LABOUR LAW IN THE COURTS

National Judges and the European Court of Justice

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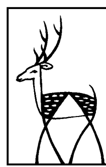
Edited by

SILVANA SCIARRA



OXFORD · PORTLAND, OREGON
2001

Hart Publishing
Oxford and Portland, Oregon

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Distributed in Netherlands, Belgium and Luxembourg by
Intersentia, Churchillaan 108
B2900 Schoten
Antwerpen
Belgium

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Telephone: +44 (0)1865 245533 Fax: +44 (0) 1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1 84113-024-9

Typeset by John Saunders Design & Production
Printed and bound in Great Britain by Biddles Ltd,
www.biddles.co.uk

Preface

This book is the product of joint work carried out by a research group funded by the Research Council of the European University Institute.

The group met several times in S. Domenico di Fiesole, developing the project's leading ideas in close symbiosis and discovering, beyond an initial scepticism and a healthy fear of being over-ambitious, a genuine pleasure at being together and developing ideas, leaving behind all academic formalities. The working team developed into a larger one soon after its first meeting. It proved both natural and profitable to include in the original group younger colleagues who, in various capacities, had been taking an active part during the workshops. The overcoming of generation gaps can thus be taken as a good sign of successful communication and of mutual trust.

Workshops were held informally, keeping the number of participants fairly small, in order to facilitate comments and discussion.

When some of the materials circulated among the group appeared coherent and complete, the group decided to submit them for publication in the *EUI Working Papers of the Law Department* and also to encourage publication in national journals.[1] It thus happened that a central core of research was consolidated, with regard to the methodology adopted and the data collected, while the final distribution of chapters among the contributors was still to be decided. We also made the decision to refer to Article 177 rather than Article 234 throughout the research. The old numbering for us evoked more effectively the historical development of preliminary references in the Community legal order which we wished to understand.

A more systematic approach slowly prevailed over a country-based analysis. The working papers on transfers of undertakings were absorbed into a chapter which also took into consideration the evolution of the European Court of Justice case law. This chapter draws on two other papers, subsequently developed into autonomous essays, for different reasons. One explains in detail the specificity of the Italian 'style' in referring cases on transfers, testing in a very specific case the overall methodology of the

[1] P. Davies, 'The relationship between the European Court of Justice and the British courts over the interpretation of Directive 77/187/EC', EUI Working Paper Law 97/2; A. Jeammaud, M. Le Friant, 'La directive 77/187 CEE, la Cour de Justice et le droit francais', EUI Working Paper Law 97/3; M. Körner, 'The impact of Community law on German labour law. The example of transfer of undertakings', EUI Working Paper Law 96/8, all published also in Italian translation in *Giornale di Diritto del Lavoro e di Relazioni Industriali* (1997), 65 ff.

research group.[2] The second, due to the linguistic and legal skills of the author, explores the Danish legal system.[3] Originally not included among the country studies, Denmark is very relevant in a comparative and historical perspective because of the many and significant preliminary ruling procedures *started* in that country, within the group's main fields of analysis.

Other papers presented in workshops were submitted for publication;[4] they too represent a basis on which ideas have been progressively shaped and developed within the group, without interfering with the authors' original points of view.

It was our good fortune to have as a member of the group *Raffaele Foglia*, someone who combines so well the roles of being an academic, both in labour and EC law, and a judge.[5]

This rich and long gestation of the book does not make it a collection of published works. The intention and the hope of all contributors is that the work of the research group over a period of time should not be hidden, but rather be offered to readers in its complexity and in its progressive development. Papers already published constitute therefore the background to a slow and yet committed plan of investigation.

The final meeting, organised in December 1998, was held under the auspices of the Robert Schuman project of the European Commission.[6] A number of national judges took part in that meeting and made the concluding work of the group a very special event. In mentioning their names at the end of this preface, the editor wishes to express the group's gratitude for the stimulating contribution they all made. It goes without saying that they took no official position, neither must they be considered responsible for views expressed in this volume.

It is the editor's duty—and pleasure—to acknowledge that her role, as director of the project, has been constantly nourished by the vicinity, the enthusiasm and the inspiration of the group, as much as by the contributions of its individual members.

[2] V. Leccese, 'Italian courts, the ECJ, and transfers of undertakings: a multi-speed dialogue?', (1999) *5 ELJ* 311ff, (Italian translation in *Giornale di diritto del lavoro e di relazioni industriali*, 81/1 (1999).

[3] H. Sundberg, 'Danish industrial relations, Community Litigation and the Acquired Rights Directive', (1999) *IJCLLIR* 15.

[4] S. Sciarra, 'Dynamic integration of national and Community sources: the case of night-work for women', in T.Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union*, (Wiley, Chichester, 1998) C. Kilpatrick, 'Production and circulation of EC night work jurisprudence', (1996) *ILJ* 169.; C. Kilpatrick, 'Community or Communities of courts in European integration? Sex equality dialogues between UK courts and the ECJ', (1998) *ELJ* 121.

[5] Among his many publications, one in particular reflects his original contribution to the group: R. Foglia, 'Il ruolo della Corte di Giustizia e il rapporto tra giudice comunitario e i giudici nazionali nel quadro dell'art. 177 del Trattato', (1999) *Diritto del Lavoro* 138 ff.

[6] Accompanying initiative Decision no. 1496/98/CE of the European Parliament and the Council, 22 June 1998, OJ L 196, 14.7.1998.

To express gratitude to a number of other collaborators in the project must not sound like a rhetorical device, but rather be a true indication of the essential role they played, through the whole project.

Susan Garvin is an EUI project assistant who combines competence and good humour in dealing with complex and delicate phases of research projects. She has been responsible for the organisation of workshops as well as for the co-ordination of working papers and drafts of the chapters, taking over from *Evie Zaccardelli* who assisted in the setting up and launching of the project at the outset.

Miguel Poiares Maduro and *Sabrina Tesoka* worked as research assistants during different phases of the project. They were at the same time completing their own projects as doctoral students at the EUI and are now authors of innovative and well received publications.[7] It was a sign of generosity and open mindedness for them to share their ideas with the rest of the group.

Claire Kilpatrick, herself a doctoral graduate of the EUI Law Department, was a Research Fellow in the Law Department during the period of preparation of the final conference. As an active and enthusiastic member of the research group, she was crucially important for the final merging and editing of papers, thus helping towards the convergence of ideas into chapters of this book. She has been a reliable and solid pillar throughout the life of the project and has contributed with her writings to the dissemination of core working hypotheses.

Mark Jeffery, also having now successfully completed his doctoral programme at the EUI, brought his considerable organisational skills to the setting up and smooth running of the final conference. Equally importantly, his competence in labour law became an added—and very special—value when it came to establishing personal links with judges coming from different legal backgrounds, and in the preparation of the final papers for the conference.

Stefano Giubboni, an EUI researcher, has applied his patience and competence in the final editing of my Introduction, final updating of other chapters and preparation of the index.

Sabrina Regent, also an EUI researcher, prepared with great care and efficiency the Table of Cases for this book.

Rita Inston, more than a translator, is an inexhaustible source of inspiration and a rigorous reader of legal texts in all languages.

[7] M, Poiares, *We the Court. The European Court of Justice & the European Economic Constitution* (Hart, Oxford, 1998); S. Tesoka, A public policy by default? Judicial Activism in the 'Community Social Space' The Case of Sex Equality, EUI, Department of Political and Social Sciences, Ph.D Thesis, Florence, October 1998; 'Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality', Max-Planck-Institut für Gesellschaftsforschung Discussion Paper 99/2.

It is obvious—and yet necessary—to say that my very deep gratitude to all colleagues and collaborators in this project nevertheless leaves me solely responsible for omissions, mistakes, imprecise interpretations and all that makes the oneiric life of authors so troublesome.

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The Rt Hon the Lord Slynn of Hadley (House of Lords, London, UK)
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Abbreviations

AiB	Arbeitsrecht im Betrieb
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
Am.Pol.Sci.R	American Political Science Review
ArbG	Arbeitsgericht
ArbuR	Arbeit und Recht
BAG	Bundesarbeitsgericht
BB	Betriebs-Berater
BGB	Bürgerlich Gesetzbuch
CA	Court of Appeal
CCT	Compulsory Competitive Tendering
CFDT	Confédération Française Démocratique des Travailleurs
CGT	Confédération Générale du Travail
CJEL	Columbia Journal of European Law
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
CPS	Comparative Political Studies
CYEL	Cambridge Yearbook of European Law
DA	Dansk Arbejdsgiverforening
DB	Der Betrieb
EAT	Employment Appeal Tribunal
EBLR	European Business Law Review
ECB	European Central Bank
E.Comp.l.Rev.	European Competition law Review
ECSC	European Coal and Steel Community
EJLE	European Journal of Law and Economics
ELJ	European Law Journal
ELR	European Law Review
EMU	Economic and Monetary Union
EOC	Equal Opportunities Commission
EPD	Equal Pay Directive
EqPA	Equal Pay Act
EQN	Equality Quarterly News
EqSC	Equal Status Council
ET	Estatuto de los Trabajadores
ETD	Equal Treatment Directive
EUI	European University Institute
EZA	Entscheidungssammlung zum Arbeitsgericht

EZW	Europäische Zeitschrift für Wirtschaftsrecht
F'ham ILJ	Fordham International Law Journal
HK	Handels-og Kontorfunktionaerernes Forbund i Danmark
HL	House of Lords
IAB	Industrial Arbitration Board
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IJEL	Irish Journal of European Law
ILJ	Industrial Law Journal
ILO	International Labour Organisation
Iowa LR	Iowa Law Review
IO	International Organization
IRLR	Industrial Relations Law Reports
IT	Industrial Tribunal
JBL	Journal of Business Law
JCMS	Journal of Common Market Studies
JEEP	Journal of European Public Policy
JESP	Journal of European Social Policy
JLS	Journal of Law and Society
KAD	Kvindeligt Arbejdforbund i Danmark
LO	Landsorganisationen i Danmark
LAG	Landesarbeitsgericht
MJECL	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NEC	National Equality Committee
NJW	Neue Juristische Wochenschrift
NZA	Neue Zeitschrift für Arbeitsrecht
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
PA	Public Administration
PWD	Pregnant Workers' Directive
RdA	Recht der Arbeit
RJ	Repertorio de la Jurisprudencia
RSC	Robert Schumann Centre
S. Calif. LJ	Southern California Law Journal
SI	Statutory Instrument
SiD	Specialarbejderforbundet i Danmark
SDA	Sex Discrimination Act 1975
SME	Small and Medium Sized Enterprises
TAR	Tribunale Amministrativo Regionale
TC	Tribunal Constitucional
Tulane LR	Tulane Law Review

TS	Tribunal Supremo
TSJ	Tribunal Superior de Justicia
UEAPME	Union Européenne de l'artisanat et des petites et moyennes entreprises
UDHR	Universal Declaration of Human Rights
WEP	West European Politics
YEL	Yearbook of European Law
ZW	Zeitschrift für Wirtschaftsrecht

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1

Integration Through Courts: Article 177 as a Pre-federal Device

SILVANA SCIARRA*

A. Community Dialogues under Article 177 as a Lawmaking Process

When addressing an audience of national and Community judges at the end of his term of office, Judge Pescatore had a very vivid perception of all the practical and symbolic implications of preliminary ruling proceedings initiated under Article 177 of the Rome Treaty (now Article 234 EC).[1]

Judicial interpretation of Community law—he maintained—is a creative process, whether it serves the purpose of consolidating unstable legal principles, clarifying them or favouring further developments. The European Court of Justice (ECJ) has been driven by national courts in addressing central points of Community law: direct effect, supremacy, the protection of fundamental rights, common market and competition rules and the social dimension.[2] A judge is not alone in the Community system:[3] there is ever-growing responsibility towards other judges and a need to develop common interpretative criteria. Co-operation is an essential part of such a unique system of adjudication, in which each national court must preserve its own linguistic and cultural identity and yet be aware of belonging to a community of courts.[4]

* I wish to express my very warm thanks to Claire Kilpatrick and Stefano Giubboni, who provided useful comments on this chapter

[1] P. Pescatore, 'Il rinvio pregiudiziale di cui all'Art. 177 del Trattato CEE e la coopenazione tra la corte ed i giudici nazionali', *Il foro italiano* 1986, V, 26 ff.

[2] See also R. Dehousse, *La Cour de justice des Communautés européennes* (Montchrestien, Paris, 1994), 9 ff.

[3] P. Pescatore, above, n. 1, at 36.

[4] Throughout this chapter the expression 'community of courts' is used to indicate the active involvement of national courts within the European legal system, be it by direct enforcement of EC law, by non-enforcement of domestic law or, more generally, by inventive use of preliminary rulings. This notion has been explored by C. Kilpatrick, 'Community or Communities of Courts in European Integration', (1998) *ELJ* 121 ff. The emphasis in the use of the plural ('communities') reminds us of the close link courts maintain with their national systems: 'they are both 'of' and 'not of' the national and the European systems of governance' (at 145).

Whereas the practical implications of this constant exchange of messages between courts are visible in the day-to-day enforcement of Community law, symbolic implications are hidden between the lines of national references and in the ECJ's decisions. National judges remain responsible for settling the dispute which originated the reference,[5] and in the end it is they who will have to decide the case, but their reasonable doubts on the interpretation or the validity of Community law become the expression of a broader *malaise*.

Malaise is not a word chosen to point out a negative connotation. It exemplifies a state of constant search for a new, more advanced equilibrium between the centre and periphery of the European judiciary system. Such a search goes beyond the courts themselves; their activism in making the reference forces governments to 'juridify' the dispute, namely, to be present and alert in defending themselves before the ECJ.[6] Likewise, the expansion of the direct effect of Community norms, in being invoked directly before national courts, is a sign of judicial independence and yet a reminder of reduced autonomy for other branches of state machinery.[7]

ECJ rulings, when set in motion by national preliminary references, are intended first and foremost to provide an answer to the specific questions put by the referring courts. However, the Court's power to penetrate domestic legal systems has, over the years, proved to be more pervasive and at times more challenging than mere compliance with supranational law might have implied. 'Conversation' and 'dialogue', as metaphorical descriptions of an existing, rich exchange of messages between courts,[8] are effective and yet

[5] *Note for Guidance on References by National Courts for Preliminary Rulings, Proceedings of the Court of Justice and the Court of First Instance of the European Communities*, 9 December 1996 n.34/96. This note stresses once more that questions referred for a preliminary ruling 'must be limited to the interpretation or validity of a provision of Community law, since the Court of Justice does not have jurisdiction to interpret national law or assess its validity' (point 3).

[6] J. Weiler, 'Journey to an Unknown Destination: a Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', (1993) *JCMS* 422. The author rightly underlines that the 'interstatal discourse' engendered by the juridification of a dispute is different from diplomacy (footnote 6); see also J. Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) *YEL* 267, particularly 298 ff.

[7] D. Chalmers, 'Judicial Preferences and the Community Legal Order', (1997) *MLR* 164 ff., at 183 in particular.

[8] A-M. Slaughter, A. Stone Sweet and J. Weiler (eds) *The European Courts and National Courts* (Hart Publishing, Oxford, 1998), in the 'Prologue' to the book, indicate as a premise to their research the fact that constitutionalization, within the Community legal order, is above all a conversation between national and transnational actors. Contributors to the present book have also frequently adopted dialogue as a guiding concept. An early clarification of the methodological—and metaphorical—options made by this research group is to be found in C. Kilpatrick, above n. 4 at 121 ff. For the German debate see S. Simitis, 'Dismantling or Strengthening Labour Law: The Case of the European Court of Justice', (1996) *ELJ* 156; G. and A. Lyon-Caen, *Droit social international et européen* (Dalloz, Paris, 1993) 173, talk of an 'original form of collaboration'. Co-operation is the leading concept developed by P. Davies, 'The European Court of Justice, National Courts,

insufficient devices to enter a wide and complex phase of institutional changes, which are not driven solely by courts' activism.

We argue in the present book that within the domain of labour law, an area seemingly marginal and yet crucial in terms of its implications for other branches of European law and hence closely linked with broad economic policies, the conversational metaphor goes beyond a linguistic exercise. It becomes a highly intriguing expression of lawmaking within a supranational legal order. Nothing is private about this dialogue: those who talk keep very few secrets and are very often eager to share the floor with other interlocutors and interact with them. This dynamic exchange of viewpoints can re-invigorate the links between the centre and periphery of the European legal system. It can also energize the inter-institutional dialogue and induce innovative results, forcing all actors to take responsibility for future steps to be taken following the effects of litigation or even during its course.

Cases decided by the ECJ may have an *erga omnes* effect when they deal with the invalidity of Community acts;[9] they may also be offered as precedents to a potentially unlimited number of interpreters of national and Community law. The binding effect of the decision on the referring judge is an essential ingredient of the co-operation between courts. The founding fathers must have envisaged this as an original institutional device for a Community which was essentially kept together by a common market.

Although no overall theory of binding precedents is established, it would be a challenging exercise to measure the impact of the Court's decisions on national judges different from the referring one. When enforcing the Court's rulings as any other European legal source, national judges scattered in all Member States, are capable of revealing that they are constantly listening to the dialogue and may even tune into it and speak their own words.

We shall come back to this point later, and discuss the formidable effect that a court can provoke within its own legal system, when loyalty to the ECJ's rulings is expressed as non-application of national law. Meanwhile, we are at ease with the image of messages referred back and forth from the centre to the peripheries of a supranational legal system.

and the Member States', in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law. Principles and Perspectives. Liber Amicorum Lord Wedderburn* (Clarendon Press, Oxford, 1996), 98 ff. Discourse, rather than dialogue, is suggested by T. de la Mare, 'Article 177 in Social and Political Context', in P. Craig and G. de Búrca (eds.)*The Evolution of EU Law* (OUP, Oxford, 1999), 240–41, with references to discourse theories, particularly to R. Alexy, *A Theory of Legal Argumentation* (Clarendon Press, Oxford, 1989). See below D.

[9] A. Adinolfi, *L'accertamento in via pregiudiziale della validità di atti comunitari*, (Giuffrè, Milan, 1997) 287 ff, discussing whether, despite the generalized effect of a decision on the invalidity of acts, preliminary references can still be proposed, since a decision by the Court can be subject to revisions. This is so in the light of the principle that Community law is interpreted in its evolution. See G. Gaja, 'Beyond the Reasons Stated in Judgements', (1993–94) 92 *Michigan Law Rev* 1966 ff.

The adoption of all national idioms within the European Court[10] and the fact that courts do speak their own language when they refer cases gives an idea of the fair cultural balance which stays at the origin of judicial conversation.[11]

Cultural theory has been evoked to explain what lies behind such relations between courts. Whereas the ECJ reflects a 'strong group identity' and as a consequence of this may reveal an 'institutional cultural bias', the preferences evinced by national courts mirror the national legal orders to which they belong and towards which they show respect.[12]

The process of 'judicial self-identification',[13] consisting in acceptance of Community law, is particularly varied when lower courts come onto the scene. No hierarchy is built. While the ECJ is dependent on national courts and on their application of Community law, it does not fear the challenge coming from national governments, since the latter are ultimately subject to the rule of law.

In all circumstances, be they the recipients of Community law or those who seek clarifications on its enforcement, national courts place themselves at the centre of an inborn and yet unpredictable institutional equilibrium. They are the vehicle for insinuating supranational norms into domestic systems and at the same time those who may vigorously, albeit indirectly, suggest the adaptation of national laws.

When, following a reference under Article 177, national legislatures are hit by a decision of the ECJ, a potentially disruptive effect may derive from initiatives by individual judges to follow the Court rather than wait for parliaments to adopt a coherent and overall approach on the matter. In this search for an institutional balance the metaphor of dialogue between courts may seem insufficient. What is in play is a powerful confrontation between national and supranational lawmakers, all striving to establish primacy over one another and measuring the strength and breadth of their sovereignty.

And yet, while the conversation goes on and develops into direct effect and supremacy of Community law, the words of the ECJ are spoken loudly and listened to very carefully, even by those who are not direct interlocutors.[14] 'Without direct effect, we would have a very different Community today, a more obscure, more remote Community, barely distinguishable from so many other international organisations whose existence passes unnoticed by ordinary citizens'.[15] The enforceability of the basic rights created by the

[10] F. Mancini and D. Keeling, 'Language, Culture and Politics in the Life of the European Court of Justice', (1995) *CJEL* 397 ff.

[11] T. Koopmans, 'The Birth of European Law at the Cross Roads of Legal Traditions', (1991) 39 *AJCL* 493 ff.

[12] D. Chalmers, 'Judicial Preferences and the Community Legal Order', above n. 7, respectively at 168 and 175.

[13] *Ibid.*, at 176.

[14] The classic reference is to E. Stein, 'Lawyers, judges and the making of a transnational constitution', (1981) *AJIL* 1 ff.

[15] F. Mancini and D. Keeling, 'Democracy and the European Court of Justice', (1994) *MLR* 183.

Treaty would have been dependent on other Community institutions—the Commission and the Council—caught, more than the Court, in a spiral of compromises and difficult balances.

The Commission, while pursuing Community goals, has limited powers with respect to the enforcement of Community law; the Council, a true expression of national governments, does not pursue an ambition to act as a quasi-federal institution. National courts are therefore left with the task of using Community law as if they were federal judges, dealing with supranational legislation.[16]

When moving from the ECSC to the EEC—it has been argued—'those who put Article 177 in the Treaties must have anticipated that it would be used, and indeed must have to some degree anticipated supremacy and direct effect without which it would rarely have been possible or worthwhile to use'.[17] They did not anticipate that the system as a whole, through a most original pattern of courts' activism, would develop—as suggested here—pre-federal attitudes, notwithstanding delays and uncertainties in pursuing political integration.

An analysis of the Court's early rulings on cases related to the ECSC portrays the image of a creative lawmaker, part of a supranational system which bears within itself conflicting values.[18] Functionalism is the most frequently recurring key to an explanation of spillover effects of judicial decisions into the political system. While this analysis helps us to understand the ambiguities of the early steps by the Court, it also highlights the implications of judicial review exercised in a legal system such as the European one, subject to political changes and, later on in its history, oriented far beyond economic goals.

The very pragmatic issues set at the origin of the ECSC, whereby integration was seen as a basis for enhancing efficiency in two sectors of the economy,[19] put the Court in the position of exercising the power of judicial review 'over a fluid and highly volatile process of political change'.[20] Although changes were predictable, the Court had to refrain from reallocating values and restrict its role to enforcing existing rights. It had, therefore, to face dilemmas whenever the establishment of a normative basis could become functional to political changes.

[16] M. D'Antona, 'Sistema giuridico comunitario', in A. Baylos, B. Caruso, M. D'Antona and S. Sciarra, *Dizionario di diritto del lavoro comunitario* (Monduzzi, Bologna, 1996), 28–29, arguing for the 'federal' attitude on the part of national courts, through means such as non-enforcement of national law incompatible with Community law and the granting of exceptional remedies, even against States in breach of Community law.

[17] M. Shapiro, 'The European Court of Justice', in P. Craig and G. De Búrca (eds.), above n. 8 at 330.

[18] S. Scheingold, *The Rule of Law in European Integration* (Yale Univ. Press, New Haven & London, 1965), 3 ff.

[19] A. and G. Lyon-Caen, above n. 8 at 160, underline the unusual combination of light social policies and measures aimed at the creation of an internal market for coal and steel, resulting in a 'less dogmatic liberalism' than that underlying the EEC.

[20] S. Scheingold, above n. 8 at 8.

One could argue that the ECSC paved the way for an independent role of the Court, although the political pressure put on the judicial system at a later stage, in the formation of the EEC, proved very different and in some ways more intense. This had to do with a different allocation of powers within the Community, subsequently within the Union, and with the growing complexity of the decision-making machinery. It also had to do with an acquired and ever-growing pride on the part of the Court, aware of its unique role when it came to establishing a political balance between governments and other European institutions.[21]

Comparative research on the Court's early rulings on Article 177 references revealed that the reluctance to stimulate a creative role performed by the Court was more accentuated in some Member States than in others.[22] Although it is difficult to ascertain, this fear might have been a symbol of political opposition to federalisation. Rather than there being any inadequacy of the legal mechanism provided for in the Treaty, one could speculate that the potentialities of the Court as a quasi-federal institution were clear and visible to those Member States which had no intention of trading national interests against excessively strong centralised powers.

Those who put a strong emphasis on the constitutionalisation undergone by the European Court could not have anticipated the degree to which national courts—particularly those with an obligation to refer in accordance with the third paragraph of Article 177—would have been prepared to delegate their powers. Nor would it have been easy to foresee whether paying homage to a supranational court and enforcing its rulings could have become a way of insinuating them more deeply into national legal orders, with a potentially disruptive effect on the coherence of national systems. Invalidation of domestic law as a consequence of compliance with European law, a departure from uniform interpretation of the law itself,[23] puts the Court in a position to urge governments to take appropriate action, thus adding political substance to judicial relations.

When viewed from a distance, after years of recourse to it, the mechanism of preliminary references may have proved too 'sophisticated',[24] so that in

[21] See H. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, Dordrecht, Boston, Lancaster, 1986); see also the review essay by J.H.H. Weiler, 'The Court of Justice on Trial', (1987) *CMLR* 555 ff.

[22] R. Buxbaum, 'Article 177 of the Rome Treaty as a Federalizing Device', (1969) *Stanford L R* 1041 ff.; J. Mashaw, 'Federal Issues in and about the Jurisdiction of the Court of Justice of the European Communities', (1965) *Tulane LR* 21 ff.; R. Kovar, 'La Cour de Justice des Communautés européennes et l'intégration des systèmes juridiques: analyse fonctionnelle de la procédure du renvoi préjudiciel en interprétation', in E. McWhinney and P. Pescatore with R. Baeyens (eds) *Federalism and Supreme Courts and Integration of Legal Systems*, (Heule, Brussels and Namur, 1973) 217 ff.

[23] This discussion was started in early and long-sighted work on the case-law of the Court. See P. Hay, 'Supremacy of Community Law in National Courts', (1968) *AJCL* 524 ff. and in particular 538–540.

[24] F. Mancini and D. Keeling, 'From *CILFIT* to *ERT*: the Constitutional Challenge Facing the European Court', (1991) *YEL* 1 and 9.

practice, understanding the division of tasks between courts may turn out to be too intricate. In *CILFIT*,[25] the Italian *Corte di Cassazione* was seeking clarification on whether there was an obligation to refer a question of interpretation when the meaning of Community law was clear. The Court gave such a narrow definition of obviousness to make it almost impossible for courts not to refer. This proves the willingness of the ECJ to 'reformulate the question'[26] put to it, thus touching the borders of judicial review and acting similarly to a constitutional court. In comparison with other institutions, the Court assumes a very specific role, dealing with abstract reasoning and yet entering national conflicts by a side door. This peculiar situation also permits Member States 'to engage in tacit bargaining with the Court',[27] threatening to disobey or to reduce the Court's jurisdiction.

To confirm this theory one need only look at the subtle criticism that, over the years, has been formulated by the *Bundesverfassungsgericht* towards the ECJ.[28] Threats are motivated by the fear that national fundamental rights may be imperilled: the invitation to the Court not to interfere reflects expectations that other Community institutions would act consequently and match German domestic standards.

Even outside Germany one can sense an almost unconscious fear expressed by defenders of the internal harmony of national legal systems. The paradox is presented of a national law implementing EC law which could prove to be unconstitutional.[29]

[25] Case 283/81 *CILFIT* v. *Italian Ministry of Health* [1982] ECR 3415. The *Corte di Cassazione* has developed a case-law whereby the obligation to refer must not reduce its power to evaluate the interpretative question. Cases are reported by G. Mammone, Unpublished paper delivered at the December 1998 Workshop held at the EUI (see 'Preface').

The *Corte di Cassazione* consistently exercises the discretion allowed to lower courts under Art. 177(2), thus challenging the ECJ on the ground that national prerogatives prevail in the interpretation of national law.

[26] F. Mancini and D. Keeling, above n. 24 at 4. The authors refer to H. Rasmussen's commentary on the case, arguing that the Court was in that way trying to attract references, rather than make them a more remote possibility ('The European Court's Acte Clair Strategy in *CILFIT*'; (1984) *ELR* 242).

[27] M. Shapiro, above n. 17 at 332.

[28] J. Kokott, *Report on Germany*, in A-M. Slaughter et al., above n. 8 at 77 ff. A summary of the leading cases (*Solange I and II* and the Maastricht decision) is also offered by W. Däubler, 'Il *Bundesverfassungsgericht* e la Corte di Giustizia', (1998) *Lavoro e diritto* 469 ff.

[29] M.V. Ballestrero, 'Corte costituzionale e Corte di giustizia. Supponiamo che…', (1998) *Lavoro e diritto* 485 ff. The example chosen deals with the case-law of the ECJ contrary to the ban on night work for women, maintained in French and Italian legislation for a long time after the ECJ decisions in *Stoeckel* and *Levy* inspired by a thorough principle of equality. See also M. Barbera, 'Tutto a posto, niente in ordine. Il caso del lavoro notturno delle donne', (1999) I *Rivista italiana di diritto del lavoro* 301 ff. See, in the present book, C. Kilpatrick, Chap. 2, and A. Jeammaud, Chap. 4. Legal theory's contribution on the interpretation of such possible 'collisions' indicates the 'superfluity of legal answers' in a very atypical legal order such as the European one. See N. MacCormick, 'Risking Constitutional Collision in Europe', (1998) *OJLS* 530.

The urge for closer co-ordination between national courts, as these examples show, may understandably become an issue to be included in possible reforms of the referral criteria, with a view to strengthening the issue of co-ordination in the EU and achieving uniformity in the enforcement of European law.[30]

Silences, as much as glances and smiles, are important in conversations; words should not be wasted before strategies are well designed. This is why 'tacit bargaining' between courts lucidly describes the current state of affairs in the European Union: individual Member State interests are hanging over integration, and explanations in terms of spillover effects are no longer satisfactory.

In describing Article 177 as a pre-federal device the intention is to prove that integration through courts cannot come about in a vacuum of political choices, made by national governments as well as by European institutions.

The materialisation on the European scene of a truly quasi-federal actor, such as the European Central Bank, is an opportunity to investigate even further how judicial relations will counterbalance this new centralised power. It could be argued that social rights, the central theme of the present analysis, may be threatened by monetary policies and that only a pre-federal judicial attitude on the part of the European Court could improve the chances of their enforcement. Even such an attitude would not suffice to compensate for the existing imbalance between market rules and fundamental social rights.

Whereas national central banks have been drawn into a network of rules so closely woven as to make their powers merge into the ECB,[31] national judges remain free to connect or disconnect with the ECJ, while exercising pressure on other national and supranational institutions.

The assumption behind this research is that integration through courts is taking place in a pre-federal environment and notwithstanding the absence of

[30] S. Simitis, above n. 8 at 174. 'Greater uniformity in patterns of referral, but not greater numbers of referrals' is the indication in T. de la Mare, above n. 8 at 248. Various proposals were put forward by J. P. Jacqué and J. Weiler, 'On the road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference', (1990) *CMLR* 185. See also, 10 years later, J. Weiler, 'L'Unione e gli Stati membri: competenze e sovranità', (2000) I *Quaderni Costituzionali* 5 ff., where the proposal to create a Court similar to the French Conseil Constitutionnel is presented again, with the specification that even national parliaments should have power to refer.

A reflection group set up by the Commission presented a Report in January 2000. References in 'Editorial', (2000) *ELR* 217. The ECJ and the CFI also contributed to the discussion in *The Future of the Judicial System of the European Union*, http://curia.eu.int/en/txts/intergov/ave.pdf. One of the suggestions is to create decentralised judicial bodies, responsible for dealing with preliminary rulings within their territorial jurisdiction. They could have either a Community or a national status.

[31] F. Snyder, 'EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?', in P. Craig and G. De Búrca (eds.), above n. 8 at 417 ff.; A. Predieri, *Euro Poliarchie Democratiche e Mercati Monetari* (Giappichelli, Turin 1998) 300 ff.

a federal State.[32] Such a peculiar situation requires further explanations as to the interventions of nation states, visible on the scene as political actors, not ready to surrender to a federal system and yet fully aware of the implications of closer economic and political links.

In the context of the present project we highlight the role of Member States meant to investigate their role as legislators, asked to intervene because of the activism of national judges and anxious—at times even prompter than parliaments—to fulfil domestic and supranational obligations. This approach, focused on the role of States as lawmakers, cannot be artificially separated from a wider perspective aimed at capturing the intentions of States as negotiators within European institutions.

Further on these two perspectives will be presented and applied to labour law, the legal field within which this research has been carried out. This choice reflects the prevailing academic specialisation of participants in this project. A shared familiarity with a discipline deeply rooted in national legal traditions and, at the same time, very much exposed to changes, seemed sufficient justification for selecting a well-defined research area. The complex nature of both the individual and collective rights scrutinised, the powerful presence on the scene of organisations representing management and labour, and the centrality of labour law in current national and supranational legislative strategies, all seemed convincing reasons for choosing to stay within a limited area.

Apart from offering the opportunity to test broad and general theories against the more circumscribed labour law environment, the intention is also to prove that national courts active in this field are promoting original experiments. Without following coherent and uniform patterns, driven, as they often are, by intuitions and curiosities, they remain national and yet form a community of courts, contributing to raising the awareness of other institutions.

B. Judges as Legislators: Testing Labour Law Cases

The expansion of judge-made law has been visible both in common and civil law systems. It has been studied in comparative law as a phenomenon, not purely as a concept, thus enriching comparative legal methodology with an experimental approach.[33] The most remarkable finding of scholarly work in the field is that the judiciary spreads out in parallel with other branches of the state: it combines interpretation with lawmaking and is in itself a creative process, although judges cannot completely replace legislators.

[32] A. Lo Faro, 'Integrazione europea', in A. Baylos, B. Caruso, M. D'Antona and S. Sciarra, above n. 60 at 60, talks of the European legal system pursuing integration while cultivating 'federal inclinations'.

[33] M. Shapiro, *Courts: a Comparative and Political Analysis* (Univ. of Chicago Press, Chicago & London, 1981); M. Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford, 1989).

The overload imposed on national parliaments, particularly heavy from the 1980s onwards, was often at the origin of delays and imperfect functioning of the legislative institutions. In some countries it prompted widespread criticism, even to the point of calling the centrality of parliaments into question.

In the framework of the present research the argument that a dynamic and creative judiciary adds to the improvement of a system of checks and balances and exerts control over governmental and quasi-governmental groups[34] constitutes a solid and not obsolete assumption. This analysis describes judges as a strong pillar of democratic systems: they act by virtue of their own legitimacy, different from that of parliaments; they could not create Welfare States, but they can guarantee the enforcement of social and political rights stemming from them. Even in the realm of social aspirations—as it appears more appropriate to describe collective rights related to employment, information and consultation—judges can keep the scales even, arguing for procedural fairness when precise individual entitlements are not easily detectable.

Legitimacy seems, in this regard, a more appropriate notion than governance and certainly a more central one in the current debate within the EU. In constitutional adjudication as well, litigating and legislating remain two separate processes,[35] not—as has been suggested—'mutually constitutive', and certainly not leading to the conclusion that the 'traditional' separation of powers scheme is no longer of use in contemporary democracies.[36] Interaction, and sometimes disagreement between institutions does not imply overcoming their different democratic origin. We maintain this in looking at very powerful supranational actors such as the European institutions and we offer examples of such an ongoing process, claiming that the process itself, imperfect as it may appear, enshrines an important theory of rights.

The entry of judges into a public space at a time of reduced parliamentary centrality makes them particularly powerful. This is also due to the differing nature of the laws they are asked to interpret. Norms may at times be produced by organs of state administration which, rather than being charged with lawmaking functions, are intended simply to guarantee their enforcement. Norms are less general and abstract, more complex and widespread: they reflect the dispersion of interests and the impossibility of representing the latter through traditional democratic institutions. That is why—it has been argued—courts may come to express the voice of the opposition, which is less capable of fighting its battle in parliaments. They become crucial actors when 'politics as planning' comes to an end, superseded by 'politics as moral

[34] M. Cappelletti, *Giudici Legislatori?* (Giuffre, Milan, 1984) 95–6, drawing also on Shapiro and his theory of powerful groups.

[35] See, *e.g.*, with reference to the Italian tradition, E. Cheli, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri* (Il Mulino, Bologna, 1996).

[36] A. Stone Sweet, *Governing with Judges* (OUP, Oxford, 2000) at 150. Although the book takes the ECJ into account briefly, 'empirical findings' are drawn more particularly from a comparative study of German, French and Italian constitutional courts.

consciousness'. Moral issues as political issues, amplified by the media, are meticulously disseminated through courts' activism.[37]

Courts are also called on so intensively and unceasingly to intervene because of the changing nature of the rights to be enforced, particularly fundamental rights.[38] On the one hand, as we have said, complexity is a reason for an increased centrality of courts. Statutes and case-law become increasingly more scattered and oriented in numerous directions, and at times also inaccessible sources for reasons internal and external to national legal systems. On the other hand, courts may contribute to increasing complexity by intervening in areas where new balances have to be struck and resources need to be redistributed.

Several reasons add to such an expanded complexity of legislation. Domestic reasons are often linked to the emergence of new collective and individual interests and to the subsequent demand for new state functions. Supranational legal sources become intertwined with internal lawmaking mechanisms, thus enlarging the need to absorb new regulatory techniques or to adapt existing ones.[39] The decline of Welfare States is a challenging example of how lost centrality of national parliaments in supporting new social demands cannot be separated from the urgent need adequately to differentiate state functions.

The paradox of modern legal systems consists in a reduced capacity to respond to social demands just at a time when increasingly more diffused and expanded collective interests put pressure on states, expecting more and more qualified answers in terms both of the quality and of the quantity of actions to be taken.

Current discussion on employment policies in the EU, for instance, portrays the tension between supportive measures and more proactive interventions. Whereas the former were thought of in a more traditional sense as compensations for the loss of jobs or the reduction of job opportunities, the latter must be perceived as a combination of economic and social measures, oriented towards the market and able to enhance growth and competitiveness.[40] In the first example judges had the function of guaranteeing the fair treatment of individuals entitled to receive state support. In the second example individual rights cannot be easily isolated and no judicial intervention can be so powerful as to promote the redistribution or even the creation of jobs. In a non-binding

[37] A. Pizzorno, *Il potere dei giudici*, (Laterza, Rome-Bari, 1998); see also the comparative overview offered by C. Guarnieri and P. Pederzoli, *La democrazia giudiziaria* (Il Mulino, Bologna, 1998).

[38] M. Cammelli, 'Crisi dei meccanismi regolativi e supplenza giudiziale', in *Storia d'Italia. Annali* 14, *Legge Diritto Giustizia* L. Violante (ed.) in collaboration with L. Minervini, (Einaudi, Turin, 1998), 555 ff., and 566–567; G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Einaudi, Turin, 1992) 179 ff.

[39] G. Majone et al., *Regulating Europe* (Routledge, London & New York, 1996).

[40] S. Sciarra, 'Integration through co-ordination: the Employment Title in the Amsterdam Treaty', (2000) *CJEL* 207 ff.

framework mainly constituted by procedures and soft law, fairness is nevertheless a value to be protected and transparency a methodology to favour, even when the role of the judiciary is not clearly defined.

Under such circumstances, judges are not in a position to 'replace'[41] other state functions. We claim that this is unthinkable even in the European Union, although—as this book tries to indicate—the surfacing of dynamic exchanges between national courts and the ECJ may be seen as a sign of gained centrality on the side of judges.

One insistent indication emerging from the results of this research project is the need to view nation states as interlocutors in the process of legal integration. States should fulfil their role as regulators and co-ordinators of policy issues raised by interest groups and other private actors; parliaments should never cease to be at the centre of lawmaking and bear the weight of democratic accountability.

Attempts by judges to replace legislators, thereby exhibiting excessive activism and interfering with the principle of the division of powers, would not prove very efficient in the field of social rights. The enforcement of social rights requires active state intervention not just because its precondition is access to economic resources. The redistribution of such resources also reflects state priorities, which are the outcome of political choices often having to be made in the face of incumbent supranational targets.

One can argue that the reason why the ECJ has been acting as a legislator, rather than a court, is the weakness or slowness of other Community institutions. In the field of social law, the constraints inherent in the litigation process have been demonstrated in order to prove that there is no overall coherent theory or practice of lawmaking and that 'policy formation takes place incrementally, on a case by case basis'.[42]

A separate argument is that the Court behaves as a federal court because of the very special interaction with national courts created under Article 177, or as its consequence. When they wrote this article in the Rome Treaty, Member States established 'an institutional arrangement that initiated path-dependent results that they did not and could not have fully anticipated'.[43] What they did

[41] *Supplenza* of the judiciary, namely its ambition to replace legislators and to gain centrality within the political system as a whole, is a notion developed in the Italian debate, with particular emphasis on certain substantive areas of law. 'Centrality' of the judiciary is to be considered a better description of the wider role played by judges. See M. Cammelli, above n. 38 at 559 ff. For the American debate see L. M. Friedman, *Total Justice* (Russell Sage Foundation, New York, 1994); M. Shapiro, 'Access to the Legal System and the Modern Welfare State: American Continuities', in M. Cappelletti, J. Weisner and M. Seccombe (eds.) *Access to Justice* (Sijthoff, Alphen aan den Rijn, 1981) 273 ff., particularly 290 ff.

[42] S. Fredman, 'Social Law in the European Union: the Impact of the Lawmaking Process', in P. Craig and C. Harlow (eds.) *Lawmaking in the European Union* (Kluwer Law International, London, 1998) at 403.

[43] M. Shapiro, above n. 17 at 331.

anticipate was the creation of a weak Parliament and the introduction of very feeble links with national constituencies.

In nation states the centrality of parliaments was put into question by national political events, albeit to differing degrees and producing different outcomes. The European Parliament, from the very outset, had to fight its own battle to become a visible and reactive institution, and progressively succeeded in doing so with the innovations brought forward by the Amsterdam Treaty (Article 251 EC).

Under all circumstances, either because of the frail legitimacy of other European institutions or because of domestic political imbalance, courts had more opportunities to enter the field as protagonists did, rather then as mere extras would have done. We argue that this happened in labour law—the specialised area of substantive law on which we have centred the present research—because the legal basis in the Treaty was so narrowly defined and gave way to a variety of interpretations, both defensive and aggressive.[44] We also maintain that labour law principles play a unique role in balancing competition rules and enhancing efficiency within the market. Their origin in national legal systems is linked, not surprisingly, to delicate political innovations occurred in the twentieth century and to the rediscovery of essential freedoms, after the establishment of democratic political regimes in European countries.

C. Integration, Interdependence and Multi-level Policy-making

When dealing with European integration historians have advocated recourse to empirical research, as an innovative way of opposing cold-war theories and revised versions of them offered by neo-functionalism.[45] Drawing on the findings of such research legal analysis discovers the more solid foundation provided by integration theories—rather than interdependence—for a central system of law. Integration through courts, one of the hypotheses discussed in this book, is empirical evidence of how States have maintained their own point of view in observing all attempts at co-operation made by national judges. They have, whenever possible, intervened and reaffirmed the

[44] Lord Wedderburn, 'European Community Law and Workers' Rights after 1992: Fact or Fake?', in *Labour Law and Freedom. Further Essays in Labour Law* (Lawrence & Wishart, London, 1995); P. Davies, 'The Emergence of European Labour Law', in W. McCarthy (ed.), *Legal Intervention in Industrial relations* (Blackwell, Oxford, 1992) 313 ff; P. Davies, above n. 8 at 95ff and, in this last book, the introductory chapter by S. Simitis and A. Lyon-Caen, 'Community Labour Law: a Critical Introduction to its History'.

[45] A.S. Milward, F.M.B.Lynch, F. Romero, R. Ranieri and V. Sørensen, *The Frontier of National Sovereignty. History and Theory 1945–1992* (Routledge, London & New York, 1993).

sovereignty of national parliaments against the potentially disintegrative effects of the ECJ' s rulings.[46]

In doing so they have been following an original—at times delayed—instinct of States as regulators and measuring the distances between the effects of multi-level governance and quasi-federalism. Historical research teaches a very pragmatic lesson to students of inter-court co-operation: antagonism between European integration and the nation state is a false presumption. Pursuing policy objectives and being reactive to domestic pressures is not incompatible with integration; nor is the choice made by nation states, at different times in history and under different economic constraints, to resort to whatever means appears more suitable and effective, be it interdependence or integration.[47]

The 'antithesis' between the European Community and the nation state is convincingly refuted in historical analysis by the demonstration of how the 'rescue' of the nation state in post-war Europe has run parallel to the process of European integration.[48] Examples offered in such research are intended to reappraise some common oversimplifications. These findings become a valuable background to legal research and help to avoid a standardised version of the role assigned to legal integration. Oversimplifications range from the notion of the 'perfect market', likely to 'erode the state and its frontiers' because of the dominant and widespread search for higher profits, to increasing interdependence leading to integration, because of the assumed convergence of prices and wages.[49]

Particularly in the case of labour law, the idea of the perfect common market, enhancing efficiency and welfare better than any national system could have done, does not explain differences in national choices and varying degrees of evolution in legal 'models' from the post-war period onwards. The notion of harmonization of social systems, as enshrined in Article 117 of the Rome Treaty, did not produce any visible result for a long time.

The paradox hidden in such a vague idea of convergence in social standards lies in the significant diversification of European labour law regimes.[50] This

[46] I have argued this in S. Sciarra, 'Dynamic Integration of National and Community Sources: the Case of Night-Work for Women' in T. K. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (J. Wiley & Sons, Chichester, New York, Brisbane, Toronto, Singapore, 1996), 99, and with regard to the *Job Centre* litigation, below Chap. 4, Part II.

[47] A. Milward et al., above n. 45 at 20–21.

[48] A. Milward, *The European Rescue of the Nation State*, (London, Routledge, 1992), particularly Chap. 1; A. Milward, 'L'Europa in formazione', in *Storia d'Europa*, vol. I, *L'Europa oggi* (Turin, Einaudi, 1993) 161 ff.

[49] A. Milward, above n. 48 at 8 ff.

[50] G. Giugni, 'Diritto del lavoro', in *Enciclopedia del Novecento*, Vol. III, (Istituto dell'Enciclopedia Italiana, Rome 1979) 945 ff. See also G. Giugni, *Lavoro Legge Contratti* (Il Mulino, Bologna, 1989) 245 ff. with references to the evolution of labour law in most European legal systems.

very specific observation, confined to a single, albeit very significant, legal discipline, runs parallel with the historical argument that post-war European States developed similarities in constructing parliamentary democracies which then favoured economic growth. The 'much wider political consensus' developed between 1945 and 1973 and the 'diffuse alliance of lower and middle income beneficiaries of the Welfare States',[51] constituted the institutional background which then favoured labour law developments. A common political ground was created on which national particuliarities could grow and different 'styles' of legislation could be shaped.

Paths followed by national legislatures were different for different historical reasons. One reason reflects the place assigned to Constitutions and to constitutional adjudication in affirming fundamental social rights, which varied in accordance with differing balances in the hierarchy of legal sources.[52] Furthermore, the role of civil and criminal codes in assisting the regulation of employment contracts reflected the readiness of legislatures to adapt individualistic legal regimes to emerging social pressure and to the consolidation of collective interests.[53]

Comparative research revealed that an important 'circulation' of models between European legal systems was occurring[54] and was favouring advantageous mutual exchanges and an original 'contamination' of national legal traditions. A mixture of regulatory techniques in determining wages and working conditions and the relevance of non-legal sources such as voluntary collective bargaining, and custom and practice at the place of work, were all factors contributing to the diversification of labour law.

Later on, in the late 1970s and early 1980s, collective bargaining was drawn into an area of wider exchanges with governments, which marked yet another phase of labour law developments in most European countries.[55] The negotiation of social pacts, a practice currently widespread in most European countries, and the search for social consensus in implementing legislation as well as in establishing new policies, create an element of continuity in labour

[51] A. Milward, above n. 48 at 27; see also P. Baldwin, *The Politics of Social Solidarity. Class Bases of the European Welfare States 1875–1975* (Cambridge Univ. Press, Cambridge, 1992).

[52] F. Rubio Lorente, *Constitutional Jurisdiction as Law-Making*, in A. Pizzorusso (ed.) *Law in the Making* (Springer-Verlag, Berlin, 1988) 156 ff; A. Baldassarre, 'Diritto sociali', in *Diritto della persona e valori costituzionali* (Giappichelli Editore, Turin, 1997) 123 ff.

[53] S. Sciarra, 'Sindacati (dir. comp. e stran.)', in *Enciclopedia Giuridica Treccani*, XXVIII, (Istituto della Enciclopedia Italiana, Rome, 1991); S. Simitis, 'The Case of the Employment Relationship, Elements of a Comparison', in W. Steinmetz (ed.) *Private Law and Social Inequality in the Industrial Age* (OUP, Oxford-New York, 2000) 181 ff.

[54] T.Treu, 'Comparazione e circolazione dei modelli nel diritto del lavoro', (1979) *Diritto del lavoro e delle relazioni industriali* 167 ff.

[55] Lord Wedderburn and S. Sciarra, 'Collective Bargaining as Agreement and as Law: Neo-Contractualist and Neo-Corporative Tendencies of Our Age', in A. Pizzorusso (ed.) above n. 52 186 ff.

law developments. The impact of such practices on the process of integration is notable. On the one hand, consensus-building is an exercise in which the social partners gain a new centrality and make their voice heard beyond national boundaries, thus helping to give new substance to the European social dialogue. On the other hand, a consensual style is introduced into national industrial relations by policy-makers at supranational level, whereby initiatives in social policies increasingly often include decentralised phases of implementation. Employment policies and the enforcement of Title VIII of the Amsterdam Treaty are the most recent—and perhaps the most visible—examples of how to generate national practices which are directly functional to supranational co-ordination.

Theories on integration, both in the political sciences and in legal research, pay little heed to the role played by national labour movements in shaping post-war national labour law and influencing political systems irrespective of the functioning of the common market. To take just one example, still reflected in current discussion on different forms of workers' participation, the German model of co-determination at supervisory board level proved unacceptable for more conflict-oriented industrial relations systems. For decades, one of the most frustrating exercises in the field of European social policies was to shed a very dark light on legislation for the European Company Statute and to induce numerous compromises in the formulation of workers' representation. Co-ordination instead of harmonisation is the final outcome of such controversial attempts to regulate.[56]

Judges are not required to be proactive on such issues and to look to the ECJ as an authoritative interlocutor, although they may be asked to safeguard an internal equilibrium in the light of European law. In years to come it will be interesting to observe whether diffuse practices in consensus-building through concertation, social pacts and social partner involvement in macro-economic policies will marginalize industrial conflict even further. The pressure of supranational targets might indirectly induce drastic changes in the equilibrium of national labour law regimes, leaving the meaning of social emancipation undefined and making the recourse to collective action more

[56] W. Streeck, 'Rethinking the European Social Model', (1999) 6 ff.; 'Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva', *Mitbestimmung* (2000) *Stato e Mercato*, 3 ff. References to the European Works Council Directive confirm that 'horizontal europeanization' is taking place instead of harmonisation,('Rethinking', 11). Interesting developments are described in 'The German Model of Codetermination and Cooperative Governance. An evaluation of Current Practice and Future Prospects', *Report from the Commission on Codetermination* (Bertelsmann Foundation Publishers, Gütersloh 1998). See also M. Weiss, 'Workers' Participation in the European Union', in P. Davies et al., 213 ff. Recent discussion on this controversial issue was also provoked by the 'Davignon Report', a document produced by a Committee of Experts set up by the Commission with the intention of re-opening the file on workers' participation in European companies. See Group of Experts, *European Systems of Worker Involvement* (European Commission, Directorate General for Employment, Industrial Relations and Social Affairs 1997).

and more remote. Faith in strategic litigation, at least in some areas of social law, might boost a new collective awareness, moving conflict to the courtroom.[57] Even though rationalising recourse to collective action may be valued as one of the most important outcomes of a properly functioning market and solid economic systems effectively co-ordinated around it, it should be pointed out that social values giving rise to conflict follow a historical path of their own. Their independence from market values and yet their ability to adjust to different and more advanced market needs is indicative of their deeply rooted position in national legal systems. It is not surprising that strategic litigation driven by other institutional actors—such as the EOC in the UK—addresses only single issues, such as gender equality. Acknowledgement of their centrality in the overall scenario has to be counterbalanced by awareness of other emerging issues, linked with even wider collective interests.

The strong emphasis currently placed on soft law is also part of an overall strategy of co-ordination within a broad social policy area, which might ultimately reduce the impact of judge-made law. The coincidence of these two independent factors—non-justiciable aspirations based on non-binding sources and the non-availability of a collective resource such as industrial action—makes it even more desirable to be able to rely on a well-defined democratic system of checks and balances.

Theories on integration, when focusing on labour law issues, have the option of widening the angle of observation. Social partners, torn between the defence of national traditions and the fulfilment of supranational goals, are implementing new regulatory techniques and acting as original engines of integration. Judges continue to be promoters as well as guardians of integration through the preliminary reference procedure; they act as members of a community held together by the same supranational law, but nevertheless driven by very different national interpretations of the law itself. As interpreters of national law they might—in the current state of implementation of European social law—even be overlooking certain segments of the supranational legal order. Particularly in the area of labour and employment law, such a legal order is developing in new and unpredictable ways and spreading onto different levels of policy-making.

To all appearances, the interests lying behind social partner strategies are not 'shared ideals or common identity';[58] they may be the reflex of contingent

[57] A different but equally active role of labour unions in driving cases to the ECJ is shown, for countries like Denmark and the UK, by C. Kilpatrick, Chap. 2, respectively Parts III and II. As for other collective actors, an equally interesting example of initiative taken by SMEs is in Case T–135/96 *UEAPME* v. *Council* [1998] ECR II–2335. Comments in B. Bercusson, 'Democratic Legitimacy and European Labour Law', (1999) *ILJ* 153. It is still difficult to detect a strategic attitude on the part of employers' associations with regard to litigation, whereas their role as negotiators in social policies is visible and often confrontational

[58] P. Schmitter, 'Examining the Present Euro-Polity with the Help of Past Theories' in G. Marks, F. Scharpf, P. Schmitter, W. Streeck (eds.) *Governance in the European Union* (London, Sage, 1996) 5.

plans based on limited knowledge and very likely to end up by miscalculating the final results. Yet the specificity of labour law issues is such as to make the observation of multi-level social policy-making an extremely interesting operation, particularly when set against the powerful but equally contingent effort at integration displayed by activist courts in the same field.[59]

One endeavour to integrate faces the other, and both seek deeper legitimacy within the European legal order.

D. Pre-federal and Pre-constitutional Labour Law in Inter-court Co-operation

The lack of a federal law, different and separate from state law and from international law, makes the European legal order unique even in comparative legal analysis.[60] No straightforward assimilation with a federal system should, therefore, be suggested; yet the temptation to use this institutional model is ever-present, especially when a federal Europe is depicted as a point of arrival, adding aspirations at each and every step that might make such an option a closer reality. Direct effect has been presented as 'a social ordering' in which the granting of rights to individuals makes them 'involved in their own capacity (…) no longer to be passive receptors who had to await action taken on their behalf by other organs of the Community'.[61] This in itself is considered 'a step in the judicial contribution towards the building of a more federal Europe'.[62]

The absence of a federal constitution allocating powers between the centre and the periphery of the system amplifies prerogatives and traditions of the judiciary within individual Member States. EC supremacy emerges out of this adaptable supranational system in its uniqueness, different from other and

[59] Reference in regard to the notion of multi-level social policies is essentially to S. Leibfried and P. Pierson, 'Multitiered Institutions and the Making of Social Policy'; 'Semi-sovereign Welfare States: Social Policy in a Multitiered Europe'; 'The Dynamics of Social Policy Integration', all in *ibid. European Social Policy Between Fragmentation and Integration* (The Brookings Institution, Washington D.C., 1995) respectively at 1, 43, 432 ff.; and to F. Scharpf, *Governing in Europe. Effective and democratic?* (OUP, Oxford, 1999) 187 ff.

[60] T. C. Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community', (1986) 34 *AJCL* 229 ff.;T. C. Hartley, M. Cappelletti and D. Golay, 'The Judicial Branch in the Federal and Transnational Union: Its impact on Integration' in M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration Through Law. Europe and the American Experience*, Vol. 1, *Methods, Tools and Institutions*, Book 2, *Political Organs, Integration Techniques and Judicial Process* (Walter de Gruyter, Berlin, New York, 1986) 261 ff. More recently, see T. C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, Oxford, 1999).

[61] P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law', (1992) *OJLS* 458.

[62] *Ibid.*

similar federal principles essentially because its acceptance by national courts is 'selective and generally based on the national courts' own constitutional terms'.[63]

The title of this section introduces the notion of a pre-constitutional labour law. One of the aims of the present project is to learn whether the process of European integration is affected by a genetic disease, namely the weakness of the legal basis, which has been only partly corrected by the reforms undergone by the Treaties.[64] 'Pre-federal' and 'pre-constitutional' would therefore indicate phases in the process of integration, which reflect a supranational legal system which is still imperfect in terms both of the definition of competences and of the delineation of rights.

The peculiar facet of the European legal order, which we strive to underline in the present book, has to do with a powerful supranational Court which, in order to exercise its powers, relies on the initiative of national courts in submitting preliminary references under Article 177. Co-operation between courts is chosen as a metaphor to indicate that national judicial systems are co-opted into the enforcement of Community law as if a European decentralised administration of justice had come into existence.[65]

Even when the metaphor of co-operation changes and inter-court competition—between lower and higher national courts—is suggested as the driving force behind references submitted to the ECJ, the conclusion is reached that the national judiciary has become, by virtue of preliminary ruling proceedings, 'a political constituency, indeed a political power base, of its own'.[66]

The ECJ, for its part, rather than simply registering the cases, carries out a reinterpretation of them and in so doing absorbs into its own reasoning perceptions and legal arguments presented by national courts.[67]

The wide and differentiated research recently developed on national courts and the ECJ,[68] even in an interdisciplinary context,[69] enables those who remain

[63] B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in P. Craig and G. De Búrca, (eds.) above n. 8 at 177 ff. and in particular 209.

[64] M. D'Antona, 'Armonizzazione del diritto del lavoro e federalismo nell'Unione Europea', (1994) *Rivista Trimestrale di diritto e procedura civile* 695 ff. uses the expression 'genetic anomaly' (at 704). For references to the evolution of EC social policies and for discussions on the limits inherent in the legal basis, see S. Sciarra, 'European Social Policy and Labour Law. Challenges and Perspectives', in *Collected Courses of the Academy of European Law*, IV (Martinus Nijhoff Publ., The Hague, 1995). Most writers—and the present writer between them—have recurrently emphasized that innovations brought about by the SEA (namely Art. 118a and 118b) were not sufficient vehicles for expanding social rights. After Maastricht and Amsterdam new opportunities have arisen in an area of law which remains, nevertheless, significantly weaker than others.

[65] P. Davies, above n. 8 at 99.

[66] K. Alter, 'The European Court's Political Power', (1996) *WEP* 481.

[67] S. Simitis, above n. 8 at 172: 'The preliminary ruling is therefore assistance and precaution in one'.

[68] Recent examples are: D. Anderson, *References to the European Court* (Sweet & Maxwell, London, 1995); C. Barnard and E. Sharpston, 'The Changing Face of Article 177

Note 69 on following page

faithful to the dialogue metaphor to strengthen it by identifying actors other than courts who talk and listen and possibly interfere with the conversation.

Within this more direct conversational path, leaving aside for the moment quasi-institutional or non-institutional actors participating in the case, we can see a number of occasions where national courts find their way through the dispute because they seek an authoritative support elsewhere, outside national boundaries. They address preliminary references to the ECJ because they are unable to solve a domestic conflict, whether for the abrogation of national laws, supplanting their national Constitutional Court, or the review of last-instance court decisions. In all these cases, judges, rather than being ignorant of Community law, must be seen as all too knowledgeable of it.[70]

There may be situations—such as those detected in the UK—in which a more visible reluctance to refer is seen as a reflection within the judiciary of a broader political opposition to integration.[71] This is maintained as if judges were uncritically following state orientations, variable, over time, as they are, and very much linked to governmental options. In such circumstances one should rather observe the legal system in all its complexity, and assess its vitality by different means. Enforcement of Community law through national courts, for example, is the other interesting side of the coin. It proves, in specific areas of English law, deep-seated transformations ranging from a 'changing pattern of employment' to introducing new 'legal concepts, methods and reasoning'.[72]

References', (1997) *CMLR* 1113 ff. ; M. Andenas and F. Jacobs (eds.) *European Community Law in the English Courts* (Clarendon Press, Oxford, 1998); A. Lo Faro, 'La Corte di giustizia e i suoi interlocutori giudiziari nell'ordinamento giuslavoristico italiano', (1998) *Lavoro e diritto* 621 ff.; R. Foglia, 'Il ruolo della Corte di Giustizia e il rapporto tra giudice comunitario e i giudici nazionali nel quadro dell'Art. 177 del Trattato (con particolare riferimento alle politiche sociali)', (1999) *Diritto del lavoro* 138 ff.

[69] S. Tesoka, *'A Public Policy by default?'. Judicial Activism in the Community Social Space. The Case of Sex Equality* (PhD Thesis, European University Institute, Florence, 1998). See also J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', (1996) *WEP* 360; W. Sandholtz and A. Stone Sweet (eds.) *European Integration and Supranational Governance* (OUP, Oxford, 1998) (and here, in particular, the chapters by the editors, 'Integration, Supranational Governance, and the Institutionalization of the European Polity' p. 1 ff., and by A. Stone Sweet and J. A. Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' 92 ff.); A. Stone Sweet and T.L. Brunell, The European Court and the National Courts: a Statistical Analysis of Preliminary References, 1961–95, *Harvard JMF Paper* No 14/97. A critical account of this literature is given in C. Kilpatrick, above n. 4 at 126 ff.

[70] Thus making an 'instrumental' use of referral to the Court, as suggested by S. Simitis, in 'Fine o rinascita del diritto del lavoro: il caso della Corte di giustizia europea' (1995) *Giornale di diritto del lavoro e di relazioni industriali* 521 ff., particularly at 542, and in above n. 8 at 173.

[71] J. Golub, above n. 69 at 368 ff.

[72] See the examples chosen by Lord Justice Mummery,'The Community Law Impact in Employment cases', in M. Andenas and F. Jacobs, (eds), above n. 68 at 191 and 207–208. C. Barnard and S. Deakin 'Il diritto del lavoro della Corte di giustizia e le corti britanniche', (1999) *Lavoro e diritto* 505 ff. have a critical approach to some of the legislation passed as a

Article 177 is not 'the measure of all things';[73] all contributors to this book share this awareness and have tried in the following chapters to open up the floor for further clarifications within and beyond the linguistic metaphor of the dialogue.

The ECJ, as both interlocutor and main speaker, follows very closely the effects of its decisions, with reasonable pride when the result is—as in the majority of cases—a smooth application of its ruling.[74] Other institutions, particularly the Commission, may help the Court to reach this goal.[75] One can argue that there is a battle behind the curtain of collaboration and that each institution pursues its own political agenda. The machinery is such that what starts in a national court may very easily go in broader, at times unpredictable, directions.[76]

Uniformity is not an axiomatic outcome of the referring procedure and yet it is expected as an achievement. This is where symbols become an intriguing component of co-operation between courts. The legislative and factual context in which the dispute originated is important for the admissibility of individual cases, despite the Court's lack of jurisdiction on the facts behind the reference and on national law.[77] Co-operation cannot be favoured merely by an abstract reasoning; very concrete issues lie behind this constant flow of exchanges and make the conversation very intense.

'Discourse' is proposed as a more suitable word to describe the communication involving national courts and the ECJ. Reasons given for such a choice must be found in the complexity of the reference procedure, attractive for institutional actors involved in policy-making, well beyond the litigation of the individual case. Whereas 'the language of co-operation may be seen as of

consequence of ECJ rulings, seen as 'minimalistic', and yet find that the overall effect of such rulings is to introduce elements of 'constitutionalization' of English labour law. See particularly at 529.

[73] C. Kilpatrick, above n. 4 at 126.

[74] F. G. Jacobs, 'The Effect of Preliminary Rulings in the National Legal Order', in M. Andenas (ed.) *Article 177 References to the European Court—Policy and Practice*, (Butterworths, London, Dublin, Edinburgh, 1994) 29 ff.

[75] Inter-institutional aspects of the Community's legislative procedures and in particular the Commission's regulatory functions are explored by G. Bermann, 'Regulatory Decisionmaking in the European Commission', (1995) *CJEL* 414 ff.

Some examples, chosen in relation to the main fields of this research, are: the Commission Communication on *Kalanke*, below Chap. 3, Part IV at n. 35; the Commission's initiative in the enforcement of *Macrotron*—see below S. Sciarra, Chap. 4, at 250; other examples in A. Lo Faro, Chap. 3 Part IV.

[76] See, below in the present book, S. Simitis, Chap. 5 at 294–7 particularly with regard to the discussion on positive action legislation.

[77] The Court's case-law on the matter is analysed by D. O'Keeffe, 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility', in *Scritti in onore di Giuseppe Federico Mancini*, vol. II (Giuffrè, Milan, 1998) 695 ff. The expression 'in conformity with the spirit of 177' was used by Advocate General Mancini in Case 14/86, *Pretore di Salò* v. *Persons Unknown* [1987] ECR 2545, at 2557 (para. 5).

fluctuating sincerity'[78] and may reflect a contingent approach on the part of national courts, discourse should result in 'binding outcomes'.[79]

Legal reasoning as a 'linguistic activity' has been studied in its many implications—empirical, analytical, normative—as a 'practical discourse', essentially seeking to establish the 'correctness of normative statements'.[80] A correct legal decision should follow a number of criteria and should incorporate 'the rules and forms of general practical discourse'; even so, a decision, because of its 'provisional' nature, could be contested.[81]

That is why discourse theory relies on rules which 'can only be adhered to approximately', while still being important for achieving correctness.[82] Rules of discourse theory are sufficiently weak to be agreed upon by 'individuals of quite different normative outlook', and strong enough to support any kind of 'rational' discussion.[83]

This theory has the advantage of placing emphasis on the openness of the legal system, leaving behind traces of formalism and positivism, which would prove particularly inadequate for the explanation of supranational rules. In underlining the importance of procedures and rationality, discourse theories add a further element of clarity to legal decisions made by national courts in a constant exchange with the ECJ. Following the path indicated by legal argumentation, 'legal theory thus becomes the silent prologue to all judicial controversies'[84] and new possibilities are given to all actors in democratic systems to learn how to be tolerant and to listen to counter-arguments.

Discourse theories not only serve the purpose of enlarging the dialogue metaphor; they also provide a more democratic foundation for the exchange of messages which—for very different reasons—engages national courts and makes them powerful actors on the open scene of the European legal system.

Rationality in judicial decisions is also needed whenever interpretation requires the adoption of standards, as frequently happens in the labour law field. Judges have to start from the evaluation of facts and then, through the adoption of standards, assess those facts. The image has been suggested of the 'judge sociologist':[85] especially when reference is made to 'objective values', namely values which exist in specific social groups and are, as such, socially recognisable.

[78] T. de la Mare, above n. 8 at 227.

[79] *Ibid.*, at 240. The author implies—but does not give sufficient justifications for this—that practical discourse is different from theoretical discourse inasmuch as it suggests value judgement and preferences, rather than simply descriptions.

[80] R. Alexy, above n. 8 at 14–15.

[81] *Ibid.*, at 294.

[82] *Ibid.*, at 18.

[83] *Ibid.*, at 18.

[84] M. La Torre, *Teorie dell'argomentazione giuridica e concetti di diritto. Un'approssimazione*, an appendix to the Italian edition of Alexy's book, *Teoria dell'argomentazione giuridica* (Giuffrè, Milan, 1998) 379 (my translation).

[85] M. Taruffo, 'La giustificazione delle decisioni fondate su standard', in *Scritti in onore di Angelo Falzea*, vol. III (Giuffrè, Milan 1991) 2, 832.

In preliminary references the 'judge sociologist' may either be aware of the existence of such values or be pushed—by interest groups or even by groups external to the dispute—into recognising emerging and indistinct values.

The 'empirical' justification given by the judge sociologist is not necessarily political: he or she finds a way to interpret national law by looking through the lens of Community law. We can observe how national judges 'use' the Court of Justice's decisions as sources and incorporate supranational standards in their own reasoning.[86] These most striking examples of meta-standards, originally emerging from a national dispute and then filtered into a different legal system through the interpretation given by the ECJ, prove that European courts act as a community of courts, despite the absence of a federal system and in furtherance of specific integrationist goals.[87] They develop a deep sense of loyalty to the supranational source, expressed by enforcing the latter as frequently as possible.

The alternative to this, especially when social values are remote from the judge, is the adoption of 'individual' values, closer to one or both of the litigants.[88] Notwithstanding the judge's obligation to state grounds, such references might be more controversial and possibly less rational.

An incisive implication of all that has been said so far is that within the special field of law referred to in the present book, the authority of EC law is made to depend on many variables. The system demonstrates, as previously argued, its pre-federal configuration and the ambiguities of its future developments. Labour law is pre-constitutional inasmuch as it lacks deep roots in the Treaties, even though it rests on the constitutional traditions of Member States.

Diversification of national labour law systems, owing to historical reasons and to the role played by organised labour over the decades,[89] especially in the transition to democratic regimes, adds to the uncertainty on how to build a supranational architecture. The debate on the constitutionalisation of fundamental labour law principles becomes a highly complex one, entwined with the search for a new institutional equilibrium.

[86] See, for instance, the way in which Italian Courts have 'used' the ECJ's decision in *Stoeckel* (later in the present book A. Jeammaud, Chap. 4 at 237); C. Kilpatrick, Chap. 2 at 71–2 and 75–7; see also C. Kilpatrick, 'Production and Circulation of EC Night Work Jurisprudence', (1996) *ILJ*, 169 ff. References to the attitude of the Spanish Constitutional Court in 'using' EC gender equality sources are in C. Kilpatrick, Chap 2, Part IV.A. Among the many examples quoted in Chap. 3, *Schmidt* is probably the one that better gives the idea of 'circulation' of the ECJ' s decisions between national courts.

[87] K. Alter, 'Explaining National Court Acceptence of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Interpretation', in A.M. Slaughter, A. Stone Sweet and J. Weiler (eds.), above n. 8 at 241 denies that judges 'have a stake in promoting legal integration' and that their behaviour may fluctuate and even undermine integration.

[88] M. Taruffo, above n. 85 at 839. An example of 'individual' values adopted by a judge can be found in the reference made by the Italian judges in *Job Centre* I and II (see below S. Sciarra, Chap. 4).

[89] Lord Wedderburn, *The Worker and the Law* (Penguin, London, 1986) 17, showing that a labour party was formally constituted in Britain a long time after the labour movement had become active and significant legislation had been enacted.

Discourse theory and its expected normative outcome captures some of the most important implications of this troublesome construction of a supranational system. The likelihood that courts, exposed to such a variety of legal reasoning, will always be rational and adopt 'objective' social criteria, is a remote one.

This is why the obligation to state grounds and justify the choices behind references to the ECJ becomes even more stringent when courts talk to one another within the EC legal order, setting other institutional actors in motion as a consequence of their own activism. Distinct values, belonging to specific social groups, do not readily emerge in modern legal systems, still less so in the interchange of cultures and habits favoured by a supranational environment. Even the strength of once dominant organised social groups, such as management and labour, may be imperilled and weakened. This proves that fundamental social rights constitute the backbone of a legal system and create a solid ground for courts to implant their legal reasoning. The latter is innovative only when it opens up to capture notions such as adaptability of social values, evolution of social groups, and differentiation of social norms through a wide spectrum of legal and non-legal sources.

E. A Research Project on Labour Law in the Courts: Exercises in Neo-institutionalism

In order to pay attention to all the implications of preliminary references, it is essential to specify the choices made in the present research and to illustrate the selected angle of investigation. Can the referring judge's state of mind be described as a *malaise*, as suggested earlier in this Introduction? Is the logic of preliminary references that of pathology within the Community legal order, or is it the sign of a physiological discussion between Community institutions? Are judges engines of integration because of the defaults of other actors, or are they following an independent road of their own?

When addressing these questions, recourse to empirical research becomes essential in the attempt to provide some answers both to attentive students of Community law and to judges. A few more theoretical assumptions need to be presented before we move on to the details of the criteria followed by contributors to this project.

Following the most interesting findings of research in neo-institutionalism, the present book does not portray the ECJ as an actor of integration in isolation from other institutions. Inter-institutional dynamics highlighted by the present project confirm that 'over time as processes of institutionalisation within law become pervasive, the actions of the ECJ (together with those of other actors seeking to steer law) are themselves structured by law'.[90] Several

[90] K. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration', (1998) *JCMS* 156.

contributors to this book, arguing in favour of a regained centrality of national parliaments, address concerns over the legitimacy of judicial activism. The individual would be in danger of being ignored and left aside as the holder of rights, if the inter-institutional aspects of integration were to prevail over the process of constitutionalisation.[91]

Even 'historical institutionalism', a branch of scholarship which looks at institutions in order to understand political developments over a period of time, acknowledges that actors are constantly driven by their own interests. In trying to maximise those interests while pursuing reforms, they 'transform their own positions (or those of their successors) in ways that are unanticipated and/or undesired'.[92] Investigation into European social policy—including gender equality—offers empirical support to these assumptions. Powerful Member States have consistently pursued integration over the years and in so doing they have found themselves outside interstate bargaining and inside a 'dense institutional environment',[93] which creates the conditions for decentralised decision-making. Our own findings in this research, in providing further empirical evidence, follow a similar direction.

That is why we share those attentive approaches to European integration which indicate that it is more productive to 'explore the potential tensions between legal and political realities of integration and the extent to which organisational linkages and entrepreneurial activity by European Community actors resolve or indeed exploit such tensions'.[94] The alternative would be to fall into a pattern whereby national courts are in all situations uncritically dependent on political choices of nation states, thus giving up initiatives of their own choice. This could give rise to uncertain outcomes, especially in the labour law domain, where the evolution of a supranational legal system has not yet reached a high degree of coherence, for reasons which include the non-homogeneous attitude maintained by Member States.

The game of subsidiarity, combined in this specific field of law with an intense degree of national pride in defending inborn social values,[95] may produce unpredictable results, owing to the impossibility of co-ordinating judicial and legislative strategies. The 'juridification' of disputes through preliminary ruling proceedings has been a relevant starting-point in the present analysis, because of the attention this theory pays to national

[91] P. Eleftheriadis, 'Begging the Constitutional Question', (1998) *JCMS* 255.

[92] P. Pierson, 'The Path to European Integration. A Historical Institutionalist Analysis', (1996) *CPS* 126

[93] *Ibid*., at 148 ff. and 159

[94] K. Armstrong, 'New Institutionalism and European Union Legal Studies' in P. Craig and C. Harlow (eds), above n. 42 at 103. A good example of litigation directly affecting the political process has to do with the Sunday trading cases (Chap. 4, Part IV below).

[95] Examples of strenuous battles waged by national governments—even those external to the dispute such as the German and Norwegian governments—are in *Job Centre*, Chap. 4, Part II below.

governments, forced to face both the origin of the dispute and its consequences once the initiative has been taken by the individual judge.[96]

We have attempted to analyse the reluctance of governments to become obedient to ECJ rulings. An asymmetry often appears whereby judges may be prompt and quick in referring the case and governments may be slow and indecisive, choosing to follow their own planning in pursuing legislative changes.

The emphasis on national legislatures facing the impact of the European Court's decisions, is yet another indication yielded by this research of the complex and never-ending institutional battle triggered by national courts.[97] It is difficult to measure the impact decisions have on judges other than the originator, when they roll all over Europe like a snowball and, if picked up, disseminate supranational law in unpredictable corners of the European legal system.[98] The 'dual seductiveness' of the supranational norm, as distinct from international labour norms, consists in offering 'immediate and compelling instructions'[99] to national courts, without any anticipation of the possible—potentially unlimited—responses that courts may give in different national legal systems.

This is yet another way to prove—in a still imperfect form—that 'processes of institutionalisation take place at different levels'[100] and cut across political and legal systems. An understanding of the concurring forces of integration, through the interpretation of national and supranational legal sources while listening to this constant and dynamic conversation between courts, may add to the fascinating search for theories on institutionalisation.

A balance between internal and external pressures does not need to be struck. The present state of affairs is such that all perceptions emerging from empirical research are useful for capturing current developments and projecting them into future institutional scenarios.

Methodological choices made by contributors to this project have been the product of joint decisions; it is interesting in itself that labour lawyers from different national backgrounds found a common understanding of the reasons justifying comparative analysis. The common starting-point was a shared sense of disorientation due to frequent and far-reaching changes in substantive labour law and to an increasing complexity of the same. What the European scene offers, as an area for comparative work, is a supranational system not yet politically integrated, resting on solid common legal grounds. The gradual reshaping of national systems, as a consequence of choices imposed on national legislatures by EC law was a common concern, particularly because of the potentially disintegrative effects of ECJ decisions. One working hypothesis was

[96] J. Weiler, above n. 6 at 422.

[97] See in particular Chap. 3, Parts III and IV, below.

[98] An interesting example is *Carra*, discussed below in Chap. 4, Part II.

[99] C. Kilpatrick, above n. 86 at 181, with reference to cases dealing with the ban on night work for women (see also A. Jeammaud, Chap. 4 below).

[100] K. Armstrong, above n. 94 at 109.

to measure the vagueness of labour law principles against the preciseness of competition law.[101] We also selected cases according to many criteria: numerical and substantial relevance in Chapters 2 and 3, or symbolic relevance, the latter being referred to the special issues dealt with in the dispute, or to its originality in the overall scene.[102]

Reorienting comparative research, through a better understanding of the legal mechanisms driving preliminary references to the ECJ, was a way of looking at national diversities while keeping an eye on supranational goals. Making comparative research functional to an understanding of European law means paying a tribute to the path-breaking results of previous work[103] and adding something new by lifting the veil of specific areas of labour law, which has become over the years a highly specialist field of legal research.

We shared the conviction that emphasising the diversities of national labour law systems would lead us to build a unitary frame of reference. In this attempt, we did not want to leave aside the study of the impact of European law on national law, which resulted in interesting explanations of the different ways national systems have of reacting to EC law.[104]

Institutions other than the ECJ had to be kept within the picture, even though the focus of the research agenda was on inter-court co-operation.[105] The idea of 'intra-Community institutional dialogue', at times a continuation of the 'inter-Community judicial dialogue', has been substantiated with examples, arguing for a 'shadowy functionalisation' of Article 177 towards directions not envisaged by the founding fathers.[106]

Comparative research within this context is far from being aseptic, nor does it follow the mere rhetoric of listing the particuliarities of national systems.[107]

[101] G. Lyon-Caen, 'L'infiltration du droit du travail par le droit de la concurrence', (1992) *Droit Ouvrier* 316 ff.; P. Davies, 'Market Integration and Social Policy in the Court of Justice', (1995) *ILJ* 52 ff.; M. Roccella, 'Tutela del lavoro e ragioni di mercato nella giurisprudenza recente della Corte di giustizia', (1999) *Giornale di diritto del lavoro e di relazioni industriali* 33 ff. Interesting points are touched by the Court's ruling in *Albany*. See Sciarra, Chap 4, Part II below.

[102] See respectively M. Poiares and F. Valdés, Chap. 4, Parts IV and III.

[103] M. Cappelletti, M. Seccombe and J. Weiler (eds) *Integration Through Law. Europe and the American Federal Experience* (Walter de Gruyter, Berlin, New York, 1986–1987) in six volumes.

[104] Several examples in Chap. 2, Part 9.

[105] F. Valdés Dal-Ré, below Chap. 3, Part III. This part also looks at ways in which the Commission has monitored the transposition of Directive 77/187.

[106] A. Lo Faro, below Chap. 3, text and n. 78.

[107] For example, the chronological interpretation of ECJs case law on transfers offered by S. Laulom (Chap. 3, Part II) benefited from in-depth papers prepared by other members of the research group. The interpretation of what the Court does is intertwined with the acknowledgement of national differences and with the account of how national judges have provoked the Court's pronouncements through preliminary ruling proceedings. Equally challenging is the comparative technique adopted by Kilpatrick (Chap. 2) in 'coupling' countries which exhibit similarities in patterns followed in either referring or not referring cases to the ECJ.

Authors writing chapters or sections of this book were able to rely on plenary discussions held by the research group as well as on the knowledge of each national legal system brought into that discussion by each member of the group. This meant transforming the country-by-country approach[108] into what we hope resulted in a more synchronic and possibly more coherent approach. This was hinted at because of the preference given to non-statistically oriented research,[109] with a view to letting the quality of selected cases emerge.

Two main areas of labour law are analysed in Chapters 2 and 3. They reflect different attitudes of national courts, which can also be explained in the light of different interests brought forward by Member States. It so happened that courts were, in some of the cases we refer to, quicker and at times even more acute and determined in referring cases than parliaments could ever be in initiating legislative reforms. Courts started the ball rolling by 'using' Article 177, not necessarily following a national co-ordinated strategy, but at times developing a national style, particularly in some leading cases. The readiness to refer—which seems more evident in courts other than those against whose decisions there is 'no judicial remedy under national law' as the third paragraph of Article 177 specifies—resulted in an almost inborn ability to display legal problems, which could evolve into formidable institutional battles.

Even when not referring cases seems the predominant attitude of national courts, we should not be too quick to assume a non-existent judicial dialogue. Research carried out in Chapter 2 shows once again the complexity of the 'interplay' between courts and other actors, including academics, who have facilitated the circulation of supranational law. It proves that even the utilisation of EC gender equality sources by higher courts may start a circular process, whereby judges will then be readier to go beyond national boundaries and open up to new challenges in legal interpretation.[110]

In both fields—transfers of undertakings and equality—preliminary references were high in number and submitted—albeit to a different extent—by all countries included in the project. The choice of these two fields was also based on a more subtle theoretical assumption.

Equality litigation takes its origin from legislation which, over the years, developed beyond Community labour law into broader principles affecting 'all aspects of Community law'.[111] It is therefore a 'fundamental' dialogue, which

[108] In the 'Preface' references are made to national contributions—not exactly national reports, published in different languages and in different countries. In the following chapters references are made, whenever possible, to national specialized literature. The bibliographical apparatus used in this book is meant to emphasise the importance of linguistic pluralism as well as cultural diversities, which modern legal research should favour more and more.

[109] Choices in this regard have been clarified by C. Kilpatrick, above n. 4 and by A. Lo Faro, above n. 68, at 626.

[110] C. Kilpatrick, Chap. 2, Part IV.A refers to the Spanish Constitutional Court as an original example of mediation in introducing EC sources into the national legal system.

[111] P. Davies, above n. 44, at 124. See also P. Davies, below Chap. 3 arguing for the 'separateness' of Art. 13 EC and of broader issues of anti-discrimination law; G. More, 'The

captures the rich and largely unexpected developments of ECJ jurisprudence.

Disputes over transfers of undertakings are strictly connected with the functioning of the market and with legislation structurally designed—in the 1970s, when the first and alarming signs of economic instability started to be visible—to favour the mobility of businesses across frontiers. Without wishing to imply that developments in this field are less fundamental, they simply mirror a different character of the norms which originate litigation and a different function of those norms. Protection granted to employees under such legislation, relevant in historical and in substantive terms, nevertheless remains trapped in the context of legislation essentially aimed at avoiding distortions in competition.

Lessons we draw in Chapter 4 from 'some secondary areas of dialogue' are most instructive in terms of the diversification, inventiveness and creativity of all actors involved in the disputes. Whilst being the less explored areas of co-operation between courts, the few examples selected also have the advantage of bringing into the picture very sensitive areas of legislative developments at the national level.

From fragments of national histories and the explanation of the reasons behind the inhibitions of some national courts—such as the reluctance shown by the Spanish Constitutional Court to refer cases one can sketch a wider picture. 'Indirect' application of EC law may occur when labour courts follow a Constitutional Court, which chooses to adopt ECJ' s decisions.[112]

In the background of all three chapters actor-interest analysis is visible, although never brought to a clear and final theoretical definition. Not only did we feel that the instruments which lawyers are able to use better are inadequate to measure the impact of non-institutional actors in court cases, we also felt that strategies behind litigation, often obscure and difficult to prove, never followed a common pattern.[113] The most visible and tangible outcome remains in the judges' hands: they may at times be more influenced by external organized interests, or prefer to play all by themselves the role of protagonists;[114] they may be overshadowed by powerful lawyers or intense reading of scholarly work;[115] they may want to induce 'knowledge dependency' in the

Principle of Equal Treatment: from Market Unifier to Fundamental Right?' in P. Craig and G. De Búrca (eds.), above n. 8 at 517 ff.

[112] F. Valdés Dal-Ré, below Chap. 4, Part III, text and n. 6

[113] See C. Harlow, 'Towards a theory of Access for the European Court of Justice', (1992) *YEL* 213 ff.

[114] Examples of how economic actors make use of EC law to challenge national regulatory policies are in Poiares, Chap 4, Part IV.

[115] Interesting examples are to be found in *Job Centre* (Chap. 4, Part II) and in references regarding equality cases originating from Germany. See Kilpatrick Chap. 2, Part II.D, who distinguishes between 'advocate-academics' and 'academic-advocates', all active in selecting and arguing cases and adding a high value of expertise and political conviction into proceedings which, also for these reasons, become particularly interesting and controversial.

ECJ;[116] and they may be true believers in the supremacy of European law and choose to stimulate—if not provoke—national legislatures.[117]

In all these cases judges are, as has previously been noted, active within a community of courts, knowledgeable of Community law, open to an understanding of social phenomena and articulate in their legal reasoning. Whatever the future is to bring, they are unquestionably developing a new European legal culture.

[116] As in the Danish cases on pregnancy quoted in Chap. 2, Part III, B.II.

[117] Several examples emerge in the following chapters. See in particular: Chap. 4, Parts II and IV.

2

Gender Equality: A Fundamental Dialogue

CLAIRE KILPATRICK*

PART I PRELIMINARY REMARKS

Over three decades ago, a distinguished group of labour law scholars from six different countries formed the Comparative Labour Law Group.[1] One of the areas they examined was discrimination in employment which resulted in a book on that subject in 1978. Folke Schmidt, the editor of that volume, was also responsible for the chapter concerning 'Discrimination because of sex'.[2] Four of the six countries he examined were at that time members of the EEC and are also examined in this project (France, Germany, Italy and the UK). Schmidt commented on the possible impact of the Court of Justice's (ECJ's) interpretation in the 1976 *Defrenne* judgment of the equal pay Article in the Treaty of Rome, Article 119 (now Article 141 EC):

> The judgment in the *Defrenne* case concerned Belgium. It has no immediate impact on the four community countries subject to our study, since these countries had already incorporated the principle of equal pay into their national legislation in some way or other.[3]

While he noted the passage of a new 1976 Directive on equal treatment for men and women and the 1977 legislative response in Italy,[4] he clearly did not consider that EC gender equality in employment sources would require

* My sincere thanks go to Silvana Sciarra and Spiros Simitis for their invaluable comments on earlier drafts of the whole chap. Many others have helped me to gather and understand the materials used in writing this chap. They are thanked in relation to the Member State they helped me with. I remain responsible for this chapter.

[1] For comments on the group's genesis and work by two of its members see B. Aaron, 'The Comparative Labor Law Group: A Personal Appraisal', 2 *Comparative Labor Law Journal* 228 (1977) 22; Lord Wedderburn, 'Labour Law Research in Britain' in S. Edlund (ed.), *Labour Law Research in Twelve Countries* (Swedish Centre for Working Life, Almqvist & Wiksell, Stockholm, 1986) 193 at 200ff.

[2] F. Schmidt (ed.) *Discrimination in Employment* (Almqvist & Wiksell, Stockholm, 1978).

[3] *Ibid*., at 142.

[4] See below Part IV.B.

significant responses by national legislatures, let alone produce dialogue between courts.

Schmidt depicts a Europe in which the nation state both was, and was expected to remain, in almost exclusive control of legislative policy choices concerning gender equality at work. While Member States were obliged to comply with EC obligations, failure to do so would not result in changes internal to the State but rather, in an obligation on the Member State *qua* international actor to comply. Nor did Schmidt anticipate more than fairly formal controls on whether such compliance has been achieved. In other words, he did not foresee an organic on-going process of determining and refining the meaning of the gender equality in employment sources which already existed at EC level when he wrote: Article 119 (now 141) EC, the 1975 Equal Pay Directive (EPD) and the 1976 Equal Treatment Directive (ETD).

It is worth setting this out for two reasons. First, it is immediately obvious that, over two decades later, drastic revisions need to be made to this description. The main reason that these revisions are necessary is that courts—national and supranational—have engaged in dialogue regarding the meaning of these EC gender equality in employment sources. The most obvious manifestation of this is that gender equality has quantitatively been by far the most fundamental area of European social policy in producing dialogue between national courts and the ECJ. Just over 100 references have been made to date[5] and the overall willingness of national courts to engage in direct dialogue with the ECJ in this area does not appear to be waning.[6]

[5] On 1 Jan. 2001, 106 references on gender equality in employment sources had been decided or were pending before the Court of Justice (ECJ). This figure underestimates the number of preliminary references actually made by national courts as a significant number of references are withdrawn by national courts because of developments in ECJ jurisprudence. A famous example of this was the removal from the register in Sept. 1998 of the UK High Court's reference on 13 Mar. 1997 in Case C–168/97 *R.* v. *Secretary of State, ex parte Perkins* following the ECJ's decision in Case C–249/96 *Grant* [1998] ECR I–621. These figures count as decisive (for decided cases) the basis on which the ECJ decided the case. Therefore, if the ECJ decided a case under Dir. 79/7 rather than Art. 141 (formerly Art. 119) EC, Dir. 75/117 (the EPD) or Dir. 76/207 (the ETD), it is not counted as a gender equality in employment case. For a case where this occurred see Case C–139/95 *Balestra* [1997] ECR I–549. Preliminary references concerning only Dir. 92/85, the Pregnant Workers' Directive (PWD), are counted as gender equality references.

[6] The following references have come from the courts of the Member States (listed here in order of least to most numerous). There were no references from Finland, Italy, Luxembourg or Portugal. There has been one Greek reference—Case C–147/95 *Evrenopoulous* [1997] ECR I–2057 and one Spanish reference—Case C–438/99 *Jiménez Melgar* (pending). Ireland and Sweden have made two references each. For Ireland see Case 157/86 *Murphy* [1988] ECR 673, Case C–243/95 *Hill and Stapleton* [1998] ECR I–3739. For Sweden see Case C–236/98 *Jämställdhetombudsmannen Lena Svenaeus* [2000] ECR I–2189 and Case C–407/98 *Abrahamsson and Anderson*, Opinion of Saggio AG, 16 Nov. 1999, judgment 6 July 2000. Three references have come from Austrian courts: Case C–309/97 *Wiener Gebietskrankenkasse* [1999] ECR I–2865, Case C–249/97 *Gruber* [1999] ECR I–5295 and Case C–381/99 *Brunnhofer* (pending). Five Belgian references have been made. Three came from the *Defrenne* litigation: Case 80/70, [1971] ECR 445; Case 43/75, [1976] ECR 455;

Secondly, we should also ask how drastic these revisions need to be. Schmidt's comparison was between nation-states, territorial entities characterised by separate governmental structures and legal systems, including courts. The mere fact that this kind of comparison can still be carried out in the EU means that the key focus in his analysis has certainly not disappeared. Therefore, to paste the label 'European' on the field of gender equality in employment without investigating what that means in the context of an enduring, though altered, Member State presence, would be to misrepresent the development of this field. In other words, we need to find a way of examining judicial dialogue which respects and is capable of providing adequate explanatory space for the fact that the EU is a multi-level polity.[7]

This chapter analyses how dialogue between courts on EC gender equality in employment sources took place in the six Member States covered by the project—Denmark, France, Germany, Italy, Spain and the United Kingdom. It is concerned with assessing why, how and how much judicial dialogue on gender equality occurred, and in what ways this means that Schmidt's description no longer holds true. We can see that comparative legal research between Member States on gender equality will have to operate in a different context from that prevailing when Schmidt carried out his research. More precisely, we need to consider both how to approach and what can be learnt from comparative research on judicial dialogues in the specific policy area of gender equality in employment. This is considered in the remainder of this introduction by looking at what we currently know, and do not know, about how integration through courts has occurred. The purpose of this brief discussion is to set out a research agenda with which to proceed to explore the six Member States in detail.

A. Measurement

Measurement of integration through courts has generally been based on a rough and ready impression that a large volume of cases has been received by the ECJ through the preliminary reference mechanism which has used them to

Case 149/77, [1978] ECR 1365. The other two are Case C–13/93 *Minne* [1994] ECR I–371 and Case C–166/99 *Marthe Defreyn* (Opinion of Ruiz-Jarabo Colomer AG, 16 Mar. 2000; judgment 13 July 2000). France and Denmark made six references each—see below Part III. Dutch courts made ten references: Case 23/83 *Liefting* [1984] ECR 3225; Case 262/84 *Beets-Proper* [1986] ECR 773; Case C–177/88 *Dekker* [1990] ECR I–3941; Case C–109/91 *Ten Oever* [1993] ECR I–4879; Case C–28/93 *Van der Akker* [1994] ECR I–4527; Case C–57/93 *Vroege* [1994] ECR I–4541; Case C–7/93 *Beune* [1994] ECR I–4771; Case C–128/93 *Fisscher* [1994] ECR I–4583; Case C–435/93 *Dietz* [1996] ECR I–5223; Case C–476/99 *Lommers* (pending). There were 30 references from UK courts and 40 references from Germany—see below Part II.

[7] F. Scharpf, 'Community and Autonomy: Multi-level Policy-making in the European Union', (1994) *JEPP* 219.

construct doctrines of qualitative importance such as direct effect and supremacy. An important quantitative supplement to this has been more precise statistical quantification of these preliminary references made to the Court of Justice with some breakdown into substantive areas, provenance and referring court.[8] However, gender equality is subsumed in such statistical analyses into a category called 'social provisions'.[9] For reasons tested generally in this book by examining dialogue in other areas of labour law, this kind of elementary disaggregation may be deceptive.

Judicial dialogue has therefore been measured quantitatively through figures of preliminary references made to the ECJ, and qualitatively through examining a few constitutionalising doctrines developed by that Court as a result of those references. This is a supranational and highly aggregated measurement in which the ECJ stands in for courts, preliminary references stand in for dialogues and the ECJ's exposition of a few central doctrines stands in for the topics and languages of debate.

It is hardly surprising, then, that even a cursory spatial disaggregation, examining the provenance of gender equality preliminary references, raises puzzles and problems for theories resting on aggregate assumptions about national courts. Why, for instance, have the vast majority of references come from Germany and the UK? Why has the ECJ not yet decided any reference from Spain and Italy?[10] Why six from France and Denmark? Faced with actual preliminary reference figures in a substantive policy area which emphatically suggest non-uniformity in judicial empowerment we can see the clear need to explore and attempt to explain these differences through more detailed research.

