

I. Introduction

This introduction strives to give its target-group – the judges and prosecutors of Kosovo – an understandable and readable insight into the effects, mechanisms, difficulties, solutions and possibilities of European Law. The ambition of the authors is therefore much more to give the practitioner of national law a clear, maybe colourful picture as to how to solve problems and cases in European Law and thus to enable him or her to go on with this work in the future, than to give a detailed solution to every problem or to give a scientific account of the depths of this matter.

II. Basics of European Law

A. What is European Law?

The content of the term “European Law” in a broader or narrower sense and the categories “Union Law” and “Community Law” are controversial, yet in practice comparatively easy to outline.

In the first place European Law comprises nowadays the main treaties called “Treaty on European Union (TEU)” and the “Treaty establishing the European Community”, with the latter to be known in future as the ‘Treaty on the Functioning of the European Union’ (TFEU). Both treaties are equal in their legal rank, are in force beside each other and supplement one another, which is why they are going to be dealt with together.

The European Convention on Human Rights is part of the European (Union) Law by now as well, which is expressly regulated Art. 6 III of the treaty on European Union: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” Via Art. 22 of the constitution of Kosovo, the European Convention is part of the Kosovo law as well.

1. Primary Law (has priority)

- a. Treaties of the European Union establishing the Communities and the European Union in their up-to-date version.**
- b. General Principles, particularly rule of law guarantees and basic rights.**
- c. Community customary law.**
- d. The case-law of the court of the European Union.**

Ad a: These treaties are the core of European Law. They are often called the constitution of the community. It is important that the Court of the European Union does not have the competence to rule over their validity, they can only interpret their regulations. The masters over the treaties are solely the member states.

Ad b: The general legal principles are especially proportionality, protection of confidence, rule of law, prohibition of arbitrariness, the right to legal hearing, the principle ne bis in idem and the principles of effective legal protection as well as to a fair trial. These are basic principles with immediate validity in European Law. As concerns the protection of basic rights, it is to be noted that the treaties did not contain a written catalogue of such rights. This is why the European Court of Justice (by now since the Lisbon Treaty: the Court of the European Union) recurs to the European Convention on Human Rights, which has by now become part of the *acquis communautaire*. Through this the Charter of Fundamental Rights has become binding law (compare Art. 6 I TEU) – yet for Poland, the Czech Republic and the United Kingdom the Charter is not valid.

Ad c: The community customary law does not play an important role and does not need to be elaborated here.

Ad d: The case-law of the Court of the European Union is a very essential and important source of European law. Here it has to be observed that this court is the only authentic source of interpretation of European law, which is the reason why national courts are allowed or in certain cases even obliged to refer their questions and difficulties with European Law to the court in Luxembourg. The jurisdiction of the Court of the European Union has to be observed by the national courts and is an indispensable source for interpretation of the treaties, regulations and directives.

2. Secondary law: Art. 288 TEU

- a. Regulations**
- b. Directives**
- c. Decisions**
- d. Recommendations/Statements**

Ad a: Regulations are the equivalent to laws in national legislation. With their entering into force they have to be observed by everyone. Regulations as a whole are binding and have immediate effect in every member state (unless expressly ruled otherwise).

Ad b: The effect of directives is more complicated, which is why we dedicate it a separate chapter in this introduction. It can be stated here already that the essence of a directive is a common aim agreed upon by the member states through their representatives in the European Council which has to be transformed into legal reality within a given deadline, usually 2 or 3 years. How the member states put the directives into the legal framework of their system is left to them – the usual way is by passing a law with such subject.

Ad c: These are decisions in particular cases. They are binding upon those to whom they are directed.

Ad d: Recommendations and statements are not of binding character. Nonetheless the national courts are obliged to take them into account in their jurisdiction – as ruled by the Court of the European Union.

3. The European Convention on Human Rights will be dealt with in a separate chapter.

B. Important basic principles of European Law in the practice of the national courts

In the following we will enlarge upon some basic principles confining to those areas and rules which are relevant for the practice of a national court.

