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# Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction

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*In providing preliminary rulings on the interpretation of EU law, the European Court of Justice carries out essentially review of constitutionality of Member State action. The ECJ enjoys discretion in determining the specificity of its ruling. It may give an answer so specific that it leaves the referring court no margin for maneuver and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary (deference cases). The degree of specificity is not a random exercise but a conscious judicial choice. The ECJ's discretion in this respect operates as a constitutional valve and illustrates the direct use of judicial power. This article seeks to examine the varying degrees of specificity, the types of case where each is used, the reasons which determine variations, and whether any conclusions can be drawn as to the optimum approach that the Court should take.*

## 1. Constitutional Review and the Preliminary Reference Procedure

The fundamental role of the ECJ is to ensure that both EU institutions and Member States comply with their obligations arising from the Treaties.<sup>1</sup> This role is *par excellence* a constitutional one. The ECJ carries out, in effect, review of constitutionality of EU and Member State action. Control over the conduct of EU institutions is more direct and visible than control over State conduct. While there are procedures for

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<sup>1</sup> This role is reflected in Article 19(1) TEU which replaces in substance the old Article 220 EC and states that the role of the EU judiciary is to “ensure that in the interpretation and application of the Treaties the law is observed.”

challenging the validity of an EU measure both directly and indirectly,<sup>2</sup> the ECJ does not have the power to declare a national measure void. Review of state action takes place through enforcement proceedings<sup>3</sup> or through the preliminary reference procedure. Although the ECJ does not have the power to rule on the validity of national measures or apply the law on particular facts, preliminary references serve in fact as the principal way of constitutional review of State action. The national court requests a ruling on the interpretation of EU law but does so with a view to establishing, in one form or another, the compatibility of national law with EU law. ECJ rulings on interpretation thus become a proxy for constitutional review. This is a system which is based on a carefully crafted division of competences between the ECJ and the national judiciary, requires their close cooperation, and promotes a model of dual judicial sovereignty. Experience suggests that the model has been successful in that it has avoided rebellion by national courts while accommodating the symbiosis of different judicial outlooks on constitutional supremacy.<sup>4</sup>

Both in quantitative terms (i.e. number of cases) and in terms of substance, indirect review through preliminary references is more important than control through enforcement actions.<sup>5</sup> The second provides a form of conversation between institutional actors and, as such, it is subject to the policy agenda of the Commission and a process of regulatory bargaining with state actors. The first, by contrast, gives star role to private interests and the gate-keeping function of the national court. Its diffuse and *ad hoc* character enables review of constitutionality to permeate the national legal system.

Under Article 267 TFEU [Article 234 EC], the ECJ does not have jurisdiction to decide on questions of national law or the application of Community law to specific facts. Such issues fall within the exclusive jurisdiction of the national court, although in some cases the distinction between interpretation and application of law becomes difficult to draw. The ECJ's role is to interpret EU law. In exercising its interpretative function, however, the Court enjoys significant discretion in a number of respects. It has leeway with regard to the provisions of EU law on which it may offer guidance.

<sup>2</sup> Direct review takes place through the action for annulment (Article 263 TFEU [Article 230 EC]) and the action for failure to act (Article 265 TFEU [Article 232 EC]). Indirect review takes place through the plea of illegality (Article 277 TFEU [Article 241 EC]) and the preliminary reference procedure Article 267 TFEU [Article 234 EC]). Another form of indirect review may be said to be an action in damages under Article 340(2) TFEU [Article 228(2) EC].

<sup>3</sup> See Articles 258–259 TFEU [Articles 226–227 EC].

<sup>4</sup> Thus, it has become obvious from the inter-judicial dialogue that the ECJ and the national judiciaries disagree on the issue of *competenz-competenz*. The ECJ takes the view that it has exclusive jurisdiction to determine the validity of EU measures while the overwhelming majority of national courts reserve to themselves the ultimate authority to determine the outer limits of EU competence and the compatibility of EU measures with their national constitutions: see e.g. the judgment of the Danish Supreme Court in *Norup Carlsen v the Prime Minister* [1999] 3 CMLR 854, and of the German Constitutional Court in the Maastricht Treaty case (*Brunner* [1994] 1 CMLR 57) and the Lisbon Treaty case, judgment of 30 June 2009. Cf. Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>5</sup> In the period 2001 to 2005, enforcement actions accounted for 17.7% of the case law while preliminary references on issues of interpretation accounted for 25.3%. See Takis Tridimas & Gabriel Gari, *Winners and Losers in Luxembourg: A statistical analysis of Judicial Review before the European Court of Justice and the Court of First Instance: 2001–2005*, 35 EUR. L. REV. 131, 138 (2010).

Thus, it may recast the questions referred or examine issues which have not specifically been asked by the national court.<sup>6</sup> It may even give a ruling on the interpretation of an EU measure other than that to which the order of reference refers if, in the light of the factual and legal background, it considers it helpful for the national court in order to decide the case.<sup>7</sup> Such flexibility is justified by the nature of the preliminary reference procedure which is intended to facilitate a judicial dialogue rather than re-assert the parties as masters of the litigation. The ECJ may also refuse to give an answer if it considers that the question referred is hypothetical<sup>8</sup> or if the referring court has failed to define adequately the factual and legislative context of the dispute.<sup>9</sup>

Furthermore, the ECJ also enjoys significant discretion as regards the specificity of its ruling. It may be concrete and prescriptive or leave margin for input by the referring court. This aspect of its jurisdiction operates as a constitutional valve: it regulates the flow of judicial direction and determines whether review of national choices is carried out solely by the ECJ or shared with the national judiciaries. In the absence of a power of *certiorari*, the specificity of the ruling is one of the main mechanisms that the ECJ possesses to set its judicial agenda and influence the development of the law. This article seeks to examine the varying degrees of specificity, the types of case where each is used, the reasons which determine variations, and whether any conclusions can be drawn as to the optimum approach that the Court should take.

## 2. Degrees of specificity: Outcome, guidance and deference

One may distinguish three categories of cases depending on the specificity of the ruling. The ECJ may give an answer so specific that it leaves the referring court no margin for manoeuvre and provides it with a ready-made solution to the dispute (*outcome cases*); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (*guidance cases*); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (*deference cases*).

The above approaches may co-exist in the same reference where, for example, the Court provides an outcome in some of the questions referred and guidance in others.<sup>10</sup>

<sup>6</sup> See, e.g., Case C-67/89 *Berkenheide* [1990] ECR I-2615, para 16.

<sup>7</sup> See, e.g., Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] ECR I-317; Case C-383/97 *Van der Laan*, [1999] ECR I-731. For an interesting example of a difference in view between the Court and the Advocate General as to the provisions of EC law applicable in the case, see Case 367/89 *Richardt* [1991] ECR I-4621.

<sup>8</sup> See, e.g., Case C-83/91 *Meilicke* [1992] ECR I-4871. Similarly, the Court will refuse to answer where the issues of Community law on which the referring court seeks guidance bear no relation to the actual nature of the case or to the subject-matter of the main action: Case C-343/90 *Lourenco Dias* [1992] ECR I-4673.

