

Prof. Dr. S. Prechal  
Dr. R.H. van Ooik  
Prof. Dr. J.H. Jans  
Prof. Dr. K.J.M. Mortelmans

# ‘Europeanisation’ of the Law: Consequences for the Dutch Judiciary

# Table of Contents

## The report

1.	<b>Introduction</b>	4
2.	<b>The horizontal dimension: general and common aspects of the 'Europeanisation' process of the Dutch judiciary</b>	8
2.1	The organisation of the administration of justice in the EU	8
2.1.1	Centralised and decentralised enforcement of Community law	8
2.1.2	The interrelationship between centralised and decentralised enforcement and the shifting workload	9
2.1.3	The Constitutional Treaty and judicial enforcement of EU Law	11
2.2	EU law and national judicial procedures	13
2.2.1	The effects of EU law on national procedural law and the organisation of the courts	13
2.2.2	The duty to ensure effective judicial protection	14
2.2.3	Five practical examples of how the Court's case law could affect the organisation of the Dutch judiciary	16
2.3	Procedural implications of recent developments in European substantive law	20
2.3.1	Free movement	20
2.3.2	Competition policy	21
2.3.3	State aid	24
2.4	The preliminary reference procedure	25
2.4.1	Length of the procedure	25
2.4.2	Proposals for revamping the preliminary reference procedure	26
2.4.3	Short term solutions	29
2.5	The Constitutional Treaty and the protection of fundamental rights	29
3.	<b>The vertical dimension: European developments specific to civil, administrative and criminal law</b>	32
3.1	Civil law	32
3.1.1	Internal market legislation	32
3.1.2	Private international law	33
3.1.3	Enforcement and the future of European private law	34

3.2	Administrative law	35
3.2.1	Competition law	35
3.2.2	Environmental law	36
3.2.3	Immigration law	37
3.2.4	Telecom law	39
3.2.5	Agriculture and fisheries	40
3.3	Criminal law	40
3.3.1	The traditional role of the criminal judge	40
3.3.2	Obligation to enforce EC law through criminal law	41
3.3.3	Third pillar: police and judicial cooperation in criminal matters	42
3.3.4	Criminal law and the Constitutional Treaty	43
4.	<b>Conclusions</b>	46
4.1	Three major trends	46
4.2	How to cope with the major European trends?	47
4.3	Consequences of the centralisation and decentralisation processes for the organisation of the Dutch judiciary	51
	<b>Selected literature</b>	52
	<b>About the authors</b>	54
Annex I:	From Statistics of judicial activity of the Court of Justice 2003: References for a preliminary ruling (by Member State and by court or tribunal), 1959-2003	56
Annex II:	From Statistics of judicial activity of the Court of Justice 2004: Demandes de décision préjudicielle introduites, (01-01-2004 au 31-12-2004)	57
Annex III:	The Hague Programme: Strengthening Freedom, Security and Justice in the European Union	60
	Abbreviations	84

## Introduction

This report is written at the request of the Raad voor de rechtspraak that, since its establishment in 2002, has primary responsibility for the organisation and financing of the Dutch judiciary.<sup>1</sup> The report therefore primarily focuses on the consequences of the 'Europeanisation' process of in particular, Dutch law for the organisation of the Dutch judiciary. It does not intend in the first place to clarify how Dutch judges should interpret and apply the law of the European Union (EU) in everyday legal practice.

Some estimate that around 70 to 80 percent of the legislation of the EU Member States emanates from 'Brussels' these days. Others believe that this figure is too high and, moreover, that the impact of EU law on national law continues to relate mainly to socio-economic topics. In any event, the quantitative and qualitative influence of EU law on national law and legislation is increasing and is of ever-greater practical importance.

To this legislative development one has to add another vital dimension of the Europeanisation process, namely the judicial one, that is, the interpretation and further development of EU law by the Luxembourg courts, the European Court of Justice (ECJ) and the Court of First Instance (CFI). Since having laid down the most important principles regarding European Community (EC) law in the early sixties - such as the principles of supremacy and direct effect - the ECJ has been developing European law in a step-by-step fashion. This process can best be characterised as a steady evolution, without spectacular breaks and turns. At least, this is the perception of those who are long familiar with EC/EU law. Interestingly,

sometimes at the national law level, judgments of the ECJ, which are not so revolutionary from the EU law perspective, are nevertheless widely commented on and presented as astonishing novelties. A recent example is the Kühne & Heitz judgment<sup>2</sup>. Apparently there is a difference in perception and importance.

Not only are national legislators of the EU Member States confronted with the increasing influence of EU law, which results from the legislative and judicial developments mentioned above, the same holds true for national judges. They have to apply and enforce provisions of European law, either directly (for example in the case of Regulations) or indirectly (for example national legal rules which transpose EC Directives). In doing so, they have to take into account fully the case law of the ECJ and, where appropriate, the CFI on the interpretation of these European legal rules.

From this perspective, it is rather obvious that the national judiciary should get acquainted with the law of the European Union and keep in touch with its latest developments, in order to be able to apply this complex set of legal rules in its day-to-day work. In the Netherlands, the training of the judiciary in EU law is the prime responsibility of the Dutch training centre for the judiciary, the Studiecentrum Rechtspleging (SSR).

As from 2002, this organisation has offered an introductory course in EU law to all members of the Dutch judiciary, consisting of the judges, public prosecutors, trainee judges (RAIO's) and court clerks (gerechtssecretarissen). All new judges are expected to attend at least this

<sup>1</sup> With the exception of the Dutch Supreme Court (Hoge Raad) and the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak Raad van State).

<sup>2</sup> Discussed *infra*, in Section 2.2.3.

introductory course on EU law.<sup>3</sup> In addition, since 2004, SSR is developing specialised courses intended to deepen the knowledge of Dutch judges in specific fields of EU law (such as social security law, European immigration law, European criminal law and European environmental law).

These courses constitute a part of the so-called Eurinfra project, which was launched in 2000 and ended in 2004. The project consisted of three main 'pillars': (1) the above-mentioned training sessions on European law, organised by SSR; (2) the facilitation of access to EU information on the internet with the help of the newly developed Porta Iuris system, managed by Bistrot (Bureau internetsystemen en -toepassingen rechterlijke organisatie), which falls under the responsibility of the Raad voor de rechtspraak; and (3) the appointment of specialists in EU law (gerechtscöördinator Europees recht) at all courts in the Netherlands, who function as contact persons for EU law matters in their court. The 'gerechtscöördinatoren' meet regularly in the context of a network (the GCE-netwerk).<sup>4</sup> The meetings and activities of this network overlap to a certain extent with the meetings and work of another, much older network, namely the Eurogroup (Eurogroep). This group was established in 1995 in the context of the Nederlandse Vereniging voor Rechtspraak (Dutch Association for Judges and Public Prosecutors) with as main purpose to concentrate and study European law issues, in particular those which occur in everyday court practice. Members of the latter group are judges and public prosecutors

with specific interest in European law. Most of the abovementioned 'appointed' specialists are also members of the Eurogroup.

Although the focus of the present report is not on the initial or ongoing training of national judges, it should be emphasized that matters of organisation of the judiciary on the one hand, and the training in and knowledge of EU law on the other, cannot very well be separated. For instance, questions as to whether certain specializations within the national judiciary should be strived for or how to reorganise the preliminary reference procedure are issues which are intimately linked to the question of (the level of) knowledge of EU law on the part of domestic courts. Moreover, as the present report will illustrate in several instances, the increasing complexity of the relationship between EU law and national law may be tackled either by organisational measures or by improving the knowledge and understanding of the law and preferably by both.

As was already pointed out above, this report is primarily written for the Dutch Council for the Judiciary. However, the authors hope that it may also serve as a document for further reflection for similar bodies in other Member States and aspirant Member States, which overarch the national judiciary in one way or the other. At the initiative of, amongst others, the President of the Dutch Council for the Judiciary sixteen of these bodies now meet informally within the framework of the European Network of the Councils for the Judiciary (ENCJ)<sup>5</sup>.

<sup>3</sup> This course is divided into a part on the institutional law of the EU (structure Treaties, direct effect, judicial protection, etc.) and a second part devoted to substantive EU law (internal market, four freedoms, competition policy, etc.). Mandatory literature consists of an introductory book by Barents and Brinkhorst, *Grondlijnen van Europees Recht* ('Foundations of European Law') and a more specific book on European law and the Dutch judiciary by Mortelmans/Van Ooik/Prechal, *Europees recht en de Nederlandse rechter*, Kluwer, Deventer 2004. According to reports, the Council for the Judiciary has decided to cut expenses with the result that, as from 2005, SSR will offer the introductory course in EU law as an optional course only to certain parts of the Dutch judiciary, such as the court clerks.

<sup>4</sup> On 21 December 2004, the Raad voor de rechtspraak organised an interesting conference in The Hague to evaluate and commemorate the Eurinfra project and to think about its future. See also the Conclusions (Section 4.2).

<sup>5</sup> Cf. 'Europa ligt tastbaar op de zittingstafel', *Staatscourant*, 4 October 2004, p. 2.

As regards the structure of this report, we first discuss the developments in EU law which are relevant to all three branches of the Dutch judiciary (civil, administrative and criminal). These developments are referred to as the horizontal dimension of the Europeanisation process of Dutch law (Section 2).

Subsequently, we turn to the vertical dimension: the main developments in EU law that are of specific importance to each of the three branches are discussed separately (Section 3).

In both Sections, the emphasis is on the developments which may affect the organisational structure of the Dutch judiciary. But, again, it must be emphasized that consequences of the Europeanisation process for the organisation of the judiciary cannot be made clear without discussing this process itself, i.e., the major substantive developments in EU legislation and case law.

In the conclusions (Section 4) the threads are brought together in order to assess what the major European developments in the years to come will be, and in what possible ways these developments could influence the organisation of the Dutch judiciary. On the basis of the trends mentioned, the Raad voor de rechtspraak can make its own assessments as regards future policymaking and strategy.

Finally, we would like to thank Prof. Mr. P.J.G. Kapteyn, former judge at the ECJ, and Mr. M.J. Kuiper, judge at the CBB and chairman of the abovementioned Eurogroup, who have supervised the present project, for their critical remarks and valuable suggestions. Particular thanks must also go to our colleague, Denise Prévost, for careful reading of the manuscript and suggesting language corrections. Needless to say, any remaining mistakes and obscurities are ours.



## The horizontal dimension: general and common aspects of the ‘Europeanisation’ process of the Dutch judiciary

In this Section, we focus on the following ‘horizontal’ developments in EU law: the organisation of the administration of justice in the Union, both at the central EU level and at the level of the Member States (2.1); the impact of EU law on the organisation of national judicial procedures (2.2); some important recent developments in substantive EC law, notably the organisational consequences of the decentralisation of European competition policy (2.3); the preliminary reference procedure, which ‘horizontally’ overarches the three branches of the national judiciary (2.4); and finally attention is given to the Constitutional Treaty,<sup>6</sup> in particular its consequences (once it comes into force) for the protection of fundamental rights and the implications this may have for the functioning and organisation of both the national and European judiciary (2.5).

### 2.1 The organisation of the administration of justice in the EU

From the system of the EC/EU Treaty it follows that while legislation is adopted at the EC/EU level, as a rule, its application and enforcement takes place at the national level. Only in limited areas (competition law and Community trademark) there exists ‘direct administration’ by the Community, usually represented by the European Commission. This leads to a division of jurisdiction between the ECJ and CFI on the one hand and the national courts of the Member States on the other.

#### 2.1.1 Centralised and decentralised enforcement of Community law

Until recently, the CFI has dealt, in the first instance, with all the cases brought by individuals

against the Communities. The ECJ had jurisdiction in all the other direct action cases. These included cases brought by the EU institutions and by Member States. As from 26 April 2004, the CFI has, however, acquired broader jurisdiction over actions for annulment and actions for failure to act (Articles 230 and 232 EC), including almost all actions against acts or failures to act of the European Commission.<sup>7</sup>

The national courts are supposed to do the main bulk of the work. They are, to a large extent, responsible for the application and enforcement of EC law and for judicial protection in cases where EC law plays a role, whether directly or ‘in disguise’, i.e. once Community law has been implemented in national law. They interpret, apply and enforce that law in actions brought by private individuals (citizens and companies) against Member State authorities (administrative law cases), by Member States against private

<sup>6</sup> Treaty establishing a Constitution for Europe, Brussels, 29 October 2004, CIG 87/2/04, Rev 2 (published in OJ C 310, of 16 December 2004). Hereinafter referred to, interchangeably, as ‘the Constitutional Treaty’, the ‘Constitution’, and the ‘EU Constitution’. It must be stressed that although the final text of this treaty has already been signed, it still requires ratification by all 25 Member States and therefore has not yet entered into force.

<sup>7</sup> See Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, OJ 2004 L 132/5. This re-allocation of jurisdiction between the ECJ and CFI in direct actions was made possible by Article 225(1) EC Treaty, introduced by the Treaty of Nice.



individuals (criminal law cases; the public prosecutor versus the suspect) and also in disputes between individuals themselves (civil law cases). In the framework of these two types of cases - or three types, if one considers actions brought by Member State authorities against private individuals as a separate category - they are also the first called upon when the validity of secondary EC law is challenged. The preliminary reference procedure plays a pivotal role in this context.<sup>8</sup>

A possibility of appeal from the CFI to the ECJ provides a safeguard for the unity of EC law and a two-tiered system of judicial protection at EU level, in accordance with international (and national) human rights standards. The preliminary reference procedure works in a comparable way: its main purpose is to safeguard the unity and coherence of Community law.

In the context of this strongly decentralised system of administration of justice, the national courts take central stage. They are responsible for providing effective protection of rights derived from Community law in all disputes between private individuals, as well as in all cases between individuals and Member State authorities (or national authorities inter se). This protection may take the form of interim measures. It may also require genuine case management, in particular where Community law gives rise to large numbers of cases.

For a long time it was assumed - and to an important extent this still holds true - that EU law interferes neither with the national organisation of the judiciary nor with national judicial procedures. Enforcement of EU law has to fit into the existing structures and procedures of the Member States. However, as will be illustrated throughout this report, EU law may bring about subtle changes.<sup>9</sup>

### 2.1.2 The interrelationship between centralised and decentralised enforcement and the shifting workload

Although we may distinguish between the central and decentralised level of judicial protection, there also exists a relationship between the two. For instance, any decision to apply and enforce Community law through EU institutions or EU agencies will result in judicial protection being placed at the EU level and not in the national courts. Consequently, the workload of the national courts will decrease, and so may the need for specific knowledge in certain - sometimes highly-technical - fields of Community law.

A good example is the protection of trademarks - the Regulation on this issue<sup>10</sup> appoints the Office for Harmonisation in the Internal Market, Trade Marks and Designs (OHIM, seated in Alicante) as the Agency responsible for applying this Regulation. As a result, disputes between companies asking for registration of their trade marks and the Alicante Agency - if it has denied the request - must be brought before the CFI, and not before the national courts of the Member States.<sup>11</sup> Consequently, the need for specialists in trademark law in the national courts vanishes, or at least significantly diminishes.

In addition to this observation, one should note the pleas coming from the field of criminal law in favour of a US-like system of federal agencies, police, prosecutors and, consequently, also federal 'European' courts, at least for certain types of cross-border crimes.<sup>12</sup> These proposals seem to be a variation on the old, but sound, theme: direct administration of, in this case, criminal prosecution by an EU body goes hand in hand with direct judicial protection at the EU level.

<sup>8</sup> See also section 2.4 and the Zuckerfabrik case, discussed in Section 2.2.3.

<sup>9</sup> See infra, in particular Section 2.2 and Section 4.3 (Conclusions).

<sup>10</sup> Regulation 40/94/EC on the Community trade mark, OJ 1994 L 11/1.

<sup>11</sup> See, more extensively, for instance A. Folliard-Monguiral and D. Rogers, 'The protection of shapes by the Community trade mark', *European Intellectual Property Review*, 2003, April, p. 169-179.

<sup>12</sup> Cf the various contributions, notably those of J.L. De Wijckerslooth and J. Simonis in: G.J.M. Corstens, W.J.M. Davids, M.I. Veldt-Foglia (red.), *Europeanisering van het Nederlands Recht. Opstellen aangeboden aan Mr. W.E. Haak*, Kluwer, Deventer 2004. See also Section 3.3.4.

Conversely, where the application of Community law is decentralised, the workload of the national administrative bodies and the national courts as well as the need for specific knowledge will increase, whereas at central level it becomes quieter. The most important recent example of this is the decentralisation of application and enforcement of European competition law.<sup>13</sup>

Centralised and decentralised enforcement are thus communicating vessels. Workload is one of the major concerns when it comes to dividing jurisdiction between the central EU level and the Member State level. From the perspective of the national judiciary, the question of workload and specific knowledge is indeed directly relevant for the functioning of the preliminary reference procedure, which will be discussed in more detail in Section 2.4. To put it simply: the less time that is spent on direct actions the more time that is available for answering preliminary questions of national courts.

One of the innovations introduced by the Nice Treaty, which is relevant in this respect, is the possibility of introducing judicial panels (Articles 220 and 225A EC Treaty). The judicial panels will be attached to the CFI. A possibility for appeal against the decisions of the panels to the CFI is provided for. As far as the subject-matter jurisdiction is concerned, staff cases and appeals in Community patent cases are the areas most often mentioned. In the area of staff cases there is a recent agreement on the transfer of these cases to a special judicial panel, which will be established in 2005.<sup>14</sup> Similarly, the proposals relating to the Community patent - not to be confused with the Community trademark - envisage

first instance jurisdiction for a panel that is going to be called the Community Patent Court.<sup>15</sup>

Apart from a certain reduction of the workload of the CFI and, consequently, also of the ECJ, these measures mark another interesting, but still somewhat hesitant trend, namely the (partial) transfer of jurisdiction from the national level to EU level in certain highly-technical areas of EU policy. The Community patent is an interesting development in this respect since, for the first time ever, a Community Court is going to deal with disputes between private individuals, in particular those concerning alleged infringements of Community patents and challenges to the validity of these patents.<sup>16</sup>

The Community patent is not the only example of the shift in jurisdiction from the national level to EU level. Recently, some scholars have suggested that also in those areas that are, or will be, heavily 'communitarised', there should be direct access to the Luxembourg courts instead of the national courts.<sup>17</sup> In fact, instances of 'mixed administration' already exist, such as the administration of the European Social Funds, procedures for the release of genetically modified organisms into the environment and indeed, the application and enforcement of competition law. As a rule, they involve a complex system of decision making, by both EU and national authorities. In such cases, it is often not clear where the responsibility lies and this necessarily leads to intriguing problems as to the level at which judicial protection must be sought.<sup>18</sup>

These proposals would lead to a rather radical change regarding the determination of the

<sup>13</sup> See further *infra*, Sections 2.3 and 3.2.1.

<sup>14</sup> Council Decision of 2 November 2004 establishing European Union Civil Service Tribunal, OJ 2004, L 333/7.

<sup>15</sup> Cf. the proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance, COM (2003) 828 final.

<sup>16</sup> Cf. the Proposal for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM (2003) 827 final.

<sup>17</sup> Proposals made by A-G Geelhoed at the T.M.C. Asser conference 2004, in particular in relation to immigration and asylum. See also L.A. Geelhoed and H. Hijmans, 'Het rechterlijk toezicht op de uitvoering van het gemeenschapsrecht in een Europabrede Unie', SEW 2002, p. 407.

<sup>18</sup> Cf. J. Jans, R. de Lange, S. Prechal and R. Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2nd ed., 2002, Nijmegen, p. 53-55.

competent judge. No longer would the type of conflict (i.e. those who are involved) be exclusively decisive for determining whether it is the national court (individual versus individual; individuals versus Member State) or the CFI/ECJ (all other types of cases) that is the competent court to hear the case. The determining of jurisdiction would also be dependent on the subject matter of the dispute, i.e. the rules that are invoked by the applicant or defendant. As soon as one of them relies on EU law that has been lifted to the central level for enforcement, such as, probably, the rules on the Community patent, the national court would have to decline jurisdiction and refer the parties to the competent panel or CFI/ECJ.

The concentration of judicial protection and enforcement at the central level has indeed a number of important advantages, such as the application of a single set of procedural rules, the uniformity of case law, the existence of one single point of reference for the parties and the obviation of the need for setting the slow preliminary reference procedure in motion. However, whatever the future development of these trends might be, there is also a caveat, which concerns the processing capacity of the Luxembourg courts. Also, most lawyers are much more familiar with judicial proceedings before their own national courts than with judicial proceedings before the CFI/ECJ. In addition, in the case of national enforcement, they do not have to travel all the way from Athens or Warsaw to Luxembourg, nor do the parties they represent have to do so.

In some quarters, some perplexity may exist about the question why the Luxembourg courts are not able to hand down more judgments. In this respect, it should be noted that the processing capacity of the Community courts is inherently limited in a situation where 25 legal traditions

and 20 possible languages meet. These factors prevent the Luxembourg courts from achieving an output comparable to that of national courts. In other words, at a certain point, the possibilities for speeding up the current processing of cases are virtually non-existent.<sup>19</sup> This also implies the limit for shifts in jurisdiction.

### 2.1.3 The Constitutional Treaty and judicial enforcement of EU law

Would the Constitutional Treaty result in a change? No doubt, the coming into force of the Constitutional Treaty is very likely to affect both the Luxembourg courts and the national courts. It will increase complexity, for instance by guaranteeing similar, but not necessarily identical, rights; by introducing certain procedural and substantive law innovations; by slightly changing the emphasis on various issues in the Treaty, etc.<sup>20</sup>

In particular, the merging of the three Union pillars will result in changes to the jurisdiction of the courts. The national and European courts will be called upon to apply the rules of the third pillar, on criminal law, in the same fashion as they currently do in the field of 'regular' Community law. Furthermore, jurisdiction will be extended in full to asylum and immigration policy. Essentially, these two areas, together with private international law issues, are referred to in the Constitution – and also in the EC Treaty after Amsterdam – as the Area of Freedom, Security and Justice (AFSJ), formerly known as Justice and Home Affairs (JHA).

This also implies that, after the entry into force of the Constitution, all national courts of all 25 Member States may or must ask preliminary rulings on criminal matters, whereas at present the preliminary reference procedure of the third pillar

<sup>19</sup> Cf. the contribution of A.W.H. Meij in: *The Uncertain Future of the Preliminary Procedure*, Symposium Council of State, the Netherlands, 30 January 2004, The Hague 2004 and F.G. Jacobs, *Recent and ongoing measures to improve the efficiency of the European Court of Justice*, *EL Rev.* 2004, p. 823-830. See also Section 2.4.2.

<sup>20</sup> Cf., for instance, the 'mainstream provision' of Title 1, Part III of the Constitutional Treaty.

