The preliminary ruling procedure – on the role of national courts in the application of EU law

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The views expressed here represent only the personal opinions of the speaker

Introduction

Imagine that there was European Union law and nobody applied it!

We need mechanisms to enforce the law of the European Union.

Otherwise EU law would have no priority, with the result that there would be no unitary EU law!
Overview

The most important instruments are:

- **Preliminary ruling procedure**
  (Art. 267 TFEU, ex-Art. 234 EC)
- **Actions for failure to fulfil an obligation**
  (Art. 258 TFEU, ex-Art. 226 EC)
- **Actions for annulment**
  (Art. 263 TFEU, ex-Art. 230 EC)
- **Actions for damages**
  (Arts. 268 and 340 TFEU, ex-Arts. 235 and 288 EC)
- **Proceedings before national jurisdictions – on the role of the national judge as an EU judge**
  (Art. 4 TEU, effectively replaces Art. 10 EC)

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Preliminary ruling procedure (I)

Art. 267 TFEU, ex Art. 234 EC:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. [...]”
Preliminary ruling procedure (II)

- **Conditions for the use of the preliminary ruling procedure**
  - **Proceedings before a national court**
    - All courts available in national system
    - Independently of its hierarchical position
    - Not arbitration or mediation services or internal bodies for administrative appeals
  - **Subject of the application**
    - Interpretation of EU law
    - Review of the validity of an EU legislative measure
    - Not competent to declare a national measure invalid on the grounds of a breach of EU law,
    - Form of the referral: Is § ... a breach of directive ...? Or: Must directive ... be interpreted such as to preclude a national law such as § ... ?
    - Need for the requested ruling to resolve the case before the national court: no hypothetical cases

Preliminary ruling procedure (III)

- **Obligation to start proceedings for a preliminary ruling**
  - if a court of the last instance, i.e. if decision can no longer be contested
  - Exception: “acte clair” doctrine (CJEC: CILFIT 1982)
  - Obligation to obtain ruling if the validity of an EU legal measure is being questioned
  - In Germany: Breach of the constitutional law principle of the competent judge, if not submitted (BVerfG, ruling of 10/12/2014 -2 BvR 1549/07)
Preliminary ruling procedure (IV)

- **Option of preliminary ruling**
  - If not the court of last instance
  - Whether the decision to submit can be contested depends on the procedural law of the Member State.

Application (V)

- **Written procedure:**
  - Submission of application by national court to CJEU
  - Translation of application into all 24 official languages (without annexes!)
  - Service to all parties, all member states and all EU institutions via the court registry
  - Publication in Official Journal (anonymity problem)
  - Written submissions by the parties, particularly the European Commission as amicus curiae
  Time limit: 2 months, exception: PPU
Preliminary ruling procedure (VI)

• Designation of the Judge-Rapporteur
  – by general meeting on the proposal of the president of the CJEU and
  – Establishing the formation on the proposal of the judge-rapporteur
    and whether the Advocate General is involved

• Oral proceedings:
  – Rapporteur’s preliminary report
  – Oral hearing (unless renounced by the parties or so ruled by the Court)
  – Advocate General’s opinion, if any

Preliminary ruling procedure (VII)

Decision
  – Majority decision of the formation
  – Announced at open hearing
  – Published on the internet (www.curia.europa.eu)
  – No longer in collection
Preliminary ruling procedure (VIII)

• **Legal consequences of the decision**
  – **Binding** on the national judge in the main proceedings
  – **Serves as a precedent** for courts and public administrations (contentious)
  – Effective “ex tunc”, unless CJEU limits the effects of its decision to the date of the judgment or even later (e.g. granting a period of grace). See CJEC C-188/03 *Junk*, (Collective Redundancies Directive, without transitional period, therefore applicable retroactively)

Preliminary ruling procedure (IX)