1. The supremacy of European Law over national law

a. In General

The supremacy of European law over national law is a classical example of creation of law by the Court of the European Union, hence this principle is not written down, neither in primary nor in secondary law. The famous decision *Costa ./. ENEL* (judgement 6/64, of 15.06.1964) was the first judgement in this direction, but we would like to illustrate this principle with a more modern case, the judgement “*Tanja Kreil*”, C-285/98, 11.01.2000. The facts of this case are as follows: A young German lady, 23 years of age applied for a job as electronic technician with the German army in the year 1996, after she had read an advertisement in a local newspaper. As the lady said later on after the verdict in an interview she did not primarily want to become a soldier, but much more wished to get a good vocational training, which this unit of the army was famous to offer. Ms. Kreil hoped for better chances on the free job market after going through such training. The responsible army office declined her application referring to a regulation in the German “law on soldiers” and the German constitution which both governed that women are not allowed to serve with weapons in the Germany army. Women were allowed to serve in medical units and units playing military music, but they were excluded from all such entities that were obliged to carry weapons. Unfortunately these units were not attractive for Ms. Kreil, which is why she asked her lawyer to sue the army for discriminating against her on the mere grounds of her sex. Tanja Kreil’s attorney was of the opinion that these rules were in conflict with those of the directive 76/207, dating from 09.02.1976, which governed the equal treatment of women and men concerning the equal access to professions. Because the army office could not be convinced, Tanja Kreil turned to the court in charge of such claims, which found themselves unable to solve this legal question of a provision of the German constitution being in conflict with a European directive and turned to the European Court of Justice in Luxemburg (now Court of the European Union) with a preliminary ruling. The court in Luxemburg had to deal with several legal problems in this case, but the least of them was the conflict between the directive and the German constitution: The European Court of Justice governed that it is irrelevant, which rank a national law has in the hierarchy within the national legal system. If it collides with binding

European law – the treaties, directives and regulations – then European law has supremacy, is stronger and overrules national law.

Not long after this judgement the German constitution was changed and today women serve in the German army all over the world, of course using the same weapons as their male comrades-in-arms.

b. Effect of the collision with national law

The supremacy of European law over national law does not mean that the national law becomes invalid. It just cannot be applied in cases where it collides with European law. But for this first European law has to be applicable. This is not always the case, on the contrary: most cases before national courts deal with merely national circumstances, own nationals, national law, where Germans argue with Germans in Germany over German law, Hungarians with Hungarians in Hungary over Hungarian law and so forth. But as soon as there is a European reference point – e.g. goods, persons, services crossing a border between member states, an implemented directive is the basis of the national rules or a regulation has to be applied – European law has to be applied. A very well-known case may illustrate what this rule of primacy in application means in practice: The case stems from Germany again, from 1984, referred to the European Court of Justice in this year – reference number: 178/84, judgement from 12.03.1987 – and deals with the German purity law for beer. This rule was created in 1516 and is the oldest rule on food in the world. It says that beer may not contain other substances than water, hop, barley and yeast and is manifested in the German beer tax law. Beverages containing other substances than the named – like lemonade or chemical preservatives – were not admitted to the German market under the brand “beer”. Because of this German provision, drinks from other countries like Belgium or France were not admitted to Germany as long as they were called “beer”. The European Commission stated that according to them this is a breach of European law, the freedom of goods, because beer obviously falls under the category “goods”, it therefore should be allowed to circulate within the member states, unless there was profound reason to confine this freedom. The government of the Federal Republic of Germany argued before the court that beer is a kind of essential aliment in their country; it needs specific protection, because a lack of purity could endanger the health of the consumers. The European Court of Justice accepted the argumentation that the health of the consumers might justify a confinement of the freedom of goods; nonetheless in this case the court stated a breach of European law, because – according to the court – it is not eligible why the health of consumers in Germany should be in danger from drinking beer mixed with lemonade, whereas Belgium or French beer-drinkers are still alive and not damaged in their health from drinking such beer. Therefore the Court of Justice stated an infringement upon European law by the German regulation of the beer tax law.

The effect of this judgement is what interests us most here: As stated above, European law has a primacy in the applicability of a national rule. It does not make the German law invalid. Therefore the beer tax law could not be applied when there was a European reference point – e.g. Belgium beer crossing the border to Germany -, but it was and has stayed in force, when there was no European reference: German beer had and still has to be brewed in accordance with the German beer tax law.

This case shows another aspect of European law one has to be aware of: the diverted discrimination, meaning discrimination through a state against its own nationals. European law can lead to the result that nationals are in a worse position than European foreigners, because the latter are protected by European law, the nationals are not. The Court of Justice in Luxemburg has governed that this is not a problem of European, but of national law. Austria`s constitutional court has by now ruled that also the diverted discrimination is a breach of the national principle of non-discrimination. Other courts may follow.

2. Examination of European law by national courts ex officio

The question whether European law has to be applied by national court in their own motion without the parties referring to it has not been answered yet. Depending on the national particularities in the civil procedural law, this question may not even arise: In Germany the general attitude and the legal situation say that the parties only have to give the facts, on this basis the court will examine the law and will give the solution on the basis of the regulations of the law, in accordance with the old Roman law principles: *da mihi factum, dabo tibi ius* (you give me the facts, I give you the law) or *“ius novit curia”* (the court knows the law). In other countries like Hungary the parties, particularly when represented by lawyers, are expected to make exact reference to the law. Here the question does arise whether the court has to examine European law as well, even when the parties did not even mention it.