(Article 35 TEU) is merely optional.<sup>21</sup> With respect to the first component of the term AFSJ (and JHA), namely asylum and immigration, the most important novelty will be that subordinate courts will be given the possibility to refer. At present, under Article 68 EC, only supreme courts may and must refer.<sup>22</sup>

On the other hand, with respect to the Union's Common Foreign and Security Policy (CFSP), the ECJ will still have no jurisdiction at all.<sup>23</sup> Also the accession of the EU to the ECHR will have implications for the ECJ and its relationship with the European Court of Human Rights.<sup>24</sup>

However, in terms of the organisation of the judiciary in the strict sense of the word, the effect of the provisions of the Constitutional Treaty is almost negligible. The major changes already took place in Nice. The most important innovations brought about by the Nice Treaty are the introduction of judicial panels (Articles 220 and 225A EC Treaty), the re-allocation of jurisdiction between the ECJ and CFI in direct actions (Article 225(1) EC Treaty) and the possibility to confer upon the CFI jurisdiction to give preliminary rulings in certain types of cases (Article 225(3) EC Treaty).<sup>25</sup>

The most important general tendency that is likely to be reinforced is that the CFI will in fact become the general court of first instance. It will have

a sort of 'default' jurisdiction in direct actions, including the majority of direct actions brought by the Member States and the institutions. This is underlined by the fact that the CFI was renamed the 'High Court' by the European Convention that drew up the initial version of the Constitutional Treaty, and the 'General Court' by the Member States that made some changes to the Convention's version of the Constitution.<sup>26</sup> However, certain restrictions would guarantee that (quasi) constitutional cases are dealt with directly by the ECJ.<sup>27</sup> The latter's role as the constitutional court of the Union will thus more clearly be highlighted in the future.

---

<sup>21</sup> See further Sections 3.3.3 and 3.3.4

<sup>22</sup> See also Section 3.2.3.

<sup>23</sup> See Article III-376 of the Constitutional Treaty: 'The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy'. At present, the Court's jurisdiction with regard to the second pillar, on CFSP, is excluded in Article 46 TEU.

<sup>24</sup> A legal basis, and even an obligation to seek for accession, has been laid down in Article I-9(2) of the EU Constitution: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution'. See further *infra*, Section 2.5.

<sup>25</sup> See Section 2.1.2 for the first two issues; see *infra*, Section 2.4.2 for the last point on the preliminary rulings procedure.

<sup>26</sup> See Article I-28 of the July 2003 version, and Article I-29 of the final version of 29 October 2004. However, it must also be taken into account that the exercise in naming and renaming of the Luxembourg courts is partly due to terminological problems.

<sup>27</sup> Cf., for instance, the Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, OJ L 132/5.

## 2.2 EU law and national judicial procedures

### 2.2.1 The effects of EU law on national procedural law and the organisation of the courts

Increasingly, the ECJ bases obligations in respect of the legal protection of individuals who are confronted with a breach of their rights under Community law on Article 10 of the EC Treaty. According to this provision, Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the EC Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. Also, Member States shall abstain from any measure that could jeopardize the attainment of the objectives of the EC Treaty.

If there is no Community legislation on the subject, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for the enforcement of Community law:

"In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law".<sup>28</sup>

Such national competence - usually referred to as the principle of national procedural autonomy - however does not mean that national procedural

law cannot be affected by Community law at all. As is well known, the European Court of Justice, in the same judgments, also held that:

" it [is] being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law".<sup>29</sup>

The Court of Justice, referring to Article 10 of the EC Treaty, thus provides for two conditions to be met by national procedural law. First, the procedural rules relating to the enforcement of Community law rights by private individuals in front of national courts may not be less favourable than those governing the same or a similar right of action on a purely internal matter (principle of equivalence). Second, these rules must in no case be laid down in such a way as to render impossible in practice the exercise of the rights which the national courts must protect (principle of effectiveness).

The test applied by the ECJ can be found in, for instance, the *Peterbroeck and Van Schijndel* judgments.<sup>30</sup> In these two cases, the Court held that compliance with the principles of equivalence and effectiveness "must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration". In legal writing, such a balanced approach has been referred to as the procedural rule of reason.<sup>31</sup>

<sup>28</sup> Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, para. 13; and Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, para 13.

<sup>29</sup> *Rewe*, at para. 13.

<sup>30</sup> Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599; Joined Cases C-430/93 and Case C-431/93 *Van Schijndel and others* [1995] ECR I-4705.

<sup>31</sup> S. Prechal, 'Community Law in National Courts: the Lessons from *Van Schijndel*', 35 (1998) *CMLRev.* 681. For the 'substantive' rule of reason, see Section 2.3.1.

### 2.2.2 The duty to ensure effective judicial protection

From the case law of the ECJ it can be deduced that - apart from the two *Rewe/Comet* restrictions to the principle of national procedural autonomy, discussed above - Community law contains a general obligation on Member States to ensure that effective judicial protection exists to guarantee that the rights conferred on individuals by Community law can actually be enforced.<sup>32</sup> The requirement of effective judicial review - in legal writing sometimes referred to as the solution to problems of the 'third generation'<sup>33</sup> - reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The *Johnston* and *Heylens* cases provide a good illustration of the ECJ's point of view on this principle of effective judicial protection.

*Johnston*<sup>34</sup> was concerned with a challenge brought against the decision of a Chief Constable who refused to renew a contract with Mrs Johnston on the grounds of public safety. The claimant contended that the decision infringed the principle of equal treatment of men and women laid down in Directive 76/207.<sup>35</sup> Under the relevant national law, a decision taken on public policy grounds became non-reviewable by virtue of a procedural provision, which accorded the force of conclusive evidence to a certificate issued by the Secretary of State stating that the decision was justified on these grounds. The

ECJ analysed the provision of Article 6 of the Directive that reads as follows:

"Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities".

The ECJ interpreted Article 6 and concluded that:

"It follows from that provision that the Member States must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned".<sup>36</sup>

In *Heylens*<sup>37</sup> the Court not only repeated some of its considerations in *Johnston*, but also elaborated on them. The ECJ stressed that the existence of a judicial remedy is essential for the effective protection of the rights that individuals derive from Community law, but it added that an effective judicial review also includes a duty for judicial and administrative authorities to give reasons.

From a more recent case, *Commission vs. Austria*, concerning a refusal by a public authority to grant permission for the marketing of medicinal products, it can be concluded that an internal appeal procedure to an administrative authority cannot be equated with review by a genuine judicial body.<sup>38</sup>

<sup>32</sup> See, e.g., Case C-340/89 *Vlassopoulou* [1991] ECR I-2357; Case 222/86 *Heylens* [1987] ECR 4097; Case 222/84 *Johnston* [1986] ECR 1651; Case C-97/91 *Oleificio Borelli v. Commission* [1992] ECR I-6313.

<sup>33</sup> D. Curtin and K. Mortelmans, 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script' in: D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers* (1994, Dordrecht: Nijhoff) 423. See also the conclusions in Section 4.2 for the problems of 'generation zero'.

<sup>34</sup> Case 222/84 *Johnston* [1986] ECR 1651.

<sup>35</sup> The so-called Second Equal Treatment Directive, Directive 76/207/EEC, OJ 1976 L39/40.

<sup>36</sup> *Johnston*, at para. 19.

<sup>37</sup> Case 222/86 *Unectef v. Heylens* [1987] ECR 4097.

<sup>38</sup> Case C-424/99 *Commission v Austria* [2001] ECR I-9285.

In the Constitutional Treaty, the Court's case law on the right to an effective remedy and a fair trial is codified in Articles I-29 and II-107. According to the former provision:

"Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

The second provision reads as follows:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."<sup>39</sup>

In summary: national law must provide the remedies necessary to allow judicial enforcement of Community law provisions (access to court). If such remedies do not exist, the national legislator should create them and even - in the view of many commentators - the national court may have to create an effective remedy on its own motion.<sup>40</sup>

It should be added that obligations for Member States to provide for effective judicial remedies arise not only from the case law of the Court, but also - explicitly or implicitly - from directives, regulations and other sources of secondary Community law. The example of Article 6 of the Second Equal Treatment Directive has already been mentioned. Other examples of legislative provisions requiring Member States to provide for effective remedies at national level can be found in directives on consumer protection,<sup>41</sup> directives on public procurement,<sup>42</sup> the Community Customs Code,<sup>43</sup> and also in regulations on cross border insolvency.<sup>44</sup> It is expected that in other areas of European policy, for instance environmental law, similar developments will take place in the near future.<sup>45</sup>

<sup>39</sup> The first paragraph is clearly based on Article 13 of the ECHR and the second paragraph corresponds to Article 6(1) of the ECHR.

<sup>40</sup> This is often inferred from the first Factortame case (C-213/89 Factortame I [1990] ECR I-2433).

<sup>41</sup> See, for instance, Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95 of 21 April 1993. This provision states, inter alia, that Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. These means shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

<sup>42</sup> For instance, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209/1.

<sup>43</sup> See, in particular, Article 243 et seq. of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ L 302/1, 19 October 1992.

<sup>44</sup> Regulations nos. 1346, 1347 and 1348 of 29 May 2000, OJ, L160, 30 June 2001.

<sup>45</sup> See *infra*, Section 3.2.2. See also Section 3.2.4 for an example in the field of telecom law. According to some Dutch scholars, Article III-398(1) of the Constitutional Treaty ("In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration") will provide a legal ground for the harmonisation of national procedural public law and to introduce a sort of 'European General Administrative Law Act', comparable to the Dutch Algemene Wet Bestuursrecht. See A.P.W. Duijkersloot en R.J.G.M. Widdershoven, 'Kroniek Europees bestuursrecht', NTB 2003, p. 350-359. This, however, requires a very - and in the view of the authors of this report: too - flexible and creative interpretation of Article III-398(1).

### 2.2.3 Five practical examples of how the Court's case law could affect the organisation of the Dutch judiciary

1. Köbler judgment.<sup>46</sup> In this case the ECJ concluded, "that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation."<sup>47</sup>

Under Dutch law, a 'Köbler action' would have to be instituted by means of a civil action against the State. In other words, in the Dutch legal order the Hoge Raad, the highest ordinary court, would ultimately have to decide on judicial errors of the highest administrative courts: the Afdeling bestuursrechtspraak Raad van State (Administrative Law Branch, Council of State), the College van Beroep voor het bedrijfsleven (Regulatory Industrial Organisation Appeals Court), and the Centrale Raad van Beroep (Central Court of Appeal, for the public service and social security matters). This would give the Hoge Raad the final word on whether administrative courts have fulfilled their Community law obligations properly. And this would mean that Köbler has acquired unexpected organisational implications. For instance, one of the questions that remain unanswered is how we should deal,

in procedural terms, with errors of the Hoge Raad itself. It is a moot point whether Articles 6 and 13 ECHR would preclude it from hearing a case in which its own mistake is the subject of the dispute, and that it is not likely that such a procedure – within the same branch of the judiciary – would result in a favourable decision for the injured party. Therefore, one could argue that the Köbler judgment requires the introduction into the Dutch judicial system of a new procedure to accommodate claims against the State for damages resulting from mistakes of the Hoge Raad itself.<sup>48</sup>

However, answering questions from senator Jurgens, a member of the Dutch First Chamber of Parliament, the Dutch Minister of Justice, Donner, did not see any necessity to introduce new legislation to address this, in the Minister's view, 'hypothetical' problem.<sup>49</sup>

2. Kühne & Heitz.<sup>50</sup> According to the judgment in Kühne & Heitz, a public authority is required - under certain circumstances - to reconsider a decision that conflicts with Community law at the request of the injured party. The ECJ ruled that the principle of cooperation, arising from Article 10 EC, imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the ECJ. The Court, however, added a number of conditions which are strictly connected to the facts of the case:

<sup>46</sup> Case C-224/01 Köbler [2003] ECR I-10239.

<sup>47</sup> Köbler, dictum.

<sup>48</sup> See also P.J. Wattel, Köbler Cilfit and Welthgrove, 'We can't go on meeting like this', 41 CMLRev, 2004, 177. This line of argumentation has also been brought forward by A. Zuckerman, 'Appeal to the High Court against House of Lords decisions on the interpretation of Community law- Damages for judicial error', in CLJ 2003.

<sup>49</sup> Aanhangsel van de Handelingen I, 2003-2004, nr. 14 (in the original words of Minister Donner: "Slechts als de Hoge Raad die uitspraak apert zou negeren, of het cassatieberoep andermaal zonder prejudiciële verwijzing en met vermeende miskenning van de Köbler-doctrine zou afdoen, ontstaat er een situatie waarbij de vraag gewettigd is of het Nederlandse recht wel in een effectieve rechtsbescherming voorziet. [...] Ik acht de zo-even besproken samenloop van omstandigheden met betrekking tot de Hoge Raad op dit moment dermate exceptioneel en hypothetisch, dat de vraag gewettigd is of die zich ooit daadwerkelijk zal voordoen.")

<sup>50</sup> Case C-453/00, judgment of 13 January 2004. Also published with case annotations in AB 2004, no. 58 (R. Widdershoven); JB 2004, 42 (NV); and SEW 2004, 38 (S. Prechal).



(1) under national law, the administrative body has the power to reopen that decision; (2) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; (3) that judgment is, in the light of a decision given by the ECJ subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and (4) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

Thus, an injured party can request the administrative body to "reconsider" the decision that caused the loss or damage; and under the circumstances mentioned above, it is obliged to reconsider a decision that conflicts with Community law. That being the case, the question arises how this fits in with the obligation of an injured party under the *Brasserie* judgment to limit the extent of loss or damage. In *Brasserie*, the Court observed that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself.<sup>51</sup> Does this mean that injured parties must now first request the administrative body in question to reconsider its earlier decision before bringing an action against the State for judicial errors? And if this request is rejected, must they then first go through the entire administrative law process before the State can be held liable? We submit that this last question should be answered in the negative, because otherwise matters would drag on forever.<sup>52</sup> It seems to us that requiring this of an injured party goes beyond the bounds of "reasonable diligence". Matters would become even more

complicated if we combine *Kühne & Heitz* with the Court's judgment in *Köbler*, discussed earlier. Then, we should ask ourselves what the consequences of *Kühne & Heitz* are for the public law judiciary. If there exists a duty for public administrative authorities to reconsider their decisions, does there also exist, under certain conditions, a duty for the courts to reconsider their judgments?<sup>53</sup> Whether there is a need for a redefinition of the *res judicata* principle, is just one of the questions triggered by these judgments. Also, what exactly are the consequences of the two judgments for the civil law judiciary?

It goes, however, beyond the scope of this contribution to give a comprehensive analysis of all of these issues, but it shows that the judgments discussed can have an - albeit uncertain - impact on the organisation of the national judiciary. One thing, however, is very certain: legal uncertainty will generate new preliminary questions, with all sorts of procedural constraints as a consequence.

3. *Zuckerfabrik* case law.<sup>54</sup> In this judgment the European Court of Justice held that national courts have the power provisionally not to apply a Community regulation, the validity of which is contested. National courts may - under certain conditions - order suspension of the enforcement of a national measure adopted on the basis of such a regulation or order interim measures to regulate the legal positions or relationships at issue concerning a national administrative measure based on such a Community regulation.<sup>55</sup>

There are three conditions to be met: (1) that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the

<sup>51</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

<sup>52</sup> See also J.H. Jans & K.J. de Graaf, 'Bevoegdheid = verplichting? Enkele opmerkingen over de uitspraak van het Hof van Justitie in de zaak *Kühne & Heitz*', NTER 2004, p. 98-192.

<sup>53</sup> The first preliminary questions on this issue have already been asked: see Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*.

<sup>54</sup> Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Soest und Zuckerfabrik Suderdithmarschen* [1991] ECR I-415.

<sup>55</sup> Joined Cases C-143/88 and C-92/89, dictum. See also Case C-465/93 *Atlanta* [1995] ECR I-3761.

contested measure not already have been brought before the Court, itself refers that question to the Court;

(2) there is urgency and a threat of serious and irreparable damage to the applicant; and

(3) the national court takes due account of the Community's interests.

A recent example of the impact of the Zuckerfabrik case law on the Dutch judiciary is provided for by the Nevedi case of the district court in The Hague.<sup>56</sup> In that case, a Dutch court had serious doubts about the legality of a Directive<sup>57</sup> and therefore decided not to apply the national legislation implementing that Directive and thus, in fact, refused to apply the Directive itself; simultaneously making a preliminary reference to the ECJ.

This recent application of the Zuckerfabrik case law in the Netherlands clearly illustrates three points. First, the impact of EC law on the organisation of the Dutch judiciary is shown: having a speedy procedure for imposing interim measures is almost indispensable. Second, the importance of being very familiar with EC law is highlighted since the three conditions mentioned above are uniform, Community criteria that all national courts have to apply. Thirdly, Nevedi illustrates the enormous importance of being familiar with these types of judgments, which suspend the application of certain secondary EU legal rules in a certain Member State.<sup>58</sup>

4. Orfanopoulos judgment.<sup>59</sup> In a recent judgment on the free movement of persons and the legitimacy of a national expulsion order under Directive 64/221, the Court seems to have indicated that under certain circumstances the national court is required to exercise an *ex nunc* review (instead of the normal *ex tunc*

review) of the legality of national expulsion orders and to take into account circumstances occurring between the final decision of an administrative authority and the review by an administrative court of the lawfulness of that decision.

If and when applied more broadly, this judgment could have a serious impact on the role of administrative courts in safeguarding European-based rights. However, if and to what extent this case law can indeed be 'exported' to other areas of European law, remains to be seen.

#### 5. Streekgewest Westelijk Noord-Brabant<sup>60</sup>

In Dutch administrative law access to complaints and appeal procedures is reserved for so called "interested parties". The General Act on Administrative Law stipulates in Article 1:2 (1): " 'Interested party' means a person whose interest is directly affected by an order."

In Dutch administrative law, the plaintiff must have a sufficient interest in the proceedings. If not, his or her appeal will be "inadmissible". The decisive criterion is whether the decision challenged by the plaintiff is injurious to his or her interests.

The leading doctrine denies that any *Schutznorm* or – relativity principle – is part of Article 1:2 AWB. In other words, if the court finds that the administrative order is in violation of the law, the court will quash the contested decision, regardless of whether the statutory requirements have the intention of protecting the interest of the plaintiff.<sup>61</sup> It is well known that in other legal systems, for instance in German administrative law, as well as in Dutch private law a *Schutznorm* theory is applied.

<sup>56</sup> District Court of The Hague, 23 April 2004, KG 04/317.

<sup>57</sup> Namely Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feeding stuffs (OJ 2002 L 63/23).

<sup>58</sup> See further, extensively, the Conclusions, Section 4.2. See also the annotation to this case by R. Widdershoven, AB 2004, nr. 364; R. van Ooik and T. Vandamme, 'Schorsing van Europese regelgeving in Nederland', SEW February 2005, p. 60-69.

<sup>59</sup> Case Joined Cases C-482/01 and C-493/01 Orfanopoulos, judgment of 29 April 2004, not yet published in the ECR.

<sup>60</sup> Case C-174/02, judgment of 13 January 2005, not yet published in the ECR.

<sup>61</sup> Cf. J.C.A. de Poorter, B.W.N. de Waard, A.T. Marseille, M.J. Zomer, *Herijking van het belanghebbende begrip; Een relativiteitsvereiste in het Awb-procesrecht*. Den Haag 2004.

Recently however, it has been argued that such a *Schutznorm* should be introduced in Dutch administrative law as well. One of the main reasons which would support such an introduction is efficiency (reducing the case load of the courts). In a recent evaluation of the General Act on Administrative Law (Commissie Boukema) it was furthermore argued that the current situation leads to an improper use of the right of appeal.<sup>62</sup> Academic doctrine is rather divided on the issue.<sup>63</sup>

It is against this highly sensitive background that the preliminary question of the Dutch Supreme Court<sup>64</sup> in Case C-174/02 must be situated: "May only an individual who is affected by a distortion of cross-border competition as a result of an aid measure rely on the last sentence of Article 93(3) of the EC Treaty ...?"

The answer of the ECJ is crystal clear: "An individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision. In the latter case, the question whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is that the

individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision."

Applying a *Schutznorm* to deny interested parties the right to rely on directly effective provisions of European law seems no longer possible. Of course, it would be possible to apply a *Schutznorm* in cases outside the scope of application of European law. However, that would create inconsistencies in Dutch administrative law as such. Therefore it seems fair to conclude that introducing a *Schutznorm* with respect to Article 1:2(1) Awb in order to reduce the case load of Dutch public courts will prove to be very difficult indeed.

After discussing the five practical examples above, on how judgments of the ECJ can affect the organisation of the Dutch judiciary, some general observations have to be made.

Firstly, one has to acknowledge that, looking at the case law of the ECJ from a European legal perspective, some judgments are not very 'revolutionary' at all. The Kühne & Heitz judgment, discussed above, is, arguably, a rather standard judgment of the ECJ. But seen from a national legal perspective, this judgment can have a rather severe impact on one of the key provisions of Dutch procedural administrative law, namely Article 4:6 Awb. It is therefore not surprising at all that such a judgment is commented upon by almost every Dutch academic working in the field of administrative law.<sup>65</sup>

<sup>62</sup> Verslag van de Commissie Evaluatie Awb II, p. 18.

<sup>63</sup> Pro: Ben Schueler, *Het zand in de machine*, Amsterdam, 2003. Contra: Jans/de Lange/Prechal/Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2e druk, p. 110-111.

<sup>64</sup> Judgment of 8 March 2002, LJN-nummer AB2884.

<sup>65</sup> See, for instance, T. Barkhuysen and H.M. Griffioen, 'Formele rechtskracht en kracht van gewijsde in het licht van recente EG-jurisprudentie; De zaak Kühne & Heitz nader beschouwd', *NJB* 2004, nr. 41; J.H. Jans & K.J. de Graaf, 'Bevoegdheid = verplichting? Enkele opmerkingen over de uitspraak van het Hof van Justitie in de zaak Kühne & Heitz', *NTER* 2004, p. 98-192; A.J.C. de Moor-van Vugt & E.M. Vermeulen, 'Correctie gebrekkige toepassing EG-recht', *JB-plus* 2004, p. 58-68. See also: R.J.G.M. Widdershoven & R. Ortlep, 'Schendingen van EG-recht door rechters', *O&A* 2004, p. 34- 48; E. Steyger, 'De gevolgen van aansprakelijkheid van de Staat voor rechterlijke schendingen van EG-recht', *NTER* 2004, p. 18-22; B.J.P.G. Roozendaal, *De toekomst van de formele rechtskracht*, *O&A* 2003, p. 149-159; E. Steyger, 'Formele rechtskracht geen rustig bezit meer', *NTB* 2003, p. 231; W.Th. Braams, 'Formele rechtskracht in civielrechtelijk en Europeesrechtelijk perspectief', *NTBR* 2004, p. 163.

Secondly, judgments that are, again from a European legal perspective, remarkable, are sometimes so atypical that it is hard to predict, with a safe degree of certainty, their effects on the organisation of the Dutch judiciary. Arguably the Köbler-judgment, discussed above, fits in to this category very nicely.

In sum, European law cannot only emerge in unlikely corners, it can also have an effect in unlikely corners.