• **The preliminary ruling procedure is the most important mechanism for:**
  – Development of EU law
  – Ensuring the consistency of EU law
  – Total number of cases referred to the CJEU:
    just 18,815 (1953-2013), of which 6,620 via the preliminary ruling procedure
  ➢ **Distribution by MS:**
    DE: 2,050=30%, IT: 1,227, FR: 886, NL: 879, AU: 429
    UK: 561, ES: 313; PT:116, SE: 111, FI: 83=12%, PL 60=9%
  ➢ **Distribution by court:**
    FR: Total 886, highest courts 191, lower courts 695 =78%
    DE: Total 2050, highest courts 690, lower courts 1,361=66%
    FI: Total 83, highest courts 68, lower courts 25=30%
Preliminary ruling procedure (X)

• Problems
  – No direct access by the parties to national proceedings to the CJEU, except via national judge
  – After submitting the application for a ruling no further involvement of national court (exception: rare request by the CJEU)
  – Duration of proceedings (2009-2013)
    • average 16.3 months
    • expedited or accelerated procedure (Art. 23a CJEU statute, Art. 104a, 104b CJEU rules of procedure), average PPU 2.2 months
  – Costs of proceedings

• Future
  – Now all depends on the reform of the structure of the court
  – Rethinking case 77/83 CILFIT decision
  – Driver of integration/consolidation/?

On the role of the national judge (I)

As well as questions on the interpretation of EU law and more rarely questions on the validity of EU legislative texts, since 2004 national courts have increasingly submitted questions concerning the competence of the national judge:

“Can an individual bring a case before national courts on the basis of EU law? Does the national judge have to disapply the national provision which conflicts with EC law, ... ?”

C-397/01 ff. Pfeiffer and others, 3rd application; C-282/10 Dominguez, 2nd application
C-144/04 Mangold, 3rd application; C-176/12 AMS, 1st application
C-555/07 Kucukdeveci, 2nd application; C-533/13 AKT, 3rd application
On the role of the national judge (II)

Most recently:

“Must Article 4(1) of the Temporary Agency Work Directive 2008/104/EC be interpreted as laying down a permanent obligation on national authorities, including the courts, to ensure by the means available to them that national provisions or clauses in collective agreements contrary to that provision of the directive are not in force or are not applied?”

C-533/13 Akt, 1. Application

On the role of the national judge (III)

• Common features of this application for a ruling:
  – First ask for interpretation of an EU law and whether this European law conflicts with a national law
  – If the CJEU confirms this, then consider
    • whether an individual in a legal dispute between private individuals can have recourse to this EU law and
    • whether the national judge can or must disapply this national law
  – Situation is in all cases a legal dispute between private individuals
A digression: EU legislation

Hierarchy of laws and their binding effect

- **General principles of EU law**
  - (e.g. precedence of EU law, guarantees of fundamental rights, proportionality principle, principle of protection of expression, right to a fair hearing, principle of the liability of Member States for violations of EU law)

- **Primary law**
  - EU treaties
    - (e.g. Lisbon Treaty and charter of fundamental rights)

- **Secondary law**
  - (regulations, directives, etc.)

- All cited measures are **immediately binding**

  If sufficiently precise and unconditional,

  **Exception:** Directives

The distinction between regulations and directives

- **Art. 288, 2nd para TFEU (previously Art. 249 EC) reads:**

  "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

- By contrast see, para 3 of Art. 288 TFEU (previously Art. 249 EC) = legal definition of a directive:

  "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."
Deviations from the ideal form of a directive and the response of the CJEU

• **Changes in legislation:**
  
  Directives are increasingly not limited to specifying aims, but are also prescribing concrete means, often on economic grounds, to avoid distortions of competition

• **Responses of the CJEU:**
  
  5 steps, not chronological, but tendencies

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Responses of the CJEU to changed nature of directives (I)

**Step 1:** The recognition of the direct/immediate effect of a directive if its provisions are sufficiently precise and unconditional

• Deviation from the ideal form of the content of a directive (objectives only) to concrete implementation requirements consistent with Art. 249 EC (now Art. 288 TFEU) (*Marshall I*).