<sup>9</sup> See, e.g., Joined cases 320-322/90 *Telemarsicabruzzo SpA v Circostel* [1993] ECR I-393.

<sup>10</sup> See, for example, Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions and the Motor Insurers' Bureau* [2003] ECR I-14447. In that case, the ECJ provided an outcome in relation to whether the national procedure satisfied the requirements of the right to judicial protection, also an outcome in relation to the issue whether an award of compensation should include interest but only basic guidance on whether the failure to cover the costs of proceedings made it excessively difficult to protect Community rights. For another example, see Case C-341/08 *Petersen*, judgment of 12 January 2010, discussed below.

This tripartite distinction is not watertight. The difference between the guidance and the deference category is one of degree and their boundaries are not always clear.<sup>11</sup> Nevertheless, the categories identified above essentially encapsulate the alternative approaches of the ECJ in engaging with the national judiciary. Guidance and deference may be seen as illustrations of judicial subsidiarity: the ECJ appoints national courts as its agents and asks them to fulfill their part of the bargain. The outcome approach may be seen as a sign of leadership although, as we shall see, leadership and activism may be pursued also through deference. The distinction among the three approaches is particularly striking in relation to the principle of proportionality but present also in the application of other principles<sup>12</sup> and, more generally, in all areas of Treaty and statutory interpretation.

## 2.1. Outcome

In many cases on free movement, the ECJ has provided an outcome by determining the compatibility of national law with the Treaty. Thus, in *Caixa Bank*, it held that French law which prohibited banks from paying interest in current accounts was in breach of the right of establishment. In *Alfa Vita Vassilopoulos AE*,<sup>13</sup> Greek law which prohibited supermarkets from selling bakery products whose baking was completed on the premises was held to be in breach of Article 28 EC (now Article 34 TFEU). Similarly, in *DocMorris*<sup>14</sup> the Court provided detailed outcomes both in relation to the existence of discrimination in fact under the *Keck* formula<sup>15</sup> and the issue of proportionality on all aspects of the case. In fact, although there is no intention here to carry out a comprehensive analysis of the case law, there is no doubt that outcome cases account for a substantial part of the case law on free movement.<sup>16</sup> Many cases on statutory interpretation of directives and regulations are also outcome cases.<sup>17</sup>

<sup>11</sup> Note that, to determine to which category a judgment belongs, one needs to have regard not only to the ruling but also to the reasoning of the Court as articulated in the grounds of the judgment.

<sup>12</sup> See, e.g., for a recent case where it was for the national court to establish, subject to the guidelines given by the ECJ, whether the principle of non-discrimination was breached: Case C-453/08 *Karanikolas v Ministry of Agriculture*, judgment of 2 September 2010.

<sup>13</sup> Joined Cases C-158 & C-159/04 *Alfa Vita Vassilopoulos AE v Greek State*, [2006] ECR I-8135.

<sup>14</sup> Case C-322/01 *Deutscher Apothekerverband eV v DocMorris and Watervel*, [2003] ECR I-14887.

<sup>15</sup> Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

<sup>16</sup> By way of example, for measures found to be incompatible with Article 28 (now Article 34 TFEU), see Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories SNC* [1994] ECR I-317; Case C-470/93 *Mars* [1995] ECR I-1923; Case C-239/02 *Douwe Egberts v Westrom Pharma*, [2004] ECR I-7007. For measures found to be compatible, see *Keck*, *supra* note 15, Joined Cases C-401 and 402/92 *Tankstation T Heuske and Boermans* [1994] ECR I-2199; Joined Cases C-418 etc/93 *Semeraro Casa Uno v Sindaco del Comune di Erbusco* [1996] ECR I-2975. For national measures found compatible with the freedom to provide services, see, e.g. *Alpine Investments* [1995] ECR I-1141; Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL*, [2005] ECR I-1167; Joined Cases C-544/03 & C-545/03 *Mobistar SA v Commune de Schaerbeek*, [2005] ECR I-7723.

<sup>17</sup> See, e.g., for recent examples, Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH*, judgment of 14 January 2010 (Directive 2005/09 on Unfair Commercial Practices; Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland*, judgment of 14 January 2010 (Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora).

A remarkable example of the outcome approach in the field of remedies is provided by *Grundig Italiana SpA v Ministerodelle Finanze*.<sup>18</sup> The case concerned Italian legislation which retroactively reduced the time-limit for claiming reimbursement of consumption taxes levied in contravention to Community law. The original limitation period of five years was replaced by a new time limit of three years and claimants whose claims had arisen before the new time limit came into force were given a transitional period of ninety days within which to initiate proceedings. The Court found that the ninety day period was insufficient. But it went further and, by a rare and somewhat surprising piece of judicial legislation, set at six months the minimum transitional period that national laws must guarantee. *Grundig Italiana* is unusual in that the Court not only provided a clear ruling that the national time-limit failed to comply with Community law but prescribed the requisite minimum time-limit that would comply with the principle of effectiveness.

It should be stressed that, where the Court follows the outcome approach, it does not make findings of fact. It reaches a conclusion, based on the facts of the case as provided in the order for reference, as to the compatibility of a national measure with EU law or as to how the correct interpretation of EU law requires the dispute to be resolved in the circumstances of the case. The difference between making findings of fact and providing an outcome may sometimes be difficult to draw and has given rise to problems in national proceedings.<sup>19</sup>

## 2.2. Guidance cases

In guidance cases, the ECJ sets parameters and provides the national court with guidelines which it must take into account in resolving the dispute. The ECJ has itself stated that, where appropriate, it will provide clarifications designed to give the national court guidance in its interpretation and in evaluating the compatibility of national law with EU law.<sup>20</sup> Such guidance may be detailed or more general depending on the circumstances of the case. An example of detailed guidance is provided by *Familiapress*.<sup>21</sup> The case concerned the compatibility with free movement of goods of Austrian legislation which prohibited newspapers from offering readers free gifts upon the successful completion of crosswords and other press competitions. The prohibition affected the marketing of German newspapers but the Austrian government argued

<sup>18</sup> Case C-255/00 *Grundig Italiana SpA v Ministerodelle Finanze* [2002] ECR I-8003. See further: Joined Cases C-216/99 and C-222/99 *Riccardo Prisco Srl v Amministrazione delle Finanze dello Stato* [2002] ECR I-6761; and Case C-62/00 *Marks & Spencer plc v Commissioners of Customs and Excise* [2002] ECR I-6325.

<sup>19</sup> See *Arsenal Football Club Plc v. Reed (No.2)* [2003] 1 All E.R. 137. The case generated controversy because, following the ruling of the ECJ, Laddie J held that the ECJ had exceeded its jurisdiction by making findings of fact and refused to follow the ruling. His judgment was however reversed on appeal.

<sup>20</sup> See, e.g., Case C-255/02 *Halifax v Commissioners of Customs and Excise* [2006] ECR I-1609, para 77; Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, para 40; Case C-79/01 *Payroll and Others* [2002] ECR I-8923, para 29.

