

The Law of the EUROPEAN UNION

Teaching Material



THE COMMUNITY SYSTEM OF JUDICIAL REMEDIES:
JURISDICTION EXAMINED: ARTICLE 234

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NOTE AND QUESTIONS

1. Article 234 (ex Art. 177) provides the legal foundation of the entire Community system. Strong words? We will have already seen that it is the centre-piece of the system of judicial remedies available to the individual. Later in the course we shall see that this Article provided the Court with a powerful rationale for the process Professor Weiler called the "constitutionalization" of the Treaties.

Preliminary references have been the procedural vehicle through which key concepts such as direct effect and supremacy have developed. As described by Mancini and Keeling: "If the doctrines of direct effect and supremacy are [...] the "twin pillars of the Community's legal system," the reference procedure laid down in Article 177 must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion--beautiful but not of much practical utility." (G. Federico Mancini & David T. Keeling, From CILFIT to ERT: The Constitutional Challenge Facing the European Court, 11 Y.B. Eur. L. 1, 2-3 (1991))

2. Read first the text of Article 234 and identify the problems of interpretation to which the text of Article 234 gives rise. Examine the text carefully and systematically. Virtually all terms in the Article allow an interpretative choice in which is involved a policy issue. Identify these issues. The readings that follow will indicate the answers and policy choices adopted by the Court.

e.g.

The Court shall have **jurisdiction**...: What does this mean? What policy issues hide behind the possible range of interpretations to be given to the concept of the Court's jurisdiction?

... to give **preliminary rulings**...: What questions should be asked about the term preliminary ruling?

1. RELEVANT TREATY PROVISIONS

Article 234 EC Treaty (ex Art. 177)

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this Treaty;
- b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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 of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

2. WHAT IS A COURT OR TRIBUNAL?



NOTE AND QUESTIONS

1. Only a “court or tribunal” of a Member State may make a preliminary reference to the Court under Article 234. Whether the referring body is a “court or tribunal” is normally not an issue, but every once in a while it is. After having read the cases in this section, but also in other sections of this Unit, you should formulate an abstract principle for determining a “court or tribunal” in the sense of Article 234 (ex Art. 177).

2. Proposals have been made at recent IGCs to restrict the level of national courts from which Preliminary references can be made. Germany for instance proposed that only national appellate courts (possibly only supreme courts) would be permitted to refer questions to the European Courts. Think of possible reasons why would such a solution, however it would reduce the flow of preliminary references, and by so doing reduce the burden on the Court, be problematic? What could a lower court do when it would face an EC measure, applicable to the case before it, that it would deem to be invalid under the EC Treaty?

1.1 Case C-54/96: Dorsch Consult

Dorsch Consult Ingenieurgesellschaft mbH

v

Bundesbaugesellschaft mbH

C-54/96

Court of Justice

17 September 1997

[1997] E.C.R. I-4983

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 5 February 1996, received at the Court on 21 February 1996, the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board, hereinafter 'the Federal Supervisory Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).
2. The question has been raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH (hereinafter 'Dorsch Consult') and Bundesbaugesellschaft Berlin mbH (hereinafter 'the awarding authority') concerning a procedure for the award of a service contract.
3. On 28 June 1995 the awarding authority published in the Official Journal of the European Communities a notice advertising the award of a contract for architectural and construction engineering services. On 25 August 1995 Dorsch Consult submitted its tender to the awarding authority. In all, 18 tenders were received, of which seven, including that of Dorsch Consult, were chosen for further consideration. On 30 November 1995, two companies, together with an architect, were chosen to form a working party to perform the services which were the subject of the contract. The contract itself was signed on 12 January 1996. Dorsch Consult was informed on 25 January 1996 that its tender was not the most advantageous economically.
4. Having learned that the awarding authority had not chosen it for the contract but before its tender was formally rejected, Dorsch Consult had applied, on 14 December 1995, to the Bundesministerium für Raumordnung, Bauwesen und Städtebau (Federal Ministry for Regional Planning, Building and Urban Planning), as the body responsible for reviewing public procurement awards (Vergabeprüfstelle), seeking to have the contract-awarding procedure stopped and the contract awarded to it. It considered that, in concluding the contract with another undertaking, the awarding authority had acted in breach of both Directive 92/50 and Paragraph 57a(1) of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter 'the HGrG'). By decision of 20 December 1995, the review body held that it had no competence in the matter on the ground that, under Paragraphs 57a and 57b of the HGrG, it had no power to review the award of contracts when they related to services.
5. In those circumstances, on 27 December 1995 Dorsch Consult lodged an application for a determination by the Federal Supervisory Board on the ground that the review body had

wrongly declined jurisdiction. It stated that, in so far as Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) had not been transposed, it was directly applicable and had to be complied with by the review bodies.

6. The Federal Supervisory Board found that the Federal Republic of Germany had not yet transposed Directive 92/50. Although a circular had been issued by the Federal Ministry for Economic Affairs on 11 June 1993 stating that the directive was directly applicable and that it had to be applied by the administration, it could not be regarded as a proper transposition of the directive. According to the Federal Supervisory Board, where public service contracts are concerned, German domestic law does not empower a review body to determine whether the provisions governing public procurement have been complied with. It is quite possible that the provisions of Directive 92/50 have direct effect. Finally, the Federal Supervisory Board is unsure whether, by virtue of Article 41 of Directive 92/50, the competence of existing review bodies also applies directly to the award of public service contracts.
7. The Federal Supervisory Board therefore suspended proceedings and referred the following question to the Court of Justice:

'Is Article 41 of Council Directive 92/50/EEC of 18 June 1992 to be interpreted to the effect that, after 30 June 1993, the bodies set up by the Member States which, under Council Directive 89/665/EEC of 21 December 1989, are competent to review procedures for the award of public contracts falling within the scope of Directives 71/305/EEC and 77/62/EEC are also competent to review procedures for the award of public service contracts within the meaning of Directive 92/50/EEC in order to determine whether alleged infringements of Community public procurement law or of domestic rules enacted in implementation of that law have taken place?'

Legal background

8. The purpose of Directive 92/50 is to regulate the award of public service contracts. It applies to contracts having a value above a certain limit. As far as the matter of legal protection is concerned, Article 41 provides:

'Article 1(1) of Council Directive 89/665/EEC ... shall be replaced by the following:

"1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law."

9. In accordance with Article 44(1), Directive 92/50 had to be transposed by the Member States before 1 June 1993.

10. Article 2(8) of Directive 89/665 provides:

"Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this

independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

11. Directive 89/665 was transposed into German law by a Law of 26 November 1993 (BGBl. I, p. 1928), which supplemented the HGrG by adding Paragraphs 57a to 57c.
12. Paragraph 57a(1) of the HGrG provides:

'In order to meet obligations arising from directives of the European Communities, the Federal Government shall regulate, by means of regulations, with the assent of the Bundesrat, the award of public supply contracts, public works contracts and public service contracts and the procedures for awarding public service contracts ...'
13. Paragraph 57b(1) of the HGrG makes provision for the procedures for awarding public supply contracts, public works contracts and public service contracts mentioned in Paragraph 57a(1) to be reviewed by review bodies.

Under Paragraph 57b(2), the Federal Government is to adopt, in the form of regulations, with the assent of the Bundesrat, the provisions governing the competence of those review bodies. According to subparagraph (3), a review body must initiate a review procedure if there is evidence of a breach of procurement rules applicable under a regulation adopted pursuant to Paragraph 57a. In particular, it must initiate that procedure where a person who has, or had, an interest in a particular contract claims that the aforementioned provisions were contravened.
14. According to Paragraph 57b(4) of the HGrG, the review body must determine whether the provisions adopted pursuant to Paragraph 57a have been complied with. It may compel the awarding authority to annul unlawful measures or decisions or to take lawful measures or decisions. It may also provisionally suspend a procedure for the award of a contract. Under Paragraph 57b(5), a review body may require the awarding authority to provide the information necessary for it to carry out its task. Subparagraph (6) provides that actions for damages in the event of breach of the provisions applicable in relation to the award of contracts are to be brought before the ordinary courts.
15. Paragraph 57c(1) of the HGrG provides that the Federation and the Länder must each establish a supervisory board, performing its functions independently and on its own responsibility, to supervise procedures for the award of contracts in the fields concerning them. According to subparagraphs (2), (3) and (4) of that provision, each supervisory board is to sit in chambers composed of a chairman, an official assessor and a lay assessor, who are to be independent and subject only to observance of the law. The chairman and one of the assessors must be public officials. As regards annulment or withdrawal of their appointment and their independence and dismissal, various provisions of the Richtergesetz (Law on the Judiciary) apply by analogy. As regards the annulment or withdrawal of a lay member's appointment, certain provisions of the Richtergesetz also apply by analogy. Where a lay member commits a serious breach of his duties, his appointment must be annulled. The term of office of a supervisory board's lay members is five years.
16. Under subparagraph (5), the supervisory board is to determine the legality of determinations made by review bodies but it does not review the way in which they ascertain the facts. Where a determination is found to be unlawful, the supervisory board directs the review body to make a fresh determination taking account of its own legal findings. Paragraph 57c(6) of the HGrG provides that any person claiming that the provisions governing the award of public contracts have been infringed may make application to the supervisory board within a period of four weeks following the relevant determination of the review body.
17. Paragraph 57c(7) of the HGrG establishes a Federal Supervisory Board (Vergabeüberwachungsausschuß des Bundes). Its official members are the chairman and assessors from the decision-making departments of the Bundeskartellamt (Federal Cartel

Office). The president of the Bundeskartellamt decides on the composition of the Federal Supervisory Board and the formation and composition of its chambers. He appoints lay assessors and their deputies on a proposal from the leading public-law trade boards. He also exercises administrative supervisory control on behalf of the Federal Government. The Federal Supervisory Board adopts its own internal rules of procedure.

18. Pursuant to Paragraph 57a of the HGrG the Federal Government adopted a regulation on the award of contracts. This regulation is, however, applicable only to supply contracts and works contracts and not to contracts for services. Directive 92/50 has not yet been transposed by the Federal Republic of Germany.

19. Pursuant to Paragraphs 57b and 57c of the HGrG, the Federal Government has adopted a regulation on the procedure for review of public procurement awards (Verordnung über das Nachprüfungsverfahren für öffentliche Verträge, BGBl. I 1994, p. 324). Paragraph 2(3) of the regulation provides:

'The review body's determination regarding the awarding authority shall be given in writing, contain a statement of reasons and be notified without delay. The review body shall send without delay to the person claiming that there has been a breach of public procurement provisions the text of its determination, shall draw attention to the possibility of making application for a determination by the supervisory board within a period of four weeks and shall name the competent supervisory board.'