• Readily interpreted content is sufficient for certainty
Responses of the CJEU to changed nature of directives (II)

Step 2: The recognition of the vertical effect of directives, as long as they are adequately precise and unconditional

- The legal principle of the prohibition of contradictory behaviour forbids Member States from taking advantage of a failure to implement legislation contrary to EU law against citizens (Becker, Marshall I)

- Individuals can invoke a directive against a state: \textit{vertical effect} (SACE, Ratti, Kloppenburg, Marshall I) but not against private law entities

- Rejection of \textit{horizontal effect} (Faccini Dori, Marshall II, RAS, Wells)

Responses of the CJEU to changed nature of directives (III)

Step 3: Extension of the concept of the state

- Not merely the traditional three branches – legislative, executive, judiciary – but all organisations, regardless of legal form, where under state authority, state as employer (Foster, Collino and Chiappero)

- Privatisation - grey area

Step 4: Recognition of the obligation on Member States to interpret national law in line with EU law

see below
Responses of the CJEU to changed nature of directives (IV)

Step 5: Recognition of the state’s liability for damages to individuals resulting from non-implementation or incorrect transposition of directives

*Francovich decision* (1991)

- Claim for compensation from state if directive is not or incorrectly transposed
- 4 preconditions: Breach of EC law; protective purpose of directive = protection of the individual; breach sufficiently serious; causal link between breach and loss
- e.g. guarantee funds for insolvency cases, travel policy

The method of interpretation in line with EU law (I)


“It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law”

concerning national law
The method of interpretation in line with EU law (II)

- National interpretation methods vary widely, so e.g. interpretation and development of the law not clearly separated
- Scope of application of a directive would depend on interpretation method
- Is there an interpretation method in EU law?
- Also, cases could conceivably arise in which interpretation in accordance with EU law would not be possible – what then?

On the role of the national judge on issues of Community law (I)

- Fundamental: Simmenthal (106/77)
  "... a national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."
- likewise Ratti, Faccini Dori, Arcaro, Kurz, Riksskattevet, Pflücke

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On the role of the national judge on issues of Community law (II)

• Typical of this series of CJEU decisions:
  Disputes between individuals and the state, vertical effect of directives, resulting in guidelines for judge: 
  *Non-application of national law which conflicts with EU law*

On the role of the national judge on issues of Community law (III)

• Up to 2004, for disputes between private parties the CJEC limited itself to interpreting the directive, no guidelines to national judge, leaving it open how the judge should proceed further

  (see: *Océano Grupo, Centrosteele, Bellone, Bernáldez, Heininger, Kühne and Nagel*)

• However, turning point in 2004 with CJEC judgment of 5/10/2004 in C-397/01 *Pfeiffer and others*
CJEC judgment of 5/10/2004 in C-397/01 Pfeiffer and others (I)

• Circumstances:
  – Working week of 49 hours as Red Cross ambulance driver including on-call periods

• German regulation:
  – § 3 Working time law:
    8 hrs/day x 6 days = 48 hrs/week
  – § 7 Working time law (in the version in force up to 31/12/2003):
    Flexibility clause for collective agreements and company agreements
    Here: DRK collective agreement permitted 49 hours per week including stand-by time

CJEC judgment of 5/10/2004 in Pfeiffer and others (II)

• EU law:
  Art. 6 of the Working Time Directive 93/104/EC

  Maximum weekly working time = 48 hours in 7 day reference period
CJEC judgment of 5/10/2004 in *Pfeiffer and others* (III)

- CJEC statements on the Working Time Directive:
  - On-call service is working time in the sense of the Directive,
  - Art. 6 para 2 of the Working Time Directive, which sets the maximum weekly working time at 48 hours, has immediate/direct effect, as it is sufficiently precise
- §§ 3, 5 ArbZG a.F. is consistent with EU law,
- The opening clause of § 7 ArbZG a.F. is not consistent with EU law

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CJEC judgment of 5/10/2004 in *Pfeiffer and others* (IV)

- 3. Application:
  
  “Is Article 6 of Directive 93/104 in itself unconditional and sufficiently precise to be capable of being relied on by individuals before national courts where the State has not properly transposed the directive into national law?”

