

**ADVOCATORUM CASSATIONIS SOCIETAS EUROPAEA**

**THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE  
SUPREME COURTS OF THE MEMBER STATES**

Brussels, 19 May 2017

Ladies and Gentlemen,

It is a great honour for me to be here today at the annual conference organised by the European Association of Supreme Court Bars, and to share with you some thoughts on the relationship between the Court of Justice of the European Union (EU) and the Supreme Courts of the Member States.

The Court of Justice and the national courts, and in particular Supreme Courts, play a vital role in safeguarding the rule of law within the EU. They are responsible, each within their respective jurisdiction, to guarantee an effective judicial protection of individuals' rights and to ensure that in the interpretation and the application of the Treaties, 'the law' is observed.

In order to attain this objective within the European Union, the Court of Justice and national courts are called upon to cooperate, notably by means of the preliminary ruling mechanism, which constitutes the

keystone of the European Union's judicial system.<sup>1</sup> This preliminary rulings procedure operates as a hyphen between the legal orders of the European Union and its Member States. It involves a continuous judicial dialogue between the courts of the Member States and the Court of Justice.

My speech will focus on this preliminary ruling procedure, in particular on the discretion of national courts to refer a question to the Court of Justice, on the possible effects of rulings of the Court of Justice on the case-law of the Supreme Courts of the Member States and on the independence of the national courts as a prerequisite for the proper functioning of the preliminary ruling procedure.

It must first of all be stressed that there is no relationship of hierarchy between the national courts and the Court of Justice. They cooperate in ensuring the uniform interpretation and application of European Union law. A *culture of trust* characterises this cooperation.

On the one hand, national courts must trust the Court of Justice in that it will deliver a judgment that is based on a solid reasoning, taking into consideration all relevant societal circumstances and technological developments, that not only helps to solve the particular case at hand, but also contributes to the development of the existing case-law, and that within a reasonable time frame.

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<sup>1</sup> Opinion 2/13, EU:C:2014:2454, para. 176.

On the other hand, the Court of Justice has to trust the Member State courts, which are the European Union's 'regular' courts, that they are willing and capable of ensuring the consistency of their own domestic law with European Union law.

With respect in particular to Supreme Courts of the Member States, this implies that they respect the obligation provided for in Article 267 TFEU to refer a preliminary question to the Court of Justice where an issue of interpretation or validity of European Union law is raised before them.

The only exceptions to the obligation for courts of final instance to refer a question to the Court of Justice have been clearly set out in the *Cilfit*<sup>2</sup> line of case-law. A national court of final instance is not required to refer a question of interpretation of European Union law to the Court of Justice, first, when an identical or similar question has already been put before the Court of Justice, second, when the answer to the question can be clearly deduced from the existing case-law and, third, when the correct application of Union law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).

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<sup>2</sup> Judgment of 6 October 1982, [Cilfit](#) and Others, 283/81, EU:C:1982:335.

These exceptions to the obligation for national Supreme Courts to refer – the only ones – flow from the case-law of the Court of Justice and therefore directly from European Union law.

A provision of national law can never make an exception to the obligation of a national court of final instance to refer or in any way undermine this obligation.

It follows from the judgment of the Court of Justice of 5 April 2016 in *PFE*<sup>3</sup> that the obligation to refer not only applies to a Supreme Court of a Member State sitting in plenary session but to every chamber of such court.

The *PFE* case concerned a provision of Italian procedural law according to which a chamber of the *Consiglio di Stato* (Council of State) was required to apply the principles of law established by the Council of State sitting in plenary session, even in respect of questions concerning the interpretation and application of European Union law. There was only the possibility for that chamber, if it wished to depart from those principles, to refer the matter to the plenary session in order to seek a reversal of the case-law.

In *PFE*, the Sicilian chamber of the *Consiglio di Stato* had serious doubts as regards the lawfulness of the interpretation of a provision of

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<sup>3</sup> C-689/13, EU:C:2016:199.

a Directive on public procurement which had been given by the Council of State in plenary session in an earlier judgment.