20. Paragraph 3 provides:

'(1) Procedure before the Public Procurement Awards Supervisory Board shall be governed by Paragraph 57c of the Haushaltsgrundsätzegesetz and by this regulation according to the rules of procedure which the board shall adopt.

(2) The Public Procurement Awards Supervisory Board shall be obliged, under Article 177 of the Treaty establishing the European Community, to make a reference to the Court of Justice of the European Communities when it considers that a preliminary ruling on a question relating to the interpretation of that Treaty or to the validity and interpretation of a legal act adopted on that basis is necessary in order to enable it to make its determination.

(3) Before a chamber makes any determination, the parties to the procedure before the procurement review body shall be heard.

(4) A chamber shall not be empowered to suspend a procedure for the award of a contract or to give other directions concerning a procedure for the award of a contract.

(5) A chamber shall reach its determination by an absolute majority of votes. Determinations shall be in writing, contain a statement of reasons and shall be sent to the parties without delay.'

21. The rules of procedure of the Federal Supervisory Board regulate the organization and allocation of cases and the conduct of procedure, which consists of a hearing to which the persons concerned are called, and the conditions governing determinations of the Federal Supervisory Board.

Admissibility

22. Before the question submitted by the national court is addressed, it is necessary to examine whether the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty. That question must be distinguished from the question whether the Federal Supervisory Board fulfils the conditions laid down in Article 2(8) of Directive 89/665, which is not in point in this case.

23. In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by

law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, the judgments in Case 61/65 Vaassen (néé Göbbels) [1966] ECR 261; Case 14/86 Pretore di Salò v Persons unknown [1987] ECR 2545, paragraph 7; Case 109/88 Danfoss [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 Almelo and Others [1994] ECR I-1477; and Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9).

24. As regards the question of establishment by law, the Commission states that the HGrG is a framework budgetary law which does not give rise to rights or obligations for citizens as legal persons. It points out that the Federal Supervisory Board's action is confined to reviewing determinations made by review bodies. However, in the field of public service contracts, there is, as yet, no competent review body. The Commission therefore concludes that in such matters the Federal Supervisory Board has no basis in law on which it can act.
25. It is sufficient to note in this regard that the Federal Supervisory Board was established by Paragraph 57c(7) of the HGrG. Its establishment by law cannot therefore be disputed. In determining establishment by law, it is immaterial that domestic legislation has not conferred on the Federal Supervisory Board powers in the specific area of public service contracts.
26. Nor is there any doubt about the permanent existence of the Federal Supervisory Board.
27. The Commission also submits that the Federal Supervisory Board does not have compulsory jurisdiction, a condition which, in its view, may mean two things: either that the parties must be required to apply to the relevant review body for settlement of their dispute or that determinations of that body are to be binding. The Commission, adopting the second interpretation, concludes that German legislation does not provide for the determinations made by the Federal Supervisory Board to be enforceable.
28. It must be stated first of all that Paragraph 57c of the HGrG establishes the supervisory board as the only body for reviewing the legality of determinations made by review bodies. In order to establish a breach of the provisions governing public procurement, application must be made to the supervisory board.
29. Secondly, under Paragraph 57c(5) of the HGrG, when the supervisory board finds that determinations made by a review body are unlawful, it directs that body to make a fresh determination, in conformity with the supervisory board's findings on points of law. It follows that determinations of the supervisory board are binding.
30. The Commission also submits that since, according to the Federal Supervisory Board's own evidence, procedure before that body is not inter partes, it cannot be regarded as a court or tribunal within the meaning of Article 177 of the Treaty.
31. It must be reiterated that the requirement that the procedure before the hearing body concerned must be inter partes is not an absolute criterion. Besides, under Paragraph 3(3) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.
32. According to the Commission, the criterion relating to the application of rules of law is not met either, because, under Paragraph 57c of the HGrG and Paragraph 3(1) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, procedure before the Federal Supervisory Board is governed by rules of procedure which it itself adopts, which do not take effect in relation to third parties and which are not published.
33. It is, however, undisputed that the Federal Supervisory Board is required to apply provisions governing the award of public contracts which are laid down in Community directives and in domestic regulations adopted to transpose them. Furthermore, general procedural requirements, such as the duty to hear the parties, to make determinations by an absolute majority of votes and to give reasons for them are laid down in Paragraph 3 of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, which is published in the Bundesgesetzblatt. Consequently, the Federal Supervisory Board applies rules of law.

34. Finally, both Dorsch Consult and the Commission consider that the Federal Supervisory Board is not independent. They point out that it is linked to the organizational structure of the Bundeskartellamt, which is itself subject to supervision by the Ministry for Economic Affairs, that the term of office of the chairman and the official assessors is not fixed and that the provisions for guaranteeing impartiality apply only to lay members.
35. It must be observed first of all that, according to Paragraph 57c(1) of the HGrG, the supervisory board carries out its task independently and under its own responsibility. According to Paragraph 57c(2) of the HGrG, the members of the chambers are independent and subject only to observance of the law.
36. Under Paragraph 57c(3) of the HGrG, the main provisions of the Richtergesetz concerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the Richtergesetz concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers.
37. It must also be pointed out that, in this particular instance, the Federal Supervisory Board exercises a judicial function, for it can find that a determination made by a review body is unlawful and it can direct the review body to make a fresh determination.
38. It follows from all the foregoing that the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, so that the question it has referred to the Court is admissible.

[...]

1.2 Arbitration Tribunals and Article 234

1.2.1 Case 102/81: Nordsee



NOTE AND QUESTIONS

One function defining a court or tribunal within the meaning of Article 234 EC is whether its **jurisdiction is compulsory**. This condition seems to exclude arbitration tribunals.

1. The rapid development of arbitration as an alternative method of dispute resolution in international trade, including transactions involving EU trade, has increased the significance of questions relating to the application, enforcement, and interpretation of EU law, both in arbitration proceedings and in related court proceedings, aimed at setting aside or the recognition and enforcement of arbitration awards. Why did the court, in your opinion, decline the opportunity to broaden the interpretation of “court or tribunal” and by so doing enlarge the circle of institutions authorized to seek preliminary rulings?

2. What do you think of the Courts position expressed in Paragraph 14, that Community law issues can still be raised in national court proceedings ancillary to the arbitration?

Nordsee Deutsche Hochseefischerei GmbH

V

**Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse
Hochseefischerei Nordstern AG & Co. KG**

Case 102/81

22 March 1982

Court of Justice

[1982] ECR 01095

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

Three German shipping groups contracted for the joint construction of freezer ships and sought financial aid for this project from the EC. When they learnt that funding would be available for some

but not for all the ships they planned to build, they companies entered into a secret agreement to share the available financial aid equally among themselves – irrespective of how the EC funds were divided. One of the shipping groups (Nordsee) later sought payment under their agreement from another of them (Nordstern) because it had built six ships, while the other had only built three. Nordstern refused to pay, alleging that the agreement was in violation of Community law. The Commission viewing pooling contracts as a fraudulent diversion of the EC Fund's aid, had received advance assurance from all three groups that they had no intention of pooling any aid awarded to them.

The agreement contained an arbitration clause excluding recourse to the ordinary courts, and an arbitrator eventually heard the case. German law requires private arbitrators to apply German Civil procedure, makes arbitral awards definitive and provides for judicial enforcement, the arbitrator decided that the validity under German law depended on the answer on the permissibility of pooling agreements under EC law, and therefore sought a preliminary ruling from the ECJ.

Judgement:

7. Since the arbitration tribunal [...] was established pursuant to a contract between private individuals the question arises whether it may be considered as a court or tribunal of one of the Member States within the meaning of Article 177 (now 234).

[...]

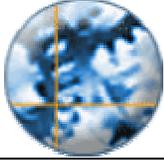
9. It must be noted that, as the question indicates, the jurisdiction of the Court to rule on questions referred to it depends on the nature of the arbitration in question.
10. It is true, as the arbitrator noted in his question, that there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of *res judicata*, and may be enforceable if leave to issue execution is obtained. However, those characteristics are not sufficient to give the arbitrator the status of a "court or tribunal of a Member State" within the meaning of Article 177 of the Treaty.
11. The first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration.
12. The second point to be noted is that the German public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitrator. The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with in the sphere in question in this case.
13. It follows from these considerations that the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbitrator to be considered as a "court or tribunal of a Member State" within the meaning of Article 177.
14. As the Court has confirmed in its judgment of 6 October 1981 (Broekmeulen, Case 246/80 [1981] ECR 2311), Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it.

In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award - which may be more or less extensive depending on the circumstances - and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

15. It is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of Community law which they may need to apply when exercising such auxiliary or supervisory functions.
16. It follows that in this instance the Court has no jurisdiction to give a ruling.

[...]

1.2.2 Case C-126/97: Eco Swiss



NOTE AND QUESTIONS

From the Nordsee judgment we could deduce, that if reference to the arbitration tribunal were compulsory and at last instance, a reply would be given to the question by the ECJ (that was so in case 109/88: Danfoss [1989] ECR 3199).

In Case C-126/97 Eco Swiss [1999] ECR I-3055, the ECJ accepted several questions referred for a preliminary ruling in the contest of an appeal against an arbitration award - the reference was made by the Hoge Raad – Netherlands.

Several problems can arise if the ECJ regards arbitrators as court or tribunals within the meaning of Article 234. Consider arguments pro and con the Court's approach (see also Opinion of AG Ruiz-Jarabo Colomar – below).

**Eco Swiss China Time Ltd
v
Benetton International NV**

C-126/97

1 June 1999

Court of Justice

[1999] ECR I-3055

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

In July 1986, Benetton concluded an eight-year licensing agreement with Eco Swiss, Hong Kong, and Bulova, New York. Under this agreement, Benetton granted Eco Swiss the right to manufacture watches and clocks bearing the words "Benetton by Bulova," which could then be sold by Eco Swiss and Bulova.

All disputes arising out of the agreement were to be submitted to arbitration in conformity with the rules of the Nederlands Arbitrage Instituut (Netherlands Institute of Arbitration). The arbitral tribunal was to apply Netherlands law. The agreement was not notified to the European Commission and did not fall under a Block Exemption.

In June 1991, Benetton gave notice of termination effective as of September 24, 1991, about three years before the end of the fixed term. Upon the notice of termination, Eco Swiss and Bulova

initiated arbitration proceedings against Benetton.

In the Partial Final Award (PFA), the arbitrators decided that Benetton should compensate Eco Swiss and Bulova for the damage suffered due to the premature termination of the agreement. When the parties were unable to reach an agreement about the quantum of the damage, the arbitrators made a Final Arbitration Award (FAA) in which they determined the quantum.