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CJEC judgment of 5/10/2004 in *Pfeiffer and others* (V)

- **Key message on the role of the national judge in his or her position as European judge:**
  
  “... when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.” (point 119)

CJEC judgment of 5/10/2004 in *Pfeiffer and others* (VI)

- **Examine whether the national provision, which might not meet the requirements made of a directive, can be interpreted in accordance with EU law?**
  - **New:** Consideration of all national law in order to assess how far it can be applied without leading to an outcome which runs counter to the directive (point 115)
  - Reference to national interpretation methods, so not EU law interpretation method.
CJEC judgment of 5/10/2004 in *Pfeiffer and others* (VII)

What national interpretation method is there?

- The benchmark is the examination of the compatibility of the national law with higher-ranking law, so taking Germany as an example:
  - practical concordance
  - teleological reduction
  - interpretation in accordance with the constitution
  - interpretation in accordance with international law
    (see BVerfG, ruling of 14/10/2004 - 2 BvR 148/04)

CJEC judgment of 5/10/2004 in *Pfeiffer and others* (VIII)

- **Obligation to choose that method**, which
  
  “enables ... a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned” (point 116)

- Thus the CJEC refers - without going so far as to name names - to the exclusion effect in the sense of the doctrine of the directive as benchmark!
A digression: “The doctrine of the directive as benchmark”

- **Distinguish between:**
  - exclusion effect
  - substitution effect

- If national law which contradicts EU law is excluded, and remaining national law complies with EU law, then **no horizontal effect**, legal consequences flow from national law, not from directive

- Otherwise, if national law is so worded that the desired legal consequences are not available under remaining national law, but only from the directive itself, then inadmissible horizontal effect

CJEU in *CIA Security* and *Unilever Italia*

If § 7 ArbZG a.F. is “excluded” then the wishes of Pfeiffer and others come from §§ 3, 5 ArbZG a.F. and not from the directive

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Judgment of the CJEC of 22/11/2005 in C-144/04 *Mangold* (I)

- **Circumstances:** Age discrimination in fixed term employment relationships between lawyer and employees
  - Paragraph 14(3) TzBfG = no restriction on use of fixed term contracts without grounds after reaching the age of 52)
  - Directive 2000/78 = ban on age discrimination (with exclusions)
  - Deadline for transposition of directive not yet reached at the time of the original case

- **3. Question:**
  “must the national court refuse to apply the provision of domestic law which is contrary to Community law ... ?“
Judgment of the CJEC of 22/11/2005 in Mangold (II)

CJEC:

- Community law, particularly Art. 6 of Directive 2000/78, conflicts with a national measure such as para 14(3) TzBfG
- It obliges the national court to uphold the full effect of the general prohibition of discrimination on the basis of age, leaving any contradictory provision of national law disappplied, even if the deadline for transposing the directive has not yet been reached.

Judgment of the CJEC of 22/11/2005 in Mangold (III)

The result is surprising, but consistent:

- Ban on age discrimination = a general principle of Community law originating in various international law treaties and the common constitutional traditions of the Member States (notes 75,74). This principle is also sufficiently clear and unconditional. From 01.12.2009 explicitly enshrined in Art. 21(1) of the Charter of Fundamental Rights
- Directive merely puts into practice
- Validity of this ban is comprehensive (therefore also between private parties) and independent of any transposition deadline.
Judgment of the CJEU of 19/01/2010, in C-555/07 *Kücükdeveci* (I)

- **Circumstances:** Age discrimination in calculation of notice periods
- **§ 622 point 3 BGB:** Discounting of periods of employment prior to the employee’s 25th birthday when calculating extended notice periods for dismissal
- **2. Question:** “In legal proceedings between private individuals, must a court of a Member State disapply a statutory provision which is explicitly contrary to Community law?”

