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*Never too late to communicate.
Constructive and critical input from national private law
judges before and after preliminary ruling procedures*

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1. *Introduction*

While I was teaching judges and students I pondered the question of how to deal with the impact of EU law in concrete private law relationships and it became clear to me that it is not easy to comprehend the ideas and thoughts of national judges who refer preliminary questions on the one hand, and of the Advocates General and judges of the Court of Justice of the European Union who deal with the same matters on the other hand. It also struck me that it may be equally complicated to explain and understand the application by the national judge of a preliminary ruling of the Court of Justice of the European Union to the case at hand.

The results of such reflection within the domain of primary EU law (fundamental freedoms, competition law, non-discrimination, general principles of EU law), the (non-)implementation of directives and ex officio application of provisions of consumer law directives can be found in the *Ius Commune Casebook on European Law and Private Law*¹ and in the contributions to *Primary EU Law and Private Law Concepts*².

The participants to this conference may recognise the shortcomings in

¹ A. HARTKAMP, C. SIEBURGH & W. DEVROE, *European Law and Private Law, Ius Commune Casebook*, Oxford, Hart, 2017.

² H.-W. MICKLITZ & C. Sieburgh (eds.), *Primary EU Law and Private Law Concepts*, Antwerp, Intersentia 2017.

communication between courts and other actors. If such difficulties have not been perceived, the Casebook and this conference might contribute to pinpoint them.

Many of us may be confused by judgements that reach different conclusions from those expected from judgements in similar cases³. However, rather than emphasising the difficulties I would like to take the opportunity given by the initiators and organisers of this meeting to stress the importance of continuing communication between the actors involved, both within and about cases.

Why is this type of communication important? In the first place, the communication envisioned takes place within the limits of the facts and problems of a concrete case, therefore it can benefit from accuracy. Besides, since the exchange of thoughts relates to a concrete problem, the discussion aims at achieving practical results to solve that very matter. By employing this bottom-up approach the discussants anticipate possible outcomes. Their discussion sheds light on how EU law provisions and decisions of the Court of Justice of the European Union are understood. This kind of exchange provides constructive and critical input regarding both national law and EU law⁴. By communicating, the actors are able to detail the technicalities and case-related aspects of the question. As a result, the Court of Justice of the European Union is provided with an accurate photograph of the legal question and can therefore deliver a decision that the referring judge can convincingly apply to the case at hand. Moreover, other actors like other judges, national governments and individuals can gain better understanding of what has been decided. Greater comprehension enhances the legitimation of the law as it stands.

Based on my experience as a (post-doctoral) lecturer, a scholar and a judge, I can assure that this approach works. Even if a solution is not reached or agreed upon instantaneously, communication leads participants

³ Anticipating the elaboration of the case *Abercrombie & Fitch*, I refer to judgements such as *Mangold* (CJEU, 22 November 2015, C-144/04, *Mangold/Helm*) and *Küçüdeveci* (CJEU, 19 January 2010, C-555/07, *Küçüdeveci/Swedex*). The impact of the general principle of EU law of non-discrimination on the private law relationship is the subject of C.H. SIEBURGH, *The Union-Law Principle of Equality and its Effect on Private Law*, in: A.S. Hartkamp a.o. (eds), *The Influence of EU Law on National Private Law*, Deventer, Kluwer 2014, pp. 271-295.

⁴ The author promoted this method before in C.H. SIEBURGH, *A Method to substantively Guide the Involvement of EU Law in Private Law Matters*, in *ERPL* 2013/3-4, pp. 1165-1188 and Id., *General Principles and the Charter in Private Law Relationships: Constructive and Critical Input from Private Law*, in U. Bernitz a.o. (eds), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn, Wolters Kluwer 2013, Chapter 10, pp. 233-247.

to endeavour to find solutions. Rather than listening to the elaboration of someone else's ephemeral theory, they learn by doing, they envision the obstacles and become part of a work in progress, getting committed and actually involved. As a consequence, in the long run they keep on doubting, reflecting and seeking solutions⁵.

These encouraging experiences have led me to regard communication as *the* way to broaden perspectives and reach a higher level of understanding, which in its turn is a requirement and starting point for the development of the law.

2. *Example. Abercrombie and Fitch v. Bordonaro*: a. *Facts and legal framework*; b. *National judges*; c. *Actors and Court of Justice of the European Union on different treatment, legitimate aim and appropriate measure*; d. *Evaluation of "communication" by the Court of Justice of the European Union*

In order to clarify what I mean I will refer to the exchange of perspectives that took place in the Italian case *Abercrombie and Fitch v. Bordonaro*⁶. Bordonaro had brought an action before the Tribunale di Milano seeking that his on-call, fixed-term contract and his dismissal be declared unlawful on the grounds of age discrimination.

a. *Facts and legal framework.*

In December 2010 Mr Bordonaro, a worker under Art. 45 TFEU⁷, concluded an on-call contract with Abercrombie and Fitch. The contract, which had initially been a fixed-term employment contract, was converted into a permanent contract. On the basis of the contract Bordonaro provided assistance to clients and operated a till. After his 25th birthday he found out that his name was no longer included in the work schedule.