<sup>21</sup> Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag* [1997] ECR I-3689.

that it was necessary to maintain press diversity. If prizes were allowed, newspapers would compete fiercely to attract customers and small publishing houses, who would be unable to afford large prizes, might be driven out of the market. The ECJ accepted that press diversity could justify a prohibition provided that it was proportionate and there were no less restrictive means to achieve the aim in view. It left it up to the national court to decide the issue of proportionality but laid down a number of criteria. The national court should determine first, whether newspapers which offered such prizes were in competition with small press publishers who were deemed to be unable to offer comparable gifts and, secondly, whether the prospect of winning was capable of bringing about a shift in demand.<sup>22</sup> In this context, the national court would have to define the relevant market and consider the market shares of publishers and press groups.<sup>23</sup> It would also have to assess the extent to which, from the consumer's standpoint, the newspaper concerned could be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising of the prize on the title page, the likelihood of winning, the value of the prize or the extent to which winning depends on a skill or knowledge.<sup>24</sup> Furthermore, the Court held that the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in Austria the opportunity to win a prize.<sup>25</sup>

*Familiapress* is a case where the Court was rich in its guidance, circumscribing the discretion of the national court. Guidance is often accompanied by exclusions where the ECJ explains which parts of national law cannot withstand scrutiny under Community law.<sup>26</sup> It may also take the form of a quasi-presumption: the ECJ sets a principle but accepts the possibility of exceptions. An example of this is provided by *Zenatti*.<sup>27</sup> The ECJ held that the free movement of services did not prohibit Italian legislation which reserved only to certain licensing agencies the right to organize betting. The legislation was justified on social and cultural grounds, in particular, the harmful effects on society of excess gambling. Member States enjoyed a degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. But it was up to the national court to satisfy itself that the legislation truly served social policy objectives.<sup>28</sup>

<sup>22</sup> *Id.* at para 28.

<sup>23</sup> Para 30.

<sup>24</sup> Para 31.

<sup>25</sup> Para 34.

<sup>26</sup> See, e.g., Joined cases C-46 and 48/93 *Brasserie du Pêcheur v Germany and the Queen v SS for Transport ex parte Factortame* [1996] ECR I-1029 where the ECJ explained which conditions of liability applicable under English and German law made excessively difficult the protection of Community rights.

<sup>27</sup> Case C-67/98, *Questore di Verona v Diego Zenatti* ("*Zenatti*") [1999] ECR I-7289.

<sup>28</sup> National lotteries legislation is an area where the case law has vacillated but, in general, allowed ample discretion to the Member States. For a review of cases, see Dimitrios Doukas & Jack Anderson, *Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded*, OXFORD Y.B. EUR. L. (2008).



Such presumption cases are closer to the outcome approach in that the Court takes a stance as to whether the national legislation in issue is compatible with Community law and gives an amber light to the national court.<sup>29</sup> Even in cases where the ECJ provides guidance and not a concrete outcome, the intervention of the Court may have important repercussions for the Member States. Guidelines alter the mix of interests that must be taken into account by the national administration or legislature in determining the outcome of the decision making. Judgments on the interpretation of the free movement provisions of the Treaty will often preclude the application of certain criteria applicable under national law or introduce criteria that must be taken into account by national agencies effectively transforming what under national law appears to be a black and white choice into a multi-dimensional game.<sup>30</sup>

Guidance can be fact-led. In *Davidoff*<sup>31</sup> the dispute centered on the doctrine of exhaustion under Article 7(1) of the trade mark Directive,<sup>32</sup> in particular, the circumstances in which the proprietor of a trade mark may be regarded as having consented to the importation from outside the EU of products bearing its trade mark and thus relinquished its rights under the Directive. The Court provided detailed guidance on the meaning of consent stating that, in view of its serious effect in extinguishing trade mark rights, consent must be unequivocally demonstrated and cannot be implied merely from the silence of the proprietor. But it left it to the national court to decide whether, exceptionally, on any specific case consent may be inferred from the facts in the light of the conduct of the parties.<sup>33</sup> *Davidoff* is a case where the Court was rich in its guidance, providing a detailed, fact-specific, interpretation of the Directive listing a number of factual situations in which implied consent could not be inferred. But its ruling did not exceed the bounds of interpretation.<sup>34</sup>

<sup>29</sup> Case C-405/98 *Gourmet* [2001] ECR I-1795, can also be characterized as an amber light case in favour of the national choice. The ECJ held that the Swedish prohibition on advertising of alcohol was a restriction on free movement and found that, in principle, it was justified unless it was apparent that, in the circumstances of law and fact which characterized trade in Sweden there were less restrictive alternatives which was for the national court to decide.

<sup>30</sup> See, e.g., Case C-372/04 *Watts* [2006] ECR I-4325. In that case, English law required a patient to receive prior authorization in order to be eligible for reimbursement of expenses incurred for receiving medical treatment in another Member State. The ECJ listed a number of conditions for authorization which were not acceptable under Community law and which therefore had to be set aside, and also listed a number of variables to be taken into account by the national authorities and the national court in deciding whether to grant authorization.

<sup>31</sup> Joined Cases C-414 to 416/99 *Zino Davidoff v A & G Imports* [2001] ECR I-8691.

<sup>32</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

<sup>33</sup> Para. 46.

<sup>34</sup> For a further example of detailed guidance, see Case C-228/03 *Gillette v LA-Laboratoires Ltd Oyi* [2005] ECR I-2337 (determination of whether use of a trademark is in accordance with honest practices under Directive 89/104).

One of the most interesting guidance cases is *Viking*.<sup>35</sup> *Viking*, a Finnish maritime company which ran at a loss, sought to reflag its vessels in Estonia with a view to lowering its wages costs. The International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU) threatened strike action unless *Viking* agreed to apply to the employees of its Estonian subsidiary the same terms as those applicable to its Finnish workforce. ITF sent a circular to all its affiliated unions asking them to refrain from entering into negotiations with *Viking*. The Court held that the strike action was a restriction on the right of establishment but that it could, in principle, be justified by an overriding reason of public interest, such as the protection of workers, on condition that it was proportionate. It then provided two sets of guidelines, general guidance pertaining to the balance to be drawn between free movement and social protection and more specific guidance for findings to be made by the national court. It held that the protection of workers would not be a valid justification if it were established that the jobs or conditions of employment of the workers in issue were not jeopardized or under a serious threat.<sup>36</sup> There would be no such risk if the company provided a binding undertaking to a national court giving specific guarantees to workers that the applicable provisions of Finnish law would be complied with and the terms of the collective agreement governing their working relationship maintained.<sup>37</sup> If, however, the exact legal scope of that undertaking was not clear, then it would be for the national court to determine whether the jobs or the conditions of employment were jeopardized or under serious threat. In that context, the ECJ provided a second set of more specific guidelines. It held that in assessing whether strike action was a proportionate response, it was incumbent on the national court to examine whether FSU had at its disposal other means against *Viking*, which were less restrictive of freedom of establishment, and, if so, whether it had exhausted those alternative means.

