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Theme: Access to the Courts under the Rule of Law

- A Member State's Viewpoint

The theme ‘Access to the Courts under the Rule of Law’ is both of current and of enduring interest. As a representative of a Member State, Finland, before the Court of Justice of the European Communities and the Court of First Instance of the European Communities, I have interpreted the theme as permitting me to address the question of access to justice from a Member State's viewpoint. I have chosen a pragmatic approach to consider this theme.

A question may arise as to whether there is any role for a Member State’s agent in the context of this theme in the first place. Are not the Member States privileged parties or interveners in these Courts?

They are indeed. Apart from trying to influence the Courts' case law on the *locus standi* of natural and legal persons - which Member States do - we may happily ignore the extensive case law interpreting the contents of the notions ‘directly’ and ‘individually' concerned of Article 230 (4) EC when appreciating whether to appeal against a Community measure or not.

In what follows, the given theme is addressed by first, shortly defining the various categories of proceedings of the Courts in which the Member States act and by explaining their roles in these proceedings. Second, the profits for the Member States from being privileged parties before these Courts is elaborated whilst an attempt is made to justify why this is essential. It is argued that an active participation of the

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1 The author of this writing is Doctor of Laws (University of Helsinki) and Director, Legal Counsellor of the Finnish Ministry for Foreign Affairs, Legal Service, EU Litigation. The writing is based upon an address given on the occasion of celebrating the twentieth anniversary of the Court of First Instance of the European Communities on September, 25th 2009 in Luxembourg.

2 See e.g. case T-150/05, Sahlstedt et al., order 22.6.2006, ECR 2006, p. II-1851 and further case C-362/06 P, Sahlstedt et al., judgment 23.4.2009, not yet recorded in the ECR.

Member States in the Courts’ proceedings is advantageous for both the Member States and the Courts. Third, the issue of choosing the most pertinent Courts’ cases from a Member State’s viewpoint is dealt with. Fourth, potential limitations to the participation of the Member States in the Courts’ proceedings are discussed. Concise conclusions are presented in the end of this writing. It is to be noted that the intention of this writing is not to be an exhaustive survey of the given theme but rather a scratch of an issue yearning to be studied more profoundly.

**Member States Roles in Various Categories of Court Proceedings**

A Member State may act in various categories of proceedings and play several roles in these proceedings via which the Courts exercise their jurisdiction. It is to be noted that the jurisdiction of the Court of First Instance is not identical to that of the Court of Justice. From a Member State’s viewpoint the most important category of proceedings that falls outside the jurisdiction of the Court of First Instance for the time being is proceedings for preliminary ruling under Article 234 EC and Article 35 EU. According to Article 225.3 EC the Court of First Instance shall have jurisdiction to hear and determine questions referred for preliminary ruling under Article 234 EC, in specific areas laid down by the Statute. This competence has not yet been exercised. The Member States are individually notified of all preliminary reference cases and may participate in both the written and the oral phase of the proceedings. According to our statistics dating back to the year 2008, Finland participated in altogether 26 preliminary ruling cases during that year, either in the written or the oral phase or both.

Direct infringement actions initiated by the European Commission on the basis of Article 226 EC against a Member State on grounds of the Member State’s alleged non-compliance with its Treaty obligations are also outside the jurisdiction of the Court of First Instance. In these cases a Member State may act as a defendant or as an intervener supporting either the defendant Member State or the Commission. The Commission initiated altogether five direct actions against Finland in 2008.

A much more infrequent type of proceedings, also outside the jurisdiction of the Court of First Instance consists of Article 300.6 EC opinions relating to the compatibility of an envisaged international agreement with the EU law. There was only one Article 300.6 case last year. Finland participated in its written and oral phases. According to Article 107 of the Rules of Procedure of the Court of Justice, a request from the Council for an opinion is served on the Commission and on the European Parliament. This provision seems to exclude the participation of the Member States in Article 300.6 EC opinion proceedings should the Council ask for the Court of Justice’s opinion. In practise the Court of Justice has chosen a more Member State friendly interpretation of the Rules of Procedure and has also served requests by the Council on the Member States. This occurred last in 2009 as the Court of Justice served the request by the Council on the Patent Litigation Court on the Member States.

