

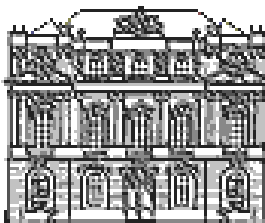


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The Application of EC Law in Austria

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Introduction

The Member States of the European Union have taken a far-reaching decision when agreeing on the European Court and the Court of First Instance, each within its jurisdiction, to ensure that in the interpretation and application of the Treaty establishing the European Community the law is observed (art. 220 EC). That way terms and principles of Community Law have been submitted to a judicial control and at the same time it has been recognized, that European Law is the basis for the economic and political integration of Europe.

Established by law, the European Communities – the European Community (EC), the European Atomic Energy Community (EAC) and the former European Coal and Steel Community (ECSC) – have been developed and consolidated by law following their ramified integrational aims in the framework of an autonomous, directly effective and prevailing legal order. This legal order calls for a uniform interpretation and application in all Member States. The European Court of Justice (ECJ) has met the challenge and did not stick on the wording of provisions but opted for a dynamic interpretation thereof which was based on the spirit and the finality of the Treaties. In such manner the ECJ and later on the Court of First Instance became the motor of the European Integration.

For guaranteeing a uniform jurisprudence the authorities and courts of the Member States have to apply EC Law according to the latest interpretation of the European courts. Therefore, the national judges making his/her decision has to bear in mind the requirements of Community Law for implementing the political aims of the European Union and for encouraging the formation of a genuine European legal discourse. Only if the Member States take all appropriate measures to ensure the fulfillment of their

communitarian obligations a Common Market and especially an Internal Market is rendered possible.

I. Community Law and National Courts

Currently, there is no uniform and common procedural law in the European Union. Generally, the Member States enforce Community Law and the individual has to go to national courts in order to get his rights deriving from Community Law asserted.¹ From the communitarian point of view the most essential task of national courts is the correct application of Community Law.² Thereby, judges who have to resolve a case dealing with Community Law have to apply communitarian law in the valid version and according to the interpretation given by the ECJ.

The Austrian legal order – like most legal systems³ – has been developed over centuries as a self contained regime and has been influenced not only by the legislature but also by the judiciary. That is why the jurisprudence of the Austrian highest courts and the interpretation of Austrian Law has broadly been accepted. With the accession to the European Union (EU) the national legal order is complemented by the directly effective and prevailing Community Law.⁴ This imposes the duty on national authorities and courts to include Community Law in their decision-making process. Consequently, national courts constitute an essential cog in the Community legal order. At the “crossroads” of a number of legal systems, their role is to make an important contribution to the effective application of Community Law and, eventually, to the development of the process of European integration.⁵

I.1. What are the consequences courts face?

¹ ECJ 17.7.1997, Case C-242/95, *GT-Link A/S*, ECR 1997, I-4449, para 23 et seqq.

² ECJ 17.5.2001, Case C-340/99, *TNT Traco SpA*, ECR 2001, I-4109, para 35.

³ Comparative studies regarding the application of Community Law is of utmost importance.

⁴ Whereas Community Law prevails over the national law – even the Constitution – the Law of the European Union (EU Law) is guided by principles of International Law, needs to be transposed into national law and is not part of the supranational legal order!

⁵ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-0000, para 53.

The function of national courts involves a dual obligation: to interpret, as far as possible, its national law in accordance with Community Law and, where that is not possible, to disapply the national law which is contrary to Community Law.⁶ As regards the obligation of interpretation in conformity with Community Law⁷, it has been established by the ECJ both in respect of primary Community Law and secondary Community Law.⁸

The courts enforce Community Law according to national procedural rules. Since Community Law is directly effective there is an interplay of national, international and supranational rules. While enforcing of EC Law national courts and authorities have to adhere to communitarian principles in order to fulfill the obligations arising out of the Treaty⁹ or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks (art. 10 EC).

The case-law of the ECJ has played a large role in developing the function of the national courts, in reinforcing their authority within the State at the expense, in certain national legal systems, of constitutional developments.¹⁰ The autonomy of the Member States as to the making of procedural rules has been modified due to a couple of principles established by the ECJ. Some of these principles might be known from the context of national law but they have been given a different meaning by the ECJ. Amongst these European principles: the supremacy of EC Law¹¹, the interpretation of Community Law in conformity with European Law, the principle of non-discrimination¹²,

⁶ ECJ 11.6.1987, Case 14/86, *Pretore di Salò*, ECR 1987, 2545, para 20; ECJ 26.2.1986, Case 152/84, *Marshall*, ECR 1986, 732, para 48; ECJ 7.3.1996, Case C-192/94, *El Corte Inglés*, ECR 1996, I-1281, para 16.

⁷ This means that decisions have to be in conformity with primary as well as secondary Community Law. See also: ECJ 10.4.1984, Case 14/83, *von Colson*, ECR 1984, 1891; ECJ 10.4.1984, Case 79/83, *Harz*, ECR 1984, 1921; ECJ 4.2.1988, Case 157/86, *Murphy*, ECR 1988, 673; ECJ 13.11.1990, Case C-106/89, *Marleasing*, ECR 1990, 4135. *Jarras*, Richtlinienkonforme bzw. EG-rechtskonforme Auslegung des nationalen Rechts, in: *Europarecht 1991*, 211.

⁸ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-0000, para 54 et seq.

⁹ I.e. the Treaty establishing the EC.

¹⁰ AG Léger, 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-0000, para 60.

¹¹ ECJ 15.7.1964, Case 6/64, *Costa/ENEL*, Slg 1964, 585.

¹² See: Non-discrimination in the field of the fundamental freedoms and the respective jurisprudence of the ECJ in numerous cases; subsidiary: Art 12 EC; ECJ 17.7.1963, Case 13/63, *Italy versus Commission*, ECR 1963, 357; ECJ 13.2.1985, Case 293/83, *Gravier*, ECR 1985, 611; ECJ 17.10.1995, Case C-450/93,

equivalence¹³, efficiency¹⁴, judicial legal protection¹⁵, legal certainty¹⁶, protection of confidence (bona fide)¹⁷, proportionality¹⁸, uniformity¹⁹, interim relief²⁰, ascertainment of rights conferred upon individuals²¹ and state liability²².

The case-law of the ECJ represents an important step forward in the definition of the function of national courts. It entails that the national courts must make the necessary effort to adapt to a legal environment which has been extended and made more complex as a result of the difficulties which may be caused by the relationship between domestic law and supranational law. However, it should be pointed out that the national courts are not left entirely to themselves, they may be assisted in their task by the ECJ, thanks to the system of judicial co-operation provided by the procedure of references for a preliminary ruling.