The Court further held that, insofar as ITF pursued a general policy against flags of convenience, the resultant restrictions on freedom of establishment could not be objectively justified. The Court took issue with what appeared to be a blanket policy of solidarity striking which would inhibit relocation even in cases where the destination state would provide a higher level of worker protection than the state of origin.

*Viking* is important for a number of reasons. The Court was faced with a fundamental conflict between, on the one hand, upholding free market ideals and enabling states and private actors to take advantage of the EU enlargement to the East and, on the other hand, avoiding social dumping. The judgment is characterized by a high degree of equivocation. The ECJ gives guidelines but the scope of the referring court's intervention is ample and creative. How is the national court to decide whether there

<sup>35</sup> Case C-438/05 *International Transport Workers Federation & Finnish Seamen's Union v Viking Line ABP* [2007] ECR I-10779; see also Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767. Another example where the ECJ provided detailed guidance to the national court (on the impact of the right of establishment on national corporate tax laws) is Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.

<sup>36</sup> *Id.* para. 81.

<sup>37</sup> Para. 82.



are less restrictive alternatives? And what does it mean that “the jobs or conditions of employment at issue must not be jeopardized or be under serious threat”? The judgment awards points to each party but does not resolve the dispute and redirects the litigation to the national court. Although the Court’s equivocation makes it difficult to establish victors and victims, in terms of risk allocation, it may be said to favor free movement and give less to workers and trade unions than proponents of social Europe would have wished.

*Viking* is important also for another reason. Although the case referred to corporate relocation from Finland to Estonia and raised issues pertaining to the protection of Finnish workers, the reference was made by an English court because ITF was based in England. The ECJ entrusted in effect an English court with applying the principle of proportionality and drawing the balance between the right to corporate relocation and protection of workers, as it applied to a different polity, namely, Finland.

### 2.3. Deference cases

In deference cases, the ECJ provides a ruling *in abstracto* leaving it to the national court to assess the compatibility of national law in issue in the proceedings or apply a principle of EU law in the circumstances of the case. Deference cases are numerically fewer. Examples are provided by the pre-*Keck* Sunday trading cases, where the ECJ was hesitant and somewhat unhelpful with regard to the compatibility of Sunday trading laws with the free movement of goods.<sup>38</sup> Further examples are provided by the judgment in *Konle*<sup>39</sup> on state liability and *ERT*<sup>40</sup> on the application of fundamental rights on national measures.<sup>41</sup>

## 3. A case study: Age discrimination cases

An area characterized by a high number of outcome decisions is age discrimination. It is pertinent to examine here by way of illustration the use of the outcome approach and the interchange between different degrees of specificity by reference to those decisions.

Directive 2000/78<sup>42</sup> lays down a framework for combatting discrimination on grounds of religion or belief, disability, age or sexual orientation. While the Directive

<sup>38</sup> For other examples, see Case C-12/02 *Grilli* [2003] ECR I-11585, where the ECJ left the issue whether German rules on motor-vehicles could be justified by public policy and public order and, if so whether they were proportionate entirely to the national court: see para 47 of the judgment. Elements of the deference approach can also be found in Case C-388/07 *The Queen on the application of Age Concern England v Secretary of State for Business* [2009] ECR I-1569, discussed below.

<sup>39</sup> Case C-302/97 *Konle v Republic of Austria* [1999] ECR I-3099.

<sup>40</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>41</sup> For an example in competition law, see Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 (on the issue of whether national legislation may be anti-competitive).

<sup>42</sup> OJ 2000, L 303/16.

prohibits direct and indirect discrimination on grounds of age, by way of exception, Article 6(1) states that differences of treatment on grounds of age do not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives.

In *Mangold v Helm*,<sup>43</sup> a judgment of wide resonance, the ECJ declared that the prohibition of discrimination on grounds of age is a general principle of Community law transcending the provisions of the Directive. It then held that Article 6(1) precluded German legislation which permitted the conclusion of fixed-term employment contracts for workers who were below the age of fifty-two only if there were objective grounds for doing so but allowed the conclusion of fixed term contracts for workers who had reached the age of fifty-two without such restriction. The ECJ held that the German legislation led to differential treatment of older employees which was not objectively necessary to attain the vocational integration of unemployed order workers. The Court applied a strict test of proportionality and reached an outcome overruling an important aspect of German social policy and signaling that it was prepared to follow an assertive approach in the field of age equality as it had done in previous years in the field of gender equality.

*Mangold* was followed by a number of cases where the Court's approach was more nuanced but, overall, no less assertive. In most of those cases it opted for outcomes. In *Kükükdeveci*,<sup>44</sup> it held that Article 6(1) prohibited German legislation which provided that periods of employment completed by an employee before reaching the age of twenty-five could not be taken into account in calculating the notice period for dismissal while such periods completed after the age of twenty-five could be so taken. Similarly, in *Hütter*<sup>45</sup> it found that Austrian law which excluded periods of service completed before the age of eighteen from being taken into account for the purposes of determining the grade of civil servants could not be justified by Article 6(1). The ECJ identified inconsistencies in the national legislation and concluded that it pursued contradictory aims and was thus unsuitable to achieve its objectives. *Mangold*, *Kükükdeveci*, and *Hütter* are all cases where the ECJ exercises a high level of scrutiny, applies a strong proportionality test and overrules national choices. *Wolf*,<sup>46</sup> by contrast, is an outcome case where the national choice receives the green light. There, the ECJ held that German legislation which set the maximum age for recruitment of fire fighters to the age of thirty was compatible with Directive 2008/78. The degree of scrutiny exercised over the national legislation in that case however was equally strong.

The above cases contrast with *Petersen*,<sup>47</sup> where the ECJ opted for guidance. The applicant contested German legislation which, subject to certain exceptions, prohibited dentists who had completed their sixty-eighth year from providing dental

<sup>43</sup> Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

<sup>44</sup> Case C-555/07 *Kükükdeveci v Swedex GmbH*, judgment of 19 January 2010.

<sup>45</sup> Case C-88/08 *Hütter* [2009] ECR I-5325.

<sup>46</sup> Case C-229/08 *Wolf v Stadt Frankfurt am Main*, judgment of 12 January 2010.

<sup>47</sup> Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, judgment of 12 January 2010.

services under statutory health insurance schemes. The prohibition had very substantial consequences for their livelihood since about 90% of the population was covered by statutory insurance. Mrs. Petersen argued that such exclusion run counter to the Directive. There was some uncertainty as to the objectives of the legislation and the possible justification of the difference in treatment. The Federal Constitutional Court had accepted that the age limit was justified on grounds of health protection, namely, the need to protect patients against the risks presented by older dentists who might be past their prime. Health protection, however, was not in fact the reason stated by the legislature in adopting the law. The statement of reasons accompanying the legislation referred to economic grounds—i.e., the need to limit expenditure in the health service while ensuring the distribution of employment opportunities among dentists of different generations. The ECJ held that it was ultimately for the national court, which has sole jurisdiction to determine the facts and interpret national law, to identify the objectives of the prohibition. The Court was accommodating to the national legislature in that it was prepared to accept justification for reasons other than those expressly stated in the law itself.<sup>48</sup>

It then proceeded to provide the national court with guidance on alternative scenarios. If it was established that the aim of the measure was health protection, the age limit would not be justified. If, conversely, the aim was to preserve the financial balance of the healthcare system, the age limit was acceptable. It is interesting to examine the rationale of the Court in some more detail.