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4 Opinion 1/08, *GATS*, pending.
From a Member State’s viewpoint the Court of First Instance plays a major role in many important types of proceedings.

The interest of a Member State to participate in State aid cases is inherent. As to date there have not been many Finnish State aid cases. Last year (2008) Finland participated before the Court of First Instance in an oral hearing in a State aid case originating from Finland dealing with the evaluation of a market value of a real estate. Finland also intervened in two other State aid cases currently pending before the Court of First Instance. Neither of these cases originates from Finland.

Member States are privileged applicants and interveners in direct action cases based on Article 230 EC or Article 232 EC. The Court of First Instance has jurisdiction in almost all cases under Article 230 EC or Article 232 EC where the Member State wishes to annul a Commission’s Decision addressed to it. Finland has made one Article 230 EC application to the Court of First Instance to annul a Commission Decision relating to financial adjustment in agricultural subsidies. It that case, the burden of proof turned out to be insuperable for us. Finland has also initiated one Article 230 EC case and one Article 232 EC case before the Court of First Instance on the issue of own resources and the interpretation of Article 296 EC. Both these cases dealt with customs duties on military equipment and were followed by Article 226 EC application of the Commission.

Finland has also intervened in several direct action cases that were first initiated by individuals or other Member States before the Court of First Instance. An important part of these cases have dealt with the interpretation of some of the provisions of the Regulation 1049/2001 on public access to documents.

If considered from the point of view of influencing the Courts’ deliberations it may be purported that arguments put forward by a Member State in a direct action case may potentially be even more influential than the arguments represented by a Member State in a preliminary reference case. In direct action cases the judgment of the Court is based upon the pleas in law of the applicant, whereas in a preliminary reference case the Court has wider discretionary powers. According to the

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6 Case T-455/05, Componenta v. Commission, judgment 18.12.2008, not yet recorded in the ECR.
8 Excluding Commission’s Decisions based on Article 11a EC.
11 Case C-284/05, Commission v. Finland, opinion of AG Colomer 10.2.2009, not yet recorded in the ECR.
established case law of the Court of Justice in the Article 234 EC proceedings “it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.” The Court may reject a request for a preliminary ruling only where the interpretation sought is irrelevant to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the factual or legal material is not adequate for the Court of Justice in order it to give a useful answer to the questions submitted to it.14 Notwithstanding this established fealty to the national judge, the Court of Justice may redraft the preliminary reference questions put forward to it. The Court of Justice may also consider the case in a wider EU law context than the national Court referring the case.15 The national Court may thus receive a more ample judgment than it initially estimated whilst drafting the request for a preliminary ruling. Even if this fact may give some leeway to the legal arguments of the Member States participating in the preliminary reference case, it also means that the judgment of Court of Justice may be based upon such legal grounds that were raised neither by the national referring Court nor by the Member States participating in the case.

As opposed to this, an applicant in a direct action case cannot expect a more ample judgment than what its pleas in law are. Was it otherwise the judgment would evidently breach a defendant’s rights of defence. From the point of view of a Member State being an applicant or a defendant of the case or intervening in it, this implies that at least in principle the Court shall deliberate all its legal arguments and cannot transfer the case to a wider EU Law context. The margin of discretion of the Court is thus narrower than in a preliminary reference case.

The Essentiality of being Privileged

What are then the profits of being privileged? The most important profit is obviously the fact that the Member States may try to influence decision making by the Court of Justice and the Court of First Instance by putting forward legal arguments. Every Member State has an equal standing before the Courts. In this respect the proceedings before the Court of Justice or the Court of First Instance differ from legislative decision making in the EU Council. A Member State participating in proceedings before these Courts does not need to count the number of voices for or against the legal interpretation it intends to submit in its written observations or oral pleadings. The weighting factors as to whether a Member State ‘succeeds’ in a Court case are the quality of its arguments and their consistency and coherence. Then again if these argumentative conditions are not fulfilled and the Court is thus not convinced, the unanimity of the Member States on their legal arguments is inconsequential for the outcome of the case.