Kalanke, ECR 1995, I-3051, para 18 et seqq; ECJ 11.-11.1997, Case C-409/95, *Helmut Marschall*, ECR 1997, I-6363, para 33.

¹³ ECJ 17.11.1998, Case C-228/96, *Aprile Srl*, ECR 1998, I-7141, para 18 et seqq.

¹⁴ ECJ 17.11.1998, Case C-228/96, *Aprile Srl*, ECR 1998, I-7141, para 18 et seqq; ECJ 1.12.1998, Case C-326/96, *Levez*, ECR 1998, I-7835, para 44.

¹⁵ ECJ 19.6.1990, Case C-213/89, *Factortame I*, ECR 1990, I-2433, para 19; ECJ 25.7.2002, Case C-50/00P, *Union de Pequeños Agricultores*, ECR 2002, I-6677, para 41.

¹⁶ ECJ 21.9.1983, Case 205-215/82, *Deutsche Milchkontor*, ECR 1983, 2633, para 30.

¹⁷ ECJ 3.5.1978, Case 112/77, *Töpfer*, ECR 1978, 1019; ECJ 21.9.1983, Case 205-215/82, *Deutsche Milchkontor*, ECR 1983, 2633, para 30; ECJ 28.4.1988, Case 120/86, *Mulder*, ECR 1988, 2321, para 23; ECJ 26.4.1988, Case 316/86, *Krücken*, ECR 1988, 2213, para 22; ECJ 1.4.1993, Case C-31-44/91, *Lageder*, ECR 1993, I-1761, para 22; ECJ 3.12.1998, Case C-381/97, *Belgocodex*, ECR 1998, I-8153, para 26; ECJ 8.6.2000, Case C-396/98, *Schloßstraße*, ECR 2000, I-4279, on 44; ECJ 11.7.2002, Case C-62/00, *Marks & Spencer*, ECR 2002, I-6325, n0 44.

¹⁸ Art 5 EC; ECJ 26.6.1980, Case 136/79, *Panasonic*, ECR 1980, 2033, para 19.

¹⁹ ECJ 29.1.1998, Case C- 315/96, *Lopez*, ECR 1998, I-317, para 19.

²⁰ ECJ 19.6.1990, Case C-213/89, *Factortame I*, ECR 1990, I-2433, para 19 et seqq.

²¹ ECJ 6.10.1970, Case 9/70, *Leberpfennig*, ECR 1970, 825; ECJ 5.4.1979, Case 148/78, *Ratti*, ECR 1979, 1629, para 23 et seqq; ECJ 26.2.1986, Case 152/84, *Marshall*, ECR 1986, 723, para 48; ECJ 25.7.1991, Case C-208/90, *Emmot*, ECR 1991, I-4269, para 19; ECJ 14.7.1994, Case C-91/92, *Faccini Dori*, ECR 1994, I-3325, para 20 et seqq.

²² ECJ 26.2.1976, Case 52/75, *Commission versus Italy*, ECR 1976, 277; ECJ 10.4.1984, Case 14/83, *Von Colson and Kamann*, ECR 1984, 1891; ECJ 19.11.1991, Cases 6 and 9/90, *Francovich I*, ECR 1991, I-5357, para 35, 40; ECJ 5.3.1996, Cases C-46/ and C-48/93, *Brasserie du Pêcheur*, ECR 1996, I-1029, para 31, 51; EuGH Rs C-392/93, *British Telecommunications*, ECR 1996, I-1631, para 38; ECJ 23.5.1996, Case C-5/94, *Hedley Lomas*, ECR 1996, I-2553, para 24; ECJ 8.10.1996, Case C-178, 179, 188-190/94,

I.2. The Co-operation of National Courts with the ECJ

Preliminary rulings have proved to be an important guarantor for the protection of rights derived from Community Law for individuals who are not entitled, to directly claim these rights or to challenge a measure of the Community organs before the ECJ.

It is up to the national administrative authorities and courts to secure the directly effective Community Law and therewith to guarantee individuals' rights residing in Community Law. For there is a uniform European interpretation of Community Law only the ECJ is entitled to interpret European Law. National courts have the possibility – courts against whose decision there is no judicial remedy even have the duty - to ask for the interpretation of particular questions regarding Community Law they have to resolve (art. 234 EC).²³ This holds true, only if the particular case is still pending and is revealing concrete questions as to the European Law. The ECJ does not answer general or hypothetical questions and does not provide legal opinions to the national judge. Apart from that all national courts that intend not to apply a provision of secondary Community Law because they believe it is contradicting the sources of primary European legislation have to ask the ECJ to rule upon the validity of the particular secondary norm.

The preliminary ruling – an interim procedure – imposes some challenging tasks on the national judge: he/she has to find out whether questions regarding to Community Law are relevant for resolving the case. If this is the case he/she has to filter the relevant questions on Community Law from the arguments produced by the parties and to find out whether or not there is already an interpretation of these particular questions by the ECJ existing.

If there is no interpretation existing yet the judge has to check whether he/she is obliged (this is the case if he is the last instance in the concrete matter) or entitled for sending questions to Luxembourg. In order to find the right answer the terms of “court” and

Dillenkofer, ECR 1996, I-4845, para 20; AG Léger ECJ 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-0000.

²³ See also: Art 150 EAC and former art 41 ECSC as well as art 46 EU and treaties according to art 293 EC.

“tribunal” in art 234 EC are to be taken into consideration. Under this provision “court” or “tribunal” must comply with the following characteristics: it has to be an independent, permanent body based on law, with obligatory jurisdiction, a body that decides according to legal norms.²⁴

On the legally superfluousness of a preliminary ruling the ECJ has ruled in the case of *CILFIT*. Only then the courts/tribunals are not obliged to refer to the ECJ a question concerning the interpretation of Community Law raised before them

- if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case;²⁵
- when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case; ²⁶
- if the correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.²⁷

Only if those conditions are satisfied, may the national court/tribunal refrain from submitting the question to the ECJ and take upon itself the responsibility for resolving it.²⁸ However, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a communitarian provision thus involves a comparison of the different language versions.²⁹ Even where the different language versions are entirely in accord with one another, Community Law uses terminology which is peculiar to it. It must be emphasized that legal concepts do not necessarily have the same meaning in national and supranational Law. Every provision must be placed in its context and interpreted in the light of the provisions of Community Law as a whole with regard to the objectives

²⁴ “Arbitration courts” do not fit these criteria.