The Court held that, within the discretion that Member States enjoy in organizing their social security systems, it was legitimate for a Member State to introduce an upper limit of sixty-eight years of age on the ground that, in general, the performance of dentists declined after a certain age. The ECJ therefore accepted by implication the reasoning of the Federal Constitutional Court to the effect that the legislature was not required to provide for an individual examination of the physical and mental capacity of every panel doctor who has reached the age of sixty-eight and was entitled to adopt general rules based on experience. But the ECJ went on to examine whether the legislation met the test of proportionality and came to a negative conclusion. While German law prohibited dentists over the age of sixty-eight from practicing under statutory health insurance schemes, there was no age limit as to their private practice. Allowing dentists over sixty-eight to practice privately undermined the claim that the age limit was necessary to ensure professional competence. The measure therefore fell on grounds of consistency.

If, by contrast, the aim of the measure was to reduce costs and preserve the financial balance of the healthcare system, allowing dentists over sixty-eight to practice privately was of no relevance since the age limit sought to control only public expenditure. The Court accepted that preserving the financial balance of the social security system was part of the objective of attaining health protection and thus a legitimate aim. Finally, if the objective of the age limit was to share out employ-

<sup>48</sup> This was also the case in *Palacios de la Villa*, discussed below, where the ECJ gave the green light to Spanish legislation on the ground that it pursued sound social objectives even though these objectives were not articulated in the law itself.

ment opportunities among different generations of dentists, the measure would be justified if certain conditions were fulfilled. The ECJ acknowledged that, where there is an excessive number of dentists or a latent risk that such a situation will occur, a Member State may consider it necessary to impose an age limit in order to facilitate access to employment by younger dentists. It was for the national court to ascertain whether such a situation existed and, if so, whether the test of proportionality was met on the facts.

In *Petersen* outcome and guidance co-exist, with the ECJ assessing, and striking down selectively, parts of the German system. The degree of scrutiny exercised is intense or, in parts, intermediate. The pendulum swung towards a lower level of scrutiny in *Palacios de la Villa*,<sup>49</sup> where the ECJ gave the green light to Spanish legislation which allowed collective labor agreements to provide for the compulsory retirement of employees upon reaching the age of sixty-five. The Court accepted that the law had been adopted at the instigation of the social partners as part of a national policy seeking to promote better access to employment, combat unemployment, and provide for better distribution of work among the generations.

In *Palacios de la Villa*, the ECJ adopted a standard of proportionality based on rational review. An interesting aspect of this case is that the Spanish law in question gave rise also to another type of difference in treatment. It allowed clauses providing for the compulsory retirement of employees upon reaching the age of sixty-five to be included only in collective labor agreements which had been concluded before its entry into force. Agreements that were concluded after the entry into force of the law, by contrast, could provide for compulsory retirement at the age of sixty-five only where that was linked to objectives “consistent with employment policy,” such as increased employment stability, the recruitment of new workers, or the conversion of temporary contracts into permanent ones. There was thus a clear difference in treatment between workers in temporal terms. It is somewhat surprising that this aspect was not questioned since, in the absence of good reason, such temporal differential could be taken as an indication of inconsistency in national policy.

Finally, in *Age Concern England*,<sup>50</sup> a charity for the promotion of the welfare of older people took issue with the way Directive 2000/78 had been implemented in the UK in that the implementing regulations allowed an employer to dismiss workers under the age of sixty-five when they reached the retirement age fixed by the employer if that was a proportionate means of achieving a legitimate aim. *Age Concern* argued that this provision was insufficiently specific and that the Directive required Member States to set out a specific list of differences of treatment which could be justified by reference to a legitimate aim. The ECJ held that Article 6(1) did not require Member States to draw up such a specific list. It proceeded however to provide guidelines. It held that aims which may justify a derogation from the principle prohibiting discrimination on grounds of age are social policy objectives, such as those related to employment policy, the labor market or vocational training. Those aims pertained to the public

<sup>49</sup> Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531.

<sup>50</sup> Case C-388/07 *The Queen on the application of Age Concern England v Secretary of State for Business* [2009] ECR I-1569.

interest and were distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it could not be ruled out that a national rule might recognize, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.<sup>51</sup> The Court then went on to hold that it was for the national court to ascertain whether the aims contemplated by the UK implementing regulation were legitimate and whether they could be attained by other means. Here, it left ample discretion to the national court, merely pointing out that generalizations concerning the capacity of a specific measure to contribute to employment policy, labor market or vocational training objectives are not enough to show that the aim of that measure could justify a derogation.<sup>52</sup>

The reason why the ECJ provided guidelines in *Age Concern* appears to be the nature of the challenge. The arguments of the applicant amounted to abstract review of the implementing legislation rather than concrete review based on the existence of inequality on specific facts. The ECJ was therefore led to make general observations on the requirements that the national legislation had to fulfill.

#### 4. Criteria determining the specificity of the ruling

The determination of the specificity of the ruling is not a random exercise. The Court makes a conscious choice. What criteria, then, may be relevant in determining the degree of specificity? Although there is no intention here to provide an exhaustive list, the following factors may be identified.

First, the compatibility of a national measure with EU law may depend closely on the evaluation of the facts, the interpretation of national law, or the interaction between EU and national law. In such cases, the national court will be much better placed, or indeed the only well-placed, to provide an outcome. The factual background may be important, for example, in determining whether the requirements of EU legislation are fulfilled<sup>53</sup> or assessing the proportionality of a national penalty.<sup>54</sup> Similarly, the compatibility of a national measure may depend on the prior interpretation of national law,<sup>55</sup> or ascertaining its objectives,<sup>56</sup> or the interaction between EU and national law.

<sup>51</sup> *Id.* at para. 46.

<sup>52</sup> *Id.* at para. 51.

<sup>53</sup> See, e.g., *Davidoff*, *supra* note 31; Case C-255/02 *Halifax v Commissioners of Customs and Excise* [2006] ECR I-1609 (where the issue of whether deduction of VAT as provided by the 6<sup>th</sup> Directive was an abuse of right was a matter for the national court to decide on the facts); Case C-228/03 *Gillette v LA-Laboratoires Ltd Oyi* [2005] ECR I-2337 (determination of whether use of a trademark is in accordance with honest practices under Directive 89/104).

<sup>54</sup> See, e.g., *Richardt*, *supra* note 7; Case C-262/99 *Louloudakis v Greece* [2002] ECR I-5547.