## 2.3 Procedural implications of recent developments in European substantive law

European substantive law pursues two objectives: negative integration and positive integration. Directly effective Treaty provisions, applied by a national judge, intend to abolish national obstacles to free movement (negative integration). However, in many fields, EC secondary law, adopted by the Community legislator, is necessary in order to establish a genuine internal market and to attain other policy objectives, such as environmental protection (positive integration).

This Section focuses on negative integration and the role of the national judge in this regard. Positive integration will be dealt with in Section 3.2, on the vertical dimension of the Europeanisation process.

According to the structure of the EC Treaty, a distinction should be made between the provisions on free movement (2.3.1), competition policy (2.3.2) and state aid (2.3.3). The procedural implications will be described after the main characteristics of these three fields have been analysed.

### 2.3.1. Free movement

#### Characteristics

Market operators (workers, companies) may invoke directly effective Treaty provisions as a sword against a measure of a public authority of one of the Member States that restricts their economic activities, including their freedom of movement. Subsequently, this authority relies on Treaty exceptions, such as Article 46 EC (public policy), as a shield. These sword-and-shield battles started in the sixties, and still exist, but the emphasis is shifting.

During the first period (1963-1992) the focus was on the free movement of goods and services. Since 1992 the free movement of persons has come more and more to the fore. The “haves” rely on the freedom of establishment (or sometimes the freedom to provide services), combined with the freedom of movement of capital. The “have-nots” invoke the provisions on the freedom of movement of workers, the general non-discrimination clause (Article 12 EC) and Articles 17/18 EC on European citizenship.

During the first period, economic measures of the national authorities were attacked, such as “buy national” campaigns for fruit or double inspections of imports of medicinal products.<sup>66</sup> More recently however non- and semi-economic measures of the national authorities, such as authorisations for surgeries or export bans for waste, have been examined by the judges.<sup>67</sup>

The role of the European Commission in these types of battles remains passive. It does not intervene in a dispute before a national judge, but parallel to the national procedure, it may start an action for infringement of the Treaty by the Member State concerned (Article 226 EC).

<sup>66</sup> Case 249/81 *Commission v Ireland* [1982] ECR 4005 (‘Buy Irish’) and Case 104/75 *De Peijper* [1976] ECR 613, respectively.

<sup>67</sup> See, e.g., Case C-157/99 *Smits Peerbooms* [2001] ECR I-5473 and Case C-2/90, *Commission v Belgium* [1992] ECR I-4439, respectively.

### Procedural implications

All judges can be faced with the Treaty provisions on the four freedoms of the internal market. During the first period, the 'economic' courts, such as, in the Netherlands, the College van Beroep voor het bedrijfsleven, but also the criminal judges, applying the Wet Economische Delicten, were the most active.<sup>68</sup>

More recently the Dutch judges in immigration matters (Vreemdelingenrechter) for the "have-nots" and the Dutch tax courts (Belastingrechter) for the "haves" regularly apply the relevant Treaty provisions. This shift in attention also has its repercussions on the content of preliminary questions asked by Dutch judges and on their workload.

In past years, the scope of the prohibitions on restrictions to free movement has been established and there is a large convergence between the four freedoms: discriminatory and equally applicable measures are, for all freedoms, covered by the relevant Treaty prohibitions. The authorities can invoke not only the Treaty exceptions, but also exceptions accepted in the case law of the European Court of Justice, such as the protection of the environment or consumer protection (the so-called rule of reason exceptions).<sup>69</sup>

Thus the problem for the Member State is not so much to find a convincing public interest which can be used to justify a restriction to free movement; the Achilles heel for the defendant, and also the national judge, is the application of the proportionality test, which is inherent to both the Treaty and the Rule of Reason exceptions.

Comparative research, in which the situation in the Netherlands was included, showed that "the

application of the proportionality principle by the national [inter alia Dutch] courts is extremely erratic".<sup>70</sup> Asking the ECJ for clarification could help to solve the problem of how to apply the proportionality principle in a concrete case, but the preliminary reference route takes much time.<sup>71</sup> Another solution would be to improve and/or intensify existing information channels between the various national courts. A procedure for rapidly exchanging relevant information between Dutch immigration courts (Vreemdelingenrechtshouders) has already proved to be successful.<sup>72</sup>

### 2.3.2 Competition policy

#### Characteristics

Regulation 1/2003 on the modernisation of the application of Article 81 EC has drastically changed the procedural landscape.<sup>73</sup> Since 1 May 2004 national judges have to apply not only Article 81(1) EC (cartel prohibition) and Article 81(2) (nullity of cartels), but also Article 81, paragraph 3 (exceptions to the cartel prohibition) if there is an effect on inter-state trade.

The monopoly of the European Commission to apply the third paragraph of Article 81 EC has thus disappeared, but in order to guarantee the uniform application of Community competition law, the Commission can, under certain conditions, intervene as an *amicus curiae* in a competition case, pleaded before a national court.<sup>74</sup>

The national competition authorities (NCA's), such as the Dutch Nederlandse mededingingsautoriteit (NMa), which is responsible for public enforcement, must also apply Article 81 EC in its entirety. Logically, the administrative courts involved in the public

<sup>68</sup> As regards this 'traditional' role of the criminal courts, see also below, Section 3.3.1.

<sup>69</sup> Cf. A. Schrauwen (ed.), *Rule of Reason. Rethinking another Classic of EC Legal Doctrine*, ELP, Groningen, 2005, forthcoming.

<sup>70</sup> See M. Jarvis, *The application of EC Law by national courts*, Oxford, 1998, p. 293.

<sup>71</sup> Cf. Section 2.4.1.

<sup>72</sup> See also the conclusions (in particular Section 4.2) for an elaboration on these ideas.

<sup>73</sup> Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1/1).

<sup>74</sup> See further below, see also Section 3.2.1.

enforcement of the cartel prohibition have to judge on the application of the exception of Article 81(3) EC as well. In the Netherlands, these are the district court of Rotterdam and, on appeal, the College van Beroep voor het bedrijfsleven (CBb).

The new pattern is taken over in many national competition laws, including the Dutch Mededingingswet. The national competition authorities share with the national judges the authority to apply both Article 6, paragraph 3, Mededingingswet and Article 81(3) of the EC Treaty, the former being an exact copy of the latter.<sup>75</sup>

Apart from public enforcement, the national civil courts may also have to enforce EC competition rules. This will happen when they are requested to do so by a private individual that was negatively affected by the cartel or the abuse of a dominant market position (prohibited by Article 82 EC), such as consumer organisations or a competitor that has only recently entered the market. Since the national civil judge must also now apply Article 81 EC in full, private enforcement of EC competition law will become more and more important in the future.

### **Procedural implications**

The national (civil) judge, confronted with the application of Articles 81 and 82 EC, may need the help of some friends. The European

Commission and/or the national competition authority (NCA) may act as *amicus curiae* and the judge may ask for an expert report, explaining complicated economic notions, such as the concept of the 'relevant market'.<sup>76</sup>

These two authorities, on their own motion, may make written submissions; the possibility for oral pleadings by the Commission and/or the NCA in the national court's proceedings is, however, to be decided upon by that court itself.<sup>77</sup>

Also, a copy of the final judgment in which Articles 81 and 82 EC are applied, must be sent to Brussels in order to inform the European Commission and to give it the full picture of how EC competition policy is applied throughout the Union.<sup>78</sup> In the Netherlands, the Raad voor de rechtspraak is responsible for sending these copies to Brussels; the national courts must send their Article 81/82 judgments to the Raad voor de rechtspraak.

When doubts exist as to the interpretation of a certain concept - for example, whether a municipality can be considered as an undertaking within the meaning of Article 81 EC - preliminary questions may be asked. It could very well be argued that such questions may also be forwarded in cases where national competition law is applied but where concepts are 'borrowed' from European competition law.

---

<sup>75</sup> On the duty to apply these Articles 81 EC and 6 Mw *ex officio*, see the judgment of the Dutch Supreme Court (Hoge Raad) of 3 December 2004, LJN AR0285. See also the preliminary questions of the CBb on the duty of national courts to apply EC law *ex officio*, 17 May 2005, LJN AT5809.

<sup>76</sup> Article 15(1) of Regulation 1/2003/EC: 'In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules'.

<sup>77</sup> See Article 15(3) of Regulation 1/2003: 'Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations' (emphasis added).

<sup>78</sup> See Article 15(2) of Regulation 1/2003: 'Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties'.

There is no case law of the ECJ specifically relating to competition cases yet,<sup>79</sup> but in other fields, such as taxes, the Court has already declared preliminary questions admissible which, strictly speaking, related to the interpretation of national (tax) law.<sup>80</sup> The Court observed that Article 234 EC is an instrument of judicial cooperation, by means of which it provides the national courts with the points of interpretation of Community law which may be helpful to them in assessing the effects of a provision of national law at issue in the disputes before them.<sup>81</sup>

Taking into account the workload of the ECJ, it may be advisable to restrict the possibility to refer preliminary questions on provisions of Dutch competition law that were 'borrowed' from EC competition law, to the Dutch Courts of Appeal (Gerechtshoven) and the Supreme Court (Hoge Raad). Of course, the *rechtbank van Rotterdam* and the CBB, should also have this possibility, in cases where they review decisions of the NMa.<sup>82</sup>

Judicial review of public enforcement by the NMa and by National Regulatory Authorities (NRA's), such as the *Onafhankelijke Post en Telecommunicatie Autoriteit*, OPTA (the Independent Postal and Telecom Authority), has proved to be effective. Now that these national authorities have to apply both European and national law and the European Commission may intervene as an *amicus curiae*, the old question of shared responsibility of the Member States and the Community becomes topical.

On the other hand, private enforcement of European competition law – notably by means of claims for damages – until now only occupies

a modest place. A recent comparative law research project (the so-called *Waelbroeck report*)<sup>83</sup> indicates that in the Member States of the European Community private enforcement is used in only 10% of the cases, whereas public enforcement accounts for about 90% of all cases.

Nevertheless, as was pointed out earlier, private enforcement of EC (and national) competition law will become more and more important in the future and the European Commission also advocates this enforcement mechanism. As the national judges have little experience in this highly complicated and technical field, the *Waelbroeck report* recommends, *inter alia*, the installation of specialised judges or specialised chambers/courts to overcome the obstacles to private enforcement.

In this context it should also be noted that the NRA's and the NCA's have created their own European Networks. In this way, they are responding to the multinational companies that are international networks *par excellence*.

Also judges specialised in competition law, have formed their own 'Bellamy' Network: Christopher Bellamy, the President of the UK Competition Appeals Tribunal and former judge at the CFL, presides over an informal contact group of national (administrative) judges which review the decisions of national competition authorities. Indeed, these kinds of European Networks, giving information on pending and delivered competition cases, can help national judges to give balanced and up-to-date judgments and to tackle forum shopping.<sup>84</sup>

<sup>79</sup> Though Case C-7/97 *Bronner* [1998] ECR I-7791 may provide some guidance on the issue.

<sup>80</sup> Cf. Case C-28/95 *Leur-Bloem* [1997] ECR I-4161; see also case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

<sup>81</sup> *Leur-Bloem*, at para. 33. See also Case C-300/01 *Salzmann* [2003] ECR I-4899.

<sup>82</sup> See also Section 2.4.1 and the Conclusions (Section 4).

<sup>83</sup> Published at: [http://europa.eu.int/comm/competition/antitrust/others/private\\_enforcement/index\\_en.html](http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html).

<sup>84</sup> See also Section 4, general conclusions.

### 2.3.3 State aid

#### Characteristics

Articles 87 and 88 EC do not have direct effect, except for the stand still clause of Article 87(3), in fine EC (according to which a Member State shall not put its proposed measure on state aid into effect until the Commission has taken its final decision).<sup>85</sup> The European Commission has a monopoly to approve or disapprove aid granted by the Member States.

The role of the national judge in this area is therefore rather limited. Nevertheless, the national judge may have to answer the preliminary question whether a national financial measure qualifies as “aid” within the meaning of the EC Treaty,<sup>86</sup> and also whether or not it is granted by the “State”. If not, no notification to Brussels is required and the stand still clause of Article 87(3) EC is irrelevant.

A good illustration of this is provided by the cases in which Dutch courts had to decide whether certain levies imposed by organs of the Publiekrechtelijke Bedrijfsorganisatie, PBO (Public Business Authorities) qualified as “aid” within the meaning of the EC Treaty. The *Wet op de bedrijfsorganisatie* (Law on the public organisation of business) governs the supervision of these public bodies (*Bedrijfslichamen*). Dutch judges had to decide in proceedings brought by private companies, for instance in the bulb sector, against the PBO organs (*Hoofdbedrijfschap Ambachten*, Central Industry Board for Skilled Trades). The later had imposed a levy, with a view to

funding a collective advertising campaign for the benefit of the companies belonging to the bulb sector.<sup>87</sup> In these cases the main question was, in particular, whether the levies imposed qualified as charges having an effect equivalent as customs duties (within the meaning of Article 25 EC) or as state aid (within the meaning of Article 87 EC). To answer the question, the Dutch courts, in particular, considered the purpose of the levies (*‘bestemmingsheffingen’*), namely the financing of an advertising campaign.

An additional role for the national courts in the context of state aid may also result from the ECJ judgment in the *Altmark* case.<sup>88</sup> This case concerned subsidies which compensate a public service obligation on the part of a transport undertaking. Under certain circumstances, to be verified by national courts, such subsidies are not caught by the prohibition of Article 87(1). The application of the criteria may indeed give rise to considerable problems of interpretation.

#### Procedural implications

Unlawful aid must be recovered in accordance with the procedures of the national law of the Member State concerned, provided that these national procedures respect the principle of equivalence and effectiveness; the procedures must also allow the immediate and effective execution of the Commission’s decision. An ever recurring problem in these procedures is posed by the principle of legitimate expectations, that offers, as a rule, more protection under national law than under Community law.<sup>89</sup> Furthermore, it seems that administrative judges in the Netherlands do

<sup>85</sup> In a recent case, the ECJ ruled that the last sentence of Article 87(3) EC must be interpreted as meaning that it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure. See Case C-174/02 *Streekgewest Westelijk Noord-Brabant*, judgment of the Court of 13 January 2005, para. 21 (delivered at the request of the *Hoge Raad*), briefly discussed in Section 2.2.3.

<sup>86</sup> Cf., for instance, Case C-342/02 *Pearle* judgment of the ECJ of 15 July 2004, not yet published in the ECR.

<sup>87</sup> Cf. Case 51/74 *Van der Hulst* [1975] ECR 79.

<sup>88</sup> Case C-280/00 [2003] ECR I-7747.

<sup>89</sup> On this, see Cf. J. Jans, R. de Lange, S. Prechal and R. Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2nd ed., 2002, Nijmegen, p. 225-232.



not have the power to order the recovery of the aid. They merely nullify the decision to grant subsidies. The recovery itself is a matter of civil or tax law.

Be this as it may, in terms of the organisation of the national judiciary, the Community rules on state aid only have limited implications.<sup>90</sup> If necessary, the national judge can ask the national authority responsible for notification of the aid state to the European Commission, or the Commission itself, to deliver relevant information. As the Pearle case illustrates, these contacts do not always run very smoothly.<sup>91</sup>

## 2.4 The preliminary reference procedure

The preliminary reference procedure (Article 234 EC) has been essential for the development of Community law and its effects in the national legal order. For national courts, it is also of vital importance: through this procedure they are, upon their own request, assisted in matters of application and interpretation of Community law. An overview taken from the statistics of the ECJ is attached to this Report and gives some indications of the 'preliminary reference behaviour' of the various national courts.<sup>92</sup>

A striking feature for the Netherlands is that, during the period 1952-2003, Dutch lower courts make relatively few references to the ECJ, namely some 40% of all Dutch references. The lower courts in, for instance, France account for some 85% of the French references. In Germany almost 70% of all references emanate from subordinate courts.

In discussing this procedure we concentrate on the organisational aspects and problems; how the procedure works, what case law relates to the procedure, when national courts may or must refer, etc. are matters already dealt with in (too) many text books, and also in the SSR training courses.<sup>93</sup>

### 2.4.1 Length of the procedure

The preliminary reference procedure has proved to be a success, but there is also a price to be paid: over the last five years the average time needed for obtaining a preliminary ruling from the ECJ has increased from 21,2 months in 1999 to 25,5 months in 2003.

From the perspective of a national court, this is an alarming development. Apart from the fact that a preliminary reference is an incident in the procedure in the case before the national court, it also means that many other (non-referred) cases have to wait.

Moreover, in the Netherlands the courts are paid, by the Raad voor de rechtspraak, on the basis of their 'output', i.e. the number of judgments delivered each year. In such circumstances, postponing the final judgment for another two years is not always a wise decision. These financial consequences could (at least partly) explain the reluctance, in recent years, of subordinate courts in the Netherlands to refer questions to the ECJ in Luxembourg.

The prospects for the future do not give rise to much optimism: the ECJ's backlog is likely to increase as more and more cases are referred

<sup>90</sup> See, M.L. Struys and H. Abbott, 'The role of national courts in State aid litigation', *EL Rev.* 2003, p. 172 and B.J.

Drijber, 'Enkele tendensen in het staatssteunrecht', *Markt en Mededinging*, 2004, p. 279; J.R. van Angeren en W. den Ouden, *Subsidierecht en staatssteun*, VAR-congres, 2004, p. 174; G.J. van Slooten, *Steunverlening en de Nederlandse bestuurspraktijk*, VAR-congres, 2004, p. 267.

<sup>91</sup> Cf. the interlocutory judgment of the district court The Hague (*Arrondissementsrechtbank Den Haag*) of 29 April 1998, published and discussed in *SEW* 1998, p. 437. See also the Order of the College van Beroep voor het bedrijfsleven of 12 May 2004, discussed in *SEW* 2004, p. 485. On how these contacts could be improved, see the Conclusions (Section 4.2, third part).

<sup>92</sup> See Annex I.

<sup>93</sup> Cf. the introductory Section 1.

to Luxembourg, including from the ten Member States that have recently joined the Union. Moreover, the areas in which the Court has or will have jurisdiction in the near future are increasing and increasingly varied.

In particular, the nature of some areas, such as asylum and immigration policy and family law, and issues such as custody of children, make the matter even more pressing.<sup>94</sup>

To this one may add the possible further extension of the jurisdiction of the ECJ in the area of criminal law as a result of the Constitutional Treaty. In particular, the existing 'limited' preliminary reference procedures in the fields of immigration and criminal law,<sup>95</sup> will be transformed into a full one, such as exists nowadays under Article 234 EC Treaty. Under the new preliminary reference procedure (Article III-369) the Court will have compulsory jurisdiction to give rulings on the interpretation of 'the Constitution', as well as the acts adopted on the basis of the Constitution,<sup>96</sup> which includes the provisions on criminal law, civil law/private international law and immigration law. Indeed, this is likely to increase the workload even more, both in qualitative and quantitative terms.

It is the ECJ itself that confirms the foregoing in the recent The Hague Programme.<sup>97</sup> It underlines the importance of its role in the relatively new area of freedom, security and justice and is 'satisfied that the Constitutional Treaty greatly increases the powers of the European Court of Justice in that area'. To ensure, both for European citizens and for the functioning of the Area, that questions on points of law brought before the Court are answered quickly, 'it is necessary to enable the

Court to respond quickly as required by Article III-369 of the Constitutional Treaty. In this context and with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court. The Commission is invited to bring forward - after consultation of the Court of Justice - a proposal to that effect'.

In brief, the duration of the preliminary reference procedure will (continue to) pose serious problems, creating legal uncertainty for the persons concerned, causing friction with requirements under the ECHR, discouraging national courts from making a reference and possibly even contributing to the avoidance of EU law issues by national courts.

#### **2.4.2 Proposals for revamping the preliminary reference procedure**

Over the years, a rich variety of options for reform of the preliminary reference procedure have been on the table, as have been the pros and cons of these proposals.

Some of the proposals solely or mainly concern the Luxembourg courts. There is, for instance, the option of conferring upon the CFI jurisdiction to give preliminary rulings in certain types of cases, an issue already dealt with by the Treaty of Nice (see Article 225(3) EC).<sup>98</sup> Other, until now less concrete options, are specialisation – often considered as a means of speeding up and facilitating the administration of justice – and decentralisation of the

<sup>94</sup> See further Sections 3.2.3 and 3.1, respectively.

<sup>95</sup> Cf. Article 68 EC Treaty and Article 35 EU Treaty, respectively. For both articles see also *supra*, Section 2.1.3 and, in particular, *infra*, Section 3.1.3 and 3.3.3.

<sup>96</sup> See Article III-369 of the Constitution: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Constitution; (b) the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union'.

<sup>97</sup> See Annex III.

<sup>98</sup> The ECJ and the Commission are supposed to submit proposals to the Council to this effect. Until now, no agreement has been reached on this within the ECJ.

preliminary reference procedure. The latter may take shape in the form of regional EU courts, which would deal with preliminary references coming from a certain region or a certain number of Member States. There are also those who propose to reconsider the length of the Court's summer vacation.

Other proposals, however, have more serious consequences for the national courts and possibly also for the organisation of the judiciary. There is the option of limiting the incoming cases at the ECJ, either by limiting the categories of courts that may make a reference<sup>99</sup> or by introducing some kind of 'filter' at the level of the ECJ. This could take shape of a leave for appeal or certiorari.

In some proposals, access to the ECJ is limited by a national filter: it is up to special or the highest national courts to deal mainly with preliminary references. Only in exceptional cases should the matter be forwarded to the ECJ. In line with this idea, the Dutch Scientific Council for Government Policy (Wetenschappelijke Raad voor het Regeringsbeleid, WRR) has proposed the creation of judicial bodies in every Member State to deal with preliminary references coming from that Member State.<sup>100</sup> These 'courts' should not be national courts but should be part of the European judiciary. The WRR is, however, not entirely clear about their composition. On the one hand, it is proposed that mainly but not exclusively judges from the Member State concerned should be appointed as members. On the other hand, the WRR stresses the importance of having national judges in these 'preliminary references courts'. First, this would improve the acceptance of their rulings by the 'ordinary' judiciary of the

Member State in which they are established. Second, since the judges are deemed to have the same legal training and background, this will result in a better understanding of the cases referred to these courts and will enable them to function as a conduit or hinge between the national and European legal order, making the 'translation' of EU law into familiar national legal concepts easier.

Another proposal, in which national courts play a crucial role, has been submitted by former ECJ judge P. Kapteyn:<sup>101</sup> courts of first instance should address their preliminary questions to specially established chambers of the courts having jurisdiction at final instance. If this chamber of the supreme court considers that the issue is of general interest for the uniformity or development of Community law, the chamber should make a reference to the ECJ. In other situations, it should answer the preliminary question itself, in a non-binding opinion, on which the parties to the dispute may comment before the court of first instance. If the decision of the latter court is appealed, the appeal court will still be empowered to make a reference to the ECJ. Such a procedure is believed to encourage national judges to resolve problems of interpretation and application of EU law themselves.

The last issue brings us to another option that is gaining attention, namely the re-orientation of the role of national courts in the context of the preliminary reference procedure. Apart from encouraging national courts to assume more responsibility for resolving questions of EU law – and proposals to improve their 'capacity' to do so! – some proposals try to cast this re-orientation in more organisational terms.