Moreover, adding a temporal dimension to this spatial disaggregation of gender equality dialogue adds further important differences which demand explanatory space. What, for instance, is the significance of the fact that UK courts were the first to exploit the opportunities proffered by the ground-

[8] A. Stone Sweet and T.L. Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95', *Harvard JMF Paper No.14/97*, now in (1998) 92 *Am Pol Sci R* 63. The statistics also constitute a central feature of A. Stone Sweet and J. Caparaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in A. Stone Sweet and W. Sandholtz (eds.) *European Integration and Supranational Governance* (OUP, Oxford, 1998) 92. See also T. De La Mare, 'Article 177 in Social and Political Context' in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (OUP, Oxford, 1999) 215 for a partly statistical analysis.

[9] See Table 4.2 in A. Stone Sweet and J. Caparaso, n. 8 above. They state that between 1961-1995 164 references have been made on 'social provisions'. Though it is unclear what they count as social provisions, it must be true that gender equality constitutes well over half of this aggregate figure.

[10] Though see Case C–139/95 *Balestra* above n.1. This could be termed a 'semi-reference' because while the referring court thought that it might be dealt with as a gender equality in employment case, the ECJ actually dealt with it as a gender equality in social security case. See further below Part IV.B.

breaking decisions in the *Defrenne* litigation[11] making references before the 1970s ended while the first French references did not come until the 1990s?[12]

B. Explanations and Evaluations

Aggregate supranational *measurement* of the contribution of judicial dialogue to integration tends also to lead to aggregate *explanations* of why judicial dialogue has occurred. Political science approaches based on neo-functionalism, unlike conventional EU legal scholarship, have the significant merit of having posed the question—why have national courts participated in integration (measured as indicated above)? Neo-functionalism explains national court involvement as a process of mutual intoxication and empowerment of both national courts and the ECJ *vis-à-vis* other branches of government. Courts speak the same language, the language of law, which binds them together, and masks and shields them from both public controversy and interference from other branches of government. Alter's[13] neo-functionalist twist argues that competition between lower and higher level courts at national level drives integration as lower national courts deliberately play the ECJ and higher national courts off against each other. These explanations of national court participation are almost exclusively built on inspired extrapolation from an overall impression of active reference activity by national courts, rather than on qualitative evaluation of the content and styles of judicial communication in the different participating courts throughout Europe. However, as Chalmers comments on Alter's inter-court competition model, 'such a model obscures both the effects of local internal decision-making cultures and asymmetries of knowledge on courts, and the pull exerted by legal discourse and local hierarchies'.[14] How dialogue is conducted will depend on how disputes are processed in specific court structures. It is banal but important to remember that national courts have relationships with each other as well as with the ECJ. These relationships cannot all (or even mainly) be subsumed in depicting courts as 'power-seeking' or 'competitive'. How 'lower' and 'higher' courts perceive each other within a legal order may be a matter of procedural law, of custom or of etiquette; but the perceptions are unlikely to be similar for all types of court even within a single Member State. Once again, this points to the need for careful comparative research.

Others have explained judicial integration (based on the quantitative statistical breakdown of references) by focusing on who pushes cases into courts. This does open a space for explaining differences in dialogue. Stone Sweet and Sandholtz argue that the primordial force creating, and therefore determining,

[11] Above n. 6. [12] Below Part III.A.

[13] K. Alter, 'The European Court's Political Power', (1996) *WEP* 458.

[14] D. Chalmers, 'Judicial Preferences and the Community Legal Order', (1997) 60 *MLR* 165 at 178.

the quantity of preliminary references is litigants wishing to displace certain national rules.[15] There are two issues here which detailed comparative research on gender equality can help with. First, national courts tend to be reduced in actor-focused accounts to being mere conveyor belts between the ECJ and transnational actors. But the preliminary reference mechanism permits access to the ECJ only *via* national courts. Therefore, the central aim of research should be precisely to map and characterise the distinctive relationships which can develop between actors, national courts and the ECJ. Secondly, comparative research on a substantive area such as gender equality can help us isolate more clearly who initiates dialogue with EC sources. We can ascertain whether different kinds of actors are involved in different Member States and what difference(s) this makes to the nature of dialogue with EC sources. We can also see whether different actors mobilise around different parts of the EC labour law canon.

Evaluation of EC judicial dialogue has, unsurprisingly, focused on the ECJ. Accounts of its role have tended to be eulogistic. They concentrate on its achievements in constitutionalising the Treaties and, in particular, its finely tuned sense of judgment in knowing when to stand firm in the face of higher national court intransigence and when to shift ground to accommodate higher national court concerns. In this supranational setting, and in sharp contrast to Folke Schmidt's nation state-centred vision, policy areas such as gender equality are seen as supranational and national courts lose their national identity, which is introduced only in order to demonstrate the struggles of the ECJ with recalcitrant higher national courts. Though neo-functionalists have acknowledged the need to add on an analysis of acceptance by national courts, this extends only to examining the highlights of constitutional battles.[16] Therefore, examining an area such as gender equality which is (sometimes) constitutionally protected but has not sparked off any of the famous constititional battles in EU history can help us test how useful a focus on these is in understanding governance through courts in the EU.

[15] A. Stone Sweet and W. Sandholtz, 'European Integration and Supranational Governance', (1997) 4 *JEPP* 297. A modified version of this can also be found in A. Stone Sweet and W. Sandholtz (eds.), above, n. 8.

[16] W. Mattli and A.-M. Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints', in A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts—Doctrine and Jurisprudence* (Hart, Oxford, 1998). While they accept (at 258) that they need to offer 'a more refined and differentiated definition of the kinds of power that courts actually seek' they theorise on the assumption that all courts which lack specific powers must want them. They do state in their conclusions that a full explanation of the role of courts in integration 'requires combining the neofunctionalist framework with a model of the diaggregated state' and the need to develop 'more specific hypotheses that can account for variation in the legal integration process across countries and among courts within a particular national legal system'.

C. Legal Texts as the Medium of Communication

Law is stripped of its personality in EU integration accounts in a number of ways. It is often reduced to acting as a channel which masks and shields litigants and courts from political attack and lay scrutiny. As Armstrong perceptively comments, 'Political science has discovered the European Court of Justice. But has it discovered law?'[17] In these accounts, law as an institution does not vary according to substantive area, type of court or Member State. But, in any given policy area, dialogue will depend on the organisation of legal sources and the interpretative practices developed around those sources at EC and national level. This can be illuminated by detailed comparative research on the placing of gender equality sources in national law and how this affects the unfolding of dialogue with EC sources. The chapter provides an in-depth study of the genesis and subsequent histories of gender equality remedies in Germany and the UK in order to make and develop this point.[18]

D. Courts as Communicators

Once we include the national courts thoroughly in accounts of integration through courts, new and interesting questions arise about different topics and modes of discourse with EC gender equality sources. Let us think about preliminary references. Do all courts ask questions in a similar way? If not, do the differences track subject area (so that all gender equality references will be similar, as will all free movement of persons' references)? Or is it the type of court sorted by, for instance, level ('lower' *vs* 'higher') or specialisation ('labour courts' *vs* 'administrative courts') which is crucial? Or could it be the 'nationality' of the court (so that all German courts ask gender equality questions in a similar way as do all UK courts) which is the most important factor? In what do the communicative differences and similarities consist? Perhaps the most important issue of all is whether the topic and way of asking a question has a decisive influence on the ECJ's response.

More detailed comparative analysis of gender equality dialogues could also help adjust more interesting work on integration through courts, such as that of Chalmers who has provided the illuminating insight that the bipolarity of judicial relations in the Community legal order, rather than being a price reluctantly paid by the ECJ, and to be dispensed with as quickly as possible, 'accounts for much of its success'.[19] While Chalmers acknowledges the existence of different doctrinal and interpretative traditions amongst the national courts, these are not always knitted into his analysis, with the result that national courts are attributed positions which are monochrome, and

[17] K.A. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration', (1998) 36 *JCMS* 155.

[18] Below Part II.E. [19] Above n.14 at 198.

frequently read off from what the ECJ assumes the national courts' preferences might be. This, in turn, obscures the useful insight that the ECJ's assumptions about what national court preferences should be do not always match up with what they actually seem to be. Two examples from gender equality, developed further in the chapter, will illustrate these points.

A significant part of Chalmers' analysis uses the splitting of authority over rights (ECJ) and remedies (national courts) to back up his bipolar institutional autonomy thesis. It is clear from cases such as *Von Colson* and *Marshall II* that remedies for breach of the ETD did not follow this pattern.[20] Chalmers realises that he must explain this deviation from his predicted outcome. He does this by arguing that the presence of Article 6 in the ETD 'rearranges the social relations between the Court of Justice and the national courts by structuring them around construction of a particular provision'.[21] But this is entirely unconvincing, as he himself indicates when he alludes to the baldness of Article 6 ETD. It was not the wording of the ETD which dictated such an outcome. Therefore, we need to ask again how and why remedies were treated differently in this particular legal policy area. This can only be answered by looking at which courts engaged in processes of dialogue and interpretation resulting in the altering of their social relations in this legal policy area. In other words, the courts themselves rearranged their social relations. Article 6 ETD was merely a useful judicial resource in this process.

The second example concerns his discussion of the lack of horizontal direct effect of directives. He explains this as the ECJ having pulled back from according horizontal direct effect to directives in order to avert a crisis in its social relations with the national courts. He argues that it is obvious from the ECJ's attempts (by widening the meaning of 'state' and developing indirect effect) to minimise this distinction, 'how clearly . . . this offended the Court's cultural bias. Yet if it was to continue to enjoy egalitarian relations with national courts, it had to balk from according Directives horizontal direct effect'.[22] This assumes that national courts are predominantly opposed to according directives horizontal direct effect. However, at least in gender equality cases, this is clearly (often) not the case, as will be seen.[23] This, of course, could mean that some courts can place stronger constraints on the ECJ than others. However, this requires greater specification of national courts' various cultural biases, of how the ECJ finds out about them (or fails to) and disaggregation of when and which courts maintain egalitarian relations with the ECJ.

E. Gender Equality as a Fundamental Right

It has already been mentioned that most EU integration scholars only take note of national courts where well-known constitutional battles have

[20] See below Part II.E. [21] Above n.14 at 187. [22] Above n.14 at 189.

[23] See below Part II.E, Part III.A.II and IV and Part IV.B.IV.

occurred, for example the 'Maastricht' decision of the German Federal Constitutional Court or the relationship between the French *Conseil d'Etat* and the ECJ. However, even if we accepted that constitutional issues are, in some way, a central case for legal integration analysis, a fairly perfunctory analysis of gender equality raises some probing questions. Gender equality is generally viewed as a fundamental right, and has been treated as such by the ECJ, the Community legislature and in many of the national constitutional orders. In all but two (the UK and Denmark) of our six Member States gender equality is protected as a constitutional right. But what does that mean in practice? We can further subdivide by separating out Member States where a court has been given the constitutional power to state that national legislation violates constitutional guarantees of gender equality. If we apply this criterion, France must disappear[24] and we are left with Germany, Italy and Spain. Germany has made 40 preliminary references, Italy has made none and Spain has recently made its first reference. Therefore, the least we can say is that the presence or absence of equality as a justiciable constitutional right does not appear to be straightforwardly correlated to the number of preliminary references made. The German, Italian and Spanish systems certainly present the potential to allow a particular version of 'inter-court competition', in which the lower courts (if we count all courts as 'lower' than the Constitutional Court) play the ECJ's version of gender equality off against the national constitutional court version, to take place. Following Alter, we should find that Spanish and Italian lower courts have deliberately 'chosen' their own constitutional court's version of gender equality over that of the ECJ and that German courts have done exactly the opposite. Perhaps, therefore, we may find that certain unitary explanations of what propels judicial dialogue such as that of inter-court competition, while inaccurate as blanket empirical explanations, may be helpful in explaining more specific phenomena.

It is true that gender equality's status as a constitutionally protected fundamental right raises interesting issues. It could leave a national constitutional court in the position of being the court 'obliged' to refer within the terms of Article 177 EC (now Article 234 EC). Thus it provides us with an opportunity to see how national constitutional courts deal with this role. We know that they very rarely make references. However, gender equality has provided a recent and important example of a reference from the Constitutional Court of the state of Hesse in Germany.[25] It does provide the potential for a 'constitutional moment', that is, when a constitutional court has to deal with a sharply defined conflict between the ECJ's interpretation of gender equality and national constitutional guarantees. But how likely is this to happen and what is its significance? This requires examining more specifically the role of

[24] But see below Part IV.A.I for the application of the constitutional guarantee by the *Conseil d'Etat* to certain legal norms.

[25] Case C–158/97 *Badeck* [2000] ECR I–1875. See S. Simitis, Chap. 5 of this volume.

particular constitutional courts, their relationship with national courts and their development of gender equality jurisprudence. This is done in particular with regard to Spain and Italy.[26]

F. Concluding Remarks

It can be concluded that, to date, although EU integration scholars have identified an important research question—why and how have courts participated in European integration—their answers have often amounted to little more than beguiling stories, spun by extrapolating from narrow and shallow foundations. Fairytale stories of an enchanted Court deep in the grand-duchy of Luxembourg are no longer enough. To carry out detailed qualitative comparative research is to begin the work necessary to build sustainable and satisfying explanations of the role of judicial dialogue in EC legal integration.

First, an adequate account of the role played by judicial dialogue in European legal integration of gender equality requires recognition of the specific constellation of state and supranational legislative commitment to the policy goal of gender equality, mobilisation by actors around such gender equality sources and the endogenous institutional build-up of doctrinal and interpretative practices around gender equality sources in sets of judicial relationships.

Secondly, judicial relationships are built on the necessity of solving concrete disputes (for example, does it contravene particular legal gender equality sources to dismiss a pregnant woman in X circumstances) by interpreting the sources considered to be available and using mechanisms, such as the preliminary reference, when that is considered expedient or unavoidable. We shall see that courts are often not 'strategic' in the sense of wishing to gain power *vis-à-vis* other national courts. What is perceived as 'strategic' is itself heavily defined and limited by the options a given court considers best at any given time, faced with a specific dispute. This will differ for different courts.

Finally, the 'success' of these judicial relationships cannot purely be measured according to endogenous institutional parameters. Hence, it is insufficient to applaud a particular jurisprudential accommodation on the ground that it maintains judicial harmony. Judicial harmony may be indicative of poor decision-making by the ECJ, flowing in turn from heavy reliance on the leading (but not necessarily appealing) suggestions of the referring court. We shall encounter significant instances where supra/national judicial harmony has led to decisions which show either a shared lack of understanding of the legal tools devised to realise gender equality, or a greater desire by the ECJ to be friends with the national courts than to make good law.

The chapter, in order to help test the common assumption that numbers of preliminary references in some way 'track' equality activity at national level, divides the Member States into three couples according to their level of

[26] See below Part IV at A.IV and C.

preliminary reference activity. The most active couple, Germany and the UK, are considered first, followed by the languid couple, who referred later, less and on fewer issues—France and Denmark. Finally, the inactive couple, Spain and Italy, with no decided references at all, will be examined.

PART II THE ACTIVE PRELIMINARY REFERENCE COUPLE: GERMANY AND THE UK

There can be no doubt that courts in Germany and the UK have been the key players in making EC gender equality dialogue happen. Contrary to what is often presumed, German courts have to date in fact made significantly more references (40) than UK courts (30) to the ECJ on gender equality in employment sources. Taken together, references from these two Member States have covered a wide range of challenging issues: the application of equal pay to occupational pensions;[27] various issues relating to equal pay for like work and work of equal value;[28] different aspects of indirect discrimination;[29] issues relating to pregnancy, maternity and childcare regimes;[30] remedies for breach of equality rights;[31] the legality of various types of positive action;[32] whether EC sources prohibit discrimination against transsexuals;[33] or on grounds of

[27] From Germany Cases 170/84 *Bilka* [1986] ECR 1607, C–110/91 *Moroni* [1993] ECR I–6591 and C–379/99 *Menauer* (pending); from the UK Cases 69/80 *Worringham* [1981] ECR 767, 12/81 *Garland* [1982] ECR 359, 19/81 *Burton* [1982] ECR 554, 151/84 *Roberts* [1986] ECR 703, 192/85 *Newstead* [1987] ECR 4753, C–262/88 *Barber* [1990] ECR I–1889, C–132/92 *Birds Eye Walls* [1993] ECR I–5579, C–200/91 *Coloroll* [1994] ECR I–4389, C–408/92 *Smith* v. *Avdel* [1994] ECR I–4435, C–152/91 *Neath* [1994] ECR I–6935, C–246/96 *Magorrian* [1997] ECR I–7153, C–78/98 *Preston*, Opinion of Léger AG, 14 Sept. 1999, judgment 16 May 2000, not yet reported.

[28] Cases 129/79 *Macarthys* [1980] ECR 1275, C–127/92 *Enderby* [1993] ECR I–5535, C–237/85 *Rummler* [1986] ECR 2101.

[29] For those concerning part-time work see below n. 49. For indirect discrimination not concerning part-time work see Case C–167/97 *ex parte Seymour-Smith* [1999] ECR I–623.

[30] From Germany Cases 184/83 *Hofmann* [1984] ECR 3047, C–421/92 *Habermann-Beltermann* [1994] ECR I–1657, C–333/97 *Lewen* [1999] ECR I–7243 and C–207/98 *Mahlburg* [2000] ECR I–549. From the UK Cases C–32/93 *Webb* [1994] ECR I–3567, C–342/93 *Gillespie* [1996] ECR I–475, C–394/96 *Brown* [1998] ECR I–4185 and C–411/96 *Boyle* [1998] ECR I–6401.

[31] From Germany Cases 14/83 *Von Colson* [1984] ECR 1891, 79/83 *Harz* [1984] ECR 1921, C–180/95 *Draehmpaehl* [1997] ECR I–2195. From the UK Cases C–271/91 *Marshall II* [1993] ECR I–4367, C–246/96 *Magorrian* [1997] ECR I–7153, C–326/96 *Levez* [1998] ECR I–7835 and C–78/98 *Preston*, Opinion of Léger AG, 14 Sept. 1999, judgment 16 May 2000, not yet reported. See below E.

[32] From Germany Cases C–405/93 *Kalanke* [1995] ECR I–3051, C–409/95 *Marschall* [1997] ECR I–6363, C–158/97 *Badeck* [2000] ECR I–1875, C–79/99 *Schnorbus,* Opinion of Jacobs AG, 6 July 2000, judgment 7 Dec. 2000, not yet reported.

[33] From the UK Case C–13/94 *P* v. *S* [1996] ECR I–2143.

sexual orientation[34] and the legality of exclusion of women from the police or military.[35]

Though Article 177 EC (now Article 234 EC) is not the be-all and end-all of dialogue, the fact that in a comparative analysis of gender equality dialogues the UK and Germany have made a high and similar number of references is noteworthy and deserves further exploration.[36]

A. Germany and the UK: Who Wants to Talk to the Court of Justice?

The first and most obvious point is that there is an important geographical dimension in the pattern of German references which does not exist in the other Member States. In the 1980s four of the six references made on gender equality came from two courts in North West Germany: Hamburg and Oldenburg. Over the entire period, over half the references (21 out of 40) have come from the four *Länder* making up North Western Germany: Lower Saxony, Hamburg, Bremen and Schleswig-Holstein. Eleven have come from Hamburg alone. If we also include North Rhine Westphalia which neighbours Lower Saxony, 28 of the 40 references (or 70 per cent) would be accounted for. However, it is also important to note some changes between the 1980s and 1990s in the geographical dispersion of these references. Oldenburg, which had played an important role in the 1980s, vanished as a preliminary reference maker in the 1990s.[37] Moreover, despite the continuing concentration of cases in the North West, the 1990s showed a clear tendency towards greater geographical dispersion, as indicated by the fact that three references came from courts in Bavaria. A final novelty has been the first reference from a labour court in one of the new *Länder*.[38]

The second important difference between Germany and the UK is in which courts made references and how this changed over time. We can see this by comparing the tables of references set out below. The table of UK references convincingly refutes blanket claims that lower courts have been the 'motors' of European dialogue between courts. The House of Lords and the Court of Appeal[39] have made almost as many references as all the Employment

[34] From the UK Case C–249/96 *Grant* [1998] ECR I–7153.

[35] From the UK Case 222/84 *Johnston* v. *CC RUC* [1986] ECR 1651, Case C–273/97 *Sirdar* [1999] ECR I–7403; from Germany Case C–285/98 *Kreil* [2000] ECR I–69.

[36] The emphasis will primarily be placed on Germany. For more on the UK see C. Kilpatrick, 'Community or Communities of Courts in European Legal Integration: Sex Equality Dialogues and the UK Courts', (1998) *ELJ* 121.

[37] For why see below n. 77.

[38] Case C–207/98 *Mahlburg*, above n. 30 referred by the LAG Mecklenburg-Vorpommern. The questions referred were similar to those raised in Case C–421/92 *Habermann-Beltermann*, above n. 30.

[39] Court of Appeal in this chap. refers exclusively to the Court of Appeal for England and Wales, not the Northern Ireland Court of Appeal.

Table 1 Preliminary references from UK courts to the Court of Justice on gender equality in employment (as of 1 Jan. 2001)

Court Year	House of Lords	Court of Appeal (England)	Employment Appeal Tribunal	Employment Tribunal (UK)	Other courts
1980s	1. *Garland* Case 12/81, [1982] ECR 359.	1. *Macarthys* Case 129/79, [1980] ECR 1275. 2. *Worringham* Case 69/80, [1981] ECR 767. 3. *Roberts* Case 151/84, [1986] ECR 703. 4. *Marshall* Case 152/84, [1986] ECR 723.	1. *Jenkins* Case 96/80, [1981] ECR 911. 2. *Burton* Case 19/81, [1982] ECR 554 3. *Newstead* Case 192/85, [1987] ECR 4753.	1. *Johnston* Case 222/84, [1986] ECR 1651.	
1990s	1. *Foster* C-188/89, [1990] ECR I-3313. 2. *Marshall II* C-271/91, [1993] ECR I-4367. 3. *Webb* C-32/93, [1994] ECR I-3567. 4. *Brown* C-394/96, [1998] ECR I-4185. 5. *Ex parte Seymour-Smith* C-167/97, [1999] ECR I-623. 6. *Preston* C-78/98, judgment 6 May 2000, nyr.	1. *Barber* C-262/88, [1990] ECR I-1889. 2. *Enderby* C-127/92, [1993] ECR I-5535. 3. *Birds Eye Walls* C-132/92, [1993] ECR I-5579.	1. *Levez* C-326/96, [1998] ECR I-7835. 2. *Coote* C-185/97, [1998] ECR I-5199.	1. *Avdel* C-408/92, [1994] ECR I-4435. 2. *Neath* C-152/91, [1994] ECR I-6935. 3. *P* v. *S* C-13/94, [1996] ECR I-2143. 4. *Magorrian* C-246/96, [1997] ECR I-7153. 5. *Grant* C-249/96, [1998] ECR I-621. 6. *Boyle* C-411/96, [1998] ECR I-6401. 7. *Sirdar* C-273/97, [1999] ECR I–7403.	1. *Coloroll* C-200/91, [1994] ECR I-4389. 2. *Meyers* C-116/94, [1995] ECR I-2131. 3. *Gillespie* C-342/93, [1996] ECR I-475.
Total = 30	7	7	5	8	3

Table 2 Preliminary references from German courts to the Court of Justice on gender equality in employment (as of 1 Jan. 2001)

	LABOUR COURTS			ADMINISTRATIVE COURTS			
	1st instance ArbG	2nd instance LAG	Federal BAG	1st instance VerWG	Other levels	Constitutional Courts	Other courts
1980s	1. *Von Colson* 2. *Harz* 3. *Rummler* 4. *Rinner-Kühn* 5. *Kowalska*		1. *Bilka*				1. *Hofmann*
1990s	1. *Nimz* 2. *Kirshammer-Hack* 3. *Moroni* 4. *Habermann-Beltermann* 5. *Grau-Hupka* 6. *Schmidt* 7. *Herzog* 8. *Lange* 9. *Kussfeld* 10. *Ludewig* 11. *Freers & Speckmann* 12. *Draehmpaehl* 13. *Kruger* 14. *Lewen* 15. *Kutz-Bauer*	1. *Bötel* 2. *Helmig* 3. *Sievers* 4. *Schrage* 5. *Schröder* 6. *Vick* 7. *Conze* 8. *Mahlburg* 9. *Kachelmann*	1. *Kalanke* 2. *Lewark* 3. *Menauer*	1. *Marschall* 2. *Gerster* 3. *Kreil* 4. *Schnorbus*		1. *Badeck*	1. *Kording*
Total = 40	20	9	4	4	0	1	2

Tribunals[40] put together. All have made about a quarter of the total number of references each. This point is underlined by comparing changes in references over time. We can see that Employment Tribunals did not start making references until relatively recently. In the UK, the reception of Community gender equality law was mediated through higher courts. Lower courts started referring more in the 1990s as Community gender equality law became more fully digested by the national system.

This contrasts very sharply with the situation in Germany. Here, the first instance labour courts (*Arbeitsgerichte*) have played a fundamental role in commencing dialogue and have maintained a strong continuing presence. In the 1980s, five courts made six references. Four of these came from three first instance labour courts.[41] Over the total period, first instance labour courts have made around half of all German references on gender equality to the ECJ (19 out of 40). Rather than the higher courts mediating the arrival of EC law as in the UK, here first instance courts have shown the way. In the 1990s, other first instance courts began to participate in preliminary reference dialogue. Overall, 24 of the 40 (60 per cent) German references came from first instance courts. Of particular importance here are the first instance administrative courts, which made important references on positive action and the related issue of indirect discrimination in promotion criteria to the ECJ[42] as well as a reference on the compatibility with EC gender equality sources of norms excluding women from the military.[43] The preliminary reference dynamic created between Community law and *Länder*-level laws on positive action in Germany also precipitated the first reference by a constitutional court in any Member State on gender equality.[44]

B. German and UK Courts: The Substance and Style of Communication

While there are overlaps between the issues German and UK courts want to talk about, there are also important contrasts. Both have recently asked questions on issues which have severely tested the Court's understanding of equality, but in very different ways. Hence UK courts asked whether

[40] These were called Industrial Tribunals (ITs) until 1 Aug. 1998 when, as a result of the Employment Rights (Dispute Resolution) Act 1998, their name changed. As a matter of historical fact, all of the preliminary references made thus far to the ECJ have been made by ITs. Both terms will be used in this Chap.

[41] Cases 14/83 *Von Colson* [1984] ECR 1891, 79/83 *Harz* [1984] ECR 1921, 237/85 *Rummler* [1986] ECR 2101 and 171/88 *Rinner-Kühn* [1989] ECR 2743.

[42] Cases C–409/95 *Marschall*, above n. 32, C–1/95 *Gerster*, below n. 49 and C–79/99 *Schnorbus*, above n. 32.

[43] See the reference in Case C–285/98 *Kreil*, above n. 35 which asked whether the exclusion of women volunteers for the armed forces from active service and their restriction to medical and military-music services was compatible with Community law. See further below n. 88 and Part IV, text accompanying nn. 233–235.

[44] C–158/97 *Badeck*, above n. 32.

discrimination against transsexuals and homosexuals is covered by EC equality sources[45] while German courts asked the ECJ to consider the legality of various types of positive action and, in particular, different forms of quotas for women in the public service.[46] The UK has referred a broader range of, and many more, questions on pensions and retirement.[47] Both have asked searching questions on remedies for breach of EC equality rights.[48]

However, by far the most striking aspect of German references in terms of substance is the predominance of references concerning discrimination against part-time workers. Twenty-five of the 40 references (63 per cent) made by German courts to the ECJ concern indirect discrimination against part-time workers. These were not all clumped in one single time-period and have constituted a continual stream of references to the Court from *Bilka* onwards.[49] It suffices to note that only one UK reference (or 3 per cent of UK references) has concerned indirect discrimination against part-time women workers[50] to bring home the dominance of German courts in creating preliminary reference dialogue on this issue.

From the part-time work cases, we can draw out the style of communication employed by the German courts in referring cases to the ECJ. The chief

[45] Above nn. 33–34. [46] Above n. 32. [47] Above n. 27.

[48] See above n. 31 and below E.

[49] They can, of course, be subdivided according to the type of discrimination experienced by the part-time worker. Six cases concerned the application of Art. 119 EC (now Art. 141 EC) to the exclusion of part-time workers from access to supplementary and occupational pension schemes pre- and post *Barber*: Cases 170/84 *Bilka* [1986] ECR 1607, Joined Cases C–270/97 *Sievers*, C–271/97 *Schrage* [2000] ECR I–929, Joined Cases C–235/96 *Conze*, C–234/96 *Vick* [2000] ECR I–799, C–50/96 *Schröder* [2000] ECR I–743. Six cases concerning exclusion of part-time but not full-time employees from overtime payments when they exceed their contractual hours were considered in the *Helmig* decision of the ECJ—see below n. 52. Three cases concerning the payment of part-time workers who are members of Works Councils/Staff Committees were referred: Case C–360/90 *Bötel* [1992] ECR I–3589, C–457/93 *Lewark* [1996] ECR I–243, C–278/93 *Freers and Speckmann* [1996] ECR I–1165. Three cases concerned national legislation distinguishing between part-time and full-time workers for the purpose of calculating length of service having effects on moving into higher pay scales (Case C–184/89 *Nimz* [1991] ECR I–297), promotion (Case C–1/95 *Gerster* [1997] ECR I–5253) and exemption from examinations (Case C–100/95 *Kording* [1997] ECR I–5289). The others concerned exclusion from sick pay (Case C–171/88 *Rinner-Kühn* [1989] ECR 2743), severance pay (Case C–33/89 *Kowalska* [1990] ECR I–2591), paying part-time employees with a main occupation less per hour than full-time employees in situations where 'main occupation' is treated as including receipt of a pension reduced by loss of earnings as a result of bringing up children (Case C–297/93 *Grau-Hupka* [1994] ECR I–5535), the exclusion of 'minor hours' part-time employees when calculating the number of employees for the purposes of granting employer exemptions from unfair dismissal legislation (Case C–189/91 *Kirshammer-Hack* [1993] ECR I–6185), redundancy selection criteria which disfavour part-time employees (Case C–322/98 *Kachelmann*, Opinion of Saggio AG, 14 Mar. 2000, judgment 14 Mar. 2000, not yet reported, the exclusion of minor workers from eligibility for a bonus set out in a collective agreement (Case C–281/97 *Krüger* [1999] ECR I–5127) and differential retirement ages affecting access to voluntary part-time work (Case C–187/00 *Kutz-Bauer* pending).

[50] Case 96/80 *Jenkins* [1981] ECR 911. See further C. Kilpatrick, above n. 36.

stylistic characteristic is *repetition*.[51] Three different types of repetition can be isolated. UK dialogue is characterised by an absence of any of these forms of repetition.

The first can be termed *same-issue repetition*. It is perfectly illustrated by *Helmig* where six references were made by five different labour courts almost simultaneously on precisely the same issue.[52] We see the same kind of repetition on a smaller scale in *Von Colson* and *Harz*[53] referred by two different labour courts (Hamm and Hamburg) at almost the same time. Indeed, the Court of Justice judgment in *Harz* repeats almost verbatim the *Von Colson* judgment.

The second, which can be termed *same issue, same court repetition*, is well illustrated by the Hamburg *Arbeitsgericht*'s referral of two of the *Helmig* cases within an extremely short space of time.[54] Why would the very same court make two references in rapid succession on the same issue?

The reasons for the third type of repetition, which we can term *persuasive repetition*, are more immediately obvious. The reason for repeated references is to put pressure on the ECJ to change its mind about a previous decision on a similar issue because the referring court does not agree with what the ECJ decided. In no other Member State do courts engage in this practice so explicitly.[55] This practice is perfectly illustrated by the *Bötel* case and the further references which followed it. In *Bötel*, referred by the *Landesarbeitsgericht* (second instance labour court) of Berlin, a female staff committee member claimed that it was indirectly discriminatory not to pay her beyond her part-time hours for attending courses as part of this function which extended beyond her part-time hours. The ECJ agreed that this was indirectly discriminatory and gave strong indications that it would be difficult to provide objective justification for this practice. The two cases[56] which were subsequently referred by the *Arbeitsgericht* of Bremen and the Federal Labour Court (BAG) reveal an utter and very explicit determination not to accept what the ECJ said in *Bötel* and to 'encourage' it to change its mind. They also reveal that this tactic can be very effective.[57] The ECJ shifted position enough to provide

[51] This could explain why the assumption that UK courts have made more references than German courts on gender equality sources exists and is not entirely misplaced.

[52] Joined Cases C–399/92 *Stadt Lengerich* v. *Helmig*, C–409/92 *Schmidt* v. *Deutsche Angestelltenkrankenkasse*, C–425/92 *Herzog* v. *Arbeiter-Samariter-Bund Landverband Hamburg eV*, C–34/93 *Lange* v. *Bundesknappschaft Bochum*, C–50/93 *Kussfeld* v. *Firma Detlef Bogdol GmbH*, C–78/93 *Ludewig* v. *Kreis Segeberg* [1994] ECR I–5727 referred respectively by LAG Hamm, ArbG Hamburg, ArbG Hamburg, ArbG Bochum, ArbG Elmshorn, ArbG Neumünster.

[53] Above n. 31. See also the five cases referred on *inter alia* the relationship between Art. 3 *Grundgesetz* and the *Barber* protocol—*Sievers and Schrage, Vick and Conze, Schröder*, above n. 49.

[54] See above n. 52 Cases C–409/92 and C–425/92.

[55] And arguably not just in the area of gender equality if we consider *Süzen* as a similar attempt in the area of transfers of undertakings. See below Chap. 3, S. Laulom at 163ff.

[56] Cases C–457/93 *Lewark* and C–287/93 *Freers and Speckmann*, above n. 49.

[57] See in particular paragraph 35 of the ECJ's judgment in *Lewark* where it opened up a

sufficient foundation for subsequent national cases on this issue to decide that the practice of not compensating part-time workers beyond their part-time hours was objectively justifiable.[58]

C. The Institutional Dynamics of German and UK Dialogue

How can we understand the very different pictures in terms of courts referring, styles of communication and substantive issues lying behind the high numbers of preliminary references from Germany and the UK?

The crucial explanation for many of these differences in gender equality dialogues is that the German legal system is much more decentralised and pluralistic than (at least) the UK legal system. The UK system encourages courts to think more carefully before making a reference and to organise their references. Set beside Germany, the processes leading to UK preliminary reference dialogue appear orderly and relatively centralised. Hence, institutional litigators—such as the Equal Opportunities Commissions for Great Britain and Northern Ireland, unions and the gay rights campaigning organisation Stonewall—are easily identifiable. They are often nationally organised and pursue planned strategic goals. In combination with litigants and skilful lawyers they have sent a continual stream of cases on gender equality in employment through that part of the UK court system which processes these labour law disputes. The UK courts have, by and large, displayed knowledgeable deference towards EC gender equality norms as interpreted at any given time by the ECJ and other (especially higher) courts in the UK court hierarchy. Courts in the UK tend carefully to check the appropriateness of a reference being made to the ECJ. These features of relative order and centralisation are well illustrated by the *Preston* litigation,[59] which has recently been decided by

space it did not allow in *Bötel* to find the policy objectively justified on the basis of the German legislature's wish to place the independence of staff councils above financial inducements for performing staff council functions: 'Such a policy aim appears in itself to be unrelated to any discrimination on grounds of sex. It cannot be disputed that the work of staff councils does indeed play a part in German social policy, in that the councils have the task of promoting harmonisation labour relations and in their interest. The concern to ensure the independence of those councils thus likewise reflects a legitimate aim of social policy'. It is also worth noting that although the ArbG Bremen referred first and the same AG (Darmon) as in *Bötel* was asked to give his Opinion, the BAG reference was given to a different AG (Jacobs) and decided by a Full Court before decision was given in the ArbG Bremen reference. A sensible recognition of the national hierarchy of courts or a sign that national courts are not all really perceived by the ECJ as 'equal partners' in the preliminary reference procedure?

[58] See the BAG decision of 3 Dec. 1998 reported by A. Hauf in (1998) *EQN*, No.3 where the BAG used the ECJ ruling in *Lewark* to decide that not paying a female part-time worker for hours above her normal week spent on a training course as a Works' Council member was objectively justified.

[59] *Preston* above n. 31. Its passage through the UK courts can be found in [1996] IRLR 484 (EAT); [1997] IRLR 233 (CA); [1998] IRLR 197 (HL).

the ECJ following a reference by the House of Lords. The reference concerns the compatibility of procedural and remedial limits in the British Equal Pay Act with Community law. Behind the *Preston* litigation, there are in fact 60,000 women each of whom lodged a claim with an Industrial (now Employment) Tribunal. Rather than let each of these claims run its own way, they were 'organised' by the UK court system. One Industrial Tribunal Chair was appointed to hear preliminary points of law arising from 22 TUC (Trades Union Congress) co-ordinated test cases.[60] This single decision was then appealed up through the system to the EAT (Employment Appeal Tribunal) and the Court of Appeal before arriving at the referring court, the House of Lords. A similar informed regard for tidy and appropriate references is displayed in the House of Lords' decision to refer. It carefully examined two other references raising similar issues referred from the UK—*Magorrian* and *Levez*.[61] The former had been ruled upon by the ECJ and the latter was still pending at the time of the House of Lords' decision to refer in *Preston*. The House of Lords' decision to refer and the manner in which it phrased the questions in its preliminary reference were heavily conditioned by its opinion that the ECJ had not (in *Magorrian*) or would not be in a position (in *Levez*) to provide full and clear answers to the questions needed to deal with the issues raised by *Preston*. Hence, the UK courts make efforts to ensure that repetitious references are not made. In Germany, there is much less national repackaging of cases for the ECJ than happens in the UK. Hence, the *Arbeitsgericht* in Hamburg which sent back-to-back two references on the same issue in *Helmig* did so because the second case made it think of a slightly different (and more extensive) way of formulating the issues.[62]

Of course, the tendency towards orderly, deferential centralisation in the UK is precisely that—a tendency, not a rule. Examples of 'maverick' (and prescient) lower courts bucking this trend are the Truro Industrial Tribunal which referred *P* v. *S*[63] and the Industrial Tribunal which used the ETD to award Ms Marshall full compensation and interest for the loss she suffered as a result of her discriminatory dismissal.[64] Maverick, though in a rather

[60] See the thought-provoking comments of the Industrial Tribunal Chair in that hearing: 'Donovan cannot possibly have contemplated that a chairman sitting alone should be called upon to disapply provisions of UK law, having first determined the interaction between UK and European substantive law, procedural and jurisdictional time limits in a handful of test cases representing some 40,000 [now 60,000] applicants with claims said to be worth in excess of £100m with 11 counsel, including three silks, addressing him on three questions of law, over five days. But that is precisely what happened to me in the part-time workers pension cases': J.K. MacMillan, 'Employment Tribunals: Philosophies and Practicalities', (1999) 28 *ILJ* 33 at 43.

[61] Above n. 31. For detailed discussion of *Magorrian*, *Levez* and *Preston* see C. Kilpatrick, 'Turning Remedies Around–A Sectoral Analysis of the Court of Justice' in G. de Búrca and J.H.H. Weiler (eds) *The European Court of Justice* (OUP, Oxford, 2001).

[62] See above n. 54. [63] Above n. 33.

[64] The next court to agree with its analysis was the ECJ five years, three appeals and a reference later. See further below E.III.

different sense, are those courts—in recent years particularly the EAT and Court of Appeal—which have refused to refer even where such a reference seems appropriate. Two examples will illustrate this. The first is whether the ETD permits non-compliance with sex-specific dress-codes to constitute a disciplinary or dismissable offence—an issue the EAT and Court of Appeal seem determined to keep away from the ECJ.[65] The second is the compatibility of various procedural and remedial limits in UK labour law with EC law. Here again, the EAT and Court of Appeal have proved extremely reluctant to refer. This, in turn, produced a third 'maverick' phenomenon, illustrated by *Levez*.[66] The preliminary reference in *Levez*—which concerns remedial limits in the Equal Pay Act 1970 and was referred by the EAT—was the outcome of the two EAT lay members outvoting the judicial President to decide that a reference was necessary. For the lay members to outvote the EAT President is very rare; to do so and make a reference is, to my knowledge, a unique occurrence.[67] However, these examples stand out precisely because they are unusual in the orderly and centralised British judicial landscape.

By contrast, each German court constitutes in an important sense its own small kingdom with a local cast of characters (lawyers, judges, academics, etc) and norms. Decentralisation is also reflected in the fact that it is much more difficult *prima facie* to explain how cases get into courts and are pushed towards the ECJ from Germany than from the UK. In the UK the Equal Opportunities Commissions (EOC) have played a pivotal role which has been elaborated and built upon by unions and pressure groups.[68] There is no such thing as the EOC in Germany. It also seems that the obstacles to taking gender equality cases to court are equal if not greater in Germany than in the UK.[69] So how did these 40 references get to the ECJ? Given the evidence that the German system has an important 'local' dimension, we should work on the assumption that our answers will reflect these characteristics of decentralisation and localisation.

A lower degree of centralised control explains why one of the characteristics of the German references is same-issue repetition. Where fewer or weaker mechanisms, whether legally articulated or socially observed, for judicial coordination exist, the possibility of more references being made on almost identical issues increases. Where no local personalities exist who wish to

[65] See e.g., *Smith* v. *Safeway plc* [1996] IRLR 456 (CA), *Blaik* v. *The Post Office* [1994] IRLR 280 (EAT), *Burrett* v. *West Birmingham Health Authority* [1994] IRLR 7 (CA).

[66] Above n. 31.

[67] [1996] IRLR 499.

[68] See C. Kilpatrick, above n. 36 and C. Barnard, 'A Euro-litigation Strategy: The Case of the EOC' in J. Shaw and G. More (eds.) *New Legal Dynamics of the European Union* (OUP, Oxford, 1996) 254.

[69] See K. Bertelsmann and U. Rust, *Equality in Law between Men and Women in the European Community—Germany* (Martinus Nijhoff and OOPEC, Nijmegen, 1995). The volume states the law as at 1 Jan. 1992.

pursue EC-oriented gender equality objectives, no references are made. This explains the geographical dimension of references in Germany. Three important types of local personality exist: courts (as institutions), law activists (in particular judges, lawyers and academics), and political parties. I will examine these in reverse order.

D. Political Parties, Law Activists and Courts in Germany

Debates over gender equality in Germany are sharply divided along political lines. The fights over the legality of various types of positive action are merely the most visible sign of this political division.[70] The battle over the legality of various forms of positive action is both local as the norms being challenged are adopted at State level, and federal because Article 3 II *Grundgesetz*[71] has been understood to mandate the positive action measures adopted by various *Länder*.[72] EC law has been instrumentalised by 'both sides' involved in the positive action debate to try to silence their opponents. Many (including the Federal Labour Court in *Kalanke*[73]) expected the ECJ to give the kinds of positive action measures used in Germany its blessing and hence to place a super 'supremacy-heavy' seal of approval on quotas and other positive action measures. When this was not forthcoming, it was the turn of those opposed to these measures to try to seise the ECJ. Hence, the protagonists in the heavily symbolic reference by the Constitutional Court of Hesse were Christian Democrat deputies (the first in alphabetical order is Mr Badeck) contesting the legality of positive action measures.[74]

Turning to our second category, law activists, let us look first at judges. Certain labour court judges in the North West of Germany in the 1980s and 1990s had a number of characteristics which profoundly affected the conduct of German gender equality dialogue. They were young, EC law-educated, active as academic labour lawyers and politically committed to the goal of gender equality in employment. This helps explain the fact that references were frequently made even when the litigants were unrepresented and the daring propositions put forward in many of these references for the ECJ to

[70] See below at text accompanying n. 109 the political battles over remedies for gender discrimination in recruitment in Germany.

[71] Art. 3 of the *Grundgesetz* states: (I) All persons shall be equal before the law (II) Men and women shall have equal rights (III) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. Translation from B.S. Markesinis, *The German Law of Obligations Volume II—The Law of Torts: A Comparative Introduction* (Clarendon Press, Oxford, 1997) 370.

[72] See J. Shaw, 'Positive Action for Women in Germany: The Use of Legally Binding Quota Systems' in B. Hepple and E.M. Szyszczak (eds.) *Discrimination: The Limits of Law* (Mansell, London, 1992) 386; D. Schiek, 'Sex Equality Law after Kalanke and Marschall', (1998) *ELJ* 148.

[73] Above n. 32.

[74] Above n. 32. See *S*. Simitis, this volume.

consider. A good, though not the only,[75] example here is Ninon Colneric who presided over the Labour Court in Oldenburg in the 1980s. She referred *Rummler* and *Rinner-Kühn*[76] to the ECJ and has made many academic contributions in the field of gender equality in employment.[77]

Also concentrated in the North West of Germany were a small number of 'advocate/academics' who wrote academic articles arguing that EC law required amendments to German legislation or particular interpretations of gender equality norms by courts. One can find these same articles cited by the labour courts in their judgments as a result of cases where the litigant was represented (and sometimes sought out) by the 'advocate/academic'.[78] It is unsurprising that this combination of EC-oriented judges and lawyers in North West Germany[79] influenced the geographical dispersion of references and the decision to make references to the ECJ (rather than, for example, turning to the Federal Constitutional Court).

The most interesting example to look at is Hamburg. Courts in Hamburg have made 11 references—over a quarter of the total number of gender equality references to the ECJ from Germany. This seems to be in large part due to a lawyer working at the Hamburg bar—Klaus Bertelsmann—and his colleagues, in particular Heide Pfarr, who have invested considerable energies in taking cases on gender equality. For example, *Hofmann* seems to have been initiated by Mr Bertelsmann.[80] Evidence for this is that the *Mutterschutzgesetz*

[75] Other cases where the employee was unrepresented and it seems that the national court did all the EC work itself and decided to refer are more than half the *Helmig* references, above n. 52, the reference by the ArbG Regensburg in *Habermann-Beltermann,* above n. 30, and the ArbG Berlin in *Grau-Hupka*, above n. 49.

[76] Above at n. 41.

[77] Gisella Rummler was unrepresented before the Oldenburg Labour Court. Colneric has written extensively about gender equality in both German and English. A particularly good example is her (academic) discussion of her labour court's (judicial) decision to refer *Rinner-Kühn*—'Anm. Zu ArbG Oldenburg v. 5.5.1988', (1998) *Streit—Feministische Rechtszeitschrift* 126. Ninon Colneric moved from Oldenburg to become President of the *Landesarbeitsgericht* of Schleswig-Holstein. Her disappearance from the Oldenburg Labour Court corresponded with its decline as an active preliminary-reference maker. In July 2000 she became the German judge at the ECJ. She is also a Professor at the University of Bremen and a visiting professor at the University of Hamburg. For further discussion of *Rummler* see below the discussion of dialogue in Spain, Part IV.A.

[78] For a good example see the LAG Hamburg decision of 11 Feb. concerning remedies for gender discrimination discussed below n. 106. The case was argued by Mr Bertelsmann, the LAG cites in support of its reasoning H. Pfarr and K. Bertelsmann, *Gleichbehandlungsgesetz. Zum Verbot der unmittelbaren und der mittelbaren Diskriminierung von Frauen im Erwerbsleben* (Wiesbaden, 1985) No.152 and the case is translated in English in K. Bertelsmann and U. Rust above at n. 69 at 181–3.

[79] For collaborative work between 'advocate/academics' and 'judge/academics' see K. Bertelsmann, N. Colneric, H. Pfarr and U. Rust, *Handbuch zur Frauenerwerbstätigkeit—Arbeitsrecht, Sozialrecht, Frauenförderung* (Neuwied, 1993, loose-leaf).

[80] *Hofmann*, above n. 30. The ECJ was asked whether reserving a portion of extended optional leave following the birth of a child to the mother contravened the ETD. For further discussion see C. Kilpatrick, 'How Long is a Piece of String? European Regulation of the

(Maternity Protection Act) came into force on 25 June 1979. A mere three weeks later Ulrich Hofmann brought proceedings before the Federal Constitutional Court, arguing that it contravened Articles 3 II and III *Grundgesetz*.[81] He simultaneously lodged an administrative appeal and it was the refusal of this claim at various levels that eventually led the *Landessozialgericht* Hamburg to make a preliminary reference. Between the hypothesis that Mr Hofmann was an extremely knowledgeable individual who launched all these claims on his own and the hypothesis that Mr Bertelsmann was looking for a test-case to challenge this law, the latter seems more plausible. The plaintiffs in *Kowalska* and *Nimz* were also represented by Mr Bertelsmann and Professor Pfarr.[82] The referring judgments show a sharp understanding of EC law and strongly encouraged the ECJ to decide in the way that it did. *Draehmpaehl* was also 'set up' by the same pair.[83]

As well as 'advocate/academics' there are also some significant examples of 'academic/advocates' playing a role in German gender equality references. Hence, Professor Simitis represented the state of Hesse before the ECJ in the *Badeck*[84] reference and Professor Däubler represented Petra Kirshammer-Hack before the ECJ.[85]

With regard to our third group, courts as institutions, we need to examine the lower labour courts' relationship with, in particular, the Federal Labour Court (BAG). It should not be implied from the discussion this far that the BAG does not play a pivotal role in the German system. It is a court of high authority and, once the BAG has pronounced on a particular issue, its position will generally be followed by labour courts in the *Länder* (the *Arbeitsgerichte* and the *Landesarbeitsgerichte*). However, the relationship between higher court and lower courts differs from the more orderly and cautious deference shown by Employment Tribunals and the Employment Appeal Tribunal in the UK to higher courts in two ways.

First, *until* the BAG has been seised of a specific issue, those lower labour courts with active judges and lawyers have felt at much greater liberty than

Post-birth Period' in T.K. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley, Chichester, 1996) 81.

[81] For the German Federal Constitutional Court's conclusion that the constitutional appeals were inadmissible because the fathers had insufficient chance of making out a breach of Art. 3 II *Grundgesetz*: see its decision of 5 Aug. 1986, (1986) *DB* 2286; reproduced in summary in English in K. Bertelsmann and U. Rust, above n. 69, at 222. On 1 Jan. 1986 the law was changed to extend the right to take this period off to fathers.

[82] For *Kowalska* and *Nimz* see above n. 49. It is worth noting that Mr Bertelsmann went on to assist the Commission in two references from Bavaria and Berlin—*Gerster* and *Körding* above n. 49. A further institutional actor to consider in Hamburg is the Regional Department promoting equality between men and women in Hamburg which played a role in *Harz,* above n. 41.

[83] See above n. 41 and below E.III.

[84] See S. Simitis, this volume.

[85] Above n. 49. They are, respectively, Professors of Labour Law at the Universities of Frankfurt and Bremen.

their UK counterparts to be innovative protagonists in preliminary reference dialogue and interaction with EC sources. If and when an issue winds its way to the BAG they will generally follow its pronouncements but, in the meantime, lower labour courts view the field as free(r) for experimentation.[86]

Secondly, while lower courts in Germany generally follow the decisions of the relevant Federal Court, there is also a practice of lower courts 'rebelling' against particular solutions adopted by higher courts. As Markesinis notes in relation to private law courts:

> It is not unknown for the various State Courts of Appeal to 'rebel' against a particular decision of the Supreme Court. Sometimes . . . the rebellion will be shortlived and within a relatively short period of time the Bundesgerichthof will manage to reassert its will; in other instances, however, the reactions of the Courts of Appeal may be stronger and more persistent, which can force the Bundesgerichthof to reconsider its own decision on the matter.[87]

This is crucial for understanding the conduct of gender equality dialogue in Germany. First, EC sources are a new resource potentially available for deployment in disputes with higher courts, such as the BAG, in the German system.[88] Secondly, the ECJ is also seen as a 'higher court' for these particular purposes by both the lower labour courts and the Federal Labour Court. Hence, if German courts do not like a particular decision from the Luxembourg Court, it will be 'normal' to rebel either through repeated references asking it to reconsider its stance or, potentially, through the withdrawal of co-operation. It is in this context that we must view the post-*Bötel* references in *Lewark* and *Freers and Speckmann*.[89] So we see that competition between courts is a general feature of the German legal landscape. EC sources and the ECJ are both absorbed into and affect the playing out of this general practice.

All of these institutional features have of course been developed in Germany and the UK against the backcloth of other institutional realities: the national organisation of gender equality in employment norms, doctrinal and interpretative practices and the responsiveness of the legislature to changes in the

[86] See below E.II.

[87] B.S. Markesinis, above n. 71, at 11.

[88] A good example of this in the context of the administrative courts is the reference to the ECJ in Case C–285/98 *Kreil,* above n. 35. Art. 12a of the German Constitution provides that women may not render service involving the use of arms. On 30 Jan. 1996 the Federal Administrative Court decided that this did not contravene other provisions, including the gender equality guarantee in Arts. 3(2) and (3) of the Constitution. The decision of the Hannover first instance administrative court to refer seems driven by unwillingness to accept that argument against a background of academic debate about whether Art. 12a of the Constitution applies only to obligatory, rather than voluntary, military service, and how it should be interpreted, given that it derogates from other, fundamental, rights contained in the German Constitution; for further references see the Opinion of La Pergola AG in *Kreil*, 26 Oct. 1999, n. 7.

[89] Above text accompanying nn. 55–58.

policy environment. To illustrate and develop this, we briefly turn to analyse in more depth some aspects of a crucial dialogue conducted by UK and German courts—that concerning remedies for breach of EC gender equality in employment rights. Because of space constraints, and the fact that some analysis of how UK courts engage in dialogue with EC gender equality sources is available elsewhere,[90] the German aspects of this dialogue will be given greater prominence. Participation by UK courts will therefore be explored where this helps to explain the specificities of the German judicial operating context.[91]

E. Dialogue on Remedies for Breach of EC Gender Equality Rights[92]

I Creating Dialogue—*Von Colson* and *Harz*

The remedies available for gender discrimination at work in Germany precipitated the first references from German courts on gender equality (and the first references from any Member State on the remedies EC gender equality provisions might require). Germany implemented its obligations under the EPD and the ETD in 1980 by inserting some new paragraphs (or §) into the German Civil Code (the *Bürgerlich Gesetzbuch*, or BGB).[93]

As formulated in 1980, §611a II BGB explicitly stated that an employer who breached the prohibition of discrimination when no contract had been formed only had to compensate for one type of pecuniary loss—negative interest.[94] The wording of §611a II BGB meant that non-pecuniary loss was also excluded as a head of recovery. The negative interest, or out-of-pocket expenses incurred, in recruitment cases invariably involved only the costs involved in posting an application. §611a II BGB came to be dubbed the 'postage paragraph'[95] as courts found themselves able only to award the costs of an envelope and a postage stamp. This was precisely the situation in which

[90] C. Kilpatrick, above n. 36.

[91] For an analysis examining the ECJ's development of all these cases see C. Kilpatrick, above n. 61.

[92] I am greatly indebted to a number of people for help with this section. Julian Rivers and Spiros Simitis engaged in very helpful discussions on the workings of the German Civil Code. Ninon Colneric provided a transcript of the Arbeitsgericht's decision in *Draehmpaehl* in the wake of its preliminary reference and the ECJ's preliminary ruling and other materials on the 1998 law. Paul Skidmore translated and discussed German cases and comments with me.

[93] The German Civil Code came into force on 1 Jan. 1900. Within the contractual part of the Code are §§611–630 which set out the basic rules of labour law. §611a BGB concerns equal treatment on grounds of sex in employment.

[94] Pecuniary loss is divided into negative interest (*Vertrauensschaden*) and positive interest (*Erfünglungsschaden*). Positive interest—expectation or profit losses—is only available when a contract exists or where it is specified by the legislature.

[95] G. Freis, 'Das Gesetz zur Änderung des Bürgerlichen Gesetzbuchs und des Arbeitsgerichtgesetzes—Zur Neugestaltung der Haftung des Arbeitsgebers bei geschechtsspezifischer Diskriminierung', (1998) *NJW* 2779.

the plaintiffs in *Von Colson* (before the Hamm Labour Court) and *Harz* (before the Hamburg Labour Court) found themselves. The labour courts in both cases asked the ECJ preliminary questions to attempt to ascertain what remedies the ETD might require.

The ECJ's response[96] is well-known. Its principal finding was that the ETD did *not* contain any provision concerning sanctions for discrimination which was sufficiently precise and unconditional to require Member States to adopt a particular type of sanction or to be relied upon by individuals before national courts. However, it is the two caveats with which the Court flanked this finding which has made the *Von Colson* decision infamous.

The first caveat was that while Community law did not require Member States to adopt any particular type of sanction, the general purpose of the directive and, in particular, its Article 6 required sanctions appropriate to achieving real equality of opportunity[97] and guaranteeing real and effective judicial protection. The Court stated that this meant that sanctions had both to have a deterrent effect on the employer and to be adequate in relation to the damage sustained. It stated that nominal compensation, such as refunding postage costs incurred in applying for the job, would not satisfy these requirements. The second caveat was that although the remedial provisions were not directly effective before national courts, Article 5 (now Article 10) of the EC Treaty required courts to interpret their national laws in conformity with the ETD, in so far as they had discretion to do so under national law. This has become known as 'indirect effect'.

II Dealing with Von Colson—Historically Constituted Spaces for Judicial Manoeuvre

The Court's preliminary rulings (referred to simply as *Von Colson*) set up a particularly defined operating space within which national remedial limits in the area of gender equality could be challenged. National courts were urged to read their national norms in line with the requirement that sanctions be adequate and have a deterrent effect on the employer.

However, *at first sight* remedial provisions in both Germany and the UK seemed equally unamenable to a 're-reading' in the light of Community gender equality provisions. As we have seen, the German recruitment provision clearly spelt out that only negative interest could be awarded. In the UK, both statutes governing gender equality in employment, the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EqPA), contained clearly defined

[96] Above n. 31.

[97] Para. 22 in *Von Colson* and *Harz* states: 'It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the Directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.'

remedial limits. The SDA (section 65(2)) set a ceiling on compensation for breaches of the employment provisions of that Act. The EqPA (section 2(5)) limits backpay for failure to respect the principle of equal pay to two years prior to the institution of proceedings. So, though it was much less obvious than it had been in relation to §611a II BGB that the UK provisions did not provide 'adequate' compensation, in both systems the clearly worded nature of gender equality provisions concerning remedies seemed to preclude any judicial scope for intervention.

Indeed, this was how UK courts and litigants generally treated it. The clear statement in *Von Colson* that Article 6 ETD was *not* directly effective with regard to remedies, a finding confirmed in the Northern Irish reference of *Johnston*,[98] meant that remedial limits (as opposed to remedial access) in the UK were not challenged for some time.

The challenge came when Ms Marshall commenced her second round of litigation in 1988.[99] The Industrial Tribunal which allowed her claim did so on the ground that the obligation to provide adequate sanctions under the ETD was vertically directly effective.[100] It used this finding to ignore the ceiling in section 65(2) SDA and award Ms Marshall substantially more compensation and interest. Prescient as this may have been, on the basis of what the Court said in *Von Colson,* it was unwarranted. The reason the Court developed 'indirect effect' in *Von Colson* was not that Von Colson was claiming against a private employer (the defendant was the State). It was that Article 6 ETD was not sufficiently unconditional and precise to be directly effective. It was this—and not a problem of lack of vertical direct effect—which meant that neither Von Colson nor Harz (or anyone else) could directly invoke Article 6 ETD before national courts. Indeed this is precisely what the EAT and the Court of Appeal relied upon to reverse the Industrial Tribunal's judgment.[101]

It is important to see that all the UK courts, including the Industrial Tribunal, in the *Marshall II* litigation were united in their conviction that there was no judicial space to re-read a clearly worded statutory remedial

[98] See para. 58 of the ECJ decision in *Johnston*, above at n. 35, where the Court explicitly distinguished the *Von Colson* situation (no direct effect 'as far as any sanctions for any discrimination are concerned') from that present in *Johnston* which concerned access to court to obtain a judicial remedy.

[99] For the first round see Case 152/84 *Marshall* [1986] ECR 723.

[100] [1988] IRLR 325. See above text accompanying n. 64.

[101] [1989] IRLR 459 (EAT); [1990] IRLR 481 (CA). Note that while the EAT considered the compensation awarded under the SDA was 'a substantial right' and therefore adequate, the Court of Appeal held (2–1) that, 'it is arguable that the limit of allowable compensation under the Act is inadequate and consequently that the UK may not have adequately complied with Article 6. However the European ECJ in *Von Colson* . . . plainly ruled that the provisions which the Court held to be implicit in Article 6 are not 'unconditional and sufficiently precise' so as to have direct effect. Therefore, neither the limit on compensation imposed by s.65(2), nor the absence of power in an Industrial Tribunal to award interest in a sex discrimination case, could be treated as overruled by the Directive itself'.

limit. Moreover, in the absence of that space, there was no further judicial mandate to roam into other national legal territory in order to provide a remedy. Only direct effect, which the Court had expressly denied to Article 6 in *Von Colson*, could help applicants get round a clearly worded remedial limit in UK law. While the Industrial Tribunal attributed direct effect to Article 6, the House of Lords chose instead to ask the ECJ whether its *Von Colson* position on direct effect still stood.

Hence, when Lord Templeman in *Duke* v. *GEC Reliance* considered the duties of the German courts in the wake of *Von Colson*, he did it by imagining that a German court would perceive itself to be constrained in a similar fashion to a UK court.

> The *Von Colson* case is no authority for the proposition that the German court was bound to invent a German law of adequate compensation if no such law existed and no authority for the proposition that a court of a Member State must distort the meaning of a domestic statute so as to conform with Community law which is not directly applicable.[102]

In fact, what actually happened to *Von Colson* before the German courts underlines that whether a court is 'inventing law which does not exist' or 'distorting the meaning of a domestic statute' is an issue which differs according to the legal structuring of policy areas in different national systems and different interpretive practices which have developed around legal structurings in those systems. What is regarded as alternative and creative in one system may be regarded as wholly unacceptable or much closer to the boundaries of what is considered to be controversial in another.

Legislative inaction in Germany, which lasted for a full decade (1984–94) after the preliminary ruling in *Von Colson*, forced dialogue between German labour courts on the possibilities for judicial action within the terms of the German Civil Code.

The referring courts, the *Arbeitsgerichte* in Hamm and Hamburg, both did the same thing on receipt of the Court's preliminary rulings.[103] The option of 're-reading' the postage paragraph (§611a II BGB) was not open. So they completely ignored it. Turning instead to the tortious provisions of the German Civil Code, they both reached the conclusion that the plaintiffs required six months of the pay they would have received in order to compensate them for breach of their personality rights and to fulfil the requirement of effectively deterring the employer set out by the ECJ in its preliminary rulings in these cases.

Reaching the conclusion that the plaintiffs should receive six months' compensation for breach of personality rights required a number of intermediate steps. Reliance was placed principally on §823 I BGB which is the general tortious liability principle:

[102] *Duke* v. *GEC Reliance* [1988] IRLR 118 (HL) at 123.

[103] ArbG Hamburg (1985) *DB* 1402; ArbG Hamm (1984) *DB* 2700.

A person who wilfully or negligently injures the life, body, health, freedom, property or other right of another contrary to law is bound to compensate him for any damages arising therefrom.

§823 I BGB does not explicitly include breach of personality rights, and liability for such breach has been built by the courts on the words 'or other right' in this paragraph. The next step involved finding a textual base for awarding non-pecuniary loss for breach of personality rights. The basic position (§253 BGB) is that no compensation for non-pecuniary loss will be awarded in German private law unless explicitly provided for in the Civil Code itself or another statute. §847 BGB is an exception to this basic position. It permits a quantum of damages for certain types of non-pecuniary loss which are explicitly listed. This list—bodily injury, injury to health, loss of freedom—does not include loss of personality rights. However it has been interpreted to cover this by the German courts provided that there has been a significant violation of the law concerning respect for human personality and the individual would remain unprotected in the absence of compensation.

The crucial point illustrated by the path taken by the courts in *Von Colson* and *Harz* is that the reading of these tortious provisions which permits this solution is both *textually unorthodox* and *judicially established*. More specifically, the positioning of gender equality remedies within the German Civil Code provided a very distinctive space for manœuvre. The German Civil Code is a century old.[104] The views of its makers have sometimes proved difficult to fit with changing needs and views put to the judiciary. The judiciary, given these opportunities and placed under these pressures, has creatively developed and extensively spun webs between its provisions in order to modify the cover of its protection.[105] However, at the same time, the German legislature had very recently stated (in 1980) what the remedy should be in this specific instance. Because of this, not all labour courts agreed with applying the well-established judicial developments on breach of personality rights here.[106] These differing first instance judicial opinions persisted until

[104] And, moreover, was seen by Gustav Radbruch as a Code which, even at its birth, was more attuned to 'the cadence of the nineteenth than the upbeat to the twentieth century', quoted in K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1998) 144.

[105] One of the most famous examples is the development of tortious liability for breach of personality rights used by the labour courts here in the wake of the ECJ decision in *Von Colson*—see B.S. Markesinis, above n. 71 at 63–8 and 376–416. The other famous example is also very pertinent to the subject matter of this chapter. This is the huge wave of judicial activism involved in the so-called 'constitutionalisation' of family law by the civil courts and the Constitutional Court. This was provoked by the legislature's failure to obey Art. 117 of the *Grundgesetz* and abolish all legal norms which were incompatible with the guarantee of gender equality in Art. 3 II GG by 31 Mar. 1953. The courts declared the relevant provisions of the BGB to be incompatible with Art. 3 II GG and fashioned a new constitutionally compatible law of marriage—see B.S. Markesinis, above n. 71, at 27ff.

[106] Compare ArbG Oberhausen (1985) *NZA* 252, LAG Frankfurt (1988) *DB* 131, LAG Hamburg (1987) *AiB* 268 (awarded compensation for breach of personality rights) with

1989 when the Federal Labour Court (BAG) heard two cases on this issue on the same day.[107]

The BAG devised a remedial solution which drew on both strains of opinion in the lower courts. It agreed with both sets of lower courts that the wording of §611a II BGB permitted only 'negative interest' to be awarded and could not be 're-read' to provide a greater remedy. However, unlike the labour courts of Hamburg and Hamm which had made the two references, it retained the place of §611a II BGB in discrimination remedies by stating that those discriminated against in recruitment should be awarded negative interest (that is, postage costs). But, agreeing with the receiving courts in *Von Colson* and *Harz*, the BAG found that this contract-based claim did not prevent an independent tortious claim for breach of personality rights. However, the BAG stated that compensation for breach of personality rights in these instances should not be six but, rather, one month's pay. This conclusion on the value of the remedy needed was based on three grounds. First, the BAG compared the remedies available for unfair dismissal and observed that six months' pay would be awarded only in the event of unfair dismissal to an employee with several years' service. Secondly, it was relevant in deciding on the value of a remedy that the German legislature clearly wished to provide the minimum compensation necessary to comply with EC law. Finally, the BAG looked to the Court of Justice's decision in *Von Colson* for guidance.

This is instructive for a number of reasons. First, it took five years for the BAG to pronounce authoritatively on how *Von Colson* applied in the context of the German Civil Code. This is, therefore, a concrete illustration of how a pattern of first instance court referral in Germany can leave the field open for lower court experimentation for a relatively long period of time.

Secondly, it reveals interesting interactions between the national legislature, the government and the courts in Germany. The German government had argued before the ECJ in *Von Colson* that Germany was not in breach of Community law because German law could be read so as to provide a greater remedy than the costs of postage.[108] It seems likely that this emboldened the ECJ to take the step it did towards 'indirect effect'. The legislature's subsequent inaction both meant that the courts had to decide how to draw on the Civil Code to provide a remedy and influenced (by indicating that a low level of compensation was acceptable) how the courts went about that task. However, crucially, the placing of remedies for gender discrimination within the particular historically developed legal space occupied by the German Civil Code meant that, unlike in the UK, there was still somewhere for the judges potentially to go even when the ETD was not directly effective and the specific

LAG Niedersachen (1985) *NZA* 327 (refused to depart from the specific remedy in §611a II BGB). See also below the reception of *Draehmpaehl* at text accompanying n. 117.

[107] BAG, 14 Mar. 1989 (1990) *NJW* 65 and 67. One of the cases which came before the BAG was the LAG Hamburg decision discussed above at n. 78 and n. 106.

[108] See [1984] ECR at 1907–8.

provision dealing with remedies for gender discrimination was insusceptible to the 'indirect effect' treatment.

Following the 1989 decision by the BAG, the legislature finally began discussing how to amend §611a II BGB. This illustrates the politically controversial nature of gender equality in employment issues in Germany. The long passage towards legislative reform was riven by political division, with the SPD-dominated *Bundesrat* (the upper house containing representatives from the *Länder*) proposing broader reforms and the Christian Democrat-dominated *Bundestag* wishing legislatively to enshrine the Federal Labour Court's decision of one month's pay as compensation.[109] The final compromise outcome was the second Equality Law in 1994 which amended §611a II BGB to allow for up to three months' pay. This was counterbalanced by an amendment to the Labour Courts' Act which provided that where more than one person had been discriminated against the maximum total compensation burden on the employer would be six months' pay if there was one post, or 12 months if there were several posts.

III The effect of Marshall II

However, this action by the German legislature in 1994 already looked like a clear case of 'too little, too late'. This was because the year before the ECJ had considered the House of Lords' reference in Ms Marshall's case challenging the upper limit on compensation for gender discrimination under UK law.[110] The Court made a two-step shift from its position in *Von Colson*. First, this time round 'adequate' compensation was interpreted as requiring *full* compensation with interest for any loss suffered. Secondly, the enforceability of Article 6 underwent a transformation. While it had stated that the ETD was not directly effective in matters concerning remedies and sanctions in *Von Colson* and *Johnston*, now the Court considered that 'the fact that Member States may choose among different solutions in order to achieve the objective pursued by the Directive depending on the situations which may arise cannot result in an individual's being prevented from relying on Article 6 in a situation such as in the present case where the national authorities have no degree of discretion in applying the chosen solution'.

Whatever the reasons for this radical intensification of meaning and shift in effect by the Court, the UK legislature swiftly responded by removing the upper limit on compensation in the SDA.[111] Though *Marshall II* cast immediate suspicion on other UK remedial limits in gender equality, the UK

[109] G. Halbach, N. Paland, R. Schwedes and O. Wlotzke, *Labour Law in Germany—An Overview* (Federal Ministry of Labour and Social Affairs, Bonn, 1994) 54.

[110] Above n. 31.

[111] The upper limit on compensation was removed by The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993/2798), made by the Secretary of State for Employment under s.2(2) of the European Communities Act 1972.

had clearly complied for the time being with its EC law obligations.[112] By contrast, the German law passed the year after *Marshall II* was obviously very unlikely to comply with EC law. This had been pointed out by Mr Bertelsmann, an 'advocate/academic' at the Hamburg bar discussed earlier,[113] during the consultation procedure prior to the 1994 law. When it came into force, he fulfilled a promise made during the consultation procedure that, if necessary, he would take a test case to prove its incompatibility with Community law.[114]

Urania, a small private company, had placed a newspaper advertisement which asked explicitly for a woman. Mr Bertelsmann and Professor Pfarr found Nils Draehmpaehl and another male applicant who had applied for this job (more than one applicant being needed to raise the aggregate compensation problem) and claimed three and a half months' pay (two weeks more than the ceiling in the 1994 Act) as compensation. The Hamburg Labour Court referred a number of questions to the ECJ designed to test the compatibility of the 1994 law with the ETD. For our purposes,[115] the questions of interest were, one, whether the three months' ceiling contravened the ETD both where the applicant would and would not have got the job in the absence of discrimination and, two, whether the aggregate limits of six and 12 months were compatible with the ETD. The ECJ stated that a three month limit where the applicant would have got the job, and the aggregate limits of six and 12 months, contravened the ETD. Disagreeing with the Advocate General, it held that the three month limit was compatible with the Directive where the applicant would not have got the job even in the absence of discrimination.

Hence the Court's preliminary ruling effectively scored thick red lines through most of the remedial provisions in the 1994 law. However, the most interesting aspect of the judgment is its silence on the fact that the defendant was a private company. Therefore, the ETD could not be applied between Draehmpaehl and Urania as directives do not have horizontal direct effect. Just as the Court had been a touch disingenuous in *Von Colson* on the possibility of 'indirect effect' dissolving the pitiful remedies in §611a II BGB, were the Court's judges collectively hoping that if they did not 'notice' the fact that, according to its own case law, directives are not horizontally directly effective no-one else would?[116] Did it hope the Hamburg Labour Court would be as

[112] See now *Magorrian*, *Levez* and *Preston,* above n. 31; discussed in detail in C. Kilpatrick, above n. 61.

[113] See above D on Mr Bertelsmann and the role of 'advocate/academics' in creating German equality law.

[114] G. Freis, above n. 95, at 2780.

[115] The issue of whether fault is required to establish liability is not addressed here.

[116] See A. Ward, 'New Frontiers in Private Enforcement of EC Directives', (1998) 23 *ELR* 65. She points out that the decision is 'bereft of constitutional problems pertaining to the enforcement of directives in actions concerning private parties *inter se*' but interprets this as the Court subtly shifting to affording dirs. horizontal direct effect in certain circumstances. For other gender equality cases where the Court 'overlooked' the horizontal direct effect of

willing as it had been in *Harz* to place the strain on the Civil Code in preference to the ECJ facing up to the problems created by its own jurisprudence?

If so, the Court will have been disappointed. When it came to apply the Court's preliminary ruling, the Hamburg Labour Court did not 'miss' the problem of lack of horizontal direct effect.[117] It pointed out correctly that the ECJ has repeatedly refused to afford horizontal direct effect to directives. It then stated that the only alternative way of granting Draehmpaehl's claim of three and a half months' salary would be through interpreting §611a II BGB or the appropriate tortious provisions of the German Civil Code in line with the ETD ('indirect effect'). Its view was that there were fundamental contradictions between German law and the ETD here which could not be resolved through a principle of sympathetic interpretation. It advised Mr Draehmpaehl that his only recourse to obtain over three months' pay was to lodge a *Francovich* claim against the German government before the *Landgericht* in Bonn (at that time the seat of government).

The important point to note here, of course, is that the Hamburg court had precisely the same option here as the one it had exercised in the wake of the preliminary reference in *Harz*.[118] It could, therefore, have used the tortious provisions to award compensation for breach of personality rights over and above the three month limit in §611a II BGB. It is significant that it both could, and did, choose not to do so in this instance. It is more difficult to pinpoint why it made that choice. It could have been because it considered the litigant to be less deserving. It could have been because the Federal Labour Court had stated that it was unhappy for amounts of compensation being paid out for recruitment cases to be higher than those for unfair dismissal. It could have been because the development of *Francovich* liability permitted the real culprit, the German government, to be directly addressed and asked to pay for any wrongs suffered. This may have seemed preferable to using the Civil Code to make the employer pay. It could have been because the Hamburg Labour Court, clearly well-versed in Community law, was unimpressed with the ECJ's performance, as evidenced by its failure to deal with the horizontal direct effect point in its response to the national court.

This time, the German government made haste to draft new legislation immediately after the ECJ's preliminary ruling in *Draehmpaehl*. It did not even wait to see whether the Hamburg Labour Court would apply the ETD in a horizontal situation. A new Act of 3 July 1998 was passed which aims to comply (but go no further) with the ECJ's decision.[119]

dirs: see *Dekker,* above n. 6 and *Habermann-Beltermann*, above n. 30. For problems concerning horizontal direct effect in gender equality cases in France and Italy see below Part III.A.IV and Part IV.B.IV.

[117] ArbG Hamburg, 21 Ca 74/95, 6 Apr. 1998, unpublished.

[118] Above n. 103.

[119] §611a II BGB now reads, 'If an employer breaches §611a in the formation of an employment contract, the disadvantaged applicant can demand an appropriate

F. Conclusions on the Active Couple

This examination of the genesis and conduct of dialogue in the two Member States which produced the highest numbers of preliminary references on gender equality in employment helps cast further light upon some of the themes discussed in the introductory section. We can see that while certain propulsive forces towards considering, and deciding, to make preliminary references, are necessary for references to be made to the ECJ, those forces cannot be straightforwardly classified as being either 'litigant-driven' or 'court-driven'. In both Member States, references are driven by litigants and courts, but litigants and courts are very distinctive in each Member State and interact with each other, and between themselves, in very different ways. The term public interest litigation embraces localised, gender-equality motivated, single individuals with EC legal expertise in Germany and large, nationally organised, institutional litigators in the UK. On the one hand, we have the decorum, case housekeeping and scrupulous attention to detail which characterises the UK courts' treatment of litigants' arguments and the ECJ's jurisprudence. On the other, we see the partisan, reference-happy, enthusiasm of many of the (comparatively fewer) German courts which engage in dialogue with EC gender equality sources. The contrast is striking. Indeed, the German courts could, in some instances, be seen as public interest litigators, blurring any clear lines between litigant- and court-driven dialogue.

This, in turn, feeds into an understanding of the complex array of interlocking issues which must be considered in order to capture the institutional aspects of the genesis and conduct of gender equality references. We can see how crucial it is to factor in, first, litigant identities and strategies, secondly, relationships between courts and, thirdly, doctrinal and interpretative practices in deciding which sources are available and how they can be read. Nor do these three factors merely co-exist; they continually interact.

Thinking back to Folke Schmidt, and his emphasis in the 1970s on control by the nation state of the development of gender equality as a policy area,[120] what can the activities outlined here in Germany and the UK tell us about how to consider the role of the nation state in the area of gender equality? Most importantly, they show that, in considering the process of legal integration, we need to disaggregate and enrich what is meant when reference is made to the 'nation state' and associated terms such as national interests, preferences and the national level. We have shown that German gender equality dialogue is recognisable as such and is distinctive from UK gender equality dialogue,

compensation. There is no right to specific performance'. §611a III limits compensation to a maximum of three months where the applicant would not have got the job in the absence of discrimination. §611a IV BGB deals with time-limits for bringing claims. This can either be what is stated in the putative contract or six months. See A. Hauf, 'Legislative Change Following Draehmpaehl', (1998) *EQN*, No.4, 29.

[120] Above Part 1.

which, in turn, has its own unique traits. In other words, each has its own national flavour. But this is not the same as Schmidt's reference to the nation states retaining control over policy choices in the sphere of gender equality. His reference to Member States and nation states is, in fact, shorthand for national executives and legislatures, not courts. The principal characteristic of legal integration of gender equality has not been inter-state bargains between national executives, although there have been some of these. At times, it has been a process of explicit compliance, with varying degrees of resistance, by national legislatures and executives, to the outcomes of the meaning of gender equality established by courts and litigants. Often, the meaning of the national gender equality source is altered though judicial interpretation without any active engagement by national legislatures and executives. Though this could be viewed as implicit compliance by national legislatures and executives, hence maintaining the view that courts are agents of the Member States, it is more persuasively captured by refusing to conflate the conceptual and empirical aspects of a principal–agent relationship. This permits us to trace and evaluate more carefully the considerable *de facto* autonomy from legislatures and executives enjoyed by national courts in this area.

The repositioning of national executives and legislatures does not mean that the nation state disappears; it means that other national and sub-national groups and institutions come into sharper relief and play a more central role. We have seen that these national groups and institutions, litigants and courts, have different biographies from national governments and legislatures. This means that they have different methods of interacting with supranational sources, different restrictions on such interactions and different outcomes as a result of such interactions.

PART III THE LANGUID COUPLE: FRANCE AND DENMARK

Let us begin with what joins France and Denmark together as the languid couple. Both made a respectable number of references, six apiece. Courts in both countries were slow starters in making preliminary references, compared to the UK and Germany, with references being made in the late 1980s and 1990s. Until very recently both made references in only two discrete areas. French courts referred equal treatment issues concerning night work and maternity leave. From Denmark came two references on equal value and three on pregnancy-related illnesses. Moreover, both share the feature of their references having come from two very different types of court. The French night work references came from first instance criminal courts (*Tribunaux de Police*) while the maternity reference was the first ever made by the highest civil court—the *Cour de Cassation*—on EC labour law. In Denmark, the equal value references came from Industrial Arbitration Boards[121] whilst the

[121] Provoking discussion in the first reference—*Danfoss*, below n. 165—as to whether they were 'courts' within the meaning of Art. 177 (now Art. 234) EC.

pregnancy-related illness references came from high civil courts—the Danish Supreme Court and the Maritime and Commercial Court.

However, once again, the stories behind these similarities reveal significant differences. Let us turn first from the riches of German and British gender equality dialogues to the rags of French gender equality dialogue.

A. France: The Pauper of Gender Equality Dialogue

Despite the fact that France was instrumental in inserting Article 119 (now Article 141) EC into the Treaty of Rome, until very recently there was almost zero litigation on national, let alone supranational, gender equality sources. This was not because France failed to implement properly the substantive equality obligations contained in EC gender equality laws. Articles L.123 and L.140-2 of the Labour Code largely reproduce these obligations. Moreover, the 1983 law[122] which introduced the most significant provisions on gender equality in employment had loftier ambitions. Unlike the situation in, for instance, the UK, under French law unions can take equal pay or equal treatment cases on behalf of (that is, substitute for) any worker.[123] Employers are placed under a raft of obligations to draw up annual gender audits for the enterprise committee stating what they have done and what they intend to do to achieve gender equality and to provide gender information to unions as part of a duty to bargain at enterprise and branch level.[124] However, French unions have shown a fatally low level of interest in taking gender equality cases on behalf of female employees and the employers' 'obligations' have proved to be anything but.[125] The *Conseil Supérieur d'Egalité Professionnelle*, charged under the Labour Code with 'participating in the definition, implementation and application of sex equality policy',[126] has no legal powers and thus cannot give legal or financial assistance. It appears to be sporadically (and under-) resourced.

For three decades nothing happened to change this situation. The few cases

[122] Law No.83–635 of 13 July 1983, *Journal Officiel*, 14 July 1983, 2176. Prior to this, Art. 11 of a 1975 law, codified as Art. 416 of the Penal Code prohibited gender discrimination in hiring and dismissal subject to a 'legitimate motive' defence provided for employers. The first general provision dealing with equal pay was introduced in 1972 and codified as Art. L.140–2 of the Labour Code.

[123] Art. L.123–6 of the Labour Code.

[124] For the annual gender report (applicable only to employers with 50 or more employees) see Art. L.432–3–1 Labour Code. For duties to provide equality information to unions at enterprise level see Art. L.132–38 Labour Code and at branch level—in the context of wage negotiation and revision of job classifications—Art. L.132–12 of the Labour Code.

[125] See C. Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK' in F. Gardiner (ed.) *Sex Equality Policy in Western Europe* (Routledge, London, 1997) 25.

[126] Art. L.330–2 of the Labour Code.

that were decided on equal pay (perhaps unsurprisingly) generally summarily rejected anything but the most basic like work situation on skimpy evidence and formalistic reasoning.[127] Cases alleging direct discrimination or indirect discrimination basically did not happen. So where did the six references come from?

With the strong proviso that what has happened in France in the last decade is still light years away from the situation in either Germany or the UK, we need to indicate that there are signs of change beginning to occur for three basic sets of reasons which may be mutually influencing each other in propagating gender equality as a useful litigation tool, and EC norms and ECJ jurisprudence as one of the chief reasons why this resource is useful. These three reasons reflect three different kinds of Community–sponsored dialogue: the aftermath of infringement proceedings, employers' use of EC gender equality laws to challenge national labour law regulations and the EC Network of Equality Experts.

I The Aftermath of Infringement Proceedings

Two sets of infringement proceedings concerning equal treatment in France were decided upon by the ECJ in 1988.

The background to the first was that the 1983 French gender equality law, due to heated Parliamentary opposition, did not make female-specific rights in collective agreements illegal but merely encouraged the social partners to move towards renegotiating them. For this reason, France was condemned by the ECJ in 1988 as a result of infringement proceedings brought by the Commission.[128] In the wake of this condemnation, a string of male employees brought claims seeking compensation for the denial of certain of these benefits (mainly crèche, birth and childcare costs payments) to them. The *Cour de Cassation* and other French courts rejected arguments that these advantages were not 'pay' and found that to pay workers of one sex less than workers of another sex violated Article 119 (now Article 141) EC and Article L.140—2 of the Labour Code. The men's claims were allowed.[129] Thus, in a case brought

[127] For the basic like work situation, see Cass. soc., 19 Feb. 1992, *Caisse d'Epargne Ecureuil de Paris* v. *Mme Domice*, Bulletin Civil V—paying the female spouse of a caretaking couple who did the same work half of her husband's wages breached the equal pay guarantee in Art. L–140 of the Labour Code. For skimpy formalistic reasoning on an equal value claim, see Cass. soc., 16 Mar. 1989, *Mme Pullès* v. *Centre Radiologie de Romans*, Bulletin Civil V—rejecting her claim *inter alia* on the ground that the advantages claimed by the employee had been awarded on a discretionary basis to other employees on different dates as a reward and without precise rules. Contrast with the ECJ decision in *Danfoss*, discussed below at B.I.

[128] Case 312/86 *Commission* v. *France* [1988] ECR 6315. Art.123 was modified in 1989 (Law No.89–488 of 10 July 1989, Art. 8) to give the social partners two years to put their collective agreements in conformity with the equal treatment guarantee of Art. L.123–1 of the Labour Code.

[129] Cass. soc. 27 Feb. 1991, *Ferandin & Perrier*, Bulletin Civil V; Cass. soc., 8 Oct. 1996, *Sté Renault* v. *M. Alain Chevalier*, Bulletin Civil V, n. 311; Conseil de Prud'hommes d'Ales (Section Industrie/Juge Départiteur), 21 Apr. 1993, *M. Balaguer et autres* v. *Sté Alcatel*

by male employees against Renault because of 'baby-arrival' and childcare-costs payments made to women only in collective agreements, the *Cour de Cassation* rejected the argument that such payments did not breach the principle of equal pay.[130] Noting that the baby-arrival payments were also given to adoptive mothers, it found that the lower court:

> had rightly held that it was not a measure aimed at protecting pregnancy or maternity or promoting equal opportunities between men and women, but was a pay supplement aimed at compensating the employee for the extra expenses linked to the presence of a child in the home, expenses which men have to bear as well as women.

The childcare-costs payments were analysed similarly, and were also held to contravene the equal pay guarantee in French law and Article 119 (now Article 141) EC.

The second set of infringement proceedings[131] also produced a litigation dynamic, but this time before the administrative courts and, in particular, before the *Conseil d'Etat*. This is because public servants in France are not covered by the provisions in the Labour Code but by specific laws, decrees and *arrêtés* which are adjudicated upon by the administrative courts.[132]

The origin of equal treatment for public servants was Article 7 of the Law of 19 October 1946 which stated that 'no discrimination shall be made in the application of this statute between the two sexes, except for the special provisions it lays down'. In a key decision in 1956,[133] the *Conseil d'Etat* combined

Câbles in (1993) *Droit Ouvrier* 390. Many other cases were decided on the same issue but are unpublished. For the judicial, commercial and trade union and employer association practices surrounding publication of labour law cases in France see M. Vericel, 'La publication des décisions de justice en droit du travail', (1997) *Droit Social* 1081. This study found than less than 1% of labour law cases published concerned gender equality. See also the provocative comments of T. Grumbach, 'Doctrine et déontologie', (1999) *Droit Social* 323.

[130] Cass. soc., 8 Oct. 1996, above n. 129. Compare with the treatment of similar benefits by Spanish courts discussed below at Part IV.A.II. See below section IV for discussion of the challenge to Renault's revised scheme which led to two preliminary references from French courts.

[131] Case 318/86 *Commission* v. *France (Re Sex Discrimination in the Civil Service)* [1988] ECR 3559.

[132] Public servant status covers a wide category of workers, such as prison officers, teachers, the army and police. A public servant who wishes to challenge a potentially discriminatory decision first requests the part of the administration which made the decision to reconsider their decision. Thus, a teacher would ask the Minister of Education. This is known as a *recours gracieux*. The administration has four months to reply. This reply (or a failure to reply, which is treated as a reply) may then be challenged before a *Tribunal administratif* in what is known as a *recours hiérarchique* which can ultimately be decided upon by the *Conseil d'Etat*.

[133] CE, 16 January 1956, *Syndicat national autonome du cadre d'administration générale des colonies et sieur Montlivet*. See P. Auvret, 'L'Egalité des sexes dans la fonction publique', (1983) *Revue de droit public* 1571; J-C. Bonichot, 'Egalité des sexes, recrutements distincts et droit communautaire', (1988) 4 *Revue française de droit administratif* 976.

Article 7 and the 1946 Preamble to the Constitution to derive a general principle of equality for male and female public servants. Derogations from this principle would be permitted only where the 'conditions of exercise of these functions require such derogations'. However, though Article 7 of the 1946 law was modified by laws of 1959 and 1975 to limit further the numbers and the manner in which public servants could be excluded from the principle of equal treatment, French law still permitted major differences in treatment between male and female public servants. Hence, a 1977 decree, following up the 1975 law, set out five corps which had solely male recruitment, two with solely female recruitment and 18 which had recruitment and conditions of access which were gender-specific. Following receipt of a Reasoned Opinion from the Commission in 1981 challenging the 1975 law and the accompanying 1977 decree as contravening the ETD, a new law was passed in 1982 which still governs equal treatment between the sexes in the public service. While maintaining the non-discrimination formula, exceptions can now only be introduced where sex is a 'determining factor', a matter set out in decrees. However, the accompanying decrees maintained the principle of separate recruitment for a considerable number of corps, ranging from police officers to physical education teachers. Following negotiations in which the Commission withdrew some of its challenges and France passed decrees taking certain occupational groups (including physical education teachers)[134] out of gender-differentiated regimes, the ECJ decided that prison governors could fall within the exceptions to the ETD but that the system of recruitment for five police corps breached the ETD.

No wholesale legislative revision followed the ECJ's judgment. Rather, administrative challenge by women excluded from occupational groups has continued to be the *modus operandi* for removing discrimination. In a number of cases since the 1988 judgment against France by the Luxembourg court, the *Conseil d'Etat* accepted such challenges but always solely on the ground that such provisions violated the constitutional guarantee of gender equality, as laid down in the 1946 Preamble to the Constitution.[135] The *Conseil d'Etat*'s first use of the ETD as a ground upon which to base its decision was not until 1994.[136] The case concerned a challenge by a teachers' union to a *note de service* issued by the Minister of Education in which the organisation of transfers of physical education teachers distinguished between posts for male and female teachers.

[134] Decree No.87–55 of 2 February 1987.

[135] CE 26 June 1989, *Fédération des syndicats généraux de l'éducation nationale et de la recherche* (Minister of Education's refusal to repeal two provisions establishing sex-based representation on certain disciplinary teachers' committees); CE 7 Dec. 1990, *Ministère de l'Education Nationale* v. *Mme Buret* (refusal to transfer Mme Buret into a post as a specialized teacher in a prison on the ground that a female teacher would encounter difficulties maintaining discipline with male prisoners); CE, 29 Dec. 1993, *Affaire Mlle Marie-Christine Martel* (decree limiting access to air officers' corps to male graduates of a Military Air School).

[136] CE 4 Nov. 1994, *Syndicat général de l'éducation nationale SGEN-CFDT*, Recueil Lebon.

In annulling the *note de service*, the *Conseil d'Etat* referred to the ETD, the 1982 law implementing the ETD in the public service, the 1983 law governing non-public servants in France and the 1987 decree which France had introduced in the context of the infringement proceedings eliminating gender-based recruitment for physical education teachers.[137]

The first use of Article 119 (now Article 141) EC by the *Conseil d'Etat* did not take place until the end of 1997.[138] The case, decided by the *Conseil d'Etat* sitting in assembly (its most solemn formation), concerned an allowance paid to army personnel and paid at a different rate according to whether the soldier was a 'head of household' or 'single'. Female soldiers married to male soldiers only received the 'single' rate. Following a set of decisions in which the *Conseil d'Etat* had held the State liable to pay the higher rate to married female soldiers on the ground that the notion of 'head of household' no longer existed in this area of French law, the French legislature reintroduced the notion of 'head of household' for the purpose of calculating these allowances in a law of 1994. As the *Conseil d'Etat* has no competence to adjudicate on the validity of primary legislation (even if the legislation at issue contravenes the Constitution) it rejected the claims of those challenging the 1994 law on the basis of domestic norms. However, other litigants had claimed that the 1994 law breached Article 119 (now Article 141) EC and ILO Convention No.100. As international law directly trumps national law in the French legal system, the *Conseil d'Etat* stated that the allowance at issue was clearly pay and could be subject to Article 119 (now Article 141) EC.[139]

On 28 July 1999, the *Conseil d'Etat* made its first gender equality preliminary reference to the ECJ.[140] The case concerns a man challenging a law reserving payment of a public servant pension supplement for children to women only. The *Conseil d'Etat* stated that as a law was being challenged, it could not employ the constitutional equality principle to test its validity. They accepted the plaintiff's arguments that it might breach either Article 141 EC or the social security directive (Directive 79/7) and stated that a reference should be made in order to ascertain whether such a pension was 'pay' and, if so, whether reserving the pension supplement to women only could fall within what is now Article 141(4) EC.[141] If it was not 'pay', the *Conseil d'Etat* enquired whether it breached Directive 79/7.

[137] Above n. 134.

[138] CE (Assemblée) 5 Dec. 1997, *Lambert*, reported in (1998) *EQN*, No.1, 27–8.

[139] This is how the *Conseil d'Etat* treated EC and international sources in this case. For a broader argument that French practice is not generally so monist and the reasons why not see B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (OUP, Oxford, 1999) 177.

[140] CE 28 July 2000, *Griesmar*, Recueil Lebon. The case is now pending before the ECJ as Case C–366/99.

[141] This states: 'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.

We can conclude from this that the *Conseil d'Etat* has to date shown limited enthusiasm for wide-scale integration of EC sources. The instances in which the ETD and Article 141 (formerly Article 119) EC have been used have been instances where the EC link was overwhelming or unavoidable. Other cases decided in this period by the *Conseil d'Etat* confirm the hypothesis that it has accorded formal and restrictive recognition to EC sources, preferring where possible to develop its own equality jurisprudence through recourse to the constitutional principle of gender equality.[142] In practice this has meant that anything beyond the most explicit instances of direct discrimination will not breach the gender equality guarantee.[143]

II Employers' Use of EC Gender Equality Law to Challenge National Labour Law Regulations

Criminal proceedings for employing women at night in breach of Labour Code provisions sparked the first two preliminary references to the ECJ by French courts on gender equality sources. The employers invoked the ETD to argue that the criminal action breached EC law. Despite the fact that French female night-work regulation was necessary to comply with ILO obligations (under Convention No.89), the *Tribunaux de Police* (first instance criminal courts), dazed by the bright lights of EC law, pronounced the national legislation to be inapplicable.[144] Possibly encouraged by these successes, employers attempted to enlist gender equality as an argument in their fight against the ban on employing workers on Sundays in the Labour Code. In 23 Sunday opening cases, employers taken to court for breaching the penal sanctions attached to this ban argued that the ban on Sunday working constituted

[142] See, e.g., CE 11 May 1998, *Mlle Aldige*, reported in (1998) *Revue française de droit administratif* 890 and in brief in (1999) *EQN*, No. 1, 21 (woman passed over for post in ground forces of army in favour of male candidates with lower marks than her in entrance tests because annual 20% quota for female recruitment had already been filled).

