicial decisions which had endorsed the grant state aid which was incompatible with Community law. Lucchini SpA was awarded,

[90] See Bobek, above n 78.
[91] See M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003) 501, 504.
[92] Above n 85.

in breach of Community law, state aid by the Italian authorities. The award was confirmed and enforced by Italian civil courts, which ordered the aid to be paid. The conflict which the Court of Justice was asked to resolve was between the national provisions, which precluded any new examination of a final judicial decision and the principle of full effectiveness of Community law. The Court of Justice gave a clear preference to the latter and opined that:

> Community law precludes the application of a provision of national law ... which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final.[93]

The judgment has been the subject of considerable controversy.[94] It is clear, however, that its structure is quite one-sided: the interest of the Community dominates, while the interest of the national judge and the sound administration of justice on the national level (which would also entail the need to establish the finality of the litigation process at some stage, even if the decision is flawed) is discarded. It is difficult to imagine that national judges would be inclined to follow a similar decision of the Court of Justice; not because they would not respect the Court of Justice, but because the basic tenet of the decision serves only Community purposes, completely disregarding the (seemingly perfectly legitimate) interests of national systems.[95]

V. THE RELATIONSHIP BETWEEN THE COURT OF JUSTICE AND THE NATIONAL COURTS—THE STATEGY OF THE SECOND-BEST CHOICE?

With a series of considerable simplifications, the latter example of value conflicts between national courts and the Court of Justice could be reduced to a matrix of a non-cooperative game, which is one of the basic models

[93] *Ibid*, para 63.

[94] From the first few case notes see, eg P Bříza, 'ECJ case *Lucchini SpA*—is there anything left of *res judicata* principle?' [2008] *Civil Justice Quarterly* 40; and X Groussot and T Minssen, '*Res Judicata* in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?' (2007) *European Constitutional Law Review* 385.

[95] The issue of 'Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States' is actually the topic of the 21st Colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, which was held in June 2008 at the Supreme Administrative Court of Poland, Warsaw. The national rapports submitted by the member jurisdictions are accessible online at <http://www.juradmin.eu/en/colloquiums/colloq_en_21.html> accessed 13 August 2008.

in the game theory.[96] The players of the game are the national court and the Court of Justice. The game called preliminary rulings is an infinite non-cooperative game: the term 'non-cooperative' is used, not because one would call into question the classical statements of the Court of Justice concerning the 'relationship of cooperation' established between the Court and the national courts,[97] but because by the definition provided by game theory, a non-cooperative game is one in which the actors are unable to agree in advance on a joint plan of action for the individual game—ie there is no communication prior to the individual game on its rules.[98]

Naturally, players choose strategies which maximise their own payoffs. One of the key assumptions of game theory is that a player will always choose a dominant strategy, if possible a strictly dominant one, ie the best choice for a player for every possible choice by the other player. To overcome the one-sided, often binary dominance of one player over the other, the core concept for solving games in post-World War II game theory became the so-called *Nash equilibrium*. The Nash equilibrium solution to non-cooperative games was to make the strategy chosen by one player subject to the choice of the other; the equilibrium point is where neither player can do better by choosing a strategy different from that of the other.[99]

Now, what could be the potential payoffs for the Court of Justice and a national court in a preliminary ruling game? If viewed through the lens of the principle of full effectiveness of Community law, the payoff in an individual case might be asserting the full and unconditional effectiveness of Community law, to assert some of it or to assert none. The dominant strategy for the Court of Justice might be to assert the full and unconditional effectiveness of Community law. However, if full effectiveness in the individual case conflicts with values pursued by the national court, the greatest payoff for the national court would be precisely the opposite strategy: no assertion of the *effet utile*, which would basically mean not to refer the case to the Court of Justice at all. The equilibrium point in this game would thus be asserting some effectiveness and primacy of EC law, but still leaving some strategic space for the conflicting interest of the other party. Only

[96] For an introduction see, eg SP Hargreaves Heap and Y Varoufakis, *Game Theory, A Critical Text* 2nd edn (London/New York, Routledge, 2004); or DG Baird, RH Gertner and RC Picker, *Game Theory and the Law* (Cambridge, Mass, Harvard University Press, 1994).

[97] See, eg Case C-99/00 *Kenny Roland Lyckeskog* [2002] ECR I-4839, para 14; Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, para 25; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 7; and Case 244/80, *Foglia v Novello* [1981] ECR 3045, para 16.

[98] See the classical definition by JF Nash, 'Two-person Cooperative Games' and 'Non-Cooperative Games', both reprinted in JF Nash, *Essays on Game Theory* (Cheltenham, Edward Elgar Publishing, 1996).

[99] First put forward in JF Nash, 'Non-Cooperative Games' (1951) 2 *Annals of Mathematics* 286.

if such strategy is adopted will both parties be induced to play and later to continue in the repetition of the game. The Nash equilibrium would thus rest with a more limited assertion of the full effectiveness of EC law, which would partially satisfy both players and should leave them happy to settle for the particular strategy, rather than feeling the need to change it.