<sup>99</sup> E.g. only the courts of last resort and appeal courts should be entitled to make a reference, as was the case under the EEX Treaty (for the EEX Regulation, see Section 3.1.3). At the Eurinfra conference of 21 December 2004 (cf. Section 1) prof. Kapteyn indeed suggested, in order to cope with the Court's ever increasing workload, that only the supreme courts of the Member States should be entitled, and obliged, to refer questions to Luxembourg.

<sup>100</sup> WRR report 'Naar een Europabrede Unie', The Hague 2001, notably at p. 281-285. See also the preparatory Working Paper by D.M. Curtin and R.H. van Ooik, Revamping the European Union's Enforcement Systems with a View to Eastern Enlargement, The Hague 2000 (both documents published at: <http://www.wrr.nl>).

<sup>101</sup> Cf. P.J.G. Kapteyn, 'Reflections on the Future of the Judicial System of the European Union after Nice', YEL 2001, p. 123, in particular at p. 183-185.

The idea of 'auto limitation' launched by A-G Jacobs seeks to limit references to cases where 'the question [of interpretation of EU law] is one of general importance and the ruling is likely to promote the uniform application of the law throughout the European Union'.<sup>102</sup> This criterion may be one to be applied by that national court when considering reference. It may, however, also become a criterion for the ECJ to assess the admissibility of the reference.

Another possibility to shift the responsibility for the interpretation of Community law to national courts, would be to adjust the *Cilfit* requirements. If the requirements mentioned by the ECJ for applying the doctrine of *acte clair* are taken seriously by a national supreme court, it is almost impossible not to refer: there must be not only "no reasonable doubt as to the manner in which the question of interpretation of community law is to be resolved", but the supreme court concerned "must be convinced that the matter is equally obvious to the courts of the other [now 24] Member States and to the Court of Justice".<sup>103</sup> While making this assessment, the court must take into account 'the characteristic features of Community law and the particular difficulties to which its interpretation gives rise'. In more concrete terms, this requires a comparison of different language versions of the relevant provisions – but how many Dutch judges read Estonian? – the court must take into account that Community law has its own terminology and, finally, that it has to be interpreted in another way than the national judge is accustomed to under domestic law, namely by using the teleological or purposive interpretation method and placing the provisions to be interpreted in the context of Community law as a whole.

A 'relaxation' of these *Cilfit* requirements would take into account that, in the meantime, the workload of the Court has increased dramatically. However, serious doubts about such a relaxation also exist. First, concerns arise because of the recent accession of ten new Member States. Many of the judges in these countries were never trained in EU law. Certain parts of EC law, like competition or public procurement are, by their very nature, new to them. Traditional attitudes, such as legal positivism, with a strong fixation on written law, make it difficult to understand the case law oriented approach of Community law. These are only a few of the difficulties the judiciary in the new Member States is facing. Second, the relaxation could create new problems of co-ordination for the national courts: if national supreme courts refer less often to the ECJ, they will more often arrive at different solutions, without there being a preliminary ruling offering the final solution and hence uniformity of interpretation. In turn, it will be up to the supreme courts to ascertain how other national (supreme) courts construe the relevant EU law provisions.

The proposal for a 'green light procedure' made by the Dutch CFI judge Meij goes a step further. He points to the artificial distinction between interpretation and application of the law, which is inherent to the preliminary reference procedure as it functions at present. In his view, the national court should complete the entire process of judicial decision making in the case at hand and it should make a complete draft judgment, including an interpretation of the provisions of EU law that are at stake. The preliminary question should then be accompanied by this draft judgment. Next, it will be up to the ECJ to decide whether

<sup>102</sup> F. Jacobs, *The Role of National Courts and of the European Court of Justice in ensuring the Uniform Application of Community Law: Is a New Approach Needed?*, in *Studi in onore de Francesco Capotorti*, Vol. II., Milano 1999, at p. 180.

<sup>103</sup> Case 283/81 *Cilfit* [1982] ECR p. 3415, at paragraphs 16-20. Another possible 'escape' for the national supreme court exists where the resolution of the point of law at issue was clear from settled case-law of the Court (*acte éclairé*, see paragraphs 13-15 of the *Cilfit* judgment). See also the Opinion of AG Stix-Hackl of 12 April 2005 in Case C-495/03 *Intermodal Transports BV vs. Staatssecretaris van Financiën*.

full proceedings are necessary in respect of the unity or consistent development of EC law. In cases where, in the light of the solution envisaged by the referring court, there are no issues of unity and further development of EU law, the case may be sent back to the national court. In this way, the latter will get a 'green light' to proceed with the case.<sup>104</sup>

### 2.4.3 Short-term solutions

In brief, a whole range of proposals exist for improving and speeding up the preliminary reference procedure, but there are few short term prospects that decisions on some more radical solutions will be taken at the EU level.<sup>105</sup> For the time being, there are two provisions in the Rules of Procedure of the ECJ that may be of some avail.

In the first place, Article 104(3) of these Rules, allows the ECJ to give its preliminary ruling by reasoned order following a simplified proceeding, instead of giving judgment upon a full proceeding. The circumstances under which this is possible are: (i) where a question referred for a preliminary ruling is identical to a question on which the Court has already ruled; (ii) where the answer to such a question may be clearly deduced from existing case-law; or (iii) where the answer to the question admits of no reasonable doubt. It goes without saying that for the national judge, it is better not to receive such a reasoned order.

The second 'speeding up mechanism' is to be found Article 104a of the Rules of Procedure. Under this Article, at the request of the national court, the President may exceptionally decide

to apply an accelerated procedure. Indeed, this applies only if the circumstances of the case make clear that a ruling by the ECJ is a matter of exceptional urgency. It is obvious that this procedure will not and cannot be used too often.<sup>106</sup> However, the need for a fast-track preliminary reference procedure is real, certainly in the light of the expanding jurisdiction in asylum, immigration, family law and criminal matters mentioned above.<sup>107</sup>

Another possible solution for urgent cases may be found in an arrangement at national level, which may take the form of interim measures to be applied while the case is pending in Luxembourg.

## 2.5 The Constitutional Treaty and the protection of fundamental rights

Above, various aspects and possible implications of the Constitutional Treaty came to the fore. This Section focuses on the protection of fundamental rights in the EU context and the effects the coming into force of the Constitutional Treaty may have for the national judiciary.

Ever since the early 1970s, the ECJ has developed, under the heading of 'general principles of Community law', a jurisprudential fundamental rights standard for the EC. As sources of fundamental rights it accepts national constitutional traditions, international treaties ratified by all Member States and, amongst the latter, in particular the ECHR.<sup>108</sup> Without much exaggeration it can be said that the ECHR is one of the most important

<sup>104</sup> Cf. the contribution of A.W.H. Meij in: *The Uncertain Future of the Preliminary Procedure*, Symposium Council of State, the Netherlands, 30 January 2004, The Hague 2004.

<sup>105</sup> For an overview of a number of recent internal measures taken at the ECJ in order to speed up the preliminary ruling procedure, such as timetabling, see F.G. Jacobs, *Recent and ongoing measures to improve the efficiency of the European Court of Justice*, *EL Rev.* 2004, p. 823-830, at p. 829.

<sup>106</sup> Until now, such acceleration has been accepted only once by the ECJ's President, in the *Jippes* case. Cf. Mortelmans and Van Ooik, 'De Europese aanpak van mond- en klauwzeer en de rechtmatigheid van het preventieve vaccinatieverbod', *Ars Aequi* 2001, pp. 911-927.

<sup>107</sup> Apparently, the ECJ is willing to use the accelerated procedure exactly for these types of cases, in particular those involving the interest of children or persons in custody. See F.G. Jacobs, *loc. cit.* note 110.

instruments used by the ECJ, despite the fact that the EC is not a party to the Convention. In recent years, the ECJ has been increasingly prepared to take into account and, indeed, refer to Strasbourg case law.

From the perspective of the national judiciary, it is further important to note that the fundamental rights do not only bind the EU institutions, but also the Member States and their authorities, when they implement Community law or when they act within the field of Community law. In particular, the latter situation is rather sensitive and far from undisputed. In any case national courts may be called upon to review, as a matter of EU law, whether the national authorities have respected fundamental rights in such a situation. And they can make a preliminary reference on such an issue.

For its part, the Strasbourg court holds the Member States of the EU responsible for violations of the ECHR, regardless of whether the national authorities are implementing EU law obligations or not.

This may result in a national court being caught between the Luxembourg and the Strasbourg Courts, whenever it reviews acts of national authorities and the case law of the two courts diverges on the relevant points. In order to complicate the matter even further, in two cases currently pending before the European Court of Human Rights (ECrHR), another thesis is tried: the responsibility of the EU Member States under the Convention for ECJ decisions which are implemented by domestic courts.<sup>109</sup>

In the (near) future it is likely that fundamental rights arguments will be brought, in an EU

context, before the national courts, the ECJ in preliminary proceedings and, eventually, before the European Court of Human Rights. The instances where the parties feel that the national court and the ECJ have erred in their interpretation of the ECHR, will become more frequent. This is partly because EU law litigants have discovered these arguments, and partly because areas such as immigration and criminal law are more sensitive from the point of view of the protection of fundamental rights than, for instance, the labelling of canned sour cherries.<sup>110</sup>

In brief, in the current situation there is a risk of diverging interpretation of one and the same fundamental rights standard (ECHR) and there exists a complex situation of different levels of fundamental rights protection: national courts, ECJ and ECrHR. To this one may add the overall problem of how to keep the procedures within reasonable time periods.

The Constitutional Treaty provides for EU accession to the ECHR in Article I-9, which is even drafted in terms of an obligation on the part of the EU ("The Union shall accede"). In addition, part II of the Constitutional Treaty incorporates the Charter of Fundamental Rights. Upon entry into force of the Constitutional Treaty, the Charter will thus be made a legally-binding document with constitutional status.

Will this drastically change the situation? Upon accession of the EU to the ECHR, the ECJ will remain the competent court for the interpretation and review of the validity of EU law, including the interpretation of the ECHR (in its capacity as primary Union law). However, the European Court of Human Rights will remain

<sup>108</sup> See, e.g., Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125. This case law was subsequently codified in the EU Treaty (Article 6 EU).

<sup>109</sup> See the *Bosphorus* case, pending before the ECrHR, application no. 45036/98 and *Emesa* case (application 62023/00). Recently, the application of *Emesa* was declared inadmissible for *ratione materiae* reasons. The issue in how far the Member States may be held liable was skilfully circumvented by the ECrHR (decision of 13 January 2005).

<sup>110</sup> See however the *Nevedi* judgment of the district court The Hague, mentioned earlier (Section 2.2.3).

the final umpire on ECHR issues. So the risk of divergent interpretation will continue, unless some method is devised to minimize the risk.

A question of a practical nature, also from the perspective of national courts, is whether a preliminary reference to the ECJ will be considered as an integral part of the domestic remedies that have to be exhausted before bringing a case to the ECtHR.

The incorporation of the Charter into the Constitution will be a matter of great constitutional significance for the EU, giving it, for the first time, its own catalogue of fundamental rights. However, for the national judiciary it will certainly not ease the task.

There are provisions in the Charter with very similar, but not identical, formulation to the rights that appear in the ECHR (and also in the other parts of the Constitutional Treaty). This will enhance the risk of differences in interpretation and application of the various rights that are safeguarded by both the ECHR and the Constitutional Treaty. This is not to say that the situation will become unsolvable, but it will be rendered even more complex. Moreover, despite what are believed to be 'watertight' horizontal clauses and other safeguards, aiming primarily at changing the existing status quo as little as possible, the scope of protection, the substance of the respective rights, the relationships between the various documents, the various courts and many other issues are a genuine gold mine for lawyers.<sup>111</sup> The possibility of a semi-autonomous development of human rights protection in the EU context, with as central feature the

concept of European citizenship, and the de facto undermining of the abovementioned horizontal clauses and safeguards, should not be excluded a priori.<sup>112</sup>

It is not difficult to imagine that all this will put the functioning of the national judiciary under pressure. The national judges will face a number of (slightly) different European fundamental rights standards. The uncertainty about the correct and most authoritative interpretation of the various provisions and their mutual relationship will render their application more complex and is likely to result in more work for the judiciary and lengthier procedures.

Finally, some scholars have suggested that individual litigants may prefer to bring their fundamental rights cases, often via national courts, before the ECJ instead of the ECtHR. Recourse to EU law may have a number of (presumed) advantages for applicants, such as the well-established doctrines of direct effect and supremacy, a more compelling system of judicial protection and greater effectiveness. Moreover, a matter to be taken into account is the heavy workload of the Strasbourg Court and the resulting length of its proceedings. Seen from this vantage point, the situation in the EU is not that bad after all.

In any event, all these factors could have the effect that the ECJ develops into a second human rights court in Europe. The question is indeed whether the ECJ is sufficiently equipped for such a task and whether this is a development one should strive for: the ECJ was not designed to carry out such a function.

<sup>111</sup> Cf. K. Lenaerts and E. de Smijter, *The Charter and the Role of the European Courts*, MJ 2001, pp. 90-101 and R. Lawson, *Human Rights: The Best is Yet to Come*, EuConst 2005, p. 27-37.

<sup>112</sup> Cf. P.J.G. Kapteyn, 'De reikwijdte van het Handvest van de grondrechten van de Europese Unie als onderdeel van een Grondwet voor Europa', *Rechtsgeleerd Magazijn Themis* 2004, p. 111- 119.

## The vertical dimension: European developments specific to civil, administrative and criminal law

### 3.1 Civil law

For national judges specialised in civil law, European Community law has never been that important, given the fact that civil law, to a large extent, emanates from the national legislator. As a result, all countries in Europe have their own civil law rules and systems.

When scholars started to talk about a 'European private law' it turned out, upon closer consideration, that they often referred to national (civil) law of a number of European states. The 'European' element was provided by comparing the laws of these states in order to find out what differences exist between the national systems (and sometimes similarities were discovered).

If the term is, however, understood in its 'proper' meaning, as referring to Community law rules that are particularly relevant to civil relations, *grosso modo*, two sets of EC rules can be distinguished.<sup>113</sup> These are, first, parts of the EC's internal market legislation and, second, the more recently adopted Article 65 EC measures on private international law (PIL) issues.

#### 3.1.1 Internal market legislation

For the civil law branch of the Dutch judiciary, parts of the EC's internal market legislation have always been the most relevant. These include, in particular, Directives on consumer protection (liability for defective products, unfair clauses in consumer contracts, etc.) and the series of Directives on company law that were adopted in the seventies and eighties. More recently, Directives on late payments in small- and medium-sized businesses and, also, rules on tobacco products have had their impact on the civil branch of the Dutch judiciary.

Since these rules were all based on Article 95 EC, they were adopted in the form of directives and hence had to be transposed into national legislation.<sup>114</sup> The advantage for the non-specialist (parts of the Dutch judiciary, but also the lawyers representing the parties in civil proceedings) is that it is rather easy to become familiar with, and study, these provisions of European private law; one simply has to read the Dutch Civil Code (*Burgerlijk Wetboek*) or other legislative provisions which implement these EC Directives. Judges of the Dutch civil sector are probably not always aware of the fact that they, in this indirect way, apply Community law.<sup>115</sup>

<sup>113</sup> See more extensively on this, K. Boele-Woelki and R.H. van Ooik, 'The Communitarization of Private International Law', *Yearbook of Private International Law*, Volume IV - 2002, Kluwer Law International, 2003, pp. 1-36.

<sup>114</sup> An exception is Regulation 2006/2004/EC of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the 'Regulation on consumer protection cooperation'), OJ 2004 L 364/1.

<sup>115</sup> Cf. J.M. Smits, 'The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries', in: M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Hart, 2004, p. 229-245. On implementation of Directives in the Netherlands through so-called Henry VIII Clauses, see T.A.J.A. Vandamme, *The Invalid Directive*, *The Hogendorp Papers* 5, ELP, Groning, 2005, p. 310-313.



The consequences of these internal market rules for the organisation of the civil branches seem to be rather limited. Application and enforcement have to fit into existing structures.<sup>116</sup>

### 3.1.2 Private international law

Certainly the most important new development that is particularly relevant to the civil law branch is the introduction (by the Treaty of Amsterdam), and the subsequent 'activation', of Article 65 of the EC Treaty. This Article transfers powers to the EC with respect to a number of private international law issues, but this legal basis is also increasingly used to cope with purely internal private law matters.

Important examples are the Brussels I Regulation (replacing the 1968 Brussels Treaty),<sup>117</sup> the second Brussels Regulation on family matters,<sup>118</sup> the Regulation on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters,<sup>119</sup> the European Enforcement Order,<sup>120</sup> and the Regulation on the taking of evidence in civil matters from foreign courts.<sup>121</sup>

The latter applies in civil or commercial matters where the court of a Member State requests: (a) the competent court of another Member State to take evidence; or (b) to take evidence directly in another Member State. Such requests shall be transmitted by the requesting court directly to the court of another Member State, the 'requested court', for the performance of the taking of evidence. Each Member State shall also designate a central body responsible for: (a) supplying information to the courts; (b) seeking solutions to any difficulties which may arise in respect of a request; and (c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court. In the Netherlands this central organ is the Raad voor de rechtspraak.<sup>122</sup>

As opposed to the internal market rules mentioned above, these new rules are usually adopted in the form of Regulations. They are 'directly applicable' and therefore do not have to be transposed into national legislation. Especially this second set of private law rules, those based on Article 65 EC, will therefore require the Dutch judiciary to actively search in the Official Journal for the relevant rules; they

<sup>116</sup> The same goes for the application of European competition policy, including, as from 1 May 2004, Article 81(3) EC (discussed earlier, see Section 2.3.2). On using existing structures for the enforcement of EC law, see also, more generally, the Conclusions (Section 4.3, decentralisation).

<sup>117</sup> Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1), in Dutch usually referred to as the EEX (European Execution) Regulation.

<sup>118</sup> Council Regulation 1347/2000/EC of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160/19), later replaced by the so-called Brussels IIA Regulation: Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1. The Brussels IIA Regulation has entered into force on 1 August 2004 but most of its provisions apply as from 1 March 2005.

<sup>119</sup> Regulation 1348/2000/EC, OJ 2000 L 160/37.

<sup>120</sup> Regulation 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ 2004 L 143/15. Thereon, see M. Freudenthal, 'De Europese Executoriale Titel en de Europese betalingsbevelprocedure: afstemming van Europese rechtsmaatregelen', NiPR 2004, no. 4, p. 393-401.

<sup>121</sup> Regulation 1206/2001/EC of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174/1).

<sup>122</sup> See the 'Uitvoeringswet EG-bewijsverordening', TK 2002-2003, no. 28 993.

cannot take it for granted that the PIL rules can be found in Dutch legislation as well. With the help of the 'Google of the Dutch Judiciary', namely *Porta Iuris*,<sup>123</sup> this should however not be too difficult.

### 3.1.3 Enforcement and the future of European private law

As regards the enforcement of these rules, the ordinary preliminary reference procedure of Article 234 EC applies to the internal market legislation discussed above. However, with respect to Article 65 EC, which is part and parcel of Title IV of the EC Treaty, the special procedure of Article 68 EC applies. The main difference with the ordinary procedure is that subordinate courts (courts of first instance, also national courts of appeal) are not entitled to refer.<sup>124</sup>

This is quite remarkable given the fact that in these types of cases there may be a serious need for speed. One must think in particular of children, those of divorced parents, those kidnapped by one of them, and also - as was already mentioned above - decisions on custody of children. As we have already observed, it is only after the entry into force of the Constitution that lower courts will be entitled to request the ECJ for assistance (under the Article III-369 preliminary reference procedure).<sup>125</sup> For the time being, however, all national remedies will first have to be exhausted, with the children meanwhile waiting and waiting.

In the future, the trend of adopting more and more, increasingly complex, rules on private (international) law will certainly continue. This is already clear from the ambitious The Hague Programme<sup>126</sup> and also from the

provisions in the EU Constitution on private law. In the Constitution 'judicial cooperation in civil matters' has been given its own place (Article III-269), more clearly separated from immigration/asylum, although both policies still constitute part of the same AFSJ policy (Chapter IV, Part III, of the Constitution).

As in the case of criminal law,<sup>127</sup> the Constitution clarifies that European private law rests on two important pillars: mutual recognition and harmonisation. Article III-269(1) stipulates that:

"The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States".

The competences of the Union in this area will, however, not be enlarged in any significant way; most topics for which the Union is competent are already mentioned in Article 65 EC. These new areas are: (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; and (h) support for the training of the judiciary and judicial staff.<sup>128</sup>

<sup>123</sup> Cf. Section 1, regarding the 'second pillar' of the Eurinfra project.

<sup>124</sup> See also Section 3.2.3 on asylum and immigration.

<sup>125</sup> See Section 2.4.1.

<sup>126</sup> See Annex II.

<sup>127</sup> Cf. below, Section 3.3.4.

<sup>128</sup> The issues mentioned under points (e), (g) and (h) are new, as compared to Article 65 EC.

Also, decision-making will remain the same: the ordinary legislative procedure applies with the exception of measures concerning family law with cross-border implications, for which the Council alone decides by unanimity. At present, the same rules apply under Article 67(5) EC.

### 3.2 Administrative law

Since the field of 'administrative' law covers such a broad range of issues, a selection has been made, based on where 'Europeanisation' is felt most intensively. The subfields of administrative law that have been selected are (national) competition law, environmental law, immigration law, telecommunications law, and agriculture and fisheries.

#### 3.2.1 Competition law

Council Regulation 17 was the first regulation in the field of competition law that laid down procedural rules for monitoring competition under Articles 81 and 82 EC Treaty. The Regulation was based on an authorisation system, given the fact that Article 81(3) was held not to be directly applicable. Undertakings that desired to conclude an agreement that infringed the provisions of Article 81(1) could notify the agreement to the Commission in order to obtain an exemption pursuant to Article 81(3).

With effect from 1 May 2004, the system of authorised exemptions has been replaced by a "directly applicable exception system", pursuant to Council Regulation 1/2003.<sup>129</sup> According to this system, Article 81(3) EC can be applied by the Commission, national competition authorities (NCAs) and national courts, which are all competent to apply European competition rules.

The Dutch competition authority (Nederlandse Mededingingsautoriteit, NMa) is expected to have a more significant role in applying and enforcing Articles 81 and 82 EC Treaty. Under the 'old' regime, decisions of the Commission had to be challenged at the Court of First Instance and on appeal at the European Court of Justice. The decentralisation of decision-making authority from the Commission to the NCAs will have as an unavoidable consequence that legal protection will also shift from the EU to the national level.

In reviewing decisions of the Nederlandse Mededingingsautoriteit, the national court will not only examine whether the prohibition of Article 81(1) applies, but will also have to assess whether the conditions of Article 81(3) have been fulfilled. In case of doubt, the national court can make a preliminary reference to the Court of Justice.

