

## Judicial Coherence in the European Union

This issue of REALaw provides a selection of papers presented at the Third REALaw Research Forum, which was held under the auspices of Utrecht University's Montaigne Centre for judicial administration and conflict resolution on January 30, 2015. The overarching theme of the one-day colloquium was judicial coherence in the European Union, with a special focus on the particular role of courts in relation to coherence of law in the EU.

Ever since the establishment of the EU's judicial system, coherence in the administration of justice within the EU has been an intriguing topic for debate amongst legal scholars and practitioners. In times in which Europe is confronted with various large-scale financial and humanitarian crises – which are evidently pressing on the solidarity between Member States, the functioning of the EU's institutions and the achievements of the European integration as such – judicial coherence proves to be not only an academic or professional question of law, but has deep, practical relevance as well. Anyone living or residing in the EU may refer to the fundamental right to effective judicial protection if the occasion arises. The rule of law embodies the backbone of European civilisation. Throughout the development of EU (administrative) law in recent decades, courts have been major players in shaping the EU legal order in law and practice. All the main doctrines related to the domestic requirements of EU law have been primarily directed towards courts: direct effect, primacy, consistent interpretation and state liability have all been developed through the interaction between national courts and the Court of Justice in the context of the preliminary reference procedure. According to solid case law of the Court of Justice, the Treaties provide a complete system of legal remedies and procedures designed to ensure judicial review and respect for the fundamental right to effective judicial protection. The Court of Justice plays an essential role in safeguarding and ensuring the uniform interpretation and effective application of EU law throughout the Union, and thereby ultimately the quality of law and the EU legal order, as is demonstrated by important judgments, such as – recently – Case C-362/14 (*Schrems*), ECLI:EU:C:2015:650, in which the Court finds that the United States is not a safe harbour in privacy matters.

Meanwhile, as a logical consequence of the way in which the system has been constructed, in the overwhelming majority of cases in everyday EU legal practice, national courts and tribunals fulfil the duty of ensuring that the law is observed in the interpretation and application of EU law. This reality explains why the idea of shared judicial authority between the Court of Justice and national courts is gaining more and more ground. However, it raises various 'classic' but nevertheless perennial questions related to maintaining coherence in EU law on a substantive and procedural level: what is the division of tasks between the CJEU and national courts in law and practice? How do national courts cope with the Europeanisation of public law, inconsistencies in legal sources and their 'dual identity' as national and European judges? What happens before and after preliminary rulings? What authority does national case law

interpreting European law hold? To what extent should judicial coherence and unity be strived for? All questions that REALaw aims to study and address as an academic journal. At the same time, these are questions which are very relevant in current EU case law developments as well.

On Wednesday 9 September 2015 the Second Chamber of the Court of Justice delivered judgments in the Case C-160/14 (*Ferreira da Silva*), ECLI:EU:C:2015:565 and Joined Cases C-72/14 and C-197/14 (*X v. Inspecteur van Rijksbelastingdienst* and *T.A. van Dijk v. Staatssecretaris van Financiën*), ECLI:C:2015:564. One of the issues in both preliminary rulings concerned the responsibility of supreme national courts in the context of the preliminary reference procedure, especially in the situation in which other (lower) national courts have given conflicting decisions concerning the interpretation and application of EU law. In its judgments, which in our opinion must be read in close connection with each other, the Court stresses that determining whether an *acte clair* exists, as an exception to the obligation to refer a matter to the Court of Justice for a preliminary ruling, is as a matter of principle the sole responsibility of the national highest court. In *Ferreira da Silva* the Court gives the following guidance:

‘41 In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU.

42 A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt.

43 However, so far as the area under consideration in the present case is concerned and as is clear from paragraphs 24 to 27 of this judgment, the question as to how the concept of a ‘transfer of a business’ should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union.

44 It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of a ‘transfer of a business’ within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law.’

Interestingly enough, the Court of Justice *de facto* acknowledges the body of case law on EU law by national courts, not only within the Member State of the national court itself but also the case law on EU law by national courts in other Member States. Paradoxically, the Court of Justice leaves the responsibility to decide on the question of whether the correct application of EU law is obvious and without any reasonable doubt to the national highest court. Meanwhile, in *Ferreira da Silva* the Court comes to the conclusion that there was no *acte clair* and the Portuguese Supremo Tribunal de Justiça should have used the preliminary reference procedure. However, in the *X and Van Dijk* judgment – delivered on the same day and with the same reporting judge – the Court of Justice seems to leave more discretion to national courts of final instance. In that case the referring court explicitly asked whether a highest national court is required to make a reference to the Court in the situation when a lower national court, in a case similar to the one before it concerning exactly the same legal issue, had made a reference to the Court or whether the highest national court is required in such situation to wait until the Court has given its preliminary ruling. The Court takes a similar approach, but ends up with a different conclusion: a national court is not required to make a reference to the Court of Justice on the sole ground that a lower national court, in a case similar to the one before it and involving the same legal issue, has referred a question to the Court for a preliminary ruling; nor is it required to wait until an answer to that question has been given. The Court explains:

‘54 It should be remembered, in particular, that the obligation on national courts and tribunals against whose decision there is no judicial remedy to refer a matter to the Court of Justice under the third paragraph of Article 267 TFEU is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court.