<sup>55</sup> See, e.g., C-302/97 *Konle v Republic of Austria* [1999] ECR I-3099, where the question whether the breach of Community law was serious so as to trigger State liability in damages could only be determined on the basis of the interpretation of Austrian law. Similarly, in Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177, the question whether Italian law was in breach of the ECJ case law on state liability dependent on its interpretation which was only for the Italian courts to ascertain.

<sup>56</sup> See *Petersen*, *supra* note 47.

In *Evans*,<sup>57</sup> which concerned state liability for breach of the Second Insurance Directive, the answer to the question whether there was a breach depended on whether the UK implementing rules complied with the directive which, in turn, could only be established by the national court on the basis of the guidelines provided by the ECJ and the assessment of national law that was to be made by the referring court.

Another factor influencing the specificity of the ruling is the need for economic analysis. It would not be possible for the ECJ to reach an outcome where the compatibility of a measure with EC law depends on its actual economic effects on free movement. Thus, in *Grilli*,<sup>58</sup> which concerned the compatibility of German legislation on the exportation of motor vehicles with the prohibition of quantitative restrictions on exports and measures having equivalent effect, the ECJ held that it was for the national court to assess whether the German rules restricted export patterns, created a difference in treatment between a state's domestic trade and its external trade, and gave rise to an advantage for national trade at the expense of that of another member state. However, the prior question whether the determination of the compatibility of a state measure with free movement indeed requires such an economic analysis is one the answer to which depends on the interpretation of the rules on free movement and thus *par excellence* one for the ECJ to decide. This is an area which is not characterized by consistency. In the early post-*Keck* years, the Court was minded to exempt selling arrangements from the bounds of Article 28 (now Article 34 TFEU) relying on their *prima facie* non-discriminatory character rather than engage in an economic analysis of the concept of discrimination in fact. A more nuanced approach has been favored in subsequent years.<sup>59</sup> In general, the ECJ is not particularly adept in using economic analysis nor insistent in requiring it. In assessing whether a national measure complies with the fundamental freedoms or whether harmonization at the EU level is necessary to remove obstacles to trade or whether a piece of national legislation makes for a legitimate derogation from equal treatment, its analysis tends to be based on principle rather than detailed economic analysis.<sup>60</sup>

The assessment of a national measure may also depend on concepts or perceptions that are closely linked to the national polity and which can better be assessed by the

<sup>57</sup> Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions and the Motor Insurers' Bureau* [2003] ECR I-14447.

<sup>58</sup> Case C-12/02 *Grilli* [2003] ECR I-11585. For another example in this category, see *Familiapress*, *supra* note 21.

<sup>59</sup> Compare, e.g., Joined Cases C-69 and 258/93 *Punto Casa* [1994] ECR I-2355 and Joined Cases C-401 and 402/92 *Tankstation T Heukske and Boermans* [1994] ECR I-2199, with cases such as Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033, Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151 and, more recently, Case C-142/05 *Aklagaren v Mickelsson and Roos* [2009] ECR I-4273; and on advertising compare Case C-412/93 *Leclerc- Siplec* [1995] ECR I-179 and Joined Cases C-34 to C-36/95 *KO v De Agostini and TV Shop* [1997] ECR I-3843 with Case C-405/98 *KO v Gourmet International Products AB (GIP)* [2001] ECR I-1795 and Case C-322/01 *Deutscher Apothekerverband eV v DocMorris and Watervel* [2003] ECR I-14887.

<sup>60</sup> See, e.g., Mangold, *supra* note 43, *Palacios de la Villa*, *supra* note 49 and, in the field of harmonization legislation, see the line of cases: Case C-376/98 *Germany v Parliament and Council (Tobacco I)* [2000] ECR I-8419; Case C-380/03 *Germany v Parliament and Council (Tobacco II)* [2006] ECR I-11573; Case C-301/06 *Ireland v Council* [2009] ECR I-593.



national courts. This is the case, for example, with the concept of average consumer for the purposes of determining whether there is a likelihood of confusion in the context of trademark protection.<sup>61</sup> Specificity may be demand-led: the referring court may phrase its question in such specific terms that the ECJ will be pushed to providing an interpretation of EU law closely linked to the facts. Although in some cases this may be inevitable, the wisdom of this approach may, in general, be disputed.<sup>62</sup> A related factor which may influence the specificity of rulings is that the judgment may be the result of a continuing conversation between the ECJ and the national courts. Where the national courts make successive references on the same or issue, the ECJ may become more specific in its rulings, elaborating on the meaning of previous judgments.<sup>63</sup>

A further consideration may be whether the legal issue in question relates to points of public or private law. One might assume that the ECJ would be more willing to be prescriptive and thus more specific on matters of public law rather than on matters pertaining to the national systems of private law. Although, in general terms, this appears to be a desirable judicial policy, there are counterbalancing factors. An increasing number of Community measures, such as the Unfair Terms Directive,<sup>64</sup> regulate private relations. The Court will inevitably shape the interpretation of such measures.<sup>65</sup> Furthermore, the dialectical development of the law and the continuing character of the inter-judicial dialogue is itself a force towards specificity. Thus, in recent years the ECJ has made inroads, for example, in relation to remedies against private parties for breach of Community law.<sup>66</sup> It is true that the Court's rulings in this

<sup>61</sup> See, e.g., Case C-48/05 *Adam Opel AG v Autec AG* [2007] ECR I-1017, para. 25.

<sup>62</sup> See below.

<sup>63</sup> A prime example here is provided by Case C-348/04 *Boehringer Ingelheim KG v Swingward Ltd* [2007] ECR I-3391. See also the cases concerning the defence of "passing on": Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595; Joined cases C-192 to C-218/95 *Comateb and Others v Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165; cf. Case C-147/01 *Weber's Wine World and others* [2003] ECR I-11365.

<sup>64</sup> Directive 93/13, OJ 1993 L 95/29.

<sup>65</sup> In relation to the Unfair Terms Directive, the ECJ has defined the meaning of unfair terms but has held that it cannot rule on the application of general criteria to a particular term: see e.g. C-237/02 *Freburger Kommunalbauten* [2004] ECR I-3403, para. 19, paras. 20-22; Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* [2009] ECR I-4713, para. 22. It has however been assertive in specifying the duties of the national courts in applying the directive and drawing the legal consequences of including an unfair term in a contract: see e.g. Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Case C-473/00 *Cofidis* [2002] ECR I-10875; Joined cases C-240 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941. In other areas, see by way of example, Case C-489/07 *Messner v Firma Stefan Krüger* [2009] ECR I-7315, where the ECJ provided guidance on the interpretation of Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ 1997 L 144/19) but left ample flexibility to the national court.

<sup>66</sup> Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-06297 (the Court held that Article 81 EC (now 101 TFEU) precludes a rule of national law under which a party to an anti-competitive contract is barred from claiming damages on the sole ground that the claimant is a party to it. The judgment set aside a traditional common law rule under which the party to an unlawful contract cannot claim damages under it but left to the national court the articulation of the consequences of the ruling); see also C-253/00 *Munoz Cia SA and Superior Fruitcola v Fumar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR I-7289; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

area are more general and less intrusive than when it comes to the articulation of remedies against public authorities, but it may be a matter of time. As the Court receives more references, it may need to articulate more concrete standards.