It goes without saying that the 'modernisation' of European competition law has a significant impact on the role the national judiciary plays in the field of competition law. One may predict that there will be more cases to be handled by national judges, both administrative and civil, and more complex assessments to be made by these national courts.

Finally, the Constitutional Treaty must be mentioned. Article I-13 states that "the establishing of the competition rules necessary for the functioning of the internal market" is to be regarded as an "exclusive" competence for the Union. It is not expected that the European Constitution will have, as such, a major effect on the role the national judiciary plays in competition law. The European Constitution however enables the Council, in Article III-163 (e), to adopt any regulation "to determine the relationship between Member States' laws and European competition law".

<sup>129</sup> OJ 2003 L1/1. See also *supra*, Section 2.3.2.

### 3.2.2 Environmental law

Recent developments in European environmental law show how initiatives undertaken by the EU at international level can have consequences at national level.

In 1998, the European Community signed the so-called Aarhus Convention ("Convention on access to information, public participation in decision-making and access to justice in environmental matters"). As can be inferred from its title, this treaty contains all kinds of provisions on access to national courts.

A first step in implementing this Convention at EU level was the enactment of Directive 2003/35 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. It also contains provisions with regard to public participation and access to justice. Implementation of this Directive is required by 25 June 2005 at the latest.<sup>130</sup> According to the Directive, a new Article 10a will have to be inserted in the 'old' EIA Directives 85/337/EEC:<sup>131</sup>

"Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive. In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

The approach taken in Directive 2003/35 will be followed in a more general Directive, aiming to cover the whole environmental field. At the moment, a proposal for a Directive on access to justice in environmental matters is being discussed at EU level.<sup>132</sup>

According to Article 4 of the proposal, members of the public should have access to environmental proceedings, including interim

<sup>130</sup> OJ 2003 L 156, p. 17-25.

<sup>131</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175/40).

<sup>132</sup> COM(2003) 624 final of 24/10/2003.

relief, in order to challenge the procedural and substantive legality of administrative acts and administrative omissions in breach of environmental law. The proposal follows more or less the same pattern as Directive 2003/35, discussed above.<sup>133</sup>

As soon as this Directive is enacted, Member States will lose their freedom regarding how to organise judicial protection in environmental law to a considerable extent. The Directive will ensure that certain minimum requirements are implemented throughout the EU. These minimum requirements concern not only the availability of courts and remedies, but also matters such as standing, costs of proceedings, and the required intensity of court review.

Although the European Constitution will bring about some changes in the field of environmental law,<sup>134</sup> major effects resulting from the Constitution on the role the national judiciary plays in environmental law are not expected.

### 3.2.3 Immigration Law

Traditionally, EC law on migration is concerned with the movement of the nationals of the Member States. These nationals have to be economically active in the host Member State, either as a worker (Article 39 EC) or as a self-employed person (falling under either the freedom of establishment or the freedom to provide services).<sup>135</sup>

More recently, free movement of EU nationals has been extended to those who are not

economically active, such as students and retired persons. To this end, in 1990 three Directives on the right of residence of non-economically-active persons were adopted. In addition, the Maastricht Treaty introduced the concept of European citizenship (see now Article 17-22 EC). The right to migrate to other Member States, to stay and live there, has become a right for everyone holding the nationality of one of the Member States, regardless of the exercise of an economic activity.<sup>136</sup>

With respect to European citizenship, at the moment there is a – rather heated – debate in Dutch legal circles regarding to what extent national courts are obliged to apply Articles 17 and 18 on EU citizenship 'on their own motion'. It has been argued that, in view of the 'fundamental character' of the rules on EU citizenship, courts are obliged to apply the said provisions even if the interested party did not rely expressis verbis on the rules before the court.<sup>137</sup>

In administrative law, the question is governed by Article 8:69 AWB which reads – in translation – as follows:

- “1. The district court shall give judgment on the basis of the notice of appeal, the documents submitted, the proceedings during the preliminary inquiry and the hearing.
2. The district court shall supplement the legal basis on its own initiative.
3. The district court may supplement the facts on its own initiative.”

<sup>133</sup> The proposal, however, also has consequences for civil litigation. Article 3 requires the Member States to ensure that members of the public, where they meet the criteria laid down in national law, have access to environmental proceedings in order to challenge acts and omissions by private persons which are in breach of environmental law.

<sup>134</sup> See J.H. Jans & J. Scott, 'The convention on the future of Europe: an environmental perspective', *Journal of Environmental Law* 2003, p. 323-339.

<sup>135</sup> Cf. Section 2.3.1.

<sup>136</sup> Although certain restrictions continue to apply. On this development caused by the introduction of the provisions (and case law) on European citizenship, see, e.g., A. Schrauwen, 'Sink or Swim Together? Developments in European Citizenship' (2000) *FILJ* 778-794; H. Oosterom-Staples en A. Vazquez Muñoz, *Burgerschap van de Unie*, SEW 2004, p. 494-506 and H. Luijendijk, *Nederlandse gemeenten en het Europese personenverkeer*, Kluwer, 2005, p. 149-213.

<sup>137</sup> See J.H. Jans, 'Recht en Vreemdelingenrecht', *NJB* 2004, p. 1126 and 'Naschrift' in *NJB* 2004, p. 1890-1891.

In short Article 8:69 AWB prohibits the court to go beyond the legal conflict as it has been presented to it by the notice of appeal, the documents submitted, the proceedings during the preliminary inquiry and the hearing. The exceptions to this are rules with a 'public policy' character. A court is allowed and even required to apply 'public policy' rules, even if parties before it did not rely on them.

One of the unanswered questions is whether directly effective provisions of EU law in general, and the rules on EU citizenship in particular, can be regarded as having such a 'public policy' character.<sup>138</sup> If this question has to be answered (partly) in the affirmative, this would imply a significant change in the role public law courts play in our system of legal protection. It would entail a more active attitude of public law courts towards EU law and therefore a more time- and (wo)manpower-consuming approach.

Apart from the migration of EU nationals, European law is also, increasingly, concerned with immigration and the legal position of third country nationals. Initially, after the entry into force of the Maastricht Treaty, asylum and immigration policy was part of the third pillar (JHA) but the Union never managed to develop a genuine common policy in this highly sensitive area. This was notably due to the requirement of unanimous voting in the EU Council.

The Amsterdam Treaty 'communautarised' the matter by moving asylum/immigration/visa policy to the first pillar, Title IV of the EC Treaty.

Together with criminal law, and PIL, these policies were henceforth referred to as the Union's policy regarding the Area of Freedom, Security and Justice (AFSJ). On the basis of this Title IV (Article 61-69 EC) many more 'hard law' instruments were adopted, notably Directives, although the unanimity requirement continued to apply (Article 67 EC).<sup>139</sup>

This flood of secondary EC measures on asylum/immigration is of especially great importance to national judges. They should familiarise themselves with these complex new EC rules, which will also cause a considerable increase in their workload.

It is very likely that in the era after the EU Constitution, this current trend will continue and will even be reinforced. The Constitution not so much extends the competence of the Union regarding these immigration issues; most aspects have already been mentioned in Title IV EC.<sup>140</sup> No, it is rather the changes in decision-making that will reinforce the trend of lifting asylum and immigration policy from the national to the EU level: henceforth qualified majority voting (QMV) will suffice in the EU Council, whereas currently most decisions in this area require unanimity (see Article 67 EC), with only a few exceptions for the most sensitive aspects of asylum and immigration policy.<sup>141</sup>

Moreover, all national courts will have the possibility to refer preliminary questions to Luxembourg, including the lower courts in the various Member States. At the moment, the special preliminary reference procedure of

<sup>138</sup> The ECJ case law on the public policy character of EC law is far from clear and is until now limited to competition law and consumer law provisions. Cf. Case C-126/97 *Eco Swiss/Benetton* [1999] ECR I-3055 and Joined Cases C-240/98 to C-244/98 *Quintero* [2000] ECR I-4941. See on this issue also S. Prechal and N. Shelkopyas, *National Procedures, Public policy and EC Law. From Van Schijndel to Eco Swiss and beyond*, ERPL 2004, p. 589-611.

<sup>139</sup> See, for instance, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31/18); Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328/17); Directive 2003/86/EC on the right to family reunification (OJ 2003 L 251/12); Directive 2004/83/EC on refugees and stateless persons (OJ 2004 L 304/12).

<sup>140</sup> Compare the current Articles 61-63 EC with the new articles III-265-267 of the Constitutional Treaty.

<sup>141</sup> See, for instance, Article III-266(3) for such an exception. As a rule, however, the ordinary legislative procedure, and hence QMV in the Council, applies to decision-making in the field of immigration.

Article 68 EC applies. The main difference with the ordinary procedure (Article 234 EC) is that subordinate courts are not entitled to refer.<sup>142</sup>

### 3.2.4 Telecoms law

Telecoms law is one of the clear examples of European legislative activity by which the Council tries to combine the general underlying principles of competition law with a more regulatory approach. In the Directive discussed below, one can see that regulating a network sector at the European level is in general accompanied by European rules on access to justice.

Article 4 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the so called Framework Directive) contains clear rules on the right of access to justice, as well as a right of appeal, in the area of telecommunications law:<sup>143</sup>

"1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits

of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty."

Article 4 of Directive 2002/21 is just one example of how EU law can affect the system of judicial protection against decisions of public authorities. The provision requires the establishment of an 'independent' appeal authority (not necessarily a court). Therefore the general approach in Dutch public law - internal review by the decision-making authority (via the so called *bezwaarschrift* en procedure) - seems to be at odds with the approach required by the Directive. It is quite remarkable that, compared to the environmental Directive 2003/35, discussed above,<sup>144</sup> Directive 2002/21 does not explicitly allow "the possibility of a preliminary review procedure before an administrative authority".

Directive 2002/21 also requires that "the merits of the case are duly taken into account" by the appeal authority. A 'merits review' in common law systems normally entails 'full review' and not - as is in general the case in Dutch judicial review - a "marginal review" (to be compared with 'Wednesbury unreasonables'

<sup>142</sup> See also Section 2.4.1.

<sup>143</sup> OJ L 108, 24/04/2002 p. 33-50.

<sup>144</sup> Section 3.2.2.

in English judicial review). The problem is, however, that the Dutch language version of the Directive does not seem to be identical to the English version. It states that “De lidstaten dragen er zorg voor dat de feiten van de zaak op afdoende wijze in aanmerking worden genomen”. The observation made by the Dutch government that Article 4 of Directive 2002/21 does not need any further implementation, because the general provisions in the Algemene Wet Bestuursrecht (General Administrative Law Act) would be sufficient, can be contested and, arguably, will lead to legal controversy and possible legal contention.<sup>145</sup>

In the explanatory memorandum to the Dutch act implementing Directive 2002/21, the government explicitly argued that it cannot be excluded that the new telecoms regime will lead to more decisions that may be appealed and therefore to a greater workload of the judiciary in the Netherlands.<sup>146</sup>

### 3.2.5 Agriculture and fisheries

According to Article I-14 of the European Constitution “agriculture and fisheries, excluding the conservation of marine biological resources” are labelled as an area of “shared competence”. Article I-12 stipulates further: “When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.” The European Constitution seems to reflect the current trend of ‘re-nationalisation’ of agricultural policy.

In June 2003, EU agricultural ministers adopted a fundamental reform of the Common Agricultural Policy (CAP). The reform will change the way the EU supports its farmers. In the future, the vast majority of subsidies will be paid independently of the volume of production. To avoid abandonment of production, Member States may choose to maintain a limited link between subsidy and production under well-defined conditions and within clear limits. These new ‘single farm payments’ will be linked to respect for environmental, food safety and animal welfare standards. The different elements of the reform package will enter into force in 2004 and 2005. The single farm payment will enter into force in 2005.

Public authorities at the Member State level will play a key role in implementing and executing these new rules and this might result in more legal proceedings before the administrative law courts of the Member States.

## 3.3 Criminal law

To a considerable extent criminal law was and is a matter for the national legislators of the Member States, including the Dutch legislator. Community law, on the other hand, was and is about socio-economic affairs, not about criminal law.

### 3.3.1 The traditional role of the criminal judge

Nevertheless, despite this general characterisation, traditionally, Dutch criminal judges could be asked to enforce Community legislation in cases where the Netherlands had opted for enforcement through criminal

<sup>145</sup> Memorie van Toelichting, Kamerstukken II, 28 851 nr. 3, p. 189.

<sup>146</sup> Memorie van Toelichting, Kamerstukken II, 28 851 nr. 3, p. 88.



law. Usually EC measures leave it up to the Member States to decide how the substantive rules are enforced (by civil, criminal, and/or administrative sanctions), as long as the sanctions chosen are effective, deterrent, and imposed in a non-discriminatory way.

Where the Netherlands opts for the criminal route, penal sanctions are usually laid down in the general Dutch law on economic crimes (Wet Economische Delicten, WED), or in an act based on this general law, and it is usually a single sitting judge (Economische Politierechter) that has to apply Community law and impose penal sanctions on the perpetrator. Some famous judgments of the ECJ have thus emanated from Dutch criminal courts, for example the Lemmens and Kolpinghuis rulings, dealing with, respectively, free movement of goods (the Notification Directive) and foodstuffs (the Mineral Water Directive).<sup>147</sup> Also, many Community measures in the field of the common agricultural policy, including fisheries, are enforced with the help of criminal law sanctions in the Netherlands.<sup>148</sup>

### 3.3.2 Obligation to enforce EC law through criminal law

More recently, the EC institutions seem to be less eager to leave it to the Member States to determine how Community law is enforced; in their view, the use of criminal law sanctions for the enforcement of EC law should be made mandatory.

The Commission came up with a proposal on the enforcement of European environmental

law through criminal law, according to which all Member States are required to provide for penal sanctions for the enforcement of EC environmental rules, apart from the possibility to enforce by other means as well.<sup>149</sup> The Council however decided to adopt similar rules on the basis of the third pillar and hence amended the legal basis of the Commission's proposal.<sup>150</sup>

The main problem at the moment is, thus, where exactly in the EU Treaty the competence for such far-reaching measures can be found: in the first pillar, i.e., Article 175 EC on environmental protection (view of the Commission and the European Parliament) or in the third pillar on criminal law (view of the Council and most Member States). At the moment this highly controversial issue is pending before the ECJ.<sup>151</sup>

If the Commission were to win this case, all (legally binding) measures on first pillar policies - not only environmental protection, but also, for example, competition policy, consumer protection, labour law - could stipulate that the substantive provisions must be enforced by means of criminal law sanctions. The unanimity requirement of the third pillar would not apply. Instead, often a qualified majority vote in the Council of Ministers would suffice since most legal bases in the EC Treaty already provide for such majority voting. This would probably lead to a considerable increase in the workload of the criminal law branches of the national judiciaries, including the Dutch criminal courts.<sup>152</sup>

<sup>147</sup> Case C-226/97 Lemmens [1998] ECR 3711; and Case 80/86 Kolpinghuis [1987] ECR 3969.

<sup>148</sup> See, for instance, Case 46/86 Romkes [1987] ECR 2671 (dealing with TACs, Total Allowable Catches).

<sup>149</sup> Proposal for a Directive on the protection of the environment through criminal law (OJ 2001 C 180E/12).

<sup>150</sup> See framework decision 2003/80/JHA on the protection of the environment through criminal law (OJ 2003 L 29/55).

<sup>151</sup> See Case C-176/03 Commission v Council (OJ 2003, C 135/21).

<sup>152</sup> On the controversial issue, see, for instance, D. Comijs, 'Communautair strafrecht?', NTER 2001, p. 267; I.M. Koopmans, 'Europa en de handhaving van het milieurecht: een pijler te ver?', NTER 2004, p. 127; Y. Buruma and J. Somsen, 'Een strafwetgever te Brussel inzake milieubescherming?', NJB 2001, p. 795. In his Opinion of 26 May 2005 in this case, AG Ruiz-Jarabo Colomer opts for the first pillar, and therefore proposes the ECJ to annul the contested framework decision of the Council."

### 3.3.3 Third pillar: police and judicial cooperation in criminal matters

Apart from the enforcement of Community law, there are, of course, also the greatly important developments in the Third Pillar of the EU. Since the Treaty of Amsterdam, this pillar exclusively deals with criminal law issues. Hence, its name was changed from Justice and Home Affairs (JHA) into Police and Judicial Cooperation in Criminal Matters (PJCC), although the first term is still widely used in practice.

The legally binding acts adopted on the basis of this revamped third pillar are of great importance to the Dutch judiciary, notably framework decisions, which can be considered to be the 'Directives of the Third Pillar'. Already some of them have had an impact on the organisation of the Dutch judiciary. For example, the framework decision on the European Arrest Warrant led to the creation of a specialised chamber within the district court of Amsterdam; it is solely responsible for briefly checking whether the request for help from abroad complies with all formalities.<sup>153</sup>

The framework decision on the protection of victims in criminal proceedings<sup>154</sup> requires Member States to ensure that victims have a real and appropriate role in their criminal legal systems. Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence (Article 2). It shall also ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection

of their interests (Article 3).<sup>155</sup> Member States shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide special waiting areas for victims on court premises (Article 8). Thus, this framework decision may even lead to the building of separate rooms within court buildings, so that the victim does not have to be confronted with the perpetrator.

One of the changes brought about by the Amsterdam Treaty was the introduction of a special preliminary reference procedure for the third pillar in Article 35 EU. The ECJ thus acquired jurisdiction to rule on criminal law measures adopted under Title VI of the EU Treaty. The procedure of Article 35 EU is, however, much 'weaker' than its counterpart in the first pillar (Article 234 EC) in three respects.

First, Member States do not have any obligation to accept the Court's competence to give preliminary rulings on third pillar issues (Article 35(2) EU). Thus, judges in a few Member States (such as the UK and Denmark) do not have any possibility at all to refer questions to the ECJ. The Netherlands, on the other hand, has accepted the Court's jurisdiction.

Second, even if the jurisdiction is accepted, there is no obligation for national courts to refer, not even supreme courts (Article 35(3) EU). Member States do, however, have the possibility to unilaterally declare that their supreme courts must ask the ECJ for help, in case they consider a preliminary ruling necessary to hand down the final judgment.

<sup>153</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1.

<sup>154</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 L 82/1.

<sup>155</sup> On the interpretation of these articles, see Case C-105/03, Pupino, case still pending, conclusion of the Advocate General of 11 November 2004. On the procedure that was used (Article 35 EU), see below.

The Netherlands has made such a unilateral statement; the criminal law branch of the Dutch Supreme Court is thus obliged to refer preliminary questions to Luxembourg.<sup>156</sup>

Third, the scope of jurisdiction of the ECJ is more limited than under the first pillar. The Court can only rule on the interpretation and validity of the most important third pillar acts; not however on the interpretation of the EU Treaty (Title VI) itself (Article 35(1) EU). Also, the Court has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (article 35(5) EU).

### 3.3.4 Criminal law and the Constitutional Treaty

Finally the Constitutional Treaty should be mentioned. It clarifies that EU criminal law rests on two pillars: mutual recognition of each other's judgments in criminal proceedings, and the harmonisation of national criminal law (Article III-270). To the latter end, European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of "particularly serious crime with a cross-border dimension" (Article III-271). These serious crimes are the following: terrorism; trafficking in human beings and sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money laundering; corruption; counterfeiting

of means of payment; computer crime; and organised crime.

Measures on these issues may, as a rule, be adopted by a qualified majority vote in the Council of Ministers – whereas at present unanimity is still required (Article 34(2) EU). Thus, Member States can be outvoted in this highly sensitive area, although an emergency exit continues to exist.<sup>157</sup> For the Netherlands this means, in particular, that its 'liberal' soft drugs policy may be put under great pressure.

One specific issue in the Constitution merits special attention, namely the establishment of the European Public Prosecutor (EPP). In order to combat crimes affecting the financial interests of the Union, a European Public Prosecutor's Office from Eurojust may be set up by the Council (Article III-274(1) Constitution). Once established, the EPP shall be responsible for "investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests". Of particular importance to the organisation of the national judiciary is the fact that the EU Public Prosecutor "shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences".

Thus, after the establishment of the Office, and if this specific type of offence is at stake (crimes affecting the financial interests of the Union), the Dutch prosecutor (Officier van Justitie) will have to be replaced by the European prosecutor. The list of offences for which the EPP is competent may be extended to other serious crimes that have cross-border

<sup>156</sup> According to a recent publication, until now 13 of the 24 Member State have not accepted ECJ jurisdiction in the Third Pillar. See R. Barents, *Procedures en procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG*, derde geheel herziene druk, Kluwer, Deventer 2005, at p. 359. What the position of Sweden is is not clear.

<sup>157</sup> See Article III-270(3) of the Constitution: Where a member of the Council considers that a draft European framework law would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council.

implications – and consequently the Dutch public prosecutor will have to be replaced in more cases by his or her European counterpart – but this decision requires the unanimous approval of all (25) members of the European Council (see Article III-274(4)).

The specific rules regarding the functioning of the EPP still have to be drawn up: the European law setting up this body shall determine, *inter alia*, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

At the moment it is already questioned whether the national courts are the most appropriate judicial organs to deal with cases between the offender against the Union's financial interests and the EPP. Should not the European Court of Justice have jurisdiction to hear these kind of cases? After all, it is a European public prosecutor that brings the case before the court. Indeed, as was discussed earlier, there are good reasons to federalise jurisdiction, as direct administration by an EU body goes hand in hand with direct judicial protection at the EU level.<sup>158</sup>

As for the enforcement of the substantive rules on criminal law, it is important to note that the ECJ will obtain full and obligatory jurisdiction in preliminary references; the current optional procedure of Article 35 EU (discussed above) will become an obligatory one because the new Article III-369 gives competence to the ECJ to interpret 'the Constitution', which includes the

Treaty provisions on criminal law.<sup>159</sup> Also, this Article III-369 indicates that the ECJ must hurry if the natural person involved is in jail: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay".

---

<sup>158</sup> See *supra*, Section 2.1.2.

<sup>159</sup> See also *supra*, Section 2.4.1. The expanding jurisdiction is a remarkable development because during the JHA period (in between the Treaties of Maastricht and Amsterdam) the ECJ hardly had any jurisdiction in the third pillar/criminal matters; during the current PJCC period the Court has been given some powers but these are still less complete than those under the EC Treaty (see Article 35 EU, discussed above). Cf. D.M. Curtin and R.H. van Ooik, 'Een Hof van Justitie van de Europese Unie?', SEW 1999, pp. 24-38.



## Conclusions

**In these conclusions, we bring together the various threads that can be found throughout the report. The purpose is, as was already pointed out in the beginning, to assess what the major European developments in the years to come will be, and in what possible ways these developments could influence the organisation of the Dutch judiciary. On the basis of the trends discussed below, the Raad voor de rechtspraak can make its own assessments as regards future policymaking and strategy.**

We prefer to speak of future trends instead of scenarios, which would have been another possible approach. While scenarios may be understood as developments or courses of action in a relatively uncertain future and often result in hypothetical exercises, a 'trend' is a development in a much more certain, predictable future, which, moreover, builds upon past achievements and it makes the development itself more predictable. This approach seems much more useful for the Raad voor de rechtspraak than hypothetical reflections on uncertain scenarios. We believe that there can hardly be any doubt that the three major trends, briefly discussed below, will actually become reality and this is largely irrespective of whether the Constitutional Treaty will come into force or not. These major trends are already partly perceptible today and there are not indications that the developments are going to evolve in another direction.