Benetton applied to the Rechtbank for the annulment of the PFA and the FAA on the ground, inter alia, that the awards were contrary to public policy because of the nullity of the license agreement under Article 81 EC Treaty (formerly Article 85). During the arbitration proceedings neither the parties nor the arbitral tribunal had raised the point that the agreement might be contrary to that provision. The Rechtbank dismissed the application, whereupon Benetton appealed to the Gerechtshof (Regional Court of Appeal) in The Hague, where the case was still pending during the ECJ proceedings. Benetton also lodged an application at the Rechtbank to stay the enforcement of the FAA. The Rechtbank denied the application and Benetton appealed to the Gerechtshof, which granted the stay. Eco Swiss brought proceedings in cassation before the Hoge Raad (Supreme Court of the Netherlands) against this decision.

The Hoge Raad referred five questions to the ECJ for a preliminary ruling. Three of these questions were answered by the ECJ, which did not consider it necessary to answer the remaining two. These three questions were: (i) does the national court have a duty to annul an award which is contrary to Article 81; (ii) should a rule of national procedural law, according to which an interim award acquires the force of res judicata, not be applied, if this is necessary in order to examine whether an agreement, which an interim award has held to be valid, may be void because it conflicts with Article 81; (iii) is it necessary, in the case described in (ii), to refrain from applying the rule that, insofar as an interim award is in the nature of a final award, annulment of that award may not be sought simultaneously with that of the subsequent award.

Judgement:

[...]

- 31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 85 of the Treaty although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.
- 32 It is to be noted, first of all, that, where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation (Nordsee, cited above, paragraph 14).
- 33 In paragraph 15 of the judgment in Nordsee, the Court went on to explain that it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.

- 34 In this regard, the Court had held, in paragraphs 10 to 12 of that judgment, that an arbitration tribunal constituted pursuant to an agreement between the parties is not a 'court or tribunal of a Member State' within the meaning of Article 177 of the Treaty since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.
- 35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.
- 36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.
- 37 It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.
- 38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).
- 39 For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.
- 40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 *Federconsorzi* [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike *Van Schijndel* and *Van Veen*, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.
- 41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

The first and third questions

- 42 In view of the reply given to the second question, there is no need to answer the first and third questions.

The fourth and fifth questions

- 43 By its fourth and fifth questions, which can be examined together, the referring court is asking essentially whether Community law requires a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of the subsequent award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.
- 44 According to the relevant domestic rules of procedure, application for annulment of an interim arbitration award which is in the nature of a final award may be made within a period of three months following the lodging of that award at the registry of the court having jurisdiction in the matter.
- 45 Such a period, which does not seem excessively short compared with those prescribed in the legal systems of the other Member States, does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.
- 46 Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata*, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle.
- 47 In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.
- 48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

[...]

1.3 *Opinion of AG Ruiz-Jarabo Colomer in C-17/00: De Coster;*



NOTE AND QUESTIONS

In the de Coster case AG Colomer thoroughly reviewed (with reference to case law, which will be especially helpful, if you would wish to further research the issue) and criticized the ECJ's definition and criteria for a "national court or tribunal". AG Colomer is of the opinion that too many of the Vaassen criteria had been relaxed and that the existing definition, however justifiable earlier, simply hinders the work of the ECJ nowadays. He therefore proposed a new definition (paras 85 et seq.), but the Court did not share his opinion.

François De Coster

v

Collège des bourgmestre et échevins de Watermael-Boitsfort Commission of the European Community

Case C-17/00

28 June 2001

Advocate General Ruiz-Jarabo Colomer

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[...]

- 12 Article 234 EC provides that the Court of Justice is to have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and of the acts of the institutions of the Community. In the second paragraph it adds that, 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 of Justice to give a ruling thereon.
- 13 However, the Treaty does not define the term 'national court or tribunal'. Nor does the Court of Justice, which has merely laid down a number of criteria for guidance, such as whether the body is established by law, whether it is permanent and independent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether the decision is of a judicial nature, and whether it applies rules of law.⁵
- 14 The result is case-law which is too flexible and not sufficiently consistent, with the lack of

⁵ See, for example, the judgment in Case 195/98 *Osterreichischer Gewerkschaftsbund* [2000] (ECR I-10497).

legal certainty which that entails. The profound contradictions noted between the solutions proposed by the Advocates General in their Opinions and those adopted by the Court of Justice in its judgments illustrate that the path is badly signposted and there is therefore a risk of getting lost. The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted⁶

15 I shall now try to describe the path trodden between the Vaasen-Göbbels case⁷ and the judgment in *sterreichischer Gewerkschaftsbund*;⁸ I shall then suggest a change of direction which I believe to be essential and, consequently, propose that the judgment should be delivered in this case by the Court of Justice in plenary session.

1. The case-law of the Court of Justice relating to the definition of a court or tribunal

16 It all began in the Vaasen-Göbbels case. A reference for a preliminary ruling had been made by an arbitration tribunal which did not form part of the Netherlands legal system but had jurisdiction to hear appeals brought against the decisions of a social security institution. The Court of Justice set out, for the first time, five of the criteria which it considers determine whether a body constitutes a court or tribunal: statutory origin, permanence, inter partes procedure, compulsory jurisdiction, and the application of rules of law.⁹

17 Since that judgment the Court has, in each case, ascertained whether those requirements are met; it has refined and perfected them, adding others, such as the requirement that the body should be independent, which was mentioned in the judgment in *Pretore di Salò*¹⁰ and adopted unconditionally in the *Corbiau* case.¹¹ It is significant that the criterion of independence, which is the most important feature that a court must display, should have to wait until 1987 to appear in a judgment of the Court of Justice.

18 The case-law has remained unchanged in respect of some of the requirements, specifically whether the body is established by law, whether it is permanent and whether its decisions apply the law. However, others, those which most clearly define a court or tribunal, such as the indispensable criterion of independence, inter partes procedure or decision of a judicial nature, have received interpretations which have been at least hesitant and, on occasions, confused.

A. The gradual relaxation of the requirement that the body should be independent

19 Although reference had already been made in *Pretore di Salò* to independence as one of the conditions for a body to be regarded as a court or tribunal for the purposes of Article 234 EC, the judgment in *Corbiau* was the first to give it its fundamental meaning, requiring that the body which makes the preliminary reference should act as a third party¹² in relation to the

⁶ Cervantes, M.de, *El ingenioso caballero Don Quijote de La Mancha*, recounts Sancho Panza's legal experiences as governor of the island of Barataria in Chapters XLV, XLVII XLIX and LI of the second part. It is curious to note that, in the last of those chapters, Sancho Panza has jurisdiction to give preliminary rulings, the literary precursor to the jurisdiction now exercised by the Court of Justice. One day he sat to hear cases and was asked a question formulated by four judges with the task of applying a rule requiring people who wished to cross a bridge over a fast-flowing river to state under oath where they were going and for what purpose; if they told the truth, they were to be allowed to cross freely and, if they lied, they were to be hanged at the gallows on the other side. When one man stated that he was going to die on the gallows, the dilemma arose that, if he were hanged, he would have told the truth and would deserve to be free and to cross the river, whereas, if he were not executed, he would have lied and, according to the law, ought to die. In his preliminary ruling, Sancho Panza, following the advice given to him previously by Don Quijote, opted to apply the rule that, when there is doubt as to how to dispense the law with justice, it should be done with mercy.

⁷ Case 61/65 *Vaasen-Göbbels* [1966] ECR 377.

⁸ Cited in footnote 6 above.

⁹ In the judgment, the Court observed that the arbitration tribunal was a permanent body, properly constituted under Netherlands law and charged with the settlement of certain disputes defined by law, in an adversarial procedure similar to that used by the ordinary courts of law. Its members were appointed by the minister and had to apply rules of law. Furthermore, the persons concerned were bound to take any disputes between themselves and their insurer to that tribunal as the proper judicial body.

¹⁰ Case 14/86 *Pretore di Salò* [1987] ECR 2545.

¹¹ Case C-24/92 *Corbiau* [1993] ECR I-1277.

¹² The requirement that the body should act as a third party in relation to the authority which adopts the contested decision is an essential, though not adequate, condition for independence (see the reasons I give in points 92 and 93 below).

- authority which adopts the decision forming the subject-matter of the proceedings.¹³
- 20 The Court of Justice was equally categorical in Criminal proceedings against X,¹⁴ in which the reference for a preliminary ruling had been made by the Procura della Repubblica. The Court declared that it did not have jurisdiction, because the prosecutor did not fulfil the requirement of independence.
- 21 In the Dorsch Consult case,¹⁵ the Court of Justice overlooked the requirement that the body taking the decision should not be linked to the parties and focused on the point that its objective should be to carry out its task 'independently'¹⁶ and 'under its own responsibility',¹⁷ which allowed it to consider that the German Federal Public Procurement Awards Supervisory Board was a court even though it was linked to the organisational structure of the Bundeskartellamt (Federal Cartel Office) and the Federal Ministry for Economic Affairs.¹⁸
- 22 For the Court of Justice it was crucial that the fundamental provisions of the statute of the German Judiciary as regards annulment or cancellation of appointments, and also independence and the possibility of dismissal, should be applied by analogy to the members of the Federal Board.¹⁹
- 23 The judgment in Köllensperger and Atzwanger²⁰ took the same approach. The Court of Justice examined whether the Public Procurement Office, Tyrol, Austria, was a court or tribunal and, although it acknowledged that the law governing that body includes a passage referring to the cancellation of the appointments of its members which is too vague, and does not contain any specific provisions on the rejection or withdrawal of, members,²¹ it stated that the independence of its members was guaranteed by the application of the General Law on Administrative Procedure, which contains very specific provisions on the circumstances in which members of the body in question must withdraw, and expressly prohibits the giving of instructions to members of the Office in the performance of their duties.²²
- 24 That judgment not only abandons the requirement that the body should be a third party, but also disregards the absence of specific rules intended to guarantee the independence of its members,²³ and considers that the generic provisions intended to ensure their impartiality or, where appropriate, the independence of the members of courts and tribunals, are adequate.
- 25 In my view, that reasoning is weak. A general principle of non-interference in the activities of the State's administrative bodies, combined with a duty to withdraw, cannot be enough to guarantee the independence of the person who has to give a ruling in the dispute.²⁴ On the

¹³ In that judgment the Court of Justice refused to regard as a third party the Luxembourg Director of Direct Taxes and Excise Duties, whose status as a court has been recognised by the Luxembourg Conseil d'État (see the Opinion of Advocate General Darmon, point 4). As head of the Administration, the Director is obviously organically linked to the departments which made the tax assessment which was being challenged and which was the subject of the complaint proceedings in which the question referred for a preliminary ruling had arisen. Furthermore, in the event of that, the Director is a party in the dispute.

¹⁴ Joined cases C-74/95 and C-129/95 Criminal proceedings against X [1996] ECR I-6609.