The ECJ may provide the referring court with a ready-made solution where it wishes to provide leadership. In this respect, outcome cases illustrate the directed use of judicial power. Thus, outcome may be associated with a departure from precedent as in *Keck*<sup>67</sup> or the introduction of a new principle as in *Köbler*.<sup>68</sup> An area of the law where the outcome approach has featured prominently is the protection of fundamental rights. In the last decade, the ECJ has both widened and deepened its fundamental rights jurisdiction, and also become more prescriptive as to the standards of review. This heightened attention to fundamental rights has been accompanied by a more extensive use of outcomes. This contrasts with earlier stages in the development of the law. In *ERT*<sup>69</sup> the Court declared for the first time that, where a member state seeks to take advantage of a derogation provided for in the Treaty, it acts within the scope of Community law and must therefore observe fundamental rights. In the context of the case, the reference to fundamental rights protection was unaccompanied by any guidance to the referring court making their invocation seem almost casual. But this deferential approach has since given way to a much more prescriptive one and in an increasing number of cases, such as *Schmidberger*, *Carpenter*, and *Omega Spielhallen* the Court provided outcomes leaving effectively no margin of discretion to the referring court.<sup>70</sup>

Two points however should be made in this context. First, reaching an outcome does not necessarily mean taking a more *communautaire* approach: the ECJ may uphold national standards acting itself as an agent of the national constitutional polity. This occurred, for example, in *Omega*<sup>71</sup> where the ECJ accepted that the right to human dignity as protected by the German Basic Law could trump the free movement of services. Secondly, an outcome may serve to delimit a new principle that intrudes on national sovereignty. In *Köbler*<sup>72</sup> the ECJ extended state liability to breaches of Community law arising from the national judiciary but came to the conclusion that, in the circumstances of the case, the judgment of the Austrian Supreme Administrative Court did not amount to a manifest breach. This served to provide a benchmark that state liability for judicial decisions will only engage in exceptional circumstances and somewhat sweeten the pill. *Köbler* is an example of a case where the ECJ used

<sup>67</sup> Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

<sup>68</sup> Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

<sup>69</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>70</sup> See Case C-112/00 *Schmidberger*, *Internationale Transporte und Planzüge* [2003] ECR I-5659; Case C-60/00 *Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See further Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH* [2004] ECR I-3025 and Joined Cases C-20 and C-64/00 *Booker Aquaculture Ltd & Hydro Seafood GSP Ltd v Scottish Minister* [2003] ECR I-7411 where the ECJ also provided outcomes in relation to the application of fundamental rights.

<sup>71</sup> *Id.*

<sup>72</sup> *Supra* note 68.

outcome to delineate the limits of a new principle, foreclose the possibility of its outlandish extension, and mitigate its effects.<sup>73</sup> By extending state liability for acts of the judiciary but finding that there was no manifest breach on the facts, the ECJ masterfully and in a way somewhat reminiscent of the US Supreme Court in *Marbury v Madison*<sup>74</sup> “assumed and rejected power in a single breath.”<sup>75</sup> *Köbler* also illustrates another use of the outcome approach, i.e., that of serving as a litigation valve. The specificity of the ruling may signal finality and seek to discourage further litigation as was also the case in *Keck* and *Omega*.

This is not to say that in every case where the ECJ introduces a new principle or makes a quantum leap, it provides an outcome. In some cases, as in *ERT*,<sup>76</sup> it is deference rather than outcome that provides the favoured method of extending the law and initiating dialogue with the national courts. The specificity of the ruling is thus politically neutral. The sensitivity of the issue discussed or the “political” character of the judgment does not bear a direct correlation to the specificity of the ruling. In fact, the ECJ may take advantage of the incomplete character of its jurisdiction to assert principles of Community law and deliberately encourage a permeating effect, such as, for example, opening the way for national courts to absorb those principles. This is best illustrated by reference to a number of cases articulating the effects of directives on national law. While the ECJ has been keen to reiterate that directives do not possess horizontal effect, in a number of cases it has restricted itself to providing rulings on the interpretation of directives in circumstances where they appear to be determinative of disputes between individuals, leaving to the national courts the task of articulating their effects on the national proceedings.<sup>77</sup>

For the same reasons, the specificity of the ruling is not necessarily correlated to the standard of scrutiny employed by the ECJ. Strict scrutiny over national legislation may lead to an outcome as in *Mangold* or *Schmidberger*, but it can also lead to guidance as in *Petersen* or *Mickelsson*. Similarly, a lower standard of scrutiny may lead to outcome, as in *Omega* or *Palacios de la Villa* or in guidance or even deference as in the cases pertaining to the circumstances when a national measure may be found to be anticompetitive.

Generality of the ruling may suggest disagreement in the deliberation room. Although, in view of the secrecy of deliberations, there is no way of conclusively proving or disproving this assertion, it is clear that a court will not reach an outcome unless

<sup>73</sup> For a subsequent case where the ECJ provided guidance on liability for judicial acts, see Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177.

<sup>74</sup> 5 U.S. 137.

<sup>75</sup> This is a paraphrase from ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 42 (1960).

<sup>76</sup> *Supra* note 40.

<sup>77</sup> See, e.g., the following line of cases: C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325; Case C-129/94 *Bernáldez* [1996] ECR I-1829; Case C-441/93 *Pafitis* [1996] ECR I-1347; Case C-373/97 *Diamantis* [2000] ECR I-1705; Case C-194/94 *CIA Security International v Signalson SA* [1996] ECR I-2201; Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535; Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031; Case C-397/01 *Pfeiffer and others* [2004] ECR I-8835; Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

there is consensus among the participating judges. It is also reasonable to suggest that consensus is easier to reach on the general interpretation of a Community provision than on the precise implications of such interpretation on particular circumstances. This claim, however, should be approached with caution. In some cases, the members of the Court may agree on the result but not on the reasoning on the basis of which the result should be reached. In such a case, consensus lies in specificity. Still, it is suggested here that disagreement among the judges is more likely to be a force of generality: the more difficult the members of the Court find it to master consensus, the greater the level of abstraction in the reasoning.

In some cases, where the Court breaks new ground, reverses precedent or rules on an important provision which is general in scope, its guidelines acquire almost a quasi-legislative character. This was the case, for example, in *Rewe* and *Comet*,<sup>78</sup> where the ECJ articulated the principles of equivalence and effectiveness for the protection of Community rights in national courts; in *Keck*,<sup>79</sup> where it redefined the scope of application of Article 28 (now Article 34 TFEU); and in *Altmark*,<sup>80</sup> where it provided guidelines on whether state subsidies granted to an undertaking responsible for discharging public service obligations are caught by the rules on state aid. In such cases, the judgment acquires a heightened precedential value and much of the subsequent case law turns on applying and refining the judicial guidelines in a process no different from the building of the common law by Anglo-Saxon courts.