### 4.1 Three major trends

The important trends in the foreseeable future are threefold.

#### Ongoing Europeanisation

First there is the ongoing Europeanisation of major parts of national legislation of the Member States, also in areas that until now were not that heavily 'communitarised'. EU

law is steadily developing far beyond socio-economic law and currently already interferes with many areas of national law. Notably the areas of civil law, asylum/immigration law, and criminal law will be severely affected by EU law in the years to come. The major factors contributing to this trend are the transfer of PIL and immigration and asylum issues to the first pillar which has already now generated considerable legislative activity. Furthermore, there is the possible introduction of qualified majority voting and of full jurisdiction of the ECJ, combined with the 'ordinary' preliminary references procedure, in the three abovementioned areas. The interaction between the ECJ and national courts often results in dynamic EU case law. In addition, it is to be expected that the everyday realities will simply compel further EU intervention. The recently adopted The Hague Programme of the European Council already makes clear what can be expected.<sup>160</sup>

#### Increasing complexity of EU legislation and case law

Second, there is the ever-increasing complexity of EU legislation and case law, caused by both its volume (some 85.000 pages of *acquis communautaire*), and its more and more detailed, specialist nature, in areas such as intellectual property law, telecoms law, environmental law, PIL, etc.<sup>161</sup>

In the near future especially the Constitution,

<sup>160</sup> Cf. Sections 3.1, 3.2.3 and 3.3.3. See also Annex II.

<sup>161</sup> Cf. sections 3.2.4, 3.1.1 and 3.2.5.

and measures adopted under it, will strengthen this trend of 'complexification'. Any introduction of new rules makes the law less transparent and requires a period of 'learning'. This certainly holds true for such a major operation as the coming into force of the Constitutional Treaty which will result in many subtle changes to EU law and structures and will require many transitional rules. However, it must be underlined that even if the Constitutional Treaty would not come into force – which, after the French and Dutch No votes, is a realistic option – it is still to be expected that the complexity of EU law will increase. That complexity will arise, in particular, from sophisticated – what we have called – 'ad hoc rescue measures'. It is, for instance, expected that the accession of the EU to the ECHR will take place in any case, independently of the entry into force of the Constitutional Treaty. As we have pointed out, the national judges will face quite some uncertainty about the interpretation of various, slightly different, European fundamental rights standards, while the recourse to fundamental rights by litigants is likely to increase.<sup>162</sup> All this, in combination with the prospect of a slowly functioning preliminary reference procedure, certainly puts national courts in an unenviable position.<sup>163</sup>

#### Shifts in jurisdiction

Third, there is the trend towards shifts in jurisdiction, upwards and downwards. Centralisation and decentralisation of enforcement of EU law are communicating vessels.

In very specific, highly-technical, areas of Union policy, a new form of centralisation is taking

place: it is the subject-matter (patent, trade mark) that determines that the European courts have jurisdiction; no longer is it exclusively the parties involved that determine who is the competent judge.<sup>164</sup> Promising areas to be 'lifted upwards to the EU level' include – apart from intellectual property law – asylum and immigration, judicial cooperation in civil matters, and perhaps criminal law.

In other areas of Union policy – which is the vast majority – there will be, and already is, an opposite trend: more decentralisation and hence an extra workload and need for EU law knowledge on the part of national judges. This trend can already clearly be seen in the field of competition policy ('convergence') and agriculture ('re-nationalisation').<sup>165</sup>

Hence, we can discern two opposite trends: one upward, in areas that are, or are going to be, heavily communitarised; the other downward, in the majority of 'ordinary' areas. It should not be excluded that, in the longer run, these developments may result in the creation of some kind of federal EU courts, possibly one in every Member State. We see the following 'ingredients' for this: the abovementioned tendencies to use the subject matter of the dispute as a criterion to determine the competent court, the pleas in criminal law circles for federal- type of prosecution agencies, combined with federal courts and moving the heavily 'communitarised' areas into the jurisdiction of the Luxembourg courts. All this, in combination with a possible decentralisation of the preliminary reference procedure,<sup>166</sup> creates interesting prospects for a new judicial architecture in the EU.<sup>167</sup>

<sup>162</sup> Cf. Section 2.5.

<sup>163</sup> Cf. Section 2.4.

<sup>164</sup> Cf. Section 2.1.2, 2.1.3 and 2.4.

<sup>165</sup> Cf. sections 2.3.2 and 3.2.5, respectively.

<sup>166</sup> Cf. for a brief discussion S. Prechal, Administration of justice in the EU – who should do what?, in *La Cour de justice des Communautés européennes 1952-2002: Bilan et perspectives*, Actes de la conférence organisée dans le cadre du cinquantième anniversaire de la Cour de justice, Bruylant, Bruxelles, 2004, at p. 76-85.

<sup>167</sup> Cf. Sections 2.1.2 and 2.4.2.

## 4.2 How to cope with the major European developments?

### Basic knowledge and permanent education

First, there is the need for permanent education in EU law on the part of the national, including Dutch, judiciary. In recent years, it has become more and more clear that, for the proper application and enforcement of EU law, sufficient knowledge and understanding of European Union law is absolutely indispensable. In order to achieve this fundamental objective, national judges must be assisted in their difficult job of searching for, learning about, applying, and interpreting the law of the European Union.

The absolutely crucial need for a good knowledge and understanding of (the most recent state of) European Union law might be referred to as a problem of the 'fourth generation'.<sup>168</sup> It has, however, never that thoroughly been realized that the other three generations of problems, regarding the application and enforcement of EC/EU law by national courts (direct effect of Community law, 'effet utile de l'effet direct'<sup>169</sup> and effective national judicial review), are preceded by a much more fundamental problem: national judges must be sufficiently familiar with the basic tenets, main elements and general doctrine of EU law, and also the landmark judgments of the ECJ and the CFI.

Without such an 'EU survival kit', there is a serious risk that the national judge will not recognize the relevance of EU law for the case she or he has to decide and, consequently, will not look for further expertise. Moreover, even if they do, the survival kit remains necessary for otherwise it is not possible to apply EC law correctly or to assess the real significance of

the EU law arguments raised by the parties. Indeed, in such circumstances there is also the risk that supremacy and direct effect of European law are not realized in court practice but remain theoretical, academic concepts. Therefore, we prefer to speak, not of a fourth generation problem; instead, the requirement of a good knowledge and understanding of the basic tenets of European Union law on the part of all national judges (c.a.) constitutes the most fundamental problem of generation zero.

Although in the Netherlands it is the SSR that is responsible for the content of the training programmes, it is the Raad voor de rechtspraak that is responsible, to a considerable extent, for financing these training courses. Within the Raad voor de rechtspraak, a serious discussion must take place as to where financial priorities should lie.

If it is decided that EU law is indeed one of the top priorities, special attention should be given, in the training courses, to the importance of the art of extrapolation and assimilation. Judgments on labour law may be relevant in the field of consumer policy if the judgment is about the direct effect of directives; the Benetton case is mainly about competition policy but since the ECJ also ruled on the concept of public order, it is of great importance in other areas of EC policy as well.<sup>170</sup> A second point of emphasis in these courses is on those areas of EU policy that will be heavily communautarised in the near future. These include, in particular, asylum and immigration policy, civil law, and criminal law. It cannot be overemphasised how important it is to anticipate these unavoidable future European developments that will have a great impact on the Dutch judiciary.

<sup>168</sup> Cf. Sections 2.2.1 and 2.2.2.

<sup>169</sup> Cf. J. Mertens de Wilmars, 'L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers', Cahiers de droit Européen 1981, p. 380.

<sup>170</sup> This is emphasized very much in the book for the Dutch judiciary, mentioned in footnote 3.



In this respect it must be noted that the main elements of the Eurinfra project, mentioned at the beginning of the report, will continue to exist, also after its official ending in December 2004: (1) the training of the Dutch judges in EU law; (2) keeping *Porta Iuris* 'in the air'; and (3) making sure that all courts remain to have their own specialist in EU law as a first contact point.<sup>171</sup> Maintaining and further developing the Eurinfra *acquis* is a vital element of an adequate response to the EU law challenges for the Dutch judiciary.

The call for continuing education in European law is also in line with the ideas of 'auto limitation' and the 'green light' procedure, discussed earlier in the framework of the preliminary rulings procedure:<sup>172</sup> not asking the ECJ for help is more acceptable and in fact only viable if the national court has sufficient knowledge of its own in order to decide the case.

#### **Permanent monitoring of EU law developments**

Second, there is also a need to continually monitor EU law developments in order to channel, where appropriate, the necessary information to the 'shop-floor'. More importantly, there is a particular need to monitor and participate in those developments, which will most likely affect the judiciary in terms of complexity and (therefore) also workload. In some cases it may seem necessary to address such developments by means of organisational measures. This may, for instance, hold true for the rather opaque situation that might arise in the area of the protection of human rights. In concrete terms this could, for instance, imply that the Raad voor de rechtspraak and similar European organisations must be actively involved in the negotiations on the accession of the EU to the ECHR, in order to make their views

and concerns known and in order to be able to anticipate what is going to happen. Comparable considerations also hold true for any possible changes to the preliminary reference procedure: also here the national judiciary should be more involved.

Another important dimension of this permanent monitoring is to discern, in due time, possible contradictory tendencies in European law and Dutch law, which may cause embarrassment and problems (if not schizophrenia) for national courts. As examples can be mentioned: the increasing use of administrative law and administrative sanctions at national level versus a clear preference for criminal enforcement in EU law; the broadening of (EU environmental law) versus the limiting of (Dutch administrative law) standing for individuals and the discussions about the possible introduction of a *Schutznorm* in Dutch administrative law. These are issues that should be acted upon by those responsible for the relevant negotiations in Brussels, on the instigation of, for instance, the Raad voor de rechtspraak. Intensification of existing contacts between representatives of the administration and the judiciary is necessary for this purpose.

#### **Exchange of information; mutual consultation and collaboration; European networks**

Third, there is the need for a smooth exchange of information between courts on how EU law is applied and interpreted. European Networks, such as the ENCJ, may facilitate this task.

As a means to achieve this objective, one can think of an obligation to send copies of final judgments in which the law of the EU is applied, to a central point, for example the European Commission or the ECJ.<sup>173</sup> Within each Member State there must also be one central body to which these judgments can be

<sup>171</sup> See, on this also below.

<sup>172</sup> Cf. Section 2.4.2.

<sup>173</sup> Already there are the yearly reports of the European Commission on monitoring the application of Community law (see, e.g. OJ 1998 C 250). The ECJ Information Note on the References by National Courts for Preliminary Rulings states already that the Court "would be grateful to receive ... a copy of the the national court's final decision". In the meantime, a semi-commercial initiative has been made public very recently in the area of publication of national case law on European matters. See [www.caselex.com](http://www.caselex.com).

sent. In the Netherlands this would preferably be the Raad voor de rechtspraak.

This proposal boils down to extending the already existing system in the field of competition policy. As was pointed out earlier, copies of final judgments in which Articles 81 and 82 EC are applied, must be sent to the Commission, through national central organs (the Raad for the judiciary in the Netherlands).<sup>174</sup>

European competition law, more specifically Regulation 1/2003, can serve as a testing ground for other proposals regarding exchange of information, as well. The European Commission has been given the power to intervene in national judicial procedures, acting as *amicus curiae*. In competition cases this cooperation is foreseen, as we have noted, in Article 15 of Regulation 1/2003.<sup>175</sup> In other areas, such as free movement and state aid cases, a similar cooperation procedure is not yet very developed. Interestingly, in a case on state aid,<sup>176</sup> and in two cases on the freedom of establishment,<sup>177</sup> the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak Raad van State) imposed a duty on the national administration to cooperate with the European Commission and with national authorities of other Member States. The ABRvS based this duty of cooperation on the principle of care in Dutch law (*zorgvuldigheidsbeginsel*, see Article 3:2 AWB), in combination – in the two cases concerning the freedom of establishment – with Article 10 EC. However, apart from these ad hoc solutions and viewed from a more general perspective, it seems that a divergent

approach – information by the Commission in competition cases, no information or only limited information in free movement and state aid cases – is inadequate.

This is underlined by cases, which not only deal with competition law, but also with free movement issues.<sup>178</sup> In those ‘mixed’ cases it is difficult to assess whether the national court can request information from the Commission and whether the court should send its final judgment to Brussels. Extending the obligation to all EC law fields would alleviate this problem.

Also, exchange of information through (European) Networks is an option, bearing in mind the problems regarding the length of the preliminary reference procedure. Mutual information, co-operation and networks where judges (from different Member States) can consult each other will become increasingly important if the preliminary reference procedure would no longer function properly, a risk to be taken seriously.

These networks can be used for the exchange of the text of judgments on EU law issues, both within one Member State and externally. The simplest solution is to put those final judgments on an easily accessible Internet site. We see a role in this regard for organs that horizontally overarch the national judiciary, such as the Raad voor de rechtspraak.<sup>179</sup> However, we also realize the problems with the practical operationalisation of such an initiative, in particular, the problem of translation of the national judgments.

<sup>174</sup> Cf. Section 2.3.2.

<sup>175</sup> Cf. Section 2.3.2 and 3.2.1.

<sup>176</sup> ABRvS 17 December 2003, on this case, see J.H. Jans, ‘De reflexwerking van het Europees recht op het formele zorgvuldigheidsbeginsel’. In: *Alles in één keer goed; Juridische kwaliteit van bestuurlijke besluitvorming*, M. Herwijer, A.T. Marseille, F.M. Noordam, H.B. Winter (eds.). Deventer 2005, p. 155-169.

<sup>177</sup> ABRvS 14. April 2001, see J. van de Gronden and K. Mortelmans, ‘Holland Media Groep of Luxemburg Media Groep. De trouvaille van de Raad van State’, *Mediaforum* 2001, p. 191 and ABRvS 6 August 2003, published in *Mediaforum* 2003, p. 315, and discussed by K. Mortelmans, ‘RTL4 en RTL5: toch een verwijzing naar Luxemburg!’, *Mediaforum*, 2003, p. 280.

<sup>178</sup> Such as the Wouters, Van Schijndel and Bosman cases.

<sup>179</sup> See also Van Ooik & Vandamme, ‘Schorsing van Europese regelgeving in Nederland’, *SEW* February 2005, p. 60, for a similar proposal.

Finally, what has been said hereabove about the exchange and co-operation between European Networks holds even more true for the national network of EU law experts appointed at the various courts, the 'GCE-network'.<sup>180</sup> This network is, at national level, a vital instrument for exchange of information, mutual assistance and judicial co-operation in EU law matters. In a way, a properly functioning national network is a precondition for meaningful networking at international level.

### 4.3 Consequences of the centralisation and decentralisation processes for the organisation of the Dutch judiciary

#### Centralisation

In case of centralisation of jurisdiction (see above), the task of the national judge is eased, in that the need to specialize in parts of EU law (patent law, trademark law) diminishes. At the same time, it may be expected that the possible federalisation we have alluded to may lead to new problems, such as those that are known from federal states, in particular in terms of mutual delineation of jurisdiction.

In any case, it seems appropriate that organisations like the Raad voor de rechtspraak continue to be involved in and closely follow the discussions regarding the division of jurisdiction. These may also have consequences for the national judiciary. The same attitude is advisable regarding the abovementioned possible accession of the EU to the ECHR – what are the possible consequences of such accession for the Dutch judiciary?<sup>181</sup>

#### Decentralisation

This is even more important in case of (possible) decentralisation of the administration of justice. Extra work and need for specific EU law knowledge are then the key words. However, when it comes to the organisation of the judiciary, in the strict sense of the word, the consequences of decentralisation are rather limited. The reason is that to a large extent the judicial architecture is still left to the discretion of the Member States. The two limitations to the principle of national procedural autonomy – the principles of equivalence and effectiveness – do not seem to have very serious consequences for the organisation of the judiciary in the Netherlands.<sup>182</sup>

Nevertheless, the Netherlands may decide, on its own initiative, to reorganise the judiciary to respond to new EU challenges. This has already happened as a result of the implementation of the framework decision on the European Arrest Warrant.<sup>183</sup> For private enforcement of the – highly complex – competition rules, the introduction of specialised chambers or specialised judges could also be considered. Otherwise all ordinary civil judges would have to do the job.<sup>184</sup>

In conclusion, the organisation of the Dutch judiciary seems able to respond to the major EC/EU challenges in the foreseeable future, but the European trends are a matter to be continuously followed and they may require timely action.

<sup>180</sup> Discussed in more detail in Section 1.

<sup>181</sup> Cf. Section 2.5.

<sup>182</sup> Cf. Sections 2.2.1 and 2.2.2.

<sup>183</sup> Cf. Section 3.3.3.

<sup>184</sup> Cf. Section 2.3.2.

## Selected Literature

### Articles and Books

A. Biondi, 'The European Court of Justice and certain national procedural limitations: not such a tough relationship', 36 *CML Rev.* (1999) p. 1271

A. Biondi, 'The Rule of Reason and national procedural limitations: is it really reasonable?', to be published in: *Rule of Reason; Rethinking another Classic of EC Legal Doctrine*, Annette Schrauwen (editor), The Hogendorp Papers (4).

G.J.M. Corstens, W.J.M. Davids, M.I. Veldt-Foglia (red.), *Europeanisering van het Nederlands Recht. Opstellen aangeboden aan Mr. W.E. Haak*, Kluwer, Deventer 2004.

A.A. Dashwood and A. Johnston, *The future of the judicial system of the European Union*, Oxford: Hart, 2001

M. Donny and E. Bribosia (eds.), *L'avenir du système juridictionnel de l'Union européenne*, Bruxelles 2002.

P. Dyrberg, 'What should the Court of Justice be doing?', *EL Rev.* 2001, p. 291

L.A. Geelhoed and H. Hijmans, 'Het rechterlijk toezicht op de uitvoering van het gemeenschapsrecht in een Europabrede Unie', *SEW* 2002, p. 407

F. Jacobs, 'Enforcing Community rights and obligations in National Courts: striking the balance', in: J. Lonbay & A. Biondi, *Remedies for Breach of EC law*, Chichester 1997, p. 25.

F. Jacobs, 'The Role of National Courts and of the European Court of Justice in ensuring the Uniform Application of Community Law: Is a New Approach Needed?', in: *Studi in onore de Francesco Capotorti*, Vol. II., Milano 1999.

W. Van Gerven, 'Of Rights, Remedies and Procedures', 37 *CML Rev.* (2000) 501

M. Hoskins, 'Tilting the balance: Supremacy and National Procedural rules' (1997) *EL Rev.* 365

J. Kakouris, 'Do Member States possess judicial procedural autonomy?', 34 (1997) *CML Rev.* 1389

P.J.G. Kapteyn, 'Europe's Expectation of its Judges', in R.H.M. Jansen et al. (eds.), *European Ambitions of the National Judiciary*, Deventer 1997.

P.J.G. Kapteyn, 'Reflections on the Future of the Judicial System of the European Union after Nice', *YEL* 2001, p. 123.

P.J.G. Kapteyn, 'De reikwijdte van het Handvest van de grondrechten van de Europese Unie als onderdeel van een Grondwet voor Europa', *Rechtsgeleerd Magazijn Themis* 2004, p. 111.

La Cour de justice des Communautés européennes 1952-2002: Bilan et perspectives, Actes de la conférence organisée dans le cadre du cinquantième anniversaire de la Cour de justice, Bruylant, Bruxelles, 2004, 118 pp.

*Magistraten zonder grenzen – de invloed van het Europese recht op de Nederlandse rechtspleging*, Raio-congres 2002, Nijmegen 2002.

K.J.M. Mortelmans, R.H. van Ooik, S. Prechal, *Europees recht en de Nederlandse rechter*, Kluwer, Deventer 2004, 166 pp.

S. Prechal, 'Community Law in National Courts: the Lessons from Van Schijndel', 35 (1998) *CML Rev.* p. 681

P. Skidmore, 'Labour Law in the Courts: National Judges and the European Court of Justice', *The Industrial Law Journal* (32) 2003-4, p. 334.

C.W.A. Timmermans, 'The European Union's Judicial System', *CML Rev.* 2004, p. 393.

G. Tridimas and T. Tridimas, 'National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure', *International review of law and economics* (24) 2004-2, p. 125.

*The Uncertain Future of the Preliminary Procedure*, Symposium Council of State, the Netherlands, 30 January 2004, The Hague 2004.

## Reports

*The Future of the Judicial System of the European Union - Proposals and Reflections* (prepared by the ECJ/CFI), May 1999.

*Report by the Working Party on the Future of the European Communities' Court System* (report of the so-called Due Committee), January 2000.

WRR report *Naar een Europabrede Unie*, Den Haag 2001, and the preparatory Working Paper by D.Curtin and R. Van Ooik, *Revamping the European Union's Enforcement Systems with a View to Eastern Enlargement*, The Hague 2000 (published at: <http://www.wrr.nl>).

## About the authors

**Sacha Prechal** is Professor of International and European Institutional Law, at the Europa Institute, Faculty of Law, Utrecht University.

**Jan H. Jans** is Professor of European Union Law, Europa Institute, Faculty of Law, University of Amsterdam; and Professor of Dutch and European Public Law, Faculty of Law, University of Groningen.

**Kamiel J.M. Mortelmans** is Professor of Public Economic Law, Europa Institute, Faculty of Law, Utrecht University.

**Ronald H. van Ooik** is senior lecturer and researcher in European Union Law, Europa Institute, Faculty of Law, Universities of Amsterdam and Utrecht.