14 See e.g. case C-44/08, Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy, judgment 10.9.2009, not yet recorded in the ECR, paras. 32-35.
Occasionally in cases where the Member States have during the proceedings expressed legal arguments which the Court has not in the end endorsed, the explicit authority of the Court - based on Article 220 EC - over the interpretation of EU Law has encountered criticism. In these instances allegations have been expressed in the legal literature and in the media of the Court ‘running wild’ by taking the role of the legislator instead of contenting itself with the role of a judiciary.\(^\text{16}\) Lately, such a criticism has occurred e.g. in cases where the Court has given an EU Law affirmative interpretation to the EC Treaty provisions on the free movement of goods, services, persons or capital or to the Treaty provisions on EU citizenship. There are some rather recent judgments that have caused harsh and noisy criticism in some Member States – whilst others may have remained astonishingly silent. Such cases are case C-438/05, *The International Transport Workers’ Federation et the Finnish Seamen’s Union*\(^\text{17}\) where the pertinent legal question was the interrelation between the right of establishment and the right to engage in a collective action and a kindred case C-341/05, *Laval un Partneri Ltd*\(^\text{18}\) on the relationship between on the one hand the freedom to provide services and posting of workers in the construction industry and on the other hand the obligation to a minimum rate of pay based on national collective agreement. In case C-127/08, *Metock*,\(^\text{19}\) the interpretation of the Court was sought on the right of nationals of third countries to enter into an EU Member State without having prior to that resided legally in another EU Member State.

The Court of Justice’s margin of appreciation may thus in some cases prove to be politically delicate. This issue has also recently risen in the Finnish Parliament during its discussions on the Council of State’s report on EU Policy.\(^\text{20}\) It was noted by the Grand Committee,\(^\text{21}\) the Constitutional Law Committee,\(^\text{22}\) the Employment and Equality Committee\(^\text{23}\) and the Social Affairs and Health Committee\(^\text{24}\) of the Parliament.

The author of this writing conceives open discussions on the Courts’ judgments as being valuable were these discussions carried out by the Parliament, by the media or by the general public. Such discussions are always interactive and they may therefore enhance the general understanding of the role of the Courts as part of the institutional and constitutional framework of the European Union and thus strengthen


\(^{20}\) VNS 4/2009 vp.

\(^{21}\) SuVM 1/2009 vp.

\(^{22}\) PeVL 8/2009 vp.

\(^{23}\) TyVL 7/2009 vp.

\(^{24}\) StVL 10/2009 vp.
the general legitimacy of the Courts’ rulings. A profound discussion about individual Courts’ cases may also clarify the legal grounds upon which the case is based. Such discussions may also be considered as a feedback to the Courts.

The legitimacy of the Courts' case law also presupposes that it is not made in a vacuum. It is therefore the task of the Member state's agent participating in Court proceedings to define the actual situation in a Member state and to illustrate with examples if need be the actual consequences of a certain interpretation of EU law to e.g. the everyday life of an EU citizen.

It is essential that the Member States remain privileged parties in Courts’ cases. By becoming Member States of the European Union we have also become members of a legal order of its own kind, *sui generis*. This legal order is not solely constituted by the founding Treaties and the numerous secondary legislative acts, regulations, directives and decisions, general principles of Community law or international agreements binding us as Member States of the European Union. The case law of the Court is an inseparable part of the EU legal order.

One could distinguish several layers in the case law of the Court of Justice and the Court of First Instance. First, an individual case layer, say Case C-372/04, *Watts*, which deals with the right of a patient, Mrs Watts, to seek medical care from a Member State other than her own. The second layer is constituted by the established case law in certain sectors of law, for example free movement of patients seeking medical care from another Member State. Finally, the third layer connotes the deeper impact of this case law on the EU legal order as a whole. One example of the deeper impact of the Courts’ case law on the EU legal order is the way in which the case law on free movement of patients seeking medical care in another Member State has influenced the European Commission in its Decisions to engage in Article 226 EC infringement procedure against Member States allegedly breaching this case law and in the Commission Proposal for a new Directive regulating the free movement of patients, as well as amendments to national law or practises relating to free movement of patients. For a Member State being both an addressee and part of this legal order it is essential to have an opportunity to participate in the evolution of each of these layers.

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26 The idea of layers in the legal order of a nation in general has been introduced by Dr. *Kaarlo Tuori* in several legal writings of which see e.g. in Critical Legal Positivism, Ashgate Publishing Group, 2002. In the EU Law context see *Ojanen, Tuomas*: The European Way. The Structure of National Court Obligation unde EC Law. Gummerus Kirjapaino Oy, 1998.