## 5. Is there an optimum approach?

The outcome approach presents some clear advantages. The ECJ ruling concludes the Community law-related aspects of the dispute and avoids further delays and costs. It leaves the litigants and the referring court with a feeling of fulfillment proving that the reference was worth making. But it is not without disadvantages. Used inappropriately, it may bring the ECJ close to applying the law on the facts thus exceeding its function under the preliminary reference procedure. National courts may resent what they perceive as the usurpation of their own jurisdiction although it appears that, in practice, this is rarely a problem.<sup>81</sup> More importantly, over-zealous specificity may lead the court to be preoccupied with the facts of the case, encourage over-centralisation, and detract from the Court's fundamental function which is to promote uniform interpretation of the law and oversee the Community's judicial universe. Although it may be favoured by the parties to the dispute, excessive recourse to the outcome approach might in fact reduce rather than help legal certainty. The more specific the ruling, the more difficult it becomes to derive the elements of principle in the judgment and the less the precedential value of its rulings. Outcomes may encourage more litigation

<sup>78</sup> Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 45/76 *Comet v Productschap voor Siergewassen* [1976] ECR 2043.

<sup>79</sup> *Supra* note 15.

<sup>80</sup> Case C-280/00 *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

<sup>81</sup> See *Arsenal v Reed*, *supra* note 19.

and increase competition rather than cooperation between the ECJ and the national judiciary.

The guidance approach, on the other hand, has its own mix of merits and drawbacks. The referring court, and the litigants, may be left with a feeling of incompleteness.<sup>82</sup> The more general and vague the ruling, the higher the risk that national courts will hesitate to make references patriating instead concepts of Community law and thus prejudicing its uniform interpretation. Such drawbacks are extenuated in the case of deference. On the positive side, guidance offers the national courts a stake not only in the application of Community law, which in many cases they will be best equipped to do, but also in the shaping of the Community legal order. In constitutional terms, guidance is a means of inviting the national courts to partake in the construction of the EU edifice and giving them a stake in the articulation of the rule of law. The national judiciaries have the opportunity to mould EU principles to the particularities and sensitivities of their legal system. The guidance approach seems, perhaps, more in keeping with the doctrine *acte clair*. If the ECJ is prepared to allow national courts to use their initiative in filtering out points of interpretation which are so clear as not to merit separate judicial determination, a *fortiori*, in areas where specificity is not warranted, the Court should concentrate on laying down principles, entrusting outcomes to the national jurisdictions. It should be noted, in this context, that a reference is not a dialogue between the ECJ and the referring court but a conversation with all national polities. A case referred from a court of one Member State may have equally, or even more, profound repercussions in other States. Guidance accommodates experimentation at national level and seems more in keeping with the model of cooperative federalism.

As stated above, a disadvantage of the guideline approach is that it may leave national courts in some uncertainty as to how to apply the Court's principles in subsequent cases. It may thus generate further litigation and references. This is however inevitable and by no means a peculiarity of judgments delivered in preliminary references. Much of the case law of national courts has to do with the elaboration of previous judicial pronouncements and distinction of precedent. There is some inherent uncertainty in the interpretation of the law and this is not a good reason to advocate more specific rulings on the part of the ECJ. The use of guidelines and the establishment of principles in preliminary references is an invitation to national courts to use their initiative. The point was poignantly made by Jacobs AG in *Loendersloot*, a case concerning the conditions under which the owner of a trademark could rely on its rights to prevent a parallel importer who had repackaged products bearing the trade mark from marketing them. The Advocate General opined that, in the circumstances of the case, the ECJ would be going beyond its functions under Article 234 EC if it were to rule on all aspects of repackaging and relabelling which might be undertaken by parallel importers in relation to different types of product. Once the Court has spelled out the essential principles, it must be left to the national courts to apply those principles

<sup>82</sup> For a case where the guidelines provided by the ECJ gave rise to uncertainty and needed to be interpreted by the UK Supreme Court, see *OB v Aventis Pasteur* [2010] UKSC 23.

in the cases before them.<sup>83</sup> The same point was made even more forcefully by Sharpston AG also in relation to the conditions governing lawful repackaging.<sup>84</sup>

## 6. Conclusion

The level of specificity of the ruling depends on a number of factors connected both with the reference in question and, more broadly, with the way that the Court perceives its function. While it is not possible to determine *a priori* an ideal level of specificity, guidance rather than outcome appears the desired default position. Drawing the balance between guidance and outcome is not an easy task. To paraphrase a judicial quote from a different context, the ECJ has no more power to usurp jurisdiction which is not given than to decline the jurisdiction which is granted.<sup>85</sup> The fundamental function of the preliminary reference procedure is to achieve the uniform interpretation of EU law and, at a more abstract level, ensure that the law is observed. The ECJ is entrusted by the founding treaties to be the agenda setter of EU law interpretation. It is not its task to adjudicate on the facts of each particular case nor to resolve every conceivable conflict between national law and EU law. In some areas, the tendency to request specific rulings appears self-proliferating and, ultimately, inappropriate for Europe's highest jurisdiction. In some, albeit exceptional, cases, requests to the ECJ for elaboration of previous rulings and more specific guidance may indicate over-use of the preliminary reference procedure.<sup>86</sup> Still, the development of the law is trial and error. National courts should not make references uncritically but the threshold between exercising initiative and taking unwarranted liberties is not an easy one to establish. It is legitimate and, in fact, necessary for national courts to ask the ECJ to explain or elaborate its previous judgments.

<sup>83</sup> Case C-349/95 *Loendersloot* [1997] ECR I-6227, at 6239.

<sup>84</sup> See Case C-348/04 *Boehringer Ingelheim KG v Swingward Ltd (Boehringer II)* [2007] ECR I-3391, Opinion of Sharpston AG, para 3. In that case, the Court of Appeal made a reference seeking detailed guidance on the application of the conditions for lawful repackaging laid down in Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb* [1996] ECR I-3457, having made a number of findings which differed from those of the High Court in the same litigation. The High Court had already received guidance by the ECJ in Case C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759 (*Boehringer I*). In her Opinion, at para 3, Sharpston AG stated as follows: "It seems to me that after 30 years of case-law on the repackaging of pharmaceutical products it should be possible to distil sufficient principles to enable national courts to apply the law to the constantly replayed litigation between manufacturers and parallel importers. I will attempt to articulate such principles in this Opinion. I would then hope that national courts will play their part robustly in applying the principles to the facts before them without further requests to fine-tune the principles. Every judge knows that ingenious lawyers can always find a reason why a given proposition does or does not apply to their client's situation. It should not however in my view be for the Court of Justice to adjudicate on such detail for evermore."

<sup>85</sup> *Cohens v Virginia* 19 U.S. (6 Wheat.) 264, 404 (1821).

<sup>86</sup> Case C-348/04 *Boehringer Ingelheim KG v Swingward Ltd (Boehringer II)* [2007] ECR I-3391.