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New Frontiers in the Relationship between National and European Courts

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FIFTY YEARS OF EUROPEAN COMMUNITY LAW PART III

INTRODUCTION

NEW FRONTIERS IN THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN COURTS

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Considering that a full fifty years have passed since the Treaty Establishing the European Community came into force, it seems appropriate to take a "long" view of the subject of this panel, namely, national courts and the courts of the European Union. I mean here to sketch the evolution, as I see it, of the challenge that consists of managing the "interface" between these two series of courts.

The central question pervading this discussion is simply stated: whether and to what extent the European Court of Justice ("Court of Justice" or "Court") (and the European institutions more generally) can count on the courts of the Member States to perform their judicial tasks in ways that are faithful to the ground rules of European Union ("EU") law, be those rules substantive or procedural in character. Looking back over the past five decades, I am struck by the succession of different forms this question of national court "fidelity" to Community law, for lack of a better term, has taken. (The quoted term is meant to evoke precisely the general duty of loyal cooperation

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imposed on Member States under Article 10 of the current EC Treaty.)[1]

I would suggest that we have witnessed essentially three generations of such "fidelity challenges."

In the early years, the fidelity challenge—or "infidelity risk," if you prefer—ran something like this: Will national courts accept and conform to the *Grundnorms* of European constitutional law, that is to say, the principles of supremacy and direct effect expounded by the Court of Justice? Or, to take a second example, will national courts genuinely make preliminary references to the Court of Justice in accordance with the criteria for the making of preliminary references that have been established in the Treaty and in the case law of the Court?[2] Considering the indispensable role that preliminary references and preliminary rulings play in the development of EU law, the importance of these ground rules should not be underestimated.

These questions strike me as systemically and institutionally fundamental, and yet they are also questions as to which it is possible (relatively speaking) to ascertain the fidelity of the Member States. At the time these questions were first raised, it may not have been thought that the fidelity of the Member State courts with regard to them could easily be measured; but in retrospect, they enjoy, by comparison with the fidelity questions that have emerged since, a high degree of determinability. In any event, these are questions driven by propositions that the Court has explicitly announced and as to which it has sought, again for lack of a better term, normative obedience.

A second generation of fidelity questions includes, notably, the one specifically treated by Judge Lauwaars in these proceed-

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1. Article 10 of the Treaty Establishing the European Community states:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Consolidated Version of the Treaty Establishing the European Community art. 10, O.J. C 321 E/37, at 47.

2. *See, e.g.*, SRL Cilfit v. Ministry of Health, Case 283/81, [1982] E.C.R. 3415, ¶ 21 (holding that "a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice.").

ings, namely, do national courts ensure the availability of remedies for the vindication of EU law claims, and do those remedies satisfy the dual requirements of equivalence and effectiveness required by the case law of the Court?[3] A further example of this generation of issues is whether national courts are faithfully and effectively implementing the Court's injunction that Member State courts open their doors to damage actions against Member States for violation of their EU law obligations, in keeping with the ground rules established by *Francovich v. Italy*[4] and subsequent judgments.

These sorts of questions—whether Member State courts are providing equivalent and adequate remedies and whether their Member State liability judgments are faithful to *Francovich*—strike me as just as important as the first generation of issues, even if they are less normative and more operational in nature.

On the other hand, such questions are, by their nature, ones as to which it is far more difficult to gauge or ascertain the degree of fidelity that Member State courts are exhibiting. After all, with these questions we are not dealing so much with abstract pronouncements of principle as with more textured judgments about what Member State courts are doing or not doing operationally in the wake of judgments of the European Court of Justice.

With this evolution in mind, I envisage yet a further stage of evolution toward a third generation of issues. Here I would place issues that may prove even more difficult to quantify and to gauge, both in the challenges and risks they raise and in the fidelity of the Member State court response. Questions of this sort would include the following: What are Member State courts doing in a given piece of litigation once in receipt of a preliminary ruling in the case from the Court of Justice? Surely what follows from a preliminary ruling of the Court may be as interesting and important—both to the law and to the litigants—as the ruling

3. *See, e.g.*, Von Colson v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, ¶ 28 ("[I]n order to ensure that it is effective and that it has a deterrent effect, . . . compensation must in any event be adequate in relation to the damage sustained.").