Judgment of the CJEU of 19/01/2010, in *Kücükdeveci* (II)

CJEU (Opinion of AG Bot of 7 July 2009, following *Kücükdeveci*):

- EU law, particularly the ban on discrimination on the grounds of age as implemented through directive 2000/78 must be interpreted as contradicting a measure such as that of § 622 point 2 sentence 2 BGB
- It obliges the national court to guarantee compliance with the ban on age discrimination in a case between private parties, such that if required contradictory provisions of national law are to be disapplied, …
CJEU judgment of 24/01/2012, in C-282/10 Dominguez (I)

- **Circumstances**: Question, if entitlement to paid annual leave under a national law can be made conditional on at least one month’s actual work?

- **Art. 7 of Directive 2003/88**:
  
  *Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks...*

- **Art. 31(2) of the EU Charter of Fundamental Rights**:
  
  *Every worker has the right to ... an annual period of paid leave.*

CJEU judgment of 24/01/2012, in Dominguez (II)

- **Question 2**: "does Article 7 of Directive 2003/88 ... require a national court hearing proceedings between individuals to disregard a conflicting national provision, … ?“

- **AG Trstenjak**
  
  - Rejection of horizontal effect, thus national judge not competent to disapply conflicting national law
  
  - No transposition of *Pfeiffer, Mangold, Kücükdevici* for other case types, because of the danger of confusion between laws of different levels
  
  - Rejection of the direct effect of fundamental rights in private law relationships
CJEU judgment of 24/01/2012, in *Dominguez* (III)

- **CJEU:**
  - Art. 7 of Directive 2003/88 is to be interpreted such that national provisions like … are contradictory
  - Obligation to examine the interpretation in line with EU law
  - If not open to interpretation, then examination of whether Art. 7 of the Directive is directly applicable, where respondent is a public body (vertical situation)
  - If respondent is not public body, then horizontal situation, so *Francovich*
  - CJEU: implicit rejection of horizontal effect, as Art. 31(2) of the Charter of Fundamental Rights is not sufficiently precise, only Directive is sufficiently clear

CJEU judgment of 15/01/2014 in C-176/12 *AMS* (I)

- **Circumstances:**
  Concerns the legality of the appointment of an employee representative for the non-profit organisation AMS. It was disputed whether under the French law transposing Directive 2002/14 {directive on informing and consulting employees} the threshold value for the obligatory introduction of an employee representative (50 employees) had been reached. Under French law apprentices and holders of an employment-initiative contract are not included in the count. AMS: French law, so no representation; trade union CGT: exclusion contrary to EU law.
CJEU judgment of 15/01/2014 in *AMS* (II)

- **Article 27 of Charter of Fundamental Rights:**
  Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

- **Art. 3 of Directive 2002/14**
  sets the threshold above which an information and consultation mechanism is required. The Member States determine the method to be used for calculating the threshold.

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CJEU judgment of 15/01/2014 in *AMS* (III)

1. **Application:**

May the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter, and as specified in the provisions of Directive 2002/14, be invoked in a dispute between private individuals in order to assess the compliance ... of a national measure implementing the Directive?
CJEU judgment of 15/01/2014 in AMS (IV)

- AG Cruz Villalón, Opinion of 18/07/2013:
  - The EU laws in question conflict with a national law, such as ...
  - Article 27 of Charter of Fundamental Rights, substantively and
directly implemented by Art. 3(1) of Directive 2002/14/EC...
can be invoked in a legal dispute between private parties, with
the disapplication of the national law as a possible consequence
- Under Article 52(5) of the Charter the national judge is
empowered to disapply the national provisions which conflict
with the specified provisions of EU law