¹⁵ Case C-54/96 Dorsch Consult [1997] ECR I-4961.

¹⁶ The Court was guilty of a tautology: a person who acts independently is independent.

¹⁷ Paragraph 35 of the judgment.

¹⁸ In its judgments in Case C-258/97 Hospital Ingenieure [1999] ECR I-1405 and Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, the Court accepted the questions referred for a preliminary ruling by bodies responsible for reviewing procedures for the award of public contracts.

¹⁹ However, as Advocate General Tesouro pointed out in his Opinion, these precautions are not the same as those taken for ordinary courts of law; not only do the members of the Federal Supervisory Board enjoy no guarantee against dismissal - they have no assurance of a fixed term of office; they can be relieved of their duties at any moment by means of purely internal organisational measures.

²⁰ Case C-103/97 Köllensperger and Atzwanger [1999] ECR I-551.

²¹ This led Advocate General Saggio to propose rejection of the question referred for a preliminary ruling.

²² This is a repetition of the provisions of Article 20 of the Austrian Federal Constitution concerning the independence of the members of collegiate bodies of a judicial nature.

²³ These, by reference to the statute governing the ordinary courts, were present in the Dorsch Consult case.

²⁴ See the Opinion delivered by Advocate General Saggio in Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539. The judgment conferred the status of court or tribunal on a Swiss administrative body, Överklagandenämnden för Högskolan (the Universities' Appeals Board), because it gave judgment without receiving any instructions and in total impartiality. For the Court of Justice, those safeguards confer on the Överklagandenämnden a status separate from the authorities which adopted the decisions under appeal, and the necessary independence. On the other hand, the Advocate General had proposed, in his Opinion, that the question

other hand, that fundamental status of a body as a court or tribunal must be guaranteed by provisions which establish, clearly and precisely, the reasons for the withdrawal, rejection and dismissal of its members.²⁵

- 26 The gradual relaxation observed in the case-law of the Court of Justice in relation to the requirement of independence culminates in the judgment in *Gabalfrisa and Others*,²⁶ in which the Court had to consider the status as courts or tribunals of the Spanish Economic-Administrative Courts (*Tribunales Económico-Administrativos*), which do not form part of the judiciary but are organically linked to the Ministry of Economic Affairs and Finance, that is, the very administration responsible for the acts which they have to judge.
- 27 In spite of the views expressed in legal literature²⁷ and by its Advocate General, the Court of Justice granted them the status of courts or tribunals of a Member State, attributing crucial importance to the separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery and, on the other hand, the economic-administrative courts which rule on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority.
- 28 However, as Advocate General Saggio again pointed out, those circumstances do not provide an adequate guarantee of impartiality. The members of the economic-administrative court are employed by the administration and appointed by the minister, who has the power to dismiss them without abiding by conditions clearly and categorically laid down by law. It cannot be said, therefore, that the body's rules of operation guarantee the irremovability of its members and, consequently, it seems doubtful that it has a degree of independence which allows it to resist possible undue intervention and pressure from the executive.

The function of the economic-administrative courts cannot be described as 'judicial'; on the contrary, the claims brought before them are in the nature of an administrative appeal, a review by the administration itself at the request of one party. On the other hand, its decisions are, without exception, open to review by the courts for contentious administrative proceedings (*Tribunales de la jurisdicción contencioso-administrativa*). Since these courts are able to assess the need to make a reference for a preliminary ruling to the Court of Justice, there is therefore no danger that Community law will not be uniformly applied.

The economic-administrative claim therefore has the role, which is characteristic of administrative appeals, of giving the administration the opportunity to adopt its final position, in *inter partes* proceedings between the persons concerned, before leaving the way open to the courts of law.

Another circumstance which confirms that the function of these bodies is of an administrative

referred for a preliminary ruling should be declared inadmissible since the referring body was not independent, because there were no specific provisions governing the terms and conditions for cancelling the appointment of its members.

²⁵ We should not forget that the Court pointed out in its judgments in *Pretore di Salò*, cited in footnote 11, paragraph 7, and *Corbiau*, cited in footnote 12, paragraph 15, and also in Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 21, that the concept of court or tribunal in Community law implies, according to the common legal traditions of the Member States, that the provisions governing the composition and activity of the body must strictly guarantee the independence and third party status of its members. This requirement must be more stringent for the rules conferring power on the Administration to cancel the appointment of the body's members.

²⁶ Joined cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.

²⁷ *Alonso García, R., Derecho comunitario. Sistema constitucional y administrativo de la Comunidad Europea*, Ed. Centro de Estudios Ramón Areces, S.A., Madrid, 1994, pp. 330 and 331. *Ruiz-Jarabo, D., El juez nacional como juez comunitario*, Ed. Civitas, Madrid, 1993, pp. 81 and 82. *Le-Barbier-Le Bris, M., Le juge espagnol face au droit communautaire*, Ed. Apogée (Publications du Centre de Recherches Européennes Université Rennes I), Rennes, 1998, pp. 347 to 350. Later, *Boulouis, J., Darmon, M. and - Huglo, J.-G., Contentieux communautaire*, Ed. Dalloz, 2nd. Ed., Paris, 2001, p. 16, emphasised this point. *Banaloche, J.*, in '*Los Tribunales Económico-Administrativos*', published in *Impuestos, revista de doctrina, legislación y jurisprudencia*, year XVII, no. 2, January 2001, pp. 1 to 8, states that, 'To begin with, the Court of Justice of the European Union needs to understand that the economic-administrative courts are subordinate to the Administration as a higher authority'. He makes this statement after saying that, although in the past there may have been grounds for thinking of them as judicial bodies, nowadays, from a constitutional point of view, it is absolutely unacceptable. 'The traditional division, in economic-administrative matters, between management bodies and those which settle appeals has frequently led to the illusion that the bodies which hear appeals are [...] quasi-judicial bodies, when the fact is that that division [...] is only a division of labour, of specialisation, which entails no more independence than in any other administrative area'. He adds that the economic-administrative courts form part of the executive, which is judge and party in proceedings to contest its own acts and to whose criteria for interpretation they are not infrequently subordinate.

nature is that passivity on their part activates the phenomenon of administrative silence, a fiction specifically created by the legislature to prevent administrative paralysis from denying the parties concerned access to justice. If the economic-administrative courts do not give a ruling within one year of the date on which the claim was lodged, the claim is deemed to be rejected and, accordingly, from that moment, the individual may have recourse to the courts for contentious administrative proceedings.

Furthermore, the Tribunal Economico-Administrativo Central (Central Economic and Administrative Court) may decline jurisdiction over matters which it considers important, or in which the amount involved is particularly high, and leave the decision to the Minister for Economic Affairs and Finance. One might ask whether, following the judgment in *Gabalfria and Others*, the Minister also has the power to refer questions for a preliminary ruling if he takes over the case.²⁸

B. The diminishing importance of the requirement that proceedings should be inter partes

- 29 The court or tribunal not only has to be independent and act independently; it also has to take its decision following inter partes proceedings, in which the opposing parties may assert their legally protected rights and interests. However, the scope of the requirement, stated in the Court's judgment in *Vaasen-Göbbels*,²⁹ that proceedings should be inter partes, was very soon reduced.
- 30 The judgments in *Politi*³⁰ and *Birra Dreher*³¹ confirmed that Article 234 EC does not make the reference to the Court conditional on whether the proceedings are inter partes and that, therefore, a question may be referred for a preliminary ruling even if there is no debate. The decisive factor, therefore, is that the body seeking the help of the Court of Justice is exercising the functions of a court or tribunal and considers that an interpretation of Community law is essential for it to reach a decision. The fact that the proceedings in which the question arises are or are not defended is irrelevant.³²
- 31 However, in the judgments in *Simmenthal*³³ and *Ligur Carni and Others*³⁴ the Court stated that it may prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard. Nevertheless, that qualifications did not lead it to go back on its previous position since it takes the view that it is for the national court alone to assess whether it is necessary to make a reference.³⁵

²⁸ I cannot imagine what C.L. de Montesquieu would say if he could see this confusion between administrative and judicial bodies.

²⁹ Cited in footnote 8.

³⁰ Case 43/71 *Politi* [1971] ECR 1039. The question was referred by the President of the Tribunale di Torino, which was hearing a summary procedure ('orden conminatoria') in which the decision is taken without the defendant being given a hearing. It is interesting to note that, owing to the specific nature of the procedure, the question arose whether an authority which was part of the judicial organisation of a Member State constituted a court or tribunal.

³¹ Case 162/73 *Birra Dreher* [1974] ECR 201. The question arose in an Italian summary procedure in which the court, adjudicating simply on the basis of the allegations presented by the plaintiff, could make an order against the other party without giving him the opportunity to present his observations, although afterwards it was possible to raise objections to the decision. The Court had already accepted several references for a preliminary ruling in the context of summary proceedings (Case 29/69 *Stauder* [1969] ECR 419; Case 33/70 *SACE* [1970] ECR 1213; and Case 18/71 *Eunomia* [1971] ECR 811).

³² According to Advocate General Lenz, in Point 6 of his Opinion in Case 228/87 *Pretura unificata di Torino* [1988] ECR 5099, since the judgment in *Birra Dreher* the Court of Justice has disregarded whether or not the proceedings are inter partes.

³³ Case 70/77 *Simmenthal* [1978] ECR 1453. In this case the reference for a preliminary ruling was made by the Pretore di Alessandria in collection proceedings in which, once again, the court had the power to give judgment on the basis solely of the allegations made by the plaintiff.

³⁴ Joined cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621. The questions were referred by the President of the Tribunale di Genova in proceedings for the adoption of interim measures.