[143] See, e.g., CE 8 Nov. 1995, *Mme Guige*, reported in *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1996* (Commission, Brussels, 1996). Here, a woman who had repeatedly been refused promotion to the post of general national inspector tried to establish discrimination by *inter alia* showing that 25% of those promoted were female while 60% of teachers were female. The *Conseil d'Etat* did not engage with this statistical evidence and stated that there was no indication whatsoever that the commission appointing inspectors was systematically refusing female candidates. In CE (Assemblée) 23 Oct. 1998, *Union des Fédérations CFDT des Fonctions publiques et assimilées* reported in (1999) *EQN*, No.1, 21, it was argued that only partially taking into account the length of service of part-time *stagiaires* (predominantly women) constituted indirect discrimination. The *Conseil d'Etat* did not seriously entertain this argument responding 'that the ground of challenge must be set aside since the provisions in question apply without distinction to men and women'.

[144] See, prior to the ECJ's decision in the first reference, the decision of the *Tribunal de Police*, La Rochelle, (1990) *Droit Social* 471. The two references by the *Tribunaux de Police* of Illkirch and Metz produced Case C–345/89 *Stoeckel* [1991] ECR I–404 and Case C–158/91 *Levy* [1993] ECR I–4287. See further C. Kilpatrick, 'Production and Circulation of EC Nightwork Jurisprudence', (1996) *ILJ* 169 and A. Jeammaud, this volume.

indirect discrimination against women and hence breached Article 141 (formerly Article 119) EC and the equality directives as the majority of Sunday workers in the enterprises concerned were women. They maintained that preventing employees working on Sunday therefore disproportionately deprived women of pay and job opportunities, which constituted a breach of Community law. The Criminal Chamber of the *Cour de Cassation* paid short shrift to this line of argument, stating simply that the rule establishing Sunday as a day of rest was taken in the interests of workers, men and women, and constituted a social benefit. As such, its enforcement was not of a nature to lead to discrimination, either direct or indirect, to the detriment of women.[145]

III The EC Network of Equality Experts

From the mid-1990s, another type of dialogue appeared to have more chances of finally helping French women to obtain some benefits from EC equality sources. Involvement in the EC Network of Equality Experts led the French experts[146] to question why gender equality sources were so under-used in France and to start criticising national court decisions which did not use relevant EC sources. This led to the first appearance in French doctrinal writing of the chronicling of this lost resource.[147] It also led to the beginnings of arguments by those representing female plaintiffs based on national and supranational gender equality sources before the French courts and to greater scrutiny of how courts used these sources. In 1996, for the first time, the *Cour de Cassation* was faced with a case in which a part-time woman argued that

[145] The cases are decided in three 'clumps', five on 5 June 1995, nine on 30 May 1995 and nine on 10 Jan. 1995. One is published in the Bulletin Criminel of 30 May 1995; the rest are unpublished. The cases came from ten different appeal courts from all over France, though 13 alone came from the *Cour d'appel* of Nancy. See also Cass. Crim. 26 May 1998, (1998) *Droit Ouvrier* 455 for a recent manifestation of the same argument; also noted in (1999) *EQN*, No.1, 22.

[146] The most recent members being Marie-Thérèse Lanquetin, Hélène Masse-Dessen and Christophe Pettiti. Lanquetin is an academic and Masse-Dessen is a practising lawyer who frequently appears before the *Conseil d'Etat* and Social (Fifth or V) Chamber of the *Cour de Cassation*. Note Masse-Dessen's own recognition of the importance of the Network of Experts, 'Il apparaît clairement que les échanges d'expériences entre les juristes des différents pays de l'Union, favorisés par la dynamique des réseaux d'experts et l'aide à la formation apportée par les instances commnautaires, ont été déterminants' in 'La mise en oeuvre des normes européennes relatives à l'égalité hommes-femmes dans les Etats membres de la communauté. Quelques éléments de la situation en France', (1998) *EQN*, No. 4,26.

[147] See, in particular, M.-T. Lanquetin, 'De la discrimination indirecte entre travailleurs masculins et féminins' in F. Kessler (ed.) *Le Droit Collectif du Travail: questions fondamentales—évolutions récentes. Etudes en honneur à Madame le Professeur Hélène Sinay* (Peter Lang, Frankfurt, 1994); M.-T. Lanquetin, 'La preuve de la discrimination: l'apport du droit communautaire', (1995) *Droit Social* 435; H. Masse-Dessen, 'La résolution contentieuse des discriminations en droit du travail: une approche civile', (1995) *Droit Social* 442; P. Martin, 'Droit social et discrimination sexuelles: à propos des discriminations générées par la loi', (1996) *Droit Social* 562; M.-T. Lanquetin, 'Egalité de traitement et discrimination entre les hommes et les femmes', (1997) *Action juridique CFDT* 3; A. Lyon-Caen, 'La Corte di giustizia e il diritto francese del lavoro', (1998) *Lavoro e Diritto* 607 at 610.

she had been indirectly discriminated against, citing the ECJ judgment in *Nimz* in support of her argument.[148] She claimed *inter alia* that requiring part-time workers to work double the time in order to qualify for promotion and, therefore, higher pay was indirectly discriminatory and that the lower court had failed to determine whether the employer had justified the difference in treatment between full-time and part-time employees. The *Cour de Cassation* did not take up the invitation to consider the Luxembourg Court's indirect discrimination jurisprudence. It stated that the lower court, which had examined to what extent the disputed provision entailed sex discrimination, even indirect, had correctly decided that no sex discrimination had been established.

Evidence, however, that the *Cour de Cassation* was not immune to this new more critical gender-equality environment, comes from its decision to refer the case of Evelyne Thibault to the ECJ.[149] She was refused a performance assessment (leading, though not always automatically, to career advancement and a 2 per cent pay increase) because a combined absence on sick leave (during her pregnancy) and maternity leave meant she had not been present at work for the requisite six months in a calendar year, as laid out in the service regulations annexed to the collective agreement. It was not necessary for this case to be referred. The *Cour de Cassation* could simply have stated, as the *Conseil de prud'hommes* (first instance labour court) did, that French equal treatment provisions (Article L.123–1 of the Labour Code) required her absence on maternity leave to be counted as actual attendance for the purpose of calculating the period necessary to create entitlement to a performance assessment. To understand why it did not do so and why it referred, it is useful to consider that it had decided an identical case just 12 months before, brought by another woman refused a performance assessment because of absence including maternity leave. In that case, the *Cour de Cassation* (overturning the *Cour d'appel* of Versailles) rejected her claim on the ground that, as the condition of absence (no more than six months in a calendar year) which prevented the granting of a performance assessment applied without distinction to both sexes, it did not lead to gender-based discrimination.[150] This decision did not go unnoticed. It was published and criticised for not having understood national or EC gender equality sources in the leading French labour law journal.[151] Could the decision to refer have been a way of allowing the *Cour de Cassation* to change position without admitting that its decision of the previous year had been inadequate? Referral presupposes a degree of

[148] Cass. soc., 9 Apr. 1996, *Mme Christine Soufflet* v. *CPAM de la Marne*, Bulletin Civil V. On *Nimz* see above n. 49.

[149] See the decision to refer, Cass. soc., 28 Mar. 1995, *Caisse Nationale d'Assurance Vielliesse des Travailleurs Salariés* v. *Mme Thibault*, Bulletin Civil V; also published in (1995) *Droit Social* 1036–7 with a note by M.-A. Moreau. For the ECJ decision see Case C–136/1995 *Thibault* [1998] ECR I–2011.

[150] Cass. soc., 30 Mar. 1994, *CNAVTS* v. *Mme Duchemin*, Bulletin Civil V.

[151] (1994) *Droit Social* 561–2 with note by M.-A. Moreau.

uncertainty about what the answer should be and might perhaps have conferred some dignity on the *Cour de Cassation's* rapid U-turn.[152]

A further new arrival into the French case law landscape is *Enderby*.[153] The *Cour d'appel* of Riom was faced with an equal pay claim from a female mushroom packer comparing her work with more highly paid male packers. The court stated that it was clear that women packers were systematically paid less than male packers and that, following *Enderby*, in a situation of apparent discrimination, it is the employer who must demonstrate that objective reasons exist for the pay difference. It rigorously examined, and rejected, the employer's proffered justifications (greater physical strength, night work) as unproven or insufficient to justify the difference in pay. The employer challenged this decision before the *Cour de Cassation* which confirmed the lower court's decision that they did the same work and no objective reasons for paying them differently had been shown.[154]

IV Combining Dialogues

Lessons from these three separately developing dialogues, propelled into the courts by different groups, have begun to combine and provide evidence of increasing judicial awareness of EC gender equality sources and mechanisms.

A combination of the first infringement proceedings-propelled dialogue and the third has now manifested itself in four further references by French courts, though one of these was subsequently withdrawn.[155] Following the successful challenge by male Renault employees to Renault's female-specific 'baby arrival' and 'care costs' payments, discussed above,[156] Renault negotiated afresh with the trade unions. The new 1991 agreement provided for a flat-rate 'baby arrival' payment for all adoptive parents, rather than just mothers as the old agreement

[152] See the reception of the ECJ ruling by the *Cour de Cassation* reported in [1999] 1 CMLR 692–5. The French court made explicit reference to the ECJ ruling to state that Arts. 2(3) and 5 ETD overrode a national rule which deprived a woman of her right to be assessed and, consequently, to be promoted, because of her absence on maternity leave. It stated, therefore, that the *Conseil de Prud'hommes* had correctly held that Art. L.123–1 of the Labour Code, implementing that dir., precluded application of such a rule.

[153] Case C–127/92, [1993] ECR I–5535. See also below at B.I for *Enderby* in Denmark.

[154] CA (Chambre Sociale) Riom, 16 Jan. 1995, *SARL USAL Champignons* v. *Mme Fabienne Douarre* reported in (1995) *Droit Social* 441; Cass. soc., 12 Feb. 1997, Bulletin Civil V no.58.

[155] Case C–218/98 *Abdoulaye* [1999] ECR I–5723 referred by the *Conseil de Prud'hommes*, Le Havre; Case C–360/98 *Bauduin and Blondeau*, referred by the *Conseil de Prud'hommes*, Bobigny was removed from the ECJ's register on 13 Jan. 2000. For the *Conseil d'Etat*'s first reference see n. 140. The fifth French reference, made by the *Tribunal de Grande Instance* of Paris—C–50/99 *Podesta*, judgment 25 May 2000, concerns the applicability of Art. 119 (now Art. 141) EC to a survivors' pension within a supplementary retirement pension scheme governed by private law and not financed by the State. The sixth reference, Case C–206/00 *Mouflin* by the Tribunal Administratif of Chalons-en-Champagne, concerns the compatbility of a civil service pension which reserves the right to retire on grounds of disability or illness to women with Art. 119 and Dir. 79/7.

[156] Above n. 130.

had provided. The monthly female-specific child-care costs payment condemned by the *Cour de Cassation* was replaced by a lump sum payment (7500 FF) to be given to all women at the moment of commencement of their maternity leave. Two hundred and forty-four male Renault employees in Le Havre lodged a claim before their local labour court contesting that the female-specific payment breached Article 119 (now Article 141) EC, whilst other male Renault employees did likewise before the *Conseil de Prud'hommes* of Bobigny.

Both courts made preliminary references to the ECJ (though the Bobigny court withdrew its reference after the ECJ's decision in *Abdoulaye*) in order to ascertain the compatibility of such a payment with Article 119 (now Article 141) EC. These were the first references ever from French first instance labour courts on European labour law sources. That much road had been rapidly travelled by (at least some) French labour courts in terms of awareness of EC gender equality sources is indicated by the perceptiveness of the *Abdoulaye* court in realising that the new re-negotiated female-specific payment at Renault did not straightforwardly fall within the *Commission* v. *France* condemnation.[157] Instead, it considered that it might fall within the zone demarcated by the ECJ in the cases of *Hofmann* and *Gillespie*,[158] which both give a discretion to Member States to allocate different treatment to women because of pregnancy or maternity (*Hofmann*) and deny the comparability of the pay situation of those on maternity leave with that of other male and female employees (*Gillespie*). However, unlike the women concerned by the *Gillespie* case, the Renault women whom the male plaintiffs wished to compare themselves with here received their full normal pay during maternity leave as well the lump sum payment.

The ECJ, in replying to the *Abdoulaye* court, relied heavily on the submissions of the referring court, the UK government and the Commission. It considered that the principle of equal pay laid down in Article 119 (now Article 141) EC did not preclude such a lump-sum payment to female workers on maternity leave where that payment was designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work. It was up to the national court to decide whether the payment here was of that nature.

The employer-led night work jurisprudence has also produced new dialogue combinations. It has spawned litigation by women wishing to work at night, unorthodox judicial reasoning and lively academic debate on the effect of directives in cases concerning two private parties.

The decision which attracted the attention of academics was made by the *Conseil de Prud'hommes* of Laval on 5 November 1998.[159] A private sector employer relied on the night work ban in Article L. 213-1 of the Labour Code, which was also enshrined in an enterprise–level collective agreement with the CGT union, to refuse a woman's request to work at night.

The labour court found in favour of the employee. In order to do so, it had

[157] Above n. 128. [158] Above n. 30. [159] Reproduced in (1999) *Droit Social* 133.

to find a way to justify non-application of the Labour Code's provisions on female night work. It did so by pulling a number of legal rabbits out of its hat, in the clear belief that their cumulative effect would magically banish the Labour Code prohibition in a way that no one of the legal sources, standing alone, seemed straightforwardly to do. Having cited various equality formulations in different Declarations of the Rights of Man (of 1789 and 1793), the 1946 Preamble to the Constitution as well as the UDHR of 1948, it stated that it was clear that the French Republic guaranteed equality between men and women. As a consequence of this, it held that Article 5 of the ETD should be applied to resolve the dispute.

The decision has given rise to a dispute between French academics on the circumstances under which directives can be applied between two private parties, as well as on the use which can be made of other equality sources, constitutional and international, of variable normative value, by ordinary courts. For Lhernould,[160] the court applied sources which it was not entitled to use, either because they have no legal value (the 1793 Declaration), no direct effect in the French legal order (UDHR), no direct effect between two private parties (the ETD), or are better left to constitutional courts to interpret in order to prevent parallel interpretations (the 1946 Preamble to the Constitution). He considers whether the decision could be considered as an application of the principle of 'indirect effect' in order to avoid the problem of directives lacking horizontal direct effect, but rejects this for two reasons. First, 'indirect effect' rests on the supremacy of Community law while here, conversely, the court applied Community law in order to respect a 'principle' of national law. Secondly, the decision explicitly directly, rather than indirectly, applied the ETD. He concludes, therefore, that the French court should have applied the ban on female night work in Article L.213-1 of the Labour Code, rather than the ETD.

By contrast, Masse-Dessen and Moreau contend that the labour court was perfectly entitled to employ the sources it did to reach the conclusion that Article 5 of the ETD was applicable in the dispute before it.[161] They argue that two different situations must be distinguished with regard to the applicability of directives: the first is where the directive has been transposed but its meaning in a given situation is unclear; the second is where transposition has not been carried out, or has been carried out incorrectly. While in the second situation they agree that directives are not horizontally directly effective, they contend that, in the first situation, the national court is obliged, because of the duties of loyal co-operation and sympathetic interpretation which flow from Article 10 (formerly Article 5) TEC, to interpret national law in a manner conforming with the principle of equal treatment, even if this means setting aside contrary provisions of national law.

[160] J.-P. Lhernould, 'Un employeur peut-il s'opposer à la demande d'une de ses salariées de travailler la nuit?', (1999) *Droit Social* 129.

[161] H. Masse-Dessen and M.-A. Moreau, 'A propos du travail de nuit des femmes: nouvelle contribution sur l'application des directives européennes', (1999) *Droit Social* 391.

This argument is highly dubious. The ECJ has not drawn a distinction with regard to the horizontal direct effect of directives based on whether they have been transposed, transposed incorrectly, or fully transposed but are in need of interpretation. Indeed, it is difficult to see how one could draw an acceptable line between incorrect transposition, on the one hand, and full transposition but contested interpretation, on the other.

What is more interesting, however, is how both the decision of the *Conseil de prud'hommes* of Laval and these doctrinal comments show how much persistent resistance, judicial and academic, there is to refusing horizontal direct effect to labour law directives in certain Member States. These tensions, and the real wellspring of Moreau and Masse-Dessen's argument, can be found in their supporting remarks for the transposition/non-transposition distinction.

> The situation in France is completely unacceptable: it is intolerable, in an area as important as the organisation of work and working time, that individuals cannot have access to licit provisions in the Labour Code…[ ]..It would seem absurd, given that the ECJ has stated that the national provision [at issue] must be set aside by the court, which is the guarantor of respect for Community law and which must provide judicial guarantees for private parties, and that, moreover, France has been condemned in infringement proceedings for not having removed the contested legal provision from the Labour Code, to maintain that the court, which is an authority bound to respect the principle of the supremacy of the Community legal order, must continue to apply provisions declared contrary to Community law.[162]

We shall see these tensions re-emerge in the area of female night work when we turn to Italy.[163]

B. Denmark: A Two-issue, Two-court Dialogue[164]

In Denmark, the two main gender equality issues referred to the ECJ, equal value[165] and issues concerning pregnancy-related illnesses,[166] do in fact

[162] *Ibid.*, at 393–4. For the infringement proceedings and EC fines against France for failure to lift the female night work prohibition see Case C–197/96, *Commission* v. *France* [1997] ECR I–1489; Case C–224/99 *Commission* v. *France* (pending, application for a periodic penalty payment to be fixed under Art. 228 (ex Art. 171) EC).

[163] See, below, Part IV.B.IV.

[164] Some of the Danish cases referred to here are translated into English in R. Nielsen, *Equality in Law between Men and Women in the European Community—Denmark* (Martinus Nijhoff, Nijmegen and OOPEC, 1995). Despite its year of publication it reflects the situation as of 1 Jan. 1993. Danish cases from late 1992 onwards referred to in this section are not in this volume. I would like to thank Prof. Nielsen for supplying me with copies of requested Danish cases, Hans Sundberg for translating and discussing them with me and the University of Bristol for paying for their translation.

[165] Cases 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark (acting for Danfoss)* v. *Dansk Arbejdsgiverforening* [1989] ECR 3199 (hereafter *Danfoss*); C–400/93 *Royal Copenhagen* v. *Specialarbejderforbundet i Danmark* [1995] ECR I–1275 (hereafter *Royal Copenhagen*).

[166] Cases C–179/88 *HK (acting on behalf of Hertz)* v. *DA (acting on behalf of Aldi*

provide a broadly accurate reflection of the issues litigated at national level.[167] Outside these two areas, there is very little litigation on other gender equality issues in Denmark. In particular, there have been practically no indirect discrimination cases and equal treatment litigation consists largely of issues relating to pregnancy.[168] Even within these two identifiable areas of gender equality activity, there has not been a flood of litigation. There are a small, though significant, number of equal value cases. However, the three challenging and interesting references made to the ECJ on the interrelations of pregnancy-related illnesses with equal pay and equal treatment do not appear to reflect a stream of litigation on this specific issue at national level. In fact, all the cases raising this issue have been referred to the ECJ. Given this, it seems most useful to investigate what has given rise to these two very specific gender-equality dialogues, which courts have conducted them, and evaluate how well the courts communicated. This will also indicate why dialogue has been largely confined to these two issues and has resulted in a high ratio of preliminary references to actual cases litigated.

I Equal Value Dialogue

The special nature of the Danish industrial relations model has shaped how equal value dialogue has developed. Denmark has a system based around very high union membership (90 per cent for manual workers, almost 80 per cent for white-collar workers) and high coverage of collective agreements (75 per cent). Both employers and employees display a high degree of organisation. The

Marked K/S) [1990] ECR I–3979; C–400/95 *HK (acting on behalf of Larsson)* v. *Dansk Handel (acting on behalf of Fotex Supermarket)* [1997] ECR I–2757; C–66/96 *HK (acting on behalf of Høj Pedersen)* v. *Fællesforeningen for Danmarks Brugsforeninger (acting on behalf of Kvickly Skive); HK (acting on behalf of Bettina Andresen* v. *Dansk Tandlægeforening (acting on behalf of Jørgen Bagner); HK (acting on behalf of Tina Pedersen)* v. *Dansk Tandlægeforening (acting on behalf of Jørgen Rasmussen); Kristelig Funktionær-Organisation (acting on behalf of Pia Sørensen)* v. *Dansk Handel (acting on behalf of Hvitfeldt Guld og Sølv ApS)* [1998] ECR I–7327. These cases will be referred to, respectively, as *Hertz*, *Larsson* and *Pedersen*.

[167] See the Danish contributions (by Ruth Nielsen) to the EC Equality Network publications which back up this view. The *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1993* (Commission, Brussels) 36 states that most direct discrimination cases involve pregnant women. The *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1995* (Brussels: Commission) 32 records four equal pay cases but no indirect discrimination cases. The *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1997* (Commission, Brussels) records that the only case of importance has been referred to the ECJ (*Pedersen,* above n. 166).

[168] But see the reference from the *Østre Landsret* (Eastern Regional Court) in Case C–226/98 *Birgitte Jørgensen* v. *Foreningen af Speciallæger, Sygesikringens Forhandlingsudvalg* [2000] ECR I–2447. This case concerned assessing indirect discrimination in a collective agreement in relation to the ETD and Dir. 86/613 (equal treatment for self-employed including agricultural workers and protection of pregnancy and maternity for self-employed women).

umbrella employers' organisation is *Dansk Arbejdsgiverforening* (Danish Employers' Confederation, usually called DA) and its largest affiliate is *Dansk Industri* which represents manufacturing employers. Its counterpart on the workers' side is LO (*Landsorganisationen i Danmark*—Danish Confederation of Trade Unions). Within this confederation are all the unions which have taken equal value cases in Denmark. Danish unions are organised on an occupational basis. LO's largest member union is HK[169] which organises lower-paid white-collar employees in both the public and private sector. It has been the most prominent protagonist in equal value cases and took the *Danfoss* litigation.[170]

Gender segregation, combined with high coverage of collective agreements agreed with occupationally organised unions, produces some specifically Danish actors and problems. It has led to the existence of a woman-only union for various categories of unskilled workers—the KAD.[171] Male unskilled workers (and some women) belong to the SiD,[172] the second largest member of LO. This means, in some cases, that men and women doing work of equal value in the same workplace will be covered by different collective agreements, one negotiated with KAD and one with SiD.[173] The fact that KAD agreements have at times included lower pay than that found in the parallel SiD agreement has led KAD to take some significant equal value cases to try to obtain equal pay for its female members, though none of these has been referred to the ECJ. By contrast, SiD, which took the second equal value case referred to Luxembourg (*Royal Copenhagen*),[174] does not appear to have been previously involved in equal value litigation.

As equal pay is generally guaranteed in collective agreements, few equal pay disputes go to the civil court system[175] and are normally decided by Industrial Arbitration Boards (IABs).[176] They are tripartite and, as a rule, the chairpersons

[169] Handels-og Kontorfunktionaerernes Forbund i Danmark (Union of Commercial and Clerical Workers) with in 1996 just over 360,000 members, 80% of whom are women. All union figures are taken from O. Hasselbalch, *European Employment and Industrial Relations Glossary: Denmark* (Sweet & Maxwell, London, 1998) 267.

[170] Above n. 165, below nn. 183–85.

[171] Kvindeligt Arbejdforbund i Danmark (Union of Danish Women Workers) with just under 93,000 members in 1996.

[172] Specialarbejderforbundet i Danmark (National Union of General Workers) with around 316,000 workers in 1996.

[173] See R. Nielsen and M. Halvorsen, 'Sex Discrimination between the Nordic Model and European Community Law' in N. Bruun *et al.*, *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries—Today and Tomorrow* (Dartmouth, Aldershot, 1992) 206.

[174] Above at n. 165 and below at nn. 191–198.

[175] Though see two cases taken by HK, one before the Maritime & Commercial Court on 8 July 1987; the other before the Western Court of Appeal on 1 Mar. 1995. The former is reproduced in English in Nielsen, above n. 164, at 113ff.

[176] Stipulations on the establishment of such tribunals are laid down in the Standard Rules for Handling Industrial Disputes agreed between the DA and the LO which apply between all parties to collective agreements who have not explicitly agreed on some other adequate procedure.

are chosen from a narrow circle of judges connected with the Labour Court.[177] Proceedings are very informal and their decisions (called 'awards') are not published but may become widely known to interested parties through their respective organisations.[178] Their decisions are final, making them courts of final appeal as far as the preliminary reference procedure is concerned.[179]

Though Denmark amended its Equal Pay Act in 1986 to state explicitly that it included equal pay for work of equal value,[180] an important Industrial Arbitration Board decision in 1977 had already accepted that equal pay included work of equal value in a case successfully brought by KAD to claim equal value for their members with work performed by SiD members in the same workplace.[181]

Until the mid-1980s Danish unions were reluctant to use EC law.[182] However, two dubious Industrial Arbitration Board decisions in 1985 as a result of litigation by HK made the EC option look both attractive and necessary.[183] One of these, the beginning of the *Danfoss* saga, was an important attempt by HK to challenge pay outcomes based on minimum pay agreements in which workers are paid the rate laid down in the collective agreement plus a series of increments decided according to different criteria. These can be distinguished from nominal pay agreements where workers are paid exactly

[177] In broad terms the Labour Court deals chiefly with alleged *breaches* of collective agreements whilst cases concerning the *interpretation* of collective agreements are dealt with by IABs: see R. Nielsen, above n. 164, at 5. The Labour Court is also tripartite; see further O. Hasselbalch above n. 169 at 55–6.

[178] See O. Hasselbalch, above n. 169 at 91–2.

[179] Only unions have access to IABs. In areas outside EC law, a union member who has a right under a collective agreement cannot enforce that right in the civil courts. According to s.1 of the Danish Equal Pay Act, the Act does not apply when the right to equal pay arises out of a collective agreement. It is therefore possible that an individual woman union member would be unable to enforce her equal pay rights in the event of her union disagreeing with her. Nielsen has argued forcefully that this is inconsistent with EC law and that therefore, if a woman was in this situation, she would have to be allowed access to the ordinary courts. See R. Nielsen, above n. 164 at 69.

[180] Following condemnation by the ECJ as a result of infringement proceedings–Case 143/83 *Commission* v. *Denmark* [1985] ECR 427.

[181] See, similarly, IAB 29 Apr. 1987, involving another KAD/SiD equal pay anomaly. The arbitrator referred extensively to the EPD, its implementation in Denmark, the infringement proceedings and the subsequent Parliamentary debates on the 1986 amendment to the Danish Equal Pay Act. Both are reproduced in English in R. Nielsen, above n. 164, at 86ff.

[182] See R. Nielsen and M. Halvorsen above n. 173, at 182.

[183] The first was IAB, 11 Feb. 1985, known as the *Vejle Amts Folkeblad* decision. HK brought an equal value claim for female administrative workers comparing them with male typographers. The IAB, while accepting the factual similarities of their work, stated that this was irrelevant in deciding whether to give equal pay as the male comparators had more vocational training. However, the vocational training was of no relevance to the work they actually did. The second was IAB, 16 Apr. 1985, the first instalment of *Danfoss,* above n. 165. For the English version see R. Nielsen, above n. 164, at 99 and 106 respectively.

the rate laid down in the collective agreement. Minimum pay agreements are becoming increasingly popular in Denmark.[184]

HK had two problems. First, women were ending up with less pay, but because it was difficult to know how the increments were applied in each individual case, it was extremely difficult to pin-point why. Secondly, the Danish Equal Pay Act placed the burden of proof on the employee to show that the difference in pay was attributable to discrimination. HK's first claim against Danfoss failed because of a combination of these two factors. They produced some small groups of employees to show that average wages for women were lower. However, the arbitrator considered that the groups chosen were unsatisfactory as they were too small and unrepresentative and found that the union had not satisfied the burden of proof requirements. HK went back to the drawing board and carried out a more wide-ranging statistical inquiry, which showed an average pay difference of 6.85 per cent between men and women in a sample of 157 Danfoss employees. It still faced, however, the problem of proving discrimination in minimum wage systems given the Danish burden of proof rules. HK returned to an Industrial Arbitration Board.

The Industrial Arbitration Board referred and received a rich and useful response to all but one of its questions from the Court of Justice.[185] The ECJ fashioned a solution which solved both of HK's problems and was of general utility for equal value claimants throughout the EC. It stated (*inter alia*) that the Equal Pay Directive must be interpreted as meaning that, where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that its practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. On receiving this response, the Industrial Arbitration Board applied it faithfully, though problems remained as to how equalisation should take place, leading to further sets of negotiations between HK and Danfoss.[186]

The ECJ did not answer the fourth question posed in *Danfoss*.[187] This question, which basically asked whether coverage by two different collective

[184] See R. Nielsen, *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1993* (Brussels: Commission) 19 and *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1995* (Commission, Brussels) 19.

[185] Case 109/88 *Danfoss* [1989] ECR 3199.

[186] See K. Precht, '*Danfoss* in the Danish Courts', (1992) 21 *ILJ* 323. Kirsten Precht is a legal counsellor for HK. For a very correct (though implicit) use of *Danfoss* in the context of a different claim brought by HK on a minimum pay agreement see IAB, 13 Nov. 1992, known as *Frisko Sol*.

[187] The question basically aimed to get an answer to the KAD/SiD problem which was not necessary for the resolution of *Danfoss*. It asked '(a) In so far as it may be found that a difference in pay for the same work is attributable to the fact that the two employees are covered by different collective agreements, will it follow from that finding that the directive does not apply? (b) Is it of importance in considering that question whether the two agreements in each case cover, exclusively or to an overwhelming degree, male and female employees exclusively?'.

agreements could be a defence to an equal pay claim, was important in Danish equal value litigation because women and men doing equal work could be covered by KAD (the women-only union) and SiD agreements respectively. A similar question subsequently had to be addressed by the ECJ as a result of the *Enderby* reference from the UK.[188] The ECJ in *Enderby* found that 'collective bargaining processes [which] taken separately have in themselves no discriminatory effect is not sufficient objective justification for the difference in pay'.

However, it also stated that 'the fact that the rates of pay at issue are decided by collective bargaining processes . . . does not preclude a finding of *prima facie* discrimination where the results of those processes show that two groups with the same employer *and the same trade union* are treated differently'.[189] The italicised part of this statement was disastrously picked up on by an Industrial Arbitration Board in a case brought by KAD which argued that higher night work compensation for workers under the male agreement than for female workers under their agreement contravened the equal pay principle.[190] The Industrial Arbitration Board concluded that *Enderby* showed that a difference in pay for male and female workers resulting from *different* collective agreements was not automatically an infringement of the Danish Equal Pay Act. It went on to state:

> These differences [in pay] are a result of the practice whereby single trade unions conclude their own collective agreements. KAD has only female members. There are agreements between KAD and NNF [a SiD subsidiary] to the effect that NNF shall not take on female members working for this undertaking. As pointed out by the defendant, a consequence of approving the plaintiff's claim would be that single trade unions could use the Equal Pay Act to achieve what in negotiations has not been prioritised. The Equal Pay Act is designed to neutralise differences in pay that are based on gender, and consequences like these, which will be of crucial importance for the whole system of collective bargaining, go beyond the purpose of that legislation.

We can see here the clear fear being expressed by the Industrial Arbitration Board that equal value litigation could potentially disrupt the Danish system of collective bargaining. The ECJ's remarks in *Enderby* on both groups involved in an equal value claim belonging to the same trade union could have been viewed as merely reflecting the facts in that particular case, rather than laying down a significant and arbitrary restriction on the operation of the principle of equal pay. The Industrial Arbitration Board exploited these remarks in order to advocate a legal position which would render it impossible for a women-only union such as KAD to bring equal value claims.

[188] Above n. 153.

[189] Emphasis added. See further C. Kilpatrick, 'Deciding When Jobs of Equal Value Can Be Paid Unequally: an Examination of s.1(3) of the Equal Pay Act 1970', (1994) *ILJ* 311 at 321–4.

[190] IAB, 7 May 1995, *KAD* v. *Mejeribrugets Arbejdsgiverforening for MD Foods*.

The resistance of Industrial Arbitration Boards to equal value claims which had the potential to have ricochet effects on established pay practices in collective agreements was demonstrated again in the litigation leading to the *Royal Copenhagen* preliminary reference.[191] SiD brought an equal value challenge to the outcomes produced by the operation of Royal Copenhagen's piecework pay system.

The system operated by giving workers a sum per piece produced plus a variable pay element. Royal Copenhagen divided its skilled workforce into large groups, turners (70 per cent men) and painters (95 per cent women). Within each of these groups were subgroups. Automatic machine operators, a male subgroup of the turners' group, were paid 57 Danish kroner (DKr.) per piece but received average hourly pay of 103.93 DKr. SiD claimed that blue-pattern painters, an almost exclusively female group, who also received 57 DKr. per piece but received average hourly wages of 92 DKr., should receive equal pay to the male machine operators. It should be noted that blue-pattern painters needed 1½ years' training whilst their male comparators needed one to four months' training to do their jobs. Looking at these two groups, which carry out distinct and well-defined tasks, there are very strong indications that the female group carries out work of greater value and that, therefore, there is something strongly amiss both in the setting of the basic piece work rate and in the (unclear) criteria used to work out the variable rate. However, this was not how the case was argued.

Another group of female painters, ornamental plate painters, were introduced into the equation by the employer. They were paid more highly (piece rate of 35.85 DKr. but overall average hourly pay of 116.20 DKr.) than the male comparators or the blue-pattern painters and received only three months' training. It is submitted that this group should be viewed as an anomalous pay group which is irrelevant in determining whether blue-pattern painters are paid unequally *vis-à-vis* the male machine operators. However, the questions referred by the Industrial Arbitration Board to the ECJ clearly show that its principal fear was 'leapfrogging', that is, that the case was a way of equalising blue-pattern painters' pay with that of the male automatic machine operators, that the latter group would in turn claim equal pay with the female ornamental plate painters and that the blue-pattern painters would in turn claim equal pay with the new male rate. In other words, the Industrial Arbitration Board assumed that the aim of this litigation was to obtain the highest (ornamental plate painter) rate for all three groups. This fear strongly coloured the questions posed by the Industrial Arbitration Board to the ECJ. However, the very real equal pay problem between the two groups being compared—female blue-pattern painters and automatic machine operators—was still evident in the information available to the ECJ. Moreover, the Court's previous jurisprudence on equal value had produced case law which

[191] Above n. 165.

demonstrated, on the whole, a sophisticated understanding of the operation of gender bias in pay systems.[192] The reference seemed, therefore, to provide an opportunity for the ECJ to choose whether firmly to reject the suggestions of the referring court by sticking clearly to the path indicated by its previous case law and the teleology of equal value, or to sacrifice this principled stance on the altar of judicial harmony.

The Advocate General embraced with gusto the suggestions of the Industrial Arbitration Board. He strongly invited it to find that the groups selected were arbitrary and unrepresentative[193] as a preliminary way of eliminating the equal pay claim. He went on to say that, in any case, average pay could not be used to show inequality within piecework systems, as differences in pay simply reflect different workers' work rates and the quality of their work.

The ECJ made a better job of this last point on average pay and piecework systems, accepting at least that it did not know the criteria upon which the variable piecework element was paid. It used a *Danfoss*—style argument to say that where workers do not know the factors used to determine the variable element, the burden of proving that the differences found are not due to sex discrimination may shift to the employer.[194] However, the ECJ was also keen to respond to the Industrial Arbitration Board's fears. It did so in two ways. First, in its comments on the groups to be compared:

> It follows that a comparison is not relevant where it involves groups formed in an arbitrary manner so that one comprises predominantly women and the other predominantly men with a view to carrying out successive comparisons and thereby bringing the pay of the group consisting predominantly of women to the level of that of another group also formed in an arbitrary manner so that it consists predominantly of women. Evidence that the groups to be compared have been formed in such an arbitrary manner may be indicated by the fact that a subgroup consisting predominantly of women used for the purposes of comparing pay with a group consisting predominantly of men is not the subgroup in terms of training requirements which is the closest to the men's group.[195]

Let us set this out in plainer language. In these paragraphs, the ECJ invited the Industrial Arbitration Board to find that a group of women (blue-pattern painters) with at least four times more training and lower pay than a group of men (automatic machine operators) could not compare themselves with this male group in order to get equal pay precisely *because* they were more highly

[192] *Danfoss*, above n. 165, *Rummler*, above nn. 76–77 and below Part IV.A.III, *Enderby*, above nn. 188–189 and below Part IV.A.III.

[193] Para. 32–35 of Léger's AG's Opinion.

[194] It did not, however, address the equally important point that the setting of the fixed piecework rate may also be discriminatory. Hence, on the facts of this case, should it not have been noteworthy that a more highly skilled female group (blue-pattern painters) was paid the same fixed piece rate as a lower skilled male group (automatic machine operators)?

[195] Paras. 36 and 37 of the judgment.

trained than the male group (and because another female group existed whose length of training was closer to that of the male group). This equates to saying that the more grossly underpaid women are, the less chance they have of bringing a successful equal pay claim.

Secondly, providing comfort for the Industrial Arbitration Board which had decided that *Enderby* did not preclude finding that different collective agreements could provide a defence to an equal pay claim,[196] the ECJ stated:

> The fact that rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups are due to objective factors unrelated to discrimination on grounds of sex.[197]

When the Industrial Arbitration Board applied this judgment,[198] the folly of how the case had been handled became even more apparent. It stated (correctly) that there were no grounds for assuming that the male comparators carried out work of greater value:

> The training requirements for these groups are different, since the blue-pattern painters go through a longer training than automatic machine operators. This indicates that the value of the work is greater than that of the automatic machine operators. None of [the differences in working conditions] can..justify the conclusion that the automatic machine operators' work is of greater value.

The obvious conclusion to be drawn from a finding that the female blue-pattern painters' work is of greater value than that of their male comparators is that they should be paid, at the very least, equally. However, drawing explicitly on paragraph 36 of the Court of Justice's judgment,[199] the Industrial Arbitration Board rejected (by a majority) SiD's claim on the ground that they found its choice of comparators so arbitrary 'that the comparison between those groups is not suitable as a basis for assessment for whether the differences in pay are due to different treatment because of gender'. It was left to the sole female voice of the dissenting member on the Industrial Arbitration Board to inject some reality into the circumstances of the case:

I find no reason to criticise the plaintiff's choice of, on the one hand, a relatively large group of female workers, working with the same thing and with generally the same education, and on the other hand a not entirely small group of male workers, who are also working with the same tasks and have roughly the same training. . . . the fact that ornamental plate painters are closer to automatic machine operators in terms of training requirements cannot lead to the conclusion that the plaintiff has to use the whole group of painters and turners as comparators. Even if ornamental plate painters are not discriminated against, blue pattern painters might well be.

[196] Above n. 190. [197] Para. 46 of the judgment. [198] IAB, 11 Mar. 1996.
[199] Above at text accompanying n. 195.

It is difficult to avoid the conclusion that the ECJ was keen to follow the path suggested by the referring court, despite its going against the *telos* of equal value and the Court's previous jurisprudence. How can this be explained and analysed?

It could be explained by the changing composition and competences of the members of the ECJ and its Advocates General, making them more knowledge-dependent in certain cases on the referring court. Equal value is a conceptually complex area; the particular Court deciding this reference may simply have failed to understand the issues. Alternatively, the Court could have been just as competent on the issues as those Courts which decided previous equal value decisions, but chose to privilege judicial harmony over the substance of the case and coherence with its previous jurisprudence. If that were the case, the ECJ would be demonstrating institutional-dependence, rather than knowledge-dependence. Of course, the greater the degree of knowledge-dependence experienced by the ECJ, the more likely it is to opt for promoting its institutional relations with the national court, particularly where that national court is evidently pushing for a particular response from the ECJ. To assess and evaluate these two different kinds of dependency more effectively, we should look at the other strand of preliminary references from Denmark, equally challenging on a conceptual level, and equally revealing of the tensions which can emerge in judicial dialogue between institutional harmony and the functional development of gender equality.

II Pregnancy-related Illnesses Dialogue

This is a very distinct litigation dynamic for a number of reasons. First, the cases were heard by the ordinary courts. This is because (as in many countries) Danish unions tend to bargain much less on equal treatment issues than on pay issues. As pregnancy-related issues are not covered in collective agreements, they go to the ordinary courts. In particular, the three references[200] concerning this issue were made by the highest civil court (the Supreme Court—*Højesteret*)[201] and by the Maritime and Commercial Court (*Sø- og Handelsretten*).[202]

Secondly, although unions (mostly HK) officially took all these cases on behalf of the women involved, there seems to be some evidence that the unions did not organise the cases but supported them at a later stage. As these cases, like those concerning equal value, are conceptually demanding, who put them

[200] Above n. 166. These cases will be referred to as *Hertz*, *Larsson* and *Pedersen*.

[201] The system of ordinary courts in Denmark is divided into three instances; lower courts, organised by territorial district, hear cases at first instance; these can be appealed to either the Western or the Eastern Regional Courts, from which appeals go to the Supreme Court: O. Hasselbalch, above n. 169, at 80.

[202] This court, as its name suggests, deals with cases in which a knowledge of maritime and commercial matters is of special advantage, including cases concerning the terms and conditions of white-collar workers based on the relevant legislation. Its decisions can be appealed to the Supreme Court.

on the agenda? We need to introduce a new institutional actor, the Equal Status Council, which has been heavily involved in the equal value litigation dynamic as well.[203] In 1987, the Equal Status Council began a campaign to promote greater understanding of a disease which causes the floor and bones of the pelvis to loosen during pregnancy. Part of this campaign was a test case to find out whether it was a violation of the Equal Treatment Act to dismiss an employee absent for a long period because of illness resulting from this disease.[204] This test case was *Hertz*, which became the first Danish reference to the ECJ on this issue.

In 1990, in its famous double-bill (*Dekker*[205] and *Hertz*) of pregnancy decisions, the ECJ seemed, according to most commentators, to state the following. From the beginning of pregnancy to the end of the maternity leave period a woman was protected. To refuse to hire her or dismiss her would be direct discrimination without any need for comparison with a sick man. However, at the end of this 'protected period', a woman—even one suffering from a pregnancy-related illness—could be dismissed if a man absent for a similar length of time would have been dismissed. It is true that this reading was, in part, a generous attempt to construct a coherent explanation from these decisions and that the ECJ's decision in *Hertz* was not quite as clear as this presentation would suggest.

In particular, Hertz's pregnancy-related illness had commenced following the end of her maternity leave and the ECJ had framed its reasoning, but not the operative part of its judgment, with regard to that particular factual situation. This gave rise to two, diametrically opposed, alternative possible readings of *Hertz*. On the one hand, it could be argued that a pregnancy-related illness which arose *during* (rather than *after* as in *Hertz*) pregnancy would provide a woman with protection from dismissal for the entire duration of the illness, even if it extended far beyond the maternity leave period. On the other, it could be argued that while a woman is protected from

[203] The Equal Status Council (EqSC) was set up in 1975 and has accrued an increasing number of powers and responsibilities. It is now governed by the Equal Opportunities Act No.238 of 1988. In 1989, the Equal Treatment and Equal Pay Acts were amended to oblige employers to provide information to the EqSC in discrimination cases. The EqSC may also call upon specialists when considering a concrete matter which can include going to examine the execution of the work in the workplaces concerned, if the employers agree. It is also responsible for granting positive action exemptions. However, even before these changes, the EqSC was heavily involved in some equal value cases and is involved in some capacity in all (though there are few) of the equal treatment cases in Denmark. With regard to equal value, unions often seek an opinion from the EqSC (which enters into detailed correspondence with the employer) before going to an Industrial Arbitration Board. The best example is IAB, 29 Apr. 1987, above at n. 181. Before the arbitration in *Royal Copenhagen*, discussed in the previous section, the SiD sought an opinion from the EqSC which stated (1 May 1989) that 'the majority view within the EqSC is that the possibility that the law on equal treatment has been infringed cannot be ruled out'.

[204] R. Nielsen, above n. 164, at 55.

[205] Case C–177/88 *Dekker* [1990] ECR I–3941.

dismissal during the 'protected period', periods of absence during that time on account of pregnancy-related illness could be used in calculating whether she had been absent for longer than a comparable 'sick man'.

Neither of these alternatives provides a plausible or attractive reading of *Hertz*. To draw a line between 'protection' and 'no protection' on the basis of when the pregnancy-related illness arose seems arbitrary. The latter argument, that absences during the 'protected period' can be counted once the maternity leave had ended, makes the 'protected period' not very protected at all.

Be that as it may, these two arguments came before the Maritime and Commercial Court in *Larsson*. HK pressed for the former argument and the employer for the latter. Larsson had been absent because of loosening of the pelvic ring for a large part of her pregnancy. She then went on maternity leave and took her annual leave. Less than one month after the end of her annual leave, she was dismissed by her employer. She was still off work suffering from the same complaint. Both HK and the employer wished the Maritime and Commercial Court to make a reference. It refused to do so, on the ground that *Hertz* clearly showed that the employer's view was right. Following an appeal by HK to the Supreme Court, the Maritime and Commercial Court was instructed by the Supreme Court to make a reference, which it then made. The Maritime and Commercial Court was, however, clearly of the view that the employer's interpretation of *Hertz* was correct. This meant that it thought that the ETD prevented women being dismissed while they were actually pregnant, but that days missed because of pregnancy-related illness during pregnancy could be incorporated in calculations to decide whether a man absent for a similar length of time because of illness would have been dismissed. Calculated in this fashion, Larsson had been absent for a considerable number of months at the time of her dismissal.

The Advocate General applied the standard view of *Hertz* to the *Larsson* facts, thus rejecting both HK's and the employer's positions. He found that the periods of pregnancy-related illness during pregnancy and the period of maternity leave could not be counted as absences. This meant that Larsson had been absent for less than four weeks when she was dismissed. The Advocate General stated that it was difficult to believe that Danish employees could be dismissed after less than a month's illness.

The ECJ clearly had greater difficulty in drawing the same obvious conclusions from its previous decisions as the Advocate General[206] and decided that absences during pregnancy for pregnancy-related illnesses (but not during maternity leave) could count in comparing her length of absence with that of a

[206] See para. 49 of the Opinion of Ruiz Jarabo-Colomer AG in the subsequent *Brown* case from the UK: 'The Court appeared not only to maintain in *Larsson* a position contrary to what is to be inferred from a brief examination of its earlier judgments, but also directly to contradict the reading of those judgments which has been propounded over time both by its Advocates General and by the numerous authors who have commented on the judgments': Case C–394/96, [1998] ECR I–4185.

sick man. In other words, it adopted the employers' argument. More importantly, it responded in the way the Maritime and Commercial Court considered the questions should have been answered. This is despite the fact that these answers drove a coach-and-horses right through the 'protected period' it had created in *Hertz* and *Dekker*.

Though it may not have helped the Danish court applying *Larsson* very much, the ECJ took the rare step of explicitly admitting the following year, in a preliminary ruling concerning pregnancy-related illness referred from the UK, that it had been wrong in *Larsson*.[207] This drives home the fact that *Larsson* is a perfect illustration of the Luxembourg Court experiencing either knowledge and/or institutional-dependence to an unhealthy degree.

In the final reference, *Pedersen*, the ECJ was asked by the Maritime and Commercial Court to deal with a number of issues in national legislation which meant that women suffering pregnancy-related illnesses were treated worse than women or men suffering from 'normal' illnesses. In particular, those suffering from non-pregnancy related illnesses received full pay, while those suffering pregnancy-related illnesses or incapacities received half-pay. The Luxembourg Court drew a line between, on the one hand, absences related to 'real' pathological conditions or risks for mothers or unborn children and, on the other, absences related to 'routine pregnancy-related inconveniences' or resulting from a 'medical recommendation intended to protect the unborn child but which is not based on an actual pathological condition or on any special risks for the unborn child'.[208] In the former, not to provide full pay is discriminatory; in the latter, it is not. Neither the judgment, nor any of the supporting documentation, shows any evidence that the medical distinction it pivots on is useful, generally accepted, or even supported by a shred of scientific evidence. This decision seems designed to promote references asking how bad morning sickness has to be in order to count as a 'real' illness rather than a routine inconvenience and what constitute 'special risks' for the unborn child.

Perhaps, however, Danish unions and the Equal Status Council may curb their desire to achieve legal change in this area through Luxembourg-oriented litigation in the face of the mounting evidence that the ECJ is demonstrating

[207] *Ibid.*, para. 27.

[208] Compare to the reasoning in *Brown*, above n. 206: 'Pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition (paragraph 22); [. . .] dismissal of a woman worker during pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and, therefore, constitutes direct discrimination on grounds of sex (paragraph 24).' What happened to the 'incapacity for work' criterion between *Brown* and *Pedersen* in order to test for discriminatory treatment because of pregnancy?

that it is particularly ill-equipped to make these decisions well. Indeed, although the supremacy attaching to these pronouncements on gender equality has made the ECJ an attractive option for litigation strategies, this has to be weighed against its knowledge-dependence and institutional dependence on specific issues. The supremacy which makes good judgments extra good also makes bad judgments extra bad.

The forces behind the pregnancy-related illness litigation needed to reckon with the particular difficulties the Luxembourg Court has in deciding this kind of case. It is not a specialised labour court and has dealt with very few pregnancy cases. *Hertz*, along with *Dekker*, was its first attempt to grapple with the interrelationship of pregnancy and gender equality. It is at a disadvantage *vis-à-vis* the average national court in terms of its ability to obtain further scientific and medical evidence in order to help it decide cases such as these along medical lines. This, of course, does not imply that national labour courts with these advantages automatically make more women-friendly pregnancy decisions.

However, the Danish litigants here needed, *for that very reason*, to reckon with the consequences of the knowledge-poverty, both relative (that is, *vis-à-vis* national courts) and absolute (that is, its familiarity and grasp of the issues surrounding different types of pregnancy-related illnesses) of the ECJ in this specialised sub-niche of pregnancy protection. This made the Court much more likely to promote judicial relations by responding in the way the national court wished it to respond, particularly where the referring court made that preference clear. So the Danish litigants needed to worry not only about how the ECJ might understand the ETD but about the attitude of the referring court, as this has a greater opportunity of having a greater influence on the Court than it would have in situations where the Court is more knowledge-rich.

We can see this more clearly by using the notions of knowledge and institutional dependence to explore the paradox of the contrasting stance taken by the ECJ in the closely related UK references of *Webb* and *Brown*.[209] In these cases, the ECJ disagreed with the stance taken by the UK courts,[210] and

[209] Case C–32/93 *Webb* [1994] ECR I–3567; *Brown,* above n. 206. See also, Table 1.

[210] *Webb* concerned the dismissal of a pregnant woman taken on as a permanent employee who was replacing at the beginning of her contract another employee who was on maternity leave. The Court of Appeal [1992] IRLR 116 distinguished *Dekker*, above n. 205 on the facts and stated that, in any case, it would be impossible to apply the ECJ judgment without distorting the words of the relevant British legislation. The House of Lords decided that the non-comparative approach in *Dekker* would not apply where the employer has a genuine 'gender-neutral' explanation for dismissing a pregnant woman; here, that a man taken on as a permanent employee initially to replace a woman on maternity leave would similarly have been dismissed if he had been unable to work during the maternity leave of the female employee. In *Brown*, the EAT rejected her discrimination claim on the ground that it was bound by the Court of Appeal decision in *Webb*. The Court of Session (the case was Scottish) held that there was no breach of the ETD as *Hertz* meant that when dismissal was due to a pregnancy-related illness, the comparable approach applied: [1995] IRLR 211.

decided the cases in ways which were broadly consonant[211] with the 'protected period' stance developed in *Hertz* and *Dekker*. *Webb* was decided after *Hertz* but before *Larsson,* while *Brown* was decided after *Larsson* but before *Pedersen*. This means that we can immediately discount explanations of the Court's widely varying stances in the UK and Danish references based on a chronological learning curve. Instead we can see that the Court episodically but consistently swung between agreeing with the referring court and rejecting its earlier case law on the 'protected period' (the Danish references of *Larsson* and *Pedersen*) and disagreeing with the referring court and accepting its earlier case law on the 'protected period' (the UK references of *Webb* and *Brown*). What would an explanation of the different stances in the UK and Danish pregnancy references based on a differential weighting of knowledge and institutional-dependence look like?

With regard to knowledge-dependence, certain hypotheses can be tested to try to isolate what made the Court suffer greater knowledge-dependence in *Larsson* and *Pedersen* than in the UK references of *Webb* and *Brown*. These hypotheses require greater analysis and testing in other areas. They are put forward here in the face of a clear need to try to explain the conundrum presented by the different stances taken by the ECJ in these references. The first is that the Court may be more knowledge-dependent when it does not sit as a Full Court. However, this is not very convincing here as, for example, both *Webb* and *Larsson* were decided by the Fifth Chamber. The second concerns the ease with which the Court could understand the issues raised in the references *vis-à-vis* the development of its non-comparative, direct discrimination approach to pregnancy during the 'protected period' in *Hertz* and *Dekker*. The fact that both Ms Webb and Ms Brown were clearly dismissed while they were pregnant, unlike the litigants in the Danish references, made these cases easier to understand within the 'protected period' analysis. Moreover, the Danish cases required a sophisticated and differentiated analysis of different kinds of pregnancy-related illnesses during and after pregnancy; the UK cases did not. Both these factors could be said to have made the ECJ more knowledge-dependent in the Danish references than in the UK references. The third hypothesis concerns institutional dependence. UK courts do not tend to frame their questions in a manner intended to indicate very clearly to the ECJ what they think the answer should be; the questions are framed fairly neutrally. This means that the ECJ is not given a clear signal that the UK court which is referring would very much like a particular response which is indicated in the preliminary reference submitted to the ECJ. This can be compared to the Industrial Arbitration Board in *Royal Copenhagen*[212] and the Maritime and

[211] See, however, the possible limitation in *Webb*, above n. 209 and a German reference Case C–421/92 *Habermann-Beltermann* [1994] ECR I–1657 of the 'protected period' to employees on contracts of unlimited duration; see further, below Part IV, text accompanying nn. 237–238, the contrast between this and Spanish jurisprudence.

[212] Above n. 45.

Commercial Court in *Larsson* and *Pedersen*.[213] Beyond these cases, we can think back to the German courts, not only in the post-*Bötel* cases,[214] where this was particularly obvious, but also to other references, such as *Rummler*,[215] where the referring German court spelt out its own theories of how it thought the case should be addressed in the preliminary reference it made. It is not that UK courts do not have views on how Community gender equality sources should be interpreted; it is a matter of difference between different national courts on how it is appropriate to communicate with the ECJ. UK courts tend to keep their views to themselves; the Danish and German courts have views and are happy to express them in their references. Where the ECJ is particularly knowledge-dependent or the national court particularly insistent, this can make a difference.

The Danish references provide particularly clear examples of how knowledge-dependence and institutional dependence can lead to tensions between various functional and institutional demands. It has been suggested that the particular configuration of knowledge and institutional dependence in these references led to the functional requirements of gender equality and the institutional value of judicial coherence losing out to the institutional value of judicial harmony.

C. Conclusions on the Languid Couple

Four brief points can be made which help to pull together what examination of France and Denmark adds to the picture being constructed of the integration of gender equality as a legal policy area through judicial dialogue.

First, both France and Denmark share the characteristic of having a very low overall gender equality case-load. It is possible to identify with reasonable precision the recent emergence of groups using gender equality legal sources, and the high degree of correlation of this emergence with identification of the utility of EC law.

Secondly, we can add to what we learnt in our examination of Germany and the UK to see an even more differentiated vision of those pushing gender equality cases into courts emerging. Once again, there is a strong contrast between the centralised institutional Danish litigators and the more sporadic and isolated utilisation of gender equality sources in France. The French example powerfully challenges a straightforward correlation being made between gender equality references and the protection of women through public interest litigation; in chronological terms, French women were the last in the six Member States examined here to start obtaining any benefits from EC gender equality sources.

[213] Above n. 166.
[214] See Part II, text accompanying nn. 56–58.
[215] Above Part II, nn.76–77; see also Part IV.A.III.

Thirdly, we can note the different attitudes of the national courts to EC sources. French courts have been slow and, in some instances reluctant, to pick up the habit of using EC sources and the preliminary reference mechanism in the area of gender equality. However, when they have done, they have been capable of an anarchic and inventive use of the equality sources at their disposal. This inventiveness has not, however, fed into the content of the preliminary references they make. By contrast, both sets of Danish courts, the Industrial Arbitration Boards and the civil courts have accepted the use of EC law but have been overt about expressing their preferences about what the substantive meaning of EC law should be in their preliminary references. In this respect, Danish courts resemble German courts while French courts resemble UK courts.

Indeed, despite the very different courts which have been involved in using EC sources and making preliminary references in France (criminal courts, first instance labour courts, civil courts at various levels including the *Cour de Cassation*, the *Conseil d'Etat*) and Denmark (Industrial Arbitration Boards and the civil courts) there is, in a number of senses, a strong similarity between all the French courts, on the one hand, and all the Danish courts, on the other. This point is worth pursuing a little further with regard to France. Most analyses of interaction between national judiciaries and the ECJ have focussed on the point in time at which the highest national courts have accepted the doctrines of direct effect and supremacy. The contrast between the French *Cour de Cassation* (relatively painless and early acceptance) and the *Conseil d'Etat* (painful and late acceptance) has assumed totemic significance in such analyses. Yet, the clear split between civil and administrative jurisdictions undergoes substantial modification when examined from an angle other than that of exclusive focus on acceptance of direct effect and supremacy. Both the *Cour de Cassation* and the *Conseil d'Etat* began active use of EC gender equality sources at about the same time, with similar degrees of reticence, and as a result of explicit pressure from litigants to use EC gender equality sources, in particular ECJ jurisprudence. Communication with EC sources by these two courts is limited, terse and formal. French courts—irrespective of level or specialisation—have not been strategic in their deployment of preliminary references on EC gender equality sources. Nor—unlike the UK courts—have they got to know ECJ jurisprudence and applied it fully where that appears necessary in the light of an overview of the panoply of ECJ case-law. Instead, EC law is sometimes under-applied and sometimes over-applied by French courts; there is no sense of ECJ case law related to gender equality becoming part of the patrimony of French courts. Fragments of EC law arrive before French courts like toys without a full set of instructions. Some courts will seek out the instructions (such as the *Abdoulaye* court); some will invent new games and rules (the *Tribunaux de Police*); and some will dispose of the toy according to the limited instructions available when there is no other (French) toy with full instructions to use instead (the *Cour de Cassation* and *Conseil d'Etat*).

Finally, we have seen the impact the content and style of preliminary reference can have on the responses given by the ECJ. This has been discussed by contrasting different degrees of knowledge-dependence and institutional dependence which the ECJ may experience in any given reference. In the French references, the Court does not exhibit any extremes of either knowledge or institutional dependence. The content of the questions asked, and the manner in which they are phrased, allows it to maintain and progressively elaborate its previous case law. The Danish references are, conversely, the best examples in the area of gender equality of the Court suffering both knowledge and institutional dependence. This had a marked impact on the quality of its responses and raises important questions about how and when harmonious dialogues between courts is achieved only at the cost of sacrificing judgments aimed at promoting, rather than limiting, gender equality. Once again, this underlines the importance of analyses which look at *courts*, rather than just ECJ jurisprudence, in order to understand and evaluate developments in a given policy area.

PART IV THE INACTIVE COUPLE: SPAIN AND ITALY

Last but, as we shall see, by no means least, come two Member States which have made none or one reference to the ECJ on gender equality in employment. Both Member States also have Constitutional Courts and constitutionally justiciable gender equality guarantees. One key aim of including Member States which have made no or few preliminary references is to demonstrate that counting preliminary references as a measure of the degree of legal integration of gender equality in a particular national legal order is deeply misleading and incomplete. But looking at the utilisation of EC gender equality sources by Italian and Spanish courts is to uncover many more interesting issues about dialogue than that the assumption that preliminary reference measurement is sufficient to gauge judicial dialogue, quantitatively or qualitatively, is wrong. It provides two highly distinctive and thought-provoking accounts of the interplay of national, constitutional and EC legal sources and the input of labour law academics into that process. Moreover, it casts light on how institutional pathways structuring engagement in dialogue can link to views on desirable functional outcomes in the policy area of gender equality.

A. Spain: A Constitutional Court Dialogue [216]

If we compare the amount of gender equality litigation in Spain with that in the other Member States examined here, though it is clearly lower than in the

[216] Special thanks go to Fernando Valdés Dal-Ré who helped me find materials in Madrid and satisfied all my on-going requests for photocopies of Spanish cases and academic articles.

UK and Germany, it is far higher than the levels found in France. It is also both higher and broader in scope than equality litigation in Denmark. This is to take nothing away from Spanish criticisms that, compared to other areas of litigation, gender equality in employment has produced a 'scanty jurisprudence',[217] this being attributed to low levels of knowledge on the part of women, lawyers, and the social partners.[218] Gender equality litigation may be too low in Spain, but it is equal to or higher than that in many other Member States. Why then has there been only one recent reference?

Understanding gender equality litigation in Spain requires turning first and foremost to the Spanish Constitution (SC) of 1978. Article 14 of the Constitution states:

> All Spaniards are equal before the law without any discrimination for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

Spanish gender equality jurisprudence has almost exclusively occurred through its development by the Constitutional Court (*Tribunal Constitucional*)[219] on the basis of Article 14 SC.[220] These cases have reached it through a special constitutional mechanism called the *recurso de amparo*. Any

[217] M. Rodriguez-Piñero, 'Igualdad entre los sexos y discriminación de la mujer', (1992) 1 *Relaciones Laborales* 10.

[218] *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1996* (Commission, Brussels) 15. There are however signs of groups and institutions being aware of, and trying to change, this situation. The *Instituto de la Mujer* (the central state funded equality body) included as part of its 2nd Equal Opportunities Plan, the organisation of technical conferences on standards and notions of equality—*General Report of the Legal Experts Group on Equal Treatment of Men and Women 1993* (Commission, Brussels) 41 and *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1996* (Commission, Brussels) 37. In Andalucia, the Spanish unions CCOO (*Comisiones Obreras*) and UGT (*Union General de Trabajadores*) and the *Instituto Andaluz de la Mujer* have agreed that the Institute will finance the employment by the unions of two female lawyers who specialise in defending female employees in cases of sex discrimination at work—*General Report of the Legal Experts Group on Equal Treatment of Men and Women 1993* (Commission, Brussels) 10. Moreover, the equal value cases discussed below were almost exclusively taken by unions or enterprise committees. Doctrinal writings on gender equality in employment, particularly in the leading Spanish journal, *Relaciones Laborales*, are common.

[219] For case references to constitutional jurisprudence, I use the conventional abbreviation TC for the Constitutional Court.

[220] Gender equality is also covered in the *Estatuto de los Trabajadores* (ET—Workers' Statute) of 10 Mar. 1980. Art. 4 ET enumerates basic workers' rights including the right not to be discriminated against on grounds of sex; Art. 17 ET provides workers with a contractual right not to be discriminated against on grounds of sex at work; Art. 24 ET states that work categories and promotion rules must be the same for men and women. Art. 28 ET deals with equal pay. Until 1994, it did not cover work of equal value (although see the interpretation of Art. 14 SC by the TC below Section III). Law 11/94 amended Art. 28 ET explicitly to include work of equal value. On Art. 28 ET post-1994 see B. Quintinilla Navarro, 'Prohibición de discriminación retributiva por razón de sexo' in F. Valdés Dal-Ré (ed.) *La Reforma del Mercado Laboral* (Lex-Nova, Valladolid, 1994) 231.

citizen may challenge a judicial decision before the Constitutional Court using this mechanism if she thinks that such a decision violates a constitutional right. This right is, however, conditional on prior exhaustion of remedies in the ordinary courts. On the basis of these cases, the Constitutional Court has developed a slim but rich jurisprudence on a wide range of gender equality issues. It must also be borne in mind that Spain did not join the Community until 1 January 1986.

The possibilities of dialogue with EC sources are heavily conditioned by the central role the Constitutional Court plays in Spanish gender equality litigation. As we shall see, it has been well apprised of EC sources in this area. In reality, if not in theory, it has been and still is the principal judicial port of entry for EC gender equality sources into the national legal system. It has not been an indiscriminate receptor. It has used the Luxembourg Court's jurisprudence in the areas where it agreed with the line it was taking and has studiously ignored ECJ jurisprudence where it did not cohere with its own vision of what gender equality means.

This implies that the Constitutional Court has developed from the cases before it and Article 14 SC its own distinctive vision of equality. This will be briefly examined before looking at how this influenced the use of EC sources and jurisprudence.

I How to Read Article 14 of the Spanish Constitution—a Change in Position

The Constitutional Court's reading of Article 14 divides into two clear phases, well-documented in doctrinal writings.[221] Between 1981 and 1987, the Constitutional Court, relying heavily on the jurisprudence of the European Court of Human Rights, gave a unitary and bilateral reading to Article 14. It read it as a general equality principle, outlawing arbitrary distinctions between comparable factual situations. As Miguel Rodriguez-Piñero notes, while this had the undoubted advantage of amplifying the scope of Article 14, far beyond the general reference to equality before the law, it also entailed considering the second part of Article 14[222] as a mere illustrative consequence of a generic prohibition of discrimination, the same as an arbitrary difference in treatment. Therefore, all differences in treatment were to be subjected to the same level of scrutiny. In practice, this produced a constitutional jurisprudence dominated

[221] See, for detailed exposition, M. Rodriguez-Piñero and M. Fernandez Lopez, *Igualdad y discriminación* (Tecnos, Madrid, 1986). See also M. Rodriguez-Piñero, above n. 217 and M. Fernandez Lopez, 'Igualdad y no discriminación por razón de sexo: planteamiento constitucional' in J. Aparicio and A. Baylos (eds.) *Autoridad y democracia en la empresa* (Trotta, Madrid, 1992) 95 at 110ff. See for subsequent developments M. Rodriguez-Piñero, 'Discriminación de la mujer y tutela antidiscriminatoria', (1992) 3 *Relaciones Laborales* 18 and, by the same author, 'Discriminaciones e igualdad entre los sexos en la relación de trabajo', (1993) 3/4 *Relaciones Laborales* 1.

[222] By second part I mean the following division: Art. 14(i) 'All Spaniards are equal before the law (ii) without any discrimination for reasons of birth, race, sex, religion, opinion or other personal or social condition or circumstance'.

by the pejoratively termed *varón discriminado* as men took cases claiming advantages given to women under Francoist laws and collective agreements.[223]

In 1987, the Constitutional Court decided a case (TC 128/1987) in which it radically altered its reading of Article 14. Instead of reading it as one sentence, it now split it into two parts. The first part, dealing with equality before the law, would still be concerned with strict formal scrutiny of arbitrary distinctions. However, the second part[224] was now given an independent existence and meaning. To quote Miguel Rodriguez-Piñero's delighted reaction to this change, 'in few and plain words, a Copernican whirl has been given to the reading of Article 14(ii) SC, considered in the light of social reality and aimed at eliminating the past and present situation of discrimination against women'.[225] The factual context in which this Copernican whirl took place are full of implications for both the development of the Constitutional Court's new vision of gender equality and for how it would deal with EC sources. The case was, once again, brought by a man claiming he had been discriminated against. In refusing the claim of this *varón discriminado*, the Constitutional Court gave a potent signal that it was changing the direction of its equality jurisprudence towards the group the gender equality guarantee had been designed to help. The Constitutional Court made its new vision of Article 14 and gender equality very explicit in the judgment and articulated it with other constitutional provisions[226] such as Article 9.2 and Article 10.1:

> Article 14 SC establishes in its first part a general equality clause for all Spanish people before the law. However, it goes on to refer expressly to a series of prohibitions of discrimination on specific grounds, among which one finds the ground of sex. This express constitutional reference does not imply the creation of a closed list; however, it represents an explicit prohibition of the maintenance of deeply rooted historical differences . . . In this sense, it must not be forgotten that the express inclusion of sex discrimination has a specific motive . . . which is the desire to end this historical situation of inferiority . . . Social reality (which cannot, in this regard, be ignored if we do not wish to deprive the

[223] See, e.g., TC 103/1983—violation of Art. 14 for widowers to have to fulfil extra conditions in order to obtain widows' pensions. In TC 81/1982 and 98/1983 men even managed to bring a successful equal pay claim against women. A 1973 Ordinance organised night work for sanitary technical assistants differently, the result being that when women did night work they got paid nine hours' overtime which men did not receive. A similar decision on a different Ordinance can be found in TC 38/1986. In TC 10/1985, a night-time break for female nurses had to be extended to male nurses.

[224] Above n. 222.

[225] M. Rodriguez-Piñero above n. 217 at 16.

[226] Art. 9.2 SC: 'It is the responsibility of the public powers to promote conditions so that the liberty and equality of the individual and the groups he joins will be real and effective, to remove those obstacles which make difficult or impede their full implementation, and to facilitate the participation of all citizens in political, economic, cultural and social life'. Art. 10.1 SC: 'The dignity of the person, the inviolable rights inherent in this, the free development of the personality, respect for the law and the rights of others, are the foundations of political order and social peace'.

constitutional provisions outlawing discrimination against women of all content) is today clearly very far from a situation of equality, as indicated by the available statistics . . .

Developing this reasoning, the Constitutional Court clearly stated that the prohibition of sex discrimination in the Constitution could and should be interpreted asymmetrically, 'if the factual supposition is the social practice of discrimination, it is obvious that the consequential corrective measures (that is, differences of treatment) will be constitutionally justified'.

The problem with EC sources lies in how the Constitutional Court applied this new asymmetrical notion of equality. The case concerned a claim by a man denied a childcare benefit given to women with children under six years old. The Constitutional Court decided that granting this benefit only to women was justified under Article 14 SC:

> [W]hile there is no normative difference between male and female family obligations, the mother who maintains in her charge small children finds herself in practice in a particularly difficult situation with regard to access to employment or remaining in a job she has already..Therefore, there is a difference between men and women. The difference is the fact that women with young children encounter undeniable and major difficulties to enter, and remain in, the labour market, a difficulty which has many different social origins but which, however, places this group in a clearly disadvantageous situation with respect to men in the same situation. Insofar then as this social reality persists, one cannot consider discriminatory measures which tend to favour access to employment of a group in a clearly socially unequal situation and which aim to avoid, by facilitating the employment of childminders, that a socially discriminatory practice translates into mothers with young children leaving employment.

There are two striking contrasts here. The first is with the ECJ's decision the following year in the infringement proceedings against France.[227] The second is with the French civil and labour courts' subsequent willingness to allow claims by men claiming precisely the types of female-specific benefits in collective agreements which the Spanish Constitutional Court firmly states in this judgment may be reserved for women in order to achieve gender equality.[228] It could of course be anticipated that the Spanish Constitutional Court would change its mind when the decision of the ECJ in *Commission* v. *France* the following year made clear the status of such female-specific benefits under Community law. However, as we shall see, this is not what happened.

II Applying and Developing this Vision—the Consciously Selective Use of EC Sources

TC 128/1987 has been quoted from extensively because the phrases therein have been a constant refrain and a 'vital constitutional focus' for the Constitutional Court in its subsequent decisions. The Constitutional Court

[227] Case 312/86 *Commission* v. *France* [1988] ECR 6315.

[228] Part III.A.I.

has subsequently explained further and refined this vision of gender equality. It has drawn a line between protective norms (constitutionally illegitimate) and positive action (legitimate). What it puts into each of these categories does not always align with ECJ classifications. Generally, the Luxembourg Court has not shown great enthusiasm for gender-differentiated measures which do not concern pregnancy and maternity.[229] More interesting is the fact that when the Constitutional Court has decided that differences in treatment *do not* conform with equality, it often uses ECJ jurisprudence to support that conclusion.[230] When, however, it decides that female-specific measures *do* conform with its vision of equality, it does not cite the same ECJ jurisprudence (for obvious reasons).[231]

While one may harbour deep reservations about the Constitutional Court's definition of 'positive action',[232] the Constitutional Court's constitutional

[229] This is well illustrated by the recent decision in *Abdoulaye* discussed in Part III.A.IV; the female-specific payment would be saved from breaching the ETD only if it was designed to offset the occupational disadvantages associated with maternity leave absence.

[230] The best example is TC 22/1992 concerning the ban on women working in mines. The lower courts decided that this ban did not violate Art. 14 as it complied with ILO Conv. No 45 of 1935. However, the Spanish Constitution contains a provision which declares the automatic elimination of all prior norms which are incompatible with it. The Constitutional Court extensively discussed the ETD in this case. Looking first at Art. 2(3) ETD, Case 184/83 *Hofmann* [1984] ECR 3047and Case 222/84 *Johnston* [1986] ECR 1651, it concluded that the protection of women and their health on grounds of sex must be examined with extreme care and suspicion. On the mine-work ban, it stated that the historical reason justifying the ban no longer justified its maintenance. This conclusion was backed up a lengthy reference to the (recently decided) *Stoeckel* decision (Case C–345/89, [1991] ECR I–2047). See also TC 28/1992—paying the transport costs of only women who work night shifts violates Art. 14 SC as it is a protective norm premised on a differentiating notion of woman by assuming that she is subject to risks to which men are not subject and that the difference lacks a justification which is reasonable, objective and congruent with the norm.

[231] See, e.g., TC 19/1989 which contrasts usefully with the approach taken by the Constitutional Court pre-1987 in TC 103/1983 above n. 223 and with the (subsequent) ECJ pensions jurisprudence. The Constitutional Court decided that paying a woman a higher pension than a man between the ages of 60 and 64 was a constitutionally legitimate difference in treatment. The circumstances were, however, quite specific. It concerned only the maintenance of this difference in treatment for women working in the textile industry pre-1967 following its removal in a 1966 law. The Constitutional Court justified this decision as necessary to avoid prejudicing the women concerned with the new (1966) system. However, it also stated that it was constitutionally justified because the difference of treatment had the object of compensating in some ways the situation of inferiority which women had suffered in working life and society. Contrast this reasoning with that of the ECJ on similar 'bridging' pensions in Case C–132/92 *Bird's Eye Walls* [1993] ECR I–5579. See also TC 109/93—a female-specific absence of one hour per day to take care of a child younger than nine months was a positive action measure, compatible with the Spanish constitutional equality principle. References to EC jurisprudence such as *Hofmann*, above n. 230, *Johnston*, above n. 230, *Commission* v. *France*, above n. 230 and *Stoeckel*, above n. 230 are conspicuous by their absence.

[232] Compare TC 28/1992 (classified as an unconstitutional protective norm), above n. 230, with TC 109/93, discussed in the previous note and TC 128/1987, above, at I (classified as positive action measures).

position and vision, articulated with other constitutional provisions, means that it has often dealt with issues in a way which the ECJ seems incapable or unwilling to emulate. This can be further illustrated by examining the exclusion of women from the armed forces and pregnancy protection through equality.

Courts in Germany and the UK have recently referred the compatibility with EC law of the exclusion of women from the armed forces (or parts of it) to the ECJ.[233] The Spanish Constitutional Court dealt with this issue in TC 216/1991. A woman was told that she could not undertake tests to enter the Military Air Academy because Article 36 of the 1980 National Defence Law required applicants to be 'Spanish and male'. In the first Equal Opportunities Plan in Spain, approved in 1987, the legislature had committed itself to the gradual entrance of women into the armed forces. The Constitutional Court, reading Article 9.2 SC[234] along with Article 14 SC, examined whether the Military Authorities had taken too long to open up to women. They concluded that the legislature had violated Article 14 through its unjustified delay in correcting this inequality. It seems unlikely that the preliminary reference procedure and the ECJ's perception of its role would permit such a finely-tuned analysis. Indeed, the decisions in *Sirdar* and *Kreil* show that, while the ETD may be effective in preventing a blanket ban of women from positions involving the use of arms,[235] more specific exclusions will readily be excused, following *Johnston*, under Article 2(2) ETD, provided that the national court finds the exclusion in question proportionate. The multi-level nature of Community judicial dialogue makes it much more difficult for the ECJ than for a national court rigorously to examine, suggest or oversee, a rolling programme of experimental insertion of women into areas from which they had previously been excluded. The institutional need to respect judicial competences can make a conservative supranational approach to methods of breaking down gender inequality almost inevitable in certain instances, the exclusion of women from the armed forces being an excellent example.[236]

[233] Cases C–273/97 *Sirdar*, [1999] ECR I–7403; C–285/98 *Kreil*, [2000] ECR I–69. See Part II, n. 35. See also the engagement of the French *Conseil d'Etat* with measures excluding women from the armed forces above Part III at nn. 138 and 142 and cases before the Italian courts below nn. 289–290.

[234] Above n. 226.

[235] As was the situation in Germany successfully challenged in *Kreil*; see further Part II, n. 88.

[236] Hence the ECJ accepted that combat effectiveness would be undermined by allowing women into the Royal Marines, making it proportionate under Art. 2(2) ETD to exclude women from this part of the armed forces. The detrimental effect on combat effectiveness is based on acceptance of the (untested) proposition that, in units where everyone is expected to engage in armed combat ('interoperability'), male Royal Marines would rush to protect female Royal Marines in a real war situation. Compare this with the Canadian experience, discussed by La Pergola AG, para. 44, *Sirdar* above n. 233. In a case decided by the Canadian Human Rights Tribunal, *Gauthier*, in 1989, evidence was introduced of trials showing that introducing women not only did not undermine combat effectiveness but, in

The second issue, pregnancy protection, reveals that the ECJ's widely applauded conclusion in *Dekker*,[237] that pregnancy discrimination is direct discrimination without any need for comparisons, had already been reached some time before by the Spanish Constitutional Court. However, more importantly for present purposes, it has managed to avoid constructing the incoherent traps and limitations the ECJ has made for itself in subsequent decisions. Hence in TC 166/1988, the Constitutional Court dealt with a case in which a woman had been dismissed during the trial period regulated by Article 14.2 of the *Estatuto de los Trabajadores* (Workers' Statute or ET) because she was unable, for health and safety reasons, to work in the dialysis area to which she had been assigned. Article 14.2 ET allows the employer unilaterally to terminate the employment relation during the trial period. However, the Constitutional Court drew extensively on the strict approach it has developed in relation to union discrimination to shape the constitutional gender equality protection of pregnancy. It stated that Article 14.2 ET did not permit unconstitutional outcomes. As pregnancy exclusively affects women, unfavourable treatment of women based on pregnancy was sex discrimination prohibited by Article 14 of the Constitution. Special obligations are placed on the employer once the employee has given indications which generate a reasonable suspicion of discriminatory dismissal. The employer must then show that the decision taken did not involve any breach of fundamental rights and that its action was necessary, that is, that the restriction of the employee's right was the only way in which the employer's legitimate interests could be attained. The Constitutional Court also placed a special obligation on lower courts where they face situations which could be gender discriminatory to express clearly the reasons for which they believe that the alleged discrimination does not exist.

This clear line on pregnancy led the Constitutional Court to a different conclusion from that reached by the ECJ in *Habermann-Beltermann* and *Webb*[238] (that equality protection of pregnancy will definitely apply only to contracts of unlimited duration) in TC 173/1994 where the employer had refused to renew a temporary contract because of pregnancy. The Constitutional Court stated that, but for the pregnancy, a new contract would have been entered into. Ignoring EC sources and drawing instead on international sources (ILO Convention No.111 and 1989 UN Convention, Article 11) it stated:

> The central importance of access to work as a vehicle for overcoming the disadvantageous social situation of groups which are discriminated against cannot be

fact, reinforced the *esprit de corps*. La Pergola AG argued for an interpretation of Arts. 2(2) and 9(2) ETD which is dynamic and allows for a modern construction which takes into account social developments which need to be encouraged.

[237] Case C–177/88 [1990] ECR I–3941. See also Part III.B.II.

[238] Cases C–241/92 *Habermann-Beltermann* [1994] ECR I–1657, C–32/93 *Webb* [1994] ECR I–3567. On the Court's pregnancy jurisprudence, see also Part III.B.II.

> denied, as the international instruments cited confirm. And, for that same reason, the mere refusal to renew a contract is legally relevant from the moment when, in the light of the proven facts, a motive prohibited as discriminatory prevented the renewal of the contract, because it enters fully within the scope of Article 14 SC and the logical consequences which flow from this must be applied.

As a result, the Constitutional Court treated the contract as having been made and ordered her wages to be paid for the duration of the contract.

III *Rummler* in a Starring Role—Equal Value in Spain

The final area of interest in looking at how the Constitutional Court decided whether to spurn or embrace dialogue with EC sources, depending on how the latter cohered with its own vision of equality, is the area of equal value.[239] This is the area where the Constitutional Court has most enthusiastically drawn on EC sources, and on one ECJ case in particular. It has developed an affection for *Rummler*,[240] an equal value reference from Germany, which has not occurred in the courts of any other Member State. This has affected how it deals with equal value cases. In *Rummler*, a preliminary reference was made to ascertain how and whether physical strength should be counted in the comparative evaluation of male and female jobs in working out whether they are of equal value. The ECJ responded that job classification systems must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must be organised as a whole in such a manner that it does not have the practical effect of discriminating generally against workers of one sex. In other words, if physical strength was relevant for carrying out a job, it should be included in the evaluation but so too should characteristics more often associated with female work such as manual dexterity.

In a key case, TC 145/1991, which introduced the concepts of indirect discrimination and equal value into Spanish law and constitutes the first systematic use of EC norms and jurisprudence by the Constitutional Court,[241] the Constitutional Court had to consider a claim by female cleaners in a Madrid hospital demanding equal pay with male labourers. The lower courts had accepted that the heavier burden and greater physical effort which characterised the men's work objectively justified the pay difference. In a rich and gender-sensitive judgment the Constitutional Court examined Article 119 (now Article 141) EC and Article 1 EPD very carefully and stated:

[239] See on the particular extreme legacy of the Franco period on discrimination in collective agreements and recent developments, B. Quintinilla Navarro, 'Discriminación retributiva por razón de sexo y convenios colectivos', (1994) *Sociologia del Trabajo* 79.

[240] Case 237/85 [1986] ECR 2101. See above Part II at n. 77 for its genesis.

[241] Note that this was at the initiative of the Constitutional Court and not the parties who made only a generic reference to EC sources. On the case see R. Quesada Segura, 'Discriminación salarial por razón de sexo: Directivas comunitarias y Constitución—Notas a la sentencia TC 145/1991 de 1 de julio', (1992) *Relaciones Laborales* 34. For the first generic reference to EC sources, see TC 241/1988.

> The exclusive and unreasonable utilisation of this objective criterion [physical strength] has produced unequal and detrimental consequences for women. It departs from an undemonstrated premise, the heavier burden and physical effort, giving unjustifiably more value to a predominantly male qualification and not recognising other characteristics of work (attention, care, assiduousness, responsibility etc.) which are more neutral in terms of their impact on each of the sexes..when such generic criteria are employed ...and physical effort, real or presumed, turns out to be the only factor which justifies the higher pay, one clearly considers exclusively 'values corresponding to the average characteristics of workers of just one sex.' (*Rummler*) and this also constitutes an infringement of the prohibition on pay discrimination through breach of the principle of equality between men and women. It cannot be otherwise, when one bears in mind, as the employer admits, that the predominant criteria of evaluation correspond solely to a male standard of work.

In TC 58/1994, the Constitutional Court set out a complex synthesis of the development of ECJ jurisprudence on equal value, explaining the combined implications of *Rummler*, *Danfoss* and *Enderby*.[242] It has also applied the ECJ part-time work jurisprudence to outlaw discrimination against part-time workers in the absence of objective justification.[243] However, the continuing obsession with physical strength as the chief issue in equal value cases has also caused some problems, as where physical strength is not used to justify the difference in value, the Constitutional Court has shown less rigour in picking up other strong indices of pay discrimination.[244]

IV Fundamentally Sustainable?

These various examples of when and how the Constitutional Court has used EC sources underline its degree of control up to now in mediating which sources get in, which are kept out and how they are used. This conclusion is strengthened by considering that the Constitutional Court introduced EC sources of its own motion and not because it was pushed by the parties.

What about all the other courts?[245] Until very recently they have appeared to be completely ignorant of EC gender equality sources and have either followed

[242] See also Part III.B.I. [243] See TC 22/1994 and TC 198/96.

[244] See TC 286/1994. The Constitutional Court stated, 'Both groups carry out very different tasks..moreover the analysis of the value of the work was carried out using neutral criteria, linked to qualities possessed indiscriminately by both sexes. Physical force was not used . . . It is not unreasonable to think that the requirements of skill or concentration is greater in the sphere of production than in the packing sector..in any case, there is no overvaluation of the cited criteria in the predominantly masculine category'. See critical comment on this case by the Spanish experts of the EC equality network in *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1995* (Commission, Brussels) 23. But see also TC 147/1995 which could be seen as a possible attempt to move away the focus on physical strength (the Court stating that it is only when effort and arduousness are seen as physical effort and muscular resistance that we can say that they are masculinised categories).

[245] Labour law disputes in Spain generally go at first instance to a *Juzgado de lo Social* (formerly *Magistraturas de Trabajo*). These comprise a judge sitting alone and normally sit

the jurisprudence of the Constitutional Court[246] or, not infrequently, seemed fairly unfamiliar with that jurisprudence as well.[247] However, there are recent, albeit very modest and isolated, signs of more sure-footed lower courts emerging, hence providing some possibilities of the Constitutional Court's monopoly of the selective use of EC sources being ousted.[248] Thus far, however, lower courts have not shown any signs of acknowledging differences between the ECJ's version of gender equality and the Spanish Constitutional Court's version, let alone expressing a preference for the former over the latter.

Turning back to the Constitutional Court, one figure should be singled out. Miguel Rodriguez-Piñero, an eminent academic labour lawyer, chief editor of the main labour law journal *Relaciones Laborales* and member of the Constitutional Court seems to have played a key role in introducing and developing utilisation of EC sources in the reading of Article 14.[249]

in the capital of each province. Their decisions can be challenged through a cassation style procedure called a *recurso de suplicación* to the *Tribunales Superiores de Justicia—sala de lo social* (TSJ) which sit in the capital of each of Spain's autonomous regions (e.g. Catalonia, Basque Country, Galicia). Very exceptionally TSJ decisions may be revised by the *Tribunal Supremo* (TS) through a procedure called a *recurso de casación para la unificación de doctrina*. This mechanism comes into play when two TSJ decisions contradict each other or when a TSJ decision contradicts a previous TS decision. For Art. 234 (ex Art. 177) TEC purposes, the TSJ would be the court obliged to refer a gender equality dispute.

[246] A nice example is TS No.1696/1996, Decision of 15 Apr. 1997, in *Repertorio de la Jurisprudencia* (RJ) 3200. The case concerned a challenge by a union on behalf of men claiming a female-specific child-care allowance established in a collective agreement. The TS used ECJ and Spanish sources but in a sense which revealed its unfamiliarity with EC sources and its determination to stick to the Constitutional Court's jurisprudence. It relied heavily on TC 128/1987 discussed above at Section I to reject the men's claim. It then stated that it was clear that this case law was not 'out of line with the ECJ *Kalanke* decision, as that decision dealt with a totally different issue'. See also TS, Decision of 9 May 1994, *RJ* 4009 where the court refers to the *Dummler* [sic] case.

[247] For many examples of Spanish courts being unfamiliar with their own Constitutional Court jurisprudence see the *General Reports* of the Equality Experts for 1993 (at 14, 24 and 26), 1995 (at 23–24) and 1996 (at 16). See the view of the Spanish members of the EC Equality Network in *General Report of the Legal Experts Group on Equal Treatment of Men and Women 1996* (Brussels: Commission) 15, 'the Constitutional Court appears to be the only court which includes Community law in its judgments'. The situation now would seem to be a few lower courts using EC cases but generally only those which the Constitutional Court has itself used; see, for example, the use of *Dekker* above n. 237 by the TSJ, Pontevedra in a decision of 15 September 1998, reported in (1999) *EQN*, No.1, 36.

[248] See Decision No.4517/1998 of the TSJ, Catalonia which used, according to the Spanish EC Equality Expert, for the first time in Spain, the Code of Practice on Sexual Harassment to decide that non-physical (verbal) harassment could constitute sexual harassment; reported in *EQN*, No. 1 (1999) 35. And see now the first preliminary reference by a Spanish court on gender equality sources (though it concerns only the Pregnant Workers' Dir.): Case C–438/99 *Jiménez Melgar*. This has been referred by the *Juzgado de lo Social* (first instance labour court) of Algeciras (a small town in Andalucia).

[249] Evidence to support this assertion can readily be found by examining the TC's judgments. Miguel Rodriguez Piñero gave the Constitutional Court's judgment in both the key equal treatment case using EC sources (TC 22/1992, above n. 230) and the key equal pay case (TC 145/1991, above n. 241).

Encouraged by the Constitutional Court's jurisprudence, lawyers do now argue EC sources before the Constitutional Court, but only in those areas where the Constitutional Court has already used those sources.[250]

The question, of course, is what will happen if some day a man deprived of a child-care benefit argues *Commission* v. *France*[251] before the Constitutional Court. Or before another Spanish court which decides to make a reference? Spain offers the most realistic chance of a possible 'constitutional moment' in the area of gender equality, that is, a sharply defined conflict between national constitutional guarantees and EC law. Its Constitutional Court has a clearly defined vision of gender equality which it cherishes but which, in certain crucial respects, is diametrically opposed to the ECJ's vision of gender equality.

Looked at from the perspective adopted by many EC constitutional lawyers, this would be a challenge to the supremacy and uniformity of EC law which would need to be faced down and overcome. 'Victory' would be when the Spanish Constitutional Court finally succumbed to the supremacy of EC law. However, if we looked at it from the point of view of someone concerned about the functional development of gender equality or the meaning attributed to fundamental rights more generally, it looks much more like a possible opportunity to consider afresh both substantive and institutional issues.

First, with regard to the substantive area of gender equality. If we were to choose our judicial level according to the parameters of quality of reasoning and temporal coherence, the Spanish Constitutional Court would beat the ECJ hands down. In particular with regard to German positive action measures,[252] the protection of pregnancy through gender equality[253] and remedies for breach of EC gender equality rights,[254] the ECJ has often reasoned poorly, incoherently and has demonstrated little foresight. While we may not agree with the Spanish Constitutional Court's classification of 'protective' measures and 'positive action' measures, at least it is a vision which can be engaged with. In many ways, it has taken the best of the Luxembourg Court's jurisprudence to enrich its own vision and discarded what are often regarded as the ECJ's less illustrious decisions.

Secondly, if we consider the substantive meaning attributed to fundamental rights as being of equal or greater importance as which court gets to decide them, what appears to be crucial is not to identify judicial 'winners' or 'losers' but rather new methods of institutional communication between (at least)

[250] A nice example of this is in TC 198/1996 where a woman argued that, having won a general competition for a state job, she had been given a job (as a weigher) requiring physical strength she did not possess. For this reason, she claimed that the dissolution of her contract during the trial period was discriminatory. Her lawyer used EC law and cases and, also, an argument on the British Sex Discrimination Act 1975.

[251] Above n. 227.

[252] See S. Simitis, this volume.

[253] See above Section II and Part III.B.II.

[254] See above Part II.E.

constitutional courts and the ECJ which will permit a deeper and richer discussion of what this meaning should be than the preliminary reference mechanism, in its current form, permits.

B. Dialogue with EC Gender Equality Sources in Italy: A Legislative Love-affair[255]

There have no preliminary references on gender equality in employment sources (discounting *Balestra* as a social security case)[256] from Italian courts. There is no evidence of strong union interest in strategic litigation on the issue. Nor, apart from the very specific issue of female night work,[257] has there been any sustained and visible use of ECJ gender equality case law by the Italian courts.

It would be tempting to conclude from this that the situation in Italy resembles that which prevailed in France until very recently. This could be summarised in three propositions. First, that it is a system characterised by negligible amounts of cases. Secondly, that these cases display an unsophisticated conceptual understanding of discrimination. Thirdly, that this low judicial output occurs within a national context where labour law academics have devoted little interest to the implications in the domestic system of EC gender equality norms as elaborated and interpreted by the ECJ.[258] Tempting but entirely wrong. It is important and illuminating to explore more carefully how and why each of these three propositions is wrong.

First, there is a noticeable quantity of gender equality case law published in scattered fashion throughout the many sets of privately published law and labour law reports (which generally publish cases accompanied by short case-notes). Before going any further, it should be noted that Italian academic and political comment on gender equality legislation is unanimous in bemoaning the extremely low levels of litigation under the two principal gender equality laws of 1977 and 1991.[259] Without wishing to deny in any sense these preoccupations about the low litigation levels in Italy, they should be seen as being comparisons within the Italian judicial system where a huge volume of labour

[255] This part of the research was made possible by a grant from the SPTL Academic Purposes Fund which allowed me to travel to the University of Catania, Sicily, in Nov. 1998. I would like to thank Prof. Bruno Caruso and all the labour lawyers and librarians there for their unstinting help and warm hospitality. Special thanks go to Marzia Barbera and Antonio Lo Faro for invaluable discussions and help in locating and understanding the materials used in this section.

[256] See below n. 286. [257] Discussed below at IV. [258] See above Part III.A.

[259] See, e.g., on the 1977 law F. Liso, 'La legislazione nazionale in materia di parità e le prospettive di riforma' in M.L. de Cristofaro (ed.) *Lavoro femminile e pari opportunità* (Cacucci, Bari, 1989) 67 who dismisses the possibility of evaluating the case law on the ground of its statistical insignificance. See, on both the 1977 and the 1991 law, the Smuraglia Report of 28 Sept. 1995 of the Parliamentary Senate's Labour and Social Welfare Commission, 12: 'if the experience of [litigation using] Article 15 of the 1977 law was extremely modest, the practical application of Article 4 [of the 1991 law] has been even less'.

law disputes are brought before the courts each year. Beside this, the number of gender equality cases does indeed seem insignificant. However, this is true, to a greater or lesser degree, throughout the EU—litigation on gender equality rights constitutes a tiny percentage of overall litigation on employment rights. It simply seems more acute in Italy because of the relatively high overall litigation figures for labour law disputes. If, however, we compare, albeit impressionistically, the 'raw' figures across the Member States examined here, we find that in terms of spread (the number of different equality issues brought before the courts), depth (the degree of conceptual understanding of equality and discrimination displayed by the courts) and numbers, there is much more going on in Italy than in France or Denmark, and about the same as in Spain. However, the perception that there is no case law worth talking about has been important in Italy as we shall see.

Secondly, while this case law very rarely engages with EC sources, it could not be described as displaying an unsophisticated conceptual understanding of gender discrimination. Indeed, a unique aspect of this case law in relation to the situation prevailing in the other five Member States examined in this chapter is that *it often demonstrates a sophisticated understanding and application of certain complex discrimination issues in combination with an absence of any use or awareness of EC norms and case law*.

Third, academic labour lawyers have devoted substantial attention to the issue of gender equality in employment particularly during the 1980s and early 1990s.[260] This has produced a rich, wide-ranging and imaginative discussion which has drawn on, but not been limited by, EC sources and ECJ jurisprudence. However, crucially, those labour law academics who clearly have a profound understanding of the interrelationship between EC and national gender equality sources have not channelled their energies and expertise into critical, sustained and systematic analysis of the use or lack of use of EC gender equality sources by courts. In other words, there have been very few attempts to promote change within the Italian system by arguing for the *incorporation of EC sources through litigation and judicial interpretation*.