²⁵ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 21.

²⁶ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 10.

²⁷ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 16. Before it comes to the conclusion that such is the case, the national court/tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ.

²⁸ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 16.

²⁹ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 18.

thereof and to its state of evolution at the date on which the provision in question is to be applied.³⁰

If the national judge after having taken into consideration all these criteria comes to the conclusion that the interpretation by the ECJ is required he has to summarise the questions relevant for his/her decision in an abstract form and must give a reasoning,³¹ too. Then the questions are sent (as a registered letter) by the national Court³² to the Chancellor of European Court of Justice in Luxembourg.³³ The Rules of Procedure of the Court of Justice of the European Communities³⁴ and the Protocol on the Statute of the Court of Justice³⁵ contain provisions governing the procedure at the ECJ.³⁶

The initial procedure is adjourned and the answer from the ECJ is awaited.³⁷ The provisions on the preliminary ruling The procedure is taken up again after the binding interpretation comes from Luxembourg. Then the national court has to apply the interpreted Community Law: the Member States have, by virtue of art 10 EC, the obligation to ensure the enforcement of Community Law.

Since preliminary rulings are formulated in a general manner they have a far reaching effect, sometimes the ECJ creates law: Following the publication of the preliminary rulings in the official languages of the European Union in the European Court Reports and several databases in the internet³⁸ judges in other Member States benefit from the

³⁰ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 19.

³¹ The reasoning has to cover the factual (facts of the case, applications of the parties) and normative framework of the case for enabling the ECJ to find out whether answering the questions is within his competence and to identify the benefit of the requested interpretation for the decision on the original case. The file of the original case should be attached. For further information see: *Dauses*, *Das Vorabentscheidungsverfahren nach Artikel 177 EG-Vertrag*, 1995, 123 et seqq.

³² Art 20 para 1 Protocol on the Statute of the ECJ; ECJ 19.3.1964, Case 75/63, *Unger*, ECR 1964, 395.

³³ Cour de justice des Communautés européennes, Bd Konrad Adenauer, L- 2925 Luxembourg.

³⁴ OJ 1991, L 176, 7.

³⁵ OJ 1988, L 319, 1.

³⁶ <http://curia.eu.int> (free of cost).

³⁷ While the case is pending with the ECJ the national court may withdraw its preliminary questions if it finds the questions are no longer relevant for resolving the case³⁷ or the initiation for a procedure according to art 234 EC was successfully challenged by a court of instance. If that is the case, the national court has to inform the ECJ immediately about the withdrawal and the case is cancelled from the ECJ-register.

³⁸ <http://curia.eu.int> (covers even very recent decisions); www.europa.eu.int/eur-lex and www.europa.eu.int/celex (paying!)

clarification as regards the interpretation or validity of Community Law as well when coming across similar problems in their daily work.

II. The Application of EC Law – A Challenge for Judges

The aim of a study carried out by the Research Unit for Institutional Change and European Integration of the Austrian Academy of Sciences was to find out how Austrian courts complied with their task of applying EC Law after accession to the EU. In order to know more about eventual difficulties of national courts in the application of Community Law two questions had to be answered:

1. Are the decisions in conformity with the interpretation given by the ECJ?
2. Have the courts fulfilled their obligation to ask the ECJ for a preliminary ruling?

The broad empirical analysis focuses on decisions of the Austrian Constitutional Court, the Administrative Court and the Supreme Court that dealt with Community Law in one way or the other. These decisions are accessible on the internet³⁹ or/and in print-media. Although, the Ministry of Justice decreed⁴⁰ that lower courts had to refer to the Ministry their cases dealing with Community Law no considerable number of cases from lower courts could be obtained and therefore the idea of covering even lower courts' decisions in the study was dropped.

The chosen and analysed data date from Austria's entry to the European Union on 1.1.1995 until mid 2002. The data comprises several hundred decisions.⁴¹ The data of this collection was scrutinised regarding the two questions mentioned above. Each and every case was summarized and evaluated from the communitarian point of view. The decisions were classified into the following groups: primary Communitarian law,

³⁹ www.ris.bka.gv.at ; www.rdb.co.at (paying!).

⁴⁰ JMZ 30.033/I.11/1999.

⁴¹ It can be assumed that the data does not cover all decisions related to Community Law, especially not those that made no mention of Community Law but where European Law should have been taken into consideration.

secondary legislation, international agreements of the EC and its Member States⁴² with third countries and individual cases. The complete collection is published at Manz, Vienna, in the form of a handbook for judges, advocates, law officers and other lawyers.⁴³ The handbook contains registers on the European and national legal sources and European as well as Austrian decisions enable all those who have to apply European Law to find reference cases quickly.

Apart from that, a database has been created comprising all preliminary questions that have been sent to Luxembourg by Austrian courts/tribunals as well as the answers from the ECJ and as far as they were already existing the decisions of the national court/tribunal following the preliminary ruling.

⁴² These were Association and Co-operation Agreements as well as Europe Agreements which were concluded as so-called "mixed agreements".

⁴³ *Bapuly – Kohlegger*, Die Implementierung des EG-Rechts in Österreich – Die Gerichtsbarkeit, 2003.

III. Potential Errors in the Application of EC Law

Remarkable results follow: The majority of the analysed decisions are not objectionable neither regarding their reasoning nor their result. The more intense occupation and consideration of Community Law shows up in the reasoning of recent judgements. Proper scrutiny of Community Law and the case Law of the ECJ have been conducive to avoiding mistakes in the implementation of Community Law.

However, some decisions were correct as to their result but hid errors. These errors were of diverse gravity: Some of them could be neglected, like the lack of concrete quotations regarding the jurisprudence of the ECJ and incomplete reasoning. A few of the cases analysed showed that initiating a preliminary ruling had been desirable. Isolated cases implied that in crucial matters when the interpretation was yet by no means certain the courts failed in asking the ECJ for preliminary ruling. The application of association agreements seemed to be particularly problematic.