An example of a strategy which would perhaps come close to the equilibrium point between the conflicting interests of national court and the Court of Justice would be the recent decision in the *Skoma-Lux* case,[100] discussed previously. On the facts of this case, let us assume that the greatest payoff for the Court of Justice in terms of the full effectiveness of Community law would be to assert the full application of Community law on the territories of the new Member States, irrespective of whether or not the legislation in question had been translated and duly published in the languages of the new Member States. Conversely, the greatest playoff for a national constitutional system, based upon the assumption of the exclusivity of the national language as the mean of communicating the content of a legal rule, would be to state that Community norms not available in the national language have no effect upon the territory of that Member State. The compromise equilibrium position was to state that decisions adopted upon the basis of non-translated Community legislation could not be enforced against individuals in that Member State and, at the same time, leave the validity of the norm untouched and to limit the temporal effects of the decision. Such a decision offers payoffs to both parties and induces them to continue the game.

The opposite example would be the *Lucchini* decision,[101] again considered above. In this situation, the payoff of the national court is negative (the interest of *res judicata*) and the only (dominant) strategy is the full effectiveness of Community law. It may be submitted that such a decision induces the national court to exit the game in the future due to negative payoffs. An alternative solution to the game presented by that case, which would come closer to the Nash equilibrium, might perhaps be to uphold the value of both interests in question (full effectiveness as well as *res judicata*), thus downgrading the payoffs of each party, and seek a compromise solution, for example via the state liability regime.

By their nature, preliminary rulings are a repetitive game; the strategy and payoffs of previous rounds are reflected in the subsequent ones. Typically, the short-term gains in one round are insufficient to compensate for future losses, especially if the costs from non-cooperation or the complete refusal further to participate in the game on the part of the national courts are very low or non-existent. One may only recall the example of the *Bundesverfassungsgericht*,

[100] Case C-161/06 *Skoma Lux sro v Celní ředitelství Olomouc*, above n 31, discussed in section III.A above.

[101] Case C-119/05 *Lucchini SpA*, above n 85, discussed in section IV.B above.

which, although it declared itself to be entitled[102] (and perhaps even obliged) to participate in the preliminary rulings game, never actually did so. The costs of the refusal to play for the *Bundesverfassungsgericht* are, apart from occasional doctrinal critique, none. Similarly, the probability of other negative consequences for the refusal to play the preliminary ruling game, be it in the form of Article 226 EC proceedings[103] or a national action for damages brought by the individual on the basis of the incorrect application of Community law by a national court,[104] are negligible.

There would, of course, also be games in which the interests of both players do not conflict and the Nash equilibrium is one of cooperation. The classic example[105] here would be of the stag/hare hunt, which involves two hunters, each of whom has only two strategies: either hunt independently for a hare or together for a stag. A hunter can catch a hare alone, but they will only catch a stag if they hunt together. Sharing a stag is always a better strategy than getting a single hare.

The examples of such overlapping interests of the submitting national court and the Court of Justice are numerous; one may even hope that they are more numerous than the instances of conflicts. One recent example involving the courts of the new Member States might be the Polish case of national tax on imported second-hand cars.[106] From the wording of the request for the preliminary rulings, submitted by the *Wojewódzki Sąd Administracyjny* in Warsaw, it was quite apparent that the submitting court already made up its mind and its aim was to get rid of the national legislation which acted as an obstacle to the free movement of goods. In similar situations, the requests for preliminary rulings are rather requests for *ex post* approval for a legal opinion already adopted by the national court. The interests of both parties overlap.

The goal at this stage is not to design a true model for the game of preliminary rulings. That would be extremely difficult, also taking into account the number of the players involved (the plurality of national courts), the potential divergence of interests between national courts themselves, the difference in the rather long-term strategy of case law development followed by the Court of Justice, and the strategy of the national courts, functioning more like trial courts in the individual case, etc. The ideas outlined above remain rather in the realm of inspiration. The inspiration is, nonetheless,

[102] BVerfGE 52, 187 (201), '*Vielleicht-Beschluss*'.

[103] For one of the few instances see Case C-129/00 *Commission v Italy* [2003] ECR I-14637.

[104] Case C-224/01 *Köbler*, above n 80, because such incorrect application must not only breach EC law, but must do so in a *sufficiently serious* manner.

[105] See further DG Baird, RH Gertner and RC Picker, *Game Theory and the Law* (Cambridge, Mass, Harvard University Press, 1994) 35 *ff*.

[106] Case C-313/05 *Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie* [2007] ECR I-513.

instructive: the interaction between the Court of Justice and the national courts should seek (Nash) equilibrium points, not strict dominance.

This would mean, in practical terms, that there is a need for willingness on both sides to look for and accept 'second-best choices'. If we skip the game theory terminology, we arrive at a simple call for compromise solutions. This requires, on the part of national judges, that they should honestly try to become 'Community judges' and, on the part of the Court of Justice, a need to realise that there are reasonable limits upon the role of national courts in their activity *qua* the Community judiciary and to reflect this reality in its case law. The above-described areas of the requirements on the methodology in the application of Community law by national courts seem to be a good place to start.

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