Rather, the doctrinal debate has focussed on *incorporation of EC sources through legislative reform*. This academic debate and accompanying political activity, particularly intense in the 1980s, culminated in the legislative passage of Law no.125/1991 and has been followed by subsequent smaller-scale legislative reforms. The almost exclusive focus on legislative reform must be understood as taking place within a labour law context where there is a huge degree of cross-over between the academic and (left-centre) governmental spheres. Professors d'Antona, Giugni and Treu are well-known examples of academic labour lawyers who have experienced this double-life.[261]

[260] Though the debate had a different principal focus in the 1980s (how to formulate positive action, indirect discrimination and design appropriate institutional supports in a legislative text) and in the early 1990s (the clash between female night work protection and EC norms post-*Stoeckel*, analysis of *Kalanke* as well as pedagogical pieces explaining the 1991 law).

Moreover, academics can find themselves being offered institutional positions created by a law they had participated (doctrinally or otherwise) in designing. Hence in Italy there is every chance that an academic well-versed (and possibly an active participant) in a particular labour law debate, could find him or herself in the position of being able (or asked) to present a draft law to the Italian parliament on that very issue. The passage of the 1991 law to update and amend Italian gender equality legislation is a textbook example of this criss-crossing between academic, governmental and institutional roles. This, combined with the perception that case law volume was too insignificant to be worthy of attention, helps explain why Italian academic gender equality writings focus overwhelmingly on legislative reform rather than on judicial education and the promotion of public interest litigation.[262]

This means that to explore dialogue in Italy requires following a distinctive route. First, the heavy focus in Italy on legislative reform and the entry of ECJ jurisprudence through the legislative pathway are examined. This will be followed by an investigation of the impact of the legislative pathway on judicial engagement with gender equality sources.

I A Legislative Pathway—from the 1977 Law to the 1991 Law

Law no.903 of 1977, entitled 'Equal treatment between men and women at work', was the principal measure introduced to comply with Italy's obligations to transpose the Equal Pay and Equal Treatment directives. It prohibited discrimination without defining it and baldly required women to be paid the same as men who did equal work or work of equal value. Much of the law is taken up with restriking the balance between protection and equality in the female-specific regimes concerning night work,[263] lifting of heavy weights at work, pensions and post-birth leave. In terms of enforcement and monitoring, the law is largely silent.[264] A number of institutional flanking mechanisms

[261] Massimo d'Antona was murdered in May 1999. At that time he was legal advisor to the Minister of Labour, Bassolino, in the d'Alema government and was a Professor of Labour Law at the University of Rome 'La Sapienza'. Gino Giugni was Minister of Labour in the Ciampi Government (1993–4) and is a Professor of Labour Law at the University of Rome 'La Sapienza'. Prior to becoming a Minister, as a Member of the Senate from 1983, he presided over the Senate's Labour and Social Welfare Commission and was President of the Governmental Commission which drafted the 1970 Worker's Statute. Tiziano Treu was Minister of Labour in the Dini (1995–6) and Prodi governments (1996–8) and was Minister of Transport in the first d'Alema government (until it fell in late 1999). He is a Professor of Labour Law at the Catholic University of Milan. This academic/political crossover is not confined to labour law but it is these particular connections which are my concern here.

[262] Signs of labour law academics' involvement in strategic labour law litigation using EC sources can however be seen in the context of the infamous litigation on the insolvency dir. Hence, the employee in Case C–261/95 *Palmisani* v. *INPS* [1997] ECR I–4025 was represented by Prof. d'Antona.

[263] See below IV.

[264] Though Art. 15 conferred special powers on the court to order the immediate cessation of acts which could violate the prohibition of discrimination or the rules on female

were introduced in the early 1980s.[265] A National Equality Committee (NEC) was created in 1983 and attached to the Labour Ministry while an Equality Commission was attached to the Prime Minister's Office. The NEC proposed the creation of a third institutional figure, the Equality Advisor. These individuals, operating at regional level to promote gender equality at work, were introduced—though given nebulous competences—in 1984.[266]

The NEC included in its composition two experts, Maria Vittoria Ballestrero and Tiziano Treu, Professors of Labour Law at the Universities of Genoa and the Catholic University of Milan respectively and key academic writers on gender equality in employment.[267] The government entrusted the NEC, in practice its experts, Ballestrero and Treu, with the task of designing a new equality law. As Ballestrero recounts, 'the task was far from simple as the law had to be devised from scratch'.[268] Though the draft they created was subject to substantial modification by successive governments and parliaments, the law which finally emerged from this long process in 1991 remains strongly marked by these two authors' awareness of EC law developments and their perception of the deficiencies of the 1977 law's vision of equality and discrimination. The lengthy parliamentary process[269] was accompanied throughout the 1980s by academic input considering the meaning to be given to equality, the existing institutional apparatus and the experiences and lessons to be learned from other jurisdictions.[270]

night work until such time as a full hearing could determine the issues. Moreover, Art. 13 of the 1977 Law amended Art. 15 of the 1970 Workers' Statute to include discrimination on grounds of sex, thus rendering void any agreement or measure based on sex aimed at dismissing or adversely affecting a worker.

[265] For detailed discussion see P. Catalini, *Eguaglianza di opportunità e lavoro femminile. Profili di diritto italiano e comparato alla luce della legge n.125/1991* (Jovene Editore, Naples, 1992) 142–70.

[266] See further A. Galoppini, 'Il consigliere di parità: un personaggio tutto da inventare', (1985) *Rivista trimestriale di diritto e procedura civile* 971; P. Catalini, 'Prime esperienze dei consiglieri di parità: riflessioni critiche e proposte', (1987) I *Il diritto del lavoro* 564.

[267] Having marked out the area of gender equality as one worthy of study and analysis in its own right in two monographs in the 1970s. See M.V. Ballestrero, *Dalla tutela alla parità. La legislazione italiana sul lavoro delle donne* (Il Mulino, Bologna, 1979) and T. Treu, *Lavoro femminile e uguaglianza* (De Donato, Bari, 1977).

[268] M.V. Ballestrero, 'Le azioni positive in Italia e le ragioni di una legge probabile', (1988) *Lavoro e diritto* 467 at 471. In the original, 'L'operazione era tutt'altro che facile perché la legge era proprio da inventare'. She attributes this governmental impulse to be the outcome of media attention given to the issue of positive action as a result of activities undertaken by the Equality Commission. See also M.V. Ballestrero, 'Modelli di azioni positive. Osservazioni su disegno di legge n.1818', (1990) *Quaderni di diritto del lavoro e delle relazioni industriali* 32; T. Treu, 'Azioni positive e discriminazioni alla rovescia, una importante sentenza della Corte Suprema degli Stati Uniti', (1988) *Lavoro e diritto* 53.

[269] As well as this governmental draft law n.1818 first presented to Parliament in Oct. 1987, there was a Communist party legislative proposal (n.1378) also presented to Parliament in 1987.

[270] See, e.g., M. Barbera, 'Eguaglianza di opportunità ed azioni positive nel diritto comunitario e nelle legislazioni dei paesi membri della Cee', (1986) I *Rivista italiana di*

The 1991 Law, entitled 'Positive action for the realisation of gender equality at work', supplemented rather than replaced the 1977 Law. It contains five principal elements: state subsidies for positive action measures and an obligation on the public sector to introduce positive action measures, workforce monitoring through an obligation placed on larger enterprises to produce a report, revamping of the NEC and the Equality Advisors including powers for the latter to act in instances of 'collective discrimination',[271] the introduction of a legislative definition of indirect discrimination and the definition of the probative elements and burden of proof required to establish discrimination.

It is the last two of these legislative ingredients which bear most clearly the imprint of ECJ influence. The definition of indirect discrimination in the law is a transcription of the words used by the ECJ in *Bilka* and subsequent cases.[272] The probative changes are also clearly, though more subtly, drawn from Luxembourg Court watching:

> Where a claimant furnishes factual elements—which may also be deduced from statistical evidence concerning recruitment, pay . . .—capable of giving rise, in a precise and convergent manner, to a presumption of discrimination on the ground of sex, the burden shifts to the defendant to prove that there has been no discrimination.

This is a translation into the Italian legal system of the shifting burden established by the ECJ in *Danfoss*. Small wonder then to find that Ballestrero wrote the definitive article on *Danfoss* in Italy.[273]

diritto del lavoro 857; M.L. De Cristofaro, 'Gli organismi per le pari opportunità in Italia ed in alcune esperienze straniere' in M.L. De Cristofaro (ed.) *Lavoro femminile e pari opportunità* (Cacucci, Bari, 1989) 145; F. Borgogelli, 'I consiglieri di parità: prospettive di riforma', (1988) *Lavoro 80* 833.

[271] As defined in Art. 4(6) of the 1991 Law.

[272] The ECJ's elaboration of the definition of indirect discrimination has largely been built on the basis of German references concerning part-time workers—see above Part II. See this definition now in Art. 2(1) of Dir. 97/80/EC on the burden of proof in cases of discrimination based on sex: 'indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'. However, the legislative pathway meant that the Italian government opposed changing (diluting) the definition of indirect discrimination developed in ECJ case law when the wording of Dir. 97/80 was being discussed. Given the position adopted by other Member States (pressure to delete the requirement that a practice be 'necessary' and Dutch opposition to the application of indirect discrimination to statutory social security schemes), this Italian insistence proved crucial in maintaining the elements of the definition developed by the ECJ with regard to the employment provisions. This provides a fascinating instance of layered, unexpected interactions between courts and legislatures at national and supranational level. I am grateful to Marzia Barbera for information on this point.

[273] 'La prova della discriminazione indiretta: ancora un passo avanti della Corte di Giustizia', (1992) II *Rivista italiana di diritto del lavoro* 775. On *Danfoss* see further above at A.III and Part III.B.I. Though the ECJ-inspired innovations in the 1991 law are drawn from its equal pay jurisprudence, the new Italian law introduced no changes geared towards

The NEC and the Equality Advisors were overhauled in the 1991 Law. It propelled the Equality Advisor to centre-stage. Italy was to be populated by a pyramid of Equality Advisors, one at national level,[274] one operating in each region and one operating in each of the provinces into which regions are divided. They were given a number of roles with regard to gender equality litigation. As well as the possibility to take 'victim-less' cases where they ascertained the existence of 'collective' discrimination, they were also given the power to act on behalf of female employees before the civil and administrative courts and to intervene in any gender equality case.

The NEC emerged from the lobbying surrounding the passage of the 1991 law with a bloated membership, having gained some new powers and lost some old ones.[275] Its principal new power was to decide which positive action plans should receive State funding. It had, however, lost its specific power to 'furnish adequate advice to individuals or associations involved in anti-discrimination claims'.[276]

The landscape up to the passage of the 1991 Law was therefore characterised by a large amount of academic output and political activity on gender equality in employment but practically no sustained interest in litigation on gender equality sources. The sole author to have fairly recently addressed the attitude of Italian courts to the 1977 Law and constitutional sources states that the low level of case law has produced a vicious circle in that those academics interested in the topic turned instead to thinking of better ways of ensuring protection against discrimination.[277] It can be concluded that, until 1991, there was little consideration of litigation on Italian gender equality sources

realising equal value. In sharp contrast to other Member States, in particular Spain, the UK and Denmark, equal value is barely litigated or discussed in Italy. This can be partly explained by the fact that gender pay differentials are low in Italy because of the way wage-setting mechanisms, in particular collective bargaining, operate—see B. Beccalli, 'Le politiche del lavoro femminile in Italia: donne, sindacati e stato', (1985) 15 *Stato e mercato* 423.

[274] Providing another good example of academic/institutional crossover in the person of Marzia Barbera. Author of one of the key texts on equality in Italian labour law, *Discriminazioni ed eguaglianza nel rapporto di lavoro* (Giuffré, Milan, 1991) and many articles on gender equality, Professor at the University of Brescia, she is now the *Consigliere nazionale di parità* (National Equality Advisor), having previously been the *Consigliere provinciale di parità* (Provincial Equality Advisor) for Milan.

[275] For detailed analysis see G. De Simone, 'Gli organismi collettivi per le pari opportunità' in T. Treu and M.-V. Ballestrero (eds.) *Le nuove leggi civili commentate n.1* (CEDAM, Milan, 1994) 101.

[276] As provided in Art. 1(e) of the Ministerial Decree of 2 Dec. 1983. This power had been used by the NEC. For details of these opinions see *Donne e Lavoro, analisi e proposte*, (Comitato nazionale per la parità, Ministero del lavoro e previdenza sociale, Rome, 1986) 55ff.

[277] G. De Simone, 'I giudici e la discriminazione sessuale', (1990) *Quaderni di diritto del lavoro e delle relazioni industriali* 109–38. See also M.V. Ballestrero, 'I giudici e la parità. Osservazioni sull'applicazione giudiziaria della legge n.903/1977', (1982) *Politica del diritto* 463.

and no consideration of either the presence or the possibilities of Italian judicial engagement with EC gender equality sources and ECJ jurisprudence.

Nor has the situation changed in the wake of the 1991 Law. Following a swathe of analyses dissecting the provisions of the 1991 Law,[278] attention turned to why the law had failed to live up to the expectations placed in it. A major study of the 1991 law in 1994, edited by Ballestrero and Treu (shortly to become the Minister responsible for this law),[279] laments the absence of case law before moving on to consider the failure of other parts of the law.[280] For our purposes, given the roles allocated to them by the law with regard to litigation, it is the malfunctioning of the Equality Advisors which is most important. A National Equality Advisor was not appointed until 1995, and regional and local coverage, particularly in Southern Italy, was (and continues to be) very patchy. For those regional and local Equality Advisors who were in post, it was a labour of love. They were entitled only to time off from their normal jobs and 26,000 lire expenses per day (13.43 Euros, less than £10 sterling) in order to carry out the vast array of tasks entrusted to them by the 1991 Law.[281] Despite these significant obstacles, some Equality Advisors have managed to start using and developing their powers under the 1991 Law.[282]

To summarise, the engagement of Italian courts with gender equality sources has been considered too paltry to merit systematic analysis.[283] I have both differed from that conclusion and attempted to explain how this conclusion was arrived at in the special context of general litigation levels in Italy and the availability of the 'legislative pathway' for academic activity. It is now

[278] See, e.g., L. Gaeta and C. Zoppoli (eds.) *Il diritto diseguale. La legge sulle azioni positive* (Giappichelli, Turin, 1992) and P. Catalini, above n. 265. See also M.V. Ballestrero, 'La legge sulle azioni positive', (1991) 18 *Spazio Impresa* 5; M. Barbera, 'Una legge per le azioni positive', (1991) 20 *Diritto e pratica del lavoro* 1240; F. Borgogelli, 'Autonomia collettiva e parità uomo-donna: una lettura della legge n.125/1991', (1992) I *Lavoro e Diritto* 139; T. Treu, 'La legge sulle azioni positive: prime riflessioni', (1991) I *Rivista italiana di diritto del lavoro* 109. It should be stressed that this constitutes a small part of the academic output analysing the 1991 Law.

[279] See Senator Smuraglia's (himself a former Labour Law Professor) comments in his 1995 Report, above at n. 259 at 23 on the Minister of Labour (Treu), 'the fact that the Minister responsible [for the 1991 law] has for a long period, in his academic work as well, concerned himself with these issues, makes it plausible to expect practical and effective measures in the very near future'.

[280] Above n. 275. There are some references to case law in some of the contributions but they are marginal and non-systematic.

[281] A new legislative decree no. 196 of 23 May 2000, providing the Equality Advisors with more adequate resources, and new, more clearly delineated, powers and responsibilities has recently come into force.

[282] See below at III for some examples.

[283] However, as with France, the need to submit reports of litigation to the EC Network of Experts may contribute to making national case law more visible and perceived as more important. The Italian experts were originally Ballestrero/Treu, followed by Ballestrero/De Simone (both at the University of Genoa), and are now De Simone and various collaborators.

time to turn to Italian judicial engagement with gender equality sources, keeping in mind this specific setting.

II The Impact of the Legislative Pathway on Italian Judicial Dialogue

The legislative pathway has meant that judicial engagement in the area of gender equality is an almost wholly national affair, based on national sources—in particular the 1977 and the 1991 Laws as well as Law 1204/1971 which sets out the labour law regime governing pregnancy, maternity and leave for care of newborn children. These national sources, in turn, exhibit internal tensions and spaces for manœuvre as they can be, and on certain issues are, measured against constitutional guarantees. So, while there is a dynamic process of developing the meaning of gender equality sources, this is principally done through access to the Constitutional Court and on the basis of national (constitutional) sources. The principal constitutional sources are Articles 3[284] and 37(1)[285] of the 1948 Italian Constitution. A considerable amount of gender equality litigation therefore takes place in splendid isolation from EC sources. This is perfectly illustrated by litigation on pregnancy, maternity and parental leave rights.[286] There is a mountain of constitutional

[284] Art. 3 is divided into two paras. The first para. provides 'All citizens are invested with equal social status and are equal before the law without distinction as to sex, race, language, religion, political opinions and personal and social conditions'. The second para. provides 'It is the responsibility of the Republic to remove all social and economic obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic and social organization of the country'. Para. 1 is generally viewed as a 'formal' equality mandate while the second is seen as mandating 'substantive' equality measures. The relationship between the two paras. is the subject of intense debate. In the context of gender equality, this debate has focussed on female-specific protective measures (especially night work) and positive action measures—see below Part IV.C. On Art. 3(2) a point of reference is U. Romagnoli, 'Il principio d'eguaglianza sostanziale', (1973) *Rivista trimestriale di diritto e procedura civile* 1318.

[285] 'Female labour enjoys equal rights and the same wages for the same work as male labour. Conditions of work must make it possible for them to fulfil their essential family duties and provide for the adequate protection of mothers and children'. It is obvious that the second line could be problematic. On Art. 37 see T. Treu in G. Branca (ed.) *Commentario della Costituzione* (Zanichelli, Bologna/Rome, 1979) sub art. 35–40.

[286] Another very fruitful example to develop would be the enormous amount of constitutional litigation and jurisprudence on the gender equality implications of retirement age, the option in the 1977 law for women to keep on working until the same age as men, and the special early pensions regime in the iron and steel industry and enterprises in crisis. Behind the reference decided under Dir. 79/7 in Case C–139/95 *Livia Balestra* v. *INPS* (1997) ECR I–549 is a fascinating and complex tale of constitutional court activity and legislative intervention to realise equality in the face of other competing considerations. The key constitutional court decisions are nos.137/1986 (1986) I *Il foro italiano* 1749, 498/1988 (1989) I *Giurisprudenza italiana* 212 and 296/1994 (1995) *Orientamenti della giurisprudenza del lavoro* 225. It is also the only area where I have found spontaneous use of EC sources by Italian courts (apart from the special situation of night work): see *Pret. Milano*, 16 Jan. 1986, (1986) *Orientamenti della giurisprudenza del lavoro* 172, *Pret. Taranto*, 25 Jan. 1986, (1986) *Orientamenti della giurisprudenza del lavoro* 184 and *Pret. Milano*, 11 July 1984 (1985) I *Il foro italiano* 919.

jurisprudence on these issues. The fact that it is not examined here is due to constraints of space rather than its lack of inherent interest. In fact, examination of Italian constitutional jurisprudence on this issue could shed considerable light on the non-inevitability of ECJ jurisprudence on parallel themes. While the ECJ has, hitherto, remained caught in the time warp of its decisions in *Commission* v. *Italy* and *Hofmann*,[287] the Italian Constitutional Court has strode ahead with the process of extending paid leave rights to fathers and adoptive parents. This does not imply that its jurisprudence is beyond criticism but it is at least engaged in an active process of rethinking what gender equality entails for parental responsibilities.

A second consequence is that courts became familiar largely only with those substantive interpretations of EC gender equality law which the legislature chose to adopt. The dialogue between Italian courts and EC sources in the field of gender equality can therefore be seen as taking place largely through the mouthpiece of the Italian legislature. This depended on the coincidence of two factors: on the one hand an extremely limited input from the 'bottom' of arguments based on EC gender equality sources by litigants before the Italian courts and, on the other, a substantial 'top-down' input of ECJ interpretation of EC sources by national legislative intervention. It explains why Italian courts, including the Constitutional Court, apply the concept of indirect discrimination and special rules on proving discrimination which have been fleshed out by the ECJ without any reference to EC sources or ECJ jurisprudence. This is examined in Section III.

A third consequence is that courts did not become familiar with handling EC sources in the area of gender equality. This should be phrased more precisely. As stated in the previous paragraph, they were in fact often applying via national law (whether they knew it or not) *some* of the *substantive* discrimination concepts elaborated by the ECJ. However, they did not have to familiarise themselves with the *operational* aspects of applying a norm which came with different operating instructions from national norms. To give an obvious and important example in the labour law context, the lack of horizontal direct effect of directives becomes an issue only when the national legislation does not reflect EC requirements. Both because little public interest litigation took place and because some of the most complex parts of ECJ jurisprudence had been translated into Italian law, occasions when the courts were asked either to interpret national law in the light of EC gender equality law or not to apply national law because it conflicted with EC gender equality

[287] Case 163/82 *Commission* v. *Italy* [1983] ECR 3273—distinction between leave arrangements between adoptive fathers and mothers does not breach the ETD as it is justified by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family during the very delicate initial period. On the genesis of *Hofmann* see Part II at n. 80. See further C. Kilpatrick, 'How Long is a Piece of String? European Regulation of the Post-birth Period' in T.K. Hervey and D. O'Keeffe (eds.) *Sex Equality Law in the European Union* (Wiley, Chichester, 1996) 81.

in employment sources were not merely few and far between; they can be exhaustively stated. The only areas where this occurred concerned the conflict between female night work regulation and the ETD and legal regulation of early pensions in Italy.[288] The implications of this are examined in Section IV.

III Legislative Mediation of ECJ Jurisprudence—Direct and Indirect Discrimination before the Italian Courts

A significant number of cases have been taken before the civil and administrative courts, as well as the Constitutional Court, on the application of directly and indirectly discriminatory criteria with the effect of excluding women from core state jobs such as fire-fighters and various branches of the police and army. These will be taken as the primary, though not exclusive, focus in this discussion. These cases are of interest for three reasons. First, they suggest that the innovations in the 1991 Law with regard to direct and indirect discrimination have had an impact in changing the decisions made in these types of cases and led to more challenges being made. Hence, the *Consiglio di Stato* (Council of State) in a decision made in 1982 employed extremely dubious reasoning to decide that the prohibition of female access to the armed forces was valid on the ground *inter alia* that women were different from men not just physically, but also behaviourally and psychologically, and the legislature was therefore entitled to treat them differently with regard to access to the armed forces.[289] This contrasts with its more recent decisions where it held that rules requiring Volunteer Fire Brigade members to have performed military service and applicants for the post of Bandleader of the Military Music Band to be male contravened the principle of gender equality.[290] Similarly, the sparse and unsuccessful challenges to minimum height requirements on the grounds that they discriminated against women[291] have been superseded following the passage of the 1991 Law by a rash of successful challenges to such rules and legal norms on the ground that they are indirectly discriminatory.[292] Nor have indirect discrimination challenges been confined to such norms.[293]

[288] See above n. 286 for references to the pensions jurisprudence.

[289] See further G. De Simone, above n. 277, at 127 ff.

[290] Respectively Case no.527 of 22 Apr. 1996 reported in *General Report of the EC Network of Equality Experts* 1996 (Commission, Brussels) 34 and Case no.582 of 10 Apr. 1998 reported (1999) *EQN*, No.1, 29. See also, for a similar decision on the Music Band of the *Guardia di Finanza*, the decision of the Constitutional Court in Case no.188/1994 (1996) II *Il diritto del lavoro* 9.

[291] See G. De Simone's (above n. 277 at 132) reference to TAR Puglia, sez. Bari, 11 Nov. 1983. TAR stands for *Tribunale Amministrativo Regionale* (Regional Administrative Court).

[292] See, e.g., *Pret. Trento*, 5 May 1992 and TAR Lombardy, 27 Nov. 1992, (1993) *D&L Rivista critica di diritto del lavoro* 111 (on fire-fighters and municipal police respectively); Constitutional Court Case n.163/1993 (1994) II *Rivista italiana di diritto del lavoro* 451 (fire-fighters); TAR Umbria, 7 May 1997 (1997) *EQN*, No.3, 36 (municipal police in Assisi).

[293] See *Pret. Modugno*, 27 Apr. 1992, (1993) *Giurisprudenza di merito* 338 n. BELFIORE

Even more striking has been the application of the new *Danfoss*–style shifting burden provision[294] to less obvious situations of direct and indirect discrimination. While prior to the 1991 Law there were doubts whether the Italian courts required prejudicial *animus* by the employer[295] or would be satisfied with a causative link to establish direct discrimination,[296] they are now handling statistical evidence to decide when the burden should shift to the employer to show non-discrimination.[297]

Secondly, much of this litigation has been supported by Equality Advisors, demonstrating the potential of this institutional figure in the enforcement of gender equality guarantees. Hence, the Regional Equality Advisors in Lombardy and Trento instigated and followed up many of these challenges. The benefits of this can be seen from the aftermath of the successful challenge before the TAR Lombardy of minimum height requirements for police officers in Milan. The new job specifications laid down a minimum length of service requirement which no woman could actually fulfil. The Lombardy Equality Advisor challenged this new requirement and in conciliation before the court a non-discriminatory solution was agreed.[298] Were the full panoply of Equality Advisors envisaged in the 1991 Law to be in post and given adequate support, a critical mass of activity and expertise could be built up.[299]

(careful application of the elements of indirect discrimination in the 1991 Law, especially regarding justification); *Pret. di Bologna*, 27 June 1998 (1998) *EQN*, No.4, 38 for a sophisticated analysis of indirect discrimination in the criteria used to hire bus-drivers.

[294] Above text accompanying n. 273.

[295] See the decision of the Cassation Court no.1444 of 5 Mar. 1986 (1986) II *Rivista italiana di diritto del lavoro* 717 (adopting the subjective test) applied by *Pret. Torino*, 2 May 1991 (1993) I *Giurisprudenza italiana* 608. See also *Pret. di Pomigliano d'Arco*, 20 Mar. 1990, (1991) I *Giustizia civile* 1065 n. MARSILI. In the latter, the employer had hired 250 men and had not shortlisted or interviewed any of the female applicants for the post. The court stated that 'it is insufficient to show merely the objective fact that there are no women among those hired, it being necessary instead to show unequivocally a discriminatory intent on the part of the employer'.

[296] See, e.g., *Pret. di Roma*, 12 Jan. 1982, (1982) *Temi Romani* 315 n. CHILOSI; *Pret. di Milano*, 30 May 1988, (1988) *Lavoro 80* 945; *Pret. di Cosenza*, 17 Dec. 1990, (1992) II *Rivista italiana di diritto del lavoro* 225 n. DE SIMONE.

[297] See, e.g., *Pret. di Milano*, 22 Nov. 1993, (1994) II *Rivista italiana di diritto del lavoro* 703. Here, a woman claimed that all those doing her marketing and PR job in the group of companies were men and given managerial status unlike her. The court, having examined statistical evidence, found in her favour stating, 'though this seems difficult to understand at first sight, it becomes readily explicable when one looks at broader figures of representation of women (especially in management positions) across the group'. See also *Pret. di Milano*, 10 July 1994, (1994) *Notiziario della giurisprudenza del lavoro* 607 and *Pret. di Roma*, 24 Nov. 1992, (1993) II *Rivista italiana di diritto del lavoro* 262. For less encouraging signs see *Trib. di Turino*, 31 Mar. 1995, (1995) 7 *Il lavoro nella giurisprudenza* 671 and *Pret. di Catania*, 16 Dec. 1994, (1996) 2 *Il lavoro nella giurisprudenza*, 127 n. NANÌ.

[298] See *General Report of the EC Network of Equality Experts 1995* (Commission, Brussels) 32. A Regional Equality Advisor also intervened in the case before the *Pret. di Bologna* above at n. 293.

[299] See now above n. 281 for the greater possibility of this occurring as a result of a new

Moreover, the NEC, despite losing in the 1991 Law its designated power to give advice in anti-discrimination disputes, has continued to do so. Because of the presence of experts in its smaller technical division (known as the *Collegio Istruttorio*) it has intervened to considerable effect and utilised ECJ jurisprudence in giving its opinions.[300]

Third, and perhaps most pertinent in this context, is the extent to which legislative mediation has blocked from the Italian courts' view the EC provenance of the innovations introduced in the 1991 Law with regard to direct and indirect discrimination. This is perfectly illustrated by examining the Constitutional Court's first decision on indirect discrimination in 1993. This case began life before the Pretore of Trento.[301]

In Italy, constitutional questions may be raised by any court and will either be held to be clearly unfounded or founded by the Constitutional Court. However, ordinary courts cannot disapply laws on the grounds that they are unconstitutional; this is exclusively a Constitutional Court competence. The discriminatory norm here was contained in a regional law. The Pretore refused various (constitutional–type) arguments put forward for it to set aside the law rather than refer it to the Constitutional Court:

> To say that the law cited does not require women to be 1m 65 cm tall would equate to an effective disapplication of that law which..is not allowed in our legal order (except in cases where the ordinary law clashes with EC law).

The utter lack of recognition that the ordinary law here does clash with the ETD is matched by a profound conviction that the norm is unconstitutional as it is a 'textbook example of indirect discrimination, a notion defined in Article 4(2) of the 1991 law'. Of course, Article 4(2) of the 1991 Law is a transcription of the ECJ's definition of indirect discrimination.

This process of non-recognition was elaborated upon by the Constitutional Court when it gave judgment in this case on the compatibility of the height requirement with Articles 3 and 37(1) of the Constitution.[302] The

legislative decree. It is worth noting the strong judicial support for the National Equality Advisor in a pregnancy discrimination case decided by the *Pret. di Lecce*, 17 Nov. 1997, (1998) *EQN*, No.2. The court, justifying its decision on the basis of advice drawn up by the National Equality Advisor, on the basis of an inquiry by the Labour Inspectorate, emphasised the institutional importance and unique competence of the National Equality Advisor to collaborate with courts in cases of gender discrimination.

[300] The current membership of the *Collegio Istruttorio* comprises three academics (Marzia Barbera, Donata Gottardi and Fausta Guarriello) and two judges (Fabrizio Amato and Alba Chiavassa). See, e.g., its Opinion of 30 Nov. 1994, using Case C–184/89 *Nimz* [1991] ECR I–297 (above Part II, n. 49) to find that applying longer seniority requirements to part-time employees than to full-time employees in the banking sector in order be promoted was indirectly discriminatory; see *General Report of the EC Network of Equality Experts 1995* (Commission, Brussels) 32. See also *Primo rapporto del comitato nazionale sull'attuazione della legge n.125/1991 ai sensi dell'art.10 della stessa legge*, 17ff.

[301] Both above n. 292. See, for useful comment on the Constitutional Court decision, the note by M. Barbera in (1993) *Corriere Giuridico* n. 8 928.

[302] Above n. 292.

Constitutional Court found the law containing the minimum height requirement to be unconstitutional. In so doing it took two important steps, one concerning constitutional and national sources and the other concerning EC sources. To find indirect discrimination constitutionally suspect, it was necessary to move beyond the normal 'rationality' relationship required by the general constitutional equality guarantee in Article 3(1). There may well be a rational correlation between a height requirement and some of the functions carried out by fire-fighters, but the prohibition of indirect discrimination requires a much higher degree of correlation. In particular, it requires the indirectly discriminatory norm or practice to be necessary and the least discriminatory method of pursuing a legitimate objective.

The Constitutional Court integrated indirect discrimination by reading afresh constitutional and national sources. It stated that the formal equality guarantee in Article 3(1) should be read with Article 3(2). The latter:

> as well as establishing an autonomous principle of 'substantive' equality . . . expresses an interpretative criterion which reflects on the breadth and means of giving effect to the principle of 'formal' equality, in the sense that the latter's guarantee is qualified in terms of the results it is capable of producing on the ground in peoples' lives as a result of the constitutional imperative [in Article 3(2)] to remove *de facto* obstacles to equality, and to pursue the ultimate objective of 'full' self-determination of each individual and his or her effective participation in the life of the community.

Moreover, the Court pointed out that the Constitution specifically singled out certain relationships in which application of the principle of equality was particularly important. One of these is the position of women at work, as stated in Article 37(1). Finally, the Constitutional Court stated that the constitutional principle of equality means that women should not have to suffer 'what Article 4(2) of Law no.125/1991 defined as "indirect discrimination"'.

EC sources are firmly subordinated to this constitutional analysis. Hence, the constitutional prohibition of gender equality which outlaws indirect discrimination means that it:

> is superfluous to take into account the [ETD] . . . because, looking only at the articles relevant in this case (Articles 2 and 3), the directive in question, on the one hand, establishes a principle analogous to that contained in Articles 3, 37 and 51 of the Constitution . . . and, on the other, is aimed at providing instructions for the Member States until the latter, in passing a national law, comply with the principle [of equal treatment].

IV Struggling with ECJ Jurisprudence—Night Work and Horizontal Direct Effect

The Italian courts' first explicit and widespread engagement with EC gender equality sources came about because the ECJ's 1991 *Stoeckel* decision made it clear that the regulation of female night work in the 1977 Law was probably

incompatible with the ETD.[303] Article 5 of the 1977 Law had modified the previous 1934 ban to allow the female night work prohibition to be lifted through collective agreement. Moreover, while the 1934 night work regime had been found to breach the constitutional guarantee of gender equality, the Constitutional Court, in notoriously unreasoned decisions, had rejected as clearly unfounded similar constitutional challenges to the 1977 Law.[304] *Stoeckel,* which found that the French night work regime contravened the ETD, fed into wider ongoing debate in the context of the 1991 Law about the meaning of formal and substantive equality.[305] It did not, however, arouse immediate academic debate about how courts should deal with application of the ETD, a task which Italian courts had no experience of.

Indeed, the Italian courts were soon demonstrating just how little practice they had had in the operational application of EC gender equality sources. Unlike the French criminal proceedings which had produced *Stoeckel*,[306] these cases were taken by women who wished to contest collective agreements lifting the night work ban. First and second instance Italian courts blithely (and wrongly) applied the ETD between the women and their (private) employers to state that the night work regime in the 1977 Law was no longer applicable.[307]

Nor were unorthodox judicial attitudes to EC sources confined to the lower Italian courts. In particular the Court of Cassation displayed the gamut of possible reactions to EC sources in its three decisions of 1993, 1995 and 1997 on female night work. Here, however, the enormous labour law case-load in Italy must be seen as relevant. Rather than seeing the careering path taken by the *Cassazione* in its night work decisions as worrying signs of a multiple personality disorder, it should be seen in the context of a court with many different sections dealing simply with labour law cases. Partly because of its case-load volume, ignorance of other relevant *Cassazione* decisions is not uncommon. There is also varying awareness of EC law, particularly between different labour law sections. Hence, its 1993 decision on the validity of the collective agreement permitting female night work stood out for its utter

[303] Case 345/89, [1991] ECR I–4047.

[304] On the 1934 regime (unconstitutional) see the Constitutional Court's Cases nos. 210 and 211/1986, (1987) II *Rivista giuridica del lavoro* 27; on the constitutionality of the 1977 regime see Case no. 246/1987 (1987) *Il foro italiano* 2605 and Case no. 378/1989, (1989) *Diritto e pratica del lavoro* 2367.

[305] See, in particular, M.V.Ballestrero, 'A proposito di eguaglianza e diritto del lavoro', 6 *Lavoro e diritto* (1992) 577; M. d'Antona, 'Uguaglianze difficili', (1992) 6 *Lavoro e diritto* 597.

[306] See above Part III.A.II and IV; see also *Stoeckel* in Spain, above n. 230.

[307] *Trib. di Catania*, 8 July 1992, 41 (1992) *Diritto e pratica del lavoro* 2811; *Pret. di Matera*, 14 July 1994 (1994) 4 *Diritto comunitario e degli scambi internazionali* 746. See, further, on the situation until 1996, S. Sciarra, 'Integrazione dinamica tra fonti nazionali e comunitarie: il caso del lavoro notturno delle donne', (1995) I *Il diritto del lavoro* 152; C. Kilpatrick, 'Production and Circulation of EC Nightwork Jurisprudence', (1996) *ILJ* 169.

failure to acknowledge EC sources in its decision.[308] Its 1995 decision swung in the opposite direction. It took the path followed by the lower Italian courts and implied that sufficiently precise and unconditional provisions in directives were both vertically and horizontally directly effective. Therefore, national courts were obliged to apply the relevant provision of Community law as though the incompatible national legal provision did not exist.[309] This decision did, however, create a certain stir. When another female night work case came before the *Cassazione* in 1997[310] it went to a section containing a judge who had written both about the issue of female night work and about EC labour law. He acted as rapporteur in the case.[311]

This case once again involved two private parties. Moreover, as the woman had been dismissed for not working at night in the absence of a collective agreement authorising female night work, it clearly violated the 1977 Law. This time, the woman's lawyers argued that the ECJ and the Constitutional Court clearly denied horizontal direct effect to directives. Moreover, they argued, there was no way of sympathetically interpreting (in the *Marleasing* sense) the 1977 Law in order to make its Article 5 (which laid down a prohibition on female night work but stated that it could be lifted by collective agreement) compatible with the ETD.

The *Cassazione*'s decision is evidently an attempt to sort out the issue of the effect of the ETD (and directives in general) in the national legal order.[312] It is lengthy, carefully reasoned and peppered with extensive references to relevant ECJ and constitutional jurisprudence. Indeed, the process which had led to this case arriving before the *Cassazione* reveals a steep learning curve by (at least some of) the Italian courts to ascertain the operational rules in the Italian legal order for application of EC norms.

The Tribunal of Padua, whose decision to set aside Article 5 of the 1977 Law was being challenged before the *Cassazione*, had by no means blindly

[308] Cass. no. 4802, 24 April 1993 (1993) *Massimario di giurisprudenza del lavoro* 353.

[309] Cass. no. 1275, 3 Feb. 1995 (1995) II *Il diritto del lavoro* 8. For comment see F. Santoni, 'La Corte di cassazione e il divieto di lavoro notturno femminile nel diritto comunitario', (1995) I *Il diritto del lavoro* 20.

[310] Cass. no. 11571, 20 Nov. 1997, (1998) *Il Foro italiano* 444 n. RICCI. For extensive discussion of the horizontal direct effect issues raised by female night work jurisprudence in Italy post-*Stoeckel*, see M. Roccella, 'Divieto di lavoro notturno femminile ed efficacia delle direttive comunitarie: fine della storia?', (1998) II *Rivista giuridica del lavoro* 322 and M. Barbera, 'Tutto a posto, niente in ordine. Il caso del lavoro notturno delle donne', (1999) I *Rivista italiana di diritto del lavoro* 301.

[311] R. Foglia, 'Il divieto del lavoro notturno femminile secondo la sentenza *Stoeckel*', (1995) I *Rivista giuridica del lavoro* 690; R. Foglia and G. Santoro Passarelli, *Profili di diritto comunitario del lavoro* (Giappichelli, Turin, 1996); R. Foglia, 'Il Lavoro' in M. Bessone (ed.) *Trattato di diritto privato. Volume XXVI, Tomo II—Il diritto privato dell'unione europea* (Giappichelli, Turin, 1999) 53–64.

[312] See, also a decision by the penal division of the Cassation Court, 1 July 1999, (2000) *Il foro italiano* 14 n. RICCI. This did not apply the 1977 night work regime noting that dirs. were vertically directly effective.

applied the ETD. Rather, it noted that the ECJ had, albeit implicitly, accorded horizontal direct effect on previous occasions to the ETD.[313] It stated that:

even taking into account the subsequent more restrictive case law of the ECJ limiting the effects of directives to those which are 'vertical', the problem of identifying the norm to be applied should be resolved in the context of the case, with an overall regard to the relevant national provisions within which the directive's effects are invoked as the judge cannot turn away from the necessary co-ordination of Community law with the internal legal order of the Italian Republic.

It thus went on to examine the guidance of the Italian Constitutional Court on the application of EC law within the national legal order. It concluded from this survey that, in the normal course of events, national norms should not be applied when they conflict with a provision of EC law. The Tribunal reasoned that this should also imply non-application of a provision which conflicted with a directive without distinguishing between public and private relationships. Indeed, there is an undeniable resonance in this stand against the distinction EC law creates in the national labour law environment between public- and private-sector employees,[314] a distinction which UK labour lawyers have termed 'arbitrary',[315] even 'ridiculous'.[316] However, the Italian court can also measure these pejorative implications against constitutional standards. Thus the Tribunal stated that its conclusion on horizontal direct effect was reinforced by the fact that the public/private employee divide it creates is in clear contrast to the (general) principle of equality set out in Article 3 of the Italian Constitution. This could be remedied only through an interpretation which bore in mind the limited effects of the EC legal order on that of Italy.

However, the *Cassazione*, while paying tribute to the quality of the lower court's reasoning, did not accept these arguments. It stated that both the ECJ and the Italian Constitutional Court had unequivocally accepted that directives are only vertically directly effective. It followed that the ETD could not be applied between the two private parties here and that judgment must therefore be given on the basis of Article 5 of the 1977 Law. The *Cassazione* finished its judgment with a different constitutional argument from that employed by the Tribunal:

[313] Though it gives the (bad) example of Case 19/81 *Burton* [1982] ECR 554 rather than the better examples of *Dekker*, above n. 237 and Case C–180/95 *Draehmpaehl* [1997] ECR I–2195 (see also Part II.E.III).

[314] See M. Barbera, above n. 310, at 314–5 who argues that if indirect effect cannot operate when there is an irreconcilable difference between EC law and national law, this ends up giving national law more favourable treatment than when such irreconcilable difference does not exist.

[315] P. Davies, 'The European ECJ, National Courts, and the Member States' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law—Principles and Perspectives. Liber Amicorum Lord Wedderburn* (Clarendon Press, Oxford, 1996) 95 at 105.

[316] H. Collins, reviewing the *Liber Amicorum*, cited above n. 315, in (1998) *LQR* 668 at 672.

> Finally, it is worthwhile stating that, at the date of the facts giving rise to this case [1990], the female night work ban, not yet condemned by the ECJ, had been given favourable scrutiny by the Constitutional Court, which viewed the protection it gave women as fully in line..with Article 37 of the Constitution.

This invites us to consider the implications of the fact that the Italian Constitutional Court has found the 1977 flexible prohibition to conform with the constitutional guarantee of gender equality while the ECJ has definitively stated that it breaches the EC guarantee of gender equality.[317] Is there, therefore, in Italy, as in Spain, the chance of a clash between constitutional visions of gender equality and the ECJ's vision? This is explored in the final section by looking at the two gender equality issues which have aroused such discussions in Italy—female night work and positive action.

C. Constitutional Dialogues on Gender Equality—the Possibilities of Battle

The potential for conflict between the ECJ and the Italian Constitutional Court over the issue of female night work has recently been extensively examined by Ballestrero.[318]

It is well known that most EU national legal orders accommodate and justify direct effect and supremacy through their national constitutions rather than accepting the ECJ's vision of direct effect and primacy of Community law as outlined in *Van Gend en Loos*, *Costa* etc..[319] In most instances this makes no practical difference. However, as the supremacy of EC law is mediated through the national constitution, it cannot be assumed (as it would in the ECJ's version) to trump all other constitutional values and protections.

In brief outline, the Italian Constitutional Court has used Article 11 of the Constitution[320] as the peg upon which to hang the supremacy of Community law. In its 1984 *Granital* decision,[321] it got around the problem (at issue in *Simmenthal*)[322] that this basis would, given that the Constitutional Court has exclusive judicial competence to decide questions of constitutionality, mean

[317] Case 207/96 *Commission* v. *Italy* [1997] ECR I–6869.

[318] 'Corte costituzionale e Corte di giustizia. Supponiamo che . . .', (1998) *Lavoro e Diritto* 485. The brief account here is indebted to Ballestrero's fuller account. See also M. Barbera, above n. 310 at 305 who makes the useful observation that none of the Italian courts' decisions on night work post-*Stoeckel* raised this possible clash between Italian constitutional norms and EC law.

[319] For a good discussion see B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (OUP, Oxford, 1998) 177.

[320] Art. 11 provides: 'Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to such limitations of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it promotes and encourages international organizations having such ends in view'.

[321] Case no.170/184, (1984) I *Il foro italiano* 2062 n.TIZZANO.

[322] Case 106/77 [1978] ECR 629.

that no ordinary court would be competent to decide on conflicts between national and EC law. It did this by depicting the EC and the national legal order as two autonomous, though co-ordinated, legal orders. Article 11 of the Constitution authorised the direct application of the EC legal order in Italy. Italian courts could *not apply* (as opposed to 'disapply') a national norm where it would affect the direct application of an EC norm. Hence, this formula permitted diffuse court control within Italian constitutional logic. EC sources are never considered part of the system of national sources; ordinary courts never 'disapply' a provision of Italian law, a competence reserved to the Constitutional Court. In practice, this formula generally provides *de facto* trumping of national law by EC law in ordinary Italian courts. However, the *de jure* construction of two autonomous legal orders, co-ordinated through the limitation on sovereignty in Article 11 of the Constitution, evidently permits (or even requires in order to confer authenticity on the depiction of two autonomous orders) instances where the EC legal order is not given entry because it clashes with bits of national sovereignty which cannot be limited by Article 11.

The Italian Constitutional Court has defined the parts that EC law cannot reach as '*controlimiti*' (counter-limits):

> The national order..does not open itself unconditionally to the Community legal order in that it is limited in each case by the respect of the fundamental principles of our constitutional order and the inalienable rights of the human being. Consequently, constitutional control of the laws executing the Treaty will be exercised to ensure such respect.[323]

There can be little doubt that the constitutional guarantee of gender equality would be a strong contender to be included in any list of counter-limits, though the Constitutional Court has not stated exhaustively which constitutional rights would be included.[324]

Ballestrero asks us to imagine that the Constitutional Court had taken a strong and reasoned stand on the necessity of the 1977 nightwork regime to

[323] Case no.168/1991 cited in M.V. Ballestrero, above n. 318, at 497. Note that the logic of two autonomous orders means that the Constitutional Court cannot exercise any direct control over EC sources (because they are foreign). A constitutional conflict would involve the Constitutional Court finding that the Italian law executing the Treaty is unlawful in that part in which it allows the Community source (such as the ETD—secondary legislation always being traceable to a Treaty provision) to produce a constitutionally illegitimate outcome. The offending EC norm would lose 'that peculiar efficacy consisting of its capacity to render 'non applicable' the conflicting national norm, which would regain its full applicability'. The citation used by M.V. Ballestrero, above n. 318, at 499 is from G. Amoroso, 'La giurisprudenza costituzionale nell'anno 1995 in tema tra ordinamento comunitario e ordinamento nazionale: verso una 'quarta fase'?', (1996) V *Il foro italiano* 72 at 88.

[324] Though it has stated that the principles of democracy, a secular state, unity of jurisdiction and the right to judicial protection are fundamental principles. Constitutional lawyers have thought it likely that the principle of formal and substantive equality in Art. 3 would be included, as would the principle of worker protection (Art. 1(1) and (4))—M.V. Ballestrero, above n. 318, at 500.

achieve the substantive equality required by Article 3(2) of the Italian Constitution.[325] She then imagines possible methods of constitutional challenge to the ECJ's vision of equality. This could be either the result of an ordinary court challenging a new law abolishing the prohibition of female night work[326] or an ordinary court questioning the constitutionality of the argument that the criminal penalties applied by Article 16 of the 1977 Law to those breaching the flexible night work prohibition contravened the ETD.

She asks whether the counter-limit of substantive gender equality would be sufficient to rescue the Italian legal order from application of the more formal version of gender equality adhered to by the ECJ and concludes:

> I really fear not: the supremacy of EC law already has legs which are strong enough to be able to jump over with relative tranquillity the obstacles presented by 'counter-limits' such as those represented by a different conception of equality.

Comparison with Spain and broadening the discussion beyond the issue of female night work can help adjust these conclusions. Ballestrero may well be correct. However, it seems to me that the balance between supremacy and a fundamental right to gender equality could depend on the degree to which a constitutional court has boldly and consciously etched a vision of what gender equality requires which is in contradistinction to that of the ECJ. We saw that the Spanish Constitutional Court has carved out a clear and coherent vision which does not seem to conform in all its elements to that of the ECJ.[327] Without denying that the Italian Constitutional Court has made some good gender equality decisions, a few swallows definitely do not make a summer. Its decisions on the constitutionality of the 1977 female night work regime provide one good example of opportunities not taken to articulate a full vision of gender equality.[328] Its decisions on the constitutionality of positive action (in the context of a law to promote female entrepreneurship[329] and a law

[325] We have seen that though the Italian Constitutional Court did find the 1977 night-work regime to be constitutional, its decisions to this effect were entirely unreasoned: see above n. 304.

[326] See now the reality of this hypothesis as a result of Art. 17 of Law no.25 of 5 Feb. 1999. Art. 17 of this Law which replaces Art.5 commences by stating that it is being introduced to comply with the ECJ's decision of 4 Dec. 1997, above n. 317.

[327] Above A.II. [328] Above at n. 304.

[329] Case no.109/1993 (1993) *Le Regioni* 1705. The Court stated, 'the aims pursued by the challenged provisions are the immediate consequence of an absolute duty which Article 3(2) assigns to the Republic. 'Positive action' in fact is the strongest instrument available to the legislature, which, respecting the autonomy and freedom of single individuals, aims to raise the starting point for socially disadvantaged categories of persons—fundamentally those covered by the prohibitions of discrimination expressed in Article 3(1) (sex, race . . .)—with the aim of ensuring to those groups an effective status of equal opportunities to social, economic and political insertion . . . Being measures aimed at transforming a situation of real disparity of conditions into a situation of substantial equal opportunities, 'positive

setting out quotas for female candidates in elections[330]) do not show as yet a court with a clear and developed vision of substantive gender equality.

One could imagine a future in which the Italian constitutional court endorses under Article 3 quotas similar to those condemned by the ECJ in *Kalanke*. However the chances of front row seats in a gender equality spar between any constitutional court and the ECJ, while not impossible, seem slim for other reasons. First, courts can be flexible and pragmatic; witness the rapid back-pedalling by the ECJ in *Marschall*.[331] Secondly, courts can be cunning. The Spanish Constitutional Court is not out to set up an open confrontation with the ECJ. Nor does it agree with it on all aspects of gender equality. So it picks what it wants from the ECJ and quietly pushes the rest to one side.

Finally, court avoidance is a foolproof strategy for keeping contentious gender equality provisions out of the reach of either the Constitutional Court or the ECJ. We can end this discussion with some examples of this from Italy. There are a number of Italian laws and practices which must have looked very shaky after the *Kalanke* decision and still do not look totally safe after *Marschall*.

The first is a very interesting provision—Article 6(5) *bis* of Law no.236 of 1993.[332] This states that 'an enterprise cannot make redundant a percentage of women higher than the percentage of women employed in the job categories concerned'. Violation of this obligation results in annulment of the dismissal and reinstatement of the employee concerned (Article 5(3) of Law no.223/1991). That this is a strict quota can be seen by looking at its relationship to the general redundancy criteria regime set out in Law no.223/1991.[333] The law sets out the 'normal' selection criteria in no hierarchical order: family obligations, length of service and technical-production requirements. These can be varied by collective agreement. The important point is that should application of either the legal or collectively agreed criteria result in a lower percentage of women in the post-redundancy pool than in the pre-redundancy

action' measures require the adoption of differentiated legal treatments in favour of socially disadvantaged categories, even in derogation from the general principle of formal equality set out in Article 3(1)'.

[330] Case no.422/1995 (1997) I *Giurisprudenza Italiana* 48. A law which requires quotas of women on lists of candidates for elections violates Arts. 3 and 51 of the Constitution. 'While legislative measures aimed at ensuring a situation of equal opportunities between the sexes can certainly be adopted to eliminate situations of social or economic inferiority or more generally to remove material inequalities between individuals (which is a presupposition of the exercise of fundamental rights) they cannot however affect the very content of those same rights which are rigorously guaranteed to all citizens; nor can belonging to one or the other sex ever be used as a criterion for eligibility to be a candidate.'

[331] Case C–409/95 [1997] ECR I–6363. See S. Simitis, this volume.

[332] See L. Nanì, 'Licenziamenti collettivi e parità fra generi: impatto della 'quota' a tutela dell'occupazione femminile', (1995) *Rivista giuridica del lavoro* 267.

[333] See M. d'Antona, 'Commento all'art.5, Legge n.223/1991' in M. Persiani (ed.) *Nuove leggi civili commentate n.4/5* (CEDAM, Milan, 1994) 936.

pool, the quota prevails over the other criteria. This is easily illustrated by a simple example.

Imagine that 100 men and 100 women are in a redundancy pool. One hundred workers are to be made redundant. Following application of the 'normal' legal criteria set out in Law no.223/1991 to dismiss 100 workers, 55 men and 45 women remain. This contravenes the 1993 obligation because, to fulfil that obligation, there should still be 50 women following application of the normal criteria. To meet the 1993 obligation, sex-specific lists need to be drawn up. Men listed 51–55 on their list must be replaced by the women listed 46–50 on their list despite the fact that these men score better on the 'normal' criteria than the woman. It is not difficult to see how Mr 51 would have a strong claim that, even after *Marschall*, this outcome contravenes the ETD.[334] It is equally obvious that the non-discriminatory nature of the 'normal' legal criteria is highly doubtful.

This example has been given because it shows that provisions of this type are confined neither to Germany nor to hiring and promotion decisions. However, it is unlikely to be challenged by a disgruntled man because it is basically not applied by employers or unions and failure to apply it is not challenged. No one goes to court.

A different way of limiting judicial involvement is illustrated by the hiring quotas introduced as a result of collective agreements by the Italian publicly owned rail company (*Ferrovie dello Stato*). The national agreement was submitted to the *Collegio Istruttorio* of the NEC (National Equality Committee) which decided in 1996 in favour of the legitimacy of the quotas. Some male applicants who had better results than female applicants were not selected in Genoa because of the quota system in that regional agreement. To head off pending judicial challenges by unions and rejected male applicants to the Genoa agreement, which were preventing the women taking up their posts, agreement was reached to abide by an advisory opinion on the legality of the Genoa agreement commissioned from three labour law academics. This opinion found that because the quota was flexible, temporary and applied in a limited area it was legitimate.[335]

[334] Indeed, it would probably have to be read as being compatible with Arts. 3 and 37 of the Italian Constitution only if its application took into due account other constitutionally protected interests. L. Nanì, above n. 332, states, for example, that the criterion of family obligations is an expression of the constitutional principle of protection of adequate income in Art. 36. Hence, the dismissal of a man with greater family burdens in favour of a female worker with no children (on an Art. 3/37 basis) means making an unwarranted assumption that one constitutional value is subordinated to another.

[335] See, for detailed discussion, D. Gottardi, 'Autonomia collettiva e sistemi di quote. Il caso delle Ferrovie dello Stato' in S. Scarponi (ed.) *Le pari opportunità nella rappresentenza politica e nell'accesso al lavoro: I sistemi di 'quote' al vaglio di legittimità* (Università degli studi di Trento, Trento, 1997) 57.

PART V CONCLUSIONS

We noted at the beginning of this chapter that 106 preliminary references have been made to the ECJ on gender equality in employment sources. This chapter has tried to cast some light on the dynamics involved in 83 of those references—the total of the references from Germany, the UK, France, Denmark, Spain and Italy.

It has shown in a number of different ways that the relationship between amounts of gender equality litigation, the existence of dialogue with EC sources and numbers of preliminary references is not straightforward. First, the number of references does not provide a reliable gauge of the quantity of gender equality litigation in any given Member State. Hence, France and Denmark, with six references apiece, have got lower levels of gender equality litigation than Italy and Spain which scarcely register as preliminary reference makers. Secondly, dialogue with EC sources often takes place without preliminary references being made. Examples of this would be the use of EC gender equality sources by the Spanish Constitutional Court and the tussles over the horizontal direct effect of the ETD in most of the Member States examined in this chapter.

The forces behind gender equality litigation, and dialogue with EC sources, have also been examined. This produced some surprising and important differences. First, the involvement of unions in gender equality litigation varied markedly between the six Member States and this had a major impact on the type and quantity of gender equality litigation supported in the Member States. Unions played a marginal role in Germany, Italy and France. Where unions did play an important role, they most often took the lead in litigation concerning equal value rather than on other issues. This is linked to the fact that bargaining on wages is a central feature of collective bargaining in EU Member States. Where unions were active on equal value, links between unions and institutional equality bodies could be forged to support gender equality litigation on other issues. A good example of this is union support for pregnancy-related illness cases in Denmark.

Academics in certain Member States occupied key roles. The impact this had on dialogue with gender equality sources depended on the roles they occupied. The most extreme example is Italy where the cross-over between academic and political life had a major impact on the reception of EC gender equality sources. In other instances, academics acted as advocates in gender equality cases. We saw examples of this from Germany (*Badeck* and *Kirshammer-Hack*), Italy and the UK.

Sometimes, however, it was practising lawyers who were more innovative and important in promoting the use of EC gender equality sources; these practising lawyers sometimes also participated in academic discussions. This is an extremely important element in explaining the conduct of gender

equality dialogue in the UK and in Germany. We also saw that the Community-sponsored dialogue, involving a mixture of academics and practising lawyers, represented by the Commission's EC Network of Equality Experts was particularly important in awakening interest in EC gender equality sources in France, a Member State with no strong union interest in gender equality and no adequately equipped equality agency.

Perhaps most interesting of all in the forces behind gender equality litigation was the active involvement of some of the judges themselves. This means that, in some instances, the distinction between actors mobilising around gender equality and the courts themselves becomes extremely blurred. This was particularly true, and very important, in some first instance labour courts in North West Germany and in the Spanish Constitutional Court. Gender equality was both given, and attracted, support from quarters which differed from those in other labour law litigation—the latter involving unions, employers, individual employees and labour inspectorates. In this sense, gender equality must be distinguished from the other labour law rights which are explored in this volume. It will be interesting in the future to compare mobilisation around the new race discrimination and framework equality directive based on Article 13 EC[336] with that outlined in this chapter. Though it will be distinctive from mobilisation around gender equality sources, it will be more like the forces behind gender equality than the forces giving rise to litigation on, for example, the structural directives or the Working Time Directive.

Related to these features of gender equality as a fundamental right is the effect of its constitutional status in some of the Member States examined here on dialogue with the ECJ. This did make a difference to the conduct of gender equality dialogue but those differences needed to be explored in the specific context of each constitution and each constitutional court. Indeed, in France, where gender equality is guaranteed in the constitution but there is no constitutional court with powers to sanction legislation already in force, we saw that constitutional sources were an important resource drawn upon by various courts to achieve aims with regard to EC gender equality sources. Sometimes, this was to use EC sources as sparingly as possible (the *Conseil d'Etat*); sometimes to avoid limitations placed by the ECJ on the application of gender equality sources.

With regard to the puzzle of the contrast between the levels of references from the three Member States where constitutional courts do have the responsibility to protect fundamental rights—Germany, Italy and Spain—more complex and subtle explanations emerged than the explanation that this resulted from lower courts playing off two judicial parents (the ECJ and the Constitutional Court) against each other. With regard to Germany, although this was a factor on some occasions, overall dialogue in Germany was better

[336] Dir. 2000/43/EC and Dir. 2000/78/EC.

explained as some lower courts and advocates, mobilised around gender equality, using a scattergun approach (approaching both the ECJ and the Constitutional Court). Sometimes a two-pronged approach was tried out with the same factual situation; sometimes a decision was made to pursue either the Constitutional Court or the ECJ. German dialogue with EC and national sources was however strategic, but this was a characteristic of German court behaviour in general rather than being specific to the treatment of EC sources. In Italy and Spain, however, lower courts made no strategic choice between their Constitutional Court and the ECJ with regard to gender equality. For the most part, they seemed largely unaware of the latter's role. In Italy, there was little evidence of strategic use by any court of EC gender equality sources while in Spain only one court—the Constitutional Court—was truly strategic.

Moreover, though it has not been examined here, the fundamental rights status of gender equality has also been a key resource harnessed by the ECJ in order to help realise its own 'constitutionalising' aims.[337]

One of the most interesting findings to come out of the detailed examination of these preliminary references on gender equality is what we might call the etiquette of preliminary reference dialogue. This differed more between Member States than between different types of court in the same Member State. Hence, the 'Danish' and 'German' preliminary reference etiquette was forceful, partisan and hands-on. The Court of Justice was given strong hints as to how the questions should be answered and little concern was displayed with regard to sending similar questions again, either to ask a question slightly differently or to ask the ECJ to think again. 'UK' and 'French' preliminary reference etiquette is restrained, polite and sober. The UK and French courts displayed greater restraint both in when they asked questions and in how they phrased the questions they wished the ECJ to answer. References were made when appropriate and were withdrawn when the ECJ had made the response clear in another ruling. These national preliminary reference 'etiquettes' in turn were related to how courts perceived each other and communicated within their national systems. What makes this most interesting, however, is the effect it has on the ECJ's responses. We have put forward evidence in this chapter that the ECJ, particularly where it is heavily knowledge-dependent, is more likely to follow the lead given by a national court adopting the 'forceful' preliminary reference etiquette. This finding, which helps explain many otherwise anomalous decisions in the area of gender equality, may hold true to a lesser degree in other policy areas where the Community has a stronger and clearer institutional mission, such as the four freedoms. Nevertheless, to the degree that it holds true, it does cast a

[336] For development of this argument see C. Kilpatrick, 'The Future of Remedies in Europe' in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of Remedies in Europe* (Hart, Oxford, 2000) 1 and C. Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the Court of Justice', in G. de Búrca and J.H.H. Weiler (eds.) *The European Court of Justice* (OUP, Oxford, 2001).

rather different light on the relationships between national courts and the ECJ. First, it means that courts from some Member States may be more 'equal' partners than others; this could have policy implications for the conduct of preliminary references. Secondly, it places the 'forceful' national court in the driving seat, with the ECJ coming across as uncertain, easily led and very anxious to preserve judicial harmony. At the very least, this provides a useful contrast to the normal Herculean presentation of the Luxembourg Court's endeavours and achievements.

To finish, we should return to Folke Schmidt's vision of gender equality as an issue safely contained within the purview of national legislatures. There can be no doubt, two decades on, that in each of these Member States judicial dialogue on EC gender equality sources has wrought profound changes on the development of gender equality as a policy area. This is challenging in two ways. First, and less problematically, we have seen how these changes can only be explained through disaggregating the nation State to see the significant roles played in policy-development and European governance by parts of the state other than national executives (in particular courts, equality agencies, government as an employer) and by other parts of civil society (unions, committed individuals). Second, and more difficult, we need to find ways of representing the 'nationality' of laws and courts in a context where their nationality still matters but is no longer clearly and distinctly bounded because of interaction between courts on EC law.

3

Transfers of Undertakings

PART I PRELIMINARY REMARKS

PAUL DAVIES

In this chapter we consider interactions between the European Court of Justice ('the ECJ') and three other actors in respect of the meaning of the Transfer of Undertakings Directive (Council Directive 77/187/EEC)[1] and its amending Directive of 1998 (Council Directive 98/50/EC).[2] The Parts which follow analyse interactions between the ECJ and (a) the national court systems of six Member States, (b) the Commission and other institutions which are part of the legislative process at Community level, and (c) the Member States. That some sort of interaction in all three areas was expected by those who drafted the founding documents of the Community is strongly suggested by their provisions. Thus, Article 234 EC (ex Article 177) provides for preliminary references by national courts and tribunals to the ECJ in order, *inter alia*, to obtain the ECJ's interpretation of the Treaty or of secondary Community legislation, whilst Article 37 of the Protocol on the Statute of the Court of Justice of the European Economic Community provides that 'Member States and institutions of the Community may intervene in cases before the Court', that is, even when they are not parties to the litigation. Of course, these formal provisions do not tell us anything about the nature of the interaction which has developed nor whether communication has taken place outside these formal mechanisms. Nevertheless, they do go a long way to dispel the notion that the ECJ was not expected to take into account the views of these interlocutors when it shaped its own decisions.

A. The Court and National Courts

I Social policy in general

This area of interaction is analysed mainly by Laulom in Part II below, but also to some extent by Valdés Dal Ré in Part III. They draw not only on their own work but also on the national reports produced for this research project which have been published separately.[3] Interaction between the ECJ and

[1] [1977] OJ L61/27. [2] [1998] OJ L201/88.

[3] On Denmark see H. Sundberg, 'Danish Industrial Relations, Community Litigation and

national judiciaries is now a well-established part of academic work by specialists in Community law and politics. Often the metaphor of dialogue is used, though that may fail to capture some forms of response to ECJ decisions on the part of national judiciaries, such as a studious failure to recognise that a particular line of ECJ decisions in fact raises a serious issue about the compatibility of national law with Community norms. Whatever may be the best way of referring to this interaction, it is clear that the 'dialogue' style of analysis starts from a point of reaction against an older tradition of 'black letter' legal analysis, which viewed the national courts' adherence to the new doctrines being produced by the ECJ as unproblematic. It can be debated whether the adherents to the older approach genuinely believed that the superior hierarchical position of the ECJ solved the problem of national court acceptance of ECJ doctrines or whether, more likely, their commitment to the triumph of the ECJ's policies and their appreciation of how fragile was the base on which the ECJ was operating made them reluctant to explore this ground.

In any event, the new approach is now firmly and rightly ensconced. However, it has been applied mainly in relation to the grand constitutional developments of Community law: supremacy, direct and indirect effect, state liability and the so-called *Kompetenz-Kompetenz* issue.[4] In this area it is clear that for both the ECJ and national courts the stakes are high, though the game plans are not necessarily straightforward. Within national court systems, for example, supremacy and direct effect may give lower courts review powers over primary legislation which previously they did not have, whilst at the same time threatening the supremacy of national constitutional courts. A complex set of interactions and outcomes is to be expected. But where does labour law or, better, social policy fit into the ECJ/national courts dialogue? Do social policy issues have the same importance for either the ECJ or the national court systems as do the grand constitutional themes which have so far attracted the lion's share of the attention?

It is perhaps worth starting with an *aperçu* of the late Judge Mancini, who did so much to bridge the gulf between the ECJ and the legal academic profession. Writing in the middle 1980s (and thus before the insertion of a social chapter into the EC Treaty but after the adoption of Directive 77/187), he

the Acquired Rights Directive', (1999) 15 *IJCLLIR* 269; on France, A. Jeammaud and M. Le Friant, *La directive 77/187 CEE, la Cour de Justice and le droit français*, EUI Working Paper Law No 97/3; on Germany, M. Körner, *The Impact of Community Law on German Labour Law—The Example of Transfer of Undertakings*, EUI Working Paper Law No 96/8; on Italy, V. Leccese, 'Italian Courts, the ECJ and Transfers of Undertakings: A Multi-speed Dialogue?', (1999) 5 *EW* 311; on the United Kingdom, P. Davies, *The Relationship between the European Court of Justice and the British Courts over the Interpretation of Directive 77/187/EEC*, EUI Working Paper Law No 97/2.

[4] For a thought-provoking collection of pieces analysing the 'constitutional' interactions see A.-M. Slaughter, A. Sweet and J.H.H. Weiler (eds.) *The European Courts and National Courts—Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998).

remarked that 'the founding fathers of the Community—and the same applies to the Council and the Commission in Brussels—never sought, or at least never sought as their first aim, to reform the lot of the man who sells his labour.'[5] This remark might suggest that the ECJ would regard the proper interpretation of Community labour law as not engaging its fundamental interests. Of course, social policy cases might provide the occasion for the development by the ECJ of its fundamental constitutional jurisprudence, as indeed they did in the areas of direct effect and state liability,[6] but the substantive content of the legislation was less important than the correct analysis of the relationship between the Community instrument and the national legal order.[7]

One clear qualification must be made to this picture of social policy as a side-show to the ECJ's concerns with constitutional fundamentals. The clear qualification is that, with the ECJ's not wholly voluntary conversion in the late 1960s and early 1970s to the use of the Community order to protect fundamental human rights,[8] the sex equality provisions of the Community's social policy acquired a special status as a concrete expression of this new concern. This point was soon after expressly made by the ECJ in its *Defrenne III* judgement.[9] The new Article 13 EC, and the express reference to equality between men and women in Article 2 EC, perhaps to some degree because these Articles are placed outside the social policy chapter, are likely to strengthen the separateness of the non-discrimination principle as a source of fundamental rights in EC law.[10] Indeed, the current debate about an EU Charter of Fundamental Rights seems likely to reinforce this tendency to turn social entitlements into fundamental rights, even though these debates

[5] 'Labour Law and Community Law', (1985) 20 *Irish Jurist* 1.

[6] See Cases 43/75 *Defrenne II* [1976] ECR 455; 152/84, *Marshall I* [1986] ECR 723 and C–271/91 *Marshall II* [1993] ECR I–4367; and C–6 and C–9/90, *Francovich I* [1991] ECR I–5357.

[7] Indeed, the *Francovich* litigation was a nullity as far as the substantive labour law entitlement was concerned: see Case C–479/93 *Francovich II* [1995] ECR I-3843.

[8] Case 26/69 *Stauder* [1969] ECR 419 and Case 11/70 *Internationale Handelgesellschaft* [1970] ECR 1125.

[9] Case 149/77 [1978] ECR 1365 at paras. 26 and 27: 'The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.' In relation to Art. 141 (ex Art. 119) EC the Court held in Case 43/74, *Defrenne II* [1976] ECR 455 that this Art., introduced into the Treaty of Rome mainly on economic grounds, had both social and economic objectives; and by 2000 the Court had advanced to the view that that 'the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'. See Case C–50/96 *Deutsche Telekom AG* v. *Lilli Schröder* [2000] ECR I–743 at para. 57.

[10] See L. Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination', (1999) 28 *ILJ* 133.

embrace political and human rights as well as social rights. At the time of writing, however, it is unclear what the outcome will be, the unclarity extending beyond the content of the rights to the legal status of the document embodying them.[11]

II The Background to the Transfers Directive

Council Directive 77/187/EEC is part of a larger policy initiative which the Community launched in the 1970s, but one which did not have as its focus the protection of human rights. Rather, that programme was grounded in the initial Community project, the creation of a single market. The objective of the programme, as explained Michael Shanks, the then Director-General for Social Affairs,[12] was to secure worker consent to, or at least acquiescence in, the programme of re-structuring of enterprises which the dismantling of national barriers to trade was thought likely to engender. Workers were not to be given a veto over this process, which was viewed as a necessary and desirable part of the enlargement of the market, but were to be afforded some assurance by Community law that their interests would be taken into account when re-structuring decisions were taken by management and some safety-net protection against the downside risks of the process was to be provided. Thus, Council Directive 75/129/EEC[13] required employers contemplating dismissals on economic grounds (above a certain size) to consult with representatives of the employees about, *inter alia*, ways of avoiding or reducing the number of dismissals and about methods of alleviating the burden on those to be dismissed; whilst Council Directive 80/987/EEC[14] requires Member States to set up guarantee funds to meet certain claims of the employees of insolvent employers. The Directive with which we are concerned here added the principle that, upon the transfer of an undertaking, the employees of the transferor were to become employees of the transferee and on the same terms and conditions of employment and, in consequence, the transfer of the undertaking was not to constitute a lawful reason for the dismissal of employees of either transferor or transferee, unless the dismissal was for an 'economic, technical or organisational' reason. The Directive also extended consultation obligations to both transferor and transferee if they envisaged 'taking measures' which would have an impact upon the workforce.

Did these three Directives together add up to a coherent programme 'to reform the lot of the man who sells his labour', to which both the ECJ and the

[11] For a selection of views see House of Lords, Select Committee on the European Union, *EU Charter of Fundamental Rights*, Eighth Report, Session 1999–2000, HL Paper 67 (The Stationery Office, London, May 2000).

[12] M. Shanks (1977) 14 *CMLRev* 373.

[13] [1975] OJ L48/29. This Dir. was later amended by Council Directive 92/56/EEC and has now been consolidated as Council Dir. 98/59/EC, [1998] OJ L225/16.

[14] [1980] OJ L283/23.

national courts could have regard when questions of interpretation of national legislation transposing the directives arose? It is suggested that they did not. They simply scratched the surface of the policy problems in the area of restructuring enterprises. Thus, Directive 75/129 did not go beyond the principle of consultation over proposed economic dismissals and so did not address the question of substantive controls over the selection of those to be made redundant (should employer, workforce or public interest criteria predominate in the selection process?) nor the vital issue of how far employers should be made to internalise the societal costs of dismissing workers for economic reasons, whether by mandating severance payments, requiring the development of social plans or through some other mechanism.[15] By contrast, Directive 80/987 provided limited substantive protections but did nothing to inject an employee voice into the crucial decisions about the different ways of handling the future of incipiently insolvent enterprises.[16]

As for Directive 77/187, it was fatally wounded by the initial decisions to exclude from the scope of the Directive transfers of control by way of purchases of shares in the company which owned the undertaking. There was, and still is, no reason to think that a new controller of an undertaking who has acquired that control by buying the company which owns the undertaking is any *less* likely to take measures which may affect the employees than a controller whose controls stems from a direct purchase of the underlying undertaking. Consequently, in such a case the consultation principle contained in the Directive is applicable, as is the ban on dismissals connected with the control shift, even if there is no need for compulsory transfer of the contracts of employment. In short, the Directive was, and is still, not about protecting employee interests where there is a shift in control of an undertaking, but rather is limited to control shifts brought about in a particular manner, that is, by the transfer of an undertaking 'to another employer as a result of a legal transfer or merger'.[17] To some significant extent, therefore, the impact of the Directive can be avoided by structuring the control shift so that it falls outside the scope of the Directive.

III The Meaning of a Transfer of an Undertaking

The single most litigated question before the Court in relation to Directive 77/187 has been the proper meaning to be attached the notion of a transfer of an undertaking, and in particular the extent to which the contracting out of

[15] H. Collins, *Justice in Dismissal* (Clarendon Press, Oxford, 1992) Chap. 5. See also G. Couturier, 'Quel avenir pour le droit du licenciement?—Perspectives d'une régulation européenne' in International Society for Labour Law and Social Security, *5th European Regional Congress for Labour Law and Social Security* (Leiden, 1996).

[16] See G. Lyon-Caen, *L'information et la consultation des représentants des salaires dans les procédures de faillite*, Report to the Commission of the European Communities, (1988).

[17] Dir. 77/187, Art. 1(a) of the amended version, n. 2 above.

services falls within the Directive.[18] Perhaps the first point to make is that it is surprising that the issue was not dealt with expressly in the Directive. A short investigation into the laws of the Member States which already knew the compulsory transfer principle would have revealed the differences of approach which later caused such difficulties for the ECJ. Thus, in interpreting French law, which had adopted the compulsory transfer principle in 1928, the French courts had taken a broad view of what constituted a transfer of an undertaking, so as to embrace the contracting out by public and private bodies of services such as canteen, cleaning and security provision.[19] By contrast, in Italy, where the compulsory transfer principle had an equally long pedigree, a commercial law test was in use, which made a transfer of an undertaking dependent on the transfer of tangible or intangible assets,[20] an approach also shared by the German courts where the compulsory transfer principle had been introduced more recently.[21]

As important, that investigation would have revealed that, by the 1970s, the breadth of the French law had come under attack from those who regarded it as an impediment to the operation of the competitive forces which were leading to a re-drawing of the boundaries of the firm, though the actual retreat by the *Cour de cassation* from the initial broad approach occurred only in the 1980s, that is, after the Directive had been adopted. Nevertheless, the distinction between two contrasting conceptualisations of the undertaking, that of the '*entreprise-activité*' (the labour law approach) and that of the '*entreprise-organisation*' (the commercial law approach),[22] which has been at the heart of recent ECJ decisions, was already well-established in the national French debate. It may be that the dynamics of the legislative process at Community level drive out the subtleties of comparative legal analysis, though that is to be regretted and a high price was certainly paid in this case. What cannot be argued is that the issue of contracting out in relation to the compulsory transfer principle arose solely because of changes in the economic climate which occurred after the adoption of the Directive. The Community legislator may perhaps be forgiven for not foreseeing the extent to which contracting out would develop in the 1980s, but that there was here a significant legal problem was manifestly apparent at the time the Directive was adopted.

However, the failings, if any, of the Community legislator merely landed the problem in the lap of the ECJ. How did the ECJ deal with the issue of how far the transfer of an undertaking should embrace the contracting out of services?

[18] Some scholars propose that one should keep separate the questions of what is an undertaking and what is a transfer, but it is submitted that the division becomes unsustainable in the discourse about particular cases.

[19] A. Jeammaud and M. Le Friant, n. 3 above, 6–11.

[20] V. Leccese, above n. 3 at 326. He points out that the Italian courts had developed this approach before the adoption of the transfers Dir.

[21] M. Körner, above n. 3 at 6.

[22] H. Blaise, 'Continuité de l'entreprise: flux et reflux de l'interprétation extensive de l'article L. 122–12 al. 2 du Code du travail', (1984) *Droit Social* 92.

One possible reading of the Parts which follow is that the ECJ did not regard fundamental Community interests as being involved in the answer to the question but rather that it took the view that a considerable degree of deference should be shown to national courts' policies on this issue. This approach would be consistent with the view, argued for above, that Directive 77/187 neither articulated fundamental principles of social protection (such as equal pay for work of equal value or non-discrimination in access to jobs) nor was part of a comprehensive code dealing with the restructuring of enterprises.

On this reading of the ECJ's decisions, deference was shown to the national courts in the period up to the *Schmidt* decision[23] by the ECJ confining itself to the so-called *Spijker's* approach,[24] that is, merely listing a wide range of unweighted factors which the national courts were obliged take into account when deciding whether there had been a transfer of an undertaking. Since the list was long and the relative importance of the factors unspecified, national courts were not much constrained by the *Spijker's* decision. After the *Süzen*[25] decision that deference has been demonstrated by the ECJ's relatively close adherence to the tests currently adopted by the national courts with the greatest experience at Member State level in applying the compulsory transfer principle. On this analysis, then, the ECJ's one mistake was the *Schmidt* decision, where it both abandoned, contrary to the advice of the Advocate General, the discretionary approach of the earlier period and adopted a prescriptive analysis of the facts which was contradictory to the position adopted by the most experienced national courts. To be more precise, the mistake was not perhaps the abandonment of the discretionary approach as such, since the continuing stream of references from the national courts about the scope of the *Spijker's* approach strongly suggested that some national judiciaries, notably those where the compulsory transfer principle was new, found that a listing of relevant factors gave them insufficient guidance. The mistake, rather, was the explicit adoption of the *entreprise-activité* conception of an undertaking without adequate consideration of why the most experienced national judiciaries had not adopted it or had given it up.[26] Again, this may perhaps be characterised as a failing of comparative law, albeit this time at ECJ rather than legislative level. Having made that mistake, however, the ECJ quickly recovered from it in *Süzen*.

IV The Responses of the National Judiciaries

As far as those Member States are concerned which knew the compulsory transfer principle before the adoption of Directive 77/187, the position of their

[23] Case C–392/92, [1994] ECR I–1311. [24] Case 24/85, [1986] ECR 1119.

[25] Case C–13/95, [1997] ECR I–1259.

[26] 'The similarity in the cleaning work performed before and after the transfer is typical of an operation which comes within the scope of Directive 77/187/EEC and which gives the employee whose activity had been transferred the protection afforded to him by that Directive': *Schmidt* judgment, above n. 23 at para. 17.

judiciaries was in many ways the converse of that of the ECJ. They reacted unfavourably towards the *Schmidt* decision not simply because it contradicted existing national law. National courts have swallowed much bigger reversals of their national positions, both within and without the area of social policy, without explicit demur. The point about *Schmidt* was that, to them as to the ECJ in the end, strong Community interests seemed not to be engaged in this problem, whilst no convincing arguments were offered by the ECJ as to why the national positions, based on some idea of *entreprise-organisation* and reached after long and arduous debate, should be thrown over. Even so and despite the strong criticism of *Schmidt* advanced by some German academics,[27] it is not clear that the judiciaries of France, Germany and Italy would not have accepted the *Schmidt* principle in the end, had the ECJ adhered to it. What the courts of those countries did indicate to the ECJ, however, was a refusal immediately to embrace the *Schmidt* principle, which acted as a signal to the ECJ that its decision in that case should be reviewed. These refusals, however, were manifested in interestingly different ways in the three countries.

In France, where, as we have seen, the *Cour de Cassation* moved away from its long-standing *organisation-activité* approach towards an *entreprise-organisation* view shortly before the ECJ in *Schmidt*, ironically, came down in favour of the former, the top courts nevertheless maintained their reluctance to make references to the ECJ. Instead, the French courts sought to reconcile the *Schmidt* decision with their new domestic understanding of the meaning of an undertaking.[28] As Laulom points out, however,[29] the result was only a rather formal level of acceptance of the *Schmidt* principle: contracting out of services was seen as a transaction which in principle fell within the scope of the French law transposing the directive, no matter what form the contracting out took, but the *Cour de cassation* did not in fact uphold any decision that a transfer had occurred in the absence of a transfer of assets. In effect, the French courts maintained their domestic change of mind of 1985, whilst waiting for clarification of what *Schmidt* might entail. This was passive rather than active 'dialogue'.

In Italy, another country with domestic experience with the compulsory transfer principle dating back to before the Second World War, the courts had a long history of using a commercial law (or *entreprise-organisation*) test for the existence of an undertaking, and so, here too, *Schmidt* threatened to upset a long-standing line of domestic decisions. As in France, the *Corte di Cassazione* sought to maintain that domestic position and failed to make a reference to the ECJ, though without achieving, perhaps, the level of intellectual justification for its position which the French courts reached.[30]

[27] M. Körner, above n. 3 at 16.

[28] See, e.g., P. Waquet 'L'application par le juge français de la directive communautaire du 14 février 1997', (1995) *Droit Social* 1007.

[29] Below Part II at 161.

[30] See V. Leccese, above n. 3 at 326–9, referring in particular to Cass. 1 Mar. 1996, n. 3354,

By contrast, in Germany, where the *Schmidt* decision received the heaviest overt criticism from academic commentators,[31] the courts opted for explicit dialogue, as they had in the earlier, and from their point of view successful, interchange with the ECJ over the payment to part-time works councillors for time spent on training courses outside their normal working hours.[32] In such explicit dialogue the national court refers a second or further similar case to the ECJ, with additional supporting arguments, in effect suggesting to the ECJ that it should reverse or qualify its previous decision. This technique has been criticised in some quarters, presumably on the ground that it evinces some degree of disloyalty to the ECJ on the part of the second referring court. However, it has the merit that it is a much more transparent form of interaction between national judicial systems and the ECJ than the complex and ultimately unconvincing argument on the part of the national judiciary to the effect that the national law remains in conformity with Community law, despite a recent contrary decision of the ECJ, so that no further reference is required. Moreover, with the *Süzen* decision of the ECJ the German judiciary received its reward for persistence.[33]

By contrast with the French, Italian and German courts the UK courts accepted the *Schmidt* decision with equanimity, and even welcomed it as providing a level playing field for contracting out. Whatever the precise form of the contracting out process, competition among the contractors would have to be based on the more efficient utilisation of labour rather than a simple downgrading of terms and conditions of employment. At first sight this response may seem strange, since the pre-Directive position of the law in the UK was based on freedom of contract, so that the British judiciary might have been expected to be unhappy with a decision which maximised the level of the Directive's interference with that doctrine. However, that argument assumes a high level of attachment on the part of the British courts to freedom of contract in the area of social policy. In fact, since the domestic courts had no reason to question the British government's decision to override freedom of contract by

(1997) II *Rivista italiana di diritto del lavoro* 395. He suggests that the Italian courts refused to recognise the problem.

[31] M. Körner, above n. 3.

[32] See Case C–360/90 *Bötel* [1992] ECR I–3589 and Case C–457/93 *Lewark* [1996] ECR I–243. In the first case the Court held that time spent on training courses attended by part-time works councillors had to be paid for, even if it fell outside their normal working hours, if full-time councillors were also paid during those hours. In the second case, informed by further arguments from the referring German court, the Court held that non-payment of the part-timers for time outside their normal working hours might be justified by the honorary nature of the works councillor's position, as conceived in German law.

[33] It is worth noting, however, that there may have been an element of rivalry within the national judiciary in respect of these references. The *Schmidt* reference was made by the *Landesarbeitsgericht* of Schleswig-Holstein, whose president is 'one of the most active judges in referring cases to the ECJ' (M. Körner, above n. 3, 14 and Chap. 2 at n. 77), whereas the *Süzen* reference was made by the *Arbeitsgericht* Bonn. There is no reason to suppose that the *Landesarbeitsgericht* president was unhappy with the answer she received.

agreeing to Directive 77/187 within the Community's legislative process, what appears to have happened is that the domestic courts felt they could follow the ECJ's guidance on the scope of a transfer without any sense that the ECJ was stamping on established domestic understandings about the transfer principle. Thus, the UK courts paid close attention to the decisions of the ECJ in developing the domestic law[34] and, as stated, welcomed *Schmidt* as settling the controversy between *entreprise-organisation* and *entreprise-activité*.[35]

However, the UK experience also shows how quickly national views on the proper approach to principles of Community law can develop, even when those principles are new to the domestic system. Almost as a consequence of the UK courts' easy acceptance of *Schmidt* there was resistance to the restrictions suggested by *Süzen*, especially on the part of the specialist labour courts. Thus, the Employment Appeal Tribunal and the Court of Appeal, presided over by a former president of the EAT, have sought to maintain the *Schmidt* position by construing narrowly the grounds upon which appeal can be made from decisions of the Employment Tribunals.[36] At the time of writing it is unclear whether this procedural expedient will lead to long-term resistance on the part of the UK courts to the *Süzen* decision.[37]

The theory that, once the domestic courts have accepted the principle of a new Community law innovation, the absence of a domestic history of litigation makes it easier for the national courts to follow the detailed guidance of the ECJ over the scope of the principle, receives some negative support from an analysis of the UK courts' reactions to another issue of interpretation of the Directive. This is the issue whether the Directive requires that dismissals in breach of its provisions should not only be unlawful but also ineffective, so that the dismissed employee is to be treated as still in employment and not just entitled to compensation. As Laulom indicates below,[38] there is a more than respectable argument that the ECJ's interpretation of the Directive is that such

[34] Yet, until recently, the UK courts had made no references in transfer matters to the Court. Whilst this clearly demonstrates that the influence of Community law upon a national system is *not* to be measured by the number of references from that national system, it is much less clear why the UK courts did not refer whilst the Danish courts, to which the principle of compulsory transfer was also new, made so many. This remains an area for future research, especially as in the adjacent area of social policy, sex discrimination, the UK courts have been a major source of references to the Court.

[35] J. McMullen, 'Atypical Transfers, Atypical Workers and Atypical Employment Structures', (1996) 25 *ILJ* 286, 291.

[36] See *ECM (Vehicle Delivery Service) Ltd* v. *Cox* [1998] IRLR 416 (EAT) and [1999] IRLR 559 (CA), decisions strongly criticised by J. McMullen in (1999) 28 *ILJ* 360. Ironically, the case involved a change in the distributor for VAG cars effected by the German company's UK subsidiary.

[37] See for British decisions more welcoming of the Court's decision in *Süzen*, *Betts* v. *Brintel Helicopters Ltd* [1997] ICR 792 and *Whitewater Leisure Management* v. *Barnes* [2000] IRLR 456 but *cf RCO Support Services* v. *UNISON* [2000] IRLR 624, an EAT decision preferring *ECM* to *Brintel*. The matter may be taken out of the courts' hands: see n. 43 below.

[38] At 175.

dismissals are ineffective. This is in contradiction to the general position in UK law whereby unlawful dismissals are nevertheless effective to terminate the contract. Somewhat in the manner of the French courts, however, the House of Lords refused to refer this issue to the ECJ on the ground that the decisions of the ECJ 'already indicated with sufficient clarity' that nullity was not required by the Directive.[39] Thus, where important established national doctrine was at issue, the UK courts took as protective a line as their continental counterparts.

B. The ECJ and the Community's Legislative Process

This relationship is analysed with great perceptiveness by Lo Faro in Part IV below. The ECJ knew from the interventions of the German and UK governments and of the Commission in *Schmidt* that none of them (nor indeed the Advocate General) would have disposed of the case in quite the way that the ECJ did, though the interveners were not by any means in agreement amongst themselves about the correct approach to the identification of an undertaking. As it happened, however, there were possibilities for more intense interaction between the ECJ and other Community institutions and the Member States than intervention in ECJ cases permitted. This arose because, even before the *Schmidt* decision, the Commission had committed itself to a programme of up-dating the restructuring Directives of the 1970s,[40] and indeed had already carried out such an exercise in relation to the Collective Redundancies Directive.[41] In this process, the views of the Commission, the Member States and other institutions of the Community became much more transparent and available in the public domain.

This episode is analysed in more detail by Lo Faro below, but the bare bones of the story are clear. The Commission proposed in 1994 to include a more elaborate definition of a transfer in the Directive so as to embrace the ECJ's long-standing gloss that a transfer of an undertaking involved the transfer of an economic entity which retained its identity. However, it also proposed also to add the crucial rider that 'the transfer only of an activity . . . does not in itself constitute a transfer'. As the Commission explained to the House of Lords' Committee in the United Kingdom which examined the Commission's proposals, 'the Commission considers that the transfer of an activity which does not involve the transfer of tangible or intangible assets does not constitute a transfer . . . Thus, sub-contracting would be excluded from the scope of the Directive only in the event of a transfer of an activity or

[39] *Wilson* v. *St Helen's Borough Council* [1998] ICR 1141 at 1159–64. It is interesting that the leading judgment of the House was given by Lord Slynn who, as Advocate General, had argued against the nullity interpretation in Case 19/83 *Wendelboe* [1985] ECR 457.

[40] See *European Social Policy – A Way Forward for the Union. A White Paper*, COM(94)333, chap. X, para. 13.

[41] The 1975 Dir. was amended by Council Dir. 92/56/EEC [1992] OJ L245.

an operation not involving the transfer of tangible or intangible assets.'[42] Thus, the rule in *Schmidt* would be substantially amended. However, after opposition from ECOSOC and the European Parliament, on the ground that such a rider would reduce the level of protection for employees, the Commission dropped its qualification to the economic entity definition, so that the final version of the amending directive shows no trace of it. Yet, the Commission's goals were substantially achieved by the ECJ's decision in *Süzen*.

The interesting question from our perspective is why the ECJ chose to back-track from its *Schmidt* position in *Süzen*. As is shown by the opinions of ECOSOC and the European Parliament, as well as the position in French law before 1985 and the welcome accorded to *Schmidt* by many writers in the UK, the *Schmidt* position was by no means untenable in policy terms. Yet, the ECJ substantially qualified it in *Süzen*. One explanation might be that the ECJ was simply accommodating the interests of those bodies which constitute primary driving forces behind the European Community project: the Commission and the German and French governments. It is probably impossible to disprove this thesis in this case, though there is certainly no evidence that the Commission dropped its rider to the new definition of a transfer on the basis of some sort of understanding that the ECJ would revise its *Schmidt* view. The difficulty for the Commission in obtaining unanimity as required by Article 94 (ex 100) EC, the only practically available legal base for the Directive at the time, is enough to explain why it dropped this particular 'hot potato'.

In any event, it is not necessary to go so far. If the argument made above is correct, namely that the ECJ did not see essential Community interests as being at stake in the definition of a transfer, that stance would only have been strengthened by the ECJ's knowledge that the Commission, like the national judiciaries with long-term experience with operating the compulsory transfer principle, took the view that the *Community's* interest lay in the adoption of a restricted definition of a transfer. Moreover, the qualification of the *Schmidt* view did not mean that Member States which preferred the *Schmidt* approach were prohibited from adopting it after *Süzen*. The freedom of those Member States which want a definition which is more protective of the employees is preserved by Article 7 of the Directive.[43] The *Süzen* decision did of course involve a rejection of the view that all Member States should be obliged to

[42] House of Lords, Select Committee on the European Communities, *Transfers of Undertakings: Acquired Rights*, Session 1995–96, HL 38, Written Evidence, 122.

[43] In the UK s. 38 of the Employment Relations Act 1999 has specifically amended the 'short-cut' procedure for translating EC obligations into domestic law so that, in the case of the amending Transfers Dir., the short-cut procedure can be used even if the domestic provisions confer rights on employees in situations where Community law would not hold that a transfer had occurred. It is not yet clear how the Government will use this power, but it could be used to continue an *entreprise-activité* test in the UK.

accept the broad view contained in the *Schmidt* decision—and to this extent the hopes of ECOSOC and the Parliament were disappointed—but this could be a consequence of the view that essential Community interests were not at stake here.

C. Conclusion

The analysis of the ECJ's interaction with national judiciaries and the various actors in the Community's legislative machinery, which has been presented above, might be caricatured as one in which the ECJ made an over-enthusiastic blunder in its *Schmidt* decision and was rapidly thereafter educated by the national judiciaries, especially the German courts, and Commission into a stance which recognised the subsidiarity arguments in favour of a more restrictive approach to the definition of a transfer. That the ECJ should make such blunders is not surprising, given the range and number of the cases before it. Whether the current admissibility criteria make the most efficient use of the ECJ's scarce resources is a debate which need not be embarked upon here. More to the point, the analysis of the 'corrected blunder' may give insufficient weight to the extent of the dialogue which took place over the scope of the Transfers Directive.

Süzen did not simply reverse *Schmidt*. Rather, it moved the ECJ to a new position which was not a straightforward adoption of the Commission's and the German courts' analysis that a transfer of assets, tangible or intangible was a necessary precondition of a transfer. In enterprises where the resources consist mainly of the workforce, the ECJ was keen to maintain the possibility of a transfer being found on the basis of a transfer of employees, uncoupled from any transfer of assets. Thus, in its disposition in *Süzen*, whilst adopting the *entreprise-organisation* test and rejecting the *entreprise-activité* approach, the ECJ nevertheless took a broad approach to its understanding of an organisation. Thus, the ECJ said in its disposition of the case, the Directive 'does not apply' to the mere transfer of a cleaning contract from one contractor to another (rejection of *entreprise-activité*), but would apply if the transfer of the contract were accompanied by a transfer 'of significant tangible or intangible assets *or* the taking over by the new employer of a major part of the workforce, in terms of their numbers and skills' (adoption of a broad view of *entreprise-organisation*). One may debate how strong is the regulatory force of the employee transfer criterion, since this is a matter within the control of the transferor and transferee,[44] but it certainly represents a step beyond the exclusive focus on tangible and intangible assets. Moreover, the dialogue continues, since it appears that the

[44] Lo Faro, below, at 223–4.

German courts are now adjusting their domestic definition of a transfer to take on board the transfer of employees.[45]

Thus, as far as the scope of the Transfers Directive is concerned, one does seem to have identified an example of a successful, multilateral dialogue in which the participants all learned from one another and where the outcome is defensible in terms of the relations between the Community and the national systems of labour law.

[45] See: BAG 22 May 1997 (1997) *DB* 1720; BAG 13 Nov. 1997, (1997) *BB* , 2590; BAG 11 Dec. 1997, (1998) *DB* 84. I am grateful to Dr Marita Körner for these additional references to cases decided after the publication of her paper cited in n. 3 above. It is less clear whether French courts currently are prepared to find a transfer on the basis of a transfer of employees alone. See Cass. soc., 7 July 1998, (1998) *Droit Social* 948, which decision seems to regard the alternative criteria of *Süzen* as cumulative.

PART II THE EUROPEAN COURT OF JUSTICE IN THE DIALOGUE ON TRANSFERS OF UNDERTAKINGS: A FALLIBLE INTERLOCUTOR?