Annex I:

## References for a preliminary ruling 1959-2003

Court of Justice

### 17. General trend in the work of the Court (1992 – 2003). New references for a preliminary ruling (by Member State and by court of tribunal)

			Total
Belgium	Cour de cassation	56	
	Cour d'arbitrage	2	
	Conseil d'État	32	
	Other courts or tribunals	381	471
Denmark	Højesteret	19	
	Other courts or tribunals	81	100
Germany	Bundesgerichtshof	87	
	Bundesarbeitsgericht	16	
	Bundesverwaltungsgericht	58	
	Bundesfinanzhof		206
	Bundessozialgericht	69	
	Staatsgerichtshof	1	
	Other courts or tribunals	927	1364
Greece	Arios Pagos	4	
	Simvoulitis Epikratias	9	
	Other courts or tribunals	61	74
Spain	Tribunal Supremo	10	
	Audiencia Nacional	1	
	Juzgado Central de lo Penal	7	
	Other courts or tribunals	127	145
France	Cour de cassation	66	
	Conseil d'État	26	
	Other courts or tribunals	563	655
Ireland	Supreme Court	13	
	High Court	15	
	Other courts or tribunals	16	44
Italy	Corte suprema di Cassazione	77	
	Consiglio di Stato	43	
	Other courts or tribunals	676	796
Luxembourg	Cour supérieure de justice	10	
	Conseil d'État	13	
	Cour administrative	4	
	Other courts or tribunals	29	56
Netherlands	Raad van State	43	
	Hoge Raad der Nederlanden	123	
	Centrale Raad van Beroep	42	
	College van Beroep voor het Bedrijfsleven	111	
	Tariefcommissie	34	
	Other courts or tribunals	229	582
Austria	Verfassungsgerichtshof	4	
	Oberster Gerichtshof	51	
	Bundesvergabeamt	22	
	Verwaltungsgerichtshof	39	
	Vergabekontrollsenat	3	
	Other courts or tribunals	130	249
Portugal	Supremo Tribunal Administrativo	30	
	Other courts or tribunals	24	54
Finland	Korkein hallinto-oikeus	10	
	Korkein oikeus	5	
	Other courts or tribunals	19	34
Sweden	Högsta Domstolen	4	
	Marknadsdomstolen	3	
	Regeringsrätten		13
	Other courts or tribunals	25	45
United Kingdom	House of Lords	31	
	Court of Appeal	27	
	Other courts or tribunals	316	374
Benelux	Cour de justice/Gerechtshof <sup>(1)</sup>	1	1
<b>Total</b>			<b>5044</b>

<sup>(1)</sup> Case C-265/00 Campina Melkunie.



**Annex II:**

## Activities of the Court of Justice in 2004

Cour de justice Greffe

### Demands de décision préjudicielle introduites - 01-01-2004 au 31-12-2004

Origine des renvois préjudiciels	Jan	Feb	Mar	Avr	Mai	Jui	Jui	Aoû	Sep	Oct	Nov	Déc	Total
Belgique		2	6	1	2	2	1	1	2	5	1	1	24
Danemark					1	2					1		4
Allemagne	1	6	7	1	2	6	4	5	4	6	3	5	50
Grèce	3		4	3	1			4	3				18
Espagne		1	2				2			1	2		8
France	2	2	1	1		6	5		1	1	1	1	21
Irlande								1					1
Italie	4	6	2	1	7	8	7	7	1	1	4		48
Luxembourg												1	1
Hongrie							2						2
Pays-Bas	3	3	1	1		2	7		1	2	1	7	28
Autriche	1				1	3	2	3		2			12
Portugal				1									1
Finlande		1		1						1		1	4
Suède			1	2		1			1				5
Royaume-Uni		1	4	1	1	2		6	3	2	1	1	22
<b>Total</b>	<b>14</b>	<b>22</b>	<b>28</b>	<b>13</b>	<b>15</b>	<b>32</b>	<b>30</b>	<b>27</b>	<b>16</b>	<b>21</b>	<b>14</b>	<b>17</b>	<b>249</b>

Cour de justice Greffe

### Demands de décision préjudicielle introduites - 01 - 01 - 2004 au 31-12-2004

Juridiction de renvoi	Jan	Feb	Mar	Avr	Mai	Jui	Jui	Aoû	Sep	Oct	Nov	Déc	Total
Cour de cassation										4	1		5
Conseil d'Etat			1	1	1								3
Autres juridictions		2	5		1	2	1	1	2	1		1	16
<b>Belgique Total</b>		<b>2</b>	<b>6</b>	<b>1</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>2</b>	<b>5</b>	<b>1</b>	<b>1</b>	<b>24</b>
Autres juridictions					1	2						1	4
<b>Danemark Total</b>					<b>1</b>	<b>2</b>					<b>1</b>		<b>4</b>
Bundesgerichtshof	1									1			2
Bundesverwaltungsgericht		1	1	1					1	1	1	1	7
Bundesfinanzhof		2	2		1		2	3	1	1	1		13
Autres juridictions		3	4		1	6	2	2	2	3	1	4	28
<b>Allemagne Total</b>		<b>1</b>	<b>6</b>	<b>7</b>	<b>1</b>	<b>2</b>	<b>6</b>	<b>4</b>	<b>5</b>	<b>4</b>	<b>6</b>	<b>3</b>	<b>50</b>
Symvoulío Epikratías			2	3				4	3				12
Autres juridictions	3		2		1								6
<b>Grèce Total</b>		<b>3</b>		<b>4</b>	<b>3</b>	<b>1</b>			<b>4</b>	<b>3</b>			<b>18</b>
Tribunal Supremo		1	1										2
Autres juridictions			1				2			1	2		6
<b>Espagne Total</b>			<b>1</b>	<b>2</b>				<b>2</b>			<b>1</b>	<b>2</b>	<b>8</b>
Cour de cassation		1		1							1	1	4

## Demandes de décision préjudicielle introduites - 01-01-2004 au 31-12-2004

Jurisdiction de renvoi	Jan	Feb	Mar	Avr	Mai	Jui	Jui	Aoû	Sep	Oct	Nov	Déc	Total
Conseil d'Eta	1		1										2
Autres juridictions	1	1				6	5		1	1			15
<b>France Total</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>1</b>		<b>6</b>	<b>5</b>		<b>1</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>21</b>
Supreme Court									1				1
<b>Ireland Total</b>								<b>1</b>					<b>1</b>
Corte suprema di cassazione		1	1		2						1		5
Consiglio di Stato	2				1		1	1					5
Autres juridictions	2	5	1	1	4	8	6	6	1	1	3		38
<b>Italie Total</b>	<b>4</b>	<b>6</b>	<b>2</b>	<b>1</b>	<b>7</b>	<b>8</b>	<b>7</b>	<b>7</b>	<b>1</b>	<b>1</b>	<b>4</b>		<b>48</b>
Cour administrative												1	1
<b>Luxembourg Total</b>												<b>1</b>	<b>1</b>
Autres juridictions							2						2
<b>Hongrie Total</b>							<b>2</b>						<b>2</b>
Raad van State		1					1						2
Hoge Raad der Nederlanden	1	1							1	2		3	8
College van Beroep voor het Bedrijfsleven		1	1			2	1					2	7
Autres juridictions	2			1			5				1	2	11
<b>Pays-Bas Total</b>	<b>3</b>	<b>3</b>	<b>1</b>	<b>1</b>		<b>2</b>	<b>7</b>		<b>1</b>	<b>2</b>	<b>1</b>	<b>7</b>	<b>28</b>

## Demandes de décision préjudicielle introduites - 01-01-2004 au 31-12-2004

Jurisdiction de renvoi	Jan	Feb	Mar	Avr	Mai	Jui	Jui	Aoû	Sep	Oct	Nov	Déc	Total
Bundesvergabeamt	1												1
Oberster Gerichtshof					1			1					2
Verwaltungsgerichtshof						2		1					3
Autres juridictions						1	2	1		2			6
<b>Autriche Total</b>	<b>1</b>				<b>1</b>	<b>3</b>	<b>2</b>	<b>3</b>		<b>2</b>			<b>12</b>
Supremo Tribunal Administrativo				1									1
<b>Portugal Total</b>				<b>1</b>									<b>1</b>
Korkein hallinto-oikeus				1								1	2
Korkein-oikeus		1								1			2
<b>Finlande Total</b>		<b>1</b>		<b>1</b>						<b>1</b>		<b>1</b>	<b>4</b>
Högsta Domstolen				1									1
Regeringsrätten			1						1				2
Autres juridictions				1		1							2
<b>Suède Total</b>			<b>1</b>	<b>2</b>		<b>1</b>			<b>1</b>				<b>5</b>
Court of Appeal						1		2	1				4
Autres juridictions		1	4	1	1	1		4	2	2	1	1	18
<b>Royaume-Uni Total</b>		<b>1</b>	<b>4</b>	<b>1</b>	<b>1</b>	<b>2</b>		<b>6</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>22</b>
<b>Total</b>	<b>14</b>	<b>22</b>	<b>28</b>	<b>13</b>	<b>15</b>	<b>32</b>	<b>30</b>	<b>27</b>	<b>16</b>	<b>21</b>	<b>14</b>	<b>17</b>	<b>249</b>



## Annex III

# The Hague Programme: Strengthening freedom, security and justice in the European union

## 1. Introduction

The European Council reaffirms the priority it attaches to the development of an area of freedom, security and justice, responding to a central concern of the peoples of the States brought together in the Union. Over the past years the European Union has increased its role in securing police, customs and judicial cooperation and in developing a coordinated policy with regard to asylum, immigration and external border controls. This development will continue with the firmer establishment of a common area of freedom, security and justice by the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004. This Treaty and the preceding Treaties of Maastricht, Amsterdam and Nice have progressively brought about a common legal framework in the field of justice and home affairs, and the integration of this policy area with other policy areas of the Union.

Since the Tampere European Council in 1999, the Union's policy in the area of justice and home affairs has been developed in the framework of a general programme. Even if not all the original aims were achieved, comprehensive and coordinated progress has been made. The European Council welcomes the results that have been achieved in the first five-year period: the foundations for a common asylum and immigration policy have been laid, the harmonisation of border controls has been prepared, police cooperation has been

improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced.

The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. Notably in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued.

Five years after the European Council's meeting in Tampere, it is time for a new agenda to enable the Union to build on the achievements and to meet effectively the new challenges it will face. To this end, the European Council has adopted this new multi-annual programme to be known as the Hague Programme. It reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe and contributes to preparing the Union for its entry into force. It takes account of the evaluation by the Commission<sup>1</sup> as welcomed by the

<sup>(1)</sup> COM (2004) 401 final.

European Council in June 2004 as well as the Recommendation adopted by the European Parliament on 14 October 2004<sup>2</sup>, in particular in respect of the passage to qualified majority voting and co-decision as foreseen by Article 67(2) TEC.

The objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies.

A key element in the near future will be the prevention and suppression of terrorism. A common approach in this area should be based on the principle that when preserving national security, the Member States should take full account of the security of the Union as a whole. In addition, the European Council will be asked to endorse in December 2004 the new European Strategy on Drugs 2005-2012 that will be added to this programme. The European Council considers that the common project of strengthening the area

of freedom, security and justice is vital to securing safe communities, mutual trust and the rule of law throughout the Union. Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole. An optimal level of protection of the area of freedom, security and justice requires multi-disciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards.

In the light of this Programme, the European Council invites the Commission to present to the Council an Action Plan in 2005 in which the aims and priorities of this programme will be translated into concrete actions. The plan shall contain a timetable for the adoption and implementation of all the actions. The European Council calls on the Council to ensure that the timetable for each of the various measures is observed. The Commission is invited to present to the Council a yearly report on the implementation of the Hague programme ('scoreboard').

<sup>2</sup> P6\_TA-PROV (2004) 0022 A6-0010/2004.

## 2. General orientations

### 1. General principles

The programme set out below seeks to respond to the challenge and the expectations of our citizens. It is based on a pragmatic approach and builds on ongoing work arising from the Tampere programme, current action plans and an evaluation of first generation measures. It is also grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States.

The Treaty establishing a Constitution of Europe (hereinafter 'the Constitutional Treaty') served as a guideline for the level of ambition, but the existing Treaties provide the legal basis for Council action until such time as the Constitutional Treaty takes effect. Accordingly, the various policy areas have been examined to determine whether preparatory work or studies could already commence, so that measures provided for in the Constitutional Treaty can be taken as soon as it enters into force.

Fundamental rights, as guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights in Part II of the Constitutional Treaty, including the explanatory notes, as well as the Geneva Convention on Refugees, must be fully respected. At the same time, the programme aims at real and substantial progress towards enhancing mutual confidence and promoting common policies to the benefit of all our citizens.

### 2. Protection of fundamental rights

Incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of

human rights and fundamental freedoms will place the Union, including its institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted.

In this context, the European Council, recalling its firm commitment to oppose any form of racism, antisemitism and xenophobia as expressed in December 2003, welcomes the Commission's communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency.

### 3. Implementation and evaluation

The evaluation by the Commission of the Tampere programme<sup>3</sup> showed a clear need for adequate and timely implementation and evaluation of all types of measures in the area of freedom, security and justice.

It is vital for the Council to develop in 2005 practical methods to facilitate timely implementation in all policy areas: measures requiring national authorities' resources should be accompanied by proper plans to ensure more effective implementation, and the length of the implementation period should be more closely related to the complexity of the measure concerned. Regular progress reports by the Commission to the Council during the implementation period should provide an incentive for action in Member States.

Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to the effectiveness of Union action. The evaluations undertaken as from 1 July 2005 must be systematic, objective,

<sup>3</sup> COM(2004) 401 final

impartial and efficient, while avoiding too heavy an administrative burden on national authorities and the Commission. Their goal should be to address the functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application. The Commission should prepare a yearly evaluation report of measures to be submitted to the Council and to inform the European Parliament and the national parliaments.

The European Commission is invited to prepare proposals, to be tabled as soon as the Constitutional Treaty has entered into force, relating to the role of the European Parliament and national parliaments in the evaluation of Eurojust's activities and the scrutiny of Europol's activities.

#### **4. Review**

Since the programme will run for a period during which the Constitutional Treaty will enter into force, a review of its implementation is considered to be useful. To that end, the Commission is invited to report by the entry into force of the Constitutional Treaty (1 November 2006) to the European Council on the progress made and to propose the necessary additions to the programme, taking into account the changing legal basis as a consequence of its entry into force.

### 3. Specific orientations

#### 1. Strengthening freedom

##### 1.1 Citizenship of the Union

The right of all EU citizens to move and reside freely in the territory of the Member States is the central right of citizenship of the Union. Practical significance of citizenship of the Union will be enhanced by full implementation of Directive 2004/38<sup>4</sup>, which codifies Community law in this field and brings clarity and simplicity. The Commission is asked to submit in 2008 a report to the Council and the European Parliament, accompanied by proposals, if appropriate, for allowing EU citizens to move within the European Union on similar terms to nationals of a Member State moving around or changing their place of residence in their own country, in conformity with established principles of Community law.

The European Council encourages the Union's institutions, within the framework of their competences, to maintain an open, transparent and regular dialogue with representative associations and civil society and to promote and facilitate citizens' participation in public life. In particular, the European Council invites the Council and the Commission to give special attention to the fight against anti-semitism, racism and xenophobia.

##### 1.2 Asylum, migration and border policy

International migration will continue. A comprehensive approach, involving all stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies is needed. To ensure such an approach, the European Council

urges the Council, the Member States and the Commission to pursue coordinated, strong and effective working relations between those responsible for migration and asylum policies and those responsible for other policy fields relevant to these areas.

The ongoing development of European asylum and migration policy should be based on a common analysis of migratory phenomena in all their aspects. Reinforcing the collection, provision, exchange and efficient use of up-to-date information and data on all relevant migratory developments is of key importance.

The second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation.

The European Council, taking into account the assessment by the Commission and the strong views expressed by the European Parliament in its Recommendation<sup>5</sup>, asks the Council to adopt a decision based on Article 67(2) TEC immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Article 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration.

##### 1.3 A Common European Asylum System

The aims of the Common European Asylum System in its second phase will be the

<sup>4</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 of 30.4.2004, p. 77)

<sup>5</sup> P6\_TA-PROV (2004) 0022 A6-0010/2004



establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase.

The European Council urges the Member States to implement fully the first phase without delay. In this regard the Council should adopt unanimously, in conformity with article 67(5) TEC, the Asylum Procedures Directive as soon as possible. The Commission is invited to conclude the evaluation of first-phase legal instruments in 2007 and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before the end of 2010. In this framework, the European Council invites the Commission to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Furthermore a separate study, to be conducted in close consultation with the UNHCR, should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.

The European Council invites the Council and the Commission to establish in 2005 appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation. Thus Member States will be assisted, inter alia, in achieving a single procedure for the assessment of applications

for international protection, and in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting, inter alia, from their geographical location. After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System.

The European Council welcomes the establishment of the new European Refugee Fund for the period 2005-2010 and stresses the urgent need for Member States to maintain adequate asylum systems and reception facilities in the run-up to the establishment of a common asylum procedure. It invites the Commission to earmark existing Community funds to assist Member States in the processing of asylum applications and in the reception of categories of third-country nationals. It invites the Council to designate these categories on the basis of a proposal to be submitted by the Commission in 2005.

#### **1.4 Legal migration and the fight against illegal employment**

Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy. It could also play a role in partnerships with third countries.

The European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States. The European Council, taking into account the outcome of discussions on

the Green Paper on labour migration, best practices in Member States and its relevance for implementation of the Lisbon strategy, invites the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.

As the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation, the European Council calls on Member States to reach the targets for reducing the informal economy set out in the European employment strategy.

### **1.5 Integration of third-country nationals**

Stability and cohesion within our societies benefit from the successful integration of legally resident third-country nationals and their descendants. To achieve this objective, it is essential to develop effective policies, and to prevent the isolation of certain groups. A comprehensive approach involving stakeholders at the local, regional, national, and EU level is therefore essential.

While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society. Obstacles to integration need to be actively eliminated.

The European Council underlines the need for greater coordination of national integration policies and EU initiatives in this field. In this respect, the common basic principles underlying a coherent European framework on

integration should be established.

These principles, connecting all policy areas related to integration, should include at least the following aspects. Integration:

- is a continuous, two-way process involving both legally resident third-country nationals and the host society,
- includes, but goes beyond, anti-discrimination policy,
- implies respect for the basic values of the European Union and fundamental human rights,
- requires basic skills for participation in society, 3.3.2005 C 53/4 Official Journal of the European Union EN
- relies on frequent interaction and intercultural dialogue between all members of society within common forums and activities in order to improve mutual understanding,
- extends to a variety of policy areas, including employment and education.

A framework, based on these common basic principles, will form the foundation for future initiatives in the EU, relying on clear goals and means of evaluation. The European Council invites Member States, the Council and the Commission to promote the structural exchange of experience and information on integration, supported by the development of a widely accessible website on the Internet.

### **1.6 The external dimension of asylum and migration**

#### **1.6.1 Partnership with third countries**

Asylum and migration are by their very nature international issues. EU policy should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their

capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.

The European Council recognises that insufficiently managed migration flows can result in humanitarian disasters. It wishes to express its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally. It calls upon all States to intensify their cooperation in preventing further loss of life.

The European Council calls upon the Council and the Commission to continue the process of fully integrating migration into the EU's existing and future relations with third countries. It invites the Commission to complete the integration of migration into the Country and Regional Strategy Papers for all relevant third countries by the spring of 2005.

The European Council acknowledges the need for the EU to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage. Countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. In this regard the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees.

### 1.6.2 Partnership with countries and regions of origin

The European Council welcomes the Commission Communication on improving access to durable solutions <sup>6</sup> and invites the Commission to develop EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation and cooperation with UNHCR. These programmes will build on experience gained in pilot protection programmes to be launched before the end of 2005. These programmes will incorporate a variety of relevant instruments, primarily focused on capacity building, and include a joint resettlement programme for Member States willing to participate in such a programme.

Policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin. The European Council welcomes the progress already made, invites the Council to develop these policies, with particular emphasis on root causes, push factors and poverty alleviation, and urges the Commission to present concrete and carefully worked out proposals by the spring of 2005.

### 1.6.3 Partnership with countries and regions of transit

As regards countries of transit, the European Council emphasises the need for intensified cooperation and capacity building, both on the southern and the eastern borders of the EU, to enable these countries better to manage

<sup>6</sup> COM (2004) 410 final

migration and to provide adequate protection for refugees. Support for capacitybuilding in national asylum systems, border control and wider cooperation on migration issues will be provided to those countries that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees. The proposal for a Regulation establishing a European Neighbourhood and Partnership Instrument<sup>7</sup> provides the strategic framework for intensifying cooperation and dialogue on asylum and migration with neighbouring countries amongst others around the Mediterranean basin, and for initiating new measures. In this connection, the European Council requests a report on progress and achievements before the end of 2005.

#### 1.6.4 Return and re-admission policy

Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.

The European Council considers it essential that the Council begins discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts. The proposal should also take into account special concerns with regard to safeguarding public order and security. A coherent approach between return policy and all other aspects of the external relations of the Community with third countries is necessary as is special emphasis on the problem of nationals of such

third countries who are not in the possession of passports or other identity documents.

The European Council calls for:

- closer cooperation and mutual technical assistance,
- launching of the preparatory phase of a European return fund,
- common integrated country and region specific return programmes,
- the establishment of a European Return Fund by 2007 taking into account the evaluation of the preparatory phase,
- the timely conclusion of Community readmission agreements,
- the prompt appointment by the Commission of a Special Representative for a common readmission policy.

## 1.7 Management of migration flows

### 1.7.1 Border checks and the fight against illegal immigration

The European Council stresses the importance of swift abolition of internal border controls, the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. In this respect the need for solidarity and fair sharing of responsibility including its financial implications between the Member States is underlined.

The European Council urges the Council, the Commission and Member States to take all necessary measures to allow the abolition of controls at internal borders as soon as possible, provided all requirements to apply the Schengen acquis have been fulfilled and after the Schengen Information System (SIS II) has

<sup>7</sup> COM (2004) 628 final

become operational in 2007. In order to reach this goal, the evaluation of the implementation of the non SIS II related acquis should start in the first half of 2006.

The European Council welcomes the establishment of the European Agency for the Management of Operational Cooperation at the External Borders, on 1 May 2005. It requests the Commission to submit an evaluation of the Agency to the Council before the end of 2007. The evaluation should contain a review of the tasks of the Agency and an assessment of whether the Agency should concern itself with other aspects of border management, including enhanced cooperation with customs services and other competent authorities for goods-related security matters.

The control and surveillance of external borders fall within the sphere of national border authorities. However, in order to support Member States with specific requirements for control and surveillance of long or difficult stretches of external borders, and where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on these borders, the European Council:

- invites the Council to establish teams of national experts that can provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting within its framework, on the basis of a proposal by the Commission on the appropriate powers and funding for such teams, to be submitted in 2005,
- invites the Council and the Commission to establish a Community border management fund by the end of 2006 at the latest,
- invites the Commission to submit, as soon as the abolition of controls at internal

borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections.

The review of the tasks of the Agency envisaged above and in particular the evaluation of the functioning of the teams of national experts should include the feasibility of the creation of a European system of border guards.

The European Council invites Member States to improve their joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area, inter alia within the framework of the Border Management Agency and in close cooperation with Europol and Eurojust. It also calls on the Council and the Commission to ensure the firm establishment of immigration liaison networks in relevant third countries. In this connection, the European Council welcomes initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future cooperation with third countries.

With a view to the development of common standards, best practices and mechanisms to prevent and combat trafficking in human beings, the European Council invites the Council and the Commission to develop a plan in 2005.

### 1.7.2 Biometrics and information systems

The management of migration flows, including the fight against illegal immigration should be strengthened by establishing a continuum

of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.

The European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals.

The European Council invites the Council, the Commission and Member States to continue their efforts to integrate biometric identifiers in travel documents, visa, residence permits, EU citizens' passports and information systems without delay and to prepare for the development of minimum standards for national identity cards, taking into account ICAO standards.