The European Court of Justice has not yet answered this question in such clarity, but seems to be of the opinion that out of the obligation to loyalty towards the European Union, the courts are to apply “of their own motion binding rules of law. it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law” - Judgement *van Schijndel* (C-430/93). Also the European Commission and the European Parliament have stated in several communications that according to them, European law has to be applied *ex officio*. This seems to be the right position considering that otherwise the validity of European law stands at the disposition of the parties, cannot be allowed, because this could and would lead to wantonness. For the practice this means that national courts have to check in their cases whether there is an influence of European law and if so, they are obliged to apply this European regulation in their law-finding process. Condition for this is that the national courts first realise that there is an impact of European law in the concrete case, which can be extremely tricky for the judge in charge. European law therefore means an enormous challenge for both courts and advocates.

3. All national institutions are bound by European law

An interesting question is who is bound, obliged to observe European law. Obviously those are bound to abide by the law who is its addressee. This is not surprising, the same is true in national law. European regulations generally bind everyone, because there are general rules with immediate effect, the same as laws created by parliament in national law. Directives have a very special effect, depending on whether they are implemented yet or not. This will be subject of a separate chapter. The effect of the treaties is there again quite clear as well. They bind all state-organs, no matter on what level and what the inner-state hierarchy and structure may be.

The following case may illustrate this, the judgement is from 24.11.1982, reference number: 249/81, Commission against Ireland. The case is known by the name “Buy Irish”.

The Irish government had founded an association, which was financed part by the government, part by the private sector. This association had the task to promote Irish products for which they started several campaigns with the slogan “Buy Irish”, meaning the appeal to the consumers to buy Irish goods – not foreign products. The Commission saw a breach of the rule of the freedom of goods in this campaign, arguing that with this campaign foreign producers were obstructed in selling their wares. The European Court of Justice followed this view and held the Republic of Ireland responsible for this breach. According to the court, it did not matter that the state was not the only factor, not the only promoter of this campaign. It found it sufficient that the government took part in it, gave money and had initiated this marketing strategy.

How far the binding of all state-organs can go became nowadays obvious in an Italian case, C-388/01, judgement from 16.01. 2003, Commission v. Italy, „Museums“. Here the European Commission turned to Luxemburg because of the regulation of entrance fees in Italian museums, for example the Doge’s palace in Venice or the Uffizi Gallery in Florence. In these museums the rule was that Italians older than 60 years were allowed in free of charge, whereas Non-Italians, no matter where they came from, were charged entrance. The European Court of Justice had here to deal with the question whether this was a discrimination on the grounds of nationality – which was obvious -, but also with the question whether this discrimination was justified. The Court in Luxemburg rejects such fiscal consideration saying otherwise any discrimination could be justified on financial reasons – unless the tax-payer gets an immediate, detectable advantage from the tax, when there is a “coherence of the tax system”. If there is not, the justification is not accepted. The European Court of Justice held the museums responsible for the infringement and discrimination arguing that their supporting institution is the self-government of the cities which are obviously endowed with state-power, which is why they have to be treated like the state.

Other examples of institutions equipped with state-power could be the local attorneys’ bar in charge of lawyers, a ministry, a library run by the self-government and so forth.

4. Third party effect of basic freedoms

a. General Principle

Generally speaking the basic freedoms in European law – free movement of goods; free movement of capital; free movement of services; free movement of persons - have only effect (as basic rights in most national constitutions) in the relation between the state and private persons.

b. Exceptions:

aa. The former Art. 119 (now Art.157) – same remuneration for women and men for the same work – was declared to be immediately applicable by the European Court of Justice. This was declared in the very simple case of a Belgium stewardess who was paid less by her employer than her male colleagues. In this case – called Defrenne II, reference number: 43/75, judgement from 08.04.1976 – it was controversial whether a private person could found its right on a provision of the treaty immediately. The Court in Luxemburg supported this view because of the

position and content of the provision within the treaty. Therefore private persons can refer to this rule immediately, even in exclusively private relations.

bb. Concerning the other provisions the general view had been for a very long time that these regulations do not have third party effect. This standpoint was shattered by two judgements by the European Court of Justice that dealt with the effect of European law in the field of sports.