SYLVAINE LAULOM

A. Introduction

There is no question that, excepting the area of sex equality in employment, the Acquired Rights Directive[1] is the instrument in the field of social policy which has given rise to the most prolific dialogue between the European Court of Justice (ECJ) and national courts, as evidenced by the number of ECJ judgments delivered on the subject.[2] In qualitative terms, it is likewise undeniable that this Community case-law has had an important influence on the direction followed by national court decisions in the various Member State systems. A comparative analysis of national decisions delivered on transfers of undertakings reveals that no Member State has remained unaffected, irrespective of the state of its domestic law prior to the Directive's adoption. The pre-Directive position in individual countries may have delayed the time taken for the effects of the Directive to make themselves felt in national legal systems, but it has not been a determining factor in the extent and strength of that influence. For example, the Directive's influence was immediate in Denmark[3] and the UK,[4] countries whose pre-Directive law did not recognise the principle of the automatic transfer of employment relationships when a business is transferred,whereas it took longer to make itself felt in Germany,[5] France[6] and Italy,[7] where that principle already existed in law.

[1] Council Dir. 77/187/EEC of 14 Feb. 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, as amended by Council Dir. 98/50/EC of 20 June 1998.

[2] See below Table 3.

[3] H. Sundberg, *The Transfer Dialogue in Denmark* (mimeo), paper written for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998).

[4] P. Davies, *The Relationship between the European Court of Justice and the British Courts over the Interpretation of Directive 77/187/EEC*, EUI Working Paper Law No. 97/2, updated in 1998 for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998). On British law as it existed prior to implementation of the 1977 Dir. see, in particular, B. Hepple, 'Workers' Rights in Mergers and Takeovers: The EEC Proposals', (1976) *ILJ* 197.

[5] M. Körner, *The Impact of Community Law on German Labour Law. The Example of Transfer of Undertakings*, EUI Working Paper Law No. 96/8, updated in 1998 for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998).

The fact that Community case law on the matter has resulted in a reaction from the national courts in all Member States makes the 1977 Directive an ideal locus for analysing interactions between national decisions and ECJ decisions. One of the points of interpretation posed by the application of the Directive was common to all the countries studied. However, as the ECJ progressively developed its case law this point of interpretation very quickly became established in a Community context and the absence of references for a preliminary ruling from certain Member States did not indicate an absence of national litigation on the matter, nor a lack of awareness of Community law on the part of the actors concerned.

Although all the national courts have been confronted with similar points of interpretation,[8] the dialogues or interactions which have grown up between ECJ decisions and national court decisions have not been uniform. In some Member States such as Denmark and, later, Germany and Spain the dialogue has been direct, developing by way of questions referred for a preliminary ruling. In others such as France and the UK this inter-court dialogue has been more indirect, not being channelled until recently through the preliminary reference procedure. Yet the paucity of references from the latter countries is not to be construed as an indifference on the part of their national judiciaries towards the Directive and its interpretation by the ECJ. Nor does it signify an absence of national litigation on the matter: in both France and the UK the courts have had to hear cases which could have given rise to preliminary references. And although references were not made until very recently by these two countries, it is still undeniable that the decisions delivered by their national courts have been influenced by the Community case-law. These decisions refer explicitly to the Directive and the national situation is analysed in the light of European decisions.[9] Accordingly, the Community influence is no less important in these countries than it is in Germany or Denmark. Lastly, there are also situations (as in the case of Italy) where the dialogue has taken both forms, depending on the nature of the point at issue: it has been direct as regards the question of the Directive's application to undertakings placed under a special administration

[6] A. Jeammaud and M. Le Friant, *La Directive 77/187/CEE, la Cour de Justice et le droit français*, EUI Working Paper Law No. 97/3, presented in the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998).

[7] V. Leccese, *Italian Courts, the ECJ and Transfers of Undertakings: A Multi-Speed Dialogue?*, paper written for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998), also published in (1999) *5 ELJ* 311–30; R. Romei, 'Il rapporto di lavoro nel trasferimento dell'azienda' in P. Schlesinger (ed.) *Il Codice Civile: Commentario* (Giuffrè, Milan 1993).

[8] For example, the question of the possible application of the 1977 Dir. to the transfer of contracts for services is common to all the Member States studied. See U. Carabelli et al., *La transmisión de empresas en Europa* (Cacucci, Bari, 1999).

[9] S. Laulom, *L'harmonisation en droit social communautaire: les enseignements de l'intégration en France et au Royaume-Uni des directives 75/129 et 77/187* (EUI Thesis, Paris X-Nanterre, 1996).

procedure in insolvency situations, but indirect in other areas where only one recent preliminary reference has emanated from the Italian courts although here again this does not signify that no point of interpretation has arisen.

Usually, analyses of the relationship between national courts and the ECJ start by examining the direction followed by Community case law, its degree of consistency and its reception by national courts, and then move on to singling out such points of divergence and convergence as exist between that case law and the stances adopted by national judges. But this approach fails to demonstrate the mechanisms of the production and dissemination of Community case-law, which are far more complex than might appear just from reading Article 177[10] of the EC Treaty. A better understanding of developments in Community case law and its reception by national judges can be gained from analysing the context in which national courts have been prompted to refer to the Community judicature, the formulation of preliminary references and their reformulation as operated by the ECJ in each judgment, and from analysing the manner in which the nature of these questions referred for a preliminary ruling has changed as the ECJ has progressively established the basic principles of its interpretation of the Directive. This method enables us to see whether the ECJ has been constrained by the questions referred to it or, conversely, has utilised them to build up a consistent interpretation of the Acquired Rights Directive. It also shows that the existence or absence of a preliminary reference can signify widely differing situations: references may correspond to a problem of interpretation of a Community text, but they may also attest to a resistance on the part of national courts to a position already adopted by the ECJ on a given issue. In addition, a reference for a preliminary ruling may also be used by a national court as a way of enlisting Community support for debunking an interpretation by a higher court in its own country. Similarly, the absence of preliminary references may equally well be an indication either of unreserved acceptance of the Community case law or of opposition or indifference to it.

The initiative in making the first preliminary references came from the national courts in Denmark[11] and the Netherlands.[12] These earliest references concerned the definition of the Directive's scope and provided the basis on which the ECJ began to lay down the principles for the interpretation of the 1977 Directive. The national courts in France and Germany, which had been assuming that their pre-existing legislation sheltered them from any

[10] Now Article 234 of the EC Treaty.

[11] Case 19/83 *Wendelboe* [1985] ECR 457; Case 105/84 *Danmols* [1985] ECR 2639; Case 287/86 *Ny Mølle Kro* [1987] ECR 5465; Case 324/86 *Daddy's Dance Hall* [1988] ECR 739; Case 101/87 *Bork* [1988] ECR 3057; Case C–209/91 *Rask and Christensen* [1992] ECR I–5755; Case C–48/94 *Rygaard* [1995] ECR I–2745. See below Table 3.

[12] Case 135/83 *Abels* [1985] ECR 469; Case 186/83 *Botzen* [1985] ECR 519, Case 24/85 *Spijkers* [1986] ECR 1119; Joined Cases 144 and 145/87 *Berg and Busschers* [1988] ECR 2559; Case C–29/91 *Dr Sophie Redmond Stichting* [1992] ECR I–3189; Case C–305/94 *Rotsart* [1996] ECR I–5927. See below Table 3.

Community influence, thus became forced to take account of this line of development in the European case law. Nowadays, these two countries—like Denmark and the UK—analyse their national provisions on the subject of transfers of undertakings in the light of Community provisions. But whereas the German courts[13] and, more recently, the Spanish courts[14] have followed the path of the preliminary reference procedure, the French courts have until recently refrained from direct dialogue.

Consequently, the national origin of preliminary references to the ECJ diversified fairly quickly,[15] as did their content. The earliest references essentially concerned the Directive's scope. These were then followed by references relating to the application of the Directive in undertakings placed under a special administration procedure as a result of insolvency situations (Italy) or to the right of employees to object to the transfer of their employment relationship (Germany). In practice, the questions referred for a preliminary ruling cover two separate issues: the definition of the scope of the Directive, and the right of employees to object to the transfer of their employment. The definition of the Directive's scope has, without question, been the major issue confronting all the Member States studied and has raised three particular difficulties: determining the nature of the legal relations giving rise to a transfer; defining the transfer concept itself, with the debate focusing in recent years on the applicability of the Directive to situations involving the transfer of a service activity[16]; and, lastly, the application of the Directive to undertakings which are in economic difficulties and have been placed under a judicially imposed administration procedure. The relevance of these questions has not, however, been the same for all the countries studied. Some preliminary references have expressed problems common to all Member States, although this does not mean that all Member States have referred such questions (see B below). Other questions, on the other hand, arose only from the specific nature of certain national legal systems (see C below). For example, the application of the Directive to undertakings in economic difficulties has more particularly concerned Italy, whose system recognised the possibility of derogating from the Directive's provisions if an agreement is concluded between management and union. And the right of employees to object to the

[13] See below Table 3. It should be noted that the *Katsikas* decision is in fact the fruit of three different German references.

[14] See below Table 3. One distinctive, and highly intriguing, feature emerges from these decisions. For the first time in the field of social policy, the Court of Justice combined references which concern the same issue even when they come from courts of different Member States (Germany and Spain). Might this be interpreted as a further step towards one community of courts?

[15] Denmark and the Netherlands were joined in a second phase by Italy and Germany. Belgium and Spain were the next to become preliminary reference makers in this area. The latest group to commence making transfers references comprised Finland, France and the UK.

[16] P. Davies, *Contracting-out of Services: The Effects of Directive 77/187/EEC in the United Kingdom, Ireland and Denmark* (Report for the European Commission, Oct. 1993).

Table 3 Preliminary references from national courts on transfers of undertakings (as of 1 Jan. 2001)

Belgium	Denmark	Finland	France	Germany	Italy	Netherlands	Spain	UK
C-171/94 *Merckx* [1996] ECR I-1253 ③	Case 19/83 *Wendelboe* [1985] ECR 457	C-172/99 *Oy Liikenne* AG Léger 12/10/2000	C-175/99 *Mayeur* Judgment 26/09/2000	C-132/91 *Katsikas* [1992] ECR I-6577 ②	C-362/89 *D'Urso* [1991] ECR I-13	Case 135/83 *Abels* [1985] ECR 469	C-336/95 *Burdalo* [1997] ECR I-2115	C-234/98 *Allen* [1999] ECR I-8643
C-172/94 *Neuhuys* [1996] ECR I-1253 ③	Case 105/84 *Danmols* [1985] ECR 2639			C-138/91 *Skreb* [1992] ECR I-6577 ②	C-472/93 *Spano* [1995] ECR I-4321	Case 179/83 *Industrie FNV* [1985] ECR 511	C-127/96 *Hernández* [1998] ECR I-8179 ④	C-164/00 *Beckman* (pending)
C-319/94 *Dethier* [1998] ECR I-1061	*Ny Mølle Kro* Case 287/86 [1987] ECR 5465			C-139/91 *Schroll* [1992] ECR I-6577 ②	C-343/98 *Collino* Judgment 14/09/2000	Case 186/83 *Botzen* [1985] ECR 519	C-74/97 *Gómez* [1998] ECR I-8179 ④	
C-399/96 *Sanders* [1998] ECR I-6965	Case 324/86 *Tellurup* [1988] ECR 739			C-392/92 *Schmidt* [1994] ECR I-1311		Case 24/85 *Spijkers* [1986] ECR 1119	C-173/96 *Sánchez* [1998] ECR I-8237 ⑤	
	Case 101/87 *Bork* [1988] ECR 3057			C-298/94 *Henke* [1996] ECR I-4989		C-144/87 *Berg* [1988] ECR 2559 ①		
	C-209/81 *Rask* [1992] ECR I-5755			C-13/95 *Süzen* [1997] ECR-I 1259		C-145/87 *Busschers* [1988] ECR 2559 ①		
	C-48/94 *Rygaard* [1995] ECR I-2745			C-247/96 *Ziemann* [1998] ECR I-8237 ⑤		C-29/91 *Dr Redmond* [1992] ECR I-3189		
				C-229/96 *Santner* [1998] ECR I-8179		C-305/94 *Rotsart* [1996] ECR I-5927		
4	7	1	1	8	3	8	4	2

① – ⑤ = Joined Cases   Total number of references = 38   Total number of cases decided by the Court = 29   Total number of cases pending = 2

transfer of their employment arose because German law attached specific consequences to that right and entitled employees to remain with their original employer. This national anchorage, however, although explaining why certain questions arose in the first place, has not precluded subsequent repercussions on other Member States as well, following the ECJ's reply. Finally, despite the recent diversification of the subject-matter of preliminary references certain aspects of the Directive have remained unexplored, although they may well fuel future dialogues (see D below).

B Common Difficulties: A Dialogue with Multiple Voices

The 1977 Directive raised two problems of interpretation that were common to all the Member States studied. The first concerned the nature of the contractual relations giving rise to a transfer. On this point the ECJ's answers brought the dialogue to a close fairly quickly. The same cannot be said of the second difficulty, concerning the very notion of the transfer of an undertaking. Until the *Schmidt* judgment in 1994 this seemed settled, but since then has been the subject of all kinds of controversy.

(I) Nature of the Contractual Relations Giving Rise to a Transfer: A Dialogue Now Closed

According to Article 1(1) of the Directive, the transfer of an undertaking is necessarily a result of a legal transfer or merger. The use of the expression 'legal transfer' could restrict the Directive's scope exclusively to transfers effected by way of agreements concluded voluntarily between the two successive employers. Consequently the earliest preliminary references,[17] emanating from the Danish and Dutch courts, concerned the formalities of the mode of transfer. In these two countries, the national versions of the text appeared to make such recognition of a transfer conditional on the existence of contractual relations between the two successive employers. The UK version of the Directive had adopted a broad conception. In France, the view at that time was that the scope of the national legislation on the matter was more extensive than that of the Directive.[19]

[17] The judgments in *Abels, Ny Mølle Kro, Daddy's Dance Hall, Berg and Busschers, Bork* and *Dr Sophie Redmond Stichting* above n. 11 and n. 12. The question was raised again in *Hernández Vidal* and *Sánchez Hidalgo,* above Table 3.

[18] See the analysis of the various national language versions in para. 11 of the *Abels* judgment, above n.12.

[19] We may cite by way of example the statement made regarding the implementation of the Dir. by the Secretary of State within the Ministry of Social Affairs when the Law was being passed in 1983 (i.e. before any intervention from the ECJ): 'The field covered by French law in the matter of transfer is broader than that of the Directive: Article L 122–12 of the French Civil Code envisages all cases of a change in the employer's identity, whatever its

In Denmark, the newness of the rules transposing the 1977 Directive prompted recourse to the Community judicature.[20] Faced with this new branch of litigation, the Danish courts[21] had to deal with points of interpretation confronting them for the first time, without being able to refer to established national concepts. They therefore showed no hesitation in requesting the ECJ's assistance. But the state of pre-existing national law in a given country, although it obviously influences the reception of Directives, is not enough on its own to explain the national origin of preliminary references. The British courts, for example, found themselves in an identical situation but did not seek the ECJ's help, even though the Directive occupied an area in which there was no regulation at all and created difficulties regarding interpretation.[22] This absence of preliminary references might have been due to a general reluctance on the part of the British courts to turn to the ECJ, but the number of references made by the UK in the field of equality in employment discounts any such explanation.[23] In Denmark, the situation of the actors involved in the cases leading to preliminary references also influenced the development of this branch of litigation. A large number of cases feature a trade union which is somewhat atypical in the Danish scenario in that its activity is based far less than that of other Danish unions on collective bargaining, creating occasion for alternative strategies such as recourse to the courts.[24]

The formulation of these preliminary references regarding the mode of transfer displayed strong similarities. In each case referred, the national courts concerned asked the ECJ whether the Directive was applicable when the transfer of an undertaking was effected by way of a particular act: following a judicial decision which declared the undertaking bankrupt or placed it under a special administration procedure[25]; following judicial rescission of a contract by reason of non-performance of that contract[26]; in the absence of a contract between the two employers who succeeded each other

cause and legal nature, whereas the Directive relates only to cases where a contractual agreement has been concluded between the two successive employers': R. Courrière, J.O. débats, Sénat, 31 May 1983, 1219.

[20] H. Sundberg, above n. 3.

[21] The courts concerned in Denmark were higher courts.

[22] P. Davies, above n.4; P. Davies, 'Acquired Rights, Creditors' Rights, Freedom of Contract and Industrial Democracy', (1989) *YEL* 21–53; H. Collins, 'Transfer of Undertakings and Inso1vency', (1989) *ILJ* 144–58, J. McMullen, *Business Transfers and Employee Rights* (2nd edn., Butterworths, London, 1992); J. McMullen, 'The Transfer of Undertakings (Protection of Employment) Regulations 1981—The English Experience of Implementation of the Acquired Rights Directive' in *Acquired Rights of Employees, Papers from the ICEL Conference* (Dublin, Irish Centre for European Law, 1988) 24.

[23] C. Kilpatrick, *Community or Communities of Courts in European Integration? Sex Equality Dialogues between UK Courts and the ECJ*, paper written for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998), also published in (1998) 4, *ELJ* 121.

[24] H. Sundberg, above n. 3.

[25] *Abels* judgment, above n. 12.

[26] *Bork* judgment, above n. 11.

as the head of an undertaking[27]; and following the transfer of a subsidy by an administrative authority.[28] In each case the question effectively being asked was whether the situation was actually one of 'legal transfer in accordance with the wording of the Directive'.

The ECJ's answer to each of these questions was very precise, and in the affirmative. In the *Ny Mølle Kro* judgment for example, to the question 'Do the words "transfer . . . as a result of a legal transfer or merger" also envisage a situation where the owner of a leased undertaking takes over its management himself following a breach of the lease by the lessee?', the ECJ replied, 'Article 1(1) . . . must be interpreted as meaning that the Directive is applicable where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee'.

This corpus of questions and the ECJ's answers to them encompass the entire range of legal transactions capable of effecting the transfer of an undertaking. The Court's reasoning, which is to be found in the grounds of its decisions and not in their operative part, has remained identical since the earliest judgment delivered on the matter. From the first judgment onwards, it eschewed a purely textual reading of Article 1(1) of the Directive. The difference between the various national versions of the provision precludes a literal interpretation, and the ECJ prefers a purposive or teleological interpretation which leads it to pronounce the Directive applicable to all situations where a change of employer occurs within the 'context of contractual relations'. Thus, the Court adheres closely to the wording of the Directive, but the absence of any definition of these terms enables it to lump together all the legal acts which give rise to a transfer.[29] The nature of the legal transaction by which one employer succeeds another makes no difference, and the same is true of the existence of a direct contractual link between the successive employers. Consequently, the mode of transfer becomes immaterial.

Paradoxically, it is in France, a country from which no court referred a question for a preliminary ruling on the matter, that this ECJ stance has had the most telling influence.[30] During the 1980s the French *Cour de Cassation* had been applying a relatively extensive interpretation of Article L. 122–12 of the *Code du Travail* (French Labour Code). It then reversed its position in 1985[31] by excluding straightforward 'loss of contract in competitive tendering' from the scope of that Article, which signified excluding contracting-out situa-

[27] *Daddy's Dance Hall* judgment, above n. 12.

[28] *Dr Sophie Redmond Stichting* judgment, above n.12.

[29] C. de Groot, 'The Council Directive on the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings: An Overview of the Case Law', (1993) 30 *CMLRev* 331 and (1998) 35 *CMLRev* at 107.

[30] Art. L. 122–12 of the *Code du Travail*, which dates back to 1928, is the principal text in France corresponding to the 1977 Dir. On the French case law of this period, see H. Blaise, 'Continuité de l'entreprise: flux et reflux de l'interprétation extensive de L. 122–12 du Code du travail', (1984) *Droit Social* 2, 91–9.

[31] *Cass.*, *Ass. Plénière*, 15 Nov. 1985 (1986) *Droit Social* 1, note by G. Couturier.

tions where a contract for the provision of services was transferred. It confirmed and extended this position in 1986,[32] when it made application of the national legislation on transfers of undertakings conditional on the existence of a direct contractual link between the successive employers. In adopting this position, the *Cour de Cassation* was not disregarding the 1977 Directive but mistakenly assuming that it was intended to cover only those situations where the two successive employers were directly linked by a mutual agreement. However, the subsequent development of Community case law on the matter[33] made it impossible to maintain such a position, and in 1990 the *Cour de Cassation* abandoned this interpretation,[34] making express reference to the Directive and adopting the Community formulation. These decisions mark the end, in France, of the absence of the Directive's influence and the commencement of the interpretation of national law on the matter in the light of Community decisions.

The ECJ case law in this area has the merit of clarity and consistency, and has not raised particular problems in any of the other Member States studied. The major consequence of this Community interpretation lies in the fact that it has refocused the debate on the definition of the transfer of an undertaking.

II. The Concept of the Transfer of an Undertaking: An Ongoing Dialogue

The concept of what constitutes the transfer of an undertaking is undoubtedly one of the most controversial issues raised by the Acquired Rights Directive. The main problem is the question of its application to transfers of service activities which may take place without any transfer of tangible or intangible assets. From the 1986 *Spijker's* judgment[35] until the *Schmidt* judgment delivered on 14 April 1994[36] the Community case law exhibited a degree of consistency, even though the questions progressively referred by national courts for a preliminary ruling revealed the difficulties caused by the ECJ's chosen method of defining the concept of a transfer. Since the

[32] *Cass. soc.*, 12 June 1986, (1986) *Droit Social* 605; see H. Blaise, 'Les modifications dans la personne de l'employeur: l'article L 122–12 dans la tourmente', (1986) *Droit Social* 837.

[33] *Daddy's Dance Hall*, (above n. 11), note by G. Couturier (1988) *Droit Social* 455; note by P. Rodière (1988) *Revue Trimestrielle de Droit Européen* 715; note by P. Pochet (1988) Dalloz *J.* 174; A. Lyon-Caen, 'L'article L 122–12 du Code du travail: vers une nouvelle révision?', (1988) *Semaine Sociale Lamy* 375; J. Déprez, 'Transferts d'entreprises et continuité des contrats de travail dans les jurisprudences françaises et communautaire', (1989) *Revue de Jurisprudence Sociale* 3.

[34] *Cass.*, *Ass. Plénière*, 16 Mar. 1990 (1990) *Droit Social* 399, note by O. Couturier and X. Prétot; A. Lyon-Caen [1990] *Dalloz* C *J* 305; J. Déprez, 'La nouvelle jurisprudence de la Cour de cassation sur la reprise des contrats de travail dans les marchés et les concessionnaires d'activités', (1990) II *Semaine Juridique, éd. Entreprise* 15825.

[35] Above n. 12. [36] Above Table 3.

Schmidt judgment, however, Community case law on the matter has entered a period of controversy as evidenced, in particular, by the opposition it has provoked at national level.

(a) **The early judgments**[37]

The concept of the transfer of an undertaking was not developed gradually in step with the occasions presented by a succession of preliminary references. The ECJ used the first occasion offered by the *Spijker's* case to define a method of assessing the existence or otherwise of a transfer, and maintained that method until its *Schmidt* judgment. In the *Spijker's* case, the Dutch court was asking whether the transfer of buildings and movable property enabling an activity to be carried on constituted the transfer of an undertaking within the meaning of the Directive, even though the business's intangible assets (such as its clientele) were not transferred. It was a general question which allowed the ECJ to take stock of the factors which must be taken into consideration in order to establish whether or not there is a transfer. The decisive criterion of the Directive's applicability, which was used in all subsequent judgments, was defined in the *Spijkers* judgment as follows:

> Article 1(1) . . . envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterizing the transaction, the business was disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.

The Directive is therefore applicable provided there has been a transfer involving a 'going concern'. It is for the national courts to establish whether there is such a going concern, by taking into consideration a series of factors (transfer of tangible and intangible assets, transfer of employees and transfer of an activity) which were defined by the ECJ. The Court's approach consists not so much in defining the concept of the transfer of an undertaking, as in detailing the circumstances to be taken into consideration by the national courts in order to characterise a transfer situation. It was to be left to the latter to classify a given situation as a transfer in the light of the

[37] For an analysis of ECJ decisions during this period, see: C. de Groot, above n. 29; B. Hepple, *The Transfer of Undertakings Directive 77/187/EEC* (Report for the Commission of the European Communities, December 1990); Commission of the European Communities, *Commission Report to the Council on the state of implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses*, SEC(92) 857 final, 1.06.1992; J. Pélissier, 'Des restructurations d'entreprises et leurs effets sur l'emploi', (1990) *Revue Internationale de Droit Comparé*' 149.

factors defined by the ECJ. Subsequent judgments, without really adding anything essential to this method, confined themselves to establishing that no single factor among those identified in this first judgment by the ECJ as characterising a going concern was enough in isolation to signify the existence of such a going concern. These judgments provided an opportunity for confirming that temporary closure of the undertaking at the time of the transfer did not preclude the applicability of the Directive,[38] and that the same was true when there was no movable property[39] and no transfer of tangible or intangible assets. In its *Rask* and *Dr Sophie Redmond Stichting* judgments the ECJ specified that the Directive was applicable to activities constituting independent organisational entities within an undertaking even if they were ancillary activities, the decisive criterion being the contractual link existing between the employees and the part of the undertaking transferred. This was no more than a logical consequence of the position adopted in the *Spijker's* judgment.

However, the content of the questions referred for a preliminary ruling after the *Spijker's* judgment revealed the 'technical' difficulties encountered by the national courts in applying this Community case law. Most of these questions were particularly precise, and not formulated in general terms. The *Rask* case[40] was an especially striking example of this. The Danish court asked the ECJ:

> Is Council Directive 77/187/EEC applicable in a case where one undertaking, Undertaking A, contracts to operate the canteen in another undertaking, Undertaking B, and where:
> – Undertaking A, in return for a fixed monthly fee, is to cover 'all ordinary operating expenditure, such as direct or indirect remuneration, insurance, work clothes, personnel management and supervisory and administrative costs'
> – Undertaking B makes the following available without charge: approved sales and production premises, including lockable storage areas, canteen equipment, electricity, heating and telephones and wardrobe facilities for the canteen staff, and carries out refuse removal;
> – Undertaking B pays the costs of disposable plates, packaging, serviettes and cleaning materials;
> – Undertaking A offers Undertaking B's canteen staff employment with the same pay and seniority as they had before?

The highly detailed nature of the question is representative of those submitted by national courts on the subject, the great majority of which were formulated in a similar manner.[41] These questions evidence a degree of misunderstanding

[38] *Ny Mølle Kro* and *Berg* judgments, above n. 11 and n. 12.

[39] *Dr Sophie Redmond Stichting* judgment, above n. 12.

[40] Above n. 11.

[41] See, e.g., the judgments in *Bork, Rygaard*, above n. 11, *Dr Sophie Redmond Stichting,* above n. 12 and *Merckx,* Table 3.

on the part of the national judiciaries (or at least those in Denmark and the Netherlands) regarding Community decisions. Each time, the national courts asked the ECJ to decide whether the particular case which had been brought before them was actually a transfer within the meaning of the Directive. They provided facts which were intended to enable the ECJ to deliver a decision, whereas it was actually for them to establish themselves, in the light of those facts, whether there was a transfer 'of a going concern'. In other words, they asked the ECJ to classify the facts which had been submitted to them, whereas in the ECJ's view that classification falls within their jurisdiction, not its own. And in each case the ECJ reiterated that, if the Directive were to be applicable to the situations concerned, it was for the national courts to assess whether the activities engaged in were actually continued or resumed by the new employer.[42] On the other hand, the concept itself of a going concern, which is deemed by the ECJ to be the decisive criterion of a transfer within the meaning of the Directive, has never been the subject of a request for clarification.

There is no doubt that the interpretation espoused by the ECJ in these judgments has influenced the positions of the national courts in all the Member States studied. The first British decisions, however, tended to nullify the effect of the UK legislation on transfers. According to Regulation 5 of TUPE (Transfer of Undertakings (Protection of Employment) Regulations[43]), in order to benefit from the continuation of their contract of employment employees had to be employed in the undertaking 'immediately before the transfer', which excluded employees who were dismissed before the transfer.[44] Moreover, certain decisions had deemed that dismissal of the entire workforce prior to transfer, at the behest of the transferee, constituted dismissal for economic reasons and was therefore perfectly fair.[45] The transfer of contracts of employment thus became dependent on the wishes of the transferee, thereby restoring the thrust of previous UK law. Rather than any intention to 'resist' the Community provisions on the matter, however, these early decisions denoted difficulties in accommodating rules which were alien to British culture. In 1990 the House of Lords[46] reverted to a reading of

[42] See, e.g., *Dr Sophie Redmond Stichting*, above n. 12.

[43] The TUPE Regs. represented the text adopted by the British Government in 1981 for the purpose of transposing the 1977 Dir.

[44] *Secretary of State for Employment* v. *Spence* [1986] IRLR 248 (CA). This interpretation was also based on the ECJ's judgment in *Wendelboe* (above n. 11), which specified that the Dir. applies only to employees who are in the undertaking's employ on the date of the transfer, thereby excluding those who have already left the undertaking. And obviously, if the ECJ restricts the application of the Dir. to those employed in the undertaking at the time of the transfer that rule does not call into question the mandatory nature of the prohibition on dismissal for a reason connected with the transfer.

[45] *Anderson* v. *Dalkeith Engineering* [1984] IRLR 429.

[46] *Litster* v. *Forth Dry Dock & Engineering Co Ltd* [1989] IRLR 161, note by E. Szyszczak (1989) *MLR* 691; see also B. Hepple and A. Byre, 'EEC Labour Law in the United Kingdom—A New Approach', (1989) 18 *ILJ* 129–43. In this decision the House of Lords added a few words to the text to achieve conformity with the Dir., by pronouncing that the

the TUPE Regulations which was more in conformity with the Directive's provisions and its interpretation by the ECJ. From then on, the latter's judgments were closely analysed and used as a guide for interpretation by the British courts. Nevertheless, that ECJ-consistent interpretation was still confronted with the problem of the express exclusion from the TUPE's scope of undertakings which were not operated for profit-making purposes.[47] This definition implied the exclusion of subcontracting and service-providing situations which at the time of their transfer were merely secondary activities without financial autonomy and therefore any profit-making objective, and also many situations of the contracting-out of services in the public sector.[48] Here again, even before the legislature intervened in 1993 to remove this restriction on the scope of the TUPE Regulations in accordance with the Directive, the British courts had adopted a very strict interpretation of the provision in order to bring their decisions into line with the European case law.[49] After 1993, analysis of the *Rask* and *Dr Sophie Redmond Stichting* judgments also prompted the British courts to accept the application of the TUPE Regulations to transfers of contracts to provide services where no transfer of assets was involved.[50] That approach was, however, far removed from previous judicial interpretations and had particularly direct implications as regards the government policy at that time for contracting-out certain public service activities.[51]

In France, the *Cour de Cassation* has been formally aligned since 1990 with Community case law on the subject. Abandonment of the requirement for a direct contractual link between the successive employers as the condition of the applicability of Article L. 122–12 of the *Code du Travail* (French Labour

TUPE Regs. were to be applicable to those employed by the transferor 'immediately before the transfer' or those 'who would have been so employed if they had not been unfairly dismissed in the circumstances described in TUPE Reg. 8(1)'.

[47] TUPE Reg. 3(1): 'undertakings . . . does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture'.

[48] *Expro Services Ltd* v. *Smith* [1991] IRLR 156 (EAT).

[49] *Wren* v. *Eastbourne Borough Council* [1993] IRLR 425 (EAT).

[50] *Kenny* v. *South Manchester College* [1993] IRLR 265 (High Court).

[51] Under this policy the central government, health services and local government authorities were committed to a large-scale programme of contracting-out certain of their activities. Local authorities were obliged to submit a large proportion of their activities to a system of compulsory competitive tendering and to follow a strict procedure of granting these contracts to the most competitive tenderer. From 1988 onwards it became unlawful to insist, as a precondition of a tenderer taking over an activity, that they should take over the workforce or observe generally accepted terms and conditions of employment and existing agreements on union recognition. See P. Davies, above n. 4; P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon Press, Oxford, 1993); B. Napier, *Compulsory Competitive Tendering, Market Testing and Employment Rights. The Effects of TUPE and the Acquired Rights Directive* (Institute of Employment Rights, London, 1993); H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws', (1990) 10 *OJLS* 353–80.

Code) led it to make the concept of 'an economic entity which retains its identity and whose activity is continued or resumed' the decisive criterion. However, one of three judgments delivered on 16 March 1990 by the *Assemblée Plénière* of the *Cour de Cassation*, reverting to the formulation given in its judgment of 1985, stated that Article L. 122–12 'is not applicable in the case of a straightforward loss of contract in competitive tendering', since the company concerned has thereby 'merely lost a customer whose activity was different from its own'. This exclusion restricted the effect of the reversal otherwise effected in 1990, because it allowed all situations involving a change of franchisee, successful tenderer or service-provider to be exempted from the application of Article L. 122–12. This redundant notion of a 'loss of contract in competitive tendering', which did not feature in the ECJ's judgments, was very quickly eliminated by the *Cour de Cassation*, whose case law 'is intended to be loyal to that of the ECJ'.[52] It acknowledged that in certain circumstances a service activity could constitute a business. Transfers of service activities which took place without any transfer of tangible or intangible assets were therefore not automatically excluded. However, the *Cour de Cassation* has never acknowledged that there is a transfer of an undertaking in cases where there is no transfer of means of production.

In Germany, § 613a of the *Bürgerliches Gesetzbuch* (German Civil Code), guaranteeing the continuation of contracts of employment in the event of the transfer of an undertaking, was initially given a fairly restrictive interpretation. An undertaking was defined as an independently organised whole possessing operating resources which may vary according to the nature of the particular undertaking concerned. Viewed from this standpoint, the continuation of employment relationships could only be a consequence of a transfer, not one of the criteria establishing that there is a transfer (the sole exception to this principle that was accepted being in the case of employees possessing specialised know-how). It was therefore impossible for service activities to be caught by this legislation. But the uncertainty on this point created by the Community case law led the *Landesarbeitsgericht* of Schleswig-Holstein to make a reference to the ECJ for a preliminary ruling in the *Schmidt* case.

The approach adopted by the European judicature therefore left the national courts a fairly wide margin for manœuvre, in that the task of classification was left within their competence. It led to national interpretations which, although formally identical, were divergent in terms of the degree of strictness exhibited by each national court in assessing the factual elements that attest to the existence of a transfer. Hence, the question of the Directive's application to service activities received varying responses, something which until the *Rask* judgment was not incompatible with the ECJ's own position.

[52] P. Waquet, 'L'application par le juge français de la directive communautaire du 14 février 1977', (1995) *Droit Social* 1007.

(b) The Onset of Turbulent Dialogue

The *Schmidt* judgment formed part of the line of development of case law that ensued from the *Spijker's* judgment. But although it might have seemed the culmination of the Community construction of the transfer concept, it actually marked the start of a period of turbulence at both Community and national level.

Two questions were referred to the ECJ in this case:

> 1. May an undertaking's cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?
> 2. If the answer to Question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?

The ECJ's answer was precise: 'Article 1(1) . . . is to be interpreted as covering a situation, such as that outlined in the order for reference, . . .'.[53] This judgment therefore seemed to mark the end of a development. First, it consolidated control by the ECJ. For the first time, the Court was no longer pronouncing on the Directive's applicability but on its application, and did not leave it to the national court to decide whether or not the situation represented a transfer. Secondly, the judgment clearly and indisputably adopted a position in favour of the application of the Directive to the transfer of a service activity.[54] Prior to the *Schmidt* judgment this interpretation had been debatable, even though in the light of its earlier judgments (*Rask* and *Dr Sophie Redmond Stichting*) it had been possible to conclude that the ECJ intended that an extensive definition of transfer should prevail.[55]

There are, in fact, two possible conceptions of the notion of an undertaking within the meaning of the Directive. First, it may be conceived as an organised whole consisting of resources (tangible, intangible and human) which enable an activity to be carried on (the production of goods or a service which constitutes the undertaking's objective). In this case, the transfer of part of the workforce can only be a consequence of a transfer, not a criterion of its having taken place. A transfer of an undertaking must be accompanied by the transfer

[53] Thus, it stated that 'the performance of a contract for the provision of services by a different supplier does not, in itself alone, effect the transfer of an economic entity which has retained its identity and whose activity is continued or resumed.' Cass. soc., 6 Nov. 1991 (1992) *Droit Social* 189.

[54] It may also be noted that the President of the court which made the reference in *Schmidt* is a judge who has been one of those most active in the dialogue with the ECJ in the field of equal treatment—see M. Körner, above n. 5 and Chap. 2 at n. 77.

[55] T. Linden, 'Service Contracts and the Transfer of Business', (1992) 21 *ILJ* 293; P. Davies, 'Transfers Again: Contracting Out and the Employee's Option', (1993) *ILJ* 151; P. Pochet, note on the *Rask* judgment (1993) II *Semaine Juridique, éd. Entreprise* 426; P.-H. Antonmattei (1993) *Semaine Juridique, éd. Entreprise* 266.

of factors of production, even if it concerns only an ancillary activity. Secondly, however, an undertaking may also be viewed in terms of its activity: in certain sectors (maintenance, catering, cleaning) the activity concerned is essentially dependent on manpower and can function without any specific assets. In such a case, therefore, it is not a question of treating what is a consequence of the transfer (the takeover of the workforce by the new employer) as a condition of the Directive's application, but simply of considering the single factor that can signify the existence of a transfer, namely, the continuation of the same employment opportunities. Consequently, the transfer of an organised function, as revealed by the specific assignment of employees to an identical activity, can constitute an undertaking within the meaning of the Directive independently of any transfer of tangible or intangible assets.[56] According to this interpretation, the characterising element of the transfer of an undertaking is the takeover by the new employer of a proportion of the employees and the organisational framework within which the work takes place. The *Schmidt* judgment recognises the existence of a transfer in the most minimalist hypothesis that there could be and therefore supports this second interpretation.[57]

This reinforcement of ECJ control and clarification of the Directive's scope did not lead to the definition of a criterion enabling national courts to assess whether a particular case involved a 'business' or 'economic unit', although in his Opinion in the *Schmidt* case the Advocate General concerned invited the Court to set out such a criterion.[58] Nor was the *Schmidt* judgment reasoned to any particular degree; it took the form more of a pronouncement than a demonstration, although it is true that the questions submitted did not direct it towards a general answer.

The reception given to the *Schmidt* judgment by the national courts was extremely mixed, ranging from loyal acceptance to rejection interspersed with

[56] P. Davies, 'Transfers Again: Contracting Out and the Employee's Option', (1993) 22 *ILJ* 151.

[57] It may be recalled that in the situation at issue the transfer affected only one single employee and that no tangible or intangible assets had been transferred.

[58] In his Opinion in *Schmidt* Van Gerven AG, without answering the question directly and so keeping in line with the previous judgments which had left it to the national courts to settle the matter, inferred from the preceding case law that the concept of an economic unit 'refers to an organized whole consisting of persons and (tangible and/or intangible) assets by means of which an economic activity is carried on having an objective of its own, *albeit* one that is ancillary to the objects of the undertaking; a whole which, moreover, can be part of an even larger corporate whole.' In the following case (*Rygaard*) Cosmas AG, in turn, attempted to define this criterion, again on the basis of the previous judgments and in particular that in *Schmidt*, and adopted a more extensive position: 'in order to determine whether the Directive is applicable the question to be addressed is essentially whether there has been a transfer of an activity in regard to which, from an organizational point of view, the relationship between the workers and the undertaking carrying out the transfer had assumed a definite form' (para. 13 of the Opinion).

indifference.[59] Differing positions have prevailed even within the Member States concerned. The British courts had already accepted the inferences of the earlier judgments and integrated contracting-out into the scope of their national legislation. They therefore adopted the implications of this judgment without any apparent difficulty. In Germany, by contrast, it aroused particularly sharp controversy.[60] Although some commentators showed a positive reaction,[61] it was also described as 'inappropriate and irresponsible'.[62] Criticism was mainly levelled against its implications as regards contracting-out.[63] These criticisms were based on recent management studies indicating that contracting-out, or outsourcing, is expected to develop and play an increasingly important role in future company organisation. The cost reductions looked for from such operations were felt to be jeopardized by the ECJ's extensive interpretation, which protected employees affected by contracting-out. Thus, it was thought, the interpretation of the Directive as given in *Schmidt* was likely to cause considerable difficulties as regards restructuring, since any undertaking seeking to acquire a new field of activity would run the risk of facing an 'automatic' transfer of the workforce of another undertaking previously active in that field. More generally, the competences of the ECJ were also criticised as encroaching on traditional national competences in the area of labour law.[64]

These conflicting views were evident in the initial reactions of the German courts. Some first instance decisions took their cue from the *Schmidt* judgment and followed the line indicated by the ECJ, while others rejected it and still others opted for the preliminary reference procedure. Prior to the delivery of the *Süzen* judgment, the *Bundesarbeitsgericht* (Federal Labour Court) chose to ask the ECJ for another preliminary ruling in a case which was, in fact, similar to *Schmidt*.

In France, since the *Schmidt* judgment there has been a divergence between

[59] P. Pochet, 'CJCE: l'apport de l'arrêt Schmidt à la définition du transfert d'une entité économique', (1994) *Droit Social* 931; P. Waquet, 'L'application par le juge français de la directive communautaire du 14 février 1977', (1995) *Droit Social* 1007; note by B. Chauvet (1994) *Dalloz J.* 534; J. McMullen, 'Contracting Out and Market Testing—the Uncertainty Ends?', (1994) 23 *ILJ* 230–40.

[60] J.-H. Bauer, 'Outsourcing Out?', (1994) *BB* 1433; H. Buchner, 'Verlagerung betrieblicher Aufgaben also Betriebsübergang i.S. § 613a BGB' (1994) *DB* 1417; M. Henssler, 'Aktuelle Rechtsprobleme des Betriebsübergangs' (1994) *NZA* 913; Voss, 'Funktionsnachfolge also Betriebsübergang i.S. von § 613a BGB' (1995) *NZA* 205.

[61] B. Zwanziger, 'Vom Reinigungsvertrag zur Krise der Europäischen Union?', (1994) *DB* 2612; B. Gaul, 'Die aktuelle Entwicklung zum Betriebs- und Unternehmensübergang', (1995) *ArbuR* 119.

[62] A. Junker, 'Der EuGH im Arbeitsrecht—Die schwarze Serie geht welter', (1994) *NJW* 2527.

[63] See M. Körner, above n.51.

[64] M. Heinze, 'Europäische Einflüsse auf das nationale Arbeitsrecht', (1994) *RdA* l. The argument is obviously not a new one, but this was one of the first times that it had real relevance in German labour law.

the respective positions adopted by the *Cour de Cassation* and the ECJ. Service activities are not excluded, in principle, from the scope of the national legislation on transfers of undertakings, but the *Cour de Cassation* has never recognised the existence of a transfer where there is no transfer of any means of production.[65]

The *Cour de Cassation* position on this point is remarkably stable and has remained impervious to the fluctuations in the European interpretation (although prior to 1985 the *Cour de Cassation* had applied an interpretation similar to that of the ECJ).[66] In the view of certain commentators,[67] that position is not at variance with Community case law, since the grounds of the French decisions refer to the notion of an economic unit. The *Cour de Cassation* has also been able to adopt a position of awaiting clarification of the *Schmidt* judgment, especially since it occurred in an area which has been the subject of two reversals in five years.[68] But under the guise of a formally consistent interpretation the *Cour de Cassation* has in fact given prevalence to its own interpretation of the transfer concept.

These instances of opposition and hesitation at national level, together with the Proposal for amendment of the Directive, whose history was itself a chequered one, may explain the fluctuations in Community case law since the *Schmidt* judgment, which in their turn account for national divergences in the interpretation of the Directive. Whereas the *Merckx* judgment confirmed the approach adopted in *Schmidt*, the *Rygaard* judgment introduced a more restrictive position by requiring that the activity transferred should exhibit a degree of stability.

The *Rygaard* and *Merckx* judgments gave answers to two questions referred for a preliminary ruling which were formulated along the lines described earlier, that is, presenting not so much a question of law as a question of fact. The courts concerned described the circumstances in which the transfers had taken place in order to ask the ECJ whether or not they

[65] For a recent example see Cass. soc., 7 Jan. 1998, *Juridisque Lamy Pourvoi* No 95-43.989. The case concerned a cleaning and maintenance contract.

[66] It may also be noted that some collective agreements for service sectors include provisions stipulating the taking over of the workforce in the event of the transfer of contracts (e.g., the national collective agreement for cleaning firms).

[67] J. Déprez, 'La notion de transfert d'entreprise au sens de la directive européenne du 14 fév. 1977 et de l'article L 122–12 al. 2 du Code du travail: jurisprudence française et communautaire', (1995) *Revue de Jurisprudence Sociale* 315; P. Waquet, 'L'application par le juge français de la directive communautaire du 14 février 1977', (1995) *Droit Social* 1007.

[68] A first amendment Proposal had been drafted by the Commission ([1994] OJ C274/10) which used a more restrictive concept of a transfer of an undertaking than that of the ECJ. This Proposal had been strongly criticised both by the Economic and Social Committee ([1995] OJ C133/13) and by the European Parliament ([1997] OJ C 33/81). See, on this point, A. Lo Faro, *Judicial Development of Social Policy and Intra-Community Institutional Dialogues: How to Define a "Legal Transfer"*, paper written for the 'European Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, Dec. 1998).

involved the transfer of an undertaking.[69] These two judgments did not mark any break from previous case law; it was merely that, as in *Schmidt*, the ECJ imposed its answer without leaving it to the national courts to assess the facts. In *Merckx*, it followed the same line as in *Schmidt* and ruled that there was a transfer within the meaning of the Directive. It held that although there had been 'neither a transfer of the company's tangible or intangible assets nor at least partial preservation of the undertaking's structure and organization . . . Those circumstances are not such as to prevent the application of the Directive, since, having regard to the nature of the activity pursued, the transfer of tangible assets is not conclusive of whether the entity in question retains its economic identity.' In *Rygaard*, on the other hand, it ruled that there was no transfer of an undertaking. Here, the temporary nature of the activity in question (building works) apparently militated in favour of the exclusion of this type of situation from the Directive's scope. Moreover the ECJ also stated in this judgment that a transfer of an undertaking was necessarily accompanied 'by the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on in a stable way.' The reference to a body of assets possibly presaged an abandonment of the *Schmidt* interpretation, and in any case provided some reassurance for those who were refusing to apply that interpretation.

Without explicitly calling the principles of *Schmidt* into question the *Süzen* judgment,[70] delivered on 11 March 1997, broke away from the traditional approach to the transfer concept. The two questions referred for a preliminary ruling in this case differed in their formulation from those in previous preliminary references: '(1) On the basis of the judgments of the Court of Justice of 14 April 1994 in Case C–392/92 and of 19 May 1992 in Case C–29/91, is Directive 77/187/EEC applicable if an undertaking terminates a contract with an outside undertaking in order then to transfer it to another outside undertaking? (2) Is there a legal transfer within the meaning of the Directive in the case of the operation described in Question 1 even if no tangible or intangible

[69] In *Rygaard*, the Danish court was asking whether the Dir. applied 'when contractor B, pursuant to an agreement with contractor A, continues work on part of a contract begun by contractor A, and (1) an agreement is entered into between contractor A and contractor B that some of contractor A's workers will continue on the work for contractor B and contractor B takes over material on the building site in order to complete the contract, and (2) after the contract has been taken over contractor A and contractor B both work on the building works at the same time.'

In *Merckx*, the *Cour du Travail*, Brussels, was asking whether there was a transfer within the meaning of the Dir. 'if an undertaking which has decided to discontinue its activities on 31 December 1987 dismisses most of its staff, keeping only 14 persons out of a total of over 60, and decides that those 14 persons, while retaining their acquired rights, must work from 1 November 1987 for an undertaking with which the first undertaking has no formal agreement, but which has since 15 October 1987 held the dealership previously held by the first undertaking, and if the first undertaking has not transferred any of its assets to the second.'

[70] P. Davies, 'Taken to the Cleaners? Contracting Out of Services Yet Again', (1997) 26 *ILJ* 193–7.

business assets are transferred?' The national origin of the preliminary reference may explain this new formulation. It has already been mentioned that the majority of earlier references emanated from the Danish courts. The manner in which they were formulated confirms that those courts, confronted with a legislation which differed from the intervention model to which they were accustomed, needed the ECJ's expert advice in order to be able to decide the cases brought before them: they were seeking precise answers to precise questions. In the *Süzen* case, the German court had a different purpose in mind. Its questions, framed in general terms, were aimed at establishing the implications of the *Schmidt* judgment and obtaining a fresh reply to the problem of the Directive's application to service activities.

The ECJ did not use the opportunity created by the German court to take up an explicit position. It began by returning to the position that had preceded *Schmidt*, that is, stating expressly that it was for the national court, not itself, to establish whether there was a transfer of an undertaking.[71] It then went on to state that the Directive did not apply 'to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, *if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract*.' For there to be a transfer within the meaning of the Directive, therefore, it is mandatory for there to be a transfer of tangible or intangible assets or of a proportion of the employees. As in *Rygaard*, and it is on this point that a development of the Community position as compared with *Schmidt* may be noted, the European reasoning featured a quantitative element (the transfer of business assets must be significant, and the taking over of employees must involve a major part of the workforce). Above all, for the first time the ECJ made the application of the Directive conditional on the transfer of certain elements: business assets, or employees. It is true that the Court acknowledged the Directive's applicability to situations where there is no transfer of tangible or intangible assets, provided that a proportion of the employees are taken over, and in this sense the judgment was certainly consistent with the interpretation in *Schmidt*. Nevertheless, the ambiguity of the answer and the reversion to leaving it to the national court to establish the existence of an economic entity created an uncertainty such as to lend support to divergent national interpretations.

In the UK, the ambiguity of the *Süzen* judgment caused some disturbance to the positions adopted by the courts. For example, in interpreting *Süzen* the Court of Appeal[72] held that in the absence of any transfer of tangible or intangible assets or employees there was no transfer of an undertaking, even though

[71] Para. 22 of the judgment.

[72] *Betts* v. *Brintel Helicopters Ltd* [1997] ICR 792.

the new employer had a need for employees to do the same work as that done by the employees of the former employer. Such a position allows the new employer in situations of this kind considerable room for manœuvre in that it is he who will ultimately decide whether or not the legislation on transfers applies by deciding whether or not to take over a proportion of the workforce. This paradoxical reading of *Süzen* certainly prompted the Employment Appeal Tribunal, a lower court than the Court of Appeal, to diverge from the latter and adopt a different interpretation.[73] The Tribunal chose, in fact, to read the *Süzen* judgment as affirming the approach adopted in *Spijker* and thus leaving it to the national court to decide whether there is a transfer within the meaning of the Directive. This interpretation was confirmed by the Court of Appeal, though this approach has not been uniformly adopted by UK courts.

In France, *Süzen* has been regarded as a response to the *Cour de Cassation* interpretation: '[t]he message has at least been heard by the ECJ, since the requirements imposed by its judgment of 11 March 1997 lead, in fact, to a similar result.'[74] If an influential member of the Social Chamber of the *Cour de Cassation* is to be believed, the latter can play a part in the development of the Community transfer concept, and the ECJ should take its position into consideration. He states: '[t]he national court is also a Community court. Its participation in the construction of a case-law giving Directive 77/187/EEC its exact import is essential'.[75] The idea of a 'negotiation' or partnership between the ECJ and the *Cour de Cassation* is therefore present in France, but this 'negotiation' is not channelled through the preliminary reference procedure as it is in Germany. However, the divergence between the ECJ and the *Cour de Cassation* is very evident in a recent decision,[76] despite the fact that it declares itself loyal to the Community position. Although the *Cour de Cassation* is careful to refer to Article L. 122–12 of the *Code du Travail* 'as interpreted in the light of the 1977 Directive', it defines a business (economic entity) as 'an organized whole consisting of persons *and* tangible or intangible assets by means of which an economic activity is carried on having an objective of its own.'[77] Consequently, for the *Cour de Cassation* these two conditions are cumulative, whereas for the ECJ they are merely alternatives.

In Italy, the reactions of the national courts are similar to those of the French courts. Although the Italian courts have shown no reluctance to engage in dialogue with the ECJ as regards the Directive's application to undertakings in economic difficulty which are placed under a special administration

[73] *ECM (Vehicle Delivery Service)* v. *Cox* [1998] IRLR 416; [1999] IRLR 559 (CA).

[74] P.-H. Antonmattéi, 'La saga de la directive no 77/187 du 14 février 1977: l'épisode d'un "reflux" ', (1997) *Droit Social* 728.

[75] P. Waquet, above n. 52.

[76] Cass. soc., 7 July 1998 (1998) *Droit Social* 948.

[77] On case law related to this problem, see: V. Leccese, above n. 7; U. Carabelli and B. Veneziani, 'Il trasferimento di azienda in Italia' in Various Authors, *La transmisión de empresas en Europa* (Cacucci, Bari, 1999) 103 ff.

procedure, and have accepted the Community interpretation even where that necessitated some distortion of their own national legislation, they have not always adopted the interpretation contained in *Schmidt*. Their current and predominant interpretation has its origin in the interpretation of Article 2112 of the Italian Civil Code and makes recognition of the transfer of an undertaking conditional on a transfer of tangible or intangible assets. As in France, this 'resistance' has been carried on under the guise of a formal adoption of the Community position. Thus, in a 1996 judgment the *Corte Suprema di Cassazione*[78] based its decision on a series of relatively early judgments by the ECJ and did not cite other more recent ones which had broadened that position. This decision is all the more interesting because one of the parties had requested that a reference for a preliminary ruling should be made to the ECJ. The *Corte di Cassazione* did not comply with that request, on the ground that in the particular case concerned there was no doubt about the interpretation of the Directive given that, as interpreted by existing ECJ judgments, it clearly excluded the situation at issue from its scope. However, some more recent decisions by first instance courts have exhibited an interpretative approach similar to that of the ECJ. Here, the courts have maintained that transfer of the great majority of the workforce to the transferee is considered to be one of the most important criteria in assessing whether there has been a transfer within the meaning of the Directive. When the number of employees transferred is substantial, the absence of economically significant assets is less important to the court's assessment.[79]

Since in both France and Italy this difficulty is clearly one needing to be settled at Community level and the uncertainties surrounding the matter are well known, the reluctance to refer questions for a preliminary ruling signals a wish to give predominance to a national interpretation. Such reluctance is somewhat surprising, given that in both countries the national legislation did not conflict with the ECJ interpretation, which had in fact already been adopted in France.

The national courts in Spain likewise refused to recognise that a transfer of service activities could be regarded as the transfer of an undertaking within the meaning of the national legislation. However, that position seems likely to change since questions on this particular issue have been referred to the ECJ for a preliminary ruling.[80] Lastly, in Germany the *Bundesarbeitsgericht* did not take advantage of the ambiguity of the *Süzen* judgment to stick to its previous case law. On the contrary, it reconsidered its decision to make a new preliminary reference to the ECJ (which some lower courts did not do) and

[78] Cass. 1 Mar. 1996, no.2254 (1997) II *Rivista italiana di diritto del lavoro* 395, with a comment by R. Romei, 'Trasferimento di azienda e successione in un rapporto di appalto'.

[79] See Pret. Genova, 27 June 1998 and 12 May 1998 (1998) *Argomenti di Diritto del Lavoro* 982 and 987; Pret. Milano, 16 Sept. 1998, *ibid*. 995.

[80] *Hernández Vidal* and *Sánchez Hidalgo* judgments, above Table 3, delivered by the ECJ on 10 Dec. 1998.

used the opportunity offered by *Süzen* to adopt a position more consistent with the 1977 Directive.[81] It now holds that, although an economic entity (business) in principle consists of tangible and intangible assets and a workforce, as far as cleaning, maintenance and catering activities are concerned the taking over of employees may be enough, in itself, to signify the existence of an economic entity. This development was made possible by the new formulation used in that judgment by the ECJ. Even though the latter made no explicit pronouncement of the fact in *Süzen*, it reverted to a more specific interpretation of the term which enabled the *Bundesarbeitsgericht* to comply fully with that interpretation.

The new Directive adopted on 29 June 1998 does not provide the forms of clarification that had been hoped for. It confirms the ECJ's case law in again adopting the criterion of 'an economic entity which retains its identity'. For the first time, it gives a definition of that concept: 'there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. The mention of an organised grouping of resources may be intended to indicate a restrictive conception of an undertaking. But those resources are taken into consideration in so far as they are necessary to the practice of an economic activity. In sectors where the economic activity concerned does not require specific operating resources, the taking over of the workforce may therefore be enough in itself to characterise the existence of a transfer. Consequently, this new definition does not necessarily exclude the transfer of service activities from the Directive's scope. Indeed, according to the Preamble to the new Directive that definition is to be interpreted 'in the light of' the Community case law:

> Whereas considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice; whereas such clarification does not alter the scope of Directive 77/187/EEC as interpreted by the Court of Justice; . . .

Thus, after stressing the need for clarification the new Directive leaves the ECJ a clear field. The debate between the ECJ and the national courts will continue. Nevertheless, the adoption of the Directive may prove useful in reducing the interference in the dialogue between the ECJ and national courts caused by the various Commission proposals which national decisions were previously able to take as their basis.

A judgment of 10 December 1998[82] offered the ECJ another opportunity to escape from the present impasse. As with the *Schmidt* and *Süzen* judgments,

[81] BAG, 22 May 1997 (1997) *DB* 1720; BAG, 13 Nov. 1997 (1998) *DB* 84; H. Buchner, 'Die Betriebsübertragung i.S. von Paragraph 613a BOB im Spannungsfeld von Arbeitsplatschutz und unternehmerischer Gestaltungsmöglichkeit', (1999) *Juristenzeitung* 593–7.

[82] *Hernández Vidal* judgment, above Table 3.

this involved establishing whether the transfer of an activity exclusive of any transfer of tangible or intangible assets could be classed as the legal transfer of an undertaking. In the wake of *Süzen*, the procedure in the cases concerned[83] was suspended by decisions of the President of the ECJ in 1997, and the Court asked the Spanish and German courts in question to indicate whether they wished to maintain their questions in view of that judgment. Surprisingly, the four courts concerned maintained their questions. Although it was clearly the interpretation of the 1977 Directive that was at issue here, there is no question that the ECJ took account of the wording of the new Directive. In the operative part of its judgment, it appears to give precedence to a restrictive interpretation of the notion of the transfer of an economic entity, which it defines as 'an organized grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised'. It adds: '[t]he mere fact that the maintenance work carried out first by the cleaning firm and then by the undertaking owning the premises is similar does not justify the conclusion that a transfer of such an entity has occurred'. This answer seems to move towards the exclusion of transfers of contracts for the provision of services from the Directive's scope. Curiously, such an interpretation is contradicted by the substantive part of the judgment itself, where the Court states: '[t]he term "entity" thus refers to an organized grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised . . . Whilst such an entity must be sufficiently structured and autonomous it will not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organized grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.'[84]

Here, the ECJ's position is revealed very clearly: in certain sectors, the taking over of the workforce may be the decisive criterion in identifying a transfer of an undertaking. In view of the national divergences already existing in the interpretation of the Community case law, it is regrettable that the precision and clarity of this form of wording is not also to be found in the operative part of the judgment, although it was proposed in the Advocate General's Opinion. The resultant contradiction is obviously bound to fuel, yet again, divergences in the national interpretation of the transfer concept.

C. Dialogues Confined to Two Voices

When it comes to the definition of the transfer of an undertaking, the dialogue between the Community judicature and the national courts has been a generalised one, even though in some countries it has proceeded without any

[83] The judgment actually related to three joined cases (C–127/96, C–229/96 and C–74/97).

[84] Paras. 26 and 27 of the judgment.

questions being directly referred for a preliminary ruling. There have, however, been other dialogues in which only certain national courts have engaged. In these cases it was the specificity of national laws that prompted reference to the ECJ. This was why the application of the Directive to undertakings in economic difficulty which have been placed under a special administration procedure held particular relevance in Italian law, whereas recognition of the right of employees to object to the transfer of their employment relationship was of particular importance for Germany.

I Application of the Directive to Undertakings in Economic Difficulty Placed under a Special Administration Procedure: An Italian Follow-up

The problem of the Directive's application to undertakings undergoing economic difficulties gave rise to the ECJ's first judgment in connection with the 1977 Directive.[85] The question as submitted by a Dutch court was couched in general terms: '[d]oes the scope of Article 1(1) of Directive No 77/187/EEC also extend to a situation in which the transferor of an undertaking is declared bankrupt or is granted leave to suspend payment of debts?' In this case the ECJ applied a distinction: Member States are free to choose not to apply the Directive in situations where the undertaking is the subject of proceedings for the liquidation of its assets, but the Directive is compulsorily applicable in situations where the function of the proceedings concerned is the preservation and continuation of the undertaking as a going concern. The grounds for the ECJ's decision were given in the main text of the judgment,[86] where the Court referred to the specificity of bankruptcy law which exists in all national legal systems and which was recognised by the first Directive on collective redundancies (75/129/EEC)[87] and by Directive 80/987/EEC relating to the protection of pay claims in the event of the employer's insolvency. But it was the objective of the 1977 Acquired Rights Directive that formed the primary basis for the decision. The purpose of the Directive is to prevent company restructuring processes from operating to the disadvantage of the employees concerned. And the Court argued that application of the Directive to insolvent undertakings could actually discourage a prospective purchaser from taking over certain of an undertaking's assets. Its application could therefore be counterproductive. Even if the finding arrived at by the ECJ may be disputable,[88] its argument nevertheless had the merit of clarity. In the *Abels* judgment it set out

[85] *Abels* judgment, above n. 12.

[86] See G. Lyon-Caen, *L'information et la consultation des représentants des travailleurs dans les procédures de faillite* (Report for the Commission, 1988).

[87] Until 1992, the Dir. on collective redundancies excluded from its scope employees affected by the termination of the establishment's activities 'where the latter is the result of a judicial decision'; the new Dir. reintegrated such undertakings within its scope.

[88] No such exclusion was provided for by the Dir. itself, although it had been specified in the Dir. on collective redundancies. And it hardly seems compatible with the Dir's. aim if the representatives of the employees are deprived of their right to be informed and consulted precisely at a time when the employees' jobs are most under threat.

a general criterion that could be used to establish the Directive's scope by all Member States (which were also free to include such undertakings within the scope of their national provisions): if the function of the national proceedings concerned was the liquidation of an undertaking's assets, the Directive did not apply; otherwise, it was compulsorily applicable.

Although the answer given by the ECJ in this judgment seemed to rule out any future dispute, the Italian courts were the source of two further preliminary references.[89] The Italian legislation on undertakings in difficulties illustrates the specificity of this type of case.[90] In undertakings in a 'state of economic crisis', where an agreement has been concluded between management and union it is possible to derogate from Article 2112 of the Italian Civil Code (which provides for the automatic transfer of contracts of employment) in order to assist the continued operation of the business concerned. As a result, the employment relationships of certain employees are transferred to the new employer who is to take over the business but the remaining employment relationships are maintained with the former employer. The purpose of this legislation and any such agreements was to save the jobs of as many employees as possible. These arguments, furthermore, seemed entirely compatible with the Directive on collective redundancies, which requires employers to enter into consultations with a view to reaching an agreement' on ways and means of avoiding collective redundancies or reducing the number of employees affected. They are, however, contrary to the rules of the 1977 Acquired Rights Directive, which according to the ECJ must be considered to be mandatory.[91] It was the signing of such an agreement, and the claim by those employees who had not been transferred that it was invalid on the basis of Article 2112 of the Italian Civil Code, which formed the subject of the *D'Urso* and *Spano* cases.

The Italian courts concerned, although aware of the ECJ's previous decisions, opted to submit questions for a preliminary ruling rather than directly apply the principles deriving from that Community case law. It is true that there were important differences between the procedure at issue in the *Abels* case and that in the *D'Urso* case (dealing with an undertaking in a state of economic crisis which had been placed under a special administration procedure). Unlike the '*surséance van betaling*' procedure under Dutch law (i.e. judicial suspension of debts) at issue in *Abels*, in the special administration procedure under Italian law the owner of the business ceases to possess powers of management and administration, which are transferred to a Commission appointed by the ministerial decree placing the business under the special procedure.[92] However, the ECJ's answer changed nothing, since it

[89] See *D'Urso* and *Spano*, above n. 15.

[90] V. Leccese, above n. 7.

[91] *Daddy's Dance Hall* judgment, above n. 11.

[92] R. Foglia, 'Nota a Corte di Giustizia CEE, 25 luglio 1991 (C–362/89)', (1991) II *Diritto del Lavoro* 334, especially at 338.

merely recalled the criteria defined in its *Abels* judgment. 'The case demonstrates how the ECJ, by refusing to take into account such differences, took (silently) another step towards extending the scope of the Directive. Hence it was not a mere confirmation but rather a strengthening of its previous position'.[93]

In fact, although it was not explicit in the questions as submitted by the Italian courts the real thrust of the questions in the *D'Urso* and *Spano* cases was not merely to establish whether the situations envisaged actually constituted the transfer of an undertaking. Nor did they express any challenge on the part of the Italian courts against the ECJ's earlier decisions. In *D'Urso* the central question was whether it was possible to derogate from the Directive's rules by way of a collective agreement, which the ECJ rejected. The preliminary reference submitted on this point was, however, worded in such a manner that it is questionable whether the Court had any real alternative.[94] In the *Spano* judgment, dealing with an undertaking officially declared to be in 'critical difficulties', the answer to the Italian court's question seemed inevitable in the wake of *Abels* and, in particular, *D'Urso*. The motive of the Italian court would therefore appear to have been not a quest for clarification of the Directive's scope, but a way of legitimising a national decision. Although the contradiction between Community law and Italian law could have led the national court to depart from the incompatible national provisions concerned, this would have been at the cost of an acrobatic 'interpretation' of the national legislation in, what was more, a particularly sensitive area. Thus, the issue at the heart of the preliminary reference in *Spano* was that of horizontal direct effect.[95] What was involved for the Italian court was not giving an interpretation of an ambiguous national provision but, in practice, setting it aside to give full effect to the Community provisions on the matter. With the backing of the ECJ's decision, it was then able to refrain from applying the national provisions which did not conform to the 1977 Directive.[96]

This dialogue between the Italian courts and the Community judicature has not been without its consequences. The 1998 Directive now explicitly enables Member States to authorise, in cases where an undertaking is the subject of insolvency proceedings under the supervision of a competent public authority, the conclusion of an agreement between the employer and the representatives of the employees,[97] for the purpose of making alterations to the employees'

[93] V. Leccese, above n. 7.

[94] The question had been worded as follows: 'Does the first subparagraph of Article 3(1) of Directive 77/187/EEC provide for the automatic transfer to the transferee of the employment relationships relating to the transferred undertaking and in existence at the time of its transfer?'. It drew an answer in the affirmative and the existence of the agreement was very quickly mentioned, with the Court confining itself to stating that the Dir's. rules applied to everyone, including the employees' union representatives (para. 17).

[95] V. Leccese, above n. 7.

[97] See also A. Lo Faro, above n. 68.

terms and conditions of employment designed to safeguard jobs by ensuring the undertaking's survival. This represents an adoption of the Italian model, in granting the social partners the possibility of concluding agreements derogating from the Directive's provisions in order to favour the survival of the undertaking.

II The employee's right of objection to transfer: a German-European dialogue

The mandatory nature of the 1977 Directive's provisions has been affirmed by the ECJ on more than one occasion.[98] Since the preliminary references concerned were worded in general terms, the Court answered in like manner. On the first such occasion, it declared: '[a]n employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as an alteration permitted by the applicable national law in cases other than the transfer of an undertaking.' This principle was reaffirmed a few months later, in a judgment stating that the Directive must be interpreted as meaning the transmission of all obligations arising under the contract of employment from the transferor to the transferee 'even if the workers employed in the undertaking did not consent or if they object' .[99] Both cases shared the feature that the employees had not wished to remain in the service of the transferor. But in the first case (*Daddy's Dance Hall*) the contract of employment had been amended at the time of the transfer and the question was to establish whether those amendments were enforceable against the transferor, whereas in the second case (*Berg*) the employees were taking action against the transferor for the payment of monies due under the contract of employment.

As before, the position adopted by the ECJ prompted a reaction from a national court confronted with a possible divergence between its national law and these two judgments. The *Bundesarbeitsgericht* in Germany has recognised an employee's right to object to the transfer of his employment but, in particular, has furnished it with a concomitant guarantee which is non-existent in the other Member States studied, namely, the right of employees to remain in the service of their original employer. This position led the German courts to concentrate their attention on the conditions governing the legitimacy of the dismissal of employees who opted to remain with the transferor. It is interesting to note in this connection that Austria has implemented a series of norms on the matter which are far more detailed and precise. Whereas in Germany this right was created merely through an interpretation of § 613a of the German Civil Code in the light of Article 12 of the

[98] *Daddy's Dance Hall* judgment, above n. 11.
[99] *Berg* judgment, above n. 12.

Grundgesetz (Basic Law), Austria anticipated Directive 77/187/EEC in a way which is largely comparable to the approach adopted by the *Bundesarbeitsgericht*.[100] The employee may object to the transfer of his contract if the new employer refuses to accept either the outcome of 'prior collective bargaining' or pre-existing company pension arrangements.[101] The interpretation applied in Germany by the *Bundesarbeitsgericht* posed the problem of its compatibility with the ECJ's judgments and led to a reference for a preliminary ruling: Does Article 3(1) of the Directive

> entitle an employee in the transferor's employ at the date of the transfer to object to the transfer of the transferors rights and obligations to the transferee, with the consequence of preventing that transfer from taking place? If the answer is in the negative, does the grant of such a right of objection under the law, regulations or administrative provisions of a Member State constitute a provision more favourable to employees within the meaning of Article 7 of Directive 77/187? [102]

The ECJ recognised, in the name of the fundamental rights of the employee, the latter's freedom to object to the transfer of his contract of employment to the transferee.[103] It took care to relate its answers to its previous judgments and so avoid contradiction: the earlier judgments had concerned the possibility of objecting to the transfer of the obligations arising from the employment relationship once the transfer had occurred, whereas in this case the issue was the employee's right to object to the transfer itself. Nevertheless, it might well be asked what the real significance of this recognised right of objection is.[104] According to the ECJ, the Member States are still free to determine the consequences of an employee's decision not to accept the transfer of his contract of employment. Three possible outcomes are envisaged, placing the employee in very different situations: the contract may be treated as terminated on the employee's initiative; the employee's refusal may be deemed to constitute a legitimate ground for dismissal by the original employer; or—the most favourable situation—the contract of employment may be maintained with the latter. German law, which (subject to certain conditions) applies this last approach, can therefore continue to do so although other Member States are not required to do so. It was perhaps because of the sensitivity of an issue which has a bearing on dismissals law that the ECJ refrained here from making any attempt to harmonise national provisions which, however, have major implications for the exercise of the right of objection.

[100] The statute in question is called *Arbeitsvertragsrechts-Anpassungsgesetz* (AVRAG), and its key provision is Art. 3.

[101] G. Wachter, 'Widerspruchsrecht und priviligierte Kündigung des Arbeitnehmers beim Betriebsübergang. Zur Umsetzung der Richtlinie 77/187/EWG in Österreich' in M. Heinze and J. Schmitt (eds.) *Festschrift für Wolfgang Gitter* (Wiesbaden, 1995) 1023.

[102] *Katsikas* judgment, above n. 13.

[103] This interpretation was reaffirmed in the *Merckx* judgment, above n. 15.

[104] F. Valdes Dal-Ré, in this volume.

D. Future Dialogues

As Community case law evolves, so the subject-matter covered has diversified. Certain fields nevertheless remain unexplored, for lack of preliminary references, but could well be the subject of future developments. Likely candidates include the definition of dismissals which are authorised in the event of the transfer of an undertaking, the possibility of altering terms and conditions of employment and, lastly, the remedies enforceable against dismissals contravening the Directive's rules. The Directive prohibits dismissal on the grounds of transfer but authorises dismissals for economic, technical or organisational reasons. Given that most transfers are accompanied by dismissals, the definition of such authorised dismissals might have been expected to give rise to requests for specific information, particularly since the majority of cases arise in a context of a job crisis[105] and the true implications of the principle of the automatic transfer of contracts of employment ultimately depend on national laws on dismissal, which still vary widely from one Member State to another. In its *Katsikas* judgment, the ECJ failed to take the opportunity of establishing this necessary link between dismissal and transfer. Although the case in question centered on the issue of dismissal the Court, by recognising an employee's right to object to transfer but at the same time leaving it to the Member States to determine the consequences of that right (resignation, lawful dismissal or maintenance of the employment relationship) refused to involve itself in this area.

The absence of preliminary references on the subject of dismissal does not signify that there have been no interpretative difficulties. For example, interpretation of the UK legislation in the light of the Directive has prompted the British courts to make changes to the contract of employment more difficult in the event of a transfer. They have given precedence to a Community conception which differs from the traditional conception of redundancy.[106] The interpretation of national law in the light of the Directive has led them to make a distinction between dismissal and substantial changes to the contract of employment. In the former case the new employer may, if there are economic grounds for doing so, dismiss some of the employees who have been taken over provided he observes the correct redundancy procedure and pays the employees concerned any redundancy payments to which they are entitled. Things are more complex as regards the second situation, where the new employer wishes to introduce changes to the terms and conditions of employment. This situation is far from being a marginal one, given that the need to amalgamate two different groups of employees (those who have now been transferred and those who were already employed by the transferee) may necessitate some such form of harmonization. The British courts take the view

[105] See the impact of such situations on the amendment of Dir. 77/187/EEC by Dir. 98/50/EC and H. Collins 'Transfer of Undertakings and Insolvency', (1989) *ILJ* 144.

[106] P. Davies above n. 4.

that the Directive authorises dismissals connected with a transfer provided they are based on economic, technical or organisational grounds, but not alterations to the terms and conditions of employment. The courts found this approach in the actual wording of the Directive, which stipulates that dismissals may take place for reasons 'entailing changes in the workforce'. Since alterations to the terms and conditions of employment do not involve such changes, contract alterations in connection with the transfer of an undertaking may not be enforceable against employees even where there are economic grounds. In Germany, the question of reconciling § 613a of the Civil Code with dismissals law has also been brought before the courts but does not seem to have received any clear answer.

The definition of remedies enforceable against dismissals carried out in contravention of the Directive's rules has been touched on, without really exploiting certain potential aspects of the Directive. In its *Bork* judgment, the ECJ acknowledged that employees whose dismissal had been pronounced contrary to the relevant provisions 'must be regarded as still in the employ of the undertaking on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee'. This position has been reaffirmed in a more recent judgment,[107] where in answer to a direct question from a Belgian court the ECJ, noting the position it had adopted in *Bork* reiterated that the contract of employment of a person wrongfully dismissed shortly before the transfer must be regarded as still extant as against the transferee even if the dismissed employee was not taken on by him.[108] Although the Court seemed here to be imposing a right to reinstatement for employees wrongfully dismissed before the transfer, its final answer was still ambiguous in that it confined itself to stating that such employees may lodge a claim against the transferee with regard to their dismissal, and it is known that elsewhere it did not require their reinstatement.[109] This question is currently under debate in Denmark and has recently been brought before the national courts there, which for the time being have decided not to submit a preliminary reference to the ECJ. In France, a recent decision by the *Cour de Cassation*[110] declared that dismissals prior to a transfer of an undertaking were to be treated as null and void, without that necessarily implying a right to reinstatement. In the UK also, the problem of defining the remedies available against dismissals carried out contrary to the Directive's rules has arisen. The House of Lords, however, decided not to submit a reference for a preliminary ruling on the matter,[111] taking the view that the Directive does not require the courts to treat such dismissal as 'ineffective'. Here again, the decision against making

[107] *Dethier*, above n. 15.

[108] Para. 41 of the judgment.

[109] *Wendelboe* judgment, above n. 11. In his Opinion in this case the AG had in fact indicated that it was for the Member States to decide on the choice of sanctions.

[110] Cass. soc., 20 Jan. 1998 (1998) *Droit Social* 1023.

[111] *Wilson* v. *St Helens Borough Council* [1998] IRLR 706.

a preliminary reference may, as in the case of France and Italy, be interpreted as a sign of resistance on the part of the House of Lords. The Directive has led the British courts to adopt a more restrictive view of the alterations to contracts of employment which may occur on the transfer of an undertaking. The House of Lords may be hesitant to couple this rule too with remedies more severe than those generally permitted in connection with dismissal. Thus, reconciling the provisions on transfer with those on dismissal seems to present a recurrent difficulty for the national courts, without any of them having so far shown a wish to bring the debate before the ECJ.

Lastly, it may be noted that the Directive's collective dimension, which provides for the information and consultation of employee representatives 'with a view to seeking agreement'[112] on the social implications of a transfer, has remained absent from the Community debate. Although there have admittedly been no preliminary references directly on the subject, it was at the heart of certain cases. This collective dimension was first ignored by the ECJ when it exempted undertakings in liquidation from the scope of the Directive. The Court based its argument here exclusively on the Directive's individual dimension: it held that, since the purpose of the Directive is to prevent restructuring operations from having detrimental consequences for the employees affected, it was necessary to exempt such undertakings in order to avoid discouraging prospective purchasers from becoming a transferee. However, depriving employees of information and consultation on the matter at a time when their jobs are most under threat hardly seems compatible with the Directive's aims.[113]

This collective aspect, suppressed by the ECJ, is also discernible in three of its other decisions.[114] In the *Ny Mølle Kro* case, the question whether there had been a transfer was posed purely in order to determine whether a transfer also implied the continued applicability of a collective agreement even though no workers had been employed by the undertaking at the time of the transfer. Furthermore, the case was brought by a trade union, without any real interests of the employee being at stake. From the trade union and employers' organisation point of view, the issue was therefore to determine whether a collective agreement could, as such, take advantage of the protection provided by the Directive. The answer was important to a labour law system such as that in Denmark, in which the collective agreement constitutes a main source of law. However, the answer given by the ECJ ignored the collective issues at stake in

[112] The new 1998 Dir. has strengthened this obligation since it now stipulates, adopting the wording used in the 1975 Dir. on collective redundancies, that consultation must be carried out 'with a view to reaching an agreement'.

[113] The new 1998 Dir. adopts a far more moderate position than the ECJ regarding undertakings in economic difficulties. It repeats the distinction made by the Court and allows Member States not to apply the Dir. to undertakings which are the subject of liquidation proceedings. However, this exemption concerns only the automatic transfer of contracts of employment; the procedure for the information and consultation of the representatives of the employees is maintained.

[114] *Ny Mølle Kro,* above n. 11, *D'Urso* and *Spano,* above n. 15.

this case. It stated that the transferee was obliged to continue to observe the terms and conditions agreed in any existing collective agreement only in respect of workers who had been employed by the undertaking at the time of the transfer. It followed from this that any collective agreement is protected only by virtue of such rights as it confers on the employee.

In both the *D'Urso* and the *Spano* judgments, the ECJ again ignored the existence of a collective agreement between union and management in arriving at its decision that any derogation from the automatic transfer of contracts of employment was prohibited. But can a derogation ensuing from a collective agreement be equated with a derogation granting the employee as an individual the right to waive the benefits conferred by the Directive, as was the case in *Daddy's Dance Hall*? To prohibit a collectively agreed outcome is, furthermore, contrary to the obligation imposed on the social partners to negotiate[115] on such measures as are envisaged both by the transferor and by the transferee in relation to their respective employees. This contradiction between the individual and collective dimensions of the Directive also becomes apparent when we turn to the possibility of collectively agreed alterations to terms and conditions of employment in the event of a transfer. The new 1998 Directive provides for this, but only in undertakings which are the subject of insolvency proceedings, which seems to exclude it in other undertakings. Yet such alterations, at least according to the interpretation applied by the British courts, are perfectly allowable provided there are economic grounds for them. So if it is assumed that the possibility of altering terms and conditions of employment is allowed in a transfer context where such alterations can be justified economically, it seems contradictory to prohibit, as the Directive appears to do, an alteration which has been collectively agreed, a channel which is *a priori* more protective of the employees' interests than a change to terms and conditions decided unilaterally by the employer. So far, therefore, the antinomy between the Directive's provisions relating to individual and to collective employment relations seems to have been resolved in favour of an interpretation that ignores its collective aspects.[116]

E. Conclusions

The 1977 Acquired Rights Directive spotlights the complexity of the relationship between the national courts and the ECJ. The questions that have been referred for a preliminary ruling have been prompted by widely differing circumstances. Some indicate a very real problem of interpretation. This is true of the first preliminary references, which emanated from the Danish courts. The fact of referring questions is simultaneously an indication that the answers given by the ECJ will be accepted. On the other hand, the fact that

[115] Or, more precisely, to engage in mutual consultation 'with a view to reaching an agreement'.

[116] See A. Lo Faro, above n. 68.

few and recent preliminary references regarding the transfer concept itself have been submitted by the French and Italian courts demonstrates a wish to give precedence to their national interpretation of the concept in question. However, the preliminary reference procedure has also been used, not for the purposes of interpretation, but in order to enlist support for, or legitimise, a decision by a particular national court. The *D'Urso* and *Spano* cases are examples of this situation, and also confirm that this type of question is more likely to emanate from lower courts. Lastly, the procedure has also been used by national courts as a way of challenging an earlier decision by the ECJ, by compelling it to deliver another judgment. The *Süzen* and *Katsikas* judgments, delivered in cases brought by the German courts, are examples of this.

Other actors have also intervened in this dialogue between the national courts and the ECJ. The Commission's first Proposal for amendment of the 1997 Directive, which was presented in 1994 and repudiated the interpretation applied by the ECJ in its *Schmidt* judgment, introduced a disruptive element by calling the legitimacy of that interpretation into question. This provided support for certain national critical reactions to the extensive interpretation being applied by the ECJ and prompted the latter to retreat from the position adopted in *Schmidt*. From this point of view the adoption of the 1998 Directive, even though it does not define a position on applicability to service activities, at least has the advantage of suppressing this source of interference between the national courts and the ECJ and could enable the latter to adopt, at last, an approach that puts an end to national divergences in the interpretation of this Directive.

PART III TRANSFERS OF UNDERTAKINGS: AN EXPERIENCE OF CLASHES AND HARMONIES BETWEEN COMMUNITY LAW AND NATIONAL LEGAL SYSTEMS

FERNANDO VALDÉS DAL-RÉ

A. Directive 77/187: a Norm at the Crossroads

To date, of the trilogy of 'structural' directives[1] which were adopted in implementation of the 1974 Social Action Programme[2] on the basis of Articles 100 and 117 of the EC Treaty, with a view to mitigating the consequences of company restructuring operations, Directive 77/187[3] relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[4] is probably the one that has had a major influence on the national labour law systems of the Member States.[5] More than twenty years on, this Acquired Rights Directive has been the subject of a recent amendment[6] whose purpose as expressly stated in its Preamble is, for 'considerations of legal security and transparency', to clarify several of its

[1] G. and A. Lyon-Caen, *Droit social international et européen*, 8th edn. (Dalloz, Paris, 1993) 303. See also P. Rodière, *Droit social et l'Union européenne* (L.G.D.J., Paris, 1998).

[2] See Council Resolution of 21 Jan. 1974 concerning a social action programme (OJ 1974 No. C 13, 1). In this resolution the Council takes note, first, of the Commission's undertaking to submit to it a proposal relating to a Directive 'on the harmonisation of laws with regard to the retention of rights and advantages in the event of changes in the ownership of undertakings, in particular in the event of mergers' and secondly, notes that the Commission has already submitted to it a proposal relating to a Directive 'on the approximation of the Member States' legislation on collective dismissals'.

[3] The other two are Dir. 75/129/EEC relating to collective redundancies (OJ 1975 No. L 48, 29) and Dir. 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 No. L 283, 23).

[4] OJ 1977 No. L 61, 27. The Dirs. eventual title differed from that initially used in the proposals submitted by both the Commission (OJ 1974 No. C 104. 1) and the Council (OJ 1975 No. C 95, 18), whose purpose of harmonisation related to the safeguarding of employees' rights and advantages 'in the case of mergers, business transfers and concentrations'. In this connection see L. Idot, 'Concentration des entreprises et protection des travailleurs dans le cadre communautaire', (1975) 12 *Droit Social* 562–7.

[5] S. Simitis and M. Körner-Dammann, 'L'influenza della disciplina comunitaria sul d ritto del lavoro tedesco', (1991) 10 *Quaderni di Diritto del Lavoro e di Relazioni Industriali* 149.

[6] Dir. 98/50/EC of 29 June 1998 amending Dir. 77/187/EEC (OJ 1998 No. L 201, 88), which alters the latter's title to read 'on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses'. The adoption of the current Dir. followed a tortuous path. The text of the Proposal drafted by the Commission (OJ 1994 No. C 274, 10) was strongly criticised both by the Economic and Social Committee (OJ 1995 No. C 133, 13), whose Opinion called in 'ambiguous' (subpara. 1.2.1), and by the European Parliament (OJ 1997 No. C 33 81), whose Opinion introduced numerous amendments.

basic concepts in the light of the subsequent case law of the European Court of Justice (ECJ).

Leaving aside this legislative amendment, however, Community law on transfers of undertakings offers an excellent observatory from which to appraise, in all their complexity, the structure and functioning of the Community legal order itself, its relations with national legal orders and the reciprocal influences between the two. The chequered history of the Directive's reception into domestic legal systems illustrates the strength and the limits both of the principles of legal ranking of the Community system of sources (supremacy and direct effect) and of Commission monitoring of the fulfilment by Member States of their Community obligations. The equally chequered experience of the ECJ, for its part, in the interpretation of the Directive likewise demonstrates the difficulties to be surmounted in the real and effective construction of what has been called the 'symbiotic relationship'[7] between the European and national systems of jurisdiction, that interactive dialogue between a court of European dimension and national courts which moves between loyal cooperation and implicit dissidence and has gradually built up through a slow but continuous input of numerous elements from the actors of the European legal system: forms of legalist reasoning that are sometimes Europe-centred and sometimes downright nationalist, protection of the individual interests of litigants, defence of a *doctrine* embedded in the habits of local judges, inter-court competition at national level or, last, political pressures, to name some of the most important.[8]

The already fairly lengthy history of the application of Community law on transfers of undertakings has, however, also witnessed a convergence of most of the *topoi* which over the past two decades have affected the legislative structures of Member State labour law systems, opening up a debate, often more self-interested than interesting, on their bases (legal basis, functions and role of the actors) and their reciprocal relations with the Community dimension. To put it in less abstract terms closer to the reality that concerns us here, it can safely be said that the cases brought before the ECJ in connection with Directive 77/187[9] and the discussions of every kind (on legal policy, policy on the right of recourse

[7] E. Stein, *Un nuovo diritto per l'Europa* (Giuffrè, Milan, 1991), 17.

[8] K. Alter, 'Explaining national court acceptance of European Court jurisprudence: a critical evaluation of theories of legal integration' in A.M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Court and National Courts. Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998) 227 *et seq*.

[9] As at 1 Jan. 2001, the relevant ECJ judgments are as follows, cited in chronological order: (1) Case 135/83 *Abels* [1985] ECR 469; (2) Case 179/83 *Industrie FNV and Federatie Nederlandse Vakbeweging* v. *Netherlands* [1985] ECR 511; (3) Case 186/83 *A. Botzen and Others* [1985] ECR 519; (4) Case 19/83 *Wendelboe and Others* [1985] ECR 457; (5) Case 105/84 *Danmols Inventar, in liquidation* [1985] ECR 2639; (6) Case 24/85 *Spijkers*[1986] ECR 1119; (7) Case 237/84 *Commission* v. *Belgium* [1986] ECR 1247; (8) Case 235/84 *Commission* v. *Italy* [1986] ECR 2291; (9) Case 287/86 *My Mølle Kro* [1987] ECR 5465; (10) Case 324/86 *Daddy's Dance Hall* [1988] ECR 739; (11) Joined Cases 144 and 145/87 *Berg and Busschers* [1988] ECR 2559; (12) Case 101/87 *P. Bork International AS, in liquidation,*

by private individuals and policy *tout court*) which some of the Court's judgments have provoked mirror the problems posed by the construction of a harmonised European social area which is compatible with the requirements flowing from the construction at the same time of a single market built on an economy with maximum interdependence and governed by criteria of competitiveness and efficiency. The extent and limits of means of increasing flexibility in the use and management of labour, the generalisation of the phenomena of decentralisation of production[10] which dismantle the organisational structures of companies and sever the traditional links with their employees, are giving rise to the appearance of a new type of enterprise: the network-enterprise.[11] The scope, content and instruments of employee rights to participation in processes of economic decision-making,[12] the respective arenas of legal intervention and collective bargaining as mechanisms for fixing terms and conditions of employment or, in short, the limits of a Community policy of partial harmonisation that seeks to reconcile national prerogatives in defining key concepts in the protection of social rights with the establishment of minimum standards of protection, represent a short but important list of the questions which arise in connection with Community law on transfers of undertakings.

All these reasons make the Directive a norm at the crossroads from which it is possible to feel the pulse of the national and Community legal systems in the area of social policy, with a view to discerning where they clash and in what direction they are heading: to clarify, in fact, one of the most significant

and Others [1988] ECR 3057; (13) Case C–362/89 *D'Urso and Others* [1991] ECR I–4139; (14) Case C–29/91 *Dr. Sophie Redmond Stichting* [1992] ECR I–3189; (15) Case C–209/91 *Watson Rask and K. Christensen* [1992] ECR I–5755; (16) Joined Cases C–132/91, C–138/91 and C–139/91 *Katsikas and Skreb and Schroll* [1992] ECR I–6577; (17) Case C–382/92 *Commission* v. *United Kingdom* [1994] ECR I–2435; (18) Case C–392/92 *Schmidt* [1994] ECR I–1311; (19) Case C–48/94 *Rygaard* [1995] ECR I–2745; (20) Case C–472/93 *Spano and Others* [1995] ECR I–4321; (21) Joined Cases C–171 and 172/94 *Merckx and Neuhuys* [1996] ECR I–1253; (22) Case C–298/94 *Henke* [1996] ECR I–4989; (23)Case C–305/94 *Rotsart* [1996] ECR I–5927 (24) *Süzen* [1997] ECR I–1259; (25) Case C–336/95 *P. Burdalo Trevejo and Others* [1997] ECR I–2115; (26) Case C–319/94 *J. Dethier Equipement SA* [1998] ECR I–1079; (27) Case C–399/96 *Sanders* [1998] ECR I–6965; (28) Joined Cases C–127/96, C–229/96 and C–74/97 *Hernández Vidal* [1998] ECR I–8179; (29) Joined Cases C–173/96 and C–247/96 *Sánchez Hidalgo* [1998] ECR I–8237; (30) Case C–234/98 *Allen* [1999] ECR I–8643; (31) Case C–343/98 *Collino*, judgment 14 Sept. 2000; (32) Case C–175/99 *Mayeur*, judgment 26 Sept. 2000; (33) Case C–172/99 *Oy Liikenne*, Opinion of Léger AG, 16 Oct. 2000; (34) Case C–164/00 *Beckman* (pending) for a country-based division see Part I, Table 3.

[10] J. Cruz Villalón, 'Descentralización productiva y responsabilidad laboral por contractas y subcontractas', (1992) 12 *Relaciones Laborales* 12.

[11] L. Pattani, *Politiche di ristrutturazione e decentramento produttivo* (Cedam, Padua, 1990) 199 *et seq*.

[12] Lord Wedderburn, 'Consulation and collective bargaining in Europe: success or ideology?', (1997) 26 *ILJ* 1–34, also in *Studi sul lavoro. Scritti in onore di Gino Giugni* (Cacucci, Bari, 1999), vol. II, 1701 *et seq*, with an Appendix on an Outline of the British Employment Relations Bill 1999.

questions attending Community law, namely, the extent to which national laws are evolving towards convergence.[13]

Before venturing into the swampy ground of legal comparisons and examining the way in which different Member States have responded to the requirements flowing from Community law on transfers of undertakings, it is worth pausing to revisit the purposive and structural aspects of the Directive, even if only briefly and schematically. An analysis of this kind can help to define from the outset the limits of the law itself and also allow a better understanding of some of the responses from national legal system.

B. Community Provisions on Transfers of Undertakings

I Employee Protection and Protection of the Integrated Market

The Preamble to the Directive states that it is necessary to provide for the protection of employees in the event of transfers of undertakings prompted by the changes in company structure being generated by economic trends, in order to ensure, in particular, that their rights are safeguarded. On this basis, starting from the earliest of its judgments on the matter the ECJ has indicated that the purpose of the Directive is 'to ensure, as far as is possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the same terms and conditions as those agreed with the transferor'.[14]

Although this social dimension attributing to the Directive the pursuit of objectives linked exclusively to employee protection unquestionably exists, it is incomplete and therefore represents a slanted view of the purpose of the Community provisions. Neither employee protection nor any similarly 'unequivocal' objective is the 'single and real result'[15] pursued, as might be suggested by an over-hasty reading of the Directive's Preamble and its citation of Article 117 of the EC Treaty. The harmonisation sought is only 'partial',[16]

[13] G. Lyon-Caen, 'Les caractères originaux du droit social europeen' in Various Authors, *Etudes offertes à L. Julliot de la Morandiére* (Dalloz, Paris, 1964), 325; A. Lyon-Caen, 'L'influenza del diritto comunitario sul diritto del lavoro francese' (1991) 10 *Quadearni di Diritto del lavoro e di Relazioni Industriali* 117.

[14] As stated in these or similar words in ECJ judgments including the following, n.9 above: *Danmols Inventar* (para. 26); *Ny Mølle Kro* (para. 12); *Tellerup*, nicknamed *Daddy's Dance Hall* (para. 9); *Berg* (para. 12); *Bork International* (para. 13); *d'Urso* (para. 9); *Redmond* (para. 11); *Watson Rask* (para. 26); *Katsikas* (para. 21); *Rygaard* (para. 15); and *Henke* (para. 13).

[15] G. Lyon-Caen, 'Il Regno Unito: allievo indisciplinato o ribelle indomabile?', (1994) 64 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 681. (The French version is in (1994) *Droit Social* 223).

[16] As the ECJ itself has also noted repeatedly in, for example, the following judgments, n.9 above: *Danmols Inventar* (para.26); *Daddy's Dance Hall* (para. 19); *Commission* v. *UK* (para. 28); and *Watson Rask* (para. 27).

and the Directive does not establish a uniform level of protection throughout the EU based on common criteria. As Advocate General Van Gerven noted in his Opinion regarding the *Katsikas* judgment, the Directive is essentially confined to 'extending the protection guaranteed to employees independently by the laws of the individual Member States' (paragraph 14).

In addition to these social policy objectives, the Community provisions also feature a second purpose, namely, market integration. The decision by the Community legislature to intervene in the matter of transfers of undertakings with a view to reducing the differences which existed and still exist in the Member States as regards the extent of the protection provided for employees was taken, as stated in the Directive's own Preamble, because 'these differences can have a direct effect[17] on the functioning of the common market'.