These findings allowed to set up the following catalogue of potential errors in the application of EC Law:

1. Restrictive interpretation of the parties' arguments or national procedural rules
2. Facts of a case have been stimulated by interests
3. Violation of the communitarian obligation of giving a reasoning
 - 3.1. No reasoning
 - 3.2. Incomplete reasoning
 - 3.3. The reasoning is missing concrete references
 - 3.4. Incorrect quoting of sources of Community Law
 - 3.5. Ambiguous reasoning
4. Violation of the obligation to ask for a preliminary ruling
5. Questionable withdrawal of preliminary references
6. Inadmissible preliminary references
7. Dispensable multiple preliminary references
8. Misinterpretation of the sphere of influence of Community Law

9. The incorrect application of Community Law
 - 9.1. Temporary effect of Community Law
 - 9.2. Primary Law
 - 9.3. Secondary Law
 - 9.4. International Agreements

III.1. Restrictive Interpretation of the Parties' Arguments or National Procedural Rules

The ECJ has established the principle of equivalence⁴⁴ according to which it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community Law. Such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community Law.⁴⁵ It is for the national courts to ascertain whether the procedural rules intended to ensure that rights derived by individuals from Community Law are safeguarded under national law comply with the principle of equivalence. For applying this principle, each case which raises the question of whether a national procedural provision renders the application of Community Law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features. In the light of this analysis the basic principles of the domestic judicial system, such as protection of the rights of the defense, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.⁴⁶ The principle of equivalence would be infringed if a person relying on a right conferred by Community Law were forced to incur additional costs and delay by comparison with a claimant whose action was based solely on domestic law. In order to decide whether procedural rules are equivalent, the national court must verify

⁴⁴ ECJ 10.7.1997, Case C-261/95, *Palmisani*, ECR I-4025, para 28 et seqq; ECJ 1.12.1998, Case C-326/96, *Levez*, ECR 1998, I-7835, para 39; ECJ 16.5.2000, Case C-78/98, *Preston*, ECR I-3201, para 56. See also chapter I.1.

⁴⁵ ECJ 14.12.1995, Case C-430/ and 431/93, *Van Schijndel*, ECR 1995, I-4705, para 17.

objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special feature of those rules.⁴⁷

In a few of the analysed cases – maybe unknowingly in order to avoid dealing with Community Law – the judges have interpreted the arguments of the parties strictly and/or interpreted procedural rules restrictively.

Excursus: The Association Council Decision 1/80.

Before Austrian courts there were a lot of cases pending dealing with the Association Agreement with Turkey. The application of the “*acquis associatif*”⁴⁸ seemed to impose some problems in Austria. The international agreements of the EC like the Association Agreements of the EC and its Member States⁴⁹ form an integral part of Community Law as to settled case-law of the ECJ⁵⁰. The Association Council Decision 1/80 (based on the Association Agreement of the EC with Turkey) confers far reaching rights to Turkish migrant workers in the EU: Being lawfully employed in the EU for one year, Turkish workers have the right to get their working permission extended for employment at the same employer disposing of a post for him. After three years he is even free to look for the same job at a different employer. After four years he can take up any employment (art 6). Family members of a Turkish worker deriving rights from the art 6 of Association Council Decision 1/80 who obtained the permit of entry into the Member State where the integrated worker is living are entitled to apply for any job after lawfully residing with the Turkish worker for three years; after five years of lawfully residing with their Turkish relative they have free access to any job (art 7). Children of Turkish migrant workers who have completed their vocational training in the Member

⁴⁶ ECJ 14.12.1995, Case C-430/ and 431/93, *Van Schijndel*, ECR 1995, I-4705, para 19.

⁴⁷ ECJ 16.5.2000, Case C-78/98, *Preston*, ECR I-3201, para 60 et seqq.

⁴⁸ This term has been created by Mrs. Vlasta Kunova.

⁴⁹ These are so-called mixed agreements. For further information see: *Bapuly*, Die Implementierung der Assoziierungsabkommen der EG mit den Mittel- und Osteuropäischen Ländern im Lichte der Rechtsprechung der österreichischen Höchstgerichte, 2001.

⁵⁰ ECJ 30.4.1974, Case 181/73; *Haegeman*, ECR 1974, 449, para 1; ECJ 30.9.1987, *Demirel*, Case C-12/86, ECR 1987, 3719, para 7ff; ECJ 14.11.1989, Case 30/88, *Greece versus Commission*, ECR 1989, 3711, para 12; ECJ 20.9.1990, Case C- 192/89, *Sevince*, Slg 1990, 3461, para 8.

State of residence of their parent have the right⁵¹ – irrespective of their duration of stay in this country – to apply for any job, if his/her parent has been lawfully employed in this State for at least three years (art 7 para 2).

Example: A Turkish migrant worker applied for a working permit in Austria (after his old one had expired) based on the Association Council Decision 1/80. The working permit was refused referring to the Law governing the Employment of Foreign Workers. The applicant did not mention about exact times and places of employment. Therefore, the court did not examine the case under art 6 Association Council Decision 1/80. Community Law does not require national courts⁵¹ to raise of their own motion an issue concerning the breach of provisions of Community Law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.⁵²

Anyway in this case, the context of the pleading had allowed the Court to check whether rights conferred by the Association Council Decision 1/80 had been established so far.

III.2. Facts of a case have been stimulated by interests

Situations may arise where the court eliminates those elements of the case which may be relevant for an assessment in the light of Community Law. In that way dealing with questions regarding Community Law are avoided.

III. 3. Violation of the Communitarian obligation of giving a reasoning

The effective protection of rights reflects a general principle of Community Law which underlines the constitutional traditions common to the Member States and has been enshrined in art 6 and art 13 of the European Convention for the Protection of

⁵¹ Children do not need a permit of entry into the country: ECJ 5.10.1994, Case C-355/93, *Eroglu*, ECR 1994, I-5113, para 22.

⁵² ECJ 14.12.1995, Case C-430/ and 431/93, *Van Schijndel*, ECR 1995, I-4705, para 20.

Human Rights and Fundamental Freedoms.⁵³ Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify reasons. Where it is particularly a question of securing the effective protection of a fundamental right conferred by Community Law, the individual must be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the court. Consequently, the national authority is under a duty to inform the individual of the reasons on which a decision is based.⁵⁴ Thus, Community Law requires the existence of a judicial remedy and the duty to state reasons.⁵⁵

III.3.1. No reasoning

Example: A party invokes Community Law and stimulates the court against whose decision there is no judicial remedy of sending preliminary questions to the ECJ. The court does not give any reason why initiating a preliminary ruling was omitted. In that case it would be desirable to cite the reason for the omission quoting the *CILFIT* criteria⁵⁶.

III.3.2. Incomplete reasoning

Example: The court gave a reasoning relating to measures liable to hinder the exercise of the freedom to provide services without referring to the case-law set up by the ECJ in *Keck*⁵⁷. Applying *Keck* congruently the court should have made up its reasoning by considering that measures whose effect is to limit freedoms may be justified as long as such measures affect in the same manner, in law and in fact, domestic services and those from other Member States.