The earlier of the two judgements - Walrave, reference number 36/74, from 12.12.1974 – hardly attracted attention, the other one – “Bosman” judgement from 15.12.1995, reference number: C-415/93 - wrote football history: Jean-Marc Bosman was playing for the Belgian first division club Liège. When his contract expired, he was offered a new one by the same club, but with essentially worse conditions giving him a salary of 800,- € per month. As Mr. Bosman was father of two children, he had to decline this offer, since with such income he found himself unable to keep up his family. He looked for a new club and found one in France with the French second division club FC Dunkerque. Bosman himself was Belgian citizen. His transfer failed, because the Belgian club missed to keep the deadline prescribed by the rules of the UEFA – the European Football Association -, moreover the French club was not inclined to pay the transfer fee – 300.000,- € - demanded for Bosman by the Belgian employer. Bosman had to stay in Liège and sued his club, the Belgian Football Association and the UEFA. The court in Liège turned to the European Court of Justice.

The first question the court had to deal with was whether European law is applicable in sports at all, because it was argued, sports is culture and culture belongs to the only competence of the member states. The European Court of Justice did not approve of this view and categorised Bosman as an ordinary employee who was playing football for his money, thus came to apply the freedom of workers as part of the right to free movement of persons in the sense of ex-Article 39, now Article 45. Another problem was that the rules Bosman protested against here were not made by the state, but by a private association. The European Court of Justice decided – similar to the case Walrave – that employees can similarly be affected by private regulations that can govern their lives to a large extent. For them it did not make a difference whether they are restricted in their rights by private entities or by the state, which is why they need to be protected in a similar way. This protection would be guaranteed by applying the regulations of the treaty to them, which the European Court of Justice did.

Due to this Bosman-jurisdiction the formula has spread that private entities are addressees of Community Law if they are endowed with similar power over individuals as states are in a certain respects which affects the individuals.

cc. Discriminations on the grounds of nationality, sex, race or ethnic origin are forbidden.

(a) The general non-discrimination rule as governed by Art. 12 (now Art. 18) deals with the discrimination on the grounds of nationality. According to that all discriminations upon this criterion are forbidden, no matter whether they are open or hidden, for example in a discrimination case because of the residence of an individual. Beyond the application of the treaty privates will be allowed to discriminate against others or, to put in other words, to decide who to deal with and who not to deal with. Member states are not free to do so; for them any kind of discrimination against other nationals is a taboo.

(b) The ban on discrimination on grounds of sex can be found in the treaty in Art. 157, which forbids unequal remuneration for equal work because of the sex of the employee. This provision has direct effect between private entities and their employees, see above.

Between the European law in this area the directive 76/207 and the directive 2002/73 should be mentioned, as they govern the equal access to employment, vocational training and promotion as well as concerning working conditions. Being a directive, these provisions had to be transmitted into national law and thus are valid for private relations between employers and employees as well.

5. Restrictions of basic freedoms of the citizens have to be proportionate

No member-state should be forced to tolerate things that go against its interests, identity, integrity or similarly important goods. On the other hand there is need to find a balance between the legitimate interests of the citizens of the EU and the ones of the states themselves. Concrete prescriptions on how to find this balance are very rare, practically this method is not used to give exact rules, which is why the jurisdiction found itself asked upon to develop rules how to check and keep the balance. The most central method for this is the use of the principle of proportionality. According to the dogmatic of the European Court of Justice, this principle of proportionality can be sub-classified into three categories:

- The suitability of the measure in question for the reaching of the envisaged aim.
- The necessity of the measure for the reaching of the envisaged aim.
- The adequacy of the measure for the reaching of the envisaged aim.

The first criterion is usually the lightest hurdle to take: a measure is only then considered not suitable if it is absolutely unsuitable for achieving the aim.

The second criterion often causes bigger problems. It demands that the mildest means is being used for the achievement of the goal. The question to control whether is really was the mildest one would be: Is there not another, milder means which is as efficient to reach the aim? If there is one, then the measure used is not necessary, hence not proportionate.

The third criterion could be explained with the proverb: it does not take a sledgehammer to crack a hazelnut. Do not use a means that causes more harm than good, do not go beyond a certain limit, which is not in a good ratio to what can be the benefit of it. Here we need to check the relation between aim and means. If the damage in somebody's legal position is bigger than the benefit for the community or general public, then we are faced with a disproportionality.

This principle is one of the most basic and most important principles in European law and should be known and observed by all institutions equipped with state power, like judges, prosecutors, ministries, self-government etc.

C. Interpretation methods in European law

1. Principle:

The rules at hand for interpretation in European law correspond to those known in national law:

- a. Wording – grammatical interpretation
- b. Systematic position – systematical interpretation
- c. Genesis of a rule – historical interpretation
- d. Ratio of a rule – teleologic interpretation

In many cases several solutions to a legal interpretation are possible without being able to decide, which is right and why only one can be right.