The national rule governing on-call contracts (Art. 34 para 2 of the

⁵ I refer to a convincing result of this approach: A. HARTKAMP, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Antwerp, Intersentia, 2016.

⁶ CJEU, 19 July 2017, C-143/16, *Abercrombie & Fitch/Bordonaro*.

⁷ A worker is a person who for a certain period of time performs services for and under the direction of another person, in return for which he receives remuneration. The CJEU makes it clear that it is for the national court to assess whether Bordonaro is a worker. CJEU 19 July 2017, C-143/16, *Abercrombie & Fitch/Bordonaro*, paras 19-23.

Decreto Legislativo 276/2003) provides for specific access and dismissal conditions for workers under 25 years of age⁸. The provision includes the automatic dismissal of the worker upon his or her reaching the age of 25. The termination of an on-call contract with a worker aged 25 or more is conditional (described by collective labour agreement or a decree). The difference in treatment of workers under 25 years of age raises the question of whether the national law provision is contrary to the principle of non-discrimination on the grounds of age referred to in Directive 2000/78 and Art. 21 para 1 of the Charter, especially because the national provision does not contain any appropriate express reason for the purposes of Art. 6 para 1 of the directive⁹.

b. *National judges*

The approach by the successive national judges differed. According to the Tribunale di Milano it was not a case of discrimination. It declared inadmissible the action of Bordonaro that sought a ruling (amongst others) of unlawfulness of the dismissal.

The Corte d'appello di Milano considered the above-mentioned domestic provision to be contrary to the principle of non-discrimination on the grounds of age. It solved the problem on the level of the concrete private law relationship and held that there was an employment relationship of an unlimited duration and ordered Abercrombie to reinstate Bordonaro in his post and to compensate him for the loss suffered.

The Corte suprema di cassazione dealt with the case on the level of the conformity of the applicable national rule and referred a preliminary question to the Court of Justice of the European Union.

c. *Actors and Court of Justice of the European Union on different treatment, legitimate aim and appropriate measure*

Four subjects for communication can be identified in the contributions by the judges, the parties, the Italian Government, the European Commission and the Advocate General Bobek. Firstly, the issue concerning the compatibility of Art. 34 para 2 Decreto Legislativo 276/2003 with the

⁸ The differences in access conditions are not relevant for the discussion in this contribution; see CJEU, 19 July 2017, C-143/16, *Abercrombie & Fitch/Bordonaro*, para. 26.

⁹ CJEU, 19 July 2017, C-143/16, *Abercrombie & Fitch/Bordonaro*, paras 14-15.

Directive. Secondly, whether workers under 25 of age and workers aged 25 or more are treated differently. Thirdly, whether workers under 25 years of age are treated less favourably than workers aged 25 or more. And finally, which judge has to assess these points.

The discussion regarding the difference in treatment focuses on whether these differences are less favourable and have a legitimate aim.

The assessment of whether or not the measure is less favourable is, according to the Advocate General, a matter for the national court. This assessment should take into account the impact of the operation of the rule, which requires both knowledge of the factual impact and knowledge of the further legislative environment in which the provision operates¹⁰.

The Court of Justice of the European Union, however, did not elaborate on which court is the most appropriate to deal with this matter.

It held that the national provision creates a difference in treatment on the grounds of age¹¹ and subsequently it deals with the question of whether such difference in treatment can be justified.

Although no legitimate aim is mentioned in the decree, the Italian Government argued that the different treatment of workers under 25 years of age is aimed at facilitating access of young people to the labour market and to obtain professional experience. Even if this possibility is flexible and limited in time, could constitute a springboard towards new employment possibilities¹².

The Advocate General argued that these aims (flexibility of the labour market, fostering access to the labour market for young people and providing a first employment opportunity for young people) may well be legitimate under the directive¹³, but the same need to be more clearly and coherently identified and specified in order to assess their appropriateness and necessity. According to the Advocate General, it is for the national court to assess the appropriateness and necessity¹⁴. For each of the aims he provided the national court with some guidelines¹⁵.

Notwithstanding the opinion of the Advocate General, the Court of Justice of the European Union ruled that the aims of the measure (flexibility

¹⁰ Opinion of Advocate General Bobek, C-143/16 (*Abercrombie & Fitch/Bordonaro*), para. 70.