### 1.7.3 Visa policy

The European Council underlines the need for further development of the common visa policy as part of a multi-layered system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions. Common visa offices should be established in the long term, taking

into account discussions on the establishment of an European External Action Service. The European Council welcomes initiatives by individual Member States which, on a voluntary basis, cooperate at pooling of staff and means for visa issuance.

#### **The European Council:**

- invites the Commission, as a first step, to propose the necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS, to review the Common Consular Instructions and table the appropriate proposal by early 2006 at the latest,
- stresses the importance of swift implementation of the VIS starting with the incorporation of among others alphanumeric data and photographs by the end of 2006 and biometrics by the end of 2007 at the latest,
- invites the Commission to submit without delay the necessary proposal in order to comply with the agreed time frame for implementation of the VIS,
- calls on the Commission to continue its efforts to ensure that the citizens of all Member States can travel without a short-stay visa to all third countries whose nationals can travel to the EU without a visa as soon as possible,
- invites the Council and the Commission to examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of shortstay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues.

## 2. Strengthening security

### 2.1 Improving the exchange of information

The European Council is convinced that strengthening freedom, security and justice requires an innovative approach to the cross-border exchange of law-enforcement information. The mere fact that information crosses borders should no longer be relevant.

With effect from 1 January 2008 the exchange of such information should be governed by conditions set out below with regard to the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.

Without prejudice to work in progress<sup>8</sup> the Commission is invited to submit proposals by the end of 2005 at the latest for implementation of the principle of availability, in which the following key conditions should be strictly observed:

- the exchange may only take place in order that legal tasks may be performed,
- the integrity of the data to be exchanged must be guaranteed,
- the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently,
- common standards for access to the data and common technical standards must be applied,
- supervision of respect for data protection,

and appropriate control prior to and after the exchange must be ensured,

- individuals must be protected from abuse of data and have the right to seek correction of incorrect data.

The methods of exchange of information should make full use of new technology and must be adapted to each type of information, where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS. New centralised European databases should only be created on the basis of studies that have shown their added value.

### 2.2 Terrorism

The European Council underlines that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole.

As a goal this means that Member States:

- use the powers of their intelligence and security services not only to counter threats to their own security, but also, as the case may be, to protect the internal security of the other Member States,
- bring immediately to the attention of the competent authorities of other Member States any information available to their services which concerns threats to the internal security of these other Member States,
- in cases where persons or goods are under surveillance by security services in connection with terrorist threats, ensure that no gaps occur in their surveillance as a result of their crossing a border,

In the short term all the elements of the

<sup>8</sup> The Draft framework decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts, doc. COM(2004) 221 final.

European Council's declaration of 25 March 2004 and the EU action plan on combating terrorism must continue to be implemented in full, notably that enhanced use of Europol and Eurojust should be made and the EU Counter Terrorism Coordinator is encouraged to promote progress.

In this context the European Council recalls its invitation to the Commission to bring forward a proposal for a common EU approach to the use of passengers data for border and aviation security and other law enforcement purposes<sup>9</sup>.

The high level of exchange of information between security services shall be maintained. Nevertheless it should be improved, taking into account the overall principle of availability as described above in paragraph 2.1 and giving particular consideration to the special circumstances that apply to the working methods of security services, e.g. the need to secure the methods of collecting information, the sources of information and the continued confidentiality of the data after the exchange.

With effect from 1 January 2005, SitCen will provide the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol.

The European Council stresses the importance of measures to combat financing of terrorism. It looks forward to examining the coherent overall approach that will be submitted to it by the Secretary General/High Representative and the Commission at its meeting in December 2004. This strategy should suggest ways to improve the efficiency of existing instruments such as the monitoring of suspicious financial flows and the freezing of assets and propose new tools in

respect of cash transactions and the institutions involved in them

The Commission is invited to make proposals aimed at improving the security of the storage and transport of explosives as well as at ensuring traceability of industrial and chemical precursors.

The European Council also stresses the need to ensure adequate protection and assistance to victims of terrorism.

The Council should, by the end of 2005, develop a long-term strategy to address the factors which contribute to radicalisation and recruitment for terrorist activities.

All the instruments available to the European Union should be used in a consistent manner so that the key concern — the fight against terrorism — is fully addressed. To that end the JHA Ministers within the Council should have the leading role, taking into account the task of the General Affairs and External Relations Council. The Commission should review Community legislation in sufficient time to be able to adapt it in parallel with measures to be adopted in order to combat terrorism.

The European Union will further strengthen its efforts being directed, in the external dimension of the area of freedom, security and justice, towards the fight against terrorism. In this context, the Council is invited to set up in conjunction with Europol and the European Border Agency a network of national experts on preventing and combating terrorism and on border control, who will be available to respond to requests from third countries for technical assistance in the training and instruction of their authorities.

---

<sup>9</sup> Declaration on Combating terrorism adopted on 25 March 2004, doc. 7906/04, point 6.



The European Council urges the Commission to increase the funding for counter-terrorism related capacity-building projects in third countries and to ensure it has the necessary expertise to implement such projects effectively. The Council also calls on the Commission to ensure that, in the proposed revision of the existing instruments governing external assistance, appropriate provisions are made to enable rapid, flexible and targeted counter-terrorist assistance.

### 2.3 Police cooperation

The effective combating of cross-border organised and other serious crime and terrorism requires intensified practical cooperation between police and customs authorities of Member States and with Europol and better use of existing instruments in this field.

The European Council urges the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against serious cross-border (organised) crime and terrorism by:

- ratifying and effectively implementing the necessary legal instruments by the end of 2004<sup>10</sup>,
- providing all necessary high quality information to Europol in good time,
- encouraging good cooperation between their competent national authorities and Europol.

With effect from 1 January 2006, Europol must have replaced its 'crime situation reports' by yearly 'threat assessments' on serious forms of organised crime, based on information provided by the Member States and input from Eurojust and the Police Chiefs Task Force. The

Council should use these analyses to establish yearly strategic priorities, which will serve as guidelines for further action. This should be the next step towards the goal of setting up and implementing a methodology for intelligence-led law enforcement at EU level.

Europol should be designated by Member States as central office of the Union for euro counterfeits within the meaning of the Geneva Convention of 1929.

The Council should adopt the European law on Europol, provided for in Article III-276 of the Constitutional Treaty, as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008, taking account of all tasks conferred upon to Europol.

Until that time, Europol must improve its functioning by making full use of the cooperation agreement with Eurojust. Europol and Eurojust should report annually to the Council on their common experiences and about specific results. Furthermore Europol and Eurojust should encourage the use of and their participation in Member States' joint investigation teams.

Experience in the Member States with the use of joint investigation teams is limited. With a view to encouraging the use of such teams and exchanging experiences on best practice, each Member State should designate a national expert.

The Council should develop cross-border police and customs cooperation on the basis of common principles. It invites the Commission to bring forward proposals to further develop the Schengen-acquis in respect of cross border operational police cooperation.

<sup>10</sup> Europol Protocols: the Protocol amending Article 2 and the Annex to the Europol Convention of 30 November 2000, OJ C 358 13.12.2000, p. 1, the Protocol on the privileges and immunities of Europol, the members of its organs, its Deputy Directors and its members of 28 November 2002 OJ C 312, 16.12.2002, p. 1 and the Protocol amending the Europol Convention of 27 November 2003, OJ C 2, 6.1.2004, p. 3. The Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJ C 197, 12.7.2000, p. 1 and its accompanying Protocol of 16 October 2001 OJ C 326, 21.11.2001, p. 2 and Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJ L 162, 20.6.2002, p. 1.

Member States should engage in improving the quality of their law enforcement data with the assistance of Europol. Furthermore, Europol should advise the Council on ways to improve the data. The Europol information system should be up and running without delay.

The Council is invited to encourage the exchange of best practice on investigative techniques as a first step to the development of common investigative techniques, envisaged in Article III-257 of the Constitutional Treaty, in particular in the areas of forensic investigations and information technology security.

Police cooperation between Member States is made more efficient and effective in a number of cases by facilitating cooperation on specified themes between the Member States concerned, where appropriate by establishing joint investigation teams and, where necessary, supported by Europol and Eurojust. In specific border areas, closer cooperation and better coordination is the only way to deal with crime and threats to public security and national safety.

Strengthening police cooperation requires focused attention on mutual trust and confidence-building. In an enlarged European Union, an explicit effort should be made to improve the understanding of the working of Member States' legal systems and organisations. The Council and the Member States should develop by the end of 2005 in cooperation with CEPOL standards and modules for training courses for national police officers with regard to practical aspects of EU law enforcement cooperation.

The Commission is invited to develop, in close cooperation with CEPOL and by the end of 2005, systematic exchange programmes for

police authorities aimed at achieving better understanding of the working of Member States' legal systems and organisations.

Finally experience with external police operations should also be taken into account with a view to improving internal security of the European Union.

#### **2.4 Management of crises within the European Union with crossborder effects**

On 12 December 2003 the European Council adopted the European security strategy, which outlines global challenges, key threats, strategic objectives and policy implications for a secure Europe in a better world. An essential complement thereof is providing internal security within the European Union, with particular reference to possible major internal crises with cross-border effects affecting our citizens, vital infrastructure and public order and security. Only then can optimum protection be provided to European citizens and vital infrastructure for instance in the event of a CBRN accident.

Effective management of cross-border crises within the EU requires not only strengthening of current actions on civil protection and vital infrastructure but also addressing effectively the public order and security aspects of such crises and coordination between these areas. Therefore the European Council calls for the Council and the Commission to set up within their existing structures, while fully respecting national competences, integrated and coordinated EU crisis-management arrangements for crises with cross-border effects within the EU, to be implemented at the latest by 1 July 2006. These arrangements should at least address the following issues:

further assessment of Member States' capabilities, stockpiling, training, joint exercises and operational plans for civilian crisis management

## 2.5 Operational cooperation

Coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice, and monitoring of the strategic priorities set by the Council, must be ensured.

To that end, the Council is invited to prepare for the setting up of the Committee on Internal Security, envisaged in Article III- 261 of the Constitutional Treaty, in particular by determining its field of activity, tasks, competences and composition, with a view to its establishment as soon as possible after the Constitutional Treaty has entered into force.

To gain practical experience with coordination in the meantime, the Council is invited to organise a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs' Task Force, and the SitCEN.

## 2.6 Crime prevention

Crime prevention is an indispensable part of the work to create an area of freedom, security and justice. The Union therefore needs an effective tool to support the efforts of Member States in preventing crime. To that end, the European Crime Prevention Network should be professionalised and strengthened. Since

the scope of prevention is very wide, it is essential to focus on measures and priorities that are most beneficial to Member States. The European Crime Prevention Network should provide expertise and knowledge to the Council and the Commission in developing effective crime prevention policies.

In this respect the European Council welcomes the initiative of the Commission to establish European instruments for collecting, analysing and comparing information on crime and victimisation and their respective trends in Member States, using national statistics and other sources of information as agreed indicators. Eurostat should be tasked with the definition of such data and its collection from the Member States.

It is important to protect public organisations and private companies from organised crime through administrative and other measures. Particular attention should be given to systematic investigations of property holdings as a tool in the fight against organised crime. Private/public partnership is an essential tool. The Commission is invited to present proposals to this effect in 2006.

## 2.7 Organised crime and corruption

The European Council welcomes the development of a strategic concept with regard to tackling cross-border organised crime at EU-level and asks the Council and the Commission to develop this concept further and make it operational, in conjunction with other partners such as Europol, Eurojust, the Police Chiefs Task Force, EUCPN and CEPOL. In this connection, issues relating to corruption and its links with organised crime should be examined.

## 2.8 European strategy on drugs

The European Council underlines the importance of addressing the drugs problem in a comprehensive, balanced and multidisciplinary approach between the policy of prevention, assistance and rehabilitation of drug dependence, the policy of combating illegal drug trafficking and precursors and money laundering, and the strengthening of international cooperation.

The European Strategy on Drugs 2005-2012 will be added to the programme after its adoption by the European Council in December 2004.

## 3. Strengthening justice

The European Council underlines the need further to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European Area for Justice will play in this respect. A number of measures have already been carried out. Further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition. It is of particular importance that borders between countries in Europe no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

### 3.1 European Court of Justice

The European Council underlines the importance of the European Court of Justice in the relatively new area of freedom, security and justice and is satisfied that the Constitutional Treaty greatly increases the powers of the European Court of Justice in that area.

To ensure, both for European citizens and for the functioning of the area of freedom, security and justice, that questions on points of law brought before the Court are answered quickly, it is necessary to enable the Court to respond quickly as required by Article III-369 of the Constitutional Treaty.

In this context and with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court. The Commission is invited to bring forward — after consultation of the Court of Justice — a proposal to that effect.

### 3.2 Confidence-building and mutual trust

Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality. In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established.

Strengthening mutual confidence requires an explicit effort to improve mutual understanding

among judicial authorities and different legal systems. In this regard, networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, should be supported by the Union.

Exchange programmes for judicial authorities will facilitate cooperation and help develop mutual trust. An EU component should be systematically included in the training of judicial authorities. The Commission is invited to prepare as soon as possible a proposal aimed at creating, from the existing structures, an effective European training network for judicial authorities for both civil and criminal matters, as envisaged by Articles III-269 and III-270 of the Constitutional Treaty.

### 3.3 Judicial cooperation in criminal matters

Improvement should be sought through reducing existing legal obstacles and strengthening the coordination of investigations. With a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State. Further development of judicial cooperation in criminal matters is essential to provide for an adequate follow up to investigations of law enforcement authorities of the Member States and Europol.

The European Council recalls in this context the need to ratify and implement effectively — without delay — the legal instruments to improve judicial cooperation in criminal matters, as referred to already in the paragraph on police cooperation.

#### 3.3.1 Mutual recognition

The comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the *ne bis in idem* principle and the execution of final sentences of imprisonment or other (alternative) sanctions<sup>11</sup>, should be completed and further attention should be given to additional proposals in that context. The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.

The Council should adopt by the end of 2005 the Framework Decision on the European Evidence Warrant<sup>12</sup>. The Commission is invited to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, by December 2004 with a view to their adoption by the Council by the end of 2005. This should be followed in March 2005 by a further proposal on a computerised system of exchange of information.

#### 3.3.2 Approximation of law

The European Council recalls that the establishment of minimum rules concerning

<sup>11</sup> OJ C 12, 15.1.2001, pages 10-22.

<sup>12</sup> COM(2003) 688.

aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.

The approximation of substantive criminal law serves the same purposes and concerns areas of particular serious crime with cross border dimensions. Priority should be given to areas of crime that are specifically mentioned in the treaties.

To ensure more effective implementation within national systems, JHA Ministers should be responsible within the Council for defining criminal offences and determining penalties in general.

### 3.3.3 Eurojust

Effective combating of cross-border organised and other serious crime and terrorism requires the cooperation and coordination of investigations and, where possible, concentrated prosecutions by Eurojust, in cooperation with Europol.

The European Council urges the Member States to enable Eurojust to perform its tasks by:

- effectively implementing the Council Decision on Eurojust by the end of 2004<sup>13</sup> with special attention to the judicial powers to be conferred upon their national members, and
- ensuring full cooperation between their competent national authorities and Eurojust.

The Council should adopt on the basis of a proposal of the Commission the European law on Eurojust, provided for in Article III-273 of the Constitutional Treaty, after the entry into force of the Constitutional Treaty but no later than 1 January 2008, taking account of all tasks referred to Eurojust.

Until that time, Eurojust will improve its functioning by focusing on coordination of multilateral, serious and complex cases. Eurojust should include in its annual report to the Council the results and the quality of its cooperation with the Member States. Eurojust should make maximum use of the cooperation agreement with Europol and should continue cooperation with the European Judicial Network and other relevant partners.

The European Council invites the Council to consider the further development of Eurojust, on the basis of a proposal from the Commission.

## 3.4 Judicial cooperation in civil matters

### 3.4.1 Facilitating civil law procedure across borders

Civil law, including family law, concerns citizens in their everyday lives. The European Council therefore attaches great importance to the continued development of judicial cooperation in civil matters and full completion of the programme of mutual recognition adopted in 2000. The main policy objective in this area is that borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

### 3.4.2 Mutual recognition of decisions

Mutual recognition of decisions is an effective means of protecting citizens' rights and securing the enforcement of such rights across European borders.

Continued implementation of the programme of measures on mutual recognition<sup>14</sup> must

<sup>13</sup> OJ L 63, 6.3.2002, pages 1-3.

<sup>14</sup> OJ C 12, 15.1.2001, pages 1-9

therefore be a main priority in the coming years to ensure its completion by 2011. Work concerning the following projects should be actively pursued: the conflict of laws regarding non-contractual obligations ('Rome II') and contractual obligations ('Rome I'), a European Payment Order and instruments concerning alternative dispute resolution and concerning small claims. In timing the completion of these projects, due regard should be given to current work in related areas.

The effectiveness of existing instruments on mutual recognition should be increased by standardising procedures and documents and developing minimum standards for aspects of procedural law, such as the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs.

Regarding family and succession law, the Commission is invited to submit the following proposals:

- a draft instrument on the recognition and enforcement of decisions on maintenance, including precautionary measures and provisional enforcement in 2005,
- a green paper on the conflict of laws in matters of succession, including the question of jurisdiction, mutual recognition and enforcement of decisions in this area, a European certificate of inheritance and a mechanism allowing precise knowledge of the existence of last wills and testaments of residents of European Union in 2005, and
- a green paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition in 2006,
- a green paper on the conflict of laws in matters relating to divorce (Rome III) in 2005.

Instruments in these areas should be completed by 2011. Such instruments should cover matters of private international law and should not be based on harmonised concepts of 'family', 'marriage', or other. Rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters. Implementation of the programme of mutual recognition should be accompanied by a careful review of the operation of instruments that have recently been adopted. The outcome of such reviews should provide the necessary input for the preparation of new measures.

### 3.4.3 Enhancing cooperation

With a view to achieving smooth operation of instruments involving cooperation of judicial or other bodies, Member States should be required to designate liaison judges or other competent authorities based in their own country. Where appropriate they could use their national contact point within the European Judicial Network in civil matters. The Commission is invited to organise EU workshops on the application of EU law and promote cooperation between members of the legal professions (such as bailiffs and notaries public) with a view to establishing best practice.

### 3.4.4 Ensuring coherence and upgrading the quality of EU legislation

In matters of contract law, the quality of existing and future Community law should be improved by measures of consolidation,

codification and rationalisation of legal instruments in force and by developing a common frame of reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union.

Measures should be taken to enable the Council to effect a more systematic scrutiny of the quality and coherence of all Community law instruments relating to cooperation on civil law matters.

#### 3.4.5 International legal order

The Commission and the Council are urged to ensure coherence between the EU and the international legal order and continue to engage in closer relations and cooperation with international organisations such as The Hague Conference on Private International Law and the Council of Europe, particularly in order to coordinate initiatives and to maximise synergies between these organisations' activities and instruments and the EU instruments. Accession of the Community to the Hague Conference should be concluded as soon as possible.



#### 4. External relations

The European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority.

In addition to the aspects already addressed in the previous chapters, the European Council calls on the Commission and the Secretary-General / High Representative to present, by the end of 2005, a strategy covering all external aspects of the Union policy on freedom, security and justice, based on the measures developed in this programme to the Council. The strategy should reflect the Union's special relations with third countries, groups of countries and regions, and focus on the specific needs for JHA cooperation with them.

All powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice. The following guidelines<sup>15</sup> should be taken into account: the existence of internal policies as the major parameter justifying external action; need for value added in relation to projects carried out by the Member States; contribution to the general political objectives of the foreign policies of the Union; possibility of achieving the goals during a period of reasonable time; the possibility of long-term action.

---

<sup>15</sup> Established at the European Council meeting in Feira in 2000.

## Abbreviations

<b>AA</b>	Ars Aequi
<b>AB</b>	Administratiefrechtelijke Beslissingen
<b>ABRvS</b>	Afdeling Bestuursrechtspraak Raad van State (Administrative Jurisdiction Division of the Council of State)
<b>AFSJ</b>	Area of Freedom, Security and Justice
<b>AWB</b>	Algemene Wet Bestuursrecht (General Act on Administrative Law)
<b>CAP</b>	Common Agricultural Policy
<b>CBB</b>	College van Beroep voor het bedrijfsleven (Regulatory Industrial Organisation Appeals Court)
<b>CFI</b>	Court of First Instance of the European Communities
<b>CFSP</b>	Common Foreign and Security Policy
<b>CLJ</b>	Cambridge Law Journal
<b>CMLRev.</b>	Common Market Law Review
<b>COM</b>	Commission Document
<b>CRvB</b>	Centrale Raad van Beroep (Central Court of Appeal)
<b>EC</b>	European Community/Communities
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECrtHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECR</b>	European Court Reports
<b>EE</b>	European Economic Community
<b>EEX</b>	European Execution Treaty/Regulation
<b>ENCJ</b>	European Network of the Councils for the Judiciary
<b>EIA</b>	Environmental Impact Assessment
<b>EL Rev.</b>	European Law Review
<b>EPP</b>	European Public Prosecutor
<b>EU</b>	European Union
<b>EuConst</b>	European Constitutional Law Review
<b>FILJ</b>	Fordham International Law Journal
<b>HR</b>	Hoge Raad der Nederlanden (Dutch Supreme Court)
<b>JB</b>	Jurisprudentie Bestuursrecht
<b>JHA</b>	Justice and Home Affairs
<b>KG</b>	Kort Geding
<b>LJN</b>	Landelijk Jurisprudentienummer (national case law number)
<b>MJ</b>	Maastricht Journal of Comparative and European Law
<b>NCA</b>	National Competition Authority
<b>NJB</b>	Nederlands JuristenBlad
<b>NMa</b>	Nederlandse Mededingingsautoriteit (Dutch Competition Authority)
<b>NRA</b>	National Regulatory Authority

<b>NTB</b>	Nederlands Tijdschrift voor Bestuursrecht
<b>NTER</b>	Nederlands Tijdschrift voor Europees Recht
<b>OJ</b>	Official Journal of the European Communities/Union
<b>OPTA</b>	Onafhankelijke Post en Telecommunicatie Autoriteit (Independent Postal and Telecom Authority)
<b>PIL</b>	Private International Law
<b>PJCC</b>	Police and Judicial Cooperation in Criminal Matters
<b>QMV</b>	Qualified Majority Voting
<b>RAIO</b>	Rechterlijke Ambtenaar in Opleiding (trainee judge)
<b>RvdR</b>	Raad voor de rechtspraak (Dutch Council for the judiciary)
<b>RvS</b>	Raad van State (Dutch Council of State)
<b>SEW</b>	Sociaal-Economische Wetgeving
<b>SSR</b>	Studiecentrum Rechtspleging (Dutch Training and Study Centre for the Judiciary)
<b>TAC</b>	Total Allowable Catch
<b>TEU</b>	Treaty on European Union
<b>TK</b>	Tweede Kamer
<b>WRR</b>	Wetenschappelijke Raad voor het Regeringsbeleid (Dutch Scientific Council for Government Policy)
<b>YEL</b>	Yearbook of European Law