Upon a reference from the Sicilian chamber of the *Consiglio di Stato*, the Court of Justice ruled that that chamber could not be prevented from referring the matter of interpretation of European Union law directly to the Court of Justice. The national provision restricting the discretion of a chamber of the Council of State to refer a preliminary question to the Court of Justice was thus incompatible with Article 267 TFEU.

If pursuant to such preliminary reference, the interpretation given by the Court of Justice of the provision of the Directive concerned were to be different from the interpretation given by the Council of State, the chamber of that court and indeed *any* national court would be bound by the interpretation of the provision at issue given by the Court of Justice and must, if necessary, disregard any national law or case-law which is inconsistent with that ruling of the Court of Justice.

The *PFE* judgment builds upon earlier case-law developed in cases such as *Rheinmühlen-Düsseldorf*<sup>4</sup>, *Melki and Abdeli*<sup>5</sup>, and *Elchinov*<sup>6</sup>. According to this case-law, national courts have the *widest discretion*

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<sup>4</sup> Judgment of 16 January 1974, [Rheinmühlen-Düsseldorf](#), 166/73, EU:C:1974:3.

<sup>5</sup> Judgment of 22 June 2010, [Melki et Abdeli](#), C-188/10 and C-189/10, EU:C:2010:363.

<sup>6</sup> Judgment of 5 October 2010, [Elchinov](#), C-173/09, EU:C:2010:581.

in referring questions to the Court of Justice. A rule of national law cannot prevent a national court from using that discretion.

This principle remains applicable even if it leads to a conflict between a lower court and its Supreme Court.

It is true that, under national law, lower courts are bound by the case-law of their Supreme Court. The Supreme Courts of the Member States indeed guarantee the uniform interpretation and application of national law. However, as the Court of Justice expressly ruled in *Elchinov*<sup>7</sup>, the obligation to respect the Supreme Court's case-law cannot affect the lower courts discretion to refer a preliminary question to the Court of Justice.

Recently, in *Gutiérrez Naranjo and Others*<sup>8</sup>, different Spanish commercial and provincial courts put questions before the Court of Justice concerning 'floor clauses' included in mortgage loan contracts in Spain. The clauses in question provided that, even if the interest rate fell below a certain threshold (or 'floor') defined in the agreement, the consumer had to continue to pay minimum interest equivalent to that threshold, without being able to benefit from a lower market rate. The Supreme Court of Spain had already held the 'floor clauses' to be unfair within the meaning of Directive 93/13 on unfair

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<sup>7</sup> Judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581.

<sup>8</sup> Judgment of 21 December 2016, *Gutiérrez Naranjo e.a.*, C-154/15, C-307/15 et C-308/15, EU:C:2016:980.

terms in consumer contracts. Indeed, the consumers had not been informed properly about the economic and legal burden which the contract would place upon them. However, in a judgment of 9 May 2013, the *Tribunal Supremo* decided to limit the temporal effects of the declaration of invalidity of those clauses, so that they would have effect only for the future.

The lower Spanish Courts did not agree with this limitation of temporal effects and referred the matter to the Court of Justice.

The Court of Justice held in its judgment of 21 December 2016 that the Spanish case-law placing a temporal limitation on the effects of the invalidity of ‘floor clauses’ and thus affecting the substance of the rights granted to consumers by Directive 93/13 was incompatible with European Union law. Indeed, in the light of the fundamental requirement of a general and uniform application of European Union law, it is for the Court of Justice – and for the Court of Justice alone – to decide upon such temporal limitation. In those circumstances, the referring courts had to disregard, of their own motion, the judgment of the *Tribunal Supremo* of 9 May 2013.