⁵³ ECJ 15.10.1987, Case 222/86, *Heylens*, ECR 1987, 4116, para 14.

⁵⁴ ECJ 15.10.1987, Case 222/86, *Heylens*, ECR 1987, 4116, para 15.

⁵⁵ ECJ 15.10.1987, Case 222/86, *Heylens*, ECR 1987, 4116, para 16.

⁵⁶ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 10 et seqq.

⁵⁷ ECJ 24.11.1993, Cases 267 and 268/91, *Keck and Mithouard*, ECR 1993, I-6097, para 16.

III.3.3. The reasoning is missing concrete references

In quite a number of cases courts referred to case-law of the ECJ without quoting any specific case. It is of course preferable to know exactly the sources the court applied in order to frame its judgment.

III.3.4. Incorrect quoting of sources of Community Law

A few cases were not precise in quoting the sources of Community Law. This makes it more difficult for the parties to understand the reasoning of their judgment.

III.3.5. Ambiguous reasoning

Isolated cases were very unclear as to their reasoning on problems of Community Law. This makes it impossible to form an opinion about the question as to whether the correct sources of law have been applied in conformity with the recent decisions of the ECJ.

Example: The case dealt with the withdrawal of the right of residence of a Turkish citizen on grounds of public policy or public security because of the fact that he committed some offences (thefts and administrative offences). He asserted his rights of stay deriving from the norms governing the association of Turkey and the EC. In deciding the particular case the domestic law and Communitarian Law had to be taken into consideration. Domestic law allows such measure for reasons that are “generally preventive” whereas, Community Law prescribes that measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct (“special preventive measure”) of the individual concerned and previous criminal convictions shall not in themselves constitute grounds for taking such measures.⁵⁸ The reasoning of the case was framed in such manner that the overall conduct of the Turkish

⁵⁸ ECJ 26.2.1975, Case 67/74, *Bonsignore*, ECR 1975, 297, para 5; ECJ 27.10.1977, Case 30/77, *Bouchereau*, ECR 1977, 1999, para 3 et seqq; ECJ 19.1.1999, Case C-348/96, *Calfa*, ECR 1999, I-11, para 21 et seqq.

citizen endangered “public policy and public security” considerably because he committed several offences over a rather long period of time.

III.4. Violation of the obligation to ask for a preliminary ruling

The empirical work revealed that in a good number of cases courts against whose decision there is no judicial remedy did not comply with their obligation of referring questions on the interpretation of EC Law to the ECJ though the *CILFIT* criteria⁵⁹ did not apply in their particular cases. “Courts” and “tribunals” in the sense of art 234 EC⁶⁰ are only released from this obligation if the question on Community Law is not relevant or when the ECJ has already ruled on that question in a similar case or if there can be absolutely no doubt on its interpretation.

Example: A national court ruled referring to decisions of the ECJ but not taking into consideration cases which the ECJ decided shortly before the judgment was made by the national court. Knowing about the recent developments in European jurisprudence could have allowed to come to a different interpretation of the case. However, only a preliminary ruling of the ECJ could have clarified the interpretation of EC Law.

III.5. Questionable withdrawal of preliminary references

In Austria quite a considerable number of preliminary questions have been withdrawn. The withdrawal of preliminary questions may have different reasons on which, courts/tribunals do not necessarily have any influence. This is the case when parties withdraw their remedies or the determination of a proceeding by amicable settlement or by acknowledgement. However, partly withdrawals can be avoided as well: For instance, when identical questions have already been asked for multiple times or when courts misinterpret precedents that have been conveyed by the ECJ .

⁵⁹ ECJ 6.10.1982, Case 283/1981, *CILFIT*, ECR 1982, 3415, para 10, 16, 21.

⁶⁰ See chapter I.2.

III.6. Inadmissible preliminary references

It happened that courts sent questions to the ECJ which were not in the scope of the ECJ's competence, questions which either referred to the compatibility of national law with supranational law or hypothetical questions or questions which were not dealing with specific questions on the interpretation of Community Law. In such cases the ECJ's reply consisted simply of a statement of incompetence.

III.7. Dispensable multiple preliminary references

In 2001 there were 237 new references for a preliminary ruling. Austrian courts sent 57 references to Luxembourg, Germany 53 and Italy 40. In 2002 out of 216 references for a preliminary ruling 59 came from Germany, 37 from Italy and 31 from Austria. Austria - in the last four years – has always been under the top three of those Member States that were referring most cases to the ECJ. Austria was even topping the list in 1999 and 2001. Compared to that, the other countries that joined the EU in 1995, Sweden and Finland, sent in this period between three and seven cases per year to the ECJ for interpretation.⁶¹

However, not all the cases referred to the ECJ are being decided. A look at the Austrian references for a preliminary ruling shows that there were quite a lot of multiple preliminary references: All in all, the Independent Administrative Tribunal of Salzburg sent 26 references for a preliminary ruling on the question as to whether the requirement of a licence according to the law governing the acquisition of land (Grundverkehrsgesetz) is in conformity with the Communitarian freedom of capital.

Why did this happen? Possibly, the courts were doubtful as to the binding nature of the decisions of the ECJ. Once the ECJ has ruled on the invalidity of specific provisions of Community Law these are not to be applied any longer. Whereas, if the ECJ has ruled on the validity of a particular norm of secondary Community Law the national court is not allowed to consider it as invalid and has to apply it or to ask for a preliminary ruling.

⁶¹ <http://www.curia.eu.int/en/instit/presentationfr/index.htm>

Example: The Austrian Supreme Court has overruled decisions interrupting the procedure which led to references for preliminary rulings containing identical questions as the ones that were already pending before the ECJ in similar cases. Therefore, the latter ones have been withdrawn again.

III.8. Misinterpretation of the Sphere of Influence of Community Law

Sometimes the influence of Community Law in some fields of domestic law where the Community has no competence is mistaken. This happens, for instance in the field of procedural law where the Member States are competent to make rules. However, the ECJ has set up principles which must be taken into consideration applying domestic procedural rules as well.

Another example: A Union citizen having the Greek and the Austrian citizenship was asked to render his military service in Austria after having performed this duty in Greece. He asserted having a concrete offer to work for an Austrian bank and, therefore, claimed his freedom of movement. The Austrian authorities stated that since there was no agreement between Greece and Austria on the acknowledgment of military service the case was to be resolved according to domestic law solely. In that case: prevailing Communitarian rules on the movement of workers have been ignored.