Firm rules for a priority of one of the interpretation methods do not exist in most national legal systems, though some think the “clear wording” is to be preferred.

2. European particularities

Ad a: wording – grammatical interpretation

The European Court of Justice has decided that if the wording gives a clear result, there is no need to recur to other methods. This seems obvious, but contains a tremendous problem in European law, because there are many, possibly varying wordings in the – at the moment – 23 official languages, which are equal in their rank, because there is no language which is “more correct” or higher in rank than the others.

Ad b.: systematic position – systematical interpretation

Here two principles have to be observed:

aa. The unity of European law: EU law makes up a unified system, which is valid in all member-states in the same way; therefore it is to be understood out of itself and to be interpreted independent from the national law system, so-called autonomous interpretation.

bb. Secondary law has to be interpreted in conformity with primary law, which means that the law lower in hierarchy – regulations, directives – has to be in harmony with the higher-ranking law.

Ad c.: genesis of a rule – historic interpretation

This interpretation method has growing importance, because the making of directives and regulations has become more and more documented and transparent recently. For older secondary law or the older primary law this does not hold true.

Ad d.: ratio of a rule – teleologic interpretation

This method has in the eyes of the European Court of Justice the highest relevance. In particular the following principles need to be observed:

- aa. Workability of the Community
- bb. Institutional balance
- cc. Effectivity („effet utile“): the practical benefit of a rule should be as high as possible.

D. Preliminary Ruling

1. The function of the preliminary ruling.

The national judges are obliged to interpret and apply European law in their own responsibility and independence. This bears the risk that in the presently 27 different member-states completely different interpretations of the same provisions of European law are used by the national jurisdictions. This has to be avoided, because every citizen of the European Union ought to have identical rights, wherever he or she is within the Union. In order to get such identical rights for the citizens and identical interpretation of the law of the European Union, the Court in Luxemburg has been set up to give an authentic interpretation of the law, which is obligatory to use for the courts of the member-states, and the national courts have the possibility or even duty to turn to the Court in Luxemburg, whenever they have doubts how to interpret European law. The procedure to do so is called preliminary ruling.

2. Details of the Reference

A reference to the Court of the European Union should consist of the following parts:

- Formulation of the question
- Summary of the facts
- Account of relevant legal aspects
- Account of the reasons that cause the court to refer the case to Luxemburg
- When indicated: Account of the legal views of the parties

Out of these points two need to be enlarged upon

- a) Formulation of the question
- b) Account of the facts and the legal problems

Ad a) Formulation of the question

Generally the question should be put as abstract as possible, but at the same time as concrete as necessary. In case of doubt a concrete putting up of the question is preferably towards an abstract formulation, in order to guarantee that the answer by the Court is a real help for solving the case by the national court. It has to be observed that the Court of the European Union will probably

reformulate the question anyway, usually by using a formula like: “basically the referring court wants to know whether.....” Such adjusting of the question is absolutely normal and not a shame for the referring court.

But: Even if you formulate your question very concrete, the national regulation should not be named in the question, because the Court will not give an answer to this regulation, but to an abstract rule.

Example: „Are art. 45 and art. 49 of the treaty to be interpreted in a way that they are opposed to a national regulation of a member-state which forbids other EU-nationals to use an academic degree they acquired in another member-state without magisterial permit to do so?”

(Not permissible would be a question like the following: „... are the articles 45 and 49 opposed to § xy of the law on academic degrees from 1951...“ The Court would have to interpret this question and reformulate it.)

You should be aware: If the Court does not understand the question in the way you meant it, you might get an answer that is not of any help for you! This could have the consequence that you wasted a lot of your and the parties` time and you are as insecure as to the right solution as you were before.

What might be great help is a discussion with the parties, particularly with their lawyers. Their role should not be underestimated anyway. Very often it is them who raised the question of a European interpretation of the law, they might even be specialised in the area in question and have knowledge of the jurisdiction of the Court of the European Union. A discussion with them might bring clarity to different points and might help to formulate the question. Nevertheless: it is exclusively the judge who decides whether to refer at all and if yes, what question to put. The national court has the last word in this decision.

Ad b) Account of the facts and the legal problems

It is important to know that the rapporteur at the Court in Luxemburg who first works on the case is – according to an unwritten, yet strictly kept rule – never a national of the country, where the case comes from. In other words: This judge in Luxemburg will definitely be an excellent jurist – otherwise he or she would not be in Luxemburg – but they will not be an expert of the national law that the case is about. That is why it is extremely important to give a thorough, but short account of the particularities of the national law. Give the Court some well-thought information about the legal background of the case in order to avoid misunderstandings. It is you who wants to be helped, so help the colleagues in Luxemburg. Every question the Court has to put to the national court, every reference to the file as well as every internal research in Luxemburg takes time and prolongs the time of the procedure. Imagine you got a question from Portugal without knowing anything about Portugese law! You would be grateful for every piece of information necessary to understand the case. But be aware: a reference should not be longer than 10 pages!