¹¹ Paras 24-28.

¹² Para. 33.

¹³ Opinion of Advocate General Bobek, C-143/16 (*Abercrombie & Fitch/Bordonaro*), paras 74-83.

¹⁴ Opinion of Advocate General Bobek, C-143/16 (*Abercrombie & Fitch/Bordonaro*), paras 84.

¹⁵ Opinion of Advocate General Bobek, C-143/16 (*Abercrombie & Fitch/Bordonaro*), paras 85-105.

of the employment market, encouragement of recruitment and promotion of young people on the labour market) itself are legitimate¹⁶. Moreover, it held that the measure is appropriate and necessary¹⁷. In conclusion, it ruled that the directive and Art. 21 Charter do not preclude a provision, such as Art. 34 para 2 Decreto Legislativo 276/2003¹⁸.

d. *Evaluation of “communication” by the Court of Justice of the European Union.*

In this case the Court of Justice of the European Union ruled on the matter referred to it. Notwithstanding its having dwelled on the requirements that have to be met to identify a legitimate aim, it hardly communicated anything. It stressed the broad discretion enjoyed by Member States in their choice, not only in order to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving the same¹⁹, but its detailed and factual consideration did not leave room for the doubts expressed by the national judge in relation to the existence of a legitimate aim. Subsequently, the referring judge quashed the decision of the Corte d’appello di Milano and referred the case to the same court in a different combination²⁰.

However, legal scholars have argued that the way the Court of Justice of the European Union dealt with the national details was not sound. Indeed, the Italian supreme court ought to consider both the Italian constitutional background and the concrete factual situation and context of the case more precisely in order to correctly assess the provision. Additionally, it has been argued that the decision of the Court of Justice of the European Union does not prevent judges dealing with slightly different facts, for example a case involving a worker under 25 of age, albeit not at his first work experience, from regarding the national provision as discriminatory²¹.

¹⁶ Paras 30-39.

¹⁷ Paras 41-46.

¹⁸ Para. 47.

¹⁹ Paras 31 and 46.

²⁰ Corte suprema di Cassazione, 21 February 2018, no. 4223.

²¹ With reference to other authors see M. PERUZZI, *Giovani, carini e inoccupati: il caso Abercrombie alla battute finali. Oppure no?*, in *Rivista Italiana di diritto del lavoro*, 2018, II, pp. 431-439; D. MARINO, *La Cassazione sul caso Abercrombie dopo la pronuncia della Corte di Giustizia: «Non poteva che attenervisi?»*, in *Rivista giuridica del lavoro*, 3/2018, II, pp. 316-327.

3. Tailoring communication

The reasoning by the Court of Justice of the European Union in the *Abercrombie* case resembles a one-way street: from the Court of Justice of the European Union towards the national judge, rather than a sophisticated exchange between judges that both play a part in safeguarding non-discrimination rules.

After the *Abercrombie* case the Court of Justice of the European Union employed this approach again in the *Cresco* case²², where it elaborated upon the concrete remedy in a non-discrimination case. The measure under scrutiny was held to be discriminatory by the Court of Justice of the European Union. The subsequent application by the Court of Justice of the European Union of EU law to the case to identify the appropriate remedy may be more convincing. Once the discrimination is ascertained, until the Member State concerned amends its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to public holiday pay where the employer has refused to approve such request. As soon as the Member State abolishes the discriminatory measure, the Member State's legal system is no longer in need of relying on that remedy.

In cases such as *Abercrombie*, however, the Court of Justice of the European Union does not limit itself to providing a remedy. It seems to pretend that it is able to assess the Member State's legal system and its decision tends to bind the Member State in a farther-reaching manner. As a result of the lack of in-depth comprehension of the factual context, the assessment of the Court of Justice of the European Union is not convincing.

I agree with legal scholars that encourage the national court to take such an answer of the Court of Justice of the European Union as a starting point for renewed communication. The national court may for example search for other allies, such as the national constitutional court. It may also reconsider and reassess the facts to open alternative grounds for communication with the decision of the Court of Justice of the European Union.

As stated in the introduction, communication is the key to profoundly analysing a case, in order to identify and remedy flaws and discover *lacunae*

²² CJEU, 22 January 2019, C-193/17, ECLI:EU:C:2019:43 (*Cresco*).

in a reasoning. For these reasons, communication is the ultimate instrument to achieve a more legitimate solution. Therefore, it is essential to give constructive and critical input when referring a question, to anticipate appropriate answers and to explain doubts and drawbacks. Even if the answer given by the CJEU appears to be *the decision* on the given matter, do not hesitate to transform it into a new starting point for exchange, keeping in mind that it is never too late to communicate.