III. 9. The incorrect application of Community Law

Even after the entry to the EU some decisions had wrongfully left Community Law unapplied giving no or unsatisfying reasoning under the following circumstances: When the facts of a case occurred partly prior and partly after the accession to the EU or when the facts of the case occurred before accession but entailed future effects even in the time after accession.

Apart from that, in some of the scrutinized cases primary or secondary Community legislation has been applied incorrectly. Furthermore, the application of the international agreements of Community Law seemed to impose unexpected problems.

III.9.1. Temporary effect of Community Law

The ECJ has ruled in number of cases on the temporary effect of Community Law. In *Ciola* it stated that a prohibition which is contrary to a Community freedom, laid down before accession of a Member State to the EU not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.⁶²

In *Saldanha* the ECJ has ruled that since the Act of Accession contains no specific provisions whatsoever with regard to the application of art 12 EC Treaty – the principle of non-discrimination –, this principle must be regarded as being immediately applicable and binding on the acceding Member State from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities. Therefore, from the date of accession, nationals of another Member State can no longer be made subject to a procedural rule which discriminates on grounds of nationality, provided that such a rule comes within the scope *ratione materiae* of the EC Treaty.⁶³

Example: A notice of 1994 prescribed taxes in advance for the years 1994 and 1995. This notice was challenged for not being in conformity with the Council Directive 69/335/EEC concerning indirect taxes on the raising of capital. Contrary to Community Law the Austrian court held in 1995 that the respective notice was not retroactively violating EC Law and, consequently did not analyse the case in the light of its conformity with Council Directive 69/335/EEC nor consider a reference for a preliminary ruling. Because of the fact that the notice had future effects regarding taxes paid in advance

⁶² ECJ 29.4.1999, Case C-224/97, *Ciola*, ECR 1999, I-2517, para 34.

⁶³ ECJ 2.10.1997, Case C-122/96, *Saldanha*, ECR 1997, I-5325, para 14.

even for 1995 the Court should have taken into consideration the Council Directive 69/335/EEC and, furthermore should have made a reference for a preliminary ruling.

III.9.2. Primary Law

In the field of primary legislation, especially the Community freedoms grant rights to individuals. It occurs that national measures restrict rights deriving from Community Law. Such measures liable to hinder the exercise of fundamental freedoms must comply with four conditions set up by the ECJ:

- i. They must be applied in a non-discriminatory manner;
- ii. They must be justified by imperative requirements in the general interest;
- iii. They must be suitable for securing the attainment of the objective which they pursue;
- iv. And they must not go beyond what is necessary in order to attain it.⁶⁴

Example: Withdrawal of the trade licence of an interpreter for not paying contributions for compulsory membership to the Chamber of Commerce without any reference to the four conditions that have to be fulfilled for justifying such a measure. The freedom to provide services (art 49 EC Treaty) is considered a specific application of the general principle of non-discrimination.⁶⁵ The ECJ has held that indistinctly applicable national measures to nationals and non-nationals alike may constitute restrictions on the freedom to provide services and in that case are consequently incompatible with the Treaty. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill the four conditions mentioned above.

⁶⁴ ECJ 30.11.1995, Case C-55/94, *Gebhard*, ECR 1995, I-4165, para 37.

⁶⁵ The Treaty prohibition of discrimination on grounds of nationality extends not only to direct but also to all forms of indirect or covert discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (place of origin or residence).

III.9.3. Secondary Law

It occurred that Council Directives were applied in case where they should not have been.

Example: The court found that Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration has to be applied on the case of a German citizen who attained a college of higher education and obtained a diploma on business administration after her application for the admission to the exam for accountants was refused on grounds that she had not completed studies at an Austrian university. In reality the court has to check whether her education entitled her to be exercise the profession of an accountant in Germany and to examine to what extend the knowledge and qualifications attested by the diploma obtained by the person in Germany correspond to these required by the rules of the host State (i.e. Austria).

III.9.4. International Agreements

The provisions of the association agreements of the EC form an integral part of Community Law.⁶⁶ As integral part of Community Law these provisions have supremacy over national law.⁶⁷ Even Decisions of the Association Council, established by the Association Agreement, since they are directly connected with the Agreement to which they give effect, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system.⁶⁸ The *acquis associatif* confers rights on citizens, which the national courts of the Community must protect.⁶⁹ It is also settled case-law that every court of a Member State must apply Community Law in its entirety and protect the rights which Community Law confers to individuals, setting aside

⁶⁶ EuGH 30.4.1974, Rs 181/73; *Haegeman*, Slg 1974, 449, Rn 1; EuGH 30.9.1987, *Demirel*, Rs C-12/86, Slg 1987, 3719, Rn 7ff; EuGH 14.11.1989, Rs 30/88, *Griechenland gegen Kommission*, Slg 1989, 3711, Rn 12; EuGH 20.9.1990, Rs C-192/89, *Sevince*, Slg 1990, 3461, Rn 8.

⁶⁷ EuGH 29.4.1982, Rs 17/81, *Pabst*, Slg 1982, 1350, Rn 27.

⁶⁸ EuGH 14.11.1989, Rs 30/88, *Griechenland gegen Kommission*, Slg 1989, 3711, Rn 13; EuGH 20.9.1990, Rs C-192/89, *Sevince*, Slg 1990, 3461, Rn 9.

⁶⁹ EuGH 5.2.1976, Rs 87/75, *Bresciani*, Slg 1976, 129, Rn 26

any provision of national law which may conflict with it.⁷⁰ A provision in an Agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation of effects, to the adoption of any subsequent measure.⁷¹

Attention has to be paid to the fact that the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identical worded provision of an agreement concluded by the Community with a non-member country depends, inter alia, on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard.⁷² An international treaty must not be interpreted solely by reference to the terms in which it is worded but also in the light of its objectives. Art 31 of the Vienna Convention on the law of treaties stipulates in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.⁷³ This specific jurisprudence on international agreements of the Community developed by the ECJ and the fact that the various agreements pursue different objectives requires a very careful analysis by the judge that may suggest and demand for a European interpretation of specific terms of these agreements.

Example:

Article 7 of Decision No 1/80 is designed to promote family unity in the host Member State, in order to facilitate the employment and residence of Turkish workers duly registered as belonging to the labour force of the Member State concerned, by first allowing family members who have been authorised to join the migrant worker to be present with him and by then consolidating their position with the right to work as employed persons in that State.⁷⁴ The wife of a Turkish worker in Austria was denied the

⁷⁰ EuGH 9.3.1978, Rs 106/77, *Simmmenthal*, Slg 1978, 629, Rn 21; EuGH 22.6.2000, Rs C-65/98, *Safet Eyüp*, Slg 2000, I-4747, Rn 42.