Like the other general provisions intended to approximate Member State laws on labour matters, Directive 77/187 belongs to the group of Community labour enactments aimed at defining a social policy which allows the correct functioning of the market.[18] In harmonising the rules applicable to situations resulting from a change of employer, the Community legislature simultaneously intended 'both to ensure comparable protection for employees' rights in the different Member States and to harmonize the costs which those protective rules entail for Community undertakings'.[19] Determining which of these two objectives is the prevalent one is not a question that lends itself to straightforward answers. Nevertheless, it seems safe to advance the following hypothesis.

At the time when the Directive was created, greater importance was probably attached to promotion of the integrated market by 'harmonising the costs' entailed for undertakings than to the protection of employees. Both a strictly literal understanding of the concepts used by the Directive to define the legal acts effecting transfer[20] and an examination of the provisions regulating information and consultation rights are indicators demonstrating that 'market requirements outweighed the social dimension'.[21] Nevertheless, in its application of the Directive the ECJ has, subject to the limitations deriving from the partial nature of the harmonisation, given prevalence to the aspect that is

[17] In their respective versions, *incidence direct* (French), *unmittelbar auswirken* (German) and *incidencia directa* (Spanish), while the Italian text states that the differences *possono ripercuotersi direttamente*.

[18] F. Pocar, 'Diritto comunitario del lavoro' in G. Mazzoni (ed.) *Enciclopedia giuridica del lavoro* (Cedam, Padua, 1983), 6; S. Sciarra, 'Il dialogo fra ordinamento comunitario e nazionale del lavoro: la contrattazione collettiva', (1992) 56 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 716.

[19] Judgment in Case C–382/92, *Commission* v. *United Kingdom*, n.9 above, para. 15.

[20] In their respective versions, *legal transfer or merger* (English), *cession conventionnelle ou fusion* (French), *durch vertragliche Übertragung oder durch Verschmelzung anwendbar* (German), *cessione contrattuale o fusione* (Italian), and *cesión contractual o fusión* (Spanish).

[21] Lord Wedderburn, 'Il diritto del lavoro inglese davanti alla Corte di Giustizia. Un frammento', (1994) 64 *Giornale di Diritto del lavoro e di Relazioni Industriali* 697.

more directly protective with regard to employees. To put it more precisely, the Court has sought to maintain a certain balance between the twin objectives by adopting a 'Solomon-like' position. On the one hand, it accentuates the social aspect in its interpretation of the scope of the Directive as regards both the acts effecting transfer (*as a result of a legal transfer or merger*) and the object of transfer (*transfer of an undertaking, business or part of a business to another employer*); on the other hand, it emphasises the market protection dimension by interpreting the content of the protection provided by the Directive in its dual aspect, i.e. individual and collective.

II Matters of Public Policy and Greater Favourability

As stated above, the Directive seeks to mitigate the social consequences of company restructuring and reorganisation processes by establishing a set of guarantees whose common denominator is the safeguarding, as far as is possible of the rights of employees in the event of a change of employer. This set of guarantees can be grouped into two categories: those which ensure the continuation of existing employment relationships, shielding the lifetime of the contract of employment from any intervening change in the person of the employer, and those which safeguard the rights which the employees transferred enjoyed before the transfer; or, as the ECJ has put it in summarising the normative content of the Directive, the latter seeks 'to guarantee, in the interests of the employees, the existing employment relationships and the social rights acquired within their framework'.[22]

The first of these objectives is served by the provisions contained in Article 4 of the Directive, which states, first, that transfer 'shall not in itself constitute grounds for dismissal by the transferor or the transferee',[23] although this does not bar dismissals for economic, technical or organisational reasons (paragraph 1),[24] and secondly, stipulates that if the contract of employment or employment relationship is 'terminated'[25] because the transfer involves a substantial change in terms and conditions of employment to the employee's detriment, the employer (transferor or transferee) is to be regarded as having been responsible for that termination (paragraph 2). The second objective is fulfilled by the provi-

[22] *Berg* judgment, n.9 above, para. 9.

[23] The unlawfulness of a dismissal effected by the transferor before and because of the transfer may be claimed by the employee concerned both against the transferor and against the transferee, even if the latter had no responsibility for it: *Dethier* judgment, n.9 above, para. 42.

[24] According to the criterion upheld by the ECJ in its *Dethier* judgment, n.9 above, both the transferor and the transferee may dismiss employees for economic reasons (para. 37).

[25] In their respective versions, *rescisión del contrato de trabajo o de la relación labora*l (Spanish), *résiliation du contrat de travail ou de la relation du travail* (French) *Beendigung des Arbeitsvertrags oder Arbeitsverhaltnisses* (German) and *rescissione del contratto di lavoro o del rapporto di lavoro* (Italian).

sions laid down in Article 3 regarding the transfer to the transferee of all the transferor's rights and obligations arising from a contract of employment (paragraph 1) and the maintenance of terms and conditions of employment agreed in any collective agreement (paragraph 2). Apart from this, the Directive expressly specifies a number of exceptions to the guarantees it establishes[26] or authorises the Member States to introduce them within certain limits.[27]

The Community Directive does not belong to the category of discretionary law; on the contrary, it falls under the heading of mandatory law (*ius cogens*). In other words, the system of guarantees it establishes rank as rules from which the parties may not agree to derogate, a status which raises a number of questions that it is useful to clarify.

The first and certain starting-point is that the guarantees to the benefit of employees which are recognised by the Community provisions are independent of the will of the parties, both individual and collective, and that any individual or collective agreement which worsens (changes *in peius*) the legal position of employees, that is, which diminishes the rights established as a minimum by the Directive, is automatically deemed to be *contra legem* and therefore devoid of legal effect. This is the criterion underlying the ECJ's pronouncement that the parties may not invoke the principle of freedom of contract in order to depart from 'the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, [which] must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees'.[28]

Secondly, the Community provisions on transfers of undertakings also represent mandatory law with respect to any laws, regulations or administrative provisions that Member States introduce in their respective national legal systems in fulfilment of their transposition obligations. This is expressed unequivocally by Article 7 of the Directive, which authorises Member States 'to apply or introduce' rules 'which are more favourable to employees'.

It is quite clear, both from the ECJ case law cited and from the normative passage mentioned, that the mandatory nature of the social guarantees established to the benefit of employees by the Directive is relative or unilateral. What is prohibited is a reduction or curtailment of the level of protection, whatever the origin or source of any such worsening of those rights may be (unilateral acts by the employer, individual or collective agreements, laws, regulations or administrative provisions). Provided the Directive's minimum standards are observed, however, the guarantees may be improved upon through any kind of legal instrument, with binding force.

[26] Art. 3(3) of Dir. 77/187.

[27] Second subparagraph of Art. 3(2) and second subparagraph of Art. 4(1) of Dir. 77/187.

[28] *Daddy's Dance Hall* judgment (para. 14) and *D'Urso* judgment (para. 11): see n.9 above. This doctrine, although in its literal interpretation confined to acts deriving from individual freedom of contract, may be extended without any interpretative breach to acts deriving from collective autonomy.

Although clear in terms of its formulation, this configuration of Directive 77/187 as a minimum floor of standards whose guarantees may be changed solely in a direction more favourable to employees poses problems when it comes to its practical application. Broadly speaking, these problems may be grouped under the following two questions: what criterion must be used to determine greater favourability, and in what circumstances may a national legal provision be deemed more favourable? The ECJ has not had opportunity to develop a general doctrine on either of these questions. Nevertheless, it has provided a number of useful interpretative guidelines that can be considered here.

As regards the first question, which is the less problematic of the two for the purposes of Community law, the criteria for determining whether an employee's legal position before and after the transfer of an undertaking has remained unaltered or has undergone some change are those generally applicable in each national legal system. In other words, the Directive does not provide a rule for determining greater favourability, which is left to be interpreted in terms of the legal rules of the Member State concerned. The system of guarantees is deemed to have been observed for an employee provided that, 'taking the matter as a whole, he is not placed in a worse position than before'.[29]

The second question is of broader legal significance. At first sight, on the basis of what has just been said regarding the criteria for determining greater favourability it might well be assumed that the matter of the circumstances in which a domestic legal provision is more favourable or, by contrast, detrimental to the interests of employees is a non-existent problem from a strictly Community point of view. Such an assumption certainly applies when considering concrete terms and conditions which are quantifiable (working hours, pay or annual holidays, to name some important examples) or which are susceptible of being deemed a 'substantial change in working conditions'. In the former case, the rule applicable is that used in the national legal system concerned as the rest for comparing terms and conditions, whether it be overall assessment of grouped clauses, clause-by-clause analysis, or any other. In the second case the national legal system still applies, subject to the clear proviso that Community law prohibits a substantial change in terms and conditions imposed by the transferor or the transferee by reason of or as a consequence of a transfer of undertaking.[30] As the ECJ's case law has reasoned, in so far as national law allows rights and obligations under the employment relationship to be altered, they may be altered with regard to the transferee to the same extent as they could have been with regard to the trans-

[29] *Daddy's Dance Hall* judgment in Case 324/86, n.9 above, para. 15.

[30] The *Merckx* judgment in Case C–171/94, n.9 above, applied this doctrine to a situation where the transferee had changed the rate of pay previously agreed with the employee (para. 38) and concluded, on the basis of Art. 4(2) of the Directive, that in such a case the employer is to be regarded as having been responsible for the termination of the contract.

feror, since the Community guarantees prohibit only changes in terms and conditions of employment for which the transfer itself constitutes the actual reason.[31]

However, this question assumes a different legal significance when the test of greater favourability is interpreted not in terms of specific employment conditions but, more generally, in terms of the system of protection established by the Directive itself. Does the substitution of the transferee in the contracts of employment concluded by the transferor and in force at the time of the transfer (and consequently the transfer of the rights and obligations arising from those employment relationships) operate automatically, or is it a rule of discretionary law from the employee's point of view? The question opens up the very difficult problem, by no means easy to resolve, of determining the extent and the limits of the protection provided by Community law on transfers of undertakings, in that it calls (or possibly calls) into question the non-discretionary and mandatory status of that law.

The first time the ECJ had occasion to broach this decisive aspect was in the *Daddy's Dance Hall* judgment of 10 February 1988,[32] in which, after recognising that the protection provided by the Directive is a matter of public policy and therefore independent of the will of the parties to the contract of employment, the Court concluded that the rights conferred on employees by the Directive are non-waivable and cannot be restricted 'even with their consent' (paragraph 15). Only a few months later, however, in its *Berg* judgment of 5 May 1988[33] the ECJ had to confront the question more directly. Here, the *Hoge Raad der Nederlanden* had made a reference to the ECJ for a preliminary ruling, asking whether Article 3(1) of the Directive could be interpreted as meaning that, after the transfer, the transferor was released from his obligations under the contract of employment even where the employees transferred had opposed the transfer. In its reply, the ECJ stated that the change of employer 'entails the automatic transfer from the transferor to the transferee of the employer's obligations' arising from the transferred contracts 'subject however to the right of the Member States to provide for joint liability of the transferor and transferee following the transfer'. It follows that, unless the Member State concerned has available itself of this opportunity, 'the transferor is released from his obligations as an employer solely by reason of the transfer and that this legal consequence is not conditional on the consent of the employees concerned' (paragraph 11).

In accepting the thesis of automatic transfer, the *Berg* judgment appeared to deny employees a right to object to the transfer of their employment relationship and therefore to deem, at least implicitly, that a provision of national law granting employees such a right of objection constitutes a less

[31] *Daddy's Dance Hall* judgment in Case 324/86, n.9 above, para. 17.

[32] See n. 9 above.

[33] Case 144/87, n.9 above.

favourable condition for them. The matter was, however, far from settled. As Advocate General Van Gerven commented at a later date in his Opinion regarding the *Katsikas* judgment,[34] although it could be deduced from the ECJ's case law that Article 3(1) of the Directive did not confer on employees a right to object to the transfer of their contracts of employment, it was not to be inferred that the Community provisions precluded such a right (paragraphs 15 and 16). This was the criterion upheld by the ECJ in its judgment, a correct understanding of which necessitates a brief *excursus* into German law.

In applying the rules on succession contained in Paragraph 613a of the *Bürgerliches Gesetzbuch* (German Civil Code), the consistent case law of the *Bundesarbeitsgericht* (Federal Labour Court) granted an employee, in the event of the transfer of part of a business, a right to object to the transfer of his contract of employment which, if exercised, neutralised the effects of substitution: the contract was maintained with the transferor as employer. The Federal Labour Court based this thesis on two different series of arguments.[35] First, it deemed Article 12 of the *Grundgesetz* (Basic Law) to be applicable, as regards both its first subparagraph (freedom of occupational choice) and its second subparagraph (protection of human dignity). Secondly, it invoked the principle of favouring the worker which its own case law had developed in order to resolve conflicts between rights of contractual and statutory origin and according to which contractual rights prevail where they are more favourable. In the light of this latter ground, the applicants were debating as to whether or not a right for employees to object to the transfer of their contract of employment could be deemed a more favourable provision within the meaning of Community law.

In this context of application of the law, which the Federal Labour Court preserved unchanged after the ECJ's *Berg* judgment,[36] two lower courts (the *Arbeitsgericht* Hamburg and *Arbeitsgericht* Bamberg) decided to make the references for preliminary rulings which resulted in the *Katsikas* judgment. Both courts asked whether the recognised right of an employee to object to the transfer of his contract, with the consequence of preventing that transfer, constituted a more favourable provision within the meaning of Article 7 of the Directive. Alongside this, as a preliminary issue, the *Arbeitsgericht* Bamberg asked whether such a right was compatible with its Article 3(1).

On this latter aspect, the ECJ's reply was both clear and decisive, even though its reasoning was not exempt from the charge of legal banality. Its solemn pronouncement that the Directive 'cannot be interpreted as obliging the employee to continue his employment relationship with the transferee'

[34] See n. 9 above.

[35] M. Körner, *The impact of Community law on German labour law, the example of transfer of undertakings* EUI Working Paper Law No. 96/8, 9 (an Italian version is in (1997) 73 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 117). See also Laulom, in this volume.

[36] See n. 9 above.

(paragraph 31) and that such an obligation 'would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen' (paragraph 32) merits such a description. This obvious conclusion says nothing in either direction on whether or not substitution is automatic. The point at issue is not the employee's possession or lack of the right to resign, which goes without saying in all circumstances, but the quite different matter of the right conferred on the employee to object to the transfer of his employment and the fact that, as a result, his contract remains in force with the transferor, who must face all the legal consequences flowing from that decision, including the impossibility of dismissing the employee for exercising his right or of introducing, in retaliation, a substantial change in his terms and conditions of employment.[37]

Apart from this erratic *ratio decidendi*, however, the ECJ ruled that the Directive does not require Member States to adopt provisions stipulating that, if an employee decides of his own accord not to continue with the contract of employment or employment relationship with the transferee, the contract or relationship remains in force with the transferor, but that neither does it preclude this. Ultimately, 'it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be' (paragraphs 35 to 37).[38]

The force, if any, of the *Katsikas* doctrine[39] lies in demonstrating the limits of the partial harmonisation effected by Community law on transfers of undertakings. The automatic nature of the succession rule operates solely in relation to the transferor and transferee employers, leaving national legal systems entirely free to delimit the legal consequences of an employee's objection to his contract being transferred. The situation may be treated, as in the UK legislation, as an unforced resignation[40] totally unconnected with any decision on the part of the transferor; or it may be treated in terms of greater protection for the employee, as in German case law.[41] In essence, *Katsikas*

[37] This approach is found in several national case laws. See, for example, the judgment of the French *Cour de Cassation* of 20 Sept. 1990 (*Mme Pink* v. *Société Castorama et autres*) (1991) 3 *Droit Social* 254, and the commentary on it by H. Blaise, 'L'article L 122–12 après la tourmente: vers la stabilisation de la jurisprudence?', (1991) 3 *Droit Social* 253.

[38] Given its conclusion that the Directive does not preclude an employee of the transferor from objecting to the transfer of his contract to the transferee, the ECJ stated in this *Katsikas* judgment, n.9 above, that there was no need to answer the question whether that right constitutes a more favourable provision or not (para. 42).

[39] Reiterated in the *Merckx* judgment, n.9 above, para. 35.

[40] Art. 5(4A) of the 1981 Regs. in the amended version introduced under the 1993 TURERA. See n. 88 below.

[41] By virtue of the criteria that must be observed by the employer in selecting employees for intended redundancies as laid down in Section 1 of the *Kündigungsschutzgesetz*, an employee who objects to the transfer of his contract is able, as a result of the neutralisation of the effects for such an emolyee of the transfer of an undertaking, to remain unaffected by the employer's decision to reduce his workforce. The Federal Labour Court has, nevertheless,

introduces a principle of *laissez-faire*[42] which may leave an employee who refuses to be transferred without any protection at all with respect to his original employer, without there necessarily being reasonable grounds (such as a drop in the market share value of the transferor undertaking). It is true that, as Advocate General Van Gerven reasoned in his Opinion regarding this judgment, that the exercise of such a right of objection 'is not more favourable to the employee in absolute terms'; it is so only if it is exercised 'within a framework which implies a certain number of guarantees for him' (paragraph 19). However, it is equally true that neither can the transfer of rights be regarded as more favourable to the employee in absolute terms. The shortcomings of the Directive's provisions mean that the harmonisation of an issue that cannot be described 'as marginal'[43] remains unresolved.

C. Integration of the Community Norm into National Legal Systems: an Interwoven Dialogue in Multiple Scenarios with Diverse Actors

Any study, however superficial, which sets out to examine the responses of Member State legal systems to the harmonisation requirements emanating from the European Union of today must include two perspectives, corresponding to the two major sequences or, better still, series of sequences through which the Community legal system acquires its identity as an autonomous and specific legal order.[44]

First, it is necessary to analyse the process of transposition of the Community norm into national legal systems, an aspect which opens up a wealth of questions including the following: whether or not a Member State has enacted national legislation which ensures the Directive's *effet utile*;[45] if so, whether those legislative measures were adopted within the time-limit set by the Directive itself, or outside it; and in this last case, whether the decision was taken on the initiative of the Member State or under pressure from the Commission, in response to recommendations contained in the Commission's reasoned opinion which precedes its recourse to infringement proceedings or following an adverse judgment delivered by the ECJ in such proceedings.

started to impose restrictions on the application of these rules to employees who object (*Bundesarbeitsgericht* 7 Apr. 1993, (1993) *NZA*, 796). For more details, see M. Körner, n. 35 above, 8–10.

[42] P. Davies, 'Opting out of transfers', (1996) 25 *ILJ* 247.

[43] M. Korner, n.35 above, 8.

[44] J.V. Louis, *El ordenamiento jurídico comunitario* 2nd edn. (Office for Official Publications of the European Communities, Luxembourg, 1986) 11.

[45] As the ECJ has indicated, not every Directive needs to be transposed into domestic law by way of a specific legislative provision; it may happen that a given national legal system has already adopted appropriate measures that guarantee its effectiveness (judgment in Case 29/84 *Commission* v. *Germany* [1985] ECR 1661).

However, this first perspective, of dialogue between the Community legislature and the national legislatures, does not take account of the full complexity of the reactions of domestic legal systems to social harmonisation measures. We need to add a second perspective which introduces a further dialogue between the ECJ and the national courts, in order to ascertain the extent to which these national courts, in applying and interpreting national transposition provisions, also ensure the *effet utile* guaranteed in the Directive. Community law, particularly harmonised Community law, not only calls for the existence of common rules; it also requires that those common rules be interpreted and applied by all Member State courts in accordance with uniform criteria. As the *Marleasing* judgment stated, when extending to pre-existing national law the criterion already established with respect to national provisions enacted in express implementation of a directive, all the authorities of Member States 'including, for matters within their jurisdiction, the courts' are under an obligation to apply national law 'in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter' (paragraph 8).[46] In essence, the law-making function conferred on the ECJ[47] and the obligation on national courts to follow the interpretation established by the Court in Luxembourg act as correctives to the weakness in the legal nature of directives by providing a 'substitute' for the horizontal direct effect which this type of Community instrument lacks.[48]

Although they can be differentiated from a systematic and formal-logic point of view, the dialogues between Community legislation and national legislation on the one hand and between Community case law and national case law on the other, deriving respectively from the processes of making and applying the law, neither can nor should be regarded as separate or parallel dialogues. The paths they each follow are interwoven, demonstrating their mutual influence. In this respect Community law on transfers of undertakings has been a true locus of interwoven dialogues, sometimes convergent and sometimes dissident.

To start with, in adopting the measure on the approximation of national laws the Community legislature evaluated the pre-existing legislative standards of the Member States, seeking a 'pre-established harmonisation',[49] although

[46] Case C–106/89 *Marleasing SA* v. *La Comercial Internacional de Alimentacíon SA* [1990] ECR I–4135. And earlier, although with more limited scope as indicated in the text, ECJ judgments in Case 14/83 *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.

[47] For a full examination of this function, see R. Lecourt, *Le juge devant le marché commun* (Institut Universitaire de Hautes Etudes Internationales, Geneva, 1970), 27 *et seq*.

[48] J. Palacio González, *El sistema judicial comunitario* (Universidad de Deusto, Bilbao, 1996) 55.

[49] A. Jeammaud and M. Le Friant, *La Directive 77/187/CEE, la Cour de Justice et le droit français* EUI working paper law No. 97/3, 6 (an Italian version is in (1997) 73 *Giornale di Diritto del lavoro e di Relazioni Industriali* 91).

this had vague outlines. To a degree, the national legal systems, or some of them, laid the ground for the subsequent intervention by the Community authorities in the form of one of the legislative instruments *ex* Article 189 of the EC Treaty. However, that same legislature remained receptive to the function of supreme interpreter of Community law which the ECJ represents, and formulated policy assessments of convergence and divergence with respect to the interpretative criteria adopted by the Court. The former have been converted into law, since the 1998 Directive amending the original text incorporates established Community case law doctrine.[50] There were also, however, assessments of dissidence on the basis of which an attempt was made to nullify the effects of a generalised application of the Directive to the contracting-out of services as a result of a possible generalisation of the jurisprudence contained in the much-debated *Schmidt* judgment.[51] Nevertheless, those assessments remained at a pre-legislative stage,[52] partly as a consequence of the criticisms levelled against this corrective operation by other EU political institutions[53] and also, to no small degree, because they were robbed of material content by the reversal which the ECJ itself introduced regarding application of the Directive to contracting-out situations in its subsequent *Süzen* judgment.[54]

[50] Directive 98/50, n.6 above, which amends the original text of the 1977 Community provisions on transfers of undertaking, is exemplary in this respect. As set out in its Preamble, this Directive clarifies the concepts of 'transfer' and 'employee' in the light of the case law of the ECJ, whose doctrine is also reflected in other aspects of the definition of the Directive's scope.

[51] See n. 9 above. On the content of that judgment see, among others, J. McMullen, 'Contracting out and marketing testing: the uncertainty ends?', (1994) 23 *ILJ* 230–40; P. Pochet, 'CJCE: l'apport de l'arrêt Schmidt a la définition du transfert d'une entité économique', (1994) 11 *Droit Social* 931–5.

[52] Article 1(1) of the Commission's Proposal for a Directive on transfers of undertakings dated 1 Oct. 1994, n. 6 above., sought to counter the ECJ jurisprudence established in the *Schmidt* judgment (n. 9 above) by excluding from the Directive's scope 'a transfer only of an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly'. This corrective attempt by the Commission has been unanimously highlighted by legal scholars: J. Déprez 'La notion de transfert d'enterprise au sens de la directive européenne du 14 février 1977 et de l'article L 122–12, al.2, du Code du Travail: jurisprudence française et communautaire, (1995) 5 *Revue de Jurisprudence Sociale* 320; P. Waquet, 'L'application par le juge français de la directive communautaire du 14 février 1977', (1994) 12 *Droit Social* 1013; J. McMullen, 'Atypical transfer, atypical workers and atypical employment structure. A case for greater transparency in transfer of employment issues', (1996) 25 *ILJ* 291; and P. Davies, n. 42 above, 247.

[53] The European Parliament's report (n.6 above) deleted the second item of Article 1(1) of the 1994 Proposal whereby it sought to exclude contracting-out from the scope of Community law on transfers of undertakings. The opinion delivered by the Committee of the Regions (OJ 1996 No. C 100, 25) was equally critical.

[54] See n. 9 above. For a critical assessment of the reversal in the treatment of contracting-out as a situation excluded from application of the Directive, see P. Davies, 'Taken to the cleaners? Contracting out yet again', (1997) 26 *ILJ* 193–7. For a view more in agreement with the change, see P.H. Antonmattéi, 'La saga de la directive no 77/187 du 14 février 1977: l'épisode du reflux' (1997) 7/8 *Droit Social* 728–32. Also, C. Scholz, ' "Employees" rights in transfers of undertaking in the European Union', (1997) 9 *EBLR* 170–1.

The interweaving of dialogues between legislation and case law is also noticeable within the national contexts; it could not be otherwise. Although we shall need to examine this in detail in the next section, it is useful to offer a few general thoughts here.

Assessing the conformity of a particular national legal system with the Community rules on transfer is not a task that can be tackled simply by making an analytical comparison of the respective legal texts, i.e. the domestic provision and Directive 77/187. Although absolutely vital to any such assessment, a comparison of this kind is not sufficient in itself and needs to be accompanied by an examination of the criteria developed by the national courts in interpreting their own national provision transposing the Community system of protection applicable to cases of a change of employer. Inasmuch as, at least in the legal tradition of Continental Europe, the social realities as translated into law by the legislators (legal concepts and ideas) are very often only partly developed and defined, it falls to the courts to perform a function which supplements the legal system because, in the respect that concerns us here, they are able to adjust, upwards or downwards, the legal policy options initially adopted by the legislature. It is over the period of time following the enactment of the provision that the constructive effects of the dialogue between Community case law and national case law make themselves felt, in the form of the impact of that dialogue on the effective achievement of the objectives of harmonisation.

Although assertions of this kind merely state what is a common position in Community legal thinking, they take on their full currency in the case of European law on transfers of undertakings. Rather than present the argument *in vacuo*, I shall illustrate it with several specific examples from the national case laws.

Article 1(1) of Directive 77/187 delimits the scope of the system of guarantees it institutes in terms of two elements: the cause of transfer ('legal transfer or merger'), which defines the legal acts that produce substitution, and the object of transfer ('undertaking, business or part of a business').[55] Although these two elements make up the hard core of Community case law in the matter,[56] the issues arising from application of the Directive have shifted, gradually but steadily, from the cause to the object. In an uninterrupted series of judgments, a veritable case law 'saga'[57] starting with *Spijkers*[58] and ending, for the time being, with *Süzen* and the subsequent consolidating cases,[59] the ECJ has taken the opportunity of gradually clarifying, not without some vacillations, what

[55] In their respective versions, *empresa, centro de actividad o parte de centro de actividad* (Spanish), *l'entreprise, l'établissement ou la partie d'établissement* (French), *der Betrieb oder der Betriebsteil* (German) and *l'impresa*, *lo stabilimento o la parte di stabilimento* (Italian).

[56] C. de Groot, 'The Council Directive on the safeguarding of employees' rights in the event of transfer of undertaking: an overview of the case law', (1993) 30 *CMLRev* 332.

[57] P.H. Antonmattéi, 'La saga de la directive no 77/187 du 14 février 1977: suite . . . sans fin', (1996) *Droit Social* 78–9.

[58] See n. 9 above.

[59] See nn. 9 and 54 above.

should be understood by 'economic entity', an artificial concept constructed by the Court itself to give conceptual unity to the object of transfer.

It is not appropriate here to review the doctrine developed by Community case law in relation to such central aspects.[60] For our present purposes suffice it to say that, from the earliest of its judgments on the matter, delivered in the *Abels* case,[62] in the face of the different language versions of Article 1(1) of the Directive[62] the Court has eschewed a purely lexicological interpretation of the 'legal transfer' concept, which could suggest a requirement for the operation of transfer that it should be a voluntary matter for the parties.[63] Instead, it has openly opted for a purposive or teleological interpretation, which constitutes, ultimately, the preferred hermeneutical canon of Community case law. Hence, in so far as the purpose of the Directive is to guarantee the safeguarding of employees' rights, the ECJ holds that it must be applicable 'in all cases where there is a change, in terms of contractual relations, in the legal or natural person who is responsible for carrying on the business'.[64]

Starting from this purposive interpretation of the delimitation of the cause of transfer, Community case law has not hesitated to extend the Directive's system of protection to those changes of employer where the transfer of the economic entity takes place without any contractual link between the transferor and the transferee, as happens in cases of the leasing of an undertaking or contracting-out in which the transferred undertaking reverts to the lessor-owner or principal employer, who then leases it to another different lessee or another different contractor. This was the doctrine expressed in the *Daddy's Dance Hall* judgment and reiterated shortly afterwards in *Bork International*.[65]

A good many years before Community case law decided to include such situations of indirect transfer involving two stages within the scope of the Community rules on succession, French case law had already accepted such a doctrine. On the basis of a broad reading of the *de facto* situation determining

[60] For a recent and comprehensive study of the concept of economic entity, see R. Serrano Olivares, 'La noción de "empresa" a los effectos de su transmisión en la jurisprudencia del Tribunal de Justicia de la Unión Europea', (1997) *Relaciones Laborales* 67–96; P. Pelissero, 'L'entitá economica come oggetto del trasferimento d'azienda: sviluppi recenti della giurisprudenza comunitaria e possibili riflessi sugli orientamenti nazionali', (1998) 1 *Dritto delle Relationi Industriali* 63–76; R. Romei, 'Cessione di ramo d'azienda e appalto' (1999) 82–83 *Giornale di Diritto del lavoro e di Relazioni Industriali;* S. Giubboni, 'L'outsourcing alla lua della direttiva 98/50/CE', (1999) 8283 *Giornale di Diritto del lavoro e di Relazioni Industriali* 423.

[61] See n. 9 above.

[62] See nn. 17, 20, 25 and 55 above.

[63] R. Serreno Olivares, n. 60 above, 68.

[64] *Berg* judgment, n. 9 above, para. 17.

[65] Where 'upon expiry of the lease, the lessee ceases to be the employer and a third party becomes the employer under a new lease concluded with the owner the resulting operation can fall within the scope of the Directive as defined in Art. 1(1). The fact that in such a case the transfer is effected in two stages . . . does not prevent the Directive from applying, provided that the economic unit in question retains its identity'. See *Daddy's Dance Hall* (para. 10) and *Bork International* (para. 14), both in n. 9 above.

a change in the legal identity of the employer (*modification dans la situation juridique de l'employeur*)[66] and in view of the aim pursued by the domestic provision concerned, which is to protect job stability, from as early as the 1940s the French *Cour de Cassation* had been taking the view that application of the principle of transmission of the transferor's rights to the transferee should not be restricted to legal acts effecting a direct continuum between the two employers. It must also be extended to legal traffic involving a third party who, without performing any acts of running the undertaking transferred, merely represents a sequential nexus between the transferor and transferee.[67]

This doctrine of the *Chambre Sociale* of the French *Cour de Cassation* remained unchanged for several decades, until it underwent a major reversal in the 1980s, in a judgment of 12 June 1986 (*Société Desquenne et Giral*).[68] This introduced, as a 'condition of application'[69] of the second subparagraph of Article L 122–12, the requirement that there should be a legal relationship (*lîen de droit*) between the successive employers, thereby excluding from the guarantees offered by the substitution mechanism a substantial proportion of the legal acts which nowadays organise the ever-growing wave of decentralisation of production. Whereas up until then French jurists had been able to read the Community Directive as a 'straightforward transposition, *à des nuances près*, of national law',[70] this change of direction in their national case law discounted that belief. The stance adopted by French case law was at variance with Community case law,[71] proceeding in a hidden and silent manner without either express or implicit reference to the Community Directive. Its effect was notable at two levels. At Community level, this dissidence diminished the degree of the French legal system's compliance with Community law

[66] These are the words used by the *Code du Travail*, whigh were incorporated first in Art. 23 and later in the second subparagraph of Art. L 122–12. The precept reads verbatim as follows: 'S'il survient une modification dans la situation juridique de l'emplyeur, notamment par succession, vente, fusion, transformation du fonds, mise en société, tous les contrats de travail en cours au jour de la modification subsistent entre le nouvel employeur et le personnel de l'entreprise'.

[67] H. Blaise, 'Continuité de l'entreprise: flux et reflux de l'interpretation extensive de l'article L 122–12, al.2, du Code du travail', (1984) 2 *Droit Social* 91–9. By the same author, 'Actualisation d'un camieu juridique: l'article L 122–12 du Code du travail', (1985) 3 *Droit Social* 161, 170.

[68] (1986) *Droit Social* 605.

[69] A. Jeammaud and M. Le Friant, n. 9 above, 11.

[70] P. Rodière, 'Note à l'arrêt du 10 février 1988 de la Cour de Justice des Communautés Européennes', (1988) 4 *Revue trimestrielle de droit européen* 716.

[71] From a purely chronological point of view, this condition for the applicability of the rules on succession was adopted prior to the ECJ's *Daddy's Dance Hall* judgment, n. 9 above. Nevertheless, the incompatibility with Community case law of the lien de droit doctrine became evident from the time of the *Spijkers* judgment, n. 9 above, in which the ECJ established the criterion that an economic entity retains its identity in cases where 'its operation was actually continued or resumed by the new employer, with the same or similar activities' (para. 12). Furthermore, that doctrine was reiterated over the following years, i.e. at a time when trends in Community case law were already rejecting dubious interpretations.

on transfers of undertakings, and at national level it curtailed the level of employee protection at a time when, paradoxically, production restructuring processes were beginning to proliferate in the French economy.[72]

Although it had initially been distant from French legal circles, the Community Directive eventually pushed its way into them brusquely. In order to accommodate Community obligations, the domestic case law found itself forced to bend its criteria and revert to its more traditional stance. Hence, by way of two judgments delivered on 16 March 1990 the *Assemblée Plénière* of the *Cour de Cassation* abolished the disputed requirement and recognised that the second subparagraph of Article L 122-12 of the French *Code du travail* applies '*même en absence d'un lien de droit entre les employeurs successifs*'.[73] Thus, the divergence initiated by the *Cour de Cassation* ended in the manner of a schoolboy escapade: a return to the familiar European rules, accompanied by a declaration of future loyalty to the ECJ.

The French experience recounted above illustrates how a domestic legislative context with an acceptable level of compliance with Directive 77/187 can nevertheless produce, under the influence of its own domestic case law, a situation where the objectives of harmonisation are weakened. The UK experience that will be considered next demonstrates quite the opposite, that is, how a legislative situation which is manifestly unsatisfactory in terms of conformity with the text of the Directive comes to be rectified and amended, to a considerable degree, as a result of the Community-focused interpretation that the UK courts placed upon their national legislation.

In most countries of Continental Europe, the adoption and entry into force of Directive 77/187 was an event of little significance, with no impact on the basic legislative structures, that regulate the contract of employment. In the United Kingdom, on the other hand, the introduction of a mandatory substitution mechanism in cases of transfers of undertakings produced an enormous impact. It had 'the effect of a bomb'[74] that wiped out one of the most ingrained principles of its legal culture. As stated in the *Nokes v. Doncaster Amalgamated Collieries Ltd* judgment,[75] 'a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he wishes to serve, so that the right to his services cannot be transferred from one employer to another without his assent'. It is therefore not surprising that, when the 1981 TUPE Regulations[76] implementing the Directive were presented to the House of

[72] M.-F. Mialon, 'Il trasferimento dell'impresa nel diritto franesce: interpretazione e applicazione dell'art. L 122–12, Cod. Travail', (1992) 1 *Diritto delle Relazioni Industriali* 68.

[73] (1990) 5 *Droit Social* 399. For more detail, see E. Wagner, 'Le nouveau application de l'article L 122–12, al.2', (1990) 6 *Droit Ouvrier* 217–21, and H. Blaise (n. 37 above), 246–54. Also P. Waquet, n.52 above, 1009 *et seq*., and A. Jeammaud and M. Le Friant, n.49 above, 17 *et seq*.

[74] P. Davies, *The relationship between the European Court of Justice and the British Courts over the interpretation of Directive* 77/187/EEC EUI Working Paper Law No 97/2 5.

[75] Dating fom 1940, quoted in P. Schofield, 'Protection of employment on transfer of undertakings', (1983) *JBL* 18.

[76] See n. 89 below.

Commons, an eminent political figure of the time (Lord Oliver) observed that the transposition of the Community rules had been carried out 'with a remarkable lack of enthusiasm'.[77]

The 1981 Regulations established, at least in their legislative expression, a '*papier mâché*' harmonisation: the complexity of their provisions could not conceal the fragility of their content. Their scope was limited, the individual guarantees could be evaded with ease, the employer's duty to inform and consult employee representatives lacked proper means of enforcement and, last but not least, intervention by the unions depended on their previous arbitrary recognition by the employer.[78]

It is not appropriate here to narrate the vicissitudes of UK legislation on the matter, a topic to which we shall return later, nor to delve in detail into the multiple and complex dialogue carried on between the national and Community actors regarding the rules on transfers of undertakings. For our present purposes, the important thing to stress is the decisive role of the courts in adjusting the national legal system in a direction favourable to its European integration. Following the observation by the House of Lords that, if the TUPE Regulations could reasonably be interpreted in a sense compatible with the United Kingdom's Community obligations, that interpretation should prevail even if 'it may involve some departure from the strict and literal application of the words which the legislature has elected to use',[79] the UK courts resolutely set about the task of steering application of the processes of business transfers towards Community shores. Furthermore, as has recently been pointed out with shrewd wit, once the pre-existing common law principle was abolished a kind of *tabula rasa* was created in the legislative structures which left the courts feeling relatively free to do their Community duty in applying with enthusiasm a case law which, as the Community case law, was never going to wound their '*amour propre*'.[80]

D. Reception of the Community System of Guarantees by the National Legal Orders

The transposition of Directive 77/187 into the national legal systems has not followed any common pattern. The diversity of the responses is perhaps one of the most striking features of the process of bringing Member State laws into line with Community law on transfers of undertakings. To inquire into the reasons for this diversity would be tantamount to pondering on the extent and

[77] P. Schofield *et al*, n. 75 above, 18.

[78] C.J. Coburn, 'Il trasferimento di azienda nel Regno Unito', (1992) 1 *Diritto delle Relazioni Industriali* 59; R. D'Sa, 'The acquired rights directive: consequences of incorrect implementation in English law', (1993) 4 *EBLR* 132.

[79] Judgment of 16 Mar. 1989 delivered in *Litster* v. *Forth Dry Dock and Engineering Co. Ltd.* ([1990] 1 AC 549 [HL]). See Davies, n. 74 above, 9.

[80] Davies, n. 74 above, 31.

limits of the EU as a community of law. It would, in short, entail engaging in a debate of complex content and dubious outcome. Generalisations can easily become banal simplifications. Purely by way of a marauding raid into these quicksands, however, an identification of some of the most recurrent topics may explain the infeasibility of reducing to a few formal-logic models the criteria followed by all the national legal systems in transposing the Directive. Even a brief list of the widely varying factors accounting for their diversity would need to include the following: the variety of the local legal traditions; the different balances existing in each Member State between 'legislation-centred' and contractualist tendencies; the partial nature of the harmonisation that the Directive takes as its objective; the pre-existence in most Member States of national provisions adopted with the broad aim of guaranteeing job stability and instituting a principle of substitution in cases (or certain cases) of a change of employer; and the varying degree of receptivity in the political attitude of different Member States' public authorities and legal communities (judges, practicing lawyers and academics) towards European legal integration in general, and in matters of social policy in particular.

Despite what has just been said, and leaving aside the inevitable exceptions, it is possible to discern in the process of harmonising national laws with Community law on transfers of undertakings a number of tendencies which, although not sufficient to serve in the development of models, make it possible to detect allied features or similar attitudes and, on that basis, to group Member State responses according to criteria of a certain comparative uniformity.

I A Measurement Test of the Impact of the Community Norm on National Legal Systems; Legislative Transposition Techniques

As a rule, domestic provisions which have been introduced to bring national legal systems into line with the Community requirement for harmonisation are not contained in a unitary legal corpus but scattered in separate legislative texts. In most cases, comparing the Directive's complex system of protection with the domestic provisions is a tedious and laborious task entailing a painstaking search through regulatory instruments of every kind: laws on the contract of employment provisions on dismissal, rules on employee representation at workplace level and trade unions, and systems of social security or social insurance funds, to name only the most important. There is an exception to this broad trend in the case of Ireland and Denmark and, to a lesser degree, Greece and the United Kingdom.

Apart from local legislative traditions, the decision by most Member States not to use the *lex specialis* technique in transposing the Directive is due to the modest impact of the Community norm on their national legal systems, a good many of which already incorporated, in some cases dating back to the period between the two World Wars, similar guarantees to the benefit of

employees, at least as regards the strictly individual continuation of contracts of employment and retention of terms and conditions of employment agreed with the previous employer. The legislative technique used in each particular Member State in order to harmonise its laws can thus be used, with caution, as a measurement test of the impact of Directive 77/187 on its domestic labour law: the more concentrated the legislative provisions are that make up a country's legal regime on transfers of undertakings, the stronger and more extensive the Directive's impact can be assumed to have been, while, conversely, scattered domestic provisions indicate that its effect was minor.

II Transposition of the Directive: A Slow and Only Partly Completed Process

As a generalisation, it can safely be said that those Member States which are referred to as the small countries (Netherlands, Denmark and Luxembourg) have fulfilled their Community obligations more promptly and more comprehensively than those which have greater political weight within the European Union of today (Italy, France and the United Kingdom). Germany is an exception to this tendency, exhibiting a paradoxical situation: despite the fact that its legislation 'is almost fully harmonised with the Directive's objectives',[81] the impact of Community law on that legislation has been 'marginal'.[82] This paradox is, however, more apparent than real and merely evidences national roots or influences on the Community Directive, which the German legal community has perceived as a corrective measure intended to supplement the lower levels of protection existing in the other Member States.[83]

Leaving aside for the moment the question of the degree of conformity of the national laws with the objectives pursued by the Directive, I wish to focus attention here on the slowness that has characterised the transposition of Community law on transfers of undertakings. Article 8(1) of Directive 77/187 allowed Member States a period of two years, from its date of notification, within which to adopt the laws, regulations or administrative provisions needed to comply with its content. Given that notification of the Directive took place within three or four days of the date of its publication in the Official Journal of the European Communities, the time limit for implementation expired, at the latest, during the period between 14 and 20 February 1979.[84] By that date, only two of the then nine Member States had fulfilled this

[81] Commission of the European Communities, 'Commission Report to the Council on the state of implementation of Directive 77/187/EEC relating to the safeguarding of employees rights in the event of undertakings, businesses or parts of businesses', SEC (92)857, Brussels, 2 June 1992, 136.

[82] M. Körner (n. 35 above), 4. For an overview of the legal regime governing transfers of undertakings in German law, see M. Weiss, 'Il trasferimento di azienda in Germania', (1992) 2 *Diritto delle Relazioni Industriali* 53–7.

[83] S. Simitis and M. Körner, n. 5 above, 146.

[84] For those member states who joined later, the time limits for implemention were laid down in their respective Acts of Accession. The general rule, to which there are permitted

obligation, namely, Belgium[85] and Denmark.[86] Other countries followed their example, outside the period specified but not all that long after the time limit for implementation. The degree of comprehensiveness varied, however.

In those Member States whose legal systems already recognised the principle of the transmission to the transferee employer of the rights and obligations of the transferor employer, legislative measures incorporating only partial adjustment were adopted. This was the case with Germany, where the Law of 13 April 1980 (*EG-Anpassungsgesetz*) amended Paragraph 613a of the *Bürgerliches Gesetzbuch* (Civil Code) to extend the guarantee of the retention of employees' rights in the event of a transfer of undertaking to include terms and conditions of employment agreed in any collective agreement applicable to the transferor, as laid down in Article 3(2) of the Directive. It was also the case with the Netherlands, where the Law of 15 May 1980 amended Articles 1639aa–dd of the *Burgerlijk Wetboek* (Civil Code). In the case of France, harmonisation was a more laborious process, prompted at least in part from Brussels. First, Law 82-915 of 28 October on employee representation in the workplace brought the national provisions into line as regards the guarantees for employee representatives (continuation of their term of office and representative function) and the obligations on employers to inform and consult them. In addition, Law 83-528 of 28 June '*Portant mise en oeuvre de la directive 77/187*' introduced a new Article into the *Code du Travail* (Article L 122-12-1), which established the liability of the transferee in the 'labour debts' of the transferor,[87] countervailing existing case law to the contrary.

In those other countries where, by contrast, both the decision on whether to continue the employment relationship or terminate it and on whether to maintain or alter the terms and conditions of employment existing before the transfer lay with the transferee employer, because it incorporated radical changes to the existing system the domestic provision adopted to transpose the Directive called for a significant degree of harmonisation, at least *devant la lettre*. This was the case with Ireland and the United Kingdom, which enacted their respective regulations on the matter in 1980[88] and 1981.[89]

execptions, is that directives should have been transposed by the date of entry. In the case of Spain and Portugal that date was 1 Jan. 1986, as was noted by the ECJ in its judgment in *Commission* v. *Spain* [1991] ECR I–5281.

[85] The Royal Decree of 19 Apr. 1978 gave *erga omnes* force of law to Collective Agreement No 32a of 28 Feb. 1978. That Agreement was subsequently renewed in 1985, 1986 and 1990. For more details, see R. Blanpain, 'Diritto del lavoro e diritto comunitario in Belgio', (1991) 10 *Quaderni di Diritto del lavoro e delle Relazioni Industriali* 173.

[86] Law 111 of 21 Mar. 1979.

[87] The final part of the first subparagraph of Art. L. 122–12–1 reads as follows: 'le nouvel employeur est en outre tenu, à l'égard des salariés dont les contrats de travail subsistent, des obligations qui incombaient à l'ancien employeur à la date de cette modification'.

[88] European Communities (Safeguarding Employees' Rights in Transfer of Undertakings) Regulations 1980, SI 1980 No. 806, which entered into force on 3 Nov. 1980. For more details, see G. Byrne, 'Transfer of a business and protection of employment rights', (1984) 78 *Gazette* (supplement) (3) 1–5.

[89] The Transfer of Undertakings (Protection of Employment) Regulations (TUPE), SI 1981

From the historical experience accumulated during the already lengthy lifetime of Directive 77/187, the differing level or degree of compliance with Community law of the various national legal systems is readily discernible. This is confirmed by the Commission Report to the Council on the state of implementation of this Directive, already considered on so many occasions, which was drawn up fifteen years after its enactment.[90] None of the then twelve Member States merited, to use a metaphor from schooldays, full marks. It is true that some were awarded a very good mark because their laws achieved, with respect to the hard core of the Directive's guarantees, '*un haut degré d'harmonisation*' (Belgium, Greece and Luxembourg),[91] reached '*une conformité presque intégrale*' (Denmark)[92] or '*une conformité fondamentale*' (Portugal)[93] or, last, were '*presque entièrement adéquate sur les objectifs*' of the Community norm (Germany).[94] Nevertheless, even in the case of the pupils who did best the Commission found a number of faults or, to use its own more diplomatic language, 'certain features' in their national legal systems which were still not compatible with either the letter or the spirit of the Directive.

If we picture a scale representing the degree of compliance of each national legal system with Community law on transfers of undertakings, the two ends would be occupied by Denmark and Germany at the top and the United Kingdom at the bottom, with the other Member States situated in between but with a slight tendency to be clustered in the direction of greater compliance. If we expand this idea in more detail but express it with specific reference to the system of protection established by the Directive, the best degree of compliance is found in relation to two aspects which were probably seen by the Commission as constituting the hard core of that system.

The first aspect for which a notable degree of conformity is found, at least in terms of the provisions as laid down, concerns the structural elements of succession, that is, those which define the scope of the guarantees established in favour of employees: the legal operations that constitute a 'legal transfer or merger' and the object of such transfer.[95] There are some national systems which offer a concept of 'legal transfer' broader than the Directive's, extending the protection to, for example, acts *mortis causa*

No. 1794, entered into force on 1 May 1982, i.e. more than five years after the Directive was adopted. For an analysis of their content, see P. Schofield (n.75 above), 18–32. It is notable that the Directive was implemented not by way of primary legislation (Act of Parliament) but in the less rigorous form of regulations. See P. Davies, n. 74 above, 2 (note 1).

[90] Commission Report, n. 81 above.

[91] See Commission Report, n. 81 above, 130, 133 and 136 respectively.

[92] See Commission Report, n. 81 above, 131.

[93] See Commission Report, n. 81 above, 137.

[94] See Commission Report, n. 81 above, 138.

[95] Despite this good conformity in legal formulation, it is the structual elements which have given rise to most of the contentious problems featuring in Community case law.

(Spain) or transfers within the context of a bankruptcy procedure (Germany). The second aspect for which a high degree of harmonisation has been achieved is that relating to the individual facet of the guarantees in the event of a change of employer: continuation of the employment relationship and retention of the terms and conditions of employment agreed, individually or collectively, with the transferor.

In the other matters dealt with by the Directive, the degree of conformity progressively diminishes, becoming most blurred and indistinct, if not impressionistic, in the section on the measures that Member States must adopt to protect rights conferring immediate or prospective entitlement to social benefits under supplementary company or inter-company pension schemes (second subparagraph of Article 3(3)) and the section on rights to information and consultation (Article 6). On this last matter, the Commission's Report supplies data that are both forceful and revealing. Belgium, the Netherlands and Spain make no provision at all for the information and consultation of employees in cases where there is no employee representation. In Spain, the *Estatuto de los Trabajadores* (Workers' Statute) confines itself to establishing an obligation to notify employee representatives of a transfer, without organising a specific consultation regime applicable to situations where there is a change of employer. The French legislation does not extend the obligation to inform and consult employees to the transferee employer. The Portuguese and Irish legal systems also regulate these obligations unsatisfactorily and, as in Germany as well, they are not given express substance but integrated within the general obligation regarding information and consultation in the context of any substantial changes which are to the detriment of employees.

This very roughly sketched panorama of the degree of compliance of national laws with Community obligations in the matter of the transfer of undertakings may be summed up by using a banal topographical allusion: the farther we advance through the text of the Directive, the worse the quality of harmonisation becomes. The greatest degree and highest quality of harmonisation are concentrated in the opening Articles, which are those instituting the basic guarantees, and this tendency gradually declines until it is reversed in the case of Articles 5 and 6, which relate to collective guarantees and procedural matters.

III Commission Monitoring of Member States' Fulfilment of their Community Obligations

In the lengthy list of judgments delivered by the ECJ in connection with Directive 77/187, those resulting from infringement proceedings brought against Member States by the Commission constitute a minority. To date, the Commission has used its power under Article 169 (now Article 226) of the EC Treaty on only three occasions, in the form of actions against Belgium, Italy

and the United Kingdom for failure to fulfil their obligations under Community law on transfers of undertakings.[96] And on all three occasions the ECJ ruled against the Member State in question.

In view of the panorama of national compliance that was outlined above, it seems safe to say that the Commission has, generally speaking, maintained a policy of self-restraint, moderation and even understanding with regard to the deviations and omissions that have been detectable and detected in the transposition of the Directive, or at least with regard to some of them.

Two tendencies are discernible in the Commission's exercise of its function as supervisor of legal integration in the matter of transfers of employment. The first is the greater degree of activism maintained in the early years of the Directive's existence, which gradually declined to give way to a phase of relaxation. The second tendency is the gradation which the Commission seems to apply to infringements, drawing a (vague) dividing line between deadly and venial 'sins' and varying accordingly the stringency with which they are treated. The definition of the scope of the law on succession and its individual guarantees would appear to fall into the first group, while the regime governing collective guarantees belongs, except in cases of manifest incompatibility (as with the United Kingdom), to the second group. A superficial comparison between, on the one hand, the reasons alleged by the Commission for initiating infringement proceedings against Belgium and Italy (the United Kingdom case is different) in connection with Directive 77/187 and, on the other, the faults found with the laws of the then twelve Member States when the Commission's 1992 Report was published[97] demonstrates these two tendencies. If the rigour exhibited at the time in regard to Belgium and Italy had been applied to other countries, the list of Member States that have been the subject of infringement proceedings would certainly be longer.[98] Nevertheless, a number of additional details are necessary to a proper understanding of these tendencies.

To start with, fulfilment of Community obligations does not require absolute conformity expressed in a word-for-word, literal rather than literary

[96] Not counting the reports drawn up by the Commission at the pre-litigation stage of monitoring, some of which prompted legislative change to bring national systems into line. This happened, for example, in the case of France. See A. Jeammaud and M. Le Friant, n. 49 above, 7.

[97] See n. 81 above.

[98] The list would certainly have had to include Spain, whose national provisions do not guarantee, within the meaning of Art. 6 of the Directive, the rights to information and consultation of employee representatives or, in the absence of such representatives, the right to information of the employees affected. This thesis is supported unanimously by legal scholars: González Biedma, *El cambio de titularidad de la empresa en el derecho del trabajo* (Publicaciones del Ministerio de Trabajo y de la Seguridad Social, Madrid, 1989), 210; T. Sala Franco and J.M. Ramírez Martínez, 'L'influenza del diritto comunitario sul diritto del lavoro spagnolo', (1991) 10 *Quaderni di Diritto del Lavoro e delle Relazioni Industriali* 137; E. González-Posada, 'La Direttiva 77/187/CEE e il diritto del lavoro spagnolo', (1992) 1 *Giornale di Diritto del lavoro e di Relazioni Industriali* 75.

transcription by national provisions of the wording of the Directive.[99] What is required is the adoption by Member States, in a clear and sufficient manner, of the guarantees necessary to achieve the *effet utile* sought by Community law. These elementary comments may, perhaps, serve to explain in advance the logic evinced by the Commission in exercising its supervisory function. The gradual decrease in the stringency applied by the Commission in the assessment of conformity over the period during which the Directive has been in force is due neither to mere caprice or arbitrariness nor to any tacit discriminatory treatment of Member States. In my view, it simply reflects fairly accurately the way in which the concept of *effet utile*, in its application as a dynamic parameter for assessing the conformity of national provisions with the Directive on transfers of undertakings, has gradually evolved within the Commission itself. With the passage of time, and as a function of developments in Community law as a whole, the Commission has narrowed down its definition of the guarantees, both substantive and procedural, whose absence is deemed to impede achievement of the Directive's *effet utile*.

It is from the perspective offered by this process of development that the judgments delivered by the ECJ in the infringement proceedings brought by the Commission, and their consequences in terms of harmonisation, are examined.

(a) **Belgium (Case 237/84): A Venial Conviction**

In the first of the judgments delivered by the ECJ in infringement proceedings brought by the Commission, the defendant was the Kingdom of Belgium. In its application the Commission had stated two separate grounds of complaint,[100] namely, failure properly to implement the second subparagraph of Article 3(3) and the second subparagraph of Article 4(1) of Directive 77/187. However, in the light of a supervening domestic legislative reform the Commission withdrew its complaint in relation to Article 3(3), and the proceedings before the ECJ therefore eventually concerned only the categories of employee covered by the Directive.

Article 7 of the national provision excluded from its scope, thereby denying them the right to continuation of their contract of employment, certain categories of employee comprising those undergoing a probationary period, those dismissed on attaining the age of retirement and those bound by a student's employment contract. The Commission maintained that the provision in question contravened the second subparagraph of Article 4(1) of the Directive. The Belgian Government contested the Commission's case on two grounds, one formal and the other substantive. First, it claimed that the Commission had been notified of the exceptions in good time and had not objected. Secondly, it contended that, in so far as the real purpose of the protection provided by the allegedly violated Community rule was to dissuade employers from dismissing

[99] The Irish legislation tends to be defective in this respect. See G. Byrne, n. 88 above, 1.
[100] See n. 85 above.

employees, that purpose was frustrated in relation to the employees excluded by the Belgian legislation. The ECJ rejected both arguments and delivered its first adverse judgment against a Member State for failure to comply with Community law on transfers of undertakings. It was, nevertheless, a minor one.

In response to the argument as to form, the Court stated that the scope of rules of Community law can be derived only from what they themselves state, and never by way of a unilateral declaration of exceptions. And in rejecting the Belgian Government's argument as to substance, the Court stated that on the basis of the wording of the second subparagraph of Article 4(1) it was clear that the Directive applied 'to any situation in which employees affected by a transfer enjoy some, albeit limited, protection against dismissal under national law'. Consequently, under the Directive that protection 'may not be taken away from them or curtailed solely because of the transfer' (paragraph 13). That was precisely the effect produced by Belgian legislation, since the categories of employee it had excluded from the benefit of Article 4(1) were categories on whom it also conferred some protection against dismissal, albeit weak in comparison with that for other employees.

(b) Italy (Case 235/84): A Not So Venial Conviction and an Acquittal for Lack of Evidence

As in France and Germany, in Italy too the entry into force of Directive 77/187 had no impact on national legislation. Like Article L 122-12 of the *Code du Travail* and Paragraph 613a of the *Bürgerliches Gesetzbuch*, Article 2112 of the Italian *Codice Civile* already established (in its first two subparagraphs) substitution of the transferee employer in the contracts of employment concluded by the transferor and the retention of rights acquired by employees before the transfer. The picture of legal coincidence in the systems of these three countries does not, however, extend beyond the initial period of the Directive's existence. Unlike France and Germany, Italy did not adopt any provision introducing partial adjustment of its domestic law to ensure compliance with the system of protection instituted by the Community norm.

It is true that, as the ECJ states, the implementation of a directive does not necessarily require legislative action in each Member State; such action is superfluous if the objectives of harmonisation and exercise of the rights created are satisfied with sufficient clarity and precision under existing national law. However, it is difficult to see how this doctrine could have been predicated of the Italian legislation, whose conformity with Community law on transfers of undertakings would have passed only a very undemanding, if not benevolent, comparative measurement test. Article 2112 of the *Codice Civile* did not guarantee full substitution of the transferee in 'labour debts' (debts from the transferor to employees and former employees, arising from employment), since that substitution was limited to cases where the transferee had knowledge of the debts at the time of the transfer (or, as Italian case law

stated, had '*conoscenza o, quantomeno, conoscibilità*').[101] Nor did it ensure the preservation of the terms and conditions of employment established in the transferor's collective agreement, or the exercise of rights to information and consultation by the representatives of the employees, which was delegated to collective bargaining except in the case of undertakings declared by ministerial order to be 'in crisis'.[102]

These omissions, and others that did not go unremarked by national commentators, were not corrected until twelve years after the Directive's entry into force. Law No 428 of 29 December 1990, promulgated to assist the harmonisation of domestic legislation with Community law, eventually amended the first and second subparagraphs of Article 2112 of the *Codice Civile*, under its Article 47.[103] Four years before this, however, the ECJ had heard the infringement action brought against Italy by the Commission and delivered a two-pronged judgment, upholding one of the Commission's complaints and rejecting the other for lack of evidence.[104]

The complaint that was rejected, on the grounds of the plaintiff's failure to produce sufficient evidence, was the Commission's first complaint to the effect that the Italian legislation did not ensure the protection of rights conferring immediate or prospective entitlement to benefits under supplementary pension schemes.[105] However, the Court upheld the Commission's

[101] Judgment Cass. 7228/86 and 6979/87, M. De Luca *et al*, 'Transferimenti d'azienda e diritti dei lavoratori nell'ordinamento comunitario: inadempieze, adeguamento e prospettive nell'ordinamento italiano', (1991) 5–II *Diritto del Lavoro* 237. This requirement was the subject of differing interpretations by Italian legal opinion. For the terms of the polemic, see S. Liebman, 'Trasferimento di azienda, continuità del rapporto e trattamento applicabile ai lavoratori', (1992) 1 *Diritto delle Relazioni Industriali* 31 *et seq*.

[102] As provided for by Art. 1(1) of Legislative Decree 80/78, which was subsequently converted into Law No. 215 of 26 May 1978.

[103] On the effect of the *novella* of 1990, see A. Maresca, 'Gli obblighi di informazione e consultazione nei trasferimento di azienda', (1992) 1 *Diritto delle Relazioni Industriali* 7–20; S. Liebman, n. 101 above, 21–42; R. Romei, 'Il trasferimento dell'azienda in crisi', (1992) 1 *Diritto delle Relazioni Industriali* 43–52; by the samme author, 'Il rapporto di lavoro nel trasferimento dell orienda', in P. Schlesinger (ed.), Il *codice civile*: commentorio (Giuffié, Milano, 1993); U. Carabelli, 'Alcune Riflessioni della tutela dei lavoratori del transferimento d'azienda: la dimensione individuale' (1995) I *Rivista Italiana di Diritto del Lavoro* 41. See also U. Carabelli and B. Veneziani, 'Il trasferimento di azienda in Italia', in AA.VV., *a trasmisión de empresas en Europa* (Cacucci, Bari, 1999), 103.

[104] M. de Luca, 'Salvaguardia dei diritti dei lavoratori, il caso del trasferimento d'azienda nel diritto comunitario: una "condanna", una'assoluzione per insufficienza di prove ed altri suggerimenti della Corte di Giustizia per l'adeguamento dell "ordinamento italiano" (1989) I *Il foro italiano*.

[105] In the proceedings before the ECJ, the Italian Government had maintained that, although specific legislative measures had not been adopted, established Italian case law regarded such benefits as rights *sorti del rapporto di lavoro*, with the result that they were to be regarded as also transferred to the transferee, thus complying with the provisions of the second subparagraph of Art. 3(3) of Dir. 77/187. On the implications of this case law, see M. Cinelli, 'Trasferimento di azienda, trasformazioni di impresa e previdenza integrativa', (1991) 3–I *Rivista Italiana di Diritto del Lavoro* 272–290.

second complaint regarding rights to information and consultation, holding that their regulation by collective agreement did not ensure general and unconditional fulfilment of the obligations arising from Article 6 of the Directive. In fact, on this point the ECJ merely reiterated the doctrine whereby the transposition of a directive by way of collective bargaining does not discharge a Member State from the obligation of ensuring that all employees are afforded the full protection provided for in that directive: 'The State guarantee must cover all cases where effective protection is not ensured by other means' (paragraph 20).[106]

(c) United Kingdom (case C–382/92): A Judgment Comprising Several Serious Convictions, Some Retrospective, and an Acquittal for Lack of Evidence

In the course of this study, mention has been made on a number of occasions of the difficult process of harmonising UK law with Community law on transfers of undertakings. In addition to being late, transposition into domestic law by way of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (the '1981 Regulations') was unsatisfactory with regard to almost the whole of the system of protection instituted by Directive 77/187, incorporating deviations in such fundamental respects as the definition of the cause of transfer, the functioning of the substitution mechanism, the effective exercise of rights to information and consultation by the representatives of the employees and, lastly, the deterrent effect of the penalties provided for in the event of violation of collective rights.

Although the UK legislature was slow to respond in the fulfilment of its Community obligations, the Commission was equally slow to react. It was not until 1989 that the Commission issued the reasoned opinion that was subsequently to give rise to the infringement proceedings on which the ECJ ruled in its judgment of 8 June 1994. During the interval that elapsed between this reasoned opinion and the judgment, the UK Government introduced an initial amendment of the 1981 Regulations.[107] After the hostile ruling of 1994 a further reform was introduced.[108]

Comparison of the grounds for the ECJ's hostile judgment and the legislative changes introduced before and after that judgment would suggest, at least at first sight, that the problems involved in the harmonisation of UK legislation with Community law on transfers of undertakings have been resolved. To paraphrase an eminent French jurist, it might be said that the United Kingdom

[106] This criterion had already been applied in an earlier ECJ judgment of 30 Jan. 1985 (Case 143/83 *Commission* v. *Denmark* [1985] ECR 427).

[107] Trade Union Reform and Employment Rights Act 1993 (TURERA), sections 33, 340.

[108] This was done by way of the Collective Redundancies and Transfer Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI 1995 No. 2587, in force from 26 Oct. 1995 although with a *vacatio legis* until 1 Mar. 1996 as regards consultation agreements in the event of transfer (and collective dismissals).

ceased to be an unmanageable rebel and became a model pupil. That would, however, be a somewhat hasty assessment. The reality of the situation distances UK law from both extremes and places it in an intermediate and more nuanced stage in which cooperation is interspersed with recalcitrance.

In its application initiating infringement proceedings, the Commission had cited five complaints against the 1981 Regulations, all of them structural and indicative of fundamental incompatibility between the domestic and Community legal regimes.[109] These complaints were as follows: two-fold limitation of the definition of the cause of transfer, in that it applied only in cases involving the transfer of ownership of the undertaking, whose activity had to have, in addition, 'the nature of a commercial venture'; ineffectiveness of the rights to information and consultation for the legal representatives of the employees, whose exercise was conditional on the employer's prior and arbitrary recognition of their designation as representatives; failure to establish an obligation to consult employees specifically with a view to seeking agreement; and, last, absence of really dissuasive penalties in the event of the employer's failure to comply with the guarantees of information and consultation.

Of this lengthy list of complaints submitted by the Commission, the ECJ rejected, for lack of evidence, that relating to restriction of the scope of the substitution mechanism exclusively to transfers of ownership,[110] and upheld the other four complaints. The legislative reform carried out in 1993 had already introduced changes in the legislative treatment of the questions constituting the grounds for this adverse ruling. First, section 33 of TURERA 1993 repealed the last sentence of regulation 2(1) of the 1981 TUPE Regulations that had expressly excluded undertakings which were not of a commercial nature. This brought the national provisions into line with Community case law[111] by making it clear that the substitution mechanism operated irrespective of the profit-making or non-profit-making nature of the undertaking, business or part of a business being transferred. The reform had also amended the system of penalties for employers who fail to inform or consult employee representatives and, in addition, had brought the obligation to inform or consult into line with Article 6(2) of the Directive by adding the specific objective that it was to be 'with a view to seeking their agreement to measures to be taken'. As a result, the ECJ's judgment against the United Kingdom related to national legislation which had for the most part already been repealed.

[109] G. Lyon-Caen, n.15 above, 686.

[110] In support of its complaint, the Commission had alleged that case law in the United Kingdom restricted the scope of the substitution mechanism to situations involving a transfer of ownership. The ECJ, however, held that the judicial decisions referred to predated the House of Lords decision in *Litster* v. *Forth Dry Dock and Engineering Co. Ltd.*, n. 79 above, which held that the 1981 Regulations must be applied in accordance with the wording and objectives of the Directive and with the ECJ's interpretation thereof (para. 37).

[111] Contained, in particular, in *Redmond Stichting*, n.9 above. The doctrine is also repeated in *Henke*, n.9 above.

It is not possible here to enter into a discussion on whether the legislative changes introduced by TURERA succeeded in satisfying the Community objectives or aborted them as a result of hasty recourse to a cosmetic regulatory operation; the latter hypothesis seems the most plausible to eminent legal opinion.[112] Nor is it the time or the place to debate whether the subsequent 1995 reform nullified or, more simply, moderated the currency of the 'voluntary, competitive, free and (ultimately) unitary'[113] system of representation which was envisaged by Mrs Thatcher's Conservative Governments and which changed the essential content of the right to organise in trade unions, making it 'no more than a right to associate together, not a right to do anything at all in association'.[114] Suffice it to record the view expressed by one of the prominent commentators on that reform, who unhesitatingly described it as a 'minimalist response to the ECJ's judgment' accompanying other anti-union and deregulation measures 'to sugar the pill'.[115] The recent amendment of the Directive[116] offers a fresh opportunity to assess the direction followed by the dialogue between the United Kingdom and Community provisions. Perhaps the question posed by G. Lyon-Caen (namely whether the United Kingdom is an undisciplined pupil or an unreformable rebel)[117] can then be answered once and for all.

[112] Lord Wedderburn, n.21 above, 693.

[113] Lord Wedderburn, n.21 above, 696.

[114] Lord Wedderburn, *Los derechos laborales en Gran Bretaña e en Europa* (Publicaciones del Ministerio de Trabajo y de la Seguridad Social, Madrid, 1994), 309, originally published as *Employment Rights in Britain and Europe* (Lawrence & Wishart, 1991). Some of the essays collected in the latter have also been published in Italian—Lord Wedderburn, *I diritti del lavoro*, edited by S. Sciarra, (Giuffrè, Milan, 1998).

[115] M. Hall, 'Beyond recognition? Employee representation and EU law', (1997) 25 *ILJ* 17.

[116] See n.6 above.

[117] See n.15 above.

PART IV JUDICIAL DEVELOPMENTS OF EC SOCIAL POLICY AND INTRA-COMMUNITY INSTITUTIONAL DIALOGUES: HOW TO DEFINE A 'LEGAL TRANSFER'

ANTONIO LO FARO

A. Inter-Community and Intra-Community Dialogues

A significant number of the legal and political science discourses currently conducted on the subject of European integration tend to acknowledge the role the ECJ has played in the evolutionary interpretation of Community law.[1] In the representation of the individual stages through which this journey has been developed, the ECJ is usually coupled with some other interlocutor: either the Member States,[2] and perhaps some particularly influential Member State, as in the case of neo-realist analyses,[3] or, alternatively, the national courts, and perhaps some particular national court prompted to interact with the ECJ by specific circumstances[4] or self-interest,[5] as in the context of the growing 'judicial dialogue' literature.[6]

Although these different analyses compete between themselves in portraying what each of them declares to be a correct understanding of the European Court's integrationist role, they all unquestionably share a common assumption: whatever the political rationales and legal procedures involved, the ECJ interlocutors focused by these analyses are located *outside* the borders of the Community 'institutional geography'. Both of the ECJ interlocutors mentioned above are non-Community actors, whose reactions give rise to an *inter-Community* institutional play, that is, to a dialogue taking place between a Community body (the ECJ) and non-Community entities (either the Member State governments or the national courts).

This inter-Community dialogue is certainly a valid perspective from which to observe the development of EC labour law in the courts. However, it is not the only institutional play in which the ECJ is involved which concerns the

[1] For a wide collection of essays on these issues, see P. Craig and C. Harlow (eds.) *Lawmaking in the European Union* (Kluwer Law International, London, 1998), particularly at Part III.

[2] M. Pollack, 'Delegation, Agency and Agenda Setting in the European Community', (1997) 51 *IO* 99.

[3] G. Garret, 'The Politics of Legal Integration in the European Union', (1995) 49 *IO* 171.

[4] J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', (1996) 19 *WEP* 360.

[5] K. Alter, 'The European Court's Political Power', (1996) 19 *WEP* 458.

[6] A.M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.) *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context,* (Hart Publishing, Oxford, 1998).

interpretative evolution of EC labour law. The aim of this Part is to draw attention to a different institutional play which can be labelled *intra-Community* in so far as it takes place between bodies which all fall *within* the borders of the Community institutional structure, and in particular between the European Court and the Commission.

B. The *Unitas Multiplex* of the Community System and the Interactions between its Institutional Elements

The 40-year long debate about the effects of European integration upon the State is still far from over. However, one partial outcome seems quite widely recognised: the disintegration of the State as a consequence of European integration and the replacement of the unitary concept of the 'State'—as deriving from the international relations heritage—by its representation as a 'constellation of institutions'.[7]

A conceptual deconstruction of this kind has not always been fully applied to the European Community, which is sometimes still considered as a unitary policy-making actor, able to pursue and bring about rationally chosen policy outcomes. In fact—in the social field as well as in other substantive areas of Community law—an analysis of some EC legislative evolutions seems to disprove such a unitary and behavioural account of the Community. The image of a plurality of national institutional actors confronted with the monolithic singleness of 'the Community' as a unitary and rational policy-maker does not correspond to a reality which is made up of 'institutional interactions in the policy formation process at the EU level'.[8] In such a fragmented scenario, indeed, a *unitas multiplex* representation of Community governance would probably fit better with the features of its internal policy-making processes.

Several institutionalist-oriented analyses of European governance[9] suggest that the ECJ takes part fully in these institutional interactions,[10] stressing that 'in certain circumstances [the Court] plays a policy role comparable to that

[7] R. Dehousse, *Intégration où désintégration? Cinq thèses sur l'incidence de l'intégration européenne sur les structures étatiques,* EUI Working Paper RSC No 96/4, 2. The 'model of a disaggregated state', is highlighted also by W. Mattli and A.M. Slaughter, 'Revisiting the European Court of Justice', (1998) 52 *IO* 177 at 204.

[8] T. Hervey, 'Sex Equality in Social Protection: New Institutionalist Perspectives on Allocation of Competence', (1998) 4 *ELJ* 196 at 201. See also L. Cram, *Policy-making in the EU* (Routledge, London, 1997), in particular chap. 6, entitled 'The Institutional Dimension of EU Policy-making: Breaking Down the Monolith'.

[9] K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (MUP, Manchester, 1998).

[10] D. Wincott, 'The Court of Justice and the European Policy Process', in J. Richardson (ed.) *European Union: Power and Policy Making* (Routledge, London, 1996).

played by other EU institutions'.[11] Historical institutionalism,[12] in particular, has been evoked as a methodological tool able to explain the sometimes inexplicable course of dynamics governing policy development at European level. To the extent that historical institutionalism tends to view all the EC-level institutions[13] as actors in a single institutional play, it 'helps to forge a link between jurisprudence of the European Court and the legislative process',[14] thus allowing a fuller comprehension of EC policy developments and, ultimately, a better understanding of 'why decisions were made in the way they were'.[15]

The multi-faceted process leading to the adoption of the new Transfers Directive (also known as the Acquired Rights Directive) is no exception. Its history provides a clear example of how a European social policy outcome has been achieved through a complex intra-Community process, encompassing both the Court and the political institutions of the European Community, each of them acting according to its own 'narratives of integration [and] path dependencies which provide the context for future action',[16] and each of them mutually and successively influencing the other. Within this perspective, therefore, the assumption that '[t]he development of the Court merits to be highlighted more in relation to the member states than to the other institutions'[17] will be openly questioned. On the contrary, it is precisely consideration of the interrelations between the Court and the other EC-level institutions which enables us to throw some light on the compounded dynamics which led to the rewriting of one of the most debated pieces of EC social legislation: the 1977 Directive on transfers of undertakings, businesses or parts of businesses, as now amended by Directive 98/50/EC of 29 June 1998.

[11] G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *JCMS* 217 at 218.

[12] On the internal nuances of the new institutionalist school of thought, see V. Lowndes, 'Varieties of New Institutionalism: A Critical Appraisal', (1996) 74 *PA* 181. For an historical institutionalist approach to the European integration process, see P. Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis', (1996) 29 *CPS* 123.

[13] But fundamentally, the ECJ and the Commission more than the Parliament. The new institutionalist approach to EU legal studies is carefully examined by K. Armstrong, 'New Institutionalism and European Union Legal Studies' in Craig and Harlow (eds.), above n. 1.

[14] S. Bulmer, 'New Institutionalism and the Governance of the Single European Market' (1998) 5 *JEPP* 365 at 373.

[15] K. Armstrong, 'Regulating the Free Movement of Goods: Institutions and Institutional Change' in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995) at 170.

[16] K. Armstrong, above n. 13, at 102–3.

[17] D. Nickel, *Amsterdam and European Institutional Balance. A Panel Discussion* (Harvard Law School, Jean Monnet Chair Working Papers No 14/98, Cambridge, Mass, 1998).

C. The Beginning (or What the 1977 Directive Did Not Seem to Mean)

When Directive 77/187/EEC was first enacted, the principle of safeguarding employment contracts and the rights arising from them in the event of a change of employer were not entirely new to the legal systems of some Member States. Although this was certainly not the case for the UK[18] or Denmark;[19] to a certain extent there seemed to be a presumption of 'pre-established harmonisation'[20] in the case of the legal communities of France, Germany[21] and Italy, at least as far as the individual dimension of the Directive was concerned.[22]

Twenty years of an intense judicial dialogue between national courts and the ECJ reveal that—along with the national systems in which the 'continuation of employment' principle was not recognised—even those systems allegedly (pre)complying with the basic provisions of the Directive were deeply perturbed by it.[23] Contrary to what might have been argued, it was precisely from France and Germany—two of the apparently pre-conformed national systems—that the strongest reactions against *une certaine idée* of the Directive as propounded by the ECJ over the years came.

This situation has been carefully analysed by other contributions prepared within the 'European Labour Law in National Courts' working group.[24] It is mentioned here solely in order to back up an initial working hypothesis: that

[18] In the UK, the prior legislation 'had always been based on the principle of freedom of contract and in particular the freedom to choose one's contracting party': P. Davies, *The Relationship between the European Court of Justice and the British Courts over the Interpretation of Directive 77/187/EEC,* mimeo, paper written for the 'EC Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, 1998) On the significance of the 1977 Dir. upon the British tradition of the common law of contracts, see also G. More, 'The Acquired Rights Directive: Frustrating or Facilitating Labour Market Flexibility?' in J. Shaw and G. More (eds.) *New Legal Dynamics of European Union* (Oxford, Clarendon Press, 1995).

[19] This is not to say that Danish workers were completely deprived of any protection before the Dir. was implemented. Some of the basic principles asserted by it were already recognised in Denmark by means of collective agreements. On the Danish case, see H. Sundberg, *The Transfers Dialogue in Denmark,* mimeo, paper written for the 'EC Labour Law in National Courts' project directed by Prof. Silvana Sciarra (European University Institute, Florence, 1998), and 'Danish Industrial Relations, Community Litigation and the Acquired Rights Directive', (1999) 15 *IJCLLIR* 269.

[20] A. Jeammaud and M. Le Friant, *La directive 77/187/CEE, la Cour de Justice et le droit française*, EUI Working Paper Law No 97/3 at 6.

[21] On the German case, see M. Körner, *The Impact of Community Law on German Labour Law The Example of Transfers of Undertakings*, EUI Working Paper Law No. 96/8.

[22] The 1977 Dir. contains also a collective side, providing rights to information and consultation for workers' representatives in the event of a transfer.

[23] See F. Valdés Dal-Ré, above Part III especially at D.

[24] See S. Laulom, above Part II.

the 1977 Directive soon—and perhaps unexpectedly—came to mean for the national systems or, better, for European business, more than it was presumed to mean when it was formally adopted. This tardy recognition of the 1977 Directive's significance has been essentially due to two supervening circumstances, each acting on different, yet interconnected, spheres.

On the one hand, the economic context within which the Directive was formulated has been radically altered by the growing spread of new ways of conceiving the organisational structures of both private companies and public services. At the time the Directive was adopted, contracting out was not on the agenda of European business, at least not to the extent it was to assume later. In addition, CCT[25]—to mention just one of the developments most widely discussed within the political, legislative and academic debate—was not such a familiar acronym for UK lawyers (and employers).

On the other hand, trying to 'evade' the restrictions imposed by the Directive on the classical forms of business restructuring—such as selling, dividing, leasing or merging undertakings—by massively contracting out services formerly run in-house, proved to be a rather unsafe way out for European business. What European employers had to take note of in pursuing their 'vertical disintegration' strategies[26] was, in fact, less the nature of the different duties imposed by the Directive than its material scope. At the very time when both private companies and public authorities began to engage in contracting out practices—either in the quest for flexibility,[27] or as a result of specific government policies[28]—the European Court began to extend the Directive's scope *along precisely the same lines that European business was following*.

[25] Compulsory competitive tendering was first introduced by the Local Government Planning and Land Act in 1980, as one of the most significant achievements of the newly elected Conservative government. CCT legislation was afterwards extended to other public administrations through a series of Local Government Acts and secondary legislation. On the legislative evolution of CCT in the UK, see J. McMullen, *Business Transfers and Employee Rights* (Butterworths, London, 1998), at chap. 5.

[26] H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration for Employment Protection Laws', (1990) 10 *OJLS* 353.

[27] See G. More, above n. 18 who analyses this issue; S. Hardy and N. Adnett, 'Entrepreneurial Freedom versus Employee Rights': The Acquired Rights Directive and EU Social Policy Post-Amsterdam', (1999) 9 *JESP* 127.

[28] M. Freedland, 'Government by Contract and by Public Law', (1994) *Public Law* 86. For a review of British government policy on the privatisation of public services, see R. Carnaghan and B. Bracewell-Milnes, *Testing the Market: Competitive Tendering for Government Services in Britain and Abroad* (Institute of Economic Affairs, London, 1993). With specific regard to the impact of transfer regs. on compulsory competitive tendering in the UK, see B Napier, *CCT, Market Testing and Employment Rights The Effects of TUPE and the Acquired Rights Directive* (Institute of Employment Rights, London, 1993); J. McMullen, 'Contracting Out and Marketing Testing—The Uncertainty Ends?', (1994) 23 *ILJ* 230; and, for an economic analysis of the subject, N. Adnett, 'The Acquired Rights Directive and Compulsory Competitive Tendering in the UK: An Economic Perspective', (1998) 6 *EJLE* 69.

It was in the wake of this dual evolutionary process that the compromise between employment protection and employment flexibility—initially set by the Directive without any possible reference to contracting out—was increasingly called into question. Whilst at the time of its adoption the Transfers Directive was probably not perceived as all that controversial a piece of legislation, the judicial broadening of its scope radically transformed the general perception of it, making the interpretation of its Article 1 a kind of arena in which different representations of European social policy have been deployed in order to compete between themselves.

The clash of these alternative visions—for many years disguised under the smooth wording of Article 177 (now Article 234) preliminary rulings—erupted quite loudly when the Directive's amendment appeared on the agenda. The conflicting institutional interactions preceding the adoption of the new Directive reflects very clearly the policy significance that the transfers *affaire* has progressively acquired over the years.

The succession of the institutional events determining the final text of the new Directive will be spelled out in detail in the following sections. For the time being, a dual assumption seems worthy of mention in the context of an investigation directed at elucidating the evolutionary dynamics of European social policy: first, that within the Community system (social) policy developments are not entirely a matter of purely politically driven choices[29]; secondly, that focusing on an 'EC labour law in the courts' perspective does not entail confirming the analysis of social policy to an exclusively judicial dimension. Neither of the two perspectives, indeed,—neither the purely political, nor the purely judicial—grasps the reality of EC social policy-making. On the contrary, the history of the new Transfers Directive authenticates the thesis that the ECJ is part of an institutional play whose other actors are not always of a judicial nature. Within the process of the 1977 Directive's redefinition, the ECJ certainly 'dialogued' with the Member States', national courts. However, both the Commission and the European Parliament also interacted with the Luxembourg Court, influencing and at the same time being influenced by the ECJ jurisprudence. This is perhaps something that semantic theorists would have some difficulties in defining as 'dialogue' proper; but it is certainly possible to ascribe to these actors a sort of mutual awareness of each other's possible reactions, and a consequent adjustment of their respective strategies.

D. The Transition (or What a New Directive was Supposed to Mean)

Seldom—and probably never—has any Community Directive been so explicitly 'deferential' to the ECJ's authority. In the Preamble to Directive 98/50/EC, the 'in the light of the case-law of the Court of Justice' formula recurs four times; and even before the new Directive was adopted, the Commission

[29] S. Bulmer, above n. 14.

published a *Memorandum on Acquired Rights of Workers in Cases of Transfers of Undertakings* largely based on the ECJ's interpretative attitudes.[30]

This situation could lead one to jump to wrong conclusions. In fact, the relationship between the Court and the Commission in the amending phase of the Transfers Directive was far from idyllic. On the contrary, what the European Commission tried to achieve following its first 1994 proposal[31] was a kind of defusing of a corpus of ECJ judgments regarded as highly explosive.

Just to refer to other earlier dialectical exchanges between the two, the Commission's position with respect to the ECJ jurisprudence on transfers—and in particular to its 1994 *Schmidt* decision—can be read against the background offered by some previous similar experiences, notably the *Kalanke* and *Cassis de Dijon* cases. In both of these, a seminal ECJ jurisprudence was promptly followed by a Commission soft-law reaction, in the form of a Communication. In the latter episode,[32] the Commission's intervention was on the same wavelength as the prior ECJ ruling[33] in that it fully endorsed the principle of mutual recognition forged by the Court. With regard to the *Kalanke* judgment,[34] on the contrary, the Commission clearly kept its distance from the ECJ, 'interpreting' the Court's ruling in a way which the Commission itself considered to be more consistent with its own policy on affirmative action.[35]

Coming back to the transfers issue, the Commission's 1994 proposal[36] following *Schmidt* resembled its 'disputing' follow-up to *Kalanke*, rather than the 'validating' intervention it promptly attached to *Cassis de Dijon*, since the orientation of the proposal was not exactly congruous with that of the recently delivered *Schmidt* judgment. Moreover, the parallelism between the Commission/Court intercourse in the *Kalanke* affair and the Commission/

[30] COM(97)85 final, 4 Mar. 1997 The document's full title is *Memorandum on Acquired Rights of Workers in Cases of Transfers of Undertakings Guidelines on the Application of Council Directive 77/187/EEC of 14 February 1977 based on the Case Law of the Court of Justice of the European Communities*.

[31] COM(94)300, 9 Sept. 1994.

[32] Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[33] *Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')*, [1980] OJ C256/2.

[34] Case C-450/93 *Kalanke* v. *Freie Hansestadt Bremen* [1995] ECR I–3051.

[35] *Communication on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C–450/93, Kalanke* v. *Freie Hansestadt Bremen*, COM(96)88 final, 27 Mar. 1996. According to some authors, the conflict between the Court and the other Community institutions over the *Kalanke* case lasted until the drafting of the new Treaty: 'Article 141(4) [may be viewed as a] provision designed to reverse [the] decision of the Court': see A. Arnull, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice' in D. O'Keeffe and P. Twomey (eds.) *Legal Issues of the Amsterdam Treaty* (Hart Publishing, Oxford, 1999) 110.

[36] See below F.

Court intercourse throughout the transfers saga,[37] could be continued further. In like manner to what happened in the post-*Kalanke* developments, indeed, the signals coming from Brussels did not fall on deaf ears in Luxembourg.

The chronological course of the institutional events succeeding each other along the path of the Directive's amendment could be considered sufficiently eloquent in this respect.

As is well known, the extensive interpretation of the 1977 Directive's scope reached its acme with the *Schmidt* case.[38] On that occasion, the notion of 'legal transfer' was interpreted by the Court of Justice as including the transfer of a mere activity not accompanied by any tangible assets: 'when an undertaking entrusts by contract the responsibility for operating one of its services . . . that operation may come within the scope of the directive'. Finally, after almost a decade of interpretative developments,[39] contracting-out seemed definitively brought within the Directive's scope.

The *Schmidt* judgment was delivered on 14 April 1994. It could hardly be considered a pure chance that the Commission's proposal followed on the heels of the Court's ruling on 8 September 1994. The extremely critical reactions aroused by the judgment were probably not that extraneous to the promptitude of the Commission's 'reparative gesture' and, above all, the choice of its substantive orientation.

As just mentioned, the Commission's proposal overtly disputed the Court's understanding of a 'legal transfer'. Having paid the ritual tribute to the Court's authority—by resorting in the Preamble to the usual 'in-the-light-of-the-case-law-of-the-Court-of-Justice' formula—the European Commission launched its proposal in exactly the opposite direction. The 1994 proposal attempted to positivise a distinction between transfers of undertakings or parts of undertakings (characterised by the transfer of some structural assets) and transfers of an activity alone (not accompanied by the transfer of any tangible assets). In the Commission's view, the latter hypothesis—covering a major part of contracting out, as this practice mostly affects services not requiring structural assets—should be excluded from the scope of the Directive. There could hardly have been a Commission proposal less consistent with what the Court had been explicitly stating only some months before.

[37] P.H. Antonmattéi, 'La saga de la directive n. 77/187 du 14 février 1977: l'épisode d'un reflux', (1997) *Droit Social* 728.

[38] Case C–392/92 *Schmidt* v. *Spar- und Leihkasse der früheren Ämter Bordersholm, Kiel und Cronshagen* [1994] ECR I–1311. For comments on the Court's judgment see J. McMullen, above n. 303; O. Pochet, 'CJCE: l'apport de l'arrêt Schmidt à la définition du transfert d'une entité économique', (1994) *Droit Social* 931; P. Lambertucci, 'La configurazione dell'azienda nel diritto comunitario e nel diritto interno, ai fini del suo trasferimento', [1997] *Argomenti di Diritto del Lavoro* 127; and Pelissero, 'L'entità economica come oggetto del trasferimento d'azienda: sviluppi recenti della giurisprudenza comunitaria e possibili riflessi sugli orientamenti nazionali', (1998) *Diritto delle Relazioni Industriali* 63.

[39] Starting in 1986 with the *Spjikers* case (Case *J.M.A. Spijkers* v. *Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV* [1986] ECR 1119.

As indicated earlier, the intra-Community institutional dialogue stirred up by the European Court—acting in this circumstance as an EC agenda-setter—soon involved other participants, the Economic and Social Committee and the European Parliament among them.

At the time the ECOSOC position was stated,[40] the belief that the Commission's proposal would have marked 'a step backwards, since it would have once again brought into question issues which seemed already resolved'[41] was quite widely shared. The Economic and Social Committee was therefore not alone in maintaining that 'in contrast with its declared aims (safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of businesses), the proposal undermines employees' rights in this respect'.[42] The ECOSOC's position, therefore, essentially adhered to that of the ECJ as far as the main vexed question—the material scope of the Directive—was concerned. However, its *Opinion* still merits particular attention, to the extent that it dwelt on a specific aspect of transfers regulation usually omitted in the 'main' Court/Commission institutional interplay. Along the same lines as what had been revealed in some Member States' internal debate,[43] the Economic and Social Committee's *Opinion* was at pains to denounce the potential indirectly discriminatory effects that the Commission proposal could have had for working women. Quoting some OECD labour force statistics, the Committee warned that most contracted-out services are usually performed by women and that, consequently, excluding contracting-out from the Directive's protection would have been likely to provoke a disproportionate negative effect on these workers. To use the ECOSOC wording, '[i]f the proposed text is adopted by the Council, then many women will find themselves deprived of rights that are otherwise more generally available to men at work'.[44]

Nor was the Commission proposal welcomed by the European Parliament. In a Resolution published on 18 January 1996,[45] the Parliament rejected the undertaking/activity distinction advocated by the Commission's proposal as something which 'may not be self-evidently clear in practice'. If any further confirmation were needed, the Parliament Resolution strengthens the conviction that what was basically at stake in the debated amendment process—and

[40] *Opinion of the Economic and Social Committee on the Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,* 29 Mar. 1995 [1995] OJC 133 13.

[41] Ibid., Point 2.3.6.

[42] Ibid., Point 2.3.7.

[43] For the UK, see references in S. Hardy and R. Painter, 'Revising the Acquired Rights Directive', (1996) 25 *ILJ* 160, and G. More, above n. 18.

[44] Point 1.3 of the ECOSOC Opinion, above n. 40.

[45] *Resolution on the proposal for a Council Directive on the approximation of the Laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses* (COM(94)0300) 18 Jan. 1996 [1996] OJ C32.

perhaps the only point that was really debated—was the material scope of the Directive. The Parliament's dissent on this point was therefore sufficient to allow it to invite the Commission to modify its proposal, since 'this major weak point could imply that other, valuable provisions in the proposal would be lost'.

It seems from the chronicle[46] sketched above that the ECJ found many allies in its 'struggle' against the Commission for the interpretation of Article 1 of Directive 77/187/EEC. It might therefore have been expected that—after such solidarity shown by the two European assemblies—the Court would have resolutely continued along the path traced by *Schmidt*. Quite to the contrary, and bewildering (if not disappointing) some commentators, it took a rather different path: one that was 'turbulent' according to some[47]; and 'somewhat ambiguous' according to others.[48] In its first two post-*Schmidt* judgments—interspersed between the ECOSOC *Opinion* and the EP *Resolution*—the ECJ first departed from,[49] and then reverted to,[50] its own *Schmidt* jurisprudence. Finally, in a third judgment[51]—delivered three weeks after the Commission withdrew its first proposal by submitting another and definitely more ambiguous one[52]—the ECJ pronounced what is still its last word on the contracting out question.

However, 'last' word is intended only in a chronological sense, since from the point of view of legal certainty no 'final' word has yet been fixed. On the contrary, the *Süzen* judgment gave vent to new doubts and uncertainties, although the criticisms raised by the judgment do not seem to be universally shared.

What is utterly regrettable—and clearly inconsistent with the repeatedly proclaimed interests of legal security and transparency repeatedly proclaimed—is that after such a lengthy process, no clear answer has yet been provided to the contracting-out question.[53] This certainly did not help

[46] In the institutionalist jargon this kind of analysis is usually referred to as the study of the 'day-to-day dynamics of policy making'. See K. Armstrong, above n. 15, 101; L. Cram, above n. 283 1; J. Hunt, 'Interdisciplinary Approaches to EU Decision-making: Law, Politics and the Multi-levelled "governance regime" ' (University of Leeds, Centre for the Study of Law in Europe, Working Paper n. 4/99, www.leeds.ac.uk/law/csle/wp4-99.htm).

[47] See S. Laulom, above Part II, this Chap.

[48] P. Davies, 'Opting out of Transfers', (1996) 25 *ILJ* 247.

[49] Case C–48/94 *Ledernes Hovedorganisation, on behalf of O Rygaard* v. *Dansk Arbejdsgiverforeningen, on behalf of Strø Mølle Akustik A/S* [1995] ECR I–2745.

[50] Joined Cases C–171 and C–172/94 *Merckx and Neuhuys* v. *Ford Motor Company Belgium SA*, [1996] ECR I–1253.

[51] Case C–13/95 *Süzen* v. *Zehnacker Gebäudereinigung GmbH Krankenhausservice,* [1997] ECR I–1259.

[52] The Commission's second proposal (COM(97)60 final, 24 Feb.1997), on the basis of which Dir. 98/50/EC was finally adopted, was published in [1997] OJC 124 48.

[53] According to P. Davies, 'The fact that the Court is not bound by its previous decisions should not mean that it does not take care about the consistency of its reasoning or about the ability of those affected by Community law to work out their legal rights and obligations': see P. Davies, 'Taken to the Cleaners? Contracting Out of Services Yet Again', (1997) 26 *ILJ* 193 at 194.

the Commission in drafting a more clear-cut text for the new Directive (see below), even though, according to some authors, there has been a discernible sort of silent agreement between the Court and the Commission, in so far as 'the principle now established by the *Süzen* judgment is equivalent to the amendment to the Directive which was proposed by the European Commission:[54] . . . The amendment was never adopted but this European Court decision achieves the same result'.[55] In fact, the alleged absolute identification between the 1994 Commission proposal and the *Süzen* decision is far from true, since it is doubtful whether the wording of the original proposal ('[t]he transfer of only an activity of an undertaking . . . does not in itself constitute a transfer within the meaning of the Directive') could have been considered entirely consistent with the Court's interpretation of an 'economic entity' in the labour-intensive sectors ('[i]n certain sectors in which the business is based essentially on the workforce, an economic entity is able to function without any significant tangible or intangible assets'). What is consistent with *Süzen* is the new 1998 Directive, not the original 1994 proposal.

E. The Conclusion? (or the 1998 Directive's Reticences)

I The New Directive: Not Just a Matter of Definitions

The definition of scope is not all the new Directive is about; it would be wrong, actually, to argue from the survey given in the preceding pages that the new Directive's only intervention concerns the definition of a 'legal transfer'. In fact, Directive 98/50/EC brought in several significant innovations to the prior rules on transfers, most of them related to previous jurisprudential interpretations of Directive 77/187/EEC.

This is the kind of 'precedent' lying behind the new rule whereby the Directive applies to public and private undertakings, even in cases where they do not operate for gain.[56] Or to the other new rule according to which it does not apply to transfers of undertakings subject to insolvency proceedings having the purpose of liquidation under the supervision of a competent public authority.[57] After the adoption of the new text, the ECJ refined its argument

[54] The reference is to the first, (1994) Commission proposal.