³⁵ In the Opinion I delivered on 5 April 2001 in Case C-55/00 *Gottardo*, in which judgment is pending, I drew attention to the inherent risks if the Court adopts a passive approach with regard to the terms in which the questions referred for a preliminary ruling are formulated. There I said that the Court, as the official interpreter of Community law, must analyse the problem with a more broadminded approach and greater flexibility so as to give a reply which will be of assistance to the national court which raises the questions and to the other courts in the European Union, in the light of the applicable Community provisions. Otherwise, the dialogue between courts introduced by Article 234 EC might depend too much on the court which raises the question, so that, depending on the way it worded the question referred for a preliminary ruling, it could determine the answer, as occurred in the cases I have just examined' (Point 36). The same is true in respect of the decision whether or not it is appropriate to refer a question for a preliminary

- 32 Consequently, the Court of Justice does not assume that a reference for a preliminary ruling is admissible because the proceedings are defended. A question may be admissible if it arises in undefended proceedings or at an undefended stage in defended proceedings. The judgments in *Birra Dreher* and *Simmenthal* emphasised what had already been stated in *Politi*, that any court or tribunal of a Member State may refer a question for a preliminary ruling at any stage in the main proceedings.
- 33 The requirement that the proceedings should be *inter partes* has gradually lost ground. In *Pretore di Cento*³⁶ and *Pretura unificata de Torino*,³⁷ neither of which had defending parties, the Court of Justice did not even query the admissibility of questions referred for a preliminary ruling.³⁸ The judgment in *Pardini*³⁹ replied to questions referred by the *Pretore di Lucca* in proceedings relating to interim measures.⁴⁰
- 34 Until then the Court of Justice had not attached much importance, if any, to the requirement that the proceedings should be *inter partes*. However, if the facts are studied carefully, it will be noted that the principle was not absent, merely deferred;⁴¹ in any event, the absence of the adversarial element was compensated for by the complete impartiality of the judge and his independence with regard both to the dispute and the parties to it.⁴²
- 35 However, in some later judgments, the Court seems to have abandoned that course and, regrettably, has admitted and given preliminary rulings on questions referred in proceedings in which the absence of the adversarial element was not offset by the fundamental independence of the body which raised the question.
- 36 Indeed, in *Dorsch Consult*⁴³ the Court admitted questions referred for a preliminary ruling by an administrative body⁴⁴ in undefended proceedings.⁴⁵
- 37 In its judgment in *Gabalfrisa and Others*,⁴⁶ the Court of Justice considered that proceedings before the Spanish economic-administrative courts⁴⁷ are *inter partes* since the parties concerned may lodge submissions and evidence in support of their claims and request a public hearing. Moreover, where an economic-administrative court considers it relevant to adjudicate on matters which were not raised by the persons concerned it must inform the parties to the proceedings and grant them a period of fifteen days to submit their observations.
- 38 However, as Advocate General Saggio made clear in his Opinion, the proceedings may be considered only partially *inter partes*, in so far as concerns the interested parties, since only limited pleadings and evidence are admitted, and the decision as to whether a public hearing

ruling in undefended proceedings. Clearly, it is for the national court to decide whether it needs an interpretation of Community law in order to settle the case before it, but it is for the Court of Justice alone to review the requirements which determine whether preliminary-ruling proceedings may be accepted.

³⁶ Case C-110/76 *Pretore di Cento* [1977] ECR 851.

³⁷ Cited in footnote 33.

³⁸ These were criminal proceedings brought against persons unknown. It must be remembered that the *pretore* is a figure peculiar to the Italian legal system, who exercises the functions both of public prosecutor and examining magistrate.

³⁹ Case 338/85 *Pardini* [1988] ECR 2041.

⁴⁰ The particular circumstances of the case were that the *Pretore* referred the question for a preliminary ruling whilst at the same time granting the interim measure, which was the sole object of the proceedings. The Court of Justice, after stating that it did not have jurisdiction to hear a reference for a preliminary ruling where the proceedings before the national court had already been terminated, accepted the *Pretore's* question because the interlocutory proceedings were still pending, since the measures adopted were subject to confirmation, variation or discharge following the intervention of the parties.

⁴¹ This is true of the *Pardini* case, cited above.

⁴² See Points 7 and 26 of the Opinion delivered by Advocate General Darmon in the *Corbiau* case, cited in footnote 12; and also Point 14 of the Opinion of Advocate General Saggio in *Gabalfrisa and Others*, cited in footnote 27.

⁴³ Cited in footnote 16.

⁴⁴ The Supervisory Board set up in Germany to review the decisions of the bodies which monitor the procedures for awarding public contracts.

⁴⁵ The Court of Justice reiterated that the requirement that the proceedings must be *inter partes* is not an absolute criterion. It also pointed out that, although the parties are not heard by the Supervisory Board, they are heard by the body which monitors the award procedures.

⁴⁶ Cited in footnote 27.

⁴⁷ I have established the status of these as administrative bodies above.

will be held is taken at the discretion of the body itself, with no subsequent appeal.⁴⁸

C. The confusion introduced by the requirement that the final decision in the case should be judicial in nature

39 Whilst the features of the requirements of independence and adversarial proceedings have faded somewhat, those of the requirement that the decision to be adopted by the referring court must be judicial in nature have always been blurred. It could not be otherwise: to say that a body which gives a judicial ruling is a court or tribunal is like saying nothing at all. That status cannot be equated to the application of legal rules, because it is not exclusive to the bodies which exercise jurisdiction. Administrative bodies act in accordance with legal criteria⁴⁹ and, consequently, also apply the law.⁵⁰

40 Therefore, to determine whether a decision is of a judicial nature, the Court of Justice has been obliged to look, indirectly, at other characteristics which define a court or tribunal, in most cases at the 'conflictive' nature of the proceedings in which the decision is adopted and, in others, at the position of the decision-taker in the legal organisation.

41 Thus, in the *Borker* case⁵¹ the Conseil de l'Ordre des Avocats à la Cour de Paris (Bar Council of the Cour de Paris) was held not to be a court or tribunal because it had not been called upon to try a case but to give its opinion on a dispute between a member of the Bar and a court or tribunal of another Member State.⁵² On similar grounds the Court of Justice, in the *Greis Unterweger* case,⁵³ denied the status of court or tribunal to the Commissione Consultiva per le Infrazioni Valutarie (Consultative Commission for Currency Offences) which issues opinions in administrative proceedings⁵⁴ and, in *Victoria Film*,⁵⁵ to the Skatterrättsnämnden (Swedish Revenue Board) because it did not settle any dispute but merely, at the request of a taxpayer, gave a preliminary decision in relation to a tax matter.⁵⁶

42 On the same lines, the judgment in *Criminal proceedings against X*⁵⁷ held that the Procura della Repubblica could be regarded as a court or tribunal since, amongst other reasons, its role was not to rule on an issue but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body.⁵⁸ Nevertheless, the judgment in *Pretore di Salò*⁵⁹ acknowledged that body - which, as I have pointed out,

⁴⁸ In its judgment in Case C-44/96 *Mannesmann* [1998] ECR I-73, the Court of Justice accepted questions referred for a preliminary ruling by the Bundesvergabeamt, Austria, the body which hears disputes relating to public contracts, without considering its status as a court or tribunal. Advocate General Lenz, who did consider the matter, harboured certain doubts regarding the adversarial nature of the proceedings, although he inferred from the order for reference that in the main proceedings there had been an inter partes hearing similar to that before a court or tribunal. In Case C-76/97 *Tögel* [1998] ECR I-5357 and Case C-111/97 *EvoBus Austria* ECR I-5411, the Court again accepted several questions referred for a preliminary ruling by the Bundesvergabeamt.

⁴⁹ Article 103(1) of the Spanish Constitution of 1978 provides that the 'Public Administration shall act [...] in full accordance with the law and legality.'

⁵⁰ They also interpret the law before applying it.

⁵¹ Case 138/80 *Borker* [1980] ECR 1975.

⁵² A German criminal court had refused to allow him to appear; he therefore asked the Conseil de l'Ordre to determine the conditions for the pursuit of his activities as a lawyer by way of provision of services before any of the courts of a Member State. Paradoxically, in Case C-55/94 *Gebhard* [1995] ECR I-4165, without considering the matter, the Court of Justice recognised the status of the Consiglio Nazionale Forense (Italian Bar Council) as a court or tribunal. According to Advocate General Léger, what led the Court of Justice to decline jurisdiction in *Borker* was not the nature of the referring body but the subject-matter of the question referred. On the other hand, a dispute relating to the requirements for membership of a professional body or concerning a sanction imposed by a Bar Council are cases in which the Court of Justice considers that the referring body has a legal obligation to give a ruling.

⁵³ Case 318/85 *Greis Unterweger* [1986] ECR 955.

⁵⁴ The Court of Justice emphasised that the Consultative Commission was not required to conduct inter partes hearings, that the person concerned had no right to bring a matter before the Commission, and that the opinion was not binding on the minister. In addition, it pointed out that the sanctions imposed by the minister after submission of the opinion may be challenged by the persons concerned before the ordinary courts and tribunals, which have unlimited jurisdiction in the matter.

⁵⁵ Case 134/97 *Victoria Film* [1998] ECR I-7023.

⁵⁶ On questions such as liability for payment of a tax, its scope and similar matters.

⁵⁷ Cited in footnote 15.

⁵⁸ In Point 7 of the Opinion which I delivered in that case, I said that the Procura della Repubblica fails to meet at least two of the Court's basic requirements for admissibility of questions referred for a preliminary ruling: it is not a body with compulsory jurisdiction (it is not even a body with iurisdictio in the strict sense) and it does not give a decision after hearing the parties in an adversarial procedure, since it is a party to the proceedings.

⁵⁹ Cited in footnote 11.

combines the functions of an examining magistrate and a prosecutor - to be a court or tribunal, even though it conceded that many of its functions were not of a strictly judicial nature, that is to say, they were not directed towards settling a legal dispute.

- 43 On the other hand, in *Garofalo and Others*⁶⁰ the Court held that a body which submitted an opinion in a procedure in which the decision was taken by a political authority exercised a judicial function. The matter related to the Consiglio di Stato issuing an opinion in the context of an extraordinary petition; however, in fact, it also provides the decision. The opinion, based on the application of rules of law, forms the basis for the decision which will be formally adopted by the President of the Republic, and any departure from the proposed solution may be made only after deliberation within the Council of Ministers and must be duly reasoned.
- 44 The Court of Justice, relying on the judgment in *Nederlandse Spoorwegen*,⁶¹ held that the Italian Council of State is a court or tribunal within the meaning of the Treaty.⁶² In contrast, in the Orders in *ANAS*⁶³ and *RAI*⁶⁴ it denied that status to the Italian Court of Auditors, since the power of review which it exercised in the main proceedings consisted essentially in the evaluation and verification of the results of administrative action, from which the Court inferred that, in the context in which the reference was made, the aforementioned auditing body was not performing judicial functions.
- 45 Until the judgment in *Job Centre I*,⁶⁵ it seemed apparent from the case-law of the Court of Justice that, where a reference for a preliminary ruling is received from a body which forms part of the national judicial organisation, the question is admissible, even if that body is not giving a ruling in a dispute.⁶⁶ Since that judgment, the position has not been so clear.
- 46 In that case the Tribunale Civile e Penale, Milan, referred two questions for a preliminary ruling in non-contentious proceedings⁶⁷ and the Court of Justice adopted a restrictive criterion. It held that a national court may seek a ruling from the Court only if there is a case pending before it and if it is called upon to render 'a decision of a judicial nature'.
- 47 It is not enough, therefore, for the Court of Justice, that the referring body is part of the judicial power of a Member State; it also has to give a ruling in a case,⁶⁸ and a case exists where there is a legal dispute with another, even if that other is a judicial body whose decision it is sought to review;⁶⁹ consequently, in its judgment in *Job Centre I*, the Court declared that a body seised of an appeal brought against a decision adopted in non-contentious proceedings exercises a judicial function.⁷⁰ This was the position in *Haaga*.⁷¹

⁶⁰ Joined cases C-69/96 to C-79/96 *Garofalo and Others* [1997] ECR I-5603.