⁷¹ ECJ 30.9.1987, Case 12/86, *Demirel*, ECR 1987, I-3719, para 14.

⁷² ECJ 1.7.1993, Case C-312/91, *Metalsa*, ECR 1993, I-3751, para 11.

⁷³ ECJ 14.12.1991, Opinion 1/91, ECR 1991, I-6079, para 14.

⁷⁴ ECJ 17.4.1997, Case C-351/95, *Kadiman*, ECR 1997, I-2133, para 34, 35, 36; ECJ 22.6.2000, Case C-65/98, *Safet Eyüp*, ECR 2000, I-4747, para 27.

right of free access to any paid employment residing in art 7 para 2 Association Council Decision 1/80 although she – being a relative – has been legally resident in the Member State of Austria for at least five years.⁷⁵ This negative decision was taken because of the fact that her husband was no longer employed on the regular labor market at the time she applied for a working permit for herself.

Possibly this decision does not comply with the effet utile of Community Law . The ECJ has ruled in the case of *Ergat*⁷⁶ that from the time when a Turkish national covered by the first paragraph of Article 7 enjoys, after five years' legal residence for the purpose of re-uniting a worker's family, the right of free access to employment in the host Member State under the second indent of that provision, not only does the direct effect of that provision mean that the person concerned derives an individual employment right directly from Decision No 1/80 but also the effectiveness of that right necessarily implies a concomitant right of residence which is also founded on Community law and is independent of the continuing existence of the conditions for access to those rights.⁷⁷ Following this principle, once rights can be derived the continuing existence of the condition of the Turkish worker still belonging to the regular labour market at the time the decision is taken by the authority is restrictive and can only be interpreted that way by the ECJ itself.

IV. Quality of the decisions

The more intense occupation and consideration of Community Law shows up in the reasoning of recent judgements. Proper scrutiny of Community Law and the case Law of the ECJ have been conducive to avoiding mistakes in the application of EC Law. The survey on the jurisprudence of Austrian Highest Courts shows that the awareness for the application of EC Law has drastically improved. On the one hand the courts'

⁷⁵ ECJ 17.4.1997, Case C-351/95, *Kadiman*, ECR 1997, I-2133, para 32, 51; ECJ 16.3.2000, Rs C-329/97, *Ergat*, ECR 2000, I-1487, para 37; ECJ 22.6.2000, Case C-65/98, *Safet Eyüp*, ECR 2000, I-4747, para 27.

⁷⁶ ECJ 16.3.2000, Rs C-329/97, *Ergat*, ECR 2000, I-1487, para 40.

⁷⁷ See, by analogy, as regards the third indent of paragraph 1 of Article 6 of Decision No 1/80, ECJ 20.9.1990, Case C-192/89, *Sevince*, ECR 1990, I-3461, para 29 and 31, and Case C-171/95, *Tetik* ECR 1997, I-329, para 26, 30 and 31; as regards the second paragraph of Article 7 of that decision, ECJ 5.10.1994, Case C-355/93, *Eroglu* ECR 1994, I-5113, para 20, and ECJ 19.11.1998, Case C-210/97, *Akman*, ECR 1998, I-7519, para 24.

reasoning indicate a deeper understanding for questions regarding Community Law and the willingness of the courts to be engaged in the supranational legal order and to cooperate with the ECJ. Recent judgements show that the judges have carefully analysed the cases as to European Law and provided a detailed reasoning whereas, in older decisions the relevant jurisprudence of the ECJ has been seldom quoted and the arguments were mainly based on national law.

IV.1 The conclusions – A Survey

Basically, those decisions that did not lead to a reference for preliminary ruling can be sub-divided into three categories: Decisions that are fully in compliance with Community Law (1); decisions where there is consent on the overall result, but that hide mistakes of diverse gravity (2): these deficiencies cover a wide range of errors from the negligible incorrect quoting of ECJ jurisprudence, to the restrictive interpretation of the parties' arguments or national procedural rules to the incomplete reasoning. Finally, the third group of decisions which are disapproved because they had demanded for an interpretation by the ECJ or were conflicting with Community Law because EC Law was ignored or applied contrary to the jurisprudence of the ECJ (3).

	OGH ⁷⁸	VfGH ⁷⁹	VwGH ⁸⁰
Total	100	40	146
(1)	55	36	90
(2)	37	4	45
(3)	8	0	11

⁷⁸ Supreme Court.

⁷⁹ Constitutional Court.

⁸⁰ Supreme Administrative Court

All in all the Austrian courts in terms of art 234 EC Treaty have sent 199 references for a preliminary ruling to Luxemburg since Austria's entry into the European Union until June 2003. Some of these references did not fall within the competence of the ECJ and therefore have been rejected (1). Point (2) gives the figure for those decisions that were withdrawn – most of these withdrawals could not be directly influenced by the national courts that have sent the references to Luxemburg. However, some of the withdrawals can be considered unjustified (3).

11.6.2003	Total	OGH	VfGH	VwGH
	199 ⁸¹⁾	48 ⁸²⁾	3 ⁸³⁾	39 ⁸⁴⁾
(1)	10	0	0	0
(2) ⁸⁵⁾	33	11	0	7
(3) ⁸⁶⁾	1	0	0	1

V. Consequences for the violation of Community Law by the Highest Judiciary

Advocate General Léger in his opinion of April 8, 2003 in the case *Köbler II*⁸⁷ argued that Member States have an obligation to make good the loss or damage caused to individuals by an inexcusable breach of Community law by a court against whose decision there is no judicial remedy. This conclusion was based on the broad scope given by the ECJ to the principle of State liability for breach of Community Law and the decisive role of national courts in the implementation of Community Law.

⁸¹⁾ Cases decided: 93.

⁸²⁾ Cases decided: 21.

⁸³⁾ Cases decided: 3.

⁸⁴⁾ Cases decided: 21.

⁸⁵⁾ Withdrawn references.

⁸⁶⁾ Wrongfully withdrawn.

⁸⁷⁾ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000.