[55] V. Shrubsall, 'Competitive Tendering, Out-sourcing and the Acquired Rights Directive', (1998) 61 *MLR* 85 at 86. Following the same logic, it is argued that 'in the final analysis, the case law of the Court in *Rygaard* and *Süzen* is much in line with the opinion of the Commission expressed in the Proposal for a Council Directive': see C. De Groot, 'The Council Directive on the Safeguarding of Employees' Rights in the Event of Transfer of Undertakings: An Overview of Recent Case Law', (1998) 35 *CMLRev* 707 at 719.

[56] As the Court stated in Case C–29/91 *Dr Sophie Redmond Stichting* v. *Hendrikus Bartol* [1992] ECR I–5755.

[57] As the Court stated in Case 135/83 *Abels* v. *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469.

on the applicability of the Directive in case of liquidation by stating that the Directive is applicable in case of voluntary liquidation.[58]

Moreover, a jurisprudential precedent is also to be found behind the new Article 4a(3), in the light of which the possibility of negotiating derogations from the Directive in the event of an insolvency procedure, with a view to ensuring the survival of the undertaking, is extended to situations of 'serious economic crisis' as defined by national law.[59] And it is another ECJ judgment[60] which has inspired the last sentence of Article 1(1)(b) of Directive 98/50/EC, specifying that the transfer of an economic entity which retains its identity[61] falls within the meaning of the Directive, whether or not the activity transferred is central or ancillary. Finally, excluding from the meaning of the Directive both administrative reorganisations of public authorities and transfers of administrative functions between public authorities—as the new Article 1(1)(c) does—is, again, the positivisation of a principle affirmed by the Court at the very time when the new Directive was being drafted.[62]

Other innovations do not arise from previous ECJ interpretations of the original Directive. One such concerns the possibility for Member States to impose upon the transferor a duty to notify the transferee of all the rights and obligations involved in the transfer. However, failure to fulfil this duty—which affects rights and obligations which the transferor knows or should have known at the moment of the transfer—does not prejudice the rights of employees against the transferee in respect of the right or obligations which should have been notified (Article 3(2)). Still within the sphere of information and consultation, the new Directive provides that these obligations shall apply whether the decision to transfer is taken by the employer or by a controlling undertaking (Article 6(4)). Another new proviso regards the explicit exclusion – unless national law provides otherwise—of supplementary pension scheme

[58] According to the ECJ, 'The directive applies where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out': Case C–399/96 *Europièces SA* v. *Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I–6965.

[59] The ECJ judgment lying behind this new rule is to be found in Case C–362/89 *D'Urso and Others* v. *Ercole Marelli Elettromeccanica Generale* [1991] ECR I–4105; and in Case C–472/93 *Spano and Others* v. *FIAT Geotech SpA and FIAT Hitachi Excavators SpA,* [1995] ECR I–4321. The two cases, originating from the Italian national legislation, are analysed by V. Leccese, *Italian Courts, the ECJ and Transfers of Undertakings: A Multi-Speed Dialogue?,* mimeo. paper written for the 'EC Labour Law in National Courts' project directed by Prof. Silvana Sciarra (EUI, Florence, 1998), and 'Italian Courts, the ECJ and Transfers of Undertakings: A Multi-Speed Dialogue?', (1999) *5 ELJ* 311.

[60] Case C–209/91 *Anne Watson Rask and Kirsten Christensen* v. *ISS Kantineservice As,* [1992] ECR I–5755.

[61] This being the positive definition of an undertaking, business or part of undertaking or business provided by the new Dir.

[62] Case C–298/94 *Annette Henke* v. *Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* [1996] ECR I–4989.

benefits from the range of rights preserved by the Directive in the event of a transfer (Article 3(4)(a)).

Ultimately, therefore, the Acquired Rights Directive is not only a matter of 'legal transfer' (new?) definitions. The brief review sketched above reveals that other not unimportant issues have been dealt with in the course of its amendment,[63] and that most of them derive from previous judicial interpretations.

Nevertheless, this is not meant to be a paper *on* the new Directive. Its purpose is rather to start *from* the new Acquired Rights Directive, in order to plunge into the broader methodological issues tackled by the Florentine working group over the years.[64] The research project within which this Part originates was aimed not so much at analysing substantive areas of EC social law as at 'making use of' them to gain understanding of how courts participate in the development of EC social policy. Within this methodological framework, the new Directive deserves primary attention precisely in so far as it constitutes the umpteenth episode—and probably not the last—of a series in which the leading part has certainly been played by the 'legal transfer' notion. This is why the great bulk of this Part has been devoted to it. If the founding working hypothesis was to look at how the judiciary enters into the dynamics leading to given EC social policy outcomes, the inter-Community judicial dialogue developed around the interpretation of the *old* Directive is certainly a field to be inspected carefully. But analysis of the intra-Community institutional dialogue developed around the elaboration of the *new* Directive likewise offers some useful clues. In fact, as will be asserted later, the two processes—inter- and intra-Community dialogues—have to be read in conjuction, unveiling the unequivocal connection that exists between them.

II Contracting Out of Services: Still in the Realm of Uncertainty?

'There is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity' (Article 1(1)(b) of Directive 98/50/EC).

As was perhaps predictable, the definition of a legal transfer as provided by the new Directive does not entirely settle the question. Or rather, the new

[63] For a first analysis of the new Dir., see V. Shrubsall, 'Employment Rights and Business Transfers—Changes to the Acquired Rights Directive', (1998) 5 *Web Journal of Current Legal Issues,* http://webjcli.ncl.ac.uk/1998/issue5/shrubsall5.html; U. Carabelli, 'Trasferimenti d'azienda: la nuova direttiva europea', (1998) 21 *Lavoro Informazione* 5; P. Davies, 'Amendments to the Acquired Rights Directive', (1998) 27 *ILJ* 365; J. Hunt, 'Success at Last? The amendment of the Acquired Rights Directive', (1999) 24 *ELR* 215; S. Hardy and R. Painter, 'The New Acquired Rights Directive and its Implications for European Employee Relations in the Twenty-First Century', (1999) 6 *MJECL* 366. On the whole, it is perhaps possible to say that the new Dir.does appear to be more effective on the collective side (new rights of information and consultation; possibility of derogation *via* collective agreements in cases of insolvency) than on part of individual rights.

[64] See Chap. 1 and the Preface to this volume.

Article 1 gives a snapshot of things the way they are, neither more nor less. The jurisprudential definition of transfers provided in *Süzen* has been given practical expression in legislation, dragging with it the same kinds of doubts that the judgment had raised at the time it was delivered (see above D). It follows from this that Recital 4 of Directive 98/50/EC is a sort of conceptual oxymoron, since it first invokes considerations of legal security requiring the concept of legal transfer to be clarified and then presumes that such certainty is to be found in the case law developed by the European Court, that is, in something which—as stigmatised by some authors[65]—is anything but certain.

Even since the new Directive has been adopted, anyway, the *Süzen* doctrine stands as the main point of reference for the interpretation of its scope. Consequently, it could be useful to pause to consider some of the most problematic issues raised by this jurisprudence.

Some of the critiques levelled against the *Süzen* doctrine—and hence also to the new Directive—could be partially played down. One main point of criticism has concerned the Court's decision to consider the transfer of a major part of the workforce as an equivalent of the transfer of tangible assets for the purposes of the Directive's applicability. As a matter of fact, given that an economic entity is defined as 'an organized grouping of *persons* and assets',[66] even a mere transfer of workers can be classed as a transfer of an economic entity. In other words, although in order to ascertain whether or not there is a legal transfer within the meaning of the Directive the national court should first verify whether any physical assets have been transferred or not, even in those cases where no tangible assets have been transferred, the ECJ still will consider the Directive applicable if an 'essential' part of the workforce has been taken over by the new employer. These conclusions are essentially referrable to labour-intensive sectors—cleaning being the paradigmatic example—where 'a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity',[67] as the Court has thereafter reaffirmed in two judgments subsequent to the new Directive: *Sánchez Hidalgo*[68] and *Hernández Vidal SA*.[69]

According to some authors, this line of reasoning would transform the main effect of the Directive—that is, the continuation of the employment contracts with the transferee—into a precondition to its application.[70] Consequently,

[65] P. Davies, above n. 53.

[66] Para. 13 of *Süzen*. My emphasis.

[67] *Ibid*., para. 21.

[68] Joined Cases C–173/96 and C–247/96 *Sánchez Hidalgo* v. *Aser and Sociedad Cooperativa Minerva*; *Ziemann* v. *Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst* [1998] ECR I–8237.

[69] Joined Cases C–127/96, C–229/96 and C–74/97 *Hernández Vidal SA* v. *Gómez Pérez, Gómez Pérez and Contratas y Limpiezas SL*; *Santner* v. *Hoechst AG*; *Gómez Montaña* v. *Claro Sol SA and RENFE* [1998] ECR I–8179.

[70] See V. Shrubsall, above n. 55.

the *Süzen* jurisprudence, and its consonant legislative follow-up, could turn out to the employees' disadvantage, to the extent that 'the transferee is given a legal incentive not to take on the transferor's employees in situations where it would be prepared to employ some of them'.[71]

Now, it is certainly true that such a perverse outcome could come about when the transferee is indeed hesitant about whether or not to take on a significant proportion of the employees.[72] But it is equally true that, if the transferee is resolved on taking on some of the employees on the basis of his own economic choices, he will be considered entirely within the Directive's scope and therefore obliged to take on *all* of the employees, granting to them all their acquired rights. In short, to regard the taking on of a significant *part* of the workforce as a constitutive element of the legal transfer notion when no tangible assets have been transferred could unquestionably induce the transferee to exempt itself from the Directive's application. However, it must be admitted that, in certain circumstances, the same controvertible interpretation could actually entail some advantages for the *rest* of the employees. It should not be forgotten—in that respect—that, in the Court's view, the 'major part' of the workforce is to be understood 'in terms of their numbers *and skills*' (my emphasis).[73] This means that even a tiny minority of skilled workers could constitute 'the major part' of the workforce, and that consequently 'the rest' of the workforce could consist of a large proportion of unskilled workers. And it is precisely such a majoritarian 'rest' of the workforce that could profit from the Court's disputed understanding of 'economic entity'. Taking on two skilled workers out of a total workforce of ten—something which the transferee could be constrained to do in order to retain the undertaking's core employment—can be considered sufficient to constitute a legal transfer, with the consequence of making the other eight unskilled workers also beneficiaries of the continuation of employment. By contrast, limiting the notion of 'economic entity' to tangible assets alone would have had the result of leaving these workers deprived of any legal protection.

F. The Interplay between Legal and Political Institutions in the Development of EC Social Law

The identification of what constitutes an 'organised grouping of resources which has the objective of pursuing an economic activity' remains a matter of judicial interpretation, with all the uncertainties this implies. Problems such as those related to the possibility of including employees in the concept of an 'organised grouping of resources' are likely to remain on the stage a little

[71] See P. Davies, above n. 53 at 196.

[72] See P. Davies, *The Relationship between the European Court of Justice and the British Courts over the Interpretation of Directive 77/187/EEC,* above n. 18.

[73] The same wording, taken from *Süzen,* recurs in the two most recent cases, *Sánchez Hidalgo* and *Hernández Vidal SA.* above n. 68 and n. 69).

longer. Accordingly, the contracting out of labour-intensive services is in danger of becoming an operation whose legal certainty is in inverse proportion to its economic spread.[74] As a consequence of these limiting conditions, '[t]he debate between the ECJ and the national court will continue'[75]; and the same applies to the dialogue between the ECJ and the Commission.

In the face of an opportunity to bring the 'legal transfer' saga to a close, in the end the Commission and the Council created the conditions for it to continue.

Why was this so? Why did the Directive remain cautious as regards the definition of a legal transfer, even though—once[76]—the Commission had proved to have its own ideas on the subject? What are the reasons why—following such a lengthy controversy—the 1998 Directive failed to take the opportunity of stating certainly and transparently what a legal transfer is? Was its wariness an unavoidable choice?

One possible explanation—still within an intra-Community dialogue context—is that the sharp criticisms addressed by the Parliament towards the first Commission proposal (see above) prompted the Commission to retreat from its initial intentions and opt for a blander text. Such an argument—which admittedly contains an element of truth—must nevertheless be viewed in terms of the procedural framework within which the Commission/Parliament dispute developed. It should not be forgotten, in particular, that the Commission proposal was presented pursuant to Article 250 (ex Article 189a) consultation procedure, something that does not allow the Parliament to have a decisive role in the shaping of a legislative text. Maybe a different option—that is recourse to Article 251 (ex Article 189b) co-decision procedure or Article 252 (ex Article 189c) co-operation procedure—would have changed the course of the events, making the Parliament, rather than the Court, the Commission's main institutional interlocutor. But careful consideration of the institutional domain in which the Directive gradually took shape forces us to conclude that the Parliament's opposition to the first Commission proposal is not sufficient to explain the Directive's 'prudence'.

A second explanation might suggest that the prudence demonstrated on this occasion has to do with the institutional constraints induced by the legal base supporting the Directive. Article 94 (ex Article 100) of the Treaty, on which Directive 98/50/EC is based, requires unanimity for deliberations adopted on its basis. Therefore, one could argue that the Directive's timidity about the

[74] The legal debate on the scope of the Transfer Dir. in the context of an increased business resort to externalisation is intense also outside the UK. In Italy, it is currently the object of conflicting interpretations between national higher courts (*Corte di Cassazione*) and the ECJ. See R. Romei, 'Cessione di ramo d'azienda e appalto', (1999) 82–83 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 325; S. Giubboni, 'L'Outsourcing alla luce della direttiva 98/50/CE', (1999) 82–83 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 423, and, in the same issue, the Opinions by M. Magnani and F. Scarpelli.

[75] See S. Laulom, above Part II, this Chap.

[76] At the time the 1994 proposal was drafted.

definition of its own scope constitutes the price to be paid for attaining its much-debated adoption. After all, it would not be the first time that the substantive content of a Commission legislation proposal had been sacrificed on the altar of its accomplishment. Yet—contrary to what has sometimes (or even often) happened in the social field—the Council's internal decision-making problems do not seem sufficient fully to explain the Community's self-restraint on this occasion. Although it is perhaps not a decisive argument, it is impossible to ignore the fact that one of the Member States included in the number of potential objectors to a hypothetical clear-cut Directive was the one under whose Presidency the new Acquired Rights Directive was presented to the Council.

In point of fact, it was not so much the fear of a decision-making stalemate that drove the Commission to drafting its proposal in such 'open' terms. The history of the amendment process suggests, rather, that what the Commission constantly considered in its strategy was less the Council's potential position than the European Court's real voice: a voice that was repeatedly raised throughout the years preceding the new Directive's adoption, as anyone can see by leafing through the past decade's European Court Reports.[77]

The thesis maintained here asserts that one of the reasons underlying the intense judicial dialogue of the early 1990s between the ECJ and the national courts should be sought beyond the manifest *rationale* of Article 177 (now Article 234) procedure. In particular, one of the reasons for the ECJ's activism on the subject of transfers in that period is to be found in the progress of the Directive's amendment process itself, which in those years was beginning to run parallel to the course of successive ECJ judgments. The judicial dialogue with national courts was also so intense, in other terms, because it was perceived by the Court as a 'card' to be played in another dialogue in which it was involved at the same time: the institutional dialogue conducted with the Commission over the definition of the Directive's scope. In short, analysis of the transfers affair reveals clearly the connection between the two kinds of dialogue outlined at the beginning of this Part (above section A): the inter-Community judicial dialogue and the intra-Community institutional dialogue, whose common denominator is to be found in the ECJ. Once again an 'institutionalist' look at the history of EC decision-making confirms the role of the ECJ as an influential actor in policy-making.[78]

What is suggested here, at the end of the day, is a sort of shadowy functionalisation of Article 234 (ex Article 177) towards aims different from those overtly assigned to it by the founding fathers. It does not appear sacrilegious to assert that in answering national courts the ECJ talks to other subjects too:

[77] For a review of the prolific ECJ case law on transfers, since the mid-1980s onwards, see S. Laulom, Part II and F. Valdés Dal-Ré, Part III, this Chap.

[78] See D. Wincott, above n. 10.

sometimes to national legislators[79]; and sometimes to the European Commission, as is recognised by those who suggest conceiving the Community as a set of mutually interdependent and (sometimes) competing institutions. 'It would be a fiction to keep up the idea of a unity of sovereignty for . . . the EC/EU. Governance is instead performed via several institutions and with the use of several and varying trajectories of relations between these institutions'.[80]

The above reconstruction could easily be countered by the assertion that the ECJ plays a part to the precise extent that national courts ask it to. That could hardly be denied. But it would be equally difficult to deny that the Luxembourg Court has at its disposal the instruments not to lend itself to the judicial dialogue when it considers it is becoming too 'closed'.[81] Ultimately, the ECJ itself opens and shuts the valve regulating its dialogue with the national courts; and there is no doubt that, in the matter of transfers, it kept it wide open until the Directive's amendment was on the Commission's agenda. Indeed, the first time the Court declined the invitation to engage in dialogue came when the struggle for the new text was already settled. On the occasion of the preliminary references made in *Sánchez Hidalgo* and *Hernández Vidal SA*,[82] the Court suspended the course of the cases, asking the national courts *a quo* whether—considering its precedents—they wished to maintain their references.[83] The suspension of the cases was decided on 18 March 1997, that is some weeks after the Commission had drafted the final proposal. It may be sheer coincidence, but it is a fact that the Court had always accepted preliminary references as long as the new Directive was still being drafted, and avoided answering as soon as the drafting was completed.

Coming back to the reasons that determined Article 1's caution in defining the Directive's scope, it could not seriously be maintained that the Commission disregarded the Court's voice. It rather carefully followed the Court's position, in terms not of opposing it but rather of welcoming—up to a certain point—the Court's propensity not to persist fully along the *Schmidt* line. It is perhaps not untenable to argue that the Commission's second proposal would have been bolder in limiting the new Directive's scope if the Court had not softened its *Schmidt* jurisprudence.

[79] I have dealt with this point in another essay: see A. Lo Faro, 'La Corte di giustizia e i suoi interlocutori giudiziali nell'ordinamento giuslavoristico italiano', (1998) *Lavoro e Diritto* 621.

[80] I.J. Sand, 'Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions', (1998) 4 *ELJ* 271 at 285.

[81] For two recent analyses of the ECJ's shifting attitude towards Art. 234 (ex Art. 177) preliminary references, see D. O'Keeffe, 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility', (1998) 23 *ELR* 509; C. Barnard and E. Sharpston, 'The Changing Face of Article 177 References', (1997) 34 *CMLRev* 1113.

[82] See above n. 68 and 69.

[83] After the new Dir. was adopted, the cases were resumed and concluded in Dec. 1998.

In any event, this does not mean that the ECJ was in a position to 'dictate' to the Commission how to rewrite Article 1, as the Directive's codification of the wording used by the Court in *Süzen* could perhaps lead some to infer. On the contrary, it was the Court which, at a certain point, realised that its extensive interpretation of the Directive's scope was going too far; or, at least, in an opposite direction to the barely veiled policy orientation cultivated within the Community with regard to 'flexibility' strategies in labour market regulation.[84]

As a consequence of the 'mutual mindfulness' exhibited by the two supranational actors, the long approach march begun in 1994 came to an end in 1998. Starting out from the point of maximum distance represented by the odd couple '*Schmidt* judgment/1994 proposal', the two sides converged to a point of contact represented by the pair '*Süzen* judgment/1998 Directive'.

The aim of the reconstruction proposed here has been to stress how the judicial dialogue between the ECJ and the national courts does not entirely fill the room available for judicially conditioned policy development to take place. In the progressive shaping of EC transfers policy since the 1970s, the ECJ has communicated with other, non-judicial actors, substantiating the thesis that 'a Community policy is created by a complex interactive process involving the different institutional actors at Community, national, and subnational level and the ECJ is one of the actors in this process'.[85] Maybe some champion of representative democracy would cast certain doubts over the constitutional orthodoxy of such policy-making. Maybe some Montesquieuan advocate would add that courts should act only as the *bouche de la loi*. But such a prescriptive stance would not be sufficient to disprove the description of how the Community is actually evolving along lines different from those inherited from national parliamentary traditions.[86] That this might not be welcomed by some, does not mean that it can be denied.

[84] For two different perspectives on the relationship between transfers of undertakings and labour market flexibility, see G. More, above n. 18; N. Adnett, above at n. 28.

[85] G. de Búrca, above n. 11, at 231.

[86] In this regard, the debate is extremely lively; see D. Curtin, *Postnational Democracy: European Union in Search of a Political Philosophy* (Kluwer Law International, The Hague, 1997); G.F. Mancini, 'Europe: The Case for Statehood', (1998) 4 *ELJ* 29, and J.H.H. Weiler, 'Europe: The Case Against the Case for Statehood', (1998) 4 *ELJ* 43.

4

Lessons From Some Secondary Areas of Dialogue

PART I PRELIMINARY REMARKS

ANTOINE JEAMMAUD

In its most visible and 'co-operative' form, as also in its less evident version of indirect interaction, the dialogue between the European Court of Justice (ECJ) and the national courts is still fairly concentrated *ratione materiae*. The preceding chapters have identified and analysed it in the two areas which over the past 15 years or so have illustrated it the most prolifically and with the most spectacular contributions to the judicial development of Community law. That is not to say that the dialogue is confined to issues connected with sex equality in employment or the fate of contracts of employment in the event of transfers of undertakings. The subject of the free movement of workers, and its corollaries, remains an arena of substantial exchanges between the ECJ and courts in the Member States, one particular example being the continued importance of preliminary references concerning the social protection of migrant workers within the Community. However, this polymorphous exchange—woven from a complex fabric of approaches which are both direct, under Article 177 (now Article 234) and indirect, and of forms of reception which are either constrained or deliberate, overt or unacknowledged, and unhesitating or reluctant—also manifests its vitality in other areas.

It would be an easy matter to identify, in these various areas, the influence of ECJ doctrine on the positions adopted by the authorities in the Member States—and in particular by the national courts—both in the application and interpretation of their domestic labour and social security law and in the inferences drawn, as regards issues relating to employment, labour relations and social protection, from the authority attributed by the ECJ to Community law in their national legal systems. The area of social protection would doubtless yield the most abundant array of examples, since the national courts of those Member States which not all that long ago were countries of immigration (such as Germany, Belgium and France) or emigration (Spain, Italy and Portugal) are very likely to have had occasion to refer to Community rules on the co-ordination of national social security systems.[1]

[1] This seems a very reasonable assumption, given experience in, e.g., Spain (see below

Such an exercise, carried out within the various national systems, would certainly also enable us to discern the stamp left on them by the requirements which the ECJ deduces from the equality of treatment between Community workers stipulated by what is now Article 39(2) (formerly Article 48(2)) of the EC Treaty. For example, a scrutiny of the corpus of decisions by the French *Cour de Cassation's* Social Chamber would reveal a fairly recent echo of a 30-year-old but very significant decision by the ECJ (its *Ugliola* judgment delivered in answer to a question referred by the German *Bundesarbeitsgericht*)[2] concerning the rights of Community migrant workers with respect to provisions in the host country which confer on employees an advantage or guarantee in connection with compulsory military service in its national forces. A 1995 decision by the Chamber[3] notes in passing that nationals of any other Community country who have completed, in their country of origin, military service similar to French 'national service' enjoy the advantage of the suspension of their contract of employment occasioned by 'call-up for national service' as provided for by a French collective agreement (and nowadays by law)[4].

In this chapter we shall consider only that form of dialogue which is initiated by a question referred by a national court to the ECJ for a preliminary ruling. Indeed, it is purely because our considerations are confined to this visible form of communication between the protagonists of the inter-court dialogue that the areas explored can rightly be described as 'secondary'. This adjective is applicable only in the quantitative sense of the number of preliminary references made regarding each; from all other points of view, some of

Part III), but one that is impossible to verify empirically (what national system of court statistics records figures on the specific occurrence of 'points of law' or reliance on various legal rules before all the courts concerned?)

[2] Case 15/69 *Südmilch* v. *Ugliola* [1969] ECR 363.

[3] Cass. soc., 1 Mar. 1995 [1995] V *Bulletin des arrêts des chambres civiles de la Cour de Cassation* No. 78, [1998] *Recueil Dalloz Sommaires commentés* 257 (comments by S. Robin).

[4] Such a scrutiny would also show that the *Cour de Cassation's* Social Chamber nowadays exhibits a certain 'Community zeal' in relying on dirs. on the approximation of national laws in the field of social policy; one example is Dir. 91/533 on an employer's obligation to inform employees of their terms and conditions of employment, from which it seems to derive legal consequences extending beyond what was foreseen by the authors of that instrument (see, e.g., Cass. soc., 18 Nov. 1998, (1999) *Droit Social* 104, note by J. Savatier). In the latter decision, as in others, the Chamber 'applied' a Dir's. provisions along with a national provision to a relationship between employer and employee, without taking account of the subtleties of Community case law concerning the horizontal effect of Dirs. and despite the fact that it was more a question of applying national law 'in the light of the wording and purpose of the Directive'. It is relevant to note here this current tendency on the part of a national supreme court, even though it concerns dirs. rather than their interpretation by the ECJ, particularly since it contrasts with the measure of difficulty found by other national authorities in France in fulfilling within the prescribed period their obligation to transpose Community legislation (specifically as regards Dir. 91/553 itself). See also A. Lyon-Caen, 'La Corte di giustizia e il diritto francese del lavoro', (1998) *Lavoro e diritto* 607.

these areas offer a rich mine to be seamed, both in terms of contributions to the corpus of Community law and the principles governing its relationship with national laws and in terms of a kind of legal sociology inherent in an understanding of the conditions and specific details of the practical application of the law.

An overall account of the lessons offered[5] will pave the way for an analysis of a few specific instances of the preliminary reference procedure—the Italian *Job Centre* case[6] and the cases which gave rise to the first two preliminary references to the ECJ made by the Spanish labour and social security courts[7]—which merit special attention as illustrative examples. Finally[8] an evaluation of 'Sunday trading' cases will prove that litigation on national measures affecting trade may have a strong impact on deeply rooted social rules.

A. A Wealth of Lessons to be Learned

These areas of the inter-court dialogue, at first sight seemingly only minor, have originated from the emergence of (or witnessed the growing prominence of) important issues of the relationship between Community law and national laws. They have featured elements of the development of Community law through case law (referred to here as *normative contributions*) which concern the legal rules governing employment as an employee but sometimes carry more general implications.[9] In particular, some of the episodes illustrating these areas underline, just as much as, if not more so than, some major cases mentioned earlier, certain significant aspects or factors of the dialogue which a purely normative approach[10] might prevent us from recognising. That is to say, they demonstrate the influence of the choices made by the actors of proceedings brought before national courts both on the development of communications between these national courts and the ECJ and on the nature of the points of law referred to the latter.[11]

I Normative Contributions

Although the questions referred by national courts to the ECJ for a preliminary ruling have extended to the interpretation of provisions of Community law other than those relating to the free movement of workers, equal treatment for men and women as regards employment or social security and acquired rights in the event of transfers of undertakings, few of them have concerned Directive 75/129 relating to collective redundancies or the various

[5] Below, this Part. [6] Below, Part II. [7] Below, Part III.
[8] Below, Part IV. [9] Below, I.
[10] That is, an approach confined to scrutinising only the legal questions dealt with, the new interpretations or rules applied by the ECJ and their reception by the national courts concerned.
[11] Below, II.

directives aimed at ensuring health and safety at work, despite the fact that these instruments for the approximation of laws have considerable bearing on national labour law systems. On the other hand, Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer has been the subject of preliminary references to the Court which, if not all that numerous, have certainly had remarkable case-law consequences for Community law (general as well as in the field of social policy).

The questions referred to the ECJ in 1989 by the Pretura (Magistrate's Court) di Vicenza and the Pretura di Bassano del Grappa, with actions pending before them against the Italian Republic (which had already been found by the ECJ to have failed to fulfil its obligations), gave the Court the opportunity to establish the principle of the liability of a Member State towards individuals in the event of its failure to transpose, or fully to transpose, a Directive[12] and to state the conditions for that liability. It is well known that, according to this famous *Francovich* judgement,[13] 'a Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987' and that consequently 'the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation' of any such loss and damage. These two joined cases, followed by other actions brought before Italian Magistrate's Courts which made preliminary references to the ECJ, enabled the latter to spell out the interpretation of the Directive and to affirm its validity 'in the light of the principle of equal treatment' (judgment in '*Francovich II*'),[14] before specifying its significance in the face of the Legislative Decree of 21 January 1992 which finally transposed the Directive into Italian law and regulated the reparation of employees who had suffered loss or damage as a result of the belatedness of that transposition (judgments in *Bonifaci and Others* and *Berto and Others*[15]; *Palmisani*[16]; and *Maso and Others*[17]).

Prior to this series of preliminary references emanating from Italian courts, another problem regarding the interpretation of Directive 80/987, this time in the face of a national legal rule in Spain which unquestionably albeit implicitly, excluded 'higher management staff' from the guarantees provided by the Pay Guarantee Fund established under the *Estatuto de los Trabajadores* (Employees' Statute), had given the *Tribunal Superior de Justicia* in Catalonia occasion to make the first Spanish reference to the ECJ for a preliminary ruling in the field of social policy. In the case in question (*Wagner Miret*),[18]

[12] A dir. which, by reason of its very content, is incapable of producing an 'upwards vertical' direct effect against a State within the latter's national legal order.

[13] Joined Cases C–6/90 and C–9/90 *Francovich and Others* [1991] ECR I–5357.

[14] Case C–479/93, [1995] ECR I–3843.

[15] Joined Cases C–94/95 and C–95/95 [1997] ECR I–3969.

[16] Case C–261/95, [1997] ECR I–4025.

[17] Case C–373/95, [1997] ECR I–4051.

[18] Case C–334/92, [1993] ECR I–6911. In fact, in a judgment already delivered by the ECJ

the latter had specified the meaning and scope of this instrument of social harmonisation in regard to a fairly detailed point and confirmed the doctrine laid down in its 1991 *Francovich* judgment on liability within the domestic legal order of a State which fails to transpose a directive within the prescribed period. But it had also recalled the obligation resting on national courts, when applying the provisions of national law which are intended to ensure (or deemed to ensure) that the latter conforms to a Community directive, to interpret them in the light of the wording and purpose of that directive.

Article 177 (now Article 234) references made by national courts to the ECJ have also led it to rule on a problem which was certainly not envisaged by those who drafted the original Treaty and had been considered by very few experts in European law until it struck imaginative lawyers as something that could be used in the interests of certain litigants. The problem in question is that of *the compatibility of certain emblematic provisions of national labour law systems* ('emblematic' because they concern working hours or the rules governing the labour market) *with rules of Community law on the free movement of goods and competition*.[19]

The Court was, for example, asked by British magistrates in 1988 (*Torfaen Borough Council* v. *B & Q plc*[20]) and then in 1989 by a French court (*Union départementale CGT de l'Aisne* v. *SA Conforama*[21]) and a Belgian court (*Procédure pénale* v. *Marchandise*[22]) about the relevance of Article 30 (now Article 28) of the 1957 Treaty, prohibiting quantitative restrictions on imports between Member States and any 'measures having equivalent effect', to national provisions on working hours which establish Sunday as a weekly rest day for employees and hence require the closure of establishments on Sundays in order to ensure that they enjoy that benefit. The Court, as is well known, ruled that the prohibition laid down by Article 30 did not apply to national legislation of this kind.

At around the same time a different question was referred to the ECJ by a German court with an action against Macrotron GmbH pending before it, concerning the position of the *Bundesanstalt für Arbeit* (Federal Employment

in answer to a question referred by a Spanish court we read that the national court called upon to interpret the law of its country 'is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter': (Case C–106/89 *Marleasing* [1990] ECR I–4135).

[19] A. Lyon-Caen, 'Droit social et droit de la concurrence' in *Les orientations sociales du droit contemporain Ecrits en l'honneur de Jean Savatier* (PUF, Paris, 1992) at 331.

[20] Case C–145/88, [1989] ECR I–3851.

[21] Case C–312/89, [1991] ECR I–997. In France, the *Cour de Cassation*'s Criminal Chamber and the *Conseil d'Etat* (following a challenge to the legality of a Prefectoral Order stipulating closure on Sundays issued on the basis of the relevant Art. of the *Code du Travail* (French Labour Code)) have had several occasions to follow this interpretation and confirm that the *Code du Travail* provisions empowering the authorities to order such closure were not incompatible with Arts. 30 and 85 (now Arts. 28 and 81) of the Treaty.

[22] Case C–332/89, [1991] ECR I–1027.

Office) with regard to the rules on competition laid down in Articles 85 *et seq*. (now Article 81 *et seq*.) of the Treaty: a seemingly surprising question at first sight, since these provisions are presented as 'rules applying to undertakings', whereas the body concerned has the status of a public agency which is not operated with a view to profit. However, it led to a ruling by the Court that, as a public employment agency engaged in placement activities, the *Bundesanstalt* constituted an 'undertaking' and was therefore subject to the prohibition of 'any abuse . . . of a dominant position within the common market or in a substantial part of it' contained in Article 86 (now Article 82), given that the application of that provision did not obstruct the performance of the particular task assigned to it. The Court deduced from this that in conferring on such a body an exclusive right to engage in the procurement of employment for job-seekers a Member State could, in certain circumstances, be in breach of Article 90(1) (now Article 86(1)) of the Treaty.[23]

We must, of course, consider in conjunction with this case and its judicial contribution to the interpretation of Community law other positions adopted regarding bodies within the French social security system[24] and the legal organisation of work in Italian ports.[25] This applies even more to the case known as *Job Centre II*,[26] which gave rise to an interpretative judgement delivered by the ECJ in answer to questions referred by the *Corte d'Appello* in Milan. The latter had before it an appeal against a decision by the *Tribunale Civile e Penale* in Milan, which had refused to confirm the statutes of a co-operative society being set up for the purpose of acting as an intermediary on the labour market (in Italy and the Community as a whole) to assist access to employment for its members or third parties.

The *Tribunale* had issued its refusal pursuant to two national Laws of 1949 and 1960, which established a monopoly of public placement offices by prohibiting both private placement (*mediazione*) and the provision of temporary staff (*interposizione nelle prestazioni di lavoro*). In its 1997 judgment delivered in answer to the reference the ECJ at the very least confirmed, if not strengthened, the line of interpretation initiated by its decision of 1991 in *Höfner and Elser*. The operative part of the judgment is very firm: 'public placement offices are subject to the prohibition contained in Article 86 of the Treaty, so long as application of that provision does not obstruct the performance of the particular task assigned to them. A Member State which

[23] Case C–41/90 *Höfner and Elser* [1991] ECR I–1979.

[24] Joined Cases C–159/91 and C–160/91 *Poucet and Others* [1993] ECR I–637; (1993) *Droit Social* 488, noted by P. Laigre; and Case C–244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I–4013; (1996) *Droit Social* 82, noted by P. Laigre.

[25] Case C–179/90 *Merci convenzionali Porto di Genova* [l991] ECR I–5889; and Case C–163/96 *Silvano Raso and Others* [1998] ECR I–533.

[26] Case C–55/96 *Job Centre coop. arl.* [1997] ECR I–7119 called *Job Centre II* because a first judgment by the ECJ had found the preliminary reference from the *Tribunale Civile e Penale* in Milan inadmissible on the ground that the case pending before the latter involved a decision of an administrative nature in a non-contentious matter. See below Part II.

prohibits any activity as an intermediary between supply and demand on the employment market, whether as an employment agency or as an employment business, unless carried on by those offices, is in breach of Article 90(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, in the following circumstances: the public placement offices are manifestly unable to satisfy demand on the market for all types of activity; the actual placement of employees by private companies is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited and non-observance of that prohibition gives rise to penal and administrative sanctions; the placement activities in question could extend to the nationals or to the territory of other Member States.'

Thus, the 'normative fruit' of some of the recent exchanges between national courts and the ECJ is confirmation that national labour and employment law, and also law on social protection, are affected not only by Community law in the field of social policy but also by 'extra-social' segments of the EU legal order. Although this reading of Community law and its impact on national laws is not beyond dispute, the *Job Centre* judgment caused little surprise in Italy, where it was received in a context of reform of the legal rules governing placement. More than others, however, it merits scrutiny extending beyond its contribution to Community law, because the circumstances and consequences of this intervention by the ECJ illustrate certain contextual elements and effects of the dialogue which is our subject here. It represents one of the exchanges between national courts and the Court in Luxembourg which clarify not just the content of Community law but, possibly even more, the ways in which certain actors are able, or know how, to utilise it.

II Some Lessons in Legal Sociology

An examination of such secondary areas of dialogue confirms, first and foremost, the diversity of the contexts in which Community law is relied on. In terms of what is most visible and more particularly relevant to the present study, this concerns *the diversity of the contexts in which national courts make preliminary references to the ECJ* for the purposes of interpreting provisions belonging to the Community legal order.

The majority of references are made on the occasion of or in connection with situations or practices which are the direct subject of Community acts whose meaning or scope (and sometimes validity) form the substance of the questions referred. In the course of a lawsuit, for example, it may be wondered whether some business reorganisation constitutes a transfer of an undertaking within the meaning of Directive 77/187, or whether or not some practice or normative provision (statutory or collectively agreed) complies with the equality of pay or employment conditions between men and women that is required by Community norms. It can perhaps even be said that, in most cases, the difficulty prompting reference to the ECJ concerns the validity

or application of national provisions which appear to or could conflict with Community law, or about which it is wondered whether they actually ensure the conformity of national law to the latter. The Article 177 (now Article 234) reference procedure was designed for this situation, and it seems by far the most common in practice. If we look for examples among the cases mentioned so far in this chapter, a good illustration is offered by the Italian cases, *Francovich and Others* and subsequent ones such as the Spanish case *Wagner Miret*.

But references may also be made to the ECJ—and its point of view received on the occasion of legal situations which were certainly not envisaged by the authors of the specific Community text at issue. Such cases may, in particular, concern the application of national rules which *a priori* do not share the same objective as that text. For example, an alleged breach of national legislation establishing Sunday as a non-working day, or private activities or complaints before the courts challenging the monopoly of job placement granted to a public office, may prompt a litigant to rely on Community law with a line of argument which then results in a reference to the ECJ. This hypothesis is illustrated by the *Torfaen Borough Council*, *Conforama* and *Marchandise* cases, and also by *Höfner* and *Job Centre*. Although the provisions of Article 30 (now Article 28) and of Articles 85 *et seq*. (now Articles 81 *et seq*.) of the Treaty were not conceived with a view to national laws on working hours or on the procurement of employment for job-seekers, with the intention either of safeguarding them or, on the contrary, of undermining them, it was a challenge against such national rules in the name of the Treaty provisions concerned which brought these cases 'up' to the ECJ.

In point of fact, the Community-level nature of these cases, the construction of these episodes in the inter-court dialogue and their role as a springboard for case-law innovations are, in many circumstances, clearly imputable to the choices on taking legal action and adopting lines of argument that are made by actors—choices which, it can only be assumed, are dictated by their interests.

In those Member States whose procedural law gives a court control over what law is to be applied in resolving a dispute or ruling on a prosecution (by authorising it, where necessary, to raise of its own motion the relevant legal rules), *that court may well find itself initiating the penetration of Community law* into contentious proceedings which originated before it in an area of purely national law. But there is no doubt that in the *Torfaen Borough Council*, *Conforama* and *Job Centre* cases, and various others, the only reason the national courts concerned made preliminary references to the ECJ was that one of the parties relied on Community norms to support its claims—even, indeed, for a purpose entirely extraneous to the specific lawsuit concerned, such as causing or hastening a legislative reform. In circumstances such as these reliance on Community provisions is, by definition, accompanied by a claim that there is conflict between the latter and national rules which block the application being made by the actor concerned for example, for

confirmation of the Job Centre co-operative's statutes) or which are being relied on in order to obtain a ruling against them in either civil actions (as in the *Conforama* case, originating from proceedings brought by a trade union before a *Tribunal de Grande Instance* (French Regional Court) under the urgent procedure asking it to order an employer to observe the rules applicable by ceasing to open his shop on Sundays and make employees work on that day) or criminal cases (as in the *Marchandise* case, an adjunct of criminal proceedings brought by the Belgian public prosecutor's office).

We know that this form of emergence of a confrontation between national law and Community law, and hence a possible inter-court dialogue, is found in the area of equality between men and women with regard to employment. Examples include, for example, the actions which gave rise to the judgments in *Stoeckel*[27] and *J-C. Levy*.[28] In both of these, the mobilisation of Community law and questioning of the provisions of the *Code du Travail* (French Labour Code) were set in the context of—and arose directly from—prosecutions against employers for infringement of the Article in the Code prohibiting night work for women in manufacturing industry. The purpose of this line of argument was to establish the absence of any infringement owing to a legal defect which was itself deduced from the non-conformity of the text in question to Directive 76/207. The legal action which gave rise to the judgment in *ONEM* v. *M. Minne*,[29] represented a variant of this form in that the contravention of the Directive represented by the prohibition on night work provided for under Belgian law had been relied on by the National Employment Office in order to obtain from the Higher Labour Court in Liège a reversal of the judgment setting aside its refusal to pay unemployment benefit to a female worker who had rejected an offer of employment involving night work.[30]

These aspects of various episodes of communication between national courts and the ECJ demonstrate *the decisive role of actors other than the courts* themselves in fuelling the dialogue, despite the fact that the latter is widely regarded as being a direct inter-court exchange. These actors, whose choices are often determining factors in the light of national rules on litigation procedure, are primarily the parties to actions brought before the national courts which thereby become 'referring courts'. They are actually free to mobilize Community law against the normally applicable national law (usually that of the court hearing the case) if they feel that their interests require such a line of argument. It is important to bear this in mind when we recall that, according to the ECJ, the 'direct co-operation' between itself and national courts which is established under Article 177 (now Article 234) takes place by way of 'a non-contentious procedure excluding any initiative of the

[27] Case C–345/89, [1991] ECR I–4047.

[28] Case C–158/91, [1993] ECR I–4287.

[29] Case C–13/93, [1994] ECR I–371.

[30] On these three cases, see above Chap. 2, Part III.A.II.

parties', who are 'merely invited to be heard' by submitting observations.[31] The fact that, in terms of the law, the position of the parties seems a subsidiary one does not prevent their role from being, in reality, a determining factor in the initiation and direction of this co-operative dialogue.

But what is the precise extent (or potential extent) of this neutrality of Community procedural law towards the role that the parties can play in the genesis of a preliminary reference? A twofold question arises in the light, for example, of some of the cases mentioned above. Is the fact of having an interest in relying on a provision of Community law sufficient, in itself, to confer entitlement to do so and, more specifically, to initiate a debate questioning the validity or applicability of national legislation? Does such interest constitute licence where necessary to bring about intervention by the ECJ, that is, to mobilise its attention and take up its time? Must the ground of Community law cited necessarily be examined, and is any resultant preliminary reference to the ECJ admissible, whatever the nature of the interest underlying this line of argument and procedural approach? Reliance on a principle of equal treatment for male and female workers by an employer or manager seeking to utilise the consistent operation of that norm in order to avoid being found to be acting unlawfully (in a way, the 'reverse' of the rule in question) may seem surprising, if not offensive. However, it is difficult to see how this mobilisation of a rule of Community social law could be dismissed or halted. Such, indeed, is the view expressed by the ECJ on more than one occasion. For example, in a fairly recent answer to the Austrian *Verwaltungsgerichtshof* (Administrative Court) it stated that an employer wishing to employ in one Member State workers who were nationals of other Member States, and whose free movement was therefore profitable to him, was perfectly entitled to rely on the principle of non-discrimination between Community workers on the basis of nationality laid down in the then Article 48(2) (now Article 39(2)) of the Treaty.[32]

It must also be remembered that the circle of actors whose choices play a role in the development and content of this dialogue includes *certain professional lawyers*, acting in the interests of litigants, who are well aware of the resources of Community law or seeking to make strategic use of a legal action in which they feature as legal representatives in order to obtain recognition of a particular interpretation. The course of events in a number of cases that have given rise to preliminary references to the ECJ attests that there is nothing imaginary about this type of approach, which is not as a matter of principle illegitimate and may be prompted by perfectly respectable considerations. Examples include several cases relating to equality between male and

[31] An analysis which is given in numerous judgments, and in particular that delivered in the case against Eurocontrol in which classification as an undertaking within the meaning of Arts. 86 and 90 (now Arts. 82 and 86) of the Treaty was once again the point at issue (Case C–364/92 *SAT Fluggesellschaft* [1994] ECR I–43).

[32] See the judgment in Case C–350/96 *Clean Car Autoservice* [1998] ECR I–2521

female workers such as the *Defrenne* case of more than 20 years ago or, more recently, *Draehmpaehl*[33] with a reference to the ECJ by the Labour Court in Hamburg ascribed by commentators to legal practitioners using the pretext of a lawsuit in order to obtain, at the highest level, an interpretation conforming to their own conception of equality.[34] The *Job Centre* case could also be cited as an illustration of such approaches by legal practitioners (in this instance, a Milanese university academic and lawyer, acting as the co-operative's legal representative and calling into question the public monopoly of *collocamento* (i.e. placement)), making use of their professional involvement in a domestic lawsuit to attempt to obtain from the ECJ a reading of Community law conforming to their own legal conceptions or helpful to their strategy for changing national legislation.

It is therefore possible that a point of social law may one day lead the ECJ to explain and state its doctrine with regard to a test case which has been more or less artificially constructed by parties who have no real dispute between them, for the purpose of prompting the Court's intervention and obtaining from it an interpretation which conforms to their own point of view on a legal question and hence to their representation of what is fair, expedient or favourable to a personal interest which is, however, under no immediate threat. The function entrusted to the Court by Article 177 (now Article 234) is exclusively that of assisting the national courts to settle 'genuine disputes'. It therefore states that it does not have jurisdiction to reply either to questions submitted to it 'within the framework of procedural devices arranged by the parties' which undermine the entire system of judicial remedy available to the litigants, or to questions which it feels are hypothetical. In particular, over a period of more than 20 years it has explained on more than one occasion that the duty assigned to it is not that of delivering advisory opinions on 'hypothetical' legal difficulties.[35]

From the point of view of a sociology which studies the application of the law, the national courts themselves must be treated as actors whose choices influence a dialogue which is never simply a matter of imposing the ECJ's viewpoint and, even more, determine the contextual setting of this exchange.

Their choices are determining factors where, possessing control over what law is applicable to a given case, they themselves raise and introduce a problem of Community law into the proceedings brought before them and then decide to refer it to the ECJ. In practice, their choice of approach is still decisive and sometimes significant as regards legal controversies arising in the domestic legal order or, indeed, disagreements within the national system of courts itself—even when they are merely referring to the ECJ a question raised by one of the parties. It is particularly significant where, like the Catalan court in the *Wagner Miret* case, courts whose final decision is subject to control by a national supreme court choose to refer to the ECJ a problem of interpretation

[33] Case C–180/95 [1997] ECR I–2195. [34] On these cases, see above Chap. 2.

[35] Case 93/78 *Mattheus* v. *Doego* [1978] ECR 2203; Case 104/79 *Foglia* [1980] ECR 745; Case 244/80 *Foglia (No.2)* [1981] ECR 3045; and Case C–83/91 *Meilicke* [1992] ECR I–4871.

(of Community law and of national law concerning it) which has already been settled by that national supreme court in a manner with which they do not agree. In these circumstances, a reference to the ECJ for a preliminary ruling on interpretation is a patently strategic decision aimed at the development of a point of law, if not even an 'act of rebellion' within the national legal order.[36]

It should be noted at this point that, in the cases cited in the present chapter as illustrations of secondary areas of this dialogue, the preliminary reference has always been made by *what are called 'lower' courts*. This once again confirms a fact which is well known and has already been mentioned elsewhere in this book: the courts which are the most inclined to enter into this form of co-operation with the ECJ, given that they take the initiative to do it although not so required by the Treaty, are those of modest ranking within their national hierarchy rather than supreme courts.[37] This observation may not necessarily imply that the latter are consistently reluctant whilst the former are receptive to a dialogue which carries the promise of subjection to the ECJ's viewpoint, but it is important when we consider the institutional and strategic aspects of that dialogue. At the very least, it suggests that *the objective interest and significance of the points of law at issue are not the sole motives* underlying the inter-court dialogue.

In this connection some details of the context of the *Job Centre* case, for example, merit attention: the *Corte d'Appello* in Milan made its reference to the ECJ a few months after the Italian *Corte di Cassazione* had held that the national Law prohibiting the provision of temporary staff (*interposizione*) was in no way contrary to 'the principles of free economic competition laid down in Articles 86 and 90 (now Articles 82 and 86) of the Treaty'; the ECJ's interpretative judgment occurred in a context of reform of the national legislation regulating job placement and temporary work and objectively assisted the liberalisation that was under debate at the time. And, as already indicated above, the context of the preliminary reference from the *Tribunal Superior de Justicia* of Catalonia which had pending before it Mr Wagner Miret's claim against the Pay Guarantee Fund provided for in Spain was one of antinomy between *jurisprudencia* (the settled case law of the *Tribunal Supremo*) and *doctrina judicial* (the judicial doctrine of the lower courts). And a second preliminary reference from Spain,[38] made by the *Tribunal Superior de Justicia* of the Basque Country, concerned a question regarding social security provision for migrant workers (Council Regulation 1408/71) on which the same *Tribunal Supremo* had held that there was no need to refer the matter to the ECJ.

Without going so far as to claim that the direct dialogue between the ECJ and national courts is, like the less evident process of indirect interaction, largely determined by the interests and strategies of actors, there are good reasons for seeing these three cases, one Italian and two Spanish, as examples of some of the contexts of and stakes involved in this co-operative exchange.

[36] On this aspect, see below Part III. [37] See above Chap. 3.

[38] Case C–251/94 *Lafuente Nieto* [1996] ECR I–4187.

PART II *JOB CENTRE*: AN ILLUSTRATIVE EXAMPLE OF STRATEGIC LITIGATION

SILVANA SCIARRA

A. A Preamble: The Crucial Notion of an Undertaking

Job Centre, a co-operative society with limited liability, then being set up with its head office in Milan, applied to the *Tribunale Civile e Penale di Milano* for approval of its memorandum of association, with a view to the company's registration. Its principal and manifest purpose was to act as an intermediary between supply and demand on the labour market, especially in providing temporary employees to third parties. This particular working arrangement, known as *lavoro interinale,* was considered incompatible with the then existing legislation, which restricted to public employment agencies the task of placing employees in jobs. The co-operative wished to offer services of this kind to management and labour, regardless of their membership, in order to act as an intermediary within both the Italian and the Community labour market.

The preliminary ruling sought by the Milan court[1] was based on the consideration, put forward by Job Centre, that Italian laws prohibiting private placement and the provision of temporary workers were contrary to Community law. The questions referred to the ECJ were related, on the one hand, to the notion of 'official authority' within the meaning of Articles 66 and 55 (now Articles 55 and 45) of the EC Treaty for matters of public policy such as the protection of workers and, on the other, to the direct applicability of Community law and the elimination of public policy justifications, given the inability of the Member State to provide the services required.

In addressing the first question the Milan court did not take into account all the references to Community sources made by the applicant. Whereas Job Centre's application appears long and, in places, overflowing, the *Tribunale's* reference is brief and none too articulate. It ignored lengthy arguments made by the applicant on the combined effect of Articles 86 and 90 (now Articles 82 and 86) EC Treaty, in particular on the non-enforceability of Article 90(2) as regards the Italian placement system, as well as to Article 48 (now Article 39) on the free movement of workers. In its attempt to be brief and effective, rather than learned and well-versed in Community law, it concentrated on the issue which best reflected the Italian legal system's most delicate choice in this field of labour law, namely, the notion of protective legislation as a matter of public policy. We shall come back to this point later, when a more detailed analysis of the application will be offered.[2]

[1] *Tribunale di Milano*, 31 Mar. 1994 (1994) *Il foro italiano* 2886.

[2] See below, 254 ff.

In this short preamble, the irony of the case must be commented upon: under Italian law the proceedure for confirmation of a company's articles of association is a non-contentious one, and as such is outside the Court's jurisdiction under Article 177 (now Article 234) of the Treaty, as references can be made under this Article only when a national court is exercising a judicial function. What at first sight appeared to be a strategic case, aimed at shaking up a dated legal and administrative apparatus and attracting the attention of Community institutions, slipped up on a procedural ground, leaving alert observers either amazed that such a mistake could have been made, or impressed that the strategy behind the case was so subtle and well thought through.

The paradox of the whole story is in its ending. In October 1995 the ECJ, possibly overwhelmed by the complex structure of the case and certainly respectful of formal requirements, declared that it had no jurisdiction to answer the questions asked by the referring judge,[3] since they had been raised in the context of 'non-contentious proceedings', aimed at issuing an administrative decision rather than at settling a dispute.

One may well wonder whether the initial strategy included this variable among the envisaged outcomes and whether the *Tribunale*'s conciseness reflected its sense of unease. Rather than a well-designed plan—whereby a national court acquainted with Luxembourg knows precisely what to ask for—this reference reveals an uncritical approach to Community law; it is particularly in the light of this consideration that the ECJ's decision can be described as a formal expression of self-restraint combined with a healthy dose of political challenge.

The preliminary ruling procedure initiated by the Milan *Tribunale Civile e Penale,* despite its imperfect references to Community law, struck a blow against the legislature; the latter's lack of sensitivity in understanding new market needs, as well as its inability to propose solutions which would prove politically acceptable, was at the origin of strategic litigation which sought to anticipate political decisions or, less ambitiously, solicit answers, while proposing a direction to be taken.

The Court's judgment, in fact, while declaring its lack of jurisdiction on the specific questions put before it by the Milan judge, gave a very strong hint to the plaintiff. It stated that the proceedings of that particular case could indeed become contentious, should the application for registration be rejected by the Milan court and therefore lead to a true judicial decision.

By thus indicating the way forward, the Court was probably trying to fulfil a political objective, without forgetting to be mindful of, and faithful to, its own role. Whether its decision was directed towards the litigants or, rather,

[3] C–111/94 *Job Centre Coop* [1995] ECR I–3361. See the comment on the case by G. Meliadò, 'Il monopolio pubblico del collocamento e il lavoro interinale in Italia innanzi ai giudici del Lussemburgo: mancate risposte ai problemi aperti', (1996) IV *Il foro italiano* 77; M. Roccella, *La Corte di giustizia e il diritto del lavoro* (Giappichelli, Turin 1997) 105 ss.

towards the national legislature, which had been slow and indecisive in ameliorating the placement system and relaxing the rules governing the labour market, or both, can be no more than a matter of pure speculation.

Meanwhile, it may suffice to refer to a passage of the Advocate General's Opinion in which significant precedents are referred to[4] in order to establish that Article 177 (now Article 234) may not be twisted to serve purposes beyond its exclusive scope, namely, to interpret Community law in order to obtain better administration of justice in the Member States.[5]

Despite this formal indication, an indirect dialogue with the legislature was opened up by *Job Centre I*. It was clear that the ECJ would be asked to intervene again, although it was impossible to predict in which direction the judgment would go. The legislature had a task to fulfil even before any possible ruling of the Court; the Minister for Labour—at that time a labour law professor—began a political marathon in an attempt to anticipate the Court. His actions were certainly motivated by professional pride, but also by the fear of allowing the disintegrative direct effects of a ECJ judgment to descend upon the Italian legal system.[6]

A second reference to the Court was made, as predicted[7]; it was followed by a series of almost identical references,[8] while the political discussion on labour law reforms continued to be lively as well as controversial. The Milan *Corte d'Appello* referred the case, following the refusal of the *Tribunale* to approve the articles of association and the resultant claim by Job Centre.

The Court's judgment in *Job Centre II*[9] tried to answer all the questions put by the referring judge in a very articulate way. It argued at great length that public placement offices are subject to Article 90(2) (now Article 86(2)), since the economic nature of their activities does not conflict with their public function. Competition rules must apply to services of general economic interest, and Article 86 (now Article 82) cannot impede the performance of such tasks when it is proved that public offices do not satisfy market demands. Further to this interpretation of Community law, the Court added that statutory provisions prohibiting the placement of workers by private companies

[4] Case 244/80 *Foglia* v. *Novello* [1981] ECR 3045.

[5] See para. 17 of the Opinion of Elmer AG [1995] ECR I–3370.

[6] In 1995 two bills were presented in Parliament on the government's initiative: no. 1985/S, dealing with the abolition of the state monopoly in the placement of workers and no. 2764/C on flexibility measures in the labour market.

[7] *Corte d'Appello di Milano*, 16 Feb. 1996, (1996) *Il foro italiano* 1028.

[8] *Pret. di Biella*, 30 Mar. 1995 (1995) II *Rivista italiana di diritto del lavoro* 711; *Pret. Pavia*, 17 Oct. 1995 (1997) *Rivista italiana di diritto del lavoro* 13.

[9] C–55/96 *Job Centre Coop* [1997] ECR I–7119. Among the many comments on the case, some in particular must be mentioned: M. Roccella, 'Il caso Job Centre II: sentenza sbagliata, risultato (quasi) giusto', (1998) II *Rivista giuridica del lavoro* 33 ff.; G. Meliadò, 'L'abolizione del monopolio pubblico del collocamento: una morte annunciata', (1998) IV *Il foro italiano* 41 ff.; R. Foglia, 'La Corte di giustizia e il collocamento pubblico: è opportuno un nuovo intervento del giudice comunitario o del legislatore nazionale?', 1988 2 *Argomenti di diritto del lavoro* 539 ff.

make it practically impossible to perform placement itself, either within the state or outside it.

The initial self-restraint in *Job Centre I* became outspoken intervention in *Job Centre II*. Meanwhile, the national legislature had only partially won its own battle, struggling through the painful preparation of a new law on *lavoro interinale*[10] while engaging, on a parallel track, in a reform of the public placement system which was mainly provoked by administrative law measures aimed at decentralising powers to the regions.[11] If we look at the interval of time between the Court's decision and the enforcement of legislation, there has been a period in which a lacuna created by the ECJ existed within the Italian legal system.

If we look more carefully at *Job Centre II*, we can try to follow up on this point when analysing the dynamic integration set in motion by the Court's judgment.

While Article 48 (now Article 39) left the scene very rapidly—and quite rightly so,[12] since it had no connection with the setting up of *Job Centre*—the interpretation of Articles 86 and 90 (now Articles 82 and 86) was central to the Court's argument. The 'social objectives of public placement' in Italy were presented by the Italian government as the reason for not characterising the activities pursued by public offices as business activities. This forced the Court to engage in the process of defining what must be regarded as an undertaking under competition law and whether the public offices in question fell within such a definition. The result is tautological: 'the concept of an undertaking encompasses every entity engaged in an economic activity . . . the placement of employees is an economic activity'.

The 'imperative reasons relating to the public interest' put forward by the Norwegian government and the claim of the latter that private employment

[10] Temporary employment agencies are dealt with in the context of supportive legislation on employment (Law no. 196 24 June 1997). The public placement system had already undergone radical changes when the criterion of free and direct selection of workers to be hired became the rule rather than the exception, with progressive erosion of the principle that workers had to be assigned by the placement offices on a numerical basis. See Art. 9bis, Law no. 608, 28 Nov. 1996, leaving the employer only with the obligation to notify the placement office five days after hiring the employee, specifying the latter's personal data, the date on which the contract of employment commenced and various other details related to the contract.

[11] D.lgs. no. 469 23 Dec. 1997, a decree in conformity with Law no. 59 15 Mar. 1997, which delegated to government the task of enforcing decentralization in public administration, following the principle of subsidiarity.

[12] This was also the position of the Italian government (Observations 30 May 1996 JUR(96) 04529), referring to the AG's opinion in *Job Centre I*. Critical of the abruptness on this point is G. Ricci, 'Il controverso rapporto tra principi comunitari della concorrenza e normative nazionali del lavoro: il caso *Job Centre II*', (1998) 2 *Diritto delle Relazioni Industriali* 145 ff. and particularly 149, who, however, underlines the irrelevance of Art. 48 (now Art 39) in this specific case, because the principle of non-discrimination between job seekers, irrespective of a public placement monopoly and the prohibition of acting as an intermediary, is not violated. On this point see M. Roccella, above n. 3, 110.

agencies may be tempted, for market reasons, to concentrate on the 'most attractive job seekers', leaving aside the weaker ones,[13] were not dealt with in the reasoning of the Court. Reference was made to *Poucet and Pistre*,[14] in order to argue that national solidarity inspiring the activity of a social security body acting as a monopoly is a good ground for excluding the enforcement of Article 86 (now Article 82).

Although one might agree that a different kind of solidarity is at the core of placement systems and that the analogy with *Poucet* is therefore misleading, it is surprising that the Court did not devote any attention to the notion of co-operation between employers and labour market authorities, again indicated by the Norwegian and German governments as the key to understanding effective placement policies which would, nevertheless, be sensitive to the protection of less favoured workers.

Poucet remains indicative of a different line of reasoning, as if there were two ways of approaching the notion of an undertaking, within the meaning of Articles 85 and 86 (now Articles 81 and 82). The overall concept of solidarity inspiring the Court is such as to leave competence on social security matters strongly rooted in domestic law. This is so because solidarity in sickness and maternity schemes 'is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons making them'. Furthermore, in old-age insurance schemes solidarity results in 'contributions paid by active workers . . . to finance the pensions of retired workers', thus adopting redistribution as a guiding principle instead of capitalisation. Finally, solidarity means considering various social security schemes 'in that those in surplus contribute to the financing of those with structural financial difficulties'.[15]

Although referring to self-employed persons, the judgment in question has much wider relevance.[16] It maintains that the social purpose of an undertaking has precedence over market rules, regardless of the non-profit nature of the same and by virtue of the fact that non-economic activities are at stake.

B. A Useful Deviation from the Main Theme: *Albany International BV*

A recent Opinion of Advocate General Jacobs[17] throws new light on the Court's divided loyalty between social values and competition rules. The

[13] Observations submitted on 12 June 1996.

[14] Cases C–159/91 and C–160/91, [1993] ECR I–637. See also Case C–244/94 *Fédération francaise des Sociétés d'assurance and others* [1995] ECR I–4013.

[15] See I–668 of the judgment.

[16] P. Mavridis, 'Régimes complémentaires: droit de la concurrence ou droit social communautaire?', (1998) *Droit Social* 242.

[17] Opinion of Jacobs AG delivered on 28 Jan. 1999, in Joined Cases C–67/96, C–115/97, C–116/97 and C–117/97 and C–219/97 *Albany International BV* [1999] ECR I–5751 all referred from Dutch courts, dealing with the compatibility of compulsory affiliation to sectoral pension funds with the competition rules of the Treaty. The cases were referred

Opinion is a monumental document in which the reader may find all relevant references for an overall grasp of this delicate matter. It is worth referring to it, while maintaining the emphasis on *Job Centre*, because, despite the complex technicalities of the cases, a whole territory of social law becomes visible at times, reminding us that a lot still needs to be done to lay the foundations of a supranational system of social rights.

In order to investigate the field of compulsory pension schemes, the question arises whether sector pension funds, as regulated by Dutch law, are to be considered undertakings within the meaning of Articles 85, 86 and 90 (now Articles 81, 82 and 86) of the EC Treaty and, if so, whether making membership of such funds compulsory for industrial undertakings is in breach of competition rules.

Spice is added to the dish by the Advocate General when the discussion focuses on collective agreements as relevant sources for the regulation of pension funds. One of the arguments at stake is that such agreements may restrict competition, when harmonising a cost factor throughout an entire sector, and consequently may affect trade between Member States. The funds, for their part, maintain that collectively agreed provisions in the social field remain outside competition rules. The Advocate General shows disagreement on this point, stressing that the Treaty expressly indicates derogations from competition rules; moreover, he refers to decisions—such as *Höfner* and *Job Centre,* on the one hand, and *Poucet* and *Fédération Française des Sociétés d'assurances* on the other—in which the Court has shown that competition rules apply to the social field, be it labour markets or pensions.

Collective agreements between management and labour, however, deserve special attention. The Opinion looks carefully at the pillars of labour law, with an unusual taste for detail. Is there a fundamental right to bargain collectively and, if so, is it correct to maintain—as the funds, and the Netherlands and French governments claim, together with the Commission—that the autonomy of management and labour in enforcing such a right would be infringed by the application of Article 85(1) (now Article 81(1))? The ECHR is carefully examined in this regard and so is the case law of the Court of Human Rights. Homage is paid to precedents as well as to principles based outside the Community legal order and yet within the wider context of international standards applying to the specific cases in question.

The Advocate General acknowledges that collective bargaining 'normally' fulfils a social function, which is kept outside the competence of national competition authorities; this does not limit private actors' initiative to intervene in more public areas, where public interests may be taken into account and therefore fall within the scope of competition law.

An interesting list of 'antitrust immunities' for collective agreements is

during three proceedings brought by three undertakings 'challenging orders issued by sectoral pension funds demanding payment of the contributions to their respective schemes'.

proposed, in order to set limits to the self-restraint of competition law. Agreements should be formally framed within collective bargaining bilateral institutions; they should be concluded in good faith and not hide issues, such as working time, potentially leading to restriction of competition; they should deal with core subjects of collective bargaining and not affect third parties or markets.

We are presented with an aseptic notion of collective agreements: the fact that they remain outside the scope of Article 85(1) (now Article 81(1)) prevents contamination of the collective parties' private initiative. The suggested immunities, if adopted as guidelines, would not easily fit a dynamic process, such as bargaining collectively, which rests on the very assumption that there is no limit to discovering new fields of action and entering new subject areas, while balancing the countervailing powers of the parties involved.

We learn instead from the Opinion in *Albany International* that parties to collective agreements should become more and more aware of the incumbent strength of the market, able to capture within rational and efficient rules all manifestations of individual or collective autonomy, particularly those eluding a well-defined private sphere. We face, therefore, restrictions on collective bargaining flowing directly from competition rules. Although subject to interpretation on a case-by-case basis, limitations to bargaining collectively are *in re ipsa*, namely in the fact of being encapsulated within a common market, functioning in accordance with the leading principles of the Treaty.

The Advocate General's conclusions state that Article 85(1) (now Article 81(1)) is not infringed when a collective agreement signed by employers and employees' representatives sets up a sector pension fund, making affiliation compulsory for all persons belonging to that sector. The pension funds in question are to be considered 'undertakings' within the meaning of European competition law. Articles 90(1) and 86 (now Articles 86(1) and 82) could only preclude the operation of funds which were manifestly not in a position to satisfy demand, and the abolition of compulsory affiliation would not obstruct the performance of the services of general interest which should be the scope of the fund.

Solidarity is once again evoked as a guiding principle assisting the operation of a pension fund; one could argue that this is one of the reasons why, in exploring this territory, the Court relies on national judges and on their interpretation of the potential abuse of a dominant position.[18]

In its ruling on *Albany*[19] the Court attempted to eliminate all doubts concerning the role to be played by collective agreements. As a product of

[18] The AG cannot resist the temptation to offer guidance to national courts, indicating typologies of interpretation which are based on leading cases decided by the ECJ. The attempt is to prove that monopolies lead to abuses only when they are linked to other measures, be they the accumulation of two exclusive rights, the inability to satisfy market demands, thus damaging consumers, the exclusion of other economic operators in the exercise of exclusive rights. See para. 395 ff. of the Opinion.

[19] Case C–67/96, [1999] ECR I–5751, para. 58 ff.

social dialogue and a way of improving working conditions and wages, such agreements fall outside the scope of Article 85(1) (now Article 81(1)), while remaining inside the framework of social provisions in the Treaty.

The Court draws a daring parallel between European collective agreements—namely the ones first provided for in the Agreement on Social Policy, now incorporated in Article 139 of the Treaty—and the Dutch agreements setting up the pension funds. The assumption is that the procedure for seeking a Council decision to implement the former could be considered similar to the Dutch ministerial decree expanding the latter *erga omnes*. There is however no parallel: the parties signatory to the agreements are embedded in a system of collective representation at a national level, whereas, at a European level, the social partners have yet to give satisfactory proof of their representativity. Furthermore, the subject matters assigned to such different sources—national and supranational collective agreements—are not easily comparable, nor can their overall functions be assimilated one into the other.

The Court is attempting to mix together two systems of legitimacy and two regulatory procedures, in order to strengthen the role of collective sources. The collectively agreed origin of the Fund illustrates its social function, specifically the one that allows the Fund itself to be granted an exclusive right to manage supplementary pension schemes, without infringing Articles 86 and 90 (now Articles 82 and 86).

After this long parenthesis, offered as a useful deviation in order to look into new and even more varied developments of the troubled relationship between market rules and social values, we can return to the main theme under discussion here.

In *Job Centre* the Court, rather than following the line of thinking marked out by *Poucet*; largely based its judgment on *Höfner*.[20] This latter case dealt with the regulation of employment procurement under German law, whereby public agencies were considered unable to satisfy market demands, in the exercise of an exclusive activity. In particular, the German public employment agency failed to satisfy the needs of executives, who were recruited to fill vacancies only up to 28 per cent of market demands. By agreement with several professional organisations, the agency reacted to this situation, in recruiting executives with the assistance of special consultants. This meant adding specific expertise to its own public function, not completely releasing a task which reflects a diffuse public interest.

This point was stressed by the German government, indicating the responsibility of the Federal State to maintain an 'overall view' of the employment market, also in compliance with ILO Conventions 88 and 96. The

[20] Case C–41/90, [1991] ECR I–1979. Comments on this case are incorporated in wider analysis of Art. 90 (now Art. 86) case law. See P. Slot, 'Article 90 Case Notes', (1991) *CMLRev* 972; S.M. Taylor, 'Article 90 and Telecommunications Monopolies', (1994) *E Comp Law Rev* 326.

Commission, on the other hand, highlighted the concept of public powers exercised by the State in which employment procurement activities are not included if they tolerate exceptions, such as the recruitment of executives.[21]

What is at stake, both in *Poucet* and *Höfner*—and in a different way in *Albany*—is a definition of an undertaking flexible enough to include all economic activities but exclude, for the purpose of guaranteeing fundamental social rights, those activities which reflect a broad public goal.

The analogy between the Italian and the German employment procurement systems, as appears from the relevance of *Höfner* in deciding *Job Centre,* pays little attention to the fact, underlined by the Italian government and the Commission, that that case concerned one specific segment of the labour market and that the German authorities had admitted both their inability to place highly skilled managers and their willingness to enlist consultants on that particular matter.

The lack of an open admission of inefficiency in providing placement services on the part of the Italian *Ministero del lavoro* may be regarded as hypocritical. However, a question of principle remains open. The social objectives of public placement mechanisms, even if they become privatised, must remain within the domain of Member States and must be the result of far-reaching transformation of the labour law principles involved, in connection with the introduction of more efficient regulation of the market. Setting priorities in the social field is a meaningful part of state discretionary choices, best reflected in legislative activities.

The Court pushed competition rules to the forefront and stated that infringement of Article 86 (now Article 82) as a consequence of being in breach of Article 90(1) (now Article 86(1)) may occur when public placement offices are 'manifestly unable to satisfy demand on the market for all types of activity'. Inefficiency of the Italian labour market was inferred, since the Court could not verify it directly; it trusted *Job Centre* on this point and made good use of the academic wisdom in the application. It referred to the 'enormous changes as a result of economic and social developments' which affect 'an extensive and differentiated market',[22] thus showing its awareness of new social needs behind transformations of the labour market.

Possible scenarios after this decision would have been that national judges could verify in specific cases the infringement of Article 86 (now Article 82) and, in a different perspective, that private companies could be allowed to act as placement agencies by not enforcing against them the penal and administrative sanctions still in force. The legislature had to make haste to try, as far as possible, to fill in this yawning lacuna, in order to avoid the disintegrative effects of the Court's judgment.

[21] Particularly at I–1987.

[22] Para. 34 of the judgment. The Court—as noted by G. Ricci, above n. 12 at 154—goes in exactly the opposite direction from *Höfner*, where a restricted and specific section of the market was in question.

C. Actor-interest Analysis and the Role of Institutions

It is worth mentioning a number of interesting institutional reactions raised by *Job Centre I* at an early stage in the proceedings, since they seem to prove the 'exemplarity' of this case from the perspective of both national and Community law.

First of all, in the Commission's observations submitted to the ECJ the reference made by the Milan *Tribunale* was described as 'laconic'.[23] Why should free movement of workers and freedom to provide services interfere with a co-operative's initiative to start its activity in Italy as an intermediary in contracts of employment and in providing temporary workers? The Commission did not comment on this particular aspect, finding that it was not pertinent to the reference. On the other two issues, namely, the contrast with Community law of two separate laws—one establishing a monopoly on the placement of workers, the other forbidding intermediation in the provision of temporary work—the Commission chose to intervene only with regard to the former, leaving the latter to the discretion of the national legislature.

The argument reflected the Court's judgment in *Höfner*[24] and specified that a dominant position could be the effect of an unsatisfactory performance of the public placement service, when the latter proved unable to meet market needs, while itself occupying a significant part of the market, even within one Member State.

Between the lines of the Commission's observations one can see two aims. One is mentioned only briefly and is meant to publicise its own activism in forcing the German government to take the necessary measures to enforce *Höfner*, also as a result of complaints presented to the Commission by other Member States. The second aim is straightforward; it consists in showing its approval of the fact that the Court should leave it to national judges to verify whether an exclusive right to the placement of workers is contrary to Articles 90(1) and 86 (now Articles 86(1) and 82) of the Treaty. The Commission wished to play the role of the guarantor of fair rules of play between different levels of governance: States must respond to the Court's rulings and the monitoring of such responses is an important task for the Commission itself. States must also be respected in the political choices they make, when selecting services of public relevance, and yet they must in turn be respectful of market rules.

In the German government's observations[25] the placement of workers is regarded as a service of 'social' importance which reflects the principle of freedom in state organisation. In assigning this task to a 'public' institution and in restricting temporary work, the State is sovereign and can decide how to exercise public authority. Furthermore, the same government reminded the

[23] Observations of 19 July 1994.

[24] Case C–41/90, [1991] ECR I–1979.

[25] 28 July 1994.

Court that it is for national legislatures to attribute such functions to subjects other than the State. Having learnt its lesson in *Höfner*, the German government was trying to distance itself from possible effects of the Court's judgment; this argument is in fact reiterated in the observations submitted in *Job Centre II*.[26]

Both moves are relevant in drawing a map of institutional prerogatives, while at the same time interpreting the Court's ruling. The Court, as we can see in *Job Centre II*, was inspired by the new and stronger observations of the Commission.[27] National judges should have a role in ascertaining the abuse of a dominant position in the market; other cases, all related to public monopolies, were referred to in order to sustain this main thesis.[28] The Commission played a very active role in quoting mainstream case law, thus laying the foundations for the Court's judgment.

The point of view which, unlike in *Job Centre I*, was officially taken second time round by the Italian government,[29] therefore appears belatedly defensive. The main points put forward were: the primacy of ILO sources—the 1949 Convention No. 96—over Community law because of Article 234 (now Article 307) of the EEC Treaty; the particular emphasis placed thereafter by the Italian 1949 Law on protecting weaker job-seekers and the reference to *Merci convenzionali*,[30] rather than *Höfner,* in order to offer a more circumscribed criterion of monopoly. *Merci convenzionali*—a case which, in a different debate, attracted criticism from labour lawyers for its scant consideration of social rights while focussing on competition law[31]—based such measurement on overall business activity within the port of Genoa, whereas the assumed monopoly in the placement system could not, because of its prevailing social goals, be compared to an enterprise pursuing an economic activity.

The origins of this very intense exchange of references and legal interpretations must be referred back to the wellspring of this litigation, namely, the first application in *Job Centre I*, to which more space must be devoted. The suggested interpretation is that, because of that very powerful document, the judge found it agreeable to be guided along the twisting path of Community law, finding it simultaneously both obscure and attractive.

[26] Observations of the German government, 3 June 1996.

[27] 30 May 1996, JUR(96)04529.

[28] Case C–323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I–5077; Case C–320/91 *Corbeau* [1993] ECR I–2533.

[29] No observations were submitted in *Job Centre I*. See now the Italian government's Observations, 17 June 1996.

[30] Case C–179/90, [1991] ECR I–5889.

[31] G. Lyon-Caen, 'L'infiltration du droit du travail par le droit de la concurrence', (1992) *Droit Ouvrier* 313; P. Davies, 'Market Integration and Social Policy in the European Court of Justice', (1995) *ILJ* 49.

D. *Job Centre*: Academics v. Politicians

Since 1949,[32] Italian labour law has followed the tradition of regulating the exchange between labour supply and demand by entrusting this task to public offices, thus implying that stronger guarantees for employees would be provided, through the objectivity of placement mechanisms aimed at pursuing a public interest rather than following a free exchange within the market.[33]

This piece of legislation, inspired at the time by ILO Conventions Nos.88/1948 and 96/1949, must be seen as one of the most visible signs of an era which has slowly and progressively come to an end. Such an evolution has had to do with the erosion of the notion of a weaker party to the contract of employment, owing to a solid body of legislation enacted within the domain of labour law and also because of the power acquired by employers' associations and unions in collective bargaining.[34]

It has also had to do, in most recent times, with a different overall function of labour law, to which the most visible defaults of macroeconomic strategies have, sometimes uncritically, been attributed. Among these, the performance of the labour market, progressively afflicted by growing unemployment, was taken as paradigmatic of the consequences of an over-protective attitude on the part of law, which needed to be clarified and, where necessary, limited. The complex and still unfinished debate on flexibility is an indication of the dilemmas faced by labour lawyers both as academics and as policy-makers. Opinions on the matter reflect a different emphasis being placed on the efficiency of the market or on social rights, and they very often reproduce a false dichotomy between these two leading principles.

Job Centre can be taken as an example of the tension between an 'old' idea of labour law as the basis for strong individual and collective rights and a 'new' idea of the same, which is at the origin of differentiated and often weaker guarantees. It is argued in this Part that this is a schematic way of presenting the fatigue and complexity of labour law developments, and interpreting the historical reasons behind it. It is also maintained that even the most powerful impact of Community law in this field will not easily sweep away national legal traditions.[35] Negative integration, especially that expressed through the non-

[32] Law no. 264, 29 Apr. 1949.

[33] A prohibition against private employment agencies, counterbalanced by some limited exceptions, inspires the 1947 Norwegian law, described in some detail in the Norwegian Government's Observation in Case C–55/96 *Job Centre*. In view of a uniform interpretation of Community law provisions which are reproduced in the EEA, that government puts forward its own interpretation, fearing the Court's interference in what is described as a very coherent and well-functioning placement system.

[34] G. Giugni, 'Juridification: Labor Relations in Italy' in G.Teubner (ed.) *Juridification of Social Spheres* (de Gruyter, Berlin, New York, 1987) 191.

[35] S. Simitis, 'Europeizzazione o rinazionalizzazione del diritto del lavoro?', (1994) 64 *Giornale di diritto del lavoro e di relazioni industriali* 653.

enforcement of national law by national courts, does not bring about an overall and coherent picture of change; it simply gives an impressionistic idea of what kind of political choices and legal reforms should be made.

Historically different phases of Italian labour law developments can be placed in this wider context and interpreted as different and, in a way, consistent expressions on the part of the legislature. The 1960 Law, which prohibited intermediation in employment contracts, was one of the leading examples of how to insinuate a quasi-public function into labour law rules. The underlying rationale of the Law, also supported by the penal sanctions provided for in Article 2, was that the employer would fraudulently try to circumvent the law when referring to intermediaries; he would do so both to escape public placement mechanisms and to avoid the enforcement of individual and collective rights grounded in employment contracts.[36]

There was solid pragmatic evidence behind the choice of the legislature and there was no doubt at the time that such measures were thought of as the continuation of a widespread principle of equality, governing labour law in all its varied expressions. It is no coincidence that the same Law dealt both with the prohibition of acting as intermediary in employment contracts and the regulation of contracting-out. The common conviction was that the principles underlying Article 3 of the Law, to extend to all employees—including those hired by contractors and working within the employer's premises—the same terms and conditions of employment, was a strong sign of innovation in an emerging and promising labour law system, such as that of Italy in the 1960s.

Job Centre submitted that the prohibition in Italian law on acting as an intermediary and on providing temporary work was to be considered contrary to Community law. In so doing it adopted some rhetorical devices which can be questioned on a legal and a comparative basis.

Job Centre was ostensibly brought before the court for the purpose of protecting the interests of the plaintiff, which felt that its economic initiative was being obstructed and impeded by Italian law. The case was also driven by the activism of an Italian labour lawyer who had passionately advocated in his academic work the freeing of the legal system from all constraints, particularly those which were born under a protective labour law regime. Because of a different economic environment and different characteristics of the labour market, such measures are considered in his analysis as a departure from their original aim, to the point of now having a counter-productive effect on the efficiency of the economic system.[37]

The main—and certainly well-known—argument is that protective measures become an impediment to employment, both because of the poor

[36] This *ratio legis* is well captured in the Opinion of Elmer AG, delivered on 15 May 1997 [1997] ECR I–7131.

[37] In P. Ichino, *Il lavoro e il mercato* (Mondadori, Milan, 1996).This book offers the author's overall position in addressing possible reforms to be introduced in the Italian labour market.

functioning of state bureaucracies and because of the inability of the legislature to intervene and capture the new needs of the market. Furthermore, his analysis attempted to challenge Community law, by arguing that the ILO was accepting change and responding to it with innovative standards, whereas Member States in the Community were resistant to putting these changes on the political agenda.

Job Centre thus became an emblem of the modern organisation of employment services with the support of ILO standards which were still in the process of being ratified.[38] The world wide research which had preceded the conclusions reached at the 1994 81st Session of the International Labour Conference[39] was presented as a strong indication of transformations occurring in the great majority of legal systems, all trying to incorporate temporary employment agencies within the legal structure of the labour market. This generalised trend was opposed to old and traditional state preservation of public prerogatives which can no longer be advocated in the light of the new attitude adopted by the ILO.

In the proceedings put before the Court academic convictions were optimally combined with professional skill and rigour. The result is a lengthy piece of legal literature—the application written by the co-operative's solicitor/scholar—published in a well-known academic journal specialising in labour law.[40] The same contribution, together with the Observations of the Commission and the German government in *Job Centre I,* appeared subsequently in a book[41] in which other documents are collected: an introduction by the same author, the ILO report on private employment agencies, a comparative analysis of *lavoro interinale* in other European countries, translations of the Swiss and French laws, and proposals for legislation on the subject drafted by the author himself in collaboration with the then Secretary to the Minister of labour, who was also a labour law professor.

Reporting on the list of contents of this book should not appear pedantic: we are describing an example of strategic litigation through academic literature, which adds an original insight to the actor/interest analysis of European integration. There has been an extraordinary convergence of academic whispering in the ears of the Italian legislature, which was susceptible to these suggestions since—as we mentioned before—the presence of labour lawyers in the competent ministry was constant and remarkable.

[38] See now ILO Convention No.181/1997 and Recommendation No.188/1997 on Private Employment Agencies.

[39] *The role of private employment agencies in the functioning of labour markets*, (International Labour Conference, Geneva, 1994). The AG's Opinion (at n. 30) refers repeatedly to this Report, acknowledging in particular the element of differentiation in employment procurement activities, as it results from field research; this is why a single provider of services cannot satisfy the needs of the market, as indicated by the Commission.

[40] (1994) III *Rivista italiana di diritto del lavoro* 113–50.

[41] P. Ichino (ed.), *Lavoro interinale e servizi per l'impiego* (Giuffrè, Milan, 1995).

Because of the reference to the ECJ, the nature of consultation with academic specialists in the field was altered: without ceasing to be technical, it also became highly political. Parliament wished to maintain its own internal coherence, responding to political pressures and meeting the needs of management and labour who were very alert and present at the discussion of legislative proposals. The scholar/solicitor knew how delicate and demanding political negotiation could be in drafting legislation of this kind: he had previously been a Member of Parliament and even in that capacity had been extremely active in this field.[42]

This is probably why his application was written employing well-chosen rhetorical devices, proving that there are many keys to open the door of legislation and that he knew how to use some of them competently.

Let us concentrate on the signals which were sent out to national actors in his application. The application quotes a 1977 report prepared by the Italian *Consiglio nazionale dell'economia e del lavoro* (an auxiliary body provided for by the Constitution in which experts in economics and law join the representatives of labour and management in all sectors of economic activity) which showed, even then, how inadequate existing legislation was in meeting the needs of the labour market. It then refers to the 1979 proceedings of the annual conference held by the Italian national association of labour lawyers which was again very critical of the *status quo*. In moving on to the early 1980s the disillusionment expressed by civil servants responsible for the placement system is reported; field research promoted by specialised institutes is presented, as well as a study sponsored by the largest Italian confederation, together with a comparative essay by Lord Wedderburn, a leading and respected academic in European labour law circles.[43]

Both the chronology and the choice of quotations are very clever. The comprehensive and detailed account of all relevant facts and commentaries related to the issue in question attempts to leave no room for further discussion and no way of escaping these weighty conclusions. An outstanding British labour lawyer, renowned for his acuity and precision in comparative work, is presented alongside Italian *dottrina*. Had the Italian referring court been intimidated by the Luxembourg judges, it could have found support and even intellectual excitement in this meticulously researched and wisely constructed application.

This picture is also filled with other images which—if one were tempted to adopt a non-legal interpretation—could be described as the writer's deep and unconfessed fears. Lest the more sophisticated reader of this essay/application

[42] P. Ichino, *Il collocamento impossibile* (De Donato, Bari, 1982). In 1979 the author was elected to Parliament and sat as a representative of the then Communist party in the *Camera*'s labour commission. The book is again a combination of legal academic analysis and very useful documentation, such as draft legislation and detailed references to the political debate held at the time.

[43] Lord Wedderburn, 'Hiring Procedures', in Lord Wedderburn, B. Veneziani and S. Ghimpu, *Diritto del lavoro in Europa* (F. Angeli, Milan, 1987).

might think that elsewhere in Europe the problem of reforming the placement system has been solved by social-democratic governments, he or she should know that Sweden, the UK and Germany all failed to do so. Public placement agencies only reached a small minority of job-seekers, as had already been documented in previous research.[44] As for field research carried out in Italy in the early 1980s and statistical data again proving the inefficiency of placement services in numerical terms, the author found it easier to attach his book published in 1982[45] as an official annex to the case documentation.[46]

Even the metaphors he employs are striking: job-seekers in a modern labour market resemble an 'ants' nest', whereas the ECJ's hoped-for decision is described as a 'healthy viaticum'[47] for labour policies in Italy.[48]

In this rich cultural setting, his references to Community law are unsurprising. However, some of them are possibly less central to the leading legal argument. Is it so obvious that temporary employment agencies help in fighting long-term unemployment, and what does this have to do with Community law, especially with the free movement of workers?[49] Is it correct to combine the 1949 and the 1960 Laws in describing the two major legal impediments to the co-operative's entry into the Italian labour market? As the outcome of two very different historical phases in Italian labour law, these two pieces of legislation also have a very different impact on an integrated market. While the former may collide with free competition, the latter coincides with a choice of the national legal system in forbidding intermediary temporary employment agencies, but also in allowing and certifying such agencies, regardless of supranational market constraints. National law, in these cases, does not automatically infringe upon free provision of services and does not necessarily have an indirectly discriminatory effect on non-national service providers.

Even the strong emphasis placed by the applicant on *Höfner* is not consistent with the description of the Italian placement system, inefficient in its

[44] Relevant references in the application are made to P. Ichino, 'Il modello britannico di intervento pubblico sul mercato del lavoro' in C. Marazia (ed.) *Istituzioni e politiche del lavoro nella Comunità europea* (F. Angeli, Milan, 1981); P. Ichino and M. Violi, 'L'alternativa neoliberista al modello socialdemocratico' in F. Carinci (ed.) *L'agenzia regionale per l'impiego* (Jovene, Naples, 1990).

[45] See above n. 42, 33.

[46] See 165 of the application, published in its full version in P. Ichino (ed.), above n. 41.

[47] This is a literal translation of the phrase '*salutare viatico*' used in the application. *Viaticum* is described in the OED as 'a Eucharist given to a person (in danger of) dying'.

[48] Respectively 173 and 202 of the application, at n. 41.

[49] See 188 of the application. On the interpretation of Art. 48 EC it is perhaps too daring to quote (at 180) F. Mancini, 'The Free Movement of Workers in the Case-law of the European Court of Justice' in D. Curtin and D. O'Keeffe (eds.) *Constitutional Adjudication in European Community and National Law* (Butterworths, London, 1992) and imply that the enforcement of that fundamental freedom mainly depends on the efficiency of placement offices throughout Europe, drawing a comparison with free speech and free press which is not sufficiently elaborated.

entirety rather than in one specific sector. The levels of legal argumentation, especially when referring to Community law, suffer from the applicant's tunnel vision of the expected outcomes: as if the Court of Justice could magically reform the Italian labour market or indeed the Italian state; as if, in deciding a case, the Court could provide the push needed to move towards a new phase of Italian politics, heralding, as we read in the final lines of the application, the birth of the 'Second Republic'.

Given all this, it is impossible to ascertain whether the case started because of pressure from the powerful multinationals active in this field all over Europe, co-founders of the co-operative and therefore represented in the case, or whether it was the power of scientific and academically rooted convictions to attract business and to construct a case of strategic litigation worthy of great attention. This perspective, external to the purpose of the present analysis, raises the more general issue of dynamic integration and of the institutional reactions aroused by this case and of the economic strategies hidden behind them.

E. Dual Conclusions for a Dual Story

The conclusions for this case, chosen as a rather original and possibly unique example of strategic litigation, are twofold. The Court's judgment had, perhaps without its volition, a dual impact.

At Community level, this decision can be framed within the Court's case law and be read as a coherent follow-up to previous judgments. What is new is the evaluation the Court gives of the placement system in its entirety, affecting with its decision the State as a whole, with its many ramifications at a decentralised level. Treating the placement system as an enterprise may certainly be correct from the point of view of the economic nature of the activity pursued. What is remarkable—and therefore adds something more to the notion of an enterprise—is the distribution of such an activity across the whole nation State and across all occupations.

Competition law tries to suggest, through the words of the Court, a new order, forcing the legislature to shape differently what used to be a state function.

At a national level, the Court's decision did more than pave the way for legislative initiative: it created a situation of political pressure different from the past, whereby non-deferrable answers were expected from Parliament. As a consequence of the first reference, until the decision in *Job Centre II*, the attempts to reform the Italian placement system, exposed as they were to critical public evaluation, became as much an embarrassment for law-makers as a challenge for academics.

Although the process of changing the law was lengthy and controversial, it reflected, throughout, the state of the political confrontation and showed in different phases the level of consensus which could be reached. This is not to

say that the system did not need to be shaken up and forced to change; the point is rather to prove that, even in cases of manifest incompatibility of national legislation with supranational market requirements, the touch of national parliaments is indispensable. And yet disintegration of the legal system may occur, as a follow-up to an ECJ decision or—one might argue—as a result of an imperfect performance of the law.

The new 1997 Law reforms the placement system mainly through decentralisation, keeping at its core the official contacts with international organisations and the European Union, as well as control and co-ordination of the information system and a complicated network of data to be uniformly disseminated to placement offices all over the country.

Decentralisation gives more powers to the regions, which, in their freedom to legislate on the matter, can further decentralise certain activities to the provinces in different forms. The Law also introduces the authorisation to act as intermediaries in employment contracts, regulated by a ministerial decree.[50] This implies that any private placement agency which tried to operate without such an authorisation, would still be liable under the old sanctions of the 1949 Law, which has not been abrogated. The same is true for the 1960 Law, which still plays a residual role, whenever the new temporary employment agencies do not comply with the legal requirements established by the 1997 Law on *lavoro interinale*. In these two different perspectives referred to two different laws, the ECJ's decision should not prevail as a source, since national law now provides specific regulations.

Alarmed criticism has been raised with regard to the retroactive effect of the Court's decision[51]: will courts have to verify on a case-by-case basis when and how to enforce the 'old' sanctions against agencies which are now operating under a new regime? What should be done with pending cases, in which a decision on current criteria of efficiency of the placement system would inevitably collide with the enforcement of previous legislation?

In *Carra*,[52] a case referred by the *Pretore* in Florence, questions of interpretation put to the Court have to do with the direct effect of the decision in *Job Centre* and with the subsequent obligation for national judges not to enforce national laws incompatible with Articles 86 and 90 (now Articles 82 and 86) EC. Indeed, the direct enforceability of such articles in national courts, as the Advocate General underlines in his Opinion,[53] puts the judges in the position not to enforce penal and administrative sanctions against agencies providing inter-mediation in employment contracts. The Court[54]

[50] Art. 10, d.lgs. no. 469/1997, above at n. 11. [51] R. Foglia, above n. 9 at 550 ff.

[52] Case C–258/98, Opinion of Ruiz-Jarabo Colomer AG, presented 25 Nov. 1999. In this case the Pretore had to decide on the enforceability of penal and administrative sanctions in cases of unlawful intermediation between labour supply and demand, as provided for in the 1949 and the 1960 Italian laws previously cited. The Italian government had pointed out the non-retroactivity of legal regulations introduced after *Job Centre II*.

[53] Conclusions, 10.

[54] Case C–258/98, 8 June 2000, not yet reported.

ruled in favour of Articles 86 and 90's direct enforceability and pointed out once more that public placement offices in Italy were unable to provide services which would satisfy labour market demands. This left the non-enforceability of national laws contrary to competition law fully in the hands of national judges.

These questions again open up the field for further discussion: the dialogue between courts inevitably includes a third actor, the national parliament, to which all internal contradictions to the domestic legal system must be referred and to which the selection of fundamental social values must be left. It is indicative, in this regard, that the power to authorise employment agencies to operate should be left with state authorities, thus indicating the control over public functions and the overall protection of public interests.

In the specific case discussed in this Part we can see several possible outcomes. Contradictions still visible within an imperfect legal system have exploded on the national judges' initiative. Contradictions have been brought back to the ECJ for further clarifications. Whereas the former outcome might prove disruptive, the latter might prove inefficient and too intrusive.

In both cases we would have to conclude that the Court in Luxembourg has limited powers: the new order it brings about, looking at the integration of the market and at its competition rules, is not perfect and certainly not self-finalised.[55]

The dialogue must continue as an open discourse within the boundaries of the State: the Italian lawmakers are still under political pressure, even after the apparent abolition of a dated, unstable and inefficient public monopoly.

[55] It may suffice to quote the Commission's reasoned opinion, sent to Italy under formal infringement proceedings, dealing with the obstacles preventing temporary employment agencies based in other Member States from offering their services in Italy (28 Apr. 1999). Law 196/1997 sets an obligation to establish a branch of the employment agencies in Italy, in order to have the necessary authorisation. Together with the obligation to deposit a financial guarantee, these measures are seen as an unjustified restriction on the freedom to provide services. See now Case C–279/00 *Commission* v. *Italy* (pending).

PART III THE EUROPEAN COURT OF JUSTICE AND THE SPANISH LABOUR AND SOCIAL SECURITY COURTS: TWO EXAMPLES

FERNANDO VALDÉS DAL-RÉ

A. Introduction

The Community directives relating to working conditions and terms and conditions of employment (at least those of the second and third generation) have been transposed into Spanish law reasonably promptly and, in terms of technical substance, correctly. That said, one might be tempted to conclude that the national courts in Spain have only a minor role to play in the reception of Community law in the field of social policy. The more assiduous the national legislators have been in preventing potential conflicts between Community and national law, the fewer occasions the courts will have to assert the supremacy of the former, to consider the possible horizontal direct effect of directives which have not been transposed or to engage in co-operative dialogue with the European Court of Justice (ECJ) through the preliminary reference procedure.