This line of case-law has been criticized especially by judges of Supreme Courts. The Court of Justice’s case-law would not be respectful of the hierarchical structure of the national court system. In my opinion, a conflict between a Supreme Court of a Member State

and its lower courts, such as the one at hand in *Elchinov* or *Gutiérrez Naranjo*, can be avoided if the Supreme Courts of the Member States respect their obligation to refer under Article 267 TFEU. In other words, if the question concerning the interpretation of European Union law that was put before the lower court had already been referred to the Court of Justice by the Supreme Court – to which that Court was in fact obliged as a court of last instance – not only that Supreme Court but all other national courts of the European Union would have had to abide by that interpretation given by the Court of Justice and such a conflict would never have arisen between the Supreme Court and the lower courts.

A judgment of the Court of Justice can have as a result that a Supreme Court of a Member State will have to adapt its own case-law. This can be illustrated with the *DI*<sup>9</sup> case. This case concerned an employee who had been fired at the age of 60. Given his age, the employee was under Danish law, as interpreted by the Danish Supreme Court, not entitled to a severance allowance. However, the Supreme Court's case-law was itself not compatible with the *Mangold*<sup>10</sup> line of case-law of the Court of Justice prohibiting any discrimination on grounds of age, a principle which is given concrete expression by Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

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<sup>9</sup> Judgment of 19 April 2016, [DI](#), C-441/14, EU:C:2016:278.

<sup>10</sup> Judgment of 22 November 2005, [Mangold](#), C-144/04, EU:C:2005:709.

The Danish Supreme Court contended that principles of legal certainty and the protection of legitimate expectations barred it from adapting its own case-law in line with the Court of Justice's case-law. The Court of Justice, however, held in *DI* that the requirement to give full effect to European Union law includes the obligation on a national court to alter established case-law, where necessary, if that is based on an interpretation of national law that is incompatible with European Union law. Thus, a national court cannot validly claim that it is impossible for it to interpret the national provision at issue in a manner that is consistent with European Union law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with European Union law.

Where the national court concerned finds it impossible to arrive at an interpretation of national law that is consistent with the interpretation of Union law given by the Court of Justice, it remains under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

Unfortunately, the Danish Supreme Court has at present not given full effect to the judgment of the Court of Justice in *DI*.

As I already said at the beginning of my speech, the relationship between national courts and the Court of Justice is one of mutual trust. An essential precondition to develop such culture of trust is judicial independence.

The concept of independence is inherent in the exercise of judicial power within a democracy, because compliance with the rule of law requires that judges, in their interpretation and application of the law, are free from improper pressure, either from the other branches of government, or from private or partisan interests.

The Court of Justice, in its seminal *Wilson* judgment<sup>11</sup>, has described the concept of judicial independence as implying that judicial power should be exercised by a body that acts as a third party in relation to the authority which adopted the contested decision.<sup>12</sup>

This concept of judicial independence is of paramount importance for the preliminary reference procedure. The judicial dialogue between the Court of Justice and national courts is an exclusively ‘judge to judge’ dialogue, one that is strictly separated from the political process.

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<sup>11</sup> Case C-506/04 *Wilson*, EU:C:2006:587, para. 49-52;

<sup>12</sup> Case C-203/14 *Consorti Sanitari del Maresme*, ECLI:EU:C:2015:664, paras. 19-20; Case C-222/13, *TDC*, EU:2014:2265, paras. 29-31.

In order to strengthen its cooperation with these independent national courts in general and with the Constitutional and Supreme Courts in particular, the Court of Justice announced on the occasion of the 60<sup>th</sup> anniversary of the Rome Treaties, the setting up of the European Union Judicial Network. This network will be an online platform that exchanges information between the Court of Justice and the Constitutional and Supreme Courts of the Member States.

On that same occasion, the Court of Justice adopted a formal declaration highlighting the role of the constructive dialogue between national courts and the Court of Justice in developing and upholding the fundamental rights and the values of democracy and the rule of law on which the European Union is founded.

The Court of Justice will continue to fulfil, in close cooperation with the national courts, the duty entrusted to it by the Treaties of ensuring respect for the law by all and for all, thereby safeguarding the values common to the citizens of the EU and the Member States.

Thank you.