The principle of State liability being inherent in the system of the EC Treaty⁸⁸ was established by the ECJ in *Francovich*⁸⁹ in a situation where a Member State failed in transposing a directive without direct effect, which prevented individuals from invoking before national courts the rights conferred on them by this directive. The ECJ underlined that just as it imposes burdens on the individuals, Community Law is also intended to give rise to rights which arise not only where they are expressly granted by the EC Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both in individuals and on the Member States and the Community institutions.⁹⁰

Since national courts whose task it is to apply the provisions of Community Law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.⁹¹ The ECJ deduced that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by breach of Community Law for which a Member State can be held responsible.⁹² According art 10 EC Treaty the Member States are required to nullify the unlawful consequences of a breach of Community Law.⁹³ Therefore, the Community Law itself imposed on the State an obligation to make reparation vis-à-vis individuals. This obligation constitutes a fundamental principle of Community Law. Like the principles of the primacy of Community Law and of direct effect the principle of the State liability helps to ensure the full effectiveness of Community Law through effective judicial protection of the rights which individuals derive from the Communitarian legal order. The principle of State liability constitutes the necessary extension of the general principle of effective judicial protection or of the right to challenge a measure before courts.

In order to obtain effective judicial protection of the rights which derive from Community Law it is not sufficient for individuals to invoke Community Law before a supreme court

⁸⁸ ECJ 5.3.1996, C-46 and 48/93, *Brasserie du Pêcheur*, ECR 1996, I-1029, para 31.

⁸⁹ ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, ECR 1991, I-5357, para 41.

⁹⁰ ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, ECR 1991, I-5357, para 31.

⁹¹ ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, ECR 1991, I-5357, para 32; ECJ 9.3.1978, Case 106/77, *Simmenthal*, ECR 1978, 629, para 16, ECJ 19.6.1990, Case C-213/89, *Factortame*, ECR 1990, I-2433, para 19.

⁹² ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, ECR 1991, I-5357, para 33.

or for that court to apply Community Law correctly. It is essential, if the supreme court renders a decision contrary to Community Law, for individuals to be in a position to obtain redress, at least where certain conditions are fulfilled. Where there is no possibility of an appeal against a decision of a court (of last instance), an action for damages alone serves to ensure the right infringed is restored and to ensure that the effective judicial protection of rights which individuals derive from Community Law is of an appropriate level.⁹⁴ However, reinstating the financial content of the individuals right is something less, a minimum remedy compared with full substantive reinstatement, which remains the optimum means of protection.⁹⁵

In the case *Brasserie du pêcheur and Factortame* the ECJ held that the principle of State liability holds good for any breach of Community Law, whatever be the organ of the State whose act or omission was responsible for the breach.⁹⁶ This results from the need of Community Law being uniformly applied all over the European Union. Therefore, domestic rules as to the division of powers between constitutional authorities cannot vary the guarantee of compliance with Community Law and consequently the liability of the State at the will of the different Member States.⁹⁷

In Community Law contrary to international law⁹⁸ State liability can be directly put in issue by individuals. The ECJ did not expressly acknowledge, in the Community Legal order, the principle of State liability for the acts or omissions of courts of last instance. In fact, it also – impliedly, but necessarily – extended the principle of State liability to judicial acts.⁹⁹ The acknowledgement of the State liability can be considered as the

⁹³ ECJ 19.11.1991, Cases 6 and 9/90, *Francovich*, ECR 1991, I-5357, para 36.

⁹⁴ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000, para 38.

⁹⁵ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000, para 39.

⁹⁶ ECJ 5.3.1996, C-46 and 48/93, *Brasserie du Pêcheur*, ECR 1996, I-1029, para 31 et seq.

⁹⁷ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000, para 43.

⁹⁸ In International Law the state liability is only indirectly put in issue by individuals.

⁹⁹ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000, para 51. See also: *Bapuly – Kohlegger*, Die Implementierung des EG-Rechts in Österreich – Die Gerichtsbarkeit, 2003, 32; *Barav*, Responsabilité et irresponsabilité de l'État en cas de méconnaissance du droit communautaire, Liber Amicorum Jean Waline, 435 ; *D. Simon*, La responsabilité de l'État législateur pour des dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté, RFDA, May/June 1996, 585.

corollary of the mission conferred to courts of last instance in the direct, immediate and effective protection of the rights which individuals derive from Community Law.¹⁰⁰

Damages must be claimed in the framework of the national law governing the State liability. Austria's law governing the State liability¹⁰¹ excludes the liability of the State for decisions of the highest instances. As the liability of the State for judicial wrong can be presumed this provision of the Austrian law is to remain unapplied. The compensation for suffered wrong does of course not dispel the violation of individuals' rights itself.

VI. Conclusions

The analysis of the jurisprudence of the highest courts in Austria revealed a couple of structural deficiencies which can be compensated by a couple of improvements:

In the field of the training in EC Law provided to lawyers adjustments to the needs of judges should be made and courses should focus more on case studies and no longer on general introductions in Community Law. Training programmes should enable the participants to find the legal sources of Community Law, to develop the awareness for the particularities of EC Law and give them a solid basis for resolving cases dealing with Community Law.

The Ministry of Justice should make available databases containing sample cases dealing with Community Law as well as one containing the references for preliminary ruling from courts of one's own country. These databases can be consulted while similar cases are to be decided. The search for actual cases pending before the ECJ or those that have already been decided may help in preventing references having an identical content as decided ones or in avoiding references regarding questions the ECJ is not competent to interpret.

¹⁰⁰ Opinion of Advocate General Léger on 8.4.2003, Case 224/01, *Köbler II*, ECR 2003, I-000, para 52.

¹⁰¹ Art 2 para 3 AHG (Amtshaftungsgesetz).

Partly national law would better be amended in order to increase legal certainty. National procedural rules in Austria do not make any mention of possibilities to take up procedure after an individual has been denied rights deriving from Community Law by the national judges of any court of last instance. However, if mistakes persist the Member States can be held responsible for judicial wrong. The Communitarian loyalty requires the Member States to fulfil the obligations arising from Community Law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (art 10 EC Treaty).

VII. Summary

In brief, the changes the Judiciary faces with the accession to the EU and some suggestions for making the application of Community law for lawyers easier.

Changes:

- Strict positivism of norms is to be given up
- Hierarchy of norms conflicts with the principle of the supremacy of EC Law
- Erosion of the “legal principle” according to which the enforcement is strictly bound to acts.
- The case law of the ECJ is to be taken into consideration in decision-making
- Dynamics of Community Law require the permanent training in EC Law
- Finding the legal sources has become more complex and difficult (non-consolidated versions)

Proposals:

- Deficits can be fought by an intensified training in Community Law that responds to the specific needs of judges
- Exchange between Member States and candidate countries, continuous dialogue between science, ministries and the judiciary.
- Databases on national decisions referring to Community Law and on preliminary rulings initiated by ones own country
- Legislature: Amendment of procedural rules, State Liability Act.

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