3. Checklist for references

There are no normative minimum standards as to what a reference should look like. General orientation should be the procedural economy. The judges in Luxembourg should be able to quickly realise what the problem of the national court is and where this problem comes from. Your question will be translated into all official languages of the European Union, thus it will be known in all member-states. Only in case of doubt will the original file itself be referred to. But this file will not be translated or published, which means that the governments of the member-states will have no chance to know the original file. They only know the question you referred. Make it easy for them to take part in the case. It might be important for an enormous number of persons. But not only this aspect is important: For you yourself as a judge, much more important is that the preliminary ruling might be declared impermissible – for some lack of information, for example. This has to be avoided.

From the explanations made above, the following „commandments“ that need to be observed can be concluded:

- The order with which you order the preliminary ruling will be in the official language of the member-state, which is going to be the language of the procedure and could look like the following:

1.) The procedure is suspended.

2.) The following question will be referred to the Court of the European Union: „Is art. 5 II 2. sentence of the directive 2005/xy on xxxxxxxx to be interpreted in the way that a national rule ordering xxxxxxxxxxxx collides with it and can therefore not be applied?“

- Reference needs to be precisely and clearly formulated.

- Short account of the facts.

- Precise, literal quotation of the relevant national regulations.

- Explanation of the important legal aspects.

- Explanation why this question is put.

- Declaration that the answer to this question is indispensable for the decision of the national case and a short explanation why this is so.

- When indicated: Short summary of the arguments of the parties.

- Add the original file. Do not translate anything. The Court in Luxembourg will take care of this.

- Correct Address: Court of the European Union, L-2925 Luxembourg, Tel: ++352-43031.

- Send the documents by registered post.

At the end of the procedure, so after getting the answer from the Court in Luxembourg and after speaking the judgement of your court: Please inform the Court in Luxembourg, how the national

court took the answer into account, how it decided and what was the end of the procedure. Mind that there is no obligation to do so, but it helps the research on European Law.

To be sure: Before you formulate your questions, you should ask yourself the following control questions:

- Is an answer to this question really indispensable for solving your case? If not, the reference is impermissible.
- Does the answer really lie within the scope of European Law, i.e. is an area involved that falls within the ruling competence of the European Union? If not, the question is not permissible.
- Do you ask something which is to be answered according to your national law? If yes: question is not permissible.
- Have you – from the point of view of a reader who is not a jurist of your national law – formulated understandably what the question and the case is all about? If not: Formulate again more precisely.
- Is it really not clear what the answer would be in European law? If it is clear, question is superfluous and should not be put.
- Does the question deal with the European Convention on Human Rights? If yes: question is impermissible (the party him/herself can turn to the Court in Strasbourg).
- Has the question been put in an abstract, but understandable way? If not: formulate anew!
- Has the question already been answered? If yes: question superfluous.

You should put and answer these questions conscientiously. This way, you can save a lot of nuisance and waste of time for yourself and the parties.

A last piece of advice is that you turn to somebody else who speaks a foreign language well. Can he or she understand your question and translate it into another language? Be aware that your question will be read in a translated version. If the question is not translatable – because it is simply too long or complicatedly structured – it cannot be understood and answered!

4. Which court has to make a reference?

As a rule every court can make a reference, those courts against whose judgements there is no remedy in national law are obliged to make a reference.

E. The effect of directives and how to work with them

Regulations and directives are the two types of secondary legislation. Regulations are comparatively easy to handle, because they are basically equal to laws in national legislation, are directly applicable after entering into force and bind everybody they apply to. Directives are a very important, indirect way of harmonising national legislation and they play a more role for the rules of the Common Market. According to art. 288 III they are binding as to the object to be achieved, but they leave the national authorities the choice of form and methods.

1. What effect do directives have?

The member states are obliged to transfer directives into their national legal system. If they miss to do so, the member states are liable to pay damages to the citizens who have suffered any loss because of this failure to transmit the directive into national law.

But obviously not only directives that have not been transferred into national law have an effect on jurisdiction and can have importance for the law-applier. It is also when the directive has been adapted and been put into national law that particularly the judges still have to pay attention to the directive that the applicable law is based on. The Court of the European Union in Luxemburg has governed that all bodies belonging to the state or equipped with state-power are obliged to strive for the achievement of the aim as declared and put down in the directive and have to take all measures in order to do so. This goes particularly for the national courts and the judges. When they apply law based upon directives they are obliged to interpret this national law in the light of the wording and objective of the directive. This means that practically the national judges should consult the directive when interpreting the national law, so if he or she has doubts as to which solution is correct.