⁶¹ Case 36/73 *Spoorwegen* [1973] ECR 1299. In that judgment, the Court accepted a reference for a preliminary ruling made by the Netherlands Council of State prior to issuing its - not legally binding - opinion in proceedings challenging administrative acts, the final decision in which lay with the Crown. Advocate General Mayras, who had addressed the issue in his Opinion, advocated opting for admissibility.

⁶² In my Opinion in *Garofalo and Others* (Point 37) I stressed that the incontestability of the final decision, which was not open to subsequent judicial review, was a key element in the admissibility of the reference. It was a manifestation of the principle of effectiveness.

⁶³ Case C-192/98 *ANAS* [1999] ECR I-8583.

⁶⁴ Case C-440/98 *RAI* [1999] ECR I-8597.

⁶⁵ Case 111/94 *Job Centre I* [1995] ECR I-3361.

⁶⁶ *Moitinho de Almeida, J.C.*, 'La notion de juridiction d'un État membre (article 177 du traité CE)', in *Mélanges en hommage à Fernand Schockweiler*, 1999, pp. 463 to 478.

⁶⁷ Previously, in Case 32/74 *Haaga* [1974] ECR 1201, the Court had accepted, although without examining whether or not it was admissible, a reference for a preliminary ruling in a similar case. Advocate General Mayras proposed that the Court should accord the referring body the status of a court or tribunal.

⁶⁸ See Paragraph 11 of the judgment. In the Opinion he delivered on 15 March 2001 in Case C-178/99, Advocate General Geelhoed proposed that the Court of Justice should declare that it did not have jurisdiction to reply to a question referred for a preliminary ruling by the Bezirksgericht (District Court), Bregenz, Austria, in proceedings to register a property, since that court does not exercise any judicial function.

⁶⁹ In Paragraph 18 of the judgment in *Victoria Film*, the Court stated that only if the preliminary decision of the Skatterättsnämnden were challenged could the court or tribunal before which the matter is brought be regarded as performing a judicial function. That was the situation in Case C-200/98 X and Y [1999] ECR I-8261, in which the Court held that the Regeringsrätten (the Swedish Supreme Administrative Court) exercises a function of a judicial nature when it hears an appeal against decisions of the Skatterättsnämnden

⁷⁰ After the Court of Justice had given its judgment in *Job Centre I*, declaring that it lacked jurisdiction to reply to the questions referred

D. The problems which arise when arbitrators are regarded as courts or tribunals

- 48 One of the factors which, since the judgment in *Vaasen-Göbbels*,⁷² defines a court or tribunal within the meaning of Article 234 EC is whether its jurisdiction is compulsory.
- 49 This factor left arbitration tribunals out of the picture. In the *Nordsee* case,⁷³ the Court declared that it had no jurisdiction to give a ruling on the questions referred by a German arbitration court to which the parties were under no obligation to refer their disputes⁷⁴ and stated that, if questions of Community law are raised in an arbitration resorted to by agreement, it is for the ordinary courts to refer a question for a preliminary ruling, if they consider it necessary, either in the context of their collaboration with the arbitration tribunals or in the course of reviewing the arbitration award.⁷⁵
- 50 After the *Nordsee* judgment, it seemed that, if reference to the arbitration tribunal were compulsory and at last instance, a reply would be given to the question. That happened in the *Danfoss* case,⁷⁶ in which the reference for a preliminary ruling was made by a Danish arbitration court granted final jurisdiction by law in disputes relating to collective agreements between employees' organizations employers, where the jurisdiction does not depend on the agreement between the parties since either may bring a case before it despite the objections of the other, and the decision is binding on everybody.
- 51 In its judgment in *Almelo*,⁷⁷ where it did adopt a consistent approach, the Court of Justice accepted jurisdiction to reply to the questions referred for a preliminary ruling by a judicial body determining, according to what appeared fair and reasonable, an appeal from an arbitration award, because it was required to observe the rules of Community Law.⁷⁸
- 52 However, because it focused so much on the requirement that the jurisdiction should be compulsory, the Court overlooked the other features which, according to its stated views, define a court or tribunal for the purposes of Article 234 EC and, in the *Danfoss* case, it acknowledged as such an arbitration board whose composition and operation are not determined in detail by statute. An arbitration board is composed on an ad hoc basis, and the proceedings conducted as agreed between the parties, within the framework of the law.⁷⁹

E. The extension of the definition to overseas courts, to courts which do not form part of the judicial system of any Member State and to international courts

for a preliminary ruling, the Tribunale Civile e Penale, Milan, gave a ruling in the case. An appeal was lodged against its decision before the Corte d'Appello, Milan, which referred three questions for a preliminary ruling. In its judgment of 11 December 1997 in Case C-55/96 *Job Centre II* ECR I-7119, the Court accepted jurisdiction and replied to the questions put to it.

⁷¹ The need to safeguard the effectiveness of Community law may be the interpretive key to reconciling the two judgments: in *Job Centre*, unlike *Haaga*, the court's decision could be appealed.

⁷² Cited in footnote 8.

⁷³ Case 102/81 *Nordsee* [1982] ECR 1095.

⁷⁴ The arbitration tribunal had jurisdiction, under a contract, to decide disputes relating to the apportionment of financial aid from the EAGGF. The arbitration was provided for by law and, following inter partes proceedings, culminated in an award which had the force of *res judicata*. The Court of Justice observed that the arbitration tribunal did not have compulsory jurisdiction and the German public authorities were not involved in the decision to opt for arbitration and could not intervene automatically in the proceedings before the arbitrator. In the light of these considerations, the Court inferred that the link between the arbitration procedure and the organisation of legal remedies through the courts in the Member State in question was not sufficiently close for the arbitrator to be considered as a court or tribunal. This last consideration allowed Advocate General Tesauro to speak, in Point 28 of his Opinion in the *Dorsch Consult* case, cited in footnote 15, of the connection to the exercise of public authority as another of the tests which must be satisfied in order for a body to be entitled to make a reference for a preliminary ruling.

⁷⁵ Bonassies, P., 'Arbitrage et droit communautaire', in *L'Europe et le droit. Mélanges en hommage à Jean Boulouis*, Ed. Dalloz, Paris, 1991, pp. 21 et seq., discusses the shortcomings of the early case-law of the Court of Justice concerning the judicial status of arbitration tribunals.

⁷⁶ Case 109/88 *Danfoss* [1989] ECR 3199.

⁷⁷ Cited in footnote 26.

⁷⁸ In Case C-126/97 *Eco Swiss* [1999] ECR I-3055, the Court of Justice again accepted several questions referred for a preliminary ruling in the context of an appeal against an arbitration award; on this occasion, the reference was made by the Hoge Raad der Nederlanden.

⁷⁹ See Points 19 to 21 of the Opinion delivered by Advocate General Lenz in that case. In my view, the rationale for Court's judgment which, on this occasion, concurs with the Advocate General's suggestion, is, once again, the need to safeguard effectiveness, since the arbitration tribunal which made the reference was ruling at last instance.

- 53 In its judgments in *Kaefer and Procacci*⁸⁰ and *Leplat*,⁸¹ the Court of Justice acknowledged that a reference for a preliminary ruling could be made by the courts or tribunals of overseas countries and territories which form part of the French judicial system
- 54 Furthermore, in *Barr and Montrose Holdings*⁸² it conferred the right to refer questions for a preliminary ruling on the courts and tribunals of the Isle of Man, even though they do not form part of the court system of the United Kingdom.⁸³ Subsequently, in *Pereira Roque*,⁸⁴ the Court, without considering admissibility, gave a preliminary ruling on a reference from a judicial body of the Bailiwick of Jersey, whose courts and tribunals also do not form part of the judicial system of the United Kingdom.⁸⁵
- 55 Although Article 234 EC refers to the courts and tribunals of a Member State, the judgment in *Parfums Christian Dior*⁸⁶ declared that the Benelux Court had not only the right to make a reference for a preliminary ruling but the obligation to do so, as a judicial body giving judgments against which no appeal lies under national law. The absence of subsequent proceedings against that court's decision, which gives a definitive interpretation of the common Benelux rules, led the Court of Justice to accept the reference.
- 56 Those pronouncements, in which the status or court or tribunal of a Member State is, without doubt, extended to bodies which are not courts or tribunals, reflects the need to ensure that Community law is applied uniformly, in such a way that all judicial bodies that settle disputes in which the *norma decidendi* is a rule of that law, may use the tool provided by Article 234 EC.
- 57 For similar reasons, and conversely, the national law must not prohibit a judicial body from referring questions for preliminary rulings. In its judgment in *Rheinmolen*,⁸⁷ the Court of Justice held that the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power of referring cases to the Court.

2. The urgent need for a change in the case-law

A. The legal uncertainty caused by the absence of a definition of court or tribunal and the vacillations in the case-law.

- 58 The previous points are not meant to be a sterile scholarly work. They show that the Court's school of thought regarding this matter is not only excessively casuistic, as I have pointed out above, but lacks the clear and precise features required by the definition of a Community concept. Far from providing a reliable frame of reference, the case-law offers a confused and inconsistent panorama, which causes general uncertainty.⁸⁸ The frequent disparity between the solutions suggested by the Advocates General and the pronouncements of the Court illustrate the legal uncertainty surrounding the concept of court or tribunal of a Member State.
- 59 The principal victim of the situation has been the Court of Justice itself, which has been hesitant with respect to the judicial nature of many bodies which have made preliminary references, and has sometimes failed to give its reasons for going in one direction or the

⁸⁰ Joined cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647

⁸¹ Case 260/90 *Leplat* [1992] ECR I-643.

⁸² Case C-355/89 *Barr and Montrose Holdings* [1991] ECR I-3479.

⁸³ As Advocate General Jacobs pointed out in Point 4 of his Opinion, like the Channel Islands, the Isle of Man is not part of the United Kingdom, nor is it a colony. However, he suggested that the expression 'court or tribunal of a Member State' should be interpreted broadly as extending to judicial bodies situated in any territory to which the Treaty applies, even if only partially (Point 18).

⁸⁴ Case 171/96 *Pereira Roque* [1998] ECR I-4607.

⁸⁵ That judgment confirms that the decision in *Barr and Montrose Holdings* applies to the Channel Islands courts.

⁸⁶ Case 337/95 *Parfums Christian Dior* [1997] ECR I-6013.

⁸⁷ Case 166/73 *Rheinmolen* [1974] ECR 33.