Although there may be a good deal of truth in this thesis, it fails to take full account of the complex and varied role played by the national labour and social security courts in deciding disputes arising from application of the provisions which make up the *acquis communautaire*.[1] In their capacity as Community courts, these national courts have to deal with a range of normative instruments which extends beyond harmonisation rules whose direct effect is usually derived from the corresponding act of transposition. It also includes co-ordination rules enacted in the form of regulations, which feature prominently in certain areas of the Community legal order such as social security. Consequently, the function performed by national courts in the reception of Community social law cannot be evaluated solely in terms of the legal technique and policy adopted by national legislators; the direct action of the Community legislature also has to be taken into account. Moreover, it must be borne in mind that the preliminary reference procedure is not always used to clarify a genuine doubt about the meaning of a Community provision which is applicable to the case at issue, or to resolve an explicit or implicit conflict of rules. References for a preliminary ruling may also serve purposes which are domestic rather than related to European legal integration and the construction of a uniform system of law. One example that springs to mind is their use to settle disagreements between national courts themselves.[2]

[1] F. Valdés Dal-Ré, 'El papel del juez laboral como juez comunitario: colaboración externa y disidencia interna', (1998) 3 *Relaciones Laborales* 1–9.

[2] S. Simitis, 'Fine o rinascita del diritto del lavoro. Il caso della Corte di giustizia europea', (1995) 68 *Giornale di diritto del lavoro e di relazioni industriali* 542.

Quite apart from all this, and obvious though it may seem to say so, in order to be in a position to exert an influence in shaping a culture of European integration within their own legal order the national courts need to be familiar with the principles and techniques which constitute the *acquis communautaire* and inform its interpretation by the ECJ. To put it another way, the role of national courts in the reception of Community law on social matters can be properly assessed only after they have had a long enough 'learning period' to become accustomed to the distinctive language and content of Community norms.

This unwritten rule certainly applies in the case of Spain's labour and social security courts. In the initial years following the country's accession to the European Communities, they made no mention of Community law and hence engaged in no dialogue with the ECJ. This is readily confirmed by a perusal of the national court reports for the late 1980s. The end of this stage of passivity and lack of understanding is marked by the 1991 judgment of the Labour Chamber of the *Tribunal Supremo* (Spanish Supreme Court) which recognised for the first time the principles of the direct effect and supremacy of Community law.[3]

The first Community provisions whose application was relied on before labour courts by national citizens were the rules on the co-ordination of social security schemes, that is, Regulation 1408/71. Large numbers of Spanish workers migrated to other European countries in the 1960s and many then returned to Spain in the following decades. This circumstance explains why co-ordinated social security law was the first area in which national courts had to deal with Community law on social policy. It is also the reason it continues to be the area which features most prominently in Spanish settled case law and judicial doctrine[4] and, probably, offers the most interesting judgments. Reliance by litigants on the rules on a co-ordinated European system of social security has increased steadily in recent years and, as will be argued below, has led to the opening up of a fruitful co-operative dialogue between the national courts and the ECJ which still has farther to go.[5]

[3] See *Tribunal Supremo* judgment of 13 June 1991, *Aranzadi* 5147.

[4] The expression 'settled case law' (*jurisprudencia*) is used here to refer to the firm and consolidated doctrine developed by the Labour Chamber of the *Tribunal Supremo*, the highest instance within Spain's system of labour and social security courts whose jurisdiction takes in the whole of national territory. The expression 'judicial doctrine' *(doctrina judicial*) refers to the criteria established by the 21 Labour Chambers of the *Tribunales Superiores de Justicia* (High Courts of Justice) whose territorial jurisdiction covers an individual Autonomous Community or, in some cases, a smaller geographical area.

[5] The ECJ has already had occasion to rule on a number of different questions on this subject raised in preliminary references made by Spanish labour courts. In its judgment of 12 Sept. 1996 (Case C–251/94 *Lafuente Nieto* v. *INSS and TGSS* [1996] ECR I–4187) it answered the questions referred by the Labour Chamber of the Basque *Tribunal Superior de Justicia* for a preliminary ruling concerning the interpretation and validity of Art. 47(1) of Reg. 1408/71 and the interpretation of its Art. 46(2). This was followed by a judgment of 20 Feb. 1997 (Joined Cases C–88/95, C–102/95 and C–103/95 *Martinez Losada and Others* v.

Things are very different, at least as yet, when it comes to the relationship between the labour courts and Community labour law in the strict sense. Save for the exceptions that will be mentioned later, there are no occasions involving application of the *acquis communautaire*. Litigants do not usually rely on Community provisions to substantiate their claims, and courts do not usually include among their *rationes decidendi* arguments based on normative elements deriving from harmonised Community law. The fact that litigation is conducted along exclusively 'national' lines has the effect of distancing Spain's labour courts from the resources of Community law, including those contributed by case law.

Although no quick and definitive answer can be given to the question why the national actors in this area of litigation pay little heed to Community provisions, two important reasons can be singled out as concerns, at least law which had already been harmonised prior to Spain's accession to the European Communities.

The first is the widespread belief, shared by national courts and legal scholars alike, that the level of protection offered by Spanish legislation is equal to or higher than that provided by the Community legal order. To the best of my knowledge, there has never been an instance of a labour court deciding not to apply a national norm (including statutes) on the ground that it is in breach of or less favourable than Community law. The second reason, which is a more complex one, arises from the procedures established in Spain's legal order for the protection of fundamental rights. The fact that litigants who have exhausted the ordinary system of legal remedy have a right of appeal (known as *recurso de amparo*) to the Constitutional Court against any alleged violation of their fundamental constitutional guarantees has produced a firmly rooted conviction that the protection of fundamental rights is a strictly national matter. The court which has the final word as the ultimate guardian of those rights is seen as the one which sits in Madrid, not Luxembourg. And this is despite the fact that, when it is dealing with the concept and associated principle of equality between men and women, the 'word' as pronounced by that Constitutional Court in Madrid is often not its own but that borrowed from the ECJ. Paradoxically, in applying the doctrine of the Spanish Constitutional Court the ordinary labour courts are indirectly incorporating Community case law.[6]

Both reasons have the same effect of strongly discouraging the ordinary

INSS [1997] ECR I–869) delivered in answer to a preliminary reference made by the Social Court of Santiago de Compostela concerning the interpretation of the Reg's. Arts. 4, 48 and 67. And on 9 Oct. 1997 the ECJ delivered a judgment (Joined Cases C–31/96, C–32/96 and C–33/96 *Naranjo Arjona and Others* v. *INSS and Others* [1997] ECR I–5501) on a preliminary reference from the Labour Chamber of the Extremadura *Tribunal Superior de Justicia* concerning the interpretation of Art. 47(1) of the same Reg.

[6] An obvious example is the Spanish Constitutional Court's judgment of 1 July 1991 (STC 145/91). See further Chap. 2, Part IV.A.

courts from looking to Community law for solutions, but they each apply to a different area. Whereas the first operates in regard to the Community directives which protect employees in undertakings suffering economic difficulties or undergoing restructuring processes, the second affects the harmonization rules adopted for the purpose of putting into effect the principles of equality and non-discrimination between men and women. This separation between the areas affected has many consequences, both systemic and practical. On the one hand, it highlights the different nature of the two subject areas: the first is occasional and circumstantial, while the second is structural and organic. On the other, it suggests the likely route by which changes will come about in the still little developed and fragile relationship which has slowly been establishing itself between Community case law and the national courts as concerns the influence of Community labour law of the early period. Such changes have to come from a more rigorous comparison of the degree of protection provided by national provisions and by those of Community law.

Although still incipient, that change appears to be happening. Labour courts in Spain are already beginning to find that, when this comparative technique is applied, the rule provided under domestic law cannot always be classed as the more favourable of the two or, at least, that the result is unclear or ambiguous and that in order to clarify their reasonable doubts regarding the interpretation of a Community rule they need to make use of the preliminary reference procedure.[7]

For the reasons just mentioned, the contribution made by Spanish courts to European integration through Community law in the field of social policy is only a modest one. In the first place, co-operative dialogue between these national courts and the ECJ in the form of references for a preliminary ruling is infrequent both in absolute terms and in relative terms, that is, in comparison with the numbers of references made by courts in other Member States. But it is also modest in a substantive sense. Where it has taken place, this dialogue has concerned legal questions which are peripheral or secondary within Spain's legal order, although, as explained below, in some cases its

[7] As an example of this situation, the Labour Chamber of the *Tribunal Superior de Justicia*, Castilla–-La Mancha, by Order of 25 April 1996 (RL TSJ–1023), referred to the ECJ for a preliminary ruling a question whether Dir. 77/187 relating to transfers of undertakings is applicable to a situation of succession in the performance of the activity which was not accompanied by any transfer of material assets by the previous undertaking. This question was settled by the ECJ in its judgment of 10 Dec. 1998 (Joined Cases C–173/96 and C–247/96 *Sánchez Hidalgo and Others* [1998] ECR I–8237). In addition, the question whether Art. 44 of the *Estatuto de los Trabajadores* (Workers' Statute) fully complies with the standard of protection in the event of the transfer of an undertaking provided for by Dir. 77/187 is a matter of debate among legal scholars in Spain, and the need to draw up a specific instrument implementing those provisions has been suggested; see C. Gala Durán, 'Sucesión de empresa. Mantenimiento de condiciones y convenio colectivo aplicable: apuntes jurisprudenciales', (1997) 24 *Actualidad Laboral* 581.

influence on the development of Community law has, comparatively speaking, been somewhat more notable. Nevertheless, there appear to be signs in recent years of a slight and still embryonic change in this trend: the preliminary references made have increased in number and gained more substantive depth.

Only time will tell whether this proves to be correct. In the meantime, I shall examine the course of development of collaboration between national courts and the ECJ in the formation of a European legal culture by looking at specific areas. Two have been selected as examples. The first concerns harmonised social law on the protection of employees in the event of their employer's insolvency, and may be viewed as culminating in the ECJ's judgment of 16 December 1993.[8] This example is of interest not because of the labour law aspects discussed, which are merely secondary; its significance lies in its Community projection. If 'the essence' of the European legal order's system of sources lies in the relationship between supranational and national laws,[9] the case in question can rightly be described as an 'authentic test-case of Community law'[10] since it features all the main actors of the European legal scene: national courts of different levels, the ECJ, the Community legislature and the national legislators.

The second example examined concerns co-ordinated rules in the field of social security. The matter at issue has already been dealt with in two ECJ judgments[11] but cannot yet be regarded as settled because it is now the subject of a new preliminary reference made by the Spanish *Tribunal Supremo*.[12]

In common with the first example, developments in this area feature all the main actors either directly or indirectly, although the roles they play in this example are different.

B. Example 1: Inclusion of Higher Management Staff in the Pay Protection Provided under Directive 80/987

The matter at issue in *Wagner Miret*[13] was one of average technical complexity, with a limited labour-law dimension. It concerned the question whether national law complied with Community standards as regards pay protection for higher management staff in the event of the insolvency of their employer.

The system for guaranteeing the payment of amounts owing by way of salary as required under Directive 80/987[14] is for the benefit of 'employees',

[8] Case C–334/92 *T. Wagner Miret* v. *Fondo de Garantía Salarial* [1993] ECR I–6911.

[9] See G. Lyon-Caen, 'Le Royaume-Uni, mauvais élève ou rebelle indomptable?', (1994) *Droit Social* 923. An Italian translation is at (1994) *Giornale di diritto del lavoro e di relazioni industriali* 679.

[10] See C. R. Fernández Liesa and M. Rodríguez Piñero, 'Altos cargos y FOGASA: la postura del Tribunal de Justicia de las Comunidades Europeas', (1994) 2 *Relaciones Laborales* 85.

[11] See the judgments in *Lafuente Nieto* and *Naranjo Arjona* , above n. 5.

[12] See below n. 50. [13] See above n. 8. [14] See [1980] OJ L283 23.

the definition of this latter concept being left to national law. The addressees of the Directive are therefore those who, within the meaning of national law, are classed as persons working on behalf and under the direction of another. Nevertheless, the Directive allows Member States to exclude 'certain categories of employee' from the scope of this protection 'by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive'.[15]

The corresponding guarantee institution established under Spanish law is the *Fondo de Garantía Salarial* (Pay Guarantee Fund), a public fund responsible for paying employees (subject to certain quantitative and temporal limits) outstanding salary which is unpaid by reason of, among other things, their employer's insolvency (Article 33 of the *Estatuto de los Trabajadores* (Workers' Statute)).[16] Although employees are therefore the beneficiaries of the system, this does not include all employees but only those employed under a typical or ordinary employment relationship. To put it differently, employees with a special employment relationship are either included or excluded depending on the special rules covering them. In the case of higher management staff,[17] those rules expressly establish that Article 33 of the *Estatuto de los Trabajadores* is not applicable. Purely from the point of view of national law, there was no doubt about the exclusion of this category of employees from pay protection; but from the point of view of Community law it was the subject of disagreement.

Directive 80/987, as already mentioned, authorises a Member State to exclude certain categories of employee from the system of guarantees concerned provided that, in addition to the basic conditions being fulfilled (the special nature of the employment relationship affected or the existence of alternative forms of protection), the inclusion of those categories in the special Annex to the Directive has been expressly requested. This formal requirement was not complied with in the case of higher management staff, whose exclusion from the scope of the Directive had not been requested in this way by Spain.[18]

[15] *Ibid*., Art. 1(2).

[16] For more details, see J. García Murcia, 'El régimen jurídico del Fondo de Garantía Salarial', (1985) 9 *Relaciones Laborales* 11–44; I. Albiol Montesinos, *El salarin. Aspectos legales y jurisprudenciales* (Ediciones Deusto, Bilbao, 1992) especially at 170–210.

[17] Spanish law defines higher management staff (*personal de alta dirección*) as 'employees who exercise powers which are inherent in the legal ownership of the company and related to its general objectives with full autonomy and responsibility limited only by the criteria and direct instructions laid down by the person or top-level bodies in charge of the company's direction and management' (Art. 1(2) of Royal Decree No 1382/85, which regulates the special employment relationship of higher management staff). For more details see, from among the abundant literature on the subject, C. Martínez Moreno, *La relación de trabajo especial de alta dirección* (Publicaciones del Consejo Económico y Social, Madrid, 1994) especially at 29 ff.

[18] The original content of the Annex to Dir. 80/987 was amended by Dir. 87/164 to include in regard to Spain, 'domestic workers employed by a natural person'.

This is the normative context which surrounded the Community debate consisting in ascertaining whether or not the national legislation complied with Community law and, if the answer was in the negative, determining the consequences of such non-compliance. The debate can be structured into two 'acts' and an 'epilogue' featuring, respectively, (a) the entire system of national courts; (b) the ECJ and the national courts (mainly the referring court which dealt with the matter once it was returned from Luxembourg); and (c) the national legislators.

The question whether the treatment of higher management staff as regards the protection of amounts owing by way of salary in the event of their employer's insolvency should follow the national rules (which excluded them) or the Community rules (which include them) first arose in Spanish litigation in the early 1990s. Opinion on the matter as adopted in the labour courts soon became split into two irreconcilable interpretations.

An interpretation denying the direct effect of Directive 80/987, and hence its applicability, was led by the Labour Chamber of the Spanish *Tribunal Supremo*,[19] on the ground that the Directive's provisions did not meet the requirement for unconditionality and sufficient precision stipulated by the ECJ's own case law as a precondition of direct effect. In contrast to this, an interpretation according direct effect to the Directive's provisions was adopted by a number of lower courts in Spain whose jurisdiction is confined to the territory of an individual Autonomous Community, and in particular by the Labour Chamber of the Catalan *Tribunal Superior de Justicia* (High Court of Justice), which in July 1992 made a preliminary reference to the ECJ.[20] This was a clear instance of using the preliminary reference procedure to settle disagreements between national courts regarding interpretation. The decision by a lower court to refer a matter to the ECJ represents the formalisation of a doctrinal 'rebellion' against a hierarchically superior court, as the only means left of making its own interpretation prevail over that of the other court.[21]

[19] In its first judgments on the matter in 1991 (*Aranzadi* 5147 and 5985), the *Tribunal Supremo* denied application of the Dir. on the ground that the claim was brought before the competent court prior to the expiry of the three-year period allowed for Spain to transpose Community law into national law, a period whose *dies a quo* was, according to Art. 395 of the Act of Accession, the date of Spain's accession to the European Communities. In short, the *Tribunal Supremo* held that the incorporation of dirs. into national law by virtue of the Act of Accession was 'solely to the effect of notification', meaning that Spain was then allowed in addition, from the date of its accession, the particular periods prescribed in each dir. for Member States to adopt the measures necessary to comply with its provisions. This interpretation was not only circumstantial but also plainly mistaken (see R. Alonso García, 'De nuevo sabre el derecho comunitario, el personal de alta dirección y el Fondo de Garantía Salarial', (1993) 57 *Revista Española de Derecho del Trabajo* at 45). What the Act of Accession required was that by 1 Jan. (or 1 Mar.) 1986 all dirs. were to have been transposed into Spanish law. That, at any rate, was the interpretation upheld by the ECJ in its judgment of 7 Nov. 1991 in Case C–313/89 *Commission* v. *Kingdom of Spain* [1991] ECR I–5231.

[20] See Order of 31 July 1992, *Aranzadi* 4100.

[21] The Order for reference makes this perfectly clear, stating that the interpretation being advocated 'is not shared by the *Tribunal Supremo*, which is the supreme national authority on the interpretation of infra-constitutional legality'.

In the second 'act' of this debate, the main figure is the ECJ's judgment in *Wagner Miret*,[22] which had its doctrinal roots in the Court's judgment of 19 November 1991 in *Francovich*.[23] In essence, the national labour court making the reference for a preliminary ruling was asking whether higher management staff were entitled, by virtue of the Directive at issue, to request the payment of amounts owing to them by way of salary from the Guarantee Fund established under national law for the other categories of employee or, if this was not the case, whether they were entitled to request the State to make good the loss and damage sustained as a result of its failure to implement the Directive in their respect.

In reply to these questions, the judgment in *Wagner Miret* begins by recalling the doctrine already upheld in *Francovich*[24]: although the provisions of the Directive are sufficiently precise and unconditional as regards the definition of the persons entitled to the guarantee and its content, those elements are not sufficient to enable individuals to rely on the direct effect of the provisions against the State since 'the Member States have a broad discretion with regard to the organization, operation and financing of the guarantee institutions'.[25] Given that 'the Directive . . . does not oblige the Member States to set up a single guarantee institution for all categories of employee'[26] or (which comes to the same thing) that the discretion given to the Spanish State allows it to set up other institutions separate from that already established, the ECJ concludes that higher management staff cannot rely on the Directive in order to request the payment of amounts owing by way of salary from the *Fondo de Garantía Salarial*, that is, the Spanish guarantee institution.[27]

After thus denying the Directive horizontal direct effect, the judgment goes on to state: 'it follows from the *Francovich* judgment . . . that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the Directive'.[28] However, the ECJ does not end by affirming (explicitly or implicitly) the non-compliance of Spanish law with Community law. To put it more precisely, the liability of the State can be established only when the national courts, in application of the doctrine contained in *Marleasing*,[29] have been unable to interpret national law in a way which conforms with 'the wording and the purpose of the Directive'.[30] In short, the liability of the State is seen as a 'subsidiary' liability[31] with respect to the interpretation of national law in accordance with Community law.[32]

[22] See above n. 8.

[23] Joined Cases C–6/90 and C–9/90 *Francovich and Others* v. *Italian Republic* [1991] ECR I–5357. On the consequences of this judgment see, e.g., P. Davies, 'The European Court of Justice, National Courts and the Member States' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lard Wedderburn* (Clarendon Press, Oxford, 1990) at 109 ff.

[24] See n. 23. [25] At para. 11. [26] At para. 18. [27] At para. 19.

[28] At para. 22. [29] At para. 20. [30] At para. 23.

[31] ECJ judgment in Case C–106/89 *Marleasing* [1990] ECR I–4135.

[32] C. R. Fernández Liesa and M. Rodríguez-Piñero Royo, above n. 10 at 99.

Other courts apart from the ECJ also feature in this same 'act' of our first example. First, while the preliminary reference made by the Catalan *Tribunal Superior de Justicia* in *Wagner Miret* was still pending before the ECJ the *Tribunal Supremo* delivered another judgment[33] in which, after reiterating its previous doctrine, it noted *Francovich* and, in an argument which was more self-interested than interesting, asserted that 'this ECJ decision, although following different routes, arrives at interpretations coinciding' with those advocated by itself; and it concluded by declaring that its own thesis was fully compatible with that upheld by Community case law. Secondly, once the ECJ had delivered its preliminary ruling the referring court (the Catalan *Tribunal Superior de Justicia*) had to decide the appeal lodged by Mr Wagner Miret, which had been suspended while the preliminary reference was pending. In its decision,[34] it rejected the appellant's claim to be paid from the general guarantee institution (the *Fondo de Garantía Salarial*) amounts owing by way of salary which were unpaid by reason of the insolvency of the undertaking in which he had been employed as general manager, and directed him to bring another legal action regarding the possible liability of the State for any loss or damage caused to him by his exclusion from the general protection provided. In short, the Catalan *Tribunal Superior de Justicia* declared that the national legislation could not be interpreted in a way conforming with Community law and opened up for higher management staff the possibility of State liability claimed on an *ad hoc* basis.

As an 'epilogue', only a few months after the ECJ had delivered its judgment in *Wagner Miret* the Spanish legislators seized the earliest opportunity available to settle once and for all the issue of pay protection for higher management staff, in order to avoid the unforeseeable consequences of massive liability claims lodged against the State by general managers who were made redundant by undertakings undergoing economic difficulties. The formula adopted was certainly the simplest: to declare that amounts owed by way of salary to higher management staff are protected by Spain's normal system of guarantees for employees in the event of their employer's insolvency and, at the same time, to abolish the exclusion of such staff from that system under the special rules applicable to them.[35]

C. Example 2: Theoretical Calculation of Pensions for Migrant Workers under Regulation 1408/71

We now turn to our second example. It has already been pointed out that the rules on the co-ordination of social security schemes represented, historically, the first area in which Spanish labour courts came face to face with

[33] Judgment of 30 Dec. 1992, *Aranzadi* 10382.

[34] Judgment of 16 Feb. 1994 of the *Tribunal Superior de Justicia*, Catalonia, *Aranzadi* 577.

[35] See, respectively, Additional Provision No 2 and para. 3 of the List of Exceptions in Law No 11/1994 of 19 May amending certain Arts. of the *Estatuto de los Trabajadores*.

[36] See above n. 5.

Community law, and that even today this still represents the area of European law with which the national system of labour and social security courts is most frequently occupied. The *Lafuente Nieto* case[36] falls within the complex context of these rules (more specifically, Regulation 1408/71 in the version in force at the material time, that is, July 1990)[37] and essentially concerns the theoretical calculation of social security pensions—in the case in point, an invalidity pension.

Since the first time it had occasion to decide a case of this nature, the Spanish *Tribunal Supremo* has consistently upheld the same criterion: the 'Spanish' pension of migrant workers is to be calculated on the 'average contribution basis', that is, the arithmetical mean of the minimum and maximum contribution rates fixed annually in Spain for workers of the same category.[38] Given the impossibility in such situations of reconstructing in Spain the contributions record of migrant workers, the *Tribunal Supremo* has used this 'presumed' contribution (the average basis) as a way of finding a compromise between two extremes: (a) the method applied by the public institution administering Spain's social security system (the *Instituto Nacional de Seguridad Social*), that is, calculating the pension according to the contribution basis applicable prior to the worker's emigration, which the *Tribunal Supremo* regards as unfairly disadvantageous to migrant workers because this outdated basis produces a very small pension; and (b) calculating the pension on the basis of the worker's earnings in the country of emigration, which the *Tribunal* likewise rejects because it means that the calculation basis is notably higher than that applicable to workers of the same category who remained paying contributions in Spain.

There is no need here to consider in technical detail the question of the compliance of the *Tribunal Supremo*'s doctrine with Community law. Article 47(1)(e) of Regulation 1408/71, as it stood in 1990, provides that: 'Where . . . benefits are calculated on the basis of average contributions . . . that average [must be determined] exclusively by reference to those periods of insurance *completed* under the legislation of the said State' (emphasis added)[39]. Suffice it to say that, in his Opinion in *Lafuente Nieto*, Advocate General La Pergola stated that this settled case law 'is not compatible with the requirements of the Regulation. The only periods of insurance taken into account under Spanish legislation, pursuant to Article 47(1)(e), are those completed in that country by

[37] The original version was published in [1971] OJ L149 2. The provisions on the determination and calculation of pensions established in Reg. 1408/71 were amended and updated by Reg. 2001/83 [1983] OJ L230 6, and later by Reg. 1249/92 [1992] OJ L136 28.

[38] The first such judgment was that of 25 Feb. 1992, *Aranzadi* 1376. This criterion has since been applied in, among others, the judgments of 15 Oct. 1993, *Aranzadi* 9216, 4 Jan. 1994, *Aranzadi* 3226, 27 Mar. 1995, *Aranzadi* 4707, 7 Oct. 1995, *Aranzadi* 7586 and 17 Nov. 1995, *Aranzadi* 9302.

[39] See legal basis (para. 8) of the *Tribunal Supremo* judgment of 25 Feb. 1992, *Aranzadi* 1376.

[40] At para. 49, n. 27.

the person concerned before he moved to Germany. It is therefore solely by reference to the contributions required in that period that the average contributions must be calculated for the purposes of the invalidity benefit'.[40]

It is also relevant to note that, from its very first judgment on the matter in hand, the *Tribunal Supremo* denied that it was necessary or appropriate to make a reference to the ECJ for a preliminary ruling, as the appellant had requested. It stated that 'national courts are clearly not obliged to refer to the ECJ for a preliminary ruling every time an issue arises which requires the application of Community law'. A preliminary reference is necessary, so the *Tribunal* reasoned, only in cases where there are serious and well-founded doubts concerning the interpretation of the applicable Community provision owing to the obscurity, vagueness or imprecision of the text, a circumstance which it considered did not exist in the case at issue. The categorical opposition to use of the preliminary reference procedure expressed by the *Tribunal Supremo* in 1992 was repeated equally strongly a few years later.[41]

The legal experience accumulated over the now lengthy lifetime of the Community has shown that reluctance to make preliminary references to the ECJ on the part of higher national courts (which tend to exhibit some strongly national characteristics in legal and jurisdictional terms)[42] does not shut off co-operative dialogue with the Court in Luxembourg. It merely has the effect of shifting the role of actors in this dialogue onto lower national courts. This implacable unwritten law governing the relationship between the ECJ and national courts, which in the case of Spain was previously evident with regard to the guarantee of amounts owing by way of salary to higher management staff (*Wagner Miret*)[43] again applies to this subsequent series of cases concerning the calculation of the pensions of migrant workers.[44]

Some regional labour courts do not agree with the interpretation applied by the *Tribunal Supremo*, and the Basque *Tribunal Superior de Justicia* made a reference to the ECJ for a preliminary ruling[45] which gave rise to the latter's judgment of 12 September 1996 in *Lafuente Nieto*. In a nutshell, the ECJ's answer to the main issue referred was that 'calculation of the average basis for contributions rests solely on the amount of contributions paid under the legislation concerned', so that 'the theoretical amount of the benefit thus obtained is to be duly revalorized and increased as if the person concerned had

[41] See *Tribunal Supremo* judgment of 27 Mar. 1995, *Aranzadi* 2560. The dissenting view concerning the judgment, as reported by La Pergola AG in his Opinion in *Lafuente Nieto* (para. 49, n. 27), held, on the contrary, that 'there was sufficient justification for a preliminary reference to the ECJ' (legal basis, para. 6).

[42] See T.C. Hartley, *The Foundations of European Community Law* (3rd edn., Clarendon Press, Oxford, 1994) at 238.

[43] See above n. 8.

[44] See B. Ríos Salmerón, 'Reglamentos comunitarios y pensiones de invalidez', (1997) 1 *Actualidad Laboral* 10.

[45] By Order of 31 May 1994, *Aranzadi* 2305.

[46] At para. 43. [47] See above n. 5.

continued to work under the same conditions in the Member State in question'.[46]

This certainly does not mark the end of the debate on the theoretical calculation of pensions,[47] for two reasons. First, the judgment in *Lafuente Nieto*, and also the subsequent judgment in *Naranjo Arjona*, concerned the interpretation of Article 47(1)(e) of Regulation 1408/71 prior to its amendment in 1992. The doctrine contained in these judgments is applicable only to cases brought during that period, not to those initiated after the 1992 amendment. Secondly, and this is a specifically national reason, the Spanish social security institution (*Instituto Nacional de Seguridad Social*) uses rules for calculating pensions which differ from those advocated by the *Tribunal Supremo* but conform to the criteria suggested by the ECJ. The choice of one or the other set of rules is far from irrelevant, owing to the important financial consequences involved: harmful to the interests of the insured and beneficial to the interests of the social security institution.

Hence, theoretical calculation of the invalidity or old-age pensions of Spanish workers who migrated to other Member States and later returned to Spain has remained a controversial issue,[48] and one in which the *Tribunal Supremo* has, finally, become involved. On the earliest occasion which subsequently presented itself, the Tribunal decided to make its first-ever reference to the ECJ for a preliminary ruling.[49] The question it asks is whether the system of calculating pensions established in Article 47(1)(g) of Regulation 1408/7l (1992 version) complies, in its interpretation as developed by ECJ case law, with Articles 47 and 51 of the Treaty; that is, in an interpretation where the contribution bases used in the calculation are those for the years prior to the worker's emigration and where the pension thus obtained is not revalorised as if he had continued working in Spain but only in the same proportion as pensions of the same kind which were payable at the time when he paid his last contribution in Spain.

[48] The judgment in *Lafuente Nieto* contains certain internal contradictions in connection with revalorisation. Whereas in para. 40 it states that the amount to be revalorised is that of 'contributions paid', we read later that what is to revalorised is 'the theoretical amount of the benefit' calculated in accordance with the real contribution basis. For more details, see Ríos Salmerón, above n. 44 at 12.

[49] Although it follows the doctrine contained in *Lafuente Nieto*, the judgment in *Naranjo Arjona* (see above n. 15) adds an important detailed aspect, since it establishes that in cases where, for workers who were employed in other Member States prior to the entry into force in Spain of Reg. 1408/71, application of the general interpretation proves less advantageous than the application of a previous bilateral convention between Spain and those countries, the competent court should apply the rules laid down in that convention and not those of the Community Reg.

[50] Order of 17 Mar. 1997, *Aranzadi* 2566.

D. Outlook for the Future

Given the course of previous events in this area, identifying the likely motive behind the *Tribunal Supremo*'s decision to make this preliminary reference to the ECJ is a question to which there is no quick and straightforward answer. Should it express open disagreement with the ECJ's doctrine? Should it defend its own consolidated and reasoned line of national case law as being more advantageous to the interests of Spanish workers and constituting a better guarantee of the Community principle of freedom of movement for workers? Should it find a third formula for calculating benefits which represents a compromise between the conflicting interpretations applied by the two courts and leaves their respective authority intact? Or (although this is not necessarily the last possibility) is this a deliberate attempt to regain the initiative on the basic issue of the calculation of pensions by pre-emptively precluding any further preliminary references from lower national courts through having specifically defined the terms of the debate? The probable answer is that all these motives and more besides, lay behind the *Tribunal Supremo*'s decision to make a preliminary reference. Whatever they were, it has to be welcomed as an initiative inaugurating a direct co-operative dialogue between the ECJ and the supreme interpreter in Spain of infra-constitutional legality. Passivity and lack of understanding have been left behind and the door to co-operation is open, or at least ajar.

PART IV NEVER ON A SUNDAY—WHAT HAS (EU) LAW GOT TO DO WITH IT?

MIGUEL POIARES MADURO*

A. How To Do Things With European Rules

The Sunday Trading Saga is one of the most high-profile examples of both the strategic use of Community law[1] and the conflict between the rules of market integration and national systems of social regulation.[2] The reason such a conflict acquires a very significant relevance in the overall framework of this book—and of this chapter in particular—is to be found in the nature of the social rights endangered by market integration. Working time provisions especially, as well as health and safety regulations, address issues of public policy and reflect deeply rooted choices of national legislatures. The Sunday trading cases have concerned the validity, in the light of Article 28 EC (ex Article 30), of various national rules restricting trade on Sundays. That provision of Community law establishes the prohibition of measures having an *equivalent* effect to quantitative restrictions in the light of the general principle of the free movement of goods. Individuals have made considerable use of Article 28 EC and other free movement rules in challenging national policies whose link with the EU goals of market integration is, at best, tenuous. In these cases, recourse to the Community rules is purely instrumental to the domestic policy goals of private actors. The explanation for this use of Article 28 by national actors to promote changes in domestic regulatory policies lies in the spill-over of market integration rules into all areas of national law. In many instances the impact of those Community market integration rules has challenged well-established national labour and social law provisions. It has been common for economic operators to use Community free movement provisions not only to secure access to national markets for further market integration but to secure access to the market '*tout court*' to attain greater economic freedom. In particular, Article 28 was for long understood as prohibiting any national measure 'capable of hindering, directly or indirectly,

* In preparing this Part I benefited from information and comments given to me by Hans Micklitz, who has been researching on Sunday Trading litigation but has not yet published his work on the subject. I would also like to thank Paul Davies for his comments on an earlier version of this Part. Finally, I was able to use statistics and documents on EC law-related national court decisions compiled by the Documentation Services of the ECJ which I should like to thank for making these materials available.

[1] See the earlier and fascinating analysis by R. Rawlings, 'The Eurolaw Game: Deductions from a Saga', (1993) 20 *JLS* 309.

[2] See P. Davies, 'Market Integration and Social Policy in the Court of Justice', (1995) 24 *ILJ* 49.

actually or potentially, intra-Community trade',[3] except where that measure was considered necessary and proportional to achieve a Community-recognised public interest.[4] The ECJ for a long period applied the free movement of goods to national rules whose effect on trade was not a consequence of discrimination against imports, but simply a side-effect of the restriction imposed even on domestic trade as a consequence of market regulation. The broad scope granted to Article 28 allowed challenges to be made to almost any national regulation of the market. When deciding on the proportionality of national regulations under Article 28 the ECJ was, to a large extent, deciding on the reasonableness of that state intervention in the market and second-guessing national regulatory policies.[5] The broader the scope of Article 28 and the use of proportionality by the Court to assess national regulations, the greater became the opportunities for economic and legal actors to use Community rules to challenge and overturn national regulatory policies. It is therefore not surprising that the Sunday trading cases took place in the context of an ECJ case law promoting an extensive interpretation of Article 28 which was later restricted.[6]

In the cases of Sunday trading, the initial litigation originated in the UK. A group of British litigants challenged, under Article 30 (now Article 28) EC, the traditional prohibition on shops opening on Sundays in England and Wales (imposed by the Shops Act of 1950).[7] The final outcome of the legal and political debates that follow was a partial overturn of the previous national political and legal *status quo* regarding this policy issue. The litigants started by re-introducing the debate surrounding Sunday trading into the national public sphere by challenging those rules under the free movement of goods. They had some measure of success in their legal challenge, since they succeeded, in some cases, in 'suspending' the application of the rules prohibiting Sunday trading and therefore managing to deregulate Sunday trading, at least for some years and in some regions of Britain.[8] And although they have lost the final legal battle regarding the application of Article 28 to this national legislation, the combined pressure of the judicial litigation and the change in consumer and social habits brought about by the temporary deregulation of Sunday trading was effective in causing a reassessment of national policy on Sunday trading by the political process, leading to the adoption of new British rules which favoured those wishing to trade on Sundays. As Silvana Sciarra also remarks with

[3] Case 8/74 *Dassonville* [1974] ECR 837.

[4] See my book *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, Oxford, 1998) and the bibliography mentioned therein.

[5] See *ibid*., and P. Davies, above n. 2.

[6] See below.

[7] With some minor exceptions regarding trade in particular products such as tobacco, newspapers and alcoholic drinks.

[8] See R. Rawlings, above n. 1, mainly at 332.

regard to the *Job Centre* litigation strategy,[9] it is clear that the dialogue involved in litigation strategies takes place not simply between courts but also with the political process. Moreover, it is likewise clear that the legal result may not itself determine the success or lack of success of a litigation strategy.

The litigants were, in by far the majority of cases, large retail companies legally supported by lawyers who co-operated and co-ordinated the overall litigation strategy. The first step was for these retail shops to open on Sundays in different cities and thereby openly challenge the 1950 British Shops Act prohibition on trading on Sundays. Following these several violations of the Shops Act, different proceedings were brought before different local courts by the District Councils of those cities. By thus multiplying the number and geographical locations of the legal proceedings the litigants were able to increase the possibilities of finding a court sympathetic towards the EC law argument and, at the same time, amplify the national impact of their litigation strategy. The first court to deliberate on one of these proceedings was the Chancery Division of the High Court of Justice (England) in the case brought by Wychavon District Council against Midland Enterprises.[10] This first decision was no cause for celebration for those challenging the Sunday trading rules: the Chancery Division did not even consider a reference to the ECJ necessary in judging the national rules' compatibility with Article 30 (now Article 28). However, the strategy of diversifying the judicial jurisdictions through which the Community-law-related challenge was made to the British rules soon proved to be the right one. Some months later, a different English court (the Crown Court in Bodmin) agreed to refer to the ECJ a question on the compatibility of the relevant provisions of the Shops Act with the rules on the free movement of goods.[11] A mystery involves this decision since, apparently, no request for a preliminary ruling by that English court ever reached the ECJ. However, that reality soon came to pass with the subsequent decisions by British courts asking for a preliminary ruling from the ECJ on the compatibility of the rules prohibiting trade on Sundays with Articles 30 and 36 (now 28 and 30) of the EC Treaty. These references to Luxembourg arose from various national proceedings and courts in accordance with the geographic dispersion of the challenges to the Sunday trading rules: Woodbridge Magistrates Court, Wakefield Magistrates Court, Crown Court (Shrewsbury), Cwmbran Magistrates Court, Mansfield Magistrates Court, and the Londonderry Magistrates Court. It was with regard to the reference made by the Cwmbran Court that the ECJ took its first decision on Sunday trading rules.

While these cases were already being reviewed at the ECJ, two proceedings raised the issue again before the High Court of Justice (England) but in two

[9] See the contribution of Silvana Sciarra to this Chap.

[10] Judgment of 13 Feb. 1987, [1988] *CMLR* 397.

[11] This was a decision taken in an action brought by Caradon District Council against Charles Robertson Developments [1988] *CMLR* 293.

different divisions. The Queen's Bench Division, faced with this question for the first time, decided that since the question was already the object of a case before the ECJ, no other reference was necessary but a national decision on the merits needed to wait for that judgment from Luxembourg. The Chancery Division, which, as we have seen, had first refused to refer this issue to the ECJ, was also again called on to intervene in proceedings asking for provisional measures against the prohibition of Sunday trading. Once more, the Chancery Division showed its unwillingness to accept the EC–law-related challenge to the Sunday trading rules and considered that there was insufficient evidence to justify any provisional measures.[12]

The ECJ gave its first judgment on Sunday trading rules at the end of 1989. In this judgment the Court answered the questions referred by the Cwmbran Magistrates Court in the proceedings brought by Torfaen Borough Council against B & Q plc[13] but the decision was also applicable to the other references made by British courts, which became superfluous. The ECJ started by repeating its standard interpretation of Article 30 (now Article 28). Although the Court recognised that the British rules 'apply to imported and domestic products alike' and 'the marketing of products imported from other Member States is not therefore made more difficult than the marketing of domestic products'[14] that was not, in itself, sufficient to establish their compatibility with the free movement of goods. Following its traditional case law the Court considered that the measure would be compatible with the free movement of goods only if 'any obstacle to Community trade thereby created did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law'.[15] The Court recognised that the measure pursued a legitimate public objective:

> Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States.[16]

However, the Court also considered it necessary to 'ascertain whether the effects of such national rules exceed what is necessary to achieve the aim in view'.[17] This assessment corresponds to the well-known test of proportionality. In accordance with this principle, measures restricting the free movement of goods needed to be both necessary to the pursuit of a Community-recognised public interest and proportional to the goal to be achieved. In other words, the costs arising from the restriction imposed on the free movement of goods should not exceed the benefits derived from the

[12] A similar position was adopted by the Court of Appeal (Civil Division) in a judgment delivered later in 1988 *Portsmouth City Council* v. *Brian Richard and Quietlynn Ltd*, Judgment of 16 Nov. 1988 [1989] *CMLR* 673.

[13] Case 145/88, [1989] ECR 3851. [14] Para. 11. [15] Para. 12. [16] Para 14.

[17] Para. 15.

public interest pursued by the measure. Whether that was the case had normally been an assessment made by the ECJ in the previous cases on the free movement of goods. It was the ECJ which reviewed the proportionality of national measures restricting the free movement of goods. This was, however, placing a heavy burden on the resources and legitimacy of the Court. The broad scope granted to Article 30 (now Article 28) coupled with the principle of proportionality meant that almost any national measure intervening in the market could be challenged by legal and economic operators and subject to strict scrutiny by the ECJ.

The problems arising from this traditional approach were twofold: first, the workload of the Court was becoming increasingly burdened by the growing number of cases challenging any national regulation affecting the economic freedom of economic actors; secondly, the legitimacy of the Court was being eroded by its degree of involvement in judging the reasonableness of any market regulation, something that always involves a sizeable margin of discretionary powers and complex economic and social policy analyses. These problems were expressly mentioned by Advocate General Van Gerven in his Opinion in the *Torfaen Borough Council* case:

> the Court will inevitably have to decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products. The question may arise whether excessive demands would not then be put on the Court, which would be confronted with countless new mandatory requirements and grounds of justification.[18]

It was perhaps precisely in reponse to these concerns that the Court adopted a more restrained approach in *Torfaen Borough Council* and, while maintaining a broad interpretation of Article 30 (now Article 28), left the decision on the proportionality of the British rules to the national court. The Court stated that the question whether the effects of the national rules exceeded the effects intrinsic to trade rules 'is a question of fact to be determined by the national court'[19] This was probably an attempt to safeguard its traditional interpretation of Article 28 while reducing the strains on its workload and legitimacy by assigning the assessment of the proportionality of measures of this type to national courts. As we shall see, however, this was not a successful approach and the Court has since had to restrict the scope of application of Article 28 in the well-known *Keck and Mithouard* decision in order to discourage 'the increasing tendency of traders to invoke Article 30 (now Article 28) of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even when such rules are not aimed at products from other Member States'.[20]

[18] Para. 25 of the AG's Opinion. [19] Para. 16.

[20] Joined Cases C–267/91 and C–268/91, *Keck and Mithouard* [1993] ECR I–6097, at para. 14.

The follow-up to the ECJ's initial decision in *Torfaen Borough Council* was a disparity of national judicial decisions regarding the proportionality of the British rules and, contrary to the Court expectations, a multiplication of litigation due to the spill-over of litigation to other national legal systems where the same rules existed. In the case of the UK, the courts responsible for the initial references took differing views on the proportionality and admissibility of the rules prohibiting Sunday trading. In the *Torfaen Borough Council* case itself,[21] the Cwmbran Magistrates Court considered that, taking into account both the limited restriction imposed by the rules on the free movement of goods and the public interest pursued, the effects of the Sunday trading rules did in fact remain within the effects intrinsic to trade rules and did not exceed what was necessary to achieve the aim in view. But the opposite position was taken by the Queen's Bench Division of the High Court of Justice, which held the same rules to be contrary to Article 30 (now Article 28) in view of its own different assessment of their proportionality.[22] This was followed by other contradictory national judicial decisions, with British courts being divided on the issue of the proportionality of the restriction on free trade imposed by the prohibition on trading on Sundays.[23] Finally, the issue reached the House of Lords (by then there had also been further decisions by the ECJ regarding Sunday trading rules in cases raised by courts of other Member States.)[24] The House of Lords was not willing to harmonise the different lower court decisions itself by making a final judgment on the proportionality of the Sunday trading rules. That would be the normal course of action to follow in accordance with the broad powers given by the ECJ to the national judiciary in this case. Instead, the House of Lords decided to refer the case back to the ECJ[25] in what was clearly a message to that Court in rejecting the role that the latter had offered to national courts. The wording of the questions referred by the House of Lords clearly expresses its dissatisfaction with the earlier ECJ decision which had left the 'hot potato' in the hands of national courts and led to growing litigation and conflicting decisions on the subject of Sunday trading in the British judicial system. The questions referred by the House of Lords were as follows:

> 1. Whether the effect of the Court of Justice's rulings in Cases C–312/89 *Conforama* and C–332/89 *Marchandise* is to determine that the prohibition contained in Article 30 of the EEC Treaty does not apply to national rules, such as those in issue in Case 145/88 *Torfaen Borough Council* v. *B & Q plc*, which prohibit retailers from opening their premises on Sunday for the serving of customers with certain goods;

[21] See the final decision of this Court in [1990] *CMLR* 455.

[22] *W.H. Smith Do-It-All Ltd and Payless DIY Ltd* v. *Peterborough City Council*, Judgment of 4 June 1990, [1990] *CMLR* 577.

[23] See also a review in A. Arnull, 'What Shall We do on Sunday?', (1991) 16 *ELR* 112–24.

[24] See below.

[25] *Council of the City of Stoke-on-Trent and Norwich City Council* v. *B & Q plc*, House of Lords, reference made 20 May 1991.

2. If not, whether it is nevertheless immediately apparent, whether or not evidence is adduced, that the restrictive effects on intra-Community trade which may result from national rules such as those of Question 1 above do not exceed the 'effects intrinsic to rules of that kind', as that phrase is used in the ruling of the Court of Justice in Case 145/88;

3. If not, on what criteria and by reference to what, if any, factual or other evidence the national court must determine the question whether or not the restrictive effects on intra-Community trade which may result from national rules such as those in Question 1 above exceed 'the effects intrinsic to national rules of that kind' within the meaning of that phrase as used in the ruling of the Court in Case 145/88.

The problem with the division of tasks 'proposed' by the ECJ in its first decision lies in the fact that the assignment of application of the proportionality principle to the national courts is not made to a single institution but to a plurality of different courts, including courts of first instance, all of which are empowered to apply Community law. Whether or not the national rules are upheld will depend on the different assessments of the proportionality of those rules made by individual national courts. Owing to the discretionary element involved in the assessment of proportionality there is a strong risk of differing decisions being taken by national courts within the same national legal system. This lack of uniformity could be compensated for by the internal appeals system, leading to a final uniform interpretation given by the higher national court. However, this means that the problems faced by the ECJ as a consequence of the broad scope granted to Article 28 (increased workload and legitimacy concerns) would simply be transferred to national higher courts. In the case of the Sunday trading rules the House of Lords clearly showed its unwillingness to accept this burden of judicial activism. It 'declared' its lack of satisfaction with a role that it saw as political and not judicial[26] and demanded a clear answer from the ECJ. In effect, it handed back to the ECJ the responsibility and the burden arising from the broad scope given to Article 28. And it succeeded, since the ECJ stated clearly that such legislation was valid under Article 30 (now Article 28) of the Treaty, its restriction on the free movement of goods being proportional to the public interests pursued.[27]

B. Who Does Things With European Rules

In Shakepeare's *The Tempest* there is a curious dialogue between two of the play's characters in which they are misunderstanding each other. At a certain point one of the characters says: either you said more than you wanted to say or I understood more than you wanted me to understand. The same can be said of the language of courts and the way it is taken over and used by the legal community. It is well known that when courts take a decision, they are

[26] See R. Rawlings, above n. 1 at 318.

[27] Case C–169/91 *Stoke-on-Trent and Norwich City Councils* [1992] ECR I–6635.

both deciding the case at hand and making known their judicial approach to similar cases. Since courts have limited resources (legally and physically) they must give preference to some areas of judicial activity. Their decisions are what signals their policy and priorities for judicial activity in the light of the overall demand for judicial intervention. To borrow the expressions used by Neil Komesar: court activity is defined both by the *demand* for judicial intervention and the capacity to *supply* such judicial intervention.[28] In other words, courts do not arrive at a decision simply on the basis of what they would like to decide in a particular case but also on the basis of the impact of that decision on their resources and preferences for judicial intervention. The tests, criteria, standards, approaches or classifications adopted by courts are what defines the overall allocation of their judicial resources and signals to the legal community the 'favoured' areas of judicial activity.[29] If a court chooses a clear-cut test based, for example, on the formal classification of certain types of measure it will exclude many conflicts from the judicial process. That test may deny judicial protection to cases which, on their own merits, would deserve close judicial scrutiny, but that is a necessary trade-off involved in the promotion of legal certainty and the management of the workload of courts. Conversely, where a court chooses to apply a broad standard or balance test it will increase the amount of judicial activity, since any decision on the correct balance of the interests at stake will be subject to review by courts. In this case, the court is signalling to the legal community its willingness to second-guess the other decision-making institutions in judging the conflicting interests in that area of the law. But if their decisions transmit to the legal community the willingness or otherwise of courts to intervene in certain areas of the law, the language used by courts may sometimes lead them to say more than they wanted to say or to be interpreted more broadly than they expected to be interpreted. Language disguises thought, as Wittgenstein would say. Judicial decisions are not the property of courts but of the legal community, and this includes other legal actors whose preferences for judicial activity may vary from those of courts. The final allocation of judicial and legal resources is determined like everything else in a market: by the demand for judicial intervention brought to courts by legal actors and by the supply of that judicial activity by courts.[30] The currency of transactions in this market of judicial activity is legal reasoning.

The participation of a plurality of actors in the definition of what the law is and the allocation of judicial resources, and the importance of institutional factors in determining the forms and content of judicial intervention, are

[28] N. Komesar, 'Law's Limits—The Supply and Demand of Property and Other Rights' (manuscript in preparation).

[29] I prefer to use the word 'activity' rather than 'activism' in this context since I am simply referring to the amount of litigation dealt with by the judiciary (the number of judicial decisions) and not to the type or 'policy' of judicial decisions.

[30] N. Komesar, above n. 28 at n. 30.

particularly evident in the debate on the Sunday trading rules and Article 28 of the Treaties. The broad scope traditionally given to Article 28 by the ECJ was not intended to promote the review of all market regulation. The aim was not to construct Article 28 judicially as an economic due process clause controlling the degree of public intervention in the market.[31] The broad scope granted to Article 28 is more understandable when viewed in the light of the Court's suspicion that state regulation of the market may either impose a greater burden on products from other Member States or not take into account the Community interest in harmonised rules to prevent restrictions on free trade arising from differing national rules. It was this wariness of intervention by the national political process in a common market that explained the broad scope given by the Court to Article 28 and the degree of control which, as a consequence, was exercised by the Court over national regulatory powers.

The problem was that, once the Court had formulated a criterion which was so broad as to subject to a proportionality test any state regulation of the common market, the other participants in the legal community were able to use that criterion to challenge any market regulation which opposed their economic freedom.[32] Since the ECJ's distrust of national political processes found expression in a criterion submitting all national regulation to judicial review, economic operators were able to second-guess national regulatory policies through courts even when the original judicial concerns underlying such a criterion were not at stake. What occurred was a shift of the regulatory role from national political processes to courts. The ECJ (and, through it, national courts) became the institution responsible for deciding the adequate level of market regulation. Therefore, it was possible for domestic economic actors to challenge national regulatory policies through Community law and subject them to a second process of decision-making outside the national political process. Community law became a terrain of national internal disputes over regulatory policies.

This was clearly the case with the Sunday trading litigation. As Rawlings put it, Article 30 became 'the European defence of domestic actors against national policies'.[33] There are some important conclusions to be drawn in this connection. First, judicial criteria are not simply a result of judicial drafting but of a complex process of demand and supply of law in which the broader legal community participates; judicial decisions do not single-handedly command the use of law but are subject to 'appropriation' and transformation by other legal actors. As a result, what the law is becomes a consequence of a discourse between these different legal actors (including different courts and litigants). Secondly, the instrumental 'appropriation' of law by these different legal actors leads to a transplantation of legal rules into different communities of discourse; in the case of European law we have witnessed how European

[31] See my book, above n. 4.

[32] See my book, above n. 4 and P. Davies, above n. 2.

[33] R. Rawlings, above n. 1 at 313.

rules are used in the context of purely national legal debates. Accordingly, two important questions arise: what are the consequences of importing EU law arguments into national legal debates; and is that role of reforming national legal debates on purely domestic issues a legitimate one for European law?

Irrespective of the answers to be given to the above questions it is obvious that such an extended role for EU law strains its judicial resources. That was so in the area of Article 28, with the ECJ increasingly dissatisfied with the instrumental use of this provision by economic actors to, in its own words, challenge 'any rules whose effect is to limit their commercial freedom even when such rules are not aimed at products from other Member States'.[34] The result was the restriction of the scope of Article 28 put forward in the *Keck and Mithouard* decision.[35]

But even this latter decision has been the object of 'reinterpretation' by the legal community. First, some legal actors have again tried to develop arguments which would allow them to challenge any market regulation as *de facto* discrimination against imports. That became obvious when the Sunday trading rules once more reappeared before the ECJ, this time dressed in discrimination clothes. In *Punto Casa*,[36] certain Italian companies challenged the Italian restrictions on trading on Sundays, maintaining that, by diverting trade from larger to smaller retailers, such national rules were, in effect, benefiting national products (since smaller retail shops tended to have a lower percentage of imported products than larger retailers). A second reaction of the legal community to the ECJ's intention to limit the strategic use of Article 28 was to change tack and attempt to reopen the same debates through different EC rules. For example, it would be possible to argue that the prohibition on trading on Sundays may constitute a restriction of the right of establishment by limiting the profitability of certain type of companies. In fact, there are already examples of this type of use of the other free movement rules[37] and the other case studies in this book are further evidence of the variety of litigation routes available to economic actors.

The conclusion to be drawn from this analysis is that what really commands the use of law consists in the institutional constraints and environments of the different legal actors, and these institutional elements are what need to be addressed if the use of law is to be controlled effectively. Legal arguments are much more easily reconstructable than institutions. In other words, legal actors will continue to find new legal paths to resubmit to courts the same institutional problems as long as the alternative institutions continue to suffer from serious malfunctions in addressing those issues. The

[34] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097, at para. 14.

[35] Above n. 34.

[36] Joined Cases C–69/93 and C–258/93 *Punto Casa* [1994] ECR I–2355.

[37] See my discussion of recent case law in 'The Saga of Article 30: To be Continued—A Comment on Familiapress and Other Recent Episodes', (1998) 5 *MJECL*, 1.

costs of discovering and organising new legal strategies will be less than the perceived malfunctions in the alternative institutions. That is why most of the instances of domestic strategic use of Community law coincide with instances where the national political process suffers from serious malfunctions even with regard to domestic interests. The costs of using Community law are perceived by litigants as low when compared with their lack of voice in the national political process and the perception that the latter is a prisoner of certain particular interests. The result is that these issues are fenced off from public deliberation, and it appears that excluded actors conceive Community law as the best tool for the reform of the national political process in these areas.[38] Whether or not that is a role which should be fulfilled by Community law is a different story . . .

C. The Patterns of Judicial Discourse and the Development of a European Legal Community

What has been said above calls our attention to an often overlooked aspect of the dialogue between national courts and the ECJ which may explain some of the paradoxes occurring in national courts' implementation of Community law. The supremacy and direct effect of Community law may be at least as much or even more a function of national problems demanding judicial intervention than of Community law priorities for intervention in the national sphere.[39] In other words, the impact of Community law may be stronger in areas where national courts require it for the correction of national problems which cannot be addressed through national rules (because, for example, they lack powers of judicial review or are strongly constrained in the application of national rules by previous precedents and hermeneutic traditions). This is a simple consequence of the fact that the impact of Community law is as much a function of the ECJ's preferences as of national court preferences. The body of Community rules is

[38] Or, at least, to try to alter the internal balance of power.

[39] Note that this is different from possible neo-realist or intergovernmental explanations of the role of national courts in European integration. The latter explain the approach of national courts to Community law in terms of national interest with regard to the different policies of European integration. The view proposed here is different: it stresses the role of Community law in addressing purely national issues (often not connected with issues of European integration) as an explanation for some national court approaches to Community law. On neo-realist theories approaches to the role of national courts in Community law see K. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.)*The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998) 227 at 234–8. In general, on neo-realist or intergovernmental theories of European integration see: G. Garret, 'International Cooperation and Institutional Choice: the European Community's Internal Market', (1992) 46 *I.O.* 533; and A. Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', (1991) 45 *I.O.* 19 and 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', (1993) 31 *JCMS* 473.

appropriated by the different national legal communities in accordance with interests and concerns that may differ from those of the European Community legal order itself. To borrow, with a slightly different meaning, an expression used by Alec Stone: 'supremacy enables judges to pick and choose from a menu of policy choices; in so choosing, judges determine which rule will do the most good and the least harm to the society it helps to govern'.[40] The overarching paradox is that Community law may have greater impact in areas where the European interest is weaker than in areas where the European interest would require stronger penetration of Community rules in national legal systems but that does not suit the preferences of national courts for judicial activity.

This helps to explain why the same national legal system and even the same national courts adopt, in different circumstances, totally different approaches to the implementation of Community law.[41] It also helps us to understand why, in some cases, national courts were more receptive to the application of Community law in areas where the latter's claim to be applied was actually weaker or non-existent. We need only think of the willingness of some French courts to apply Community rules to purely internal situations[42] or to grant horizontal direct effect to some Community directives[43] in express contradiction to the ECJ case law, which envisages a much more limited application of EC law in these cases.

National courts have not been passive instruments of the 'Europeanisation' of national legal orders. They have been active participants in the construction of the Community legal order and have entered into a true discourse with the ECJ beyond any hierarchical construction of the law. The reason for this lies not only in the 'veto power' of national courts with regard to the implementation and effectiveness of Community law[44] but also in the way that national courts and other legal actors shape the interpretation and application of that law. The study of the role of national courts is important to understand the legitimacy and effectiveness of Community law and the way in which the latter is developed by the ECJ. But is also particularly important in epistemological terms for a true knowledge of the Community legal order. The latter is

[40] 'Constitutional Dialogues in the European Community', in A-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), above n. 39, 305 at 329.

[41] See *ibid*. In particular see the comparative essays by Karen Alter (n. 39 above) and Alec Stone (n. 40 above), mainly at 325 ff.

[42] See: *Cour de cassation, chambre criminelle, Comité national de défense contre l'alcoolisme* v. *Rossi de Montalera et autres*, 16 June 1983, (1983) 19 on *Revue Trimestrielle de droit européen* 468; *Tribunal d'instance de Bressuire* (*greffe de Thouars*), *Commissaire de police de Thouars* v. *M. Cognet, Centre Leclerc*, 10 Apr. 1987, (1987) 23 *Revue Trimestrielle de droit européen* 553. And see my analysis of these cases in 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in C. Kilpatrick, T. Novitz and P. Skidmore (eds.) *The Future of Remedies in Europe* (Hart Publishing, Oxford, 2000) 117.

[43] Information collected during this research project and provided by French judges.

[44] See D. Chalmers, 'Judicial Preferences and the Community Legal Order', (1997) 60 *MLR* 164 at 180.

as much a product of its construction by the ECJ as of the appropriation of that body of law by broader national legal communities.

The Sunday trading cases are an example both of that appropriation of Community rules by national legal communities and of different forms of dialogue between national courts and the ECJ. For purposes of clarity we can perhaps summarise by identifying five forms of dialogue between national courts and the ECJ:

- *Input feeding*: National courts co-determine the ECJ's agenda and may propose new interpretations of Community law through the questions referred to the Court.
- *Compliance*: national courts comply in full with the case law developed by the ECJ in interpreting and determining the application of Community law.
- *Challenge*: national courts openly defy the Court and decide contrary to its case law.
- *Bargaining*: in this case conflict is not entered into directly or occurs merely as a step in an ongoing process of discourse in which national courts and the ECJ attempt to shape the law in accordance with their respective interpretations. It may occur in various ways such as: reinterpretation of ECJ decisions; repeated references to the ECJ; reformulation of interpretative questions to the ECJ; or mixed decisions (*obiter dicta* 'threatening' to challenge the Court's interpretation even though accepting and complying with its *ratio decidendi*). The House of Lords' second reference to the ECJ regarding Sunday trading rules was a clear example of this type of dialogue.
- *Evasion*: national courts ignore the Community rules or the Court's case law and interpret Community law in their own way without assuming any conflict with national law. For example: not referring questions to the ECJ; ignoring the Community dimension of the facts presented to them; or interpreting Community law according to national law and not according to the decisions of the ECJ. The first decision of the Chancery Division of the English High Court denying the Community relevance of the Sunday trading prohibition was a strategy of evasion.

Also important is the dialogue which occurs between different national courts or, broadly, between the different national legal communities (which is usually identified as cross-fertilisation of legal concepts). This facet is more often ignored[45] but is clearly present in the Sunday Trading Saga. However, this dialogue is not direct but appears to have the ECJ as an intermediary. In the case of Sunday trading, there was a clear spill-over of litigation to other Member States. Coinciding with the initial decision of the ECJ in *Torfaen Borough Council* which regarded the British rules prohibiting trading on Sundays as having an effect equivalent to a quantitative restriction, references challenging similar national provisions in other Member States were made to the Court, ultimately ending in three other decisions by it in reply to references

[45] A-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.) above n. 39.

made by Belgian,[46] French[47] and, later, Italian[48] courts. Each of these cases would merit a study of strategic litigation in itself.[49] Here, I wish to address only the process of spill-over to other Member States. This may indicate a learning process by the different national actors with regard to issues of Community law raised in the ECJ by legal actors of other Member States. On the other hand, in the case of Sunday trading it appears that this process of litigation spill-over across national borders was, in great measure, a result of a co-ordinated strategy of a group of lawyers in different Member States[50] (which explains why some of these challenges were brought before other national courts even before the initial decision of the ECJ in *Torfaen Borough Council*). This direct co-ordination and exchange of information between lawyers and litigants in different Member States does not appear to be shared by courts in different Member States.The different national courts appeared to perceive their dialogue with the ECJ on Sunday trading rules as isolated from the similar dialogues of courts of other Member States. This explains why the House of Lords felt it necessary to make a second reference to the ECJ in spite of the fact that the decisions taken by the Court in *Marchandise* and *Conforama* already made it obvious that the Court had clarified its initial *Torfaen Borough Council* approach in a sense that made Sunday trading rules compatible with Community law. At the same time, it also appears that none of the national courts took into account the decisions taken by other national courts. This highlights a systemic gap in the understanding of the European legal order by the different national courts. There is one European legal order as internally conceived by the ECJ and there are different and isolated European legal orders as applied by the different national legal communities. As a consequence, there is no real integrated and coherent European legal order such as would result from a true European legal discourse between the European Courts and national courts but also between the different national courts.[51]

Though national courts may feel that they have a role to play in shaping the European legal order they understand that legal order as a product of the ECJ and not of a broader legal community including other national courts. This

[46] Case C–332/89 *Marchandise* [1991] ECR I–1027.

[47] Case C–312/89 *Conforama* [1991] ECR I–997.

[48] Joined Cases C–69/93 and C–258/93 *Punto Casa* [1994] ECR I–2355.

[49] In France the issue was raised in more than 10 proceedings and also prompted different reactions from different national courts. For example, while the *Cour d'appel de Bordeaux* refused to recognise any relevance in this issue to Community law, a lower court, within the same jurisdiction (the *Tribunal de police de Bordeaux*), took exactly the opposite view and decided to refer the case to the ECJ.

[50] See R. Rawlings, above n. 1, at 321–2.

[51] There are, however, increasing forums augmenting the amount of informal getting together among judges from different jurisdictions and this may slowly have some effect in national judgments. See the citation of a German Federal Labour Court decision by the House of Lords in *Barry* v. *Midland Bank* [1999] ICR 872 when applying Art. 119 (now Art. 141) to a novel situation. I am grateful to Paul Davies for this reference.

reinforces some of the risks involved in the current forms of the European legal discourse. First, litigants are often multinational companies and are supported by cross-national legal strategies, while national courts' involvement in this litigation does not benefit from the same cross-national perspective or co-ordination. This gives those cross-national litigants a competitive advantage over the other participants in European legal discourse, namely national courts. Secondly, the dialogue between national courts and the ECJ tends to develop along separated national lines, creating the prospect of comparisons and competitions between those different European dialogues. Do all national courts participate in an equal manner and do they all have equal bargaining power? Does the ECJ develop privileged partners for dialogue? Will not these different forms of dialogue distort the uniform application of Community law? One may end facing a dilemma: either to maintain the artificial conception of the European legal order as a simple product of the normative autonomy of the European legal system as developed by the ECJ[52] or to face the delegitimation risks inherent in perceiving European law as a different product depending on the different national dialogues. This uneven form of dialogue would correspond, to use a cliché, to a democratic deficit prevailing in European legal discourse. Instead, a true European legal order and a true European legal discourse can be based only on an equal participation of the different actors composing the emerging European legal community. The latter form of discourse will promote a virtuous cycle in the application and construction of Community law, with national courts feeling 'bound' by the decisions of their counterparts in other Member States.[53] The European legal order should be perceived as integrating the decisions of both national courts and European Courts. Any judicial body (national or European) would be obliged to reason and justify its decisions in the context of a coherent and integrated European legal order. National 'deviations' or, perhaps better, differing applications of European rules, would still be possible, but they would have to be presented in 'universal' terms and as safeguarding the coherence and integrity of the European legal order. The idea is to promote the amenability of national decisions on Community law to universalisation and integrate them in a coherent system of interpretation of Community law by national courts. In other words, national decisions on EC law should not be seen as separated national interpretations and applications

[52] A conception which, by clearly insulating legal integration from political and economic questions, has promoted the effectiveness and expansion of Community law but at a cost to the deliberative and democratic character of European integration. On the paradox of a formal autonomous conception of the law being the perfect instrument of politics see M. Shapiro, 'Comparative Law and Comparative Politics', (1980) *S Calif LJ*, 537 at 542; and M. Volcansek, 'Supranational Courts in a Political Context' in M. Volcansek (ed.) *Law Above Nations*, (University Press of Florida, Gainesville, Fla., 1997) 1 at 11.

[53] See J. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', (1994) *CPS* 510 at 522.

of EC law but as decisions to be integrated in a system of law requiring compatibility and coherence. Only this will ensure that the dialogue supporting the European legal order is based on a truly democratic legal discourse taking place in an emerging European legal community.

D. The Patterns of Litigation and the Patterns of Participation

The same fears of a European legal order being the product of a limited group of actors resurface when we assess the patterns of participation in the litigation strategies addressed. The ultimate aim of those promoting those litigation strategies may be a change of policy, but this is a mere consequence of what really becomes the goal of litigation strategies: to shift the forum of policy-making from the national political process to the European judicial process (and, in some cases, the national judicial process). Shifting regulatory choices from the political process to the judicial process and from the national arena to the European arena is not irrelevant. On the contrary, it is a change of constitutional relevance, altering the degree of voice of different actors in social decision-making. Theories of integration have stressed the role and power of different actors in shaping the process of European integration, but they have often ignored the importance of the different institutional alternatives in the distribution of power among those actors. It is rare to see a discussion of how the limits and resources of the different institutional alternatives end up constraining and shaping the final constitutional model of the European Union. This is particularly important in the case of the European judiciary, which has played the dominant role in the process of constitutional transformation of the European Union.

We can single out some 'professional' litigants of Community law: one company, Denkavit, has contrived to bring more than 21 cases before the ECJ. There are other well known cases in the realm of Article 30 (now Article 28) EC: Quietlynn which also brought one of the Sunday trading cases; Leclerc, which in France has challenged national regulations on TV advertising and on fixed prices for books and fuel, through both Article 28 EC and the Treaty competition rules; and lastly, another 'regular customer' of Article 28 EC is GB-INNO.[54] In challenging such diverse and 'neutral' (in terms of trade impact) regulations, these litigants have had a real effect on the Court's case law and its relation with social policies. On the one hand, this use of Community law to challenge national regulatory policies may help in promoting legislative innovation at national level and challenging national regulatory regimes which have remained prisoners of certain interests and outdated conceptions of the labour market and social law. On the other hand, there is a serious problem in shifting those questions to the European judicial process: the 'voice' given to all individuals affected by the policies in question is not necessarily the same. Powerful corporations, for instance, tend to be

[54] At least four important cases in the area of free movement of goods.

'repeat players'[55] and thus are able to use and participate in the European legal discourse to a much greater degree than individuals. Moreover, multinational companies are much more able to promote Europe-wide litigation strategies and have high stakes in organising their participation in the judicial process when compared, for example, with consumer interests (which usually correspond to dispersed interests).

As the Sunday trading cases show, the broad scope granted to some free movement rules has allowed strategic litigation challenging national labour law principles. Those Community rules have been used by national litigants to favour economic freedom and change social traditions at the national level. At the same time, the broader scope granted to free movement of goods compared to the free movement of workers has favoured economic freedom litigation over social rights litigation. It was pro-deregulation litigants who were favoured by the priority given to the free movement of goods. Labour law has, once again, been forced into a pattern of compatibility with competition rules. The result is the slow erosion of traditional protective legislation and the production of a more flexible system of rights. However, the recent case law of the Court signals a shift in its judicial activism towards a limitation of the scope of the application of the free movement of goods and a broader application of the free movement of persons. The limits set in *Keck* to challenges, under Article 28, to national rules whose effect is to limit the commercial freedom of traders[56] will reduce the impact of the free movement of goods on national legislation protecting social rights. Instead, a broader use of the free movement of workers may now be available to strategic litigation promoting social rights in the European common market. The *Bosman* decision is a good example, supporting a right to work and the freedom of workers to choose their work and employment.[57] This decision prohibited rules which, albeit not discriminating against workers of other Member

[55] See the example of Sunday trading: Rawlings, above n. 1, 309 and 315.

[56] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097. By this decision, the Court has restricted the scope of application of Art. 28 with regard to national measures regulating 'selling arrangements' which do not discriminate against imports (no longer considered as capable of restricting trade in the context of the free movement of goods). The traditional interpretation of Art. 28 is, however, maintained with regard to national measures on product characteristics. On *Keck*, see S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *CMLRev* 885; L.W. Gormley, 'Two Years After *Keck*', (1996) 19 *F'ham ILJ*; H. Mattera, 'De l'arrêt "Dassonville" à l'arrêt *Keck*: l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions', (1994) *Revue du Marché Unique Européen*; D. Chalmers, 'Repackaging the Internal Market—The Ramifications of the *Keck* Judgment', (1994) 19 *ELR*, 385; M. Lopez Escudero, 'La jurisprudencia *Keck y Mithouard*: Una Revision del Concepto de Medida de Efecto Equivalente', (1994) *Revista de Instituciones Europeas* 379; N. Bernard, 'Discrimination and Free Movement in EC Law', (1996) 45 *ICLQ* 82; Higgins, 'The Free Movement of Goods Since *Keck*', (1997) 6 *IJEL*; and my '*Keck*: The End? The Beginning of the End? Or Just the End of the Beginning?', (1994) 1 *IJEL* 30.

[57] Case C–415/93 *Bosman* [1995] ECR I–4921.

States, reduced their free movement by imposing limits on their freedom to leave their employer and to choose between different employment contracts. The consequence of the recent expansion of the provisions on free movement of persons beyond the simple prohibition of discrimination on the ground of nationality may be the recognition of a set of European social rights necessary for an effective protection of the free movement of persons. Developments in this direction will depend greatly on the sophistication and capacity of social actors to institute litigation combining Community law arguments with fundamental social rights.[58]

Hitherto, the litigation which has helped to 'mould' the European Constitution has been based on market integration rules (notably free movement of goods) and dominated by certain actors (notably companies that often appear as repeated litigants). Owing to the character of those rules and to the information and organisation costs involved in participating in the Community judicial process, it has mainly been companies that have kick-started the discovery process of Community law and the European Constitution. As a result, the European Constitution (and its approach to fundamental rights) is a product of judicial construction fuelled by litigation originating from certain actors and free movement provisions. In particular, the 'preference' given to the free movement of goods has favoured litigation pushing for economic freedom. This pattern is reinforced by the character of the litigants who make use of Community rules. Just as formal constitutions are a product of representation and participation in the political process, so the European Economic Constitution is, to a large extent, a product of representation and participation in the judicial process. The present shift in the Court's case law towards restricting the scope of application of the free movement of goods and favouring an extended application of the free movement of persons (including the free movement of workers) may help to redefine the actors and the interests promoted by litigation related to market integration. It will be important for social values to be inserted into the process of market integration and the European Economic Constitution, and this will depend to a large extent on altering the patterns of Community law litigation and expanding the circle of those participating in the dialogues which mould European law and its relations with national social law.

[58] That has not been the case hitherto. In this sense, see E. Szyszczak, 'Future Directions in European Union Social Policy Law', (1995) *ILJ* 19 at 31.

5

The Complexities of Living With an Interpretation Prerogative – Some Observations on an Imperfect Dialogue

SPIROS SIMITIS

A. Setting the Frame

Reflections on the interaction between the ECJ and the laws of the EU Member States are in reality deliberations on the role and limits of interpretation. The Rome Treaty is clear on the matter to a degree such as it seldom is elsewhere. Articles 164 and 177 (now Articles 220 and 234 EC) establish and guarantee a monopoly. However numerous the interpreters of EC law may be, none of them can offer more than a personal view on what the purposes and the consequences of a specific provision may be –with one exception. The final answer is reserved to the ECJ. It is the Court's unique privilege and also its most salient characteristic, to be the guardian of the Treaty and to determine how the texts have to be read. In other words: the Treaty entrusts the ECJ with a task that definitely transcends the usual role of courts. The ECJ is vested with a singular power. Its intervention, at least in the eyes of the authors of the Treaty, ends all controversies over the Treaty's 'correct' meaning.

The purpose is fairly obvious. By monopolizing interpretation the Treaty tries to inhibit the destabilizing effect inherent in any interpretation process. Therefore, Article 177 is first and foremost a preventive move against any distortion of the motives and scopes determining the adoption of the Treaty and the ensuing Community regulations. But the authors of the Treaty were acutely aware that any attempt to eliminate or at least predetermine the results of the interpretation of a legal text is ultimately in vain. Even where limitations are particularly sought after, as in times of far-reaching political and societal changes, barriers quickly prove ineffective as the history of codifications or of specific typically interventionist laws shows only too well. Pontalis' succinct remarks in his introductory observations on the *Code civil* draft[1] still constitute

[1] Discours préliminaire, in P.A. Fenet, *Recueil complet des travaux préparatoires du Code civil*, vol. 1 (Paris, 1829) 469.

the best description of the inexorable dilemma between the regulator's attempt to establish virtually timeless rules and the latter's constant transformation in the course of an application process dominated by the demands of their continuously changing economic, political and societal context.

Accordingly, the Treaty chooses not to block but to channel interpretation. What it wants to avoid is a diversity of views that ultimately could develop into a serious obstacle to the achievement of an initially merely economic and later political union. In other words, the Treaty does accept the risk of an interpretation that necessarily entails new and other approaches to the Community's problems, but on condition that a rereading of the text is exclusively reserved to a sole instance: the ECJ. The Court's outstanding status was underscored by yet another decision of the Community. Crucial documents such as those related to the history of the Treaty or the minutes of the Council were until lately inaccessible.[2] Whether and to what extent this will change in view of Art. 255(1) of the Treaty remains to be seen. Thus, interpreters are deliberately cut off from one of their principal sources. Considerations on the motives of a particular decision or on conflicting opinions are hence, as a rule, pure speculations.

Under these conditions interpretation must more than ever focus on the very text of the Treaty and that of any other regulation. As a result, the role of the Court is accentuated. Where the text alone matters, the perception of its sole authoritative interpreter inevitably becomes the only reliable criterion for determining both the demands and the range of EC law. Consequently, although as stated in the introductory chapter to this book, Article 177 may not be the 'measure of all things',[3] it is invariably the source of all queries concerning the impact of the ECJ on the understanding of EC law and its application.

B. The Fallacy of One-way Interpretation

The Court is well aware of its crucial role, as the chapters on the two key examples of this study, sex equality[4] and the transfer of undertakings,[5] illustrate in particular. But they also show how insistent the ECJ has been in its attempts to secure and strengthen its function. The remarks of Judge Pescatore cited in the first sentences of the introductory chapter to this book[6] are already significant enough. By qualifying judicial interpretation as a creative process he points to the specific task of the Court and distinguishes it at the same time from the mere application of a series of given rules. Rather than being a simple executor, the Court continues and complements the regulatory process initiated by the Treaty. It is through this ceaseless restatement of the original rules that the Court achieves its 'creative' appropriation of the Treaty.

[2] See S. Simitis, in U. Dammann and S. Simitis, *EG-Datenschutzrichtlinie* (Nomos, Baden-Baden 1997) 71.

[3] Above Chap. 1 at 21.

[4] Above Chap. 2.

[5] Above Chap. 3.

[6] Above Chap. 1.

For precisely this reason the Court obviously did not hesitate, as another of its members, Judge Zuleeg, explained a few years later,[7] to correct the view that in proceedings under Article 177 the ECJ should confine its answers to the questions submitted by national courts to the specific points they raised. On the contrary, in the Judge's opinion, the Court must first look at the case, then carefully analyse its importance to the perception of Community law and the latter's future development and, finally, rephrase the question accordingly. Thus the ECJ, as confirmed and emphasised by *Paletta II*,[8] frees itself from the constraints of a view that, ultimately, sees in the Court no more than an authoritative informant whose sole mission is to provide the information required in a specific case and whose assignment is therefore both defined and limited by the help requested for that particular case. Instead, the inquiries received from national courts are treated as a resource from which the ECJ can mine the material needed to restructure and develop Community law.

Of all the examples discussed in this volume, sex equality is probably the best illustration of the slow but persistent appropriation of the Treaty by the ECJ. The starting-point could not have been narrower. Article 119 merely secured equal pay. Nonetheless, against the background of the Commission's long-running efforts to improve the condition of women and to achieve genuine equality, the ECJ broadened step by step the field of application of the equality principle. But while each of the ECJ's rulings restated the Treaty's original intentions, they also increasingly revealed the dialectics of the Court's efforts to review the Community's legal framework by rereading the apparently unchanged basic rules of Community law. National courts abandoned their initially distinctly passive attitude in favour of a progressively more active role. Insufficient information on European law or doubts as to its correct application may in the past have been the prevailing motive for seeking the intervention of the ECJ. By now, however, in a growing number of cases the reason for invoking Article 177, paradoxical though it may sound, is not lack of knowledge but an intimate knowledge of Community provisions.

Hence, the interference of the ECJ is a deliberately chosen detour. Its decision is thought to be the most promising chance of forcing both the national legislators and fellow national courts to revise their position and thereby eliminating long-standing deficits of national law. German courts, for instance, could have appealed to the Federal Constitutional Court, the more so since the gradual abolition of forms of discriminations is to a substantial degree due to this particular court.[9] But in the view of at least some German judges Community law definitely offered a more solid base for the improvements they

[7] 'Die Rolle der rechtsprechenden Gewalt in der europäischen Integration', (1994) *Juristenzeitung* 3.

[8] Case C–206/94, [1996] ECR I–2357, para. 32.

[9] See also Th. Dieterich, 'Die Arbeitsgerichte zwischen Bundesverfassungsgericht und Europäischem Gerichtshof', (1996) *NZA* 673.

were aiming at. Therefore, primarily national concerns, not uncertainties about the range or exact content of supranational law, were the real reason for addressing the ECJ. The reference made to the Court was, in other words, the cornerstone of a strategy that intentionally instrumentalized the ECJ.

However, once national courts begin using the ECJ for specific national purposes, the interpretation of the Treaty ceases to be a one-way process. Certainly, from a purely formal point of view, the Court is still the master of the process. But the courts of the Member States take advantage of Article 177 to set the interpretation context. Thanks to their elaborate knowledge of Community law they highlight the exact points they are interested in and at the same time, by a series of precise questions, delimit the Court's range of argumentation. Moreover, the Court's pointed description of the Article 177 procedure as a 'cooperative judicial dialogue'[10] is taken literally. Hence, whenever the ECJ's response appears unsatisfactory, the national court concerned keeps asking for clarifications.[11] In short, the one-way interpretation model is gradually displaced by an interactive process in which both partners, the ECJ and the national courts, pursue their own specific interests with regard to the interpretation of Community law. Therefore, the more European law influences ever-broader areas of the laws of the Member States, the more the unilateral appropriation of EC-law by the ECJ is *de facto* questioned.

Whether and to what extent the accent is shifted to an increasingly interactive process marked by often distinctly different and sometimes conflicting interests primarily depends, however, on the social and political relevance of the issues at stake. It is consequently far from surprising that sex equality, not the transfer of undertakings, is the main example of the changing perception of the interpretation process. Rulings such as those on indirect discrimination in particular made it clear that the time had come to review the premises of a both realistic and successful equality policy. The tenaciously defended assumption that sex equality is primarily a social process and that legislators should therefore deliberately refrain from regulatory interference had to be discarded. Positive action measures aiming at a systematic improvement of the position of women, not least by combating discrimination with the aid of intentionally established privileges with regard to access to employment, vocational training and promotion, signalled the turning-point.

Reaction was to a considerable extent openly hostile. The equality laws were harshly attacked, and the legislators accused of blindly succumbing to the *Zeitgeist* by tolerating or even furthering unquestionably unconstitutional

[10] See e.g. Cases C–147/91 *Michele Ferrer Laderer* [1992] ECR I–4097, at 4115; C–127/92 *Enderby* [1993] ECR I–5535; M. Zuleeg, above n. 7, at 2; S. Simitis, 'Dismantling or Strengthening Labour Law: The Case of the European Court of Justice', (1996) *ELJ* 171 ff.

[11] The former President of the Federal German Labour Court Th. Dieterich therefore speaks of a 'stammering dialogue', above n. 9 at 678.

discriminatory regulations. It was in this situation that a number of German courts chose to address the ECJ. They regarded the Court as a most welcome ally in their efforts to refute sharp criticisms of positive action measures and to secure their application.[12] After all, the EC Commission had pointed in the same direction, particularly in its policy papers. No wonder, therefore, that *Kalanke*[13] came as a shock, the more so since the German legislators had abandoned one after another of their initial intentions. Hard measures such as the prescription of quota had been replaced by soft rules such as the duty to draw up an 'equality plan' that would gradually achieve structural changes in a given entity and thus positively affect both the employment and promotion chances of women. Besides, most German equality laws affirmed that qualifications should ultimately be the sole relevant criterion for the selection of employees.

Hence, *Kalanke* disappointed all those who had expected that the ECJ would help to safeguard at least an obviously attenuated attempt to implement equality. Instead, the opponents of positive action measures saw in the Court's ruling an unhoped-for opportunity to inhibit such measures. *Badeck*[14] is the proof. The ECJ was once more instrumentalised—this time, however, by those who up till then had deeply distrusted its rulings. *Kalanke* seemed to offer them all the support they needed to debar positive action measures by emphasising their incompatibility with supranational rules. For precisely this reason the controversy over the constitutionality of the Hesse Law on Equal Rights for Women and Men[15] quickly grew into a dispute over its compatibility with EC law. As a result, the State Constitutional Court of the Land of Hesse chose not to decide on constitutional grounds alone and brought the matter before the ECJ. Thus, the burden of the decision was shifted. The ECJ was entrusted with the resolution of a conflict that could have been solved by adhering to the principles of the Hesse Constitution and applying them against the background of both the Federal German Constitution and the case-law of the Federal Constitutional Court.[16] Hence, for the very first time in its history the ECJ was given the opportunity to reply to questions raised by a constitutional court, and thus ultimately to intervene, on the basis of EC law, in the interpretation of a particular Constitution.

The context of the *Kalanke* case has been extensively discussed in the second chapter of this book.[17] The ECJ had understandably created, not least because of the remarks of Advocate General Tesauro, the impression of a

[12] See, for instance, N. Colneric, 'Neue Entscheidungen des EuGH zur Gleichbehandlung von Männern und Frauen: Anmerkungen aus bundesdeutscher Sicht zu den Urteilen in den Rechtssachen 109/88, C–262/88, C–3/89, C–177/88 und C–179/88', (1991) *EZW* 75.

[13] Case C–450/93 [1993] ECR I–3051.

[14] Case C–158/97, [2000] ECR I–1875.

[15] Hessisches Gleichberechtigungsgesetz of Dec. 21, 1993, *Gesetz- und Verordnungsblatt* 1993, I, 729.

[16] See esp. *Entscheidungen des Bundesverfassungsgerichts* vol. 85, 191; 92, 91.

[17] Above Chap. 2, Part II.

deliberate withdrawal. The Court therefore seemed to be in an impasse. Any deviation from the rather categorical statements made in the *Kalanke* case risked challenging its credibility. The ECJ was consequently in a patently awkward position. If changes were to be contemplated, they would have to occur in a manner that would not openly discredit or even overthrow *Kalanke*.

The solution chosen by the Court was as simple as it was ingenuous. Equality was moved back from abstract considerations, as those in *Kalanke*, to social reality. Advocate General Saggio had carefully paved the way. In his final conclusions he emphasized in a series of general statements[18] that positive action measures are a concept whose content necessarily varies in order to take into account the changing expectations of society.[19] He even went a step farther[20] and explicitly stressed, that, contrary to a frequently expressed opinion, equality is not a purely formal principle and that substantive equality can also be achieved through discriminatory measures. Article 141(4) of the EC Treaty and Article 2(4) of the 1976 Equal Treatment Directive[21] should therefore not be treated as provisions containing mere exceptions which have, consequently, to be interpreted restrictively. The Court did not literally repeat the remarks of the Advocate General. It argued however on precisely the same lines by using *Marschall*[22] to demonstrate that *Kalanke* was part of an ongoing deliberation whose purpose is to review and improve the efficiency of positive action measures.[23]

In other words, the ECJ affirmed that assertions on methods to secure equality of the sexes always build on a particular social context and accordingly have to be constantly reappraised in view of the changes in their context. Viewed from this perspective *Kalanke* appears as an essentially correct but nevertheless provisional answer to the question whether and which positive action measures are admissible. *Badeck* thus marks, in the eyes of the Court, a new stage of an open process of reflection on the legal instruments needed to safeguard and advance equality. Therefore, the ECJ had no problem in declaring the Hesse Law compatible with EC law without debating the correctness its own previous statements. In short, *Kalanke* remained unchallenged, but *Badeck* set the frame anew for all future discussions.

The importance of *Badeck* should not be underestimated. In fact, the Court regained its leadership in the interpretation process. The revised approach to equality enables the Court to adopt a position that is definitely both more flexible and differentiated than ever before. Hence, *Badeck* makes

[18] Case C–158/97, Final conclusions of Antonio Saggio AG of June 10, 1999, para. 26–8.

[19] Above n.18, para. 26.

[20] Above n.18.

[21] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women of 9 Feb. 1976, OJ No. 39/40 of 14 Feb. 1976, see also Chap. 2.

[22] Case C–409/95, [1997] ECR I–6363.

[23] Above n. 22, paras. 16–23.

it possible to bridge the gap between the distinctly reserved attitude expressed in the *Kalanke* case and the European Union's intensified efforts to strive for full equality as illustrated by Art. 13 of the EC Treaty, its thoroughly revised ex-Article 119 (141) and the EC Commission's newest action programme and proposals.[24] To be quite clear: *Badeck* has certainly not freed positive action measures from all restraints. The ECJ has, on the contrary, linked its acceptance of such measures to the need to acknowledge that limits have to be determined and implemented.[25] But *Badeck* reflects, no less than Article 141(4) of the EC Treaty, the conviction that positive action measures are an indispensable element of a policy committed to 'full equality in practice'.

C. The Comparative Approach and the Domestication of the ECJ

The more the singular importance of the ECJ's power to determine the interpretation of Community law was realized, the more attention became focused on the criteria applied by the Court. The reason is simple since the Court's competence to define both the content and the range of EC rules could not be contested, the attempt to establish a consensus on the interpretation principles appeared to be the only promising means ultimately of delimiting and reducing the Court's power. Consequently, the demand that all interpretation efforts should be based on an extensive comparative approach was put forward insistently, in particular in the wake of decisions which, as for instance the *Christel Schmidt* ruling,[26] had far-reaching effects on the laws of the Member States. In other words, the Court was expected to take the national laws as a starting-point and first and foremost to find out how they reacted to the issue at stake. They were therefore seen as a filter through which the Court's argumentation had to pass in every case.

A comparative approach certainly does not transcend the Court's normal procedure. Long before *Schmidt* the ECJ had repeatedly compared laws of the

[24] See EC Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Social Policy Agenda*—COM(2000) 379 final of 28 June 2000, 4.2.3, 4.2.4; the proposals for a Council Dir. establishing a general framework for equal treatment in employment and occupation—COM(99) 565 final of 25 Nov. 1999; for a European Parliament and Council Dir. amending Dir. 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions—COM(2000) 334 final of 7 June 2000; and for a Council decision on the Supporting Programme for the Community Framework on Gender Equality (2001-2005)—COM(2000) 335 final of 7 June 2000.

[25] *Badeck*, above n. 22 para. 23, 38, 55.

[26] Case C–392/92 [1994] ECR I–1311. For a detailed discussion of the case see the contributions of P. Davies, above at 137ff, S. Laulom, above at 158ff and F. Valdés Dal-Ré, above at 192 of this book.

Member States for mainly two reasons.[27] First, a comparison permits the Court to adjust its reasoning to the EC Treaty's quest for harmonisation. Whatever the outcome of the Court's arguments, as long as it can be presented as a contribution to a common regulation achieved by means familiar to the Member States the ECJ can claim to have remained within the bounds of mere approximation. Second, a comparative approach enables the Court better to anticipate the reactions to its rulings. The willingness to accept a decision essentially depends, exactly as in the case of a directive,[28] on its affinity to existing national regulations. The easier it is to perceive such similarity, the greater the chances of both rulings and directives being favourably received. Therefore, what the Court aims at with the help of comparison is, in the words of Judge Pescatore, a '*moyenne raison*' tolerable throughout the entire European Union.[29]

But the opponents of *Schmidt* pursued a very different purpose. For them, the comparative approach was primarily a means intended to restrict the Court's *margin of manoeuvre*. In their view comparison has a specific function: to establish a binding framework for the Court's argumentation.[30] Accordingly, the ECJ would be infringing its interpretation prerogative any time the laws of the Member States do not offer an adequate foundation for the Court's reasoning. Hence, the Court must confine itself to move along lines predetermined by national laws. The only concession made is that the ECJ is not bound to adopt an attitude shared by the majority of Member States. On the contrary, its competence is not overstepped as long as it can demonstrate that its position in a particular case has parallels in national laws.

In short, the comparative approach has a purely instrumental function. Although it may not openly question the Court's interpretation prerogative, it nevertheless sets clear limits to the Court's capacity to apply and develop EC law. The effect is, firstly, an implicit re-nationalisation of Community law. Its interpretation is still, as a rule, guided by its own texts and the principles underlying them. But wherever doubts arise as to its range and aspirations, especially in connection with new or unusual cases, the ECJ is expected to return to the laws of the Member States and to deduce from their comparison how gaps in the application of EC law should be filled.

The consequences are particularly well exemplified by the *Schmidt* case. Its crucial issue was the interpretation of the exact meaning of a transfer.[31] The

[27] See esp. P. Pescatore, 'Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes à des normes déduites de la comparaison des droits des États Membres', (1980) 32 *Revue Internationale de droit comparé* 337.

[28] See S. Simitis, 'From the Market to the Polis: The EU Directive on the Protection of Personal Data',(1995) 80 *Iowa LR* 448 *et se*q.

[29] P. Pescatore, above n. 27 at 359.

[30] See esp. W. Blomeyer, 'Der Einfluss der Rechtsprechung des EuGH auf das deutsche Arbeitsrecht', (1994) *NZA* 638; U. Preis, 'Entwicklungslinien in der Rechtsprechung des EuGH zum Arbeitsrecht', (1995) *ZW* 908.

[31] See also A. Lo Faro, above Chap. 3, Part IV.

Court was, as explained earlier in this book,[32] caught between two different readings according to whether the emphasis is placed on the '*entreprise-organisation*' or the '*entreprise-activité*'. Both readings are undeniably possible. The choice depends, in essence, on the premises of the reasoning. If the aim is to restrict the range of the Transfers Directive[33] as much as possible, a reading founded on a comparison of the national laws is certainly the best approach, as the reactions in Germany alone have shown.[34] If, on the contrary, the purpose is to maximise the protection of employees, the perception of the undertaking as an '*entreprise-activité*' must, in particular against the background of a constantly spreading outsourcing policy, govern all further reflections on the notion of transfer. It is for precisely this reason that the Court eschewed the traditional organisational, manifestly static concept of the undertaking and opted for an overtly functional view.

However, the Court's preference also underscored its readiness, irrespective of whether its arguments are shared or not, to make use of its interpretation prerogative to improve the standards of protection of employees within the European Union by broadening the application of the Transfers Directive. It was exactly this step towards a both autonomous and extensive reading of the Directive that brought about unusual aggressive reactions not only from academic commentators but also on the part of industry and governments.[35] Under the pressure of such criticisms the Court revised its original position. The compromise sought in *Süzen*[36] has, nevertheless, not eliminated the real source of the controversy: conflict over the ends and limits of interpretation.

Whatever the response, it inevitably impinges on the future development of the European Union. All attempts to domesticate the ECJ, either by prescribing mandatory criteria for the interpretation of Community law that *de facto* preserve the supremacy of national laws or by any other means with similar intentions, entail an essentially backward oriented implementation of Community regulations which at best conserves the *status quo*. Where, rather, the application of Community law is understood as an open process in the course of which the ECJ must react to challenges ensuing from the growing impact of the Community on its Member States, interpretation offers a chance to keep pace with the changing social, economic and political context and

[32] See P. Davies, above Chap. 3, Part I.

[33] Council Dir. 77/187/EEC on the transfer of undertakings of 14 Feb. 1977, OJ 1977, No L 61/27, see also the amending Council Dir. 98/50/EC of 15.7.1998, OJ 1998 No L 201/88.

[34] See e.g. W. Zöllner and K.-G. Loritz, *Arbeitsrecht* (3d ed., Munich, 1998), 132: 'scandalous'; M. Henssler, 'Aktuelle Rechtsprobleme des Betriebsübergangs', (1994) *NZA* 916: 'catastrophic'; *EZA*, Schnelldienst No 10/1994 – Kurzkommentar: 'acrobatic interpretations of labour law', 'alien to both the purpose of the norm and the facts of life'; A. Junker, 'Der EuGH im Arbeitsrecht – Die schwarze Serie geht weiter', (1994) *NJW* 2527: 'the latest in a 'black series' of decisions'.

[35] See Th. Dieterich, above n. 9 at 679; S. Simitis, above n. 10 at 158ff.

[36] Case C–13/95, [1997] ECR I–1259.

thereby to transform the application of Community principles and regulations into a stronghold of living Community law. On one condition, however, the risks of a both open and innovative interpretation should never be repressed. On the contrary, they must be systematically addressed in a critical discourse accompanying the Court's rulings.

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