A directive which has not or not correctly been transferred into national law not only opens the danger of state-liability, as mentioned above. In fact this is only the second step. In a previous step state-institutions are obliged to apply the directive directly and immediately, if – and this is the pre-condition – there is a relation between state and citizens, a so-called vertical relation. If there is a relation between two individuals equipped with equal right – horizontal relation, between private entities or citizens – there is no possibility for a direct effect. The reason for this is that the European Court “invented” the direct applicability of directives as some kind of sanction to the state that fails to transform the directive and thus to force the member states to obey the rules and obligations that have been agreed upon – to transform the directive into national law within a given deadline. This way of punishing the state of course does not apply to citizens, because there is no justification for punishing them, because they did not have any obligations to obey. In a horizontal relation there is only room for directive-conform interpretation of the national law as long as it is based on a directive.

For the direct applicability of directives there are several conditions which need to be fulfilled. It is necessary that the member state first of all failed to transform the directive into national law within the given deadline. Secondly it is necessary that the directive is clear and precise in its content, free of any conditions and gives the citizens rights or entitles him or her to something. Then the directive has direct effect, but only to the extent that it gives positive rights to the citizens. Those parts of the directive that might burden the citizens have to be left out of consideration.

3. How to interpret directives?

In a judgment from 2000 – C-240/98, „Oceano“ 27.06.2000 – the European Court of Justice stated that the national court must adapt its interpretation of the directive as much as possible to the wording and objective of the directive in order to reach the aim envisaged by it the directive. In order to do so the court has to consult the reasoning of the directive as expressed in the preambulum of the directive. The intention as expressed there is the most reliable source of information as to what was the objective or intention of this material.

G. State liability for breach of EC law obligations

1. Liability for the legislative body

The liability of the state for the acts of its representatives is a particularity of European law, which essentially differs from the kind of state liability that is known from national law. Among the current member states there is no such country which has known a financial responsibility of the state for the inactivity of the law-giving organs. Yet the European Court of Justice created such responsibility and has ever since been using this jurisdiction to express a state's accountability for its shortcomings in fulfilling its duties deriving from European law.

The basis of this jurisdiction is the judgment Francovich – C-9/90, 19.11.1991 – which has the following background: Francovich, Bonifaci and others were workers employed with an Italian enterprise which went bankrupt in 1985. Until two years before this event every member state would have had to transfer a directive into national law which would have given a basic protection for employees of a bankrupt firm, giving them an entitlement to a certain amount of money depending on their last wages. Because Italy had failed to transpose the directive into national law, Francovich and his co-workers were left without money. As we had stated before, here there is no room for a direct application of the directive, because we have a horizontal relation between the bankrupt firm and its employees. But the European Court of Justice found a different solution. It stated that if the directive gives the individual rights, then the objective of the directive can only be reached if the state is held responsible. For this it developed three conditions:

1. The directive that was not transposed into national law within the given deadline serves the aim of giving the individual specific rights.
2. The content of these rights has to be so concrete that the minimum amount of the advantage for the individual is recognizable.

3. Between the infringement against its duty to transpose the directive into national law and the individual's damage has to be a causal connection.

The last criterion has to be reviewed by the national court. It is remarkable that a default by the state is not necessary, so practically the state has no chance to excuse itself.

Since the years since laying the foundation of state liability until today the European Court of Justice had vast opportunity to further develop its jurisdiction concerning state liability. By now the criteria for the question whether the state is held responsibility for a certain drawback can be formulated on a more abstract level:

- The European rule the state infringed upon particularly intends to bestow rights on the individual

- The infringement is a qualified or considerable one.

- There is a causal connection between the state's infringement and the individual's damage.