⁸⁸ The drawbacks of the situation have been emphasised by L. Neville Brown and T. Kennedy, *The Court of Justice of the European Communities*, Sweet & Maxwell, London, 1994, pp. 209 to 213; Bergères, M.Ch., *Contentieux communautaire*, Ed. Presses Universitaires de France, 2nd. Ed., pp. 247 and 248; Jimeno Bulnes, M., *La cuestión prejudicial del art. 177 TCE*, Ed. Bosch, Barcelona, 1996, pp. 189 et seq.

other.⁸⁹

- 60 It may be observed that where the Court of Justice has seemed uncertain is, as I have already pointed out, in relation to the elements which distinguish a body which is a court or tribunal from one which is not, since legal origin, permanence and taking decisions in accordance with legal criteria are also characteristics of bodies within the administrative structure.
- B. The requirement that, as a matter of public policy, the national authority must have the status of a court or tribunal if the Court of Justice is to have jurisdiction
- 61 If uncertainty in legal relations is disturbing, the sense of unease is all the greater when it concerns a notion which, like that in Article 234 EC, is a matter of public policy. The concept of national court or tribunal determines whether the Court of Justice has jurisdiction to expedite proceedings which, like the preliminary-ruling procedure, have turned out to be essential to the gradual construction and consolidation of the Community legal order. The Court of Justice cannot have control of its own jurisdiction. The ground rules must be clearly defined in a Community governed by the rule of law. The national courts and Community citizens are entitled to know, in advance, who may be deemed to be courts or tribunals for the purposes of Article 234 EC.
- 62 The greater or lesser laxity with which the concept is addressed determines the breadth of the range of persons seeking the cooperation of the Court of Justice and, consequently, the number of its preliminary rulings. This circumstance is relevant in the task of harmonising the interpretation and application of Community law. When showing the way, by making pronouncements which everyone else is to follow, it is necessary to act cautiously and carefully. One well thought-out and well-founded decision resolves more problems than a large number of hasty judgments which do not go deeply into the reasoning and do not address the questions submitted to them.
- 63 In order to further the uniform dissemination and application of Community law, in the early years of its development, the Court of Justice encouraged the use of the preliminary-ruling procedure by using a broad interpretation of the definition of the body entitled to implement it. However, what previously was clearly justified, now - when the Community is a reality accepted by the legal practitioners of the Member States - is disturbing and may seriously hinder the work of the Court of Justice.
- 64 Therefore, as Community law now stands, there is a need to tighten the definition of court or tribunal of a Member State, to bring together its various components to provide a precise frame of reference and so to prevent uncertainty from becoming a permanent feature of this sphere. The Court's initial approach of encouraging references for preliminary rulings, which could have been described as a vocation to educate, must yield to a different dialectic, which no longer has the national court under supervision and allows it to take on the responsibility of an ordinary court of Community law.

⁸⁹ The Court of Justice has been criticised because, on several occasions, it has accepted jurisdiction without considering the status of the referring body as a court or tribunal. This occurred in Case C-166/91 Bauer [1992] ECR I-2797 and in Case C-447/93 Dreesen [1994] ECR I-4087, in which the referring body was the Conseil d' Appel d' Expression Française de l'Ordre des Architectes (Francophone Appeals Committee of the Association of Architects), Belgium. It also happened in Case C-67/91 Asociación Española de Banca Privada and Others [1992] ECR I-4785, in which the Court gave a ruling on several questions referred by the Tribunal de la Defensa de la Competencia (Tribunal for the Defence of Competition), Spain, which, as part of the Ministry for Economic Affairs, is not part of the judicial authority and an appeal always lies against its decisions before the courts for contentious administrative proceedings. To those must be added Case C-243/95 Hill and Stapleton [1998] ECR I-3739, in which the Court declared admissible the questions referred for a preliminary ruling by the Labour Court, Dublin, and Case 7/97 Bronner [1998] ECR I-7791 relating to questions referred by the Oberlandesgericht Wien (Higher Regional Court, Vienna), in its capacity as the Kartellgericht (court of first instance in competition matters). We should also remember the cases already cited in footnote 19, Hospital Ingenieure, referred by the Unabhängiger Verwaltungssenat für Kärnten (an independent administrative authority in the Land of Carinthia) which has exclusive jurisdiction for verifying the legality of measures adopted by the Administration, including those relating to the award of public contracts, and Unitron Scandinavia and 3-S, referred by the Klagenevnet for Udbud (Procurement Review Board), Denmark; and also Joined cases C-260/91 and C-261/91 Diversint and Iberlacta [1993] ECR I-1885, in which the Court accepted for the first time a question referred for a preliminary ruling by the Tribunal Económico-Administrativo Central (Central Economic-Administrative Court), Spain, without making any observation regarding its status as a court or tribunal.

C. The amendments introduced by the Treaty of Amsterdam in the general treatment of references for preliminary rulings, particularly with regard to the national courts and tribunals authorised to make references

65 The Treaty of Amsterdam may be understood as implicitly calling on the Court of Justice to define the concept of court or tribunal for the purposes of making a reference for a preliminary ruling. The Treaty breaks up the system's unitary discipline. To the 'general' reference for a preliminary ruling, under Article 234 EC, are added two 'specific' ones, with particular features: one in Article 35(1) of the Treaty on European Union, and the other in Article 68(1) EC.

66 The Treaty of the European Union has extended the jurisdiction of the Court of Justice to the third pillar by three routes. One of them enables it to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions on police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them (Article 35(1) Treaty of the European Union). The Court's jurisdiction is at a preparatory stage, since it must be approved by the Member States in order to take effect.

67 Article 68 EC grants the Court jurisdiction to give preliminary rulings in the sphere relating to the free movement of persons, with the exception of measures adopted for the maintenance of law and order and the safeguarding of internal security.

68 I wish to stress that, with regard to the first of these two kinds of preliminary reference, the Member States which accept this new jurisdiction of the Court of Justice may choose to confer the right - not the duty - to make references for a preliminary ruling to any of its courts or tribunals or only to those which give judgment at last instance, that is to say, against whose decisions there is no 'judicial remedy' (Article 35(3) of the Treaty on European Union). The second kind, which is compulsory, is directly restricted to those courts or tribunals from whose decisions no 'legal remedy' lies (Article 68(1) EC).

69 In my view, this amendment to the general rules concerning the preliminary-ruling procedure, with the consequent restriction on the bodies authorised to make references, may arise from a more or less explicit intention to limit the broad outlines in which the Court of Justice has defined court or tribunal. It seems that the Community legislature considers that the concept, as it has been interpreted, is not adequate for the new spheres of jurisdiction it has devised and that it is necessary to streamline it or to avoid it, by establishing exceptions in the issues which may sensitive for police and judicial cooperation in criminal matters and for the area of freedom, security and justice.

D. The reform which may be brought about by ratification of the Treaty of Nice and the conferring on the Court of First Instance of jurisdiction to give preliminary rulings

70 The need to clarify the definition of court or tribunal becomes even more urgent following the results of the recent intergovernmental conference. Article 225(3) of the Treaty of Nice, signed on 26 February 2001,⁹⁰ establishes the bases on which the Court of First Instance may consider questions referred for preliminary rulings under Article 234 EC, in specific matters determined by the Statute. I think that the Court of Justice should make clear what it understands by national court or tribunal, as a relevant guideline for the Court of First Instance. If it does not do so, there is the risk that, when the possibility is acted upon and takes effect, the hesitancy of the first body will be matched by that of the second.

71 The possibility that the decisions of the Court of First Instance may be reviewed by the Court of Justice, under the new third subparagraph of Article 225(3) EC, will not, in my view, provide an adequate means of avoiding the disruptive effect of a disagreement between the two Community courts, because the possibility of review is considered to be exceptional and seems to be connected with questions on the merits and not with the grounds for

⁹⁰ OJ 2001 C 80, p. 1.

admissibility of the reference for a preliminary ruling,⁹¹ amongst which is the status of the referring body as a court or tribunal. It would be more efficient to mark the route *ex ante* than *a posteriori* by way of review.

72 However, the Nice Conference has not only allowed an increase in the number of Community courts called upon to establish the uniform interpretation of the law of the European Union, but also, by providing for the enlargement of the Union from fifteen to twenty-seven Member States, made it possible for the number of bodies making preliminary references to rise more and more rapidly. The future of the European Union offers a panorama in which twelve new States, with very varied legal traditions and different organisational structures, will join a Community based on law which, if it is to be implemented effectively, requires, as the Court of Justice has so often pointed out, uniform interpretation and application of its legal order. It is essential to give a precise definition of the concept of court or tribunal for the purposes of Article 234 EC, if the Court of Justice and, as the case may be, the Court of First Instance, are not to face an avalanche of requests for preliminary rulings from bodies that are difficult to categorise, which will have to be declared admissible, in spite of the fact that they are of barely any use,⁹² because the concept is ill-defined in the case-law. Doubts will be sown and the inertia typical of all institutions will mean that references for preliminary rulings will be accepted from bodies which are merely administrative.

E. The advantage of all application of Community law remaining within the jurisdiction of the Court of Justice to give preliminary rulings

73 Thus, the Court of First Instance has also been called upon to cooperate in the task of giving preliminary rulings. However, in my view, in spite of its established reputation, it is not best-suited to this task. It is not easy to reconcile jurisdiction in references for preliminary rulings, which is repeatedly described as 'constitutional', with performance of duties under supervision,⁹³ nor is the Court of First Instance structurally designed to carry out a task which requires a great degree of operational independence, the wish to ensure uniformity, innovative ability and spirit of cooperation. 'It will not have enough freedom to fulfil a guiding role, directing everyone's efforts towards a common understanding of the law of the European Union'.⁹⁴

74 The uniform interpretation of Community law must, without exception, remain subject to the jurisdiction of the Court of Justice in preliminary rulings. It is an indivisible jurisdiction,⁹⁵

⁹¹ Review, which is provided for in exceptional circumstances, is reserved for cases in which there is 'a serious risk of the unity or consistency of Community law being affected.'

⁹² I say 'of barely any use' because, as I shall explain below (Points 75 to 79), the reply given to questions referred for a preliminary ruling by bodies which are not, strictly speaking, courts or tribunals, may be useless if the decision of the referring body is subsequently ignored by the national legal system.

⁹³ It should be remembered that, under Article 225(3) of the Treaty of Nice, the preliminary rulings of the court of First Instance may be reviewed by the Court of Justice, at the instance of the Advocate General (Article 62 of the Statute of the Court of Justice, as amended by the Treaty of Nice).