4. Francovich v. Italy, Cases C-6/90, C-9/90, [1991] E.C.R. I-5357, ¶ 42 ("In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.").

itself, and no one expects the translation of a preliminary ruling into a national court outcome to be something automatic. The degree of freedom that a Member State court enjoys, once the preliminary reference procedure has run its course, is exactly the degree of freedom that the Court will have left them, which depends in turn of course on the specificity and result-orientedness of the preliminary ruling itself.

With questions of this sort, the challenge consists of determining how well Member State courts have understood and implemented the guidance—general or specific—given them by the Court of Justice. Gauging the fidelity of the national courts in this context is an exercise of even greater difficulty than those implied by the prior generations of questions.

By way of an even more precise example of this newer breed of question, I would offer the *Marleasing*[5] (*Marleasing SA v. La Comercial Internacional de Alimentacion SA*) problem. As Sir Gordon Slynn has aptly observed at this conference, the *Marleasing* jurisprudence requires of national courts what can only be described as mental gymnastics. *Marleasing* itself illustrates the challenge, for there the Court of Justice effectively asked the referring Spanish court to determine whether it could possibly, in good conscience, interpret the Spanish Civil Code of 1889 so as to be consistent with the 1968 Company Law Directive limiting the grounds on which a company may be dissolved at the request of an aggrieved investor. This species of question asks whether national courts are affording European Union law the requisite indirect effect, i.e., whether and to what extent they are following the Court of Justice's admonition that they must interpret Member State law, if at all possible and to the fullest extent possible, in such a way as to be consistent with EU law (including unimplemented EU directives), even when the European Union law instrument in question is decades, if not centuries, subsequent to the national law requiring interpretation.

In a sense, this may be one of the most important fidelity questions of all, since the congruence between EU law as it reads and national law as it reads (much less actually means) is far from perfect. National courts that take the *Marleasing* admonition seriously are faced with a very significant—and daily—chal-

5. Marleasing SA v. La Comercial Internacional de Alimentacion SA, Case C-106/89, [1990] E.C.R. I-4135.

lenge. And, though the challenge is obvious, the difficulty of measuring the Member State response is equally so. Even an empiricist with unlimited resources would shudder at the prospect of gauging Member State fidelity to the Court's injunction to give maximal indirect effect to unimplemented EU law.

What I have here sought to depict is the escalating challenge facing Member State courts in complying with injunctions emanating from the Court of Justice and facing anyone seeking to evaluate the performance by those courts of their obligations as the European Court of Justice has formulated them. Three further questions immediately arise.

First, do national courts truly hold themselves to the high standards of compliance that the Court of Justice has established for them and, if so, how do they accomplish that? These are reasonable questions to ask in an age of rising fidelity expectations. After all, faithful application of a principle as subtle and interpretive as the *Marleasing* maxim entails a far more difficult enterprise—intellectually and analytically—than fidelity to abstract principles like the supremacy or direct effectiveness of EU law.

Second, as we move through the generational levels that I have suggested, is the preliminary reference system itself equal to the task? Will national courts continue to generate the flow of preliminary references, in the quantity and quality we have come to expect, when the references are ever more likely to yield rulings that call for intellectually and analytically burdensome exercises on the part of the national courts? Or are these just the questions that national courts may be tempted not to refer in the first place?

Lastly, what can and should the EU institutions—whether the Commission, the Court of Justice itself, or some other body—do to detect and act upon the more subtle manifestations of Member State court infidelity that, by their nature, may be poorly identifiable? The answer I expect to hear is the very sensible one to the effect that the EU is not a perfect system and should not be held to the standard of one. In that thinking, rather than dwell on the ability and will of national courts to face the challenges that mature preliminary questions raise (or on the ability and will of the institutions to deal with the national courts' shortcomings), we should instead be marveling at the

fact that the preliminary reference mechanism has arrived at the point, after a short period of fifty years, where it is generating such subtle fidelity questions.