29 See case C-211/08, *Commission v. Spain*, pending and case C-512/08, *Commission v. France*, pending. Finland has intervened in both these cases on behalf of the defendant.

In order to do this, it is important for a Member State to be an active participant in the Courts’ proceedings. This cannot be done by limiting the participation to those instances where the Member State defends itself in infringement actions by the Commission or submits written or oral observations in preliminary ruling cases originating from its national Courts. Such participation may be defined as being defensive. In order to be more influential, a Member State needs act in a wider perspective by participating in cases originating from or touching more directly upon other Member States. This is essential since judgments of the Courts interpreting for instance the provisions of the Regulation 1049/2001 on public access to documents bind all Member States. Merely to follow-up and not to participate in a case which is deemed important for a Member State might even be compared with a situation where a Member State representative would neglect active preparations of a draft Directive in Commission’s or EU Council’s working party and wait for the other Member States to do the trick.

Sometimes a Member State may by its participation in the Courts’ proceedings choose to promote a certain vision of EU law.31

**Choosing the Most Pertinent Courts’ Cases**

To do its work properly a Member State’s agent should plan his or her work beforehand. But advanced planning is demanding since, contrary to the working programmes of the Presidency of the EU Council or those of the European Commission, the Courts cannot exercise such planning into which the Member States’ agents could try to influence and thus define the annual strategies in advance.

There are indeed certain groups of cases in which Finland tend to participate. These include for instance cases relating to access to documents and currently also cases on free movement of patients seeking medical care in another Member State than the State of his residence. The threshold to participate in such cases is by definition not very high since it is considered to be consistent policy to promote similar legal arguments in cases that resemble earlier cases in which we have been involved with. Irrespective of this policy of consistent participation, all Courts’ cases are individually scrutinized. Should there be from our point of view relevant differences in apparently similar cases, a decision may well be made as to participate in one case and not in another.

How then pick and choose the most pertinent cases? Member States are by definition active in infringement cases against them. As of other cases, in other words direct actions by the Community institutions or by other Member States as well as preliminary reference cases, we rely, on the one hand, on the our line ministries.

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when it comes to cases touching upon their expertise, and, on the other hand, we scrutinize the cases ourselves and try to catalyse our line ministries. Networking among civil servants in Finland is flexible and not based on cumbersome hierarchy. This is advantageous in many perspectives. The participation of Finland in an interesting Court case is not prevented by formal grounds or lengthy official decision making procedures.

Politically, economically or legally most important cases are regularly dealt with by the Governmental Standing Committee on EU Affairs chaired by the Prime Minister. The arguments a Finnish agent puts forward in Courts proceedings are thus politically endorsed. The political backup is appreciated in particular in cases where there are divergent views among the Member States or where the outcome of the case may bring with it important financial or legal consequences or where the relation of different fundamental rights is at stake.

There is also extensive collaboration between the agents of other Member States. This takes place both during the written phase and the oral phase of the proceedings of an individual case. Member States agents give one another information of horizontally important preliminary reference cases and direct actions. A general meeting of the Member States agents is organised once a year. This occasion is used to discuss recent case law of the Courts and issues relating to the smooth functioning of the Courts proceedings. There is also active collaboration among Nordic agents.

**Potential Limitations to Member States Participation in Court Proceedings**

There are potential limitations to our participation in Courts proceedings.

One such limitation could be the lack of information about the cases. Member States get to know about the cases in many ways. When it comes to Article 226 EC infringement cases concerning Finland there is no problem whatsoever; the applications are always duly served by the Court's registries. As of Article 226 EC infringement cases concerning other Member States and Article 230 EC direct actions we follow-up the Official Journal of the European Union containing information about the cases and distribute pertinent parts of it to our line ministries electronically. Occasionally the information contained in the Official Journal is not considered to be sufficient for us to make a final decision as whether the case is pertinent enough for us to participate in it. In those instances we may try to find out more about the case by direct contacts with our colleagues in other Member States. From time to time we intervene in a case in order to receive all the documents of the case and decide on the basis of the information contained in these documents whether we remain intervener in the case or whether we withdraw from the case. Withdrawal takes place rarely. Should there be in the Statute of the Court of Justice a possibility for the Member States to intervene in direct action cases on an amicus curiae basis i.e. without stating which party to support might have enabled our intervention in some individual cases. This has occurred in a very limited number of
cases where have for instance found it too sensitive to set ourselves against another Member State or where we support some of the arguments of the applicant and some of the defendant.