60 Thus, although in a situation such as that at issue in the main proceedings a supreme court of a Member State must bear in mind in its assessment that a case is pending in which a lower court has referred a question to the Court of Justice for a preliminary ruling, that fact alone does not preclude the supreme court of a Member State from concluding, from its examination of the case and in keeping with the criteria laid down in the judgment in *Cilfit and Others* (283/81, EU:C:1982:335), that the case before it involves an ‘*acte clair*’.

61 Lastly, since the fact that a lower court has made a reference to the Court for a preliminary ruling on the same legal issue as that raised before the national court ruling at final instance does not in and of itself preclude the criteria laid down in the judgment in *Cilfit and Others* (283/81, EU:C:1982:335) from being met, with the result that the latter court might decide to refrain from making a reference to the Court and resolve the question raised before it on its own,

nor is the supreme national court required to wait until the Court of Justice has given an answer to the question referred for a preliminary ruling by the lower court.'

These judgments clearly illustrate that judicial coherence in the EU concerns a shared responsibility of the Court of Justice and the courts in the Member States. Between the lines, anticipation of the growing horizontal interaction between national courts of the EU Member States can be observed.

This issue of *REALaw* starts with the stimulating keynote lecture given at the research forum by *Morten Broberg*. Broberg elaborates and explores the preliminary reference procedure as a (potential) private party remedy and proposes amendments to the procedure before the Court to enhance this function. The preliminary reference procedure is also the central topic of the contributions of *Ramona Grimbergen*, who discusses and criticizes the incoherent approach by the Court of its jurisdiction (competence) and of the admissibility of preliminary questions, and of *Ricardo García Antón*, who states that the Court, when deciding on preliminary references in direct taxation matters, has developed into a constitutional court. *Clelia Lacchi* explores the implications of the interference by the European Court of Human Rights (ECtHR) with the preliminary reference procedure in for instance *Dhahbi versus Italy*. In her view this interference, although not entirely consistent with the Court's approach, enhances the judicial protection of individuals.

Another group of contributions is concerned with the coherence and dialogue between the Court of Justice and the ECtHR. *Malu Beijer* focusses on the development by the Court of a positive obligations doctrine and suggests that the Court may draw further inspiration from the case law of the ECtHR. *Dominic Dusterhaus* discusses the tension between the principle of mutual trust and effective judicial protection in the area of Freedom, Security and Justice (AFSJ). According to him, to prevent interference by the ECtHR, redress of this tension should primarily be sought from the Court of Justice. *Hemme Battjes* and *Evelien Brouwer* focus on the same tension in area of EU asylum law and on the interaction between the Court, the ECtHR and the national courts in this area. They consider the emphasis by the Court on the principle mutual trust a dangerous development for the protection of fundamental rights.

Other articles concentrate on questions of judicial coherence at the national level when applying EU concepts. In this regard, *Sim Haket* discusses the application of the EU obligation of consistent interpretation in the United Kingdom and the Netherlands, and concludes that the approach in both Member States is remarkably coherent. *Franziska Grashof* explores the procedural judicial coherence in environmental matters (*locus standi*, time limits, costs) in England, Germany and the Netherlands, under the influence of EU law and the Aarhus Convention. She witnesses an approximation of litigations rules between these Member States, also caused by national reforms which are independent from

EU law. *Filipe Brito Bastos* examines, through the lens of coherence, the Borelli doctrine for administrative justice in bottom-up composite procedures. According to the author, the doctrine is as such a coherent solution. Its insufficiencies are caused by the EU system of judicial protection itself.

Finally, several contributions discuss matters of judicial coherence in the area of European economic law. In her article *Alke Metselaar* explores the use by Dutch courts of the possibility to seek advice from the Commission in state aid cases. It appears that this instrument is not often used in practice and – in her opinion – for good reasons. *Carlo Maria Colombo* analyses the role national courts are supposed to play under the Lufthansa ruling, to enforce provisional decisions of the Commission in state aid matters. The contribution of *Marcin Jakub Weisbrot* shows that the Europeanisation of the national application of the principle of legitimate expectations in state aid and agricultural matters in recent case law of the Court has resulted in a more consistent EU wide application of the principle, but at the same to less legal certainty. Finally, *Federica Baldan* and *Esther van Zimmeren* explore the different concepts of judicial coherence in the very complex area of patent law. In this area the new Unified Patent Court has to interact with the Court of Justice and the national courts.

All in all, the variety, richness and refreshing approaches to questions relating to judicial coherence in this *REALaw* issue prove that judicial coherence in the EU deserves to be further explored and discovered and is of great societal relevance as well.

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