CJEU judgment of 15/01/2014 in AMS (V)

- CJEU:
  - Art. 3 of Directive 2002/14 conflicts with a national measure
which excludes certain groups of employees from the calculation of
the threshold for the establishment of an employee’s representation
(as previously CJEC, judgment of 18/01/2007, C-385/05, CGT)
  - Art. 3 Directive 2002/14 is sufficiently precise and unconditional
and can therefore take direct effect.
  - In the context of a dispute between private parties such as the
case in hand, a private party can however only invoke direct effect
if the national provision can be interpreted in accordance with EU
law.
CJEU judgment of 15/01/2014 in *AMS* (VI)

- **CJEU:**
  - This interpretation in accordance with EU law is however subject to established limits, so for instance an interpretation *contra legem* cannot stand (see CJEU *Impact* and *Dominguez*). The applicant court (Cour de Cassation) considers that the existing limits have been reached. In the context of cooperation in good faith, the CJEU is obliged to adhere to this.

CJEU judgment of 15/01/2014 in *AMS* (VII)

- **CJEU:**
  - In such a case it must then be examined whether Article 27 of the Charter of Fundamental Rights can be invoked in its own right or in connection with the provisions of Directive 2002/14 in a dispute between private parties, so that if necessary the application of the national provisions which are not consistent with EU law can be excluded.
  - Art. 27 of the Charter of Fundamental Rights and Directive 2002/14 must however still be implemented via provisions of EU law or national law, as they are not precise enough to be invoked directly.
CJEU judgment of 15/01/2014 in AMS (VIII)

• CJEU:
  – The party that suffers by the incompatibility of national law with EU law can however invoke the Francovich case if necessary to obtain compensation for the damage incurred

• Criticism:
  – For collective rights such as those in the present case this recommendation is worthless, since in general there will be no quantifiable losses; result: the violation goes unpunished! Unless the Commission starts proceedings for failure to fulfil an obligation (optional, no right to claim)

Opinion of AG Szpunar of 20/11/2014 in C-533/14 Akt (I)

• Situation:
  The first time that Directive 2008/104/EC (agency work) is the subject of CJEU proceedings. Under Finnish collective bargaining law agency work is only permitted in very limited circumstances. Finnish labour tribunal holds provision to be incompatible with Art. 4 of the Directive (prohibition of restrictions on the use of agency work except on grounds of general interest) and with the freedom to provide services (Art. 56 TFEU).
Opinion of AG Szpunar of 20/11/2014 in Akt (II)

• AG Szpunar:
  – Collective labour agreements must observe EU law and are subject to judicial supervision in this respect
  – Finnish CLA is consistent with EU law
  – Examination also possible in purely national case, no cross-border aspect necessary

Opinion of AG Szpunar of 20/11/2014 in Akt (III)

• Obiter Dictum:
  – If incompatible, then normal obligation on the court applies to interpret a CLA in accordance with EU law
  – If interpretation in this manner is not possible, examine whether direct application of Directive and Art. 56 TFEU is possible? Yes in this case.
  – Can defendant invoke this as a private party?, yes:
    “If the Court has still not recognised the direct horizontal effect of EU directives ...”
Conclusions (I)

• The role of the national judge as a European judge is comprehensive (competent to disapply national law which conflicts with EU law); **exception**: directives in disputes between private parties

• In cases where directives can be applied to disputes between private parties the role of the national judge is combined with the issue of the direct effect of fundamental rights and is thus highly sensitive

• **substitution/exclusion effect**

Conclusions (II)

• **Starting point**: changes to legislative procedures at a European level

• **Attempts by the CJEU** to make the rights given by directives to individuals also individually transposable, if necessary via *Francovich* compensation; not sufficient for collective rights!

• La finta alemana: no direct commitments in legal relationships between private parties?

• Abandoning the distinction between directives and regulations?
The End

Thank you for your attention