All Article 234 EC preliminary references are directly notified to the Member States on the basis of Article 23 of the Court's Statute. We inform our line ministries and authorities about all preliminary reference cases that touch upon their substance.

Another potential limitation to our participation is the prescribed time to act in a case. According to Article 226 EC the defendant has one month for putting forward its defence. For an intervener the President sets the time limit for the letter of intervention. We rather seldom ask for prolongation of the prescribed time. Complicated facts of a case or concurrent absence of several experts may justify us to ask for such prolongation. According to Article 230 EC we have two months for our own application. The same applies to written observations in preliminary reference cases. In Article 300.6 EC opinions the deadline for observations is prescribed by the President.

We have not experienced that the prescribed time limits have caused insuperable obstacles to our participation in the Court's proceedings. Expedited and urgent procedures have proved to be manageable as well. It is, however, to be noted that only three Member States participated in the Finnish urgent procedure case C-388/08, Leymann & Pustovarov, although the pertinent question in the case on the interpretation of the European arrest warrant is generally significant. It is not clear whether the urgency of the proceedings or the language of the case was the conclusive factor for so few Member States to appear before the Court. During the phase where the Court informed the Member States about this PPU procedure informal information about the contents of the case was given to those Member States’ agents that requested it.

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Having had the privilege to appear before both the Court of Justice and the Court of First Instance I consider that there are actual differences in the proceedings of these Courts that cannot be perceived by studying the Statute or the Rules of Procedure. The inherent necessity to investigate complicated facts of competition and State aid cases has its reflections on how the Court of First Instance handles other categories of cases as well. The proceedings - both written and oral - have been interactive and not excessively formal. From a purely personal point of view, acting as an agent of a Member State, I have found this very rewarding. It gives a feeling of a fair trial and of thorough deliberation prior to a judgment. Although it may not be found appropriate for a Member State agent to advise the Court on how it should manage court proceedings, I would humbly ask the honoured Members of this Court to keep up with this good practise.

Conclusions

Member States are privileged parties and interveners in the Court of Justice of the European Community and in the Court of First Instance of the European Community. They may act in various categories of Court proceedings and play several roles in these proceedings via which the Courts exercise their jurisdiction. A Member State may have better guarantees to have its legal arguments tested in a direct action case than in a preliminary reference case since the margin of discretion of the Court of Justice is narrower in direct action cases. In a preliminary reference case the Court may consider the case in a wider EU Law context than in what the referring national Court did.

It is essential for the Member States to be active participants in Courts proceedings. Every Member State has an equal standing before the Courts. A Member State participating in proceedings before these Courts does not need to count the number of voices for or against the legal interpretation it intends to submit in its observations. The weighting factor to a Member States ‘success’ in a Court case is the quality of its arguments and their consistency and coherence. But if these argumentative conditions are not fulfilled and the Courts are thus not convinced, the unanimity of the Member States on their legal arguments is inconsequential for the outcome of the case. Occasionally in such cases the Court may be criticised for exceeding its role of a judiciary. Open discourse on Courts’ case law is valuable also in those instances since this may enhance the general understanding of the role of the Courts as part of the institutional and constitutional framework of the European Union and thus strengthen the general legitimacy of the Courts’ rulings.

The case law of the Courts is inseparable part of the EU legal order. Case law may be distinguished in several layers: individual cases, established case law in certain sectors of law and deeper impact of the case law in the evolution of the EU legal order. For a Member State being both an addressee and part of this legal order it is essential to have an opportunity to participate in the evolution of each these layers.

It is not an easy task for a Member State to choose the most pertinent Court cases in which to participate. Networking among national experts and colleagues of other Member States is a valuable means to discover these cases. In Finland politically, economically or legally most important cases are regularly dealt with by the Governmental Standing Committee on EU Affairs chaired by the Prime Minister. The arguments a Finnish agent puts forward in Courts proceedings are thus politically endorsed.

Potential limitations to Member States participation in Courts proceedings may consist of the lack of information about the cases and time limits. Thus far these potential limitations have not caused insuperable obstacles to our participation.