2. Liability for the executive body

There are by now quite a large number of judgments in which the European Court of Justice had the opportunity to state the state's liability for the executive. An important step was the judgment Hedley Lomas – C-5/94, 23.05.1996. The facts of the case were the following: The company Hedley Lomas Ltd. had its domicile in the United Kingdom and was doing business with the utilization of sheep meat. For this purpose the enterprise exported live sheep to Spain in order to have them butchered there. The ministry in charge of giving the permit for the export refused to do so referring to allegations saying that Spain would not observe a European directive foreseeing rules for the killing of animals with the purpose of saving the animals' avoidable suffering. The ministry quoted reports by animal rights activists to undermine its view. Hedley Lomas Ltd. contradicted these reports and tried to prove the opposite, that the directive was transmitted into Spanish law properly and that their partner observed all European standards. They asked the representatives of the ministry to go to Spain to convince themselves, which they refused to do. Instead the ministry declined the permit finally. The firm suffered considerable loss and turn to the British court to claim damages. The court in charge of the case turned to the Court in Luxemburg with a preliminary ruling and thus gave the European Court of Justice opportunity to clarify its legal view of this constellation of state liability. It stated that indeed there was an infringement lying in restricting the freedom of goods – sheep of course are goods – which allows bringing goods from one member state to the other without any unjustified limitation. This infringement was seen a considerable one, because it had long be clear jurisdiction that one state must not violate European law referring to another state doing so, too.

It also seemed that there was a causal connection between the infringement and the damage which entailed the obligation to pay damages.

3. Liability for the judiciary

The liability of the state for its judiciary had been very controversial, but unconceivable for a long time. The reason for this has always been the independence of the judiciary, which made it obvious that a state could not influence the jurisdiction of its courts and therefore could not prevent infringements by the judges. Also the European Commission felt that they had to respect the independence of the judiciary and did not take measure against states, if the judiciary failed to respect. This changed completely in the year 2003 with a new jurisdiction by the European Court of Justice, which was triggered by two cases. One of the judgments – C-224/01, Köbler, 30.10.2003 – decided a case from Austria and had the following background: Professor Köbler was at that time teaching history of law at the University of Innsbruck, Austria, after teaching many years at German universities. After a while professor Köbler applied for a supplementary allowance which was to be paid to all those employees working longer than fifteen years for Austrian universities. Mr. Köbler was of the opinion that although he had not worked fifteen years in Austria, he in fact had worked fifteen years for European universities and not taking this into consideration would be discriminative. The case was brought before the administrative court in Vienna who turned to Luxemburg for a solution to this problem. After the case had arrived to Luxemburg another case – C-15/96 Schöning-Kougebetopoulou, 15.01.1998 – was decided in which a similar constellation had to be solved: Mrs. Schöning-Kougebetopoulou worked as a physician in a Greek hospital before she moved to Germany and started work in a hospital in Hamburg. After a while she – as Mr. Köbler – applied for a supplementary allowance which was granted for those colleagues who had belonged to hospitals in Hamburg for more than 8 years, arguing that she had worked for 2 years in Hamburg and 6 years in Greece. Her application was declined why she turned to the court which then asked the European Court of Justice. The court in Luxemburg answered that indeed the practice in Hamburg was discriminative and the time served in Greece must be taken into consideration. The chancellor of the European Court of Justice sent the judgment Schöning-Kougebetopoulou to the court in Vienna asking whether after this verdict there was still need to answer the reference made by the administrative court. The court informed the parties giving a hint that the case would probably be decided in favour of Mr. Köbler. Three months later the administrative court withdrew its reference and by judgment of the same day dismissed Mr. Köbler`s claim arguing the supplementary allowance was a loyalty bonus that was justified and not discriminative. A while later on Mr. Köbler sued the Republic of Austria before a Vienna civil court asking for damages, because the administrative court had – to his mind – breached severely European law. The civil court turned to Luxemburg for an answer. The European Court of Justice in its judgment referred to the jurisdiction in former cases like Francovich, Hedley Lomas and others. The Court extensively dealt with the independence of the judiciary, but stated that this principle was not able to overrule the liability of the state for all bodies equipped with state power. Yet in this concrete case the breach of the European law was found not evidential or considerable enough, so that as a result the Republic of Austria was not held responsible for the wrong decision of the Vienna administrative court. Though this concrete

result of the Köbler-case seems quite controversial, the essence is that indeed the member states are liable for their courts which is the correct solution to the abstract problem.

In another case from the same year – C-129/00, European Commission *./.* Italy, 09.12.2003 – the European Court of Justice had to deal with the problem that Italian court, particularly the Supreme Court did not take into consideration a clear jurisdiction by the European Court of Justice and decided otherwise than Luxemburg had ruled several times before. In this case the European Court of Justice stated that there was no hindrance to initiate infringement proceedings against a member state independent of the question which state body committed the breach of European Law. It held that for lower-instance courts that did not observe European law there was no need to intervene, because the importance of such verdicts would be minor. A different situation arises when a Supreme Court rendered a judgment which was of general importance. The result that the European Court of Justice reached was very interesting and surprising: It stated a breach of European law, but not through the jurisdiction, but through the legislation. In such cases it is – according to the European Court of Justice – the task of the government or the legislative body to change the national law in a way that the jurisdiction has to be changed in order to be in conformity with EU law.