⁹⁴ See my contribution, Ruiz-Jarabo, D., 'La reforma del Tribunal de justicia realizada por el Tratado de Niza y su posterior desarrollo', in *El Tratado de Niza, analisis y comentarios*, a book in which the other contributors were F. Mariño, R. Silva, A. Mangas, P. Andrés and C. Moreira, Ed. Colex, Madrid, 2001, in which I point out that the Court of First Instance 'runs the risk of suffering the same fate as Icarus, the son of Daedalus and Naucratis in Greek mythology, who, with his father, was imprisoned in the Cretan labyrinth. In order to escape, Daedalus conceived the idea of making a pair of wings for his son from bird feathers to be fixed to his body with wax; he warned the boy not to fly too close to the sun, in case the wax melted, or too close to the sea because, if the wings became wet, they would become heavier and would not work. The Court of First Instance will have to maintain a difficult balance: it must neither interfere in the fundamental work of the Court of Justice, confining itself to assisting that Court, nor fail to cooperate with the national courts and tribunals - an inherent feature of jurisdiction for preliminary rulings - nor attempt to harmonise the interpretation and application of Community law. In the circumstances in which it would be granted to the Court of First Instance, jurisdiction for preliminary rulings loses its most characteristic features and the logical reason for its existence, all the more so if the new competence is conferred on it in a limited form and with so many precautions. We shall have to avoid a repetition of Icarus' fate; he so enjoyed flying that he went too close to the sun, the wax melted, the wings became detached, and he fell into the sea and drowned'.

⁹⁵ This was the view of the Court of Justice itself. In its Report on certain aspects of the application of the Treaty on European Union, issued in May 1995, it stated immodestly that 'it is quite clear that the need to ensure the uniform interpretation and application of Community law, and of the conventions inseparably linked to the achievement of the objectives of the Treaties, requires the existence of a single court, like the Court of Justice, to establish the law definitively for the whole Community'. It added: 'This requirement is fundamental in any matter which is of a constitutional nature or which poses a significant problem for the development of the law'.

which suggests that the Court of First Instance should not be asked to share the task. The key to the success of the preliminary-ruling procedure has lain in the centralisation of the interpretative function, which promotes uniformity. If other bodies are invited to participate, there is the risk that the unity will be destroyed. The day that two different interpretations are given by the two Courts in respect of the same precept of Community law, the death knell will sound for the preliminary-ruling procedure. The risk of confusion is not avoided by the fact that Article 225 states that the Court of First Instances shall be given jurisdiction to give preliminary rulings in 'specific matters', since any jurist knows that 'different matters' share common categories, institutions and legal principles, so that the possibility of disagreements does not disappear. The preliminary-ruling procedure seeks to protect the law, in the manner of a court of cassation, and there must be only one court of cassation in each legal order.

F. The unsettling effect of the intervention of an administrative body in a dialogue between courts

- 75 There was a time when the acceptance by the Court of Justice of jurisdiction to reply to questions referred by bodies which were unquestionably not judicial in nature could be justified, as I have already pointed out, by the need to foster the implementation of a unitary legal system in the Community. However, now that the system has reached cruising speed and Community law is an accepted reality, it would be unsettling if the preliminary-ruling procedure were to be made available to bodies which do not give judgments.
- 76 Article 234 EC introduces an instrument for judicial cooperation, a technical dialogue by courts and between courts. The Court of Justice has never wavered with regard to that description. The objective of the preliminary-ruling procedure is not, therefore, to assist an executive body.
- 77 Furthermore, the members of administrative organisations which apply legal rules and take decisions in accordance with legal criteria, do not need to be jurists.⁹⁶ This may mean that the question referred is not worded in the most appropriate way or that it lacks accuracy or the necessary technical precision.
- 78 The judicial body which reviews an administrative decision adopted on the basis of the reply given by the Court of Justice may consider that it was unnecessary to make the reference or that it should have been approached from another point of view. If it comes to the conclusion that neither the interpretation nor the application of rules of Community law are in issue in the dispute, the reference for a preliminary ruling and all the effort invested in settling the question will have been pointless, with the added disadvantage that the fact that its judgments are not taken into account because they are considered unnecessary undermines the legitimacy of the Court of Justice.
- 79 If the reviewing body considers that the question should have been formulated differently, it will be faced with the difficult situation: the reference for a preliminary ruling has been made and the reply received but, for reasons of procedural economy, it is not inclined to resort again to the preliminary-ruling procedure in order to straighten out the track which it considers became twisted because the reference was incorrectly made. It is a serious matter that the system of judicial cooperation under Article 234 EC should be disrupted because the direct connection between the Court of Justice and the national court is interrupted by an administrative body which, by acts which are well-intentioned but lacking in independence and the necessary specialised legal preparation, holds up the whole procedure. We have already seen how the way in which the question is formulated may determine the Court's reply,⁹⁷ so it is important that the bodies taking part in the preliminary-ruling procedure

⁹⁶ Two examples: of the three members of the Maaseutuelinkeinojen Valituslautakakunta (Rural Businesses Appeals Board), Finland, which made the reference accepted in Joined cases C- 9/97 and C-118/97 Jokela and Pitkäranta [1998] ECR I-6267, one was a non-legal specialist. The Kartellgericht (Court of First Instance in Competition Matters), Austria, which made the reference in the Bronner case (cited in footnote 90) was composed of three members, two of whom were lay assessors.

⁹⁷ In my opinion in Gottardo, cited in footnote 36, I point out that, in the space of barely two years, the Court of Justice gave two completely different replies to the same question owing to the fact that, in the first, Case C-345/89 Stoeckel [1991] ECR I-4047, the referring court had made no mention of an ILO Convention, and in the second, Case C-158/91 Levy [1993] ECR I-4287, it had alluded to it. Chevallier, M. And Maidani, D., Guide pratique Article 177 EEC, Luxembourg: Office for Official Publications of the European Communities, 1982, observe that the Community definition of court or tribunal is not wholly independent of the legal categories of the

should remain of a judicial nature. If the question is referred by an administrative body, any judicial remedy sought against its decision may be determined by the reference, by the way in which or the time at which it was made, so that the real judicial body is to a large extent deprived of the power to use the preliminary-ruling procedure, since, even if, in theory, it could make another reference, this would cause the parties an additional delay in the main proceedings, which would be intolerable where the administration of justice was already rather slow.

In short, the acceptance of references for preliminary rulings from administrative bodies seriously hinders the dialogue between courts established by the Treaty, distorts its aims and undermines the judicial protection of the citizen.

3. Proposal for a new definition of court or tribunal for the purposes of Article 234 EC

A. The Community nature of the term

80 In the light of the considerations I have just put forward, it seems essential for the Court of Justice to try and formulate a new definition of court or tribunal under Article 234 EC.

81 Uniformity in the application of Community law requires that the concept of national court or tribunal be defined within it. The task must be addressed within the European legal order and according to its own structural requirements. In other words, the concept cannot be described only in terms of the categories of national law,⁹⁸ but, essentially, must take account of the *raison d'être* of the preliminary ruling, which is to ensure that Community law is equally effective in every corner of the Community, even though common constitutional traditions must play a crucial role when it comes to interpreting such an important definition.

82 A court or tribunal is not only a body which is such under national law, but also a body which must be such in order to guarantee that no sector of Community law escapes the process of harmonisation.. This is why the Court of Justice has attached great importance to whether the decision of the referring body is open to review within the national legal system. If it acts at last instance, the Court pays less heed to its requirements for considering a body to be a court or tribunal and confers that status on administrative bodies. That, in my view, was the case in *Danfoss*⁹⁹ and *Broekmeulen*.¹⁰⁰ Effectiveness, to ensure that Community law should always be applied in accordance with the criteria of the Court of Justice, also determined the admissibility of the questions referred for a preliminary ruling in *Barr and Montrose Holdings*¹⁰¹ and *Pereira Roque*.¹⁰²

B. General rule: inclusion in the definition of all bodies forming part of the national judicial structure

83 Throughout this Opinion, I have given details of the way in which the Court of Justice has described the elements which characterise the definition. The exercise of judicial power is attributed to bodies established by law, whose members are subject to the rule of law and

national law systems. The guidelines and criteria approved in the case-law of the Court of Justice are firmly rooted in the general legal principles common to all the Member States.

⁹⁸ Chevallier, M. And Maidani, D., *Guide pratique Article 177 EEC*, Luxembourg: Office for Official Publications of the European Communities, 1982, observe that the Community definition of court or tribunal is not wholly independent of the legal categories of the national law systems. The guidelines and criteria approved in the case-law of the Court of Justice are firmly rooted in the general legal principles common to all the Member States.

⁹⁹ Cited in footnote 77. Case 246/80 *Broekmeulen* [1981] ECR 2311, in which the Court recognised the status as a court or tribunal of a committee established by the Royal Netherlands Society for the Promotion of Medicine to hear appeals against the decisions of a General Practitioners Registration Committee. The Court relied, essentially, on the absence, in practice, of any right of appeal against the Appeal Committee's decisions, although *de lege lata* there was a remedy. It is in the light of this approach (see, in support of this, points 23 to 25 of the Opinion of Advocate General Tesaro in *Dorsch Consult*, cited in footnote 16) that that judgment should be understood.

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¹⁰¹ Judgment cited in footnote 83.

¹⁰² Judgment cited in footnote 85.

act, when giving decisions in litigation before them, with complete independence and in accordance with the principle that proceedings should be *inter partes*. However, sufficient attention has not been paid to the principle of unity and exclusive jurisdiction.

- 84 According to this latter principle, the exercise of judicial power and the right to judge and to enforce judgment are entrusted exclusively to courts which are part of the legal system. It is a field from all other public servants are excluded. Its basis is the same as that of competence to hold judicial office: independence and submission to the law. In principle, then, references for preliminary rulings must be made only by judicial bodies, those with the aforementioned exclusive jurisdiction to give judgment.
- 85 The study I have made of the case-law of the Court of Justice reveals that the bodies which form part of the national court systems are always courts or tribunals within the meaning of Article 234 EC¹⁰³; however, that does not mean that every question referred by a body of that kind must automatically be admitted and decided on the merits. The referring body must, in addition, act in the capacity of a court or tribunal and it must have a case pending before it, a dispute between litigants which it is called upon to settle by interpreting and applying legal rules. In short, it must be exercising its judicial powers.¹⁰⁴ In these circumstances, a body that is part of the court system of a Member State which acts independently to settle a case, in accordance with legal criteria, in adversarial proceedings, always constitutes a court or tribunal within the meaning of Article 234 EC, and the Court of Justice must acknowledge that fact because it cannot deny that status to a body which enjoys it under its national law.

That definition includes, of course, the requirements deriving from the definition of 'tribunal' in the European Convention on Human Rights, especially Article 6(1), as interpreted by the institutions in Strasbourg. By means of this common denominator - since it has been ratified by all the Member States - it is possible to overcome the difficulties which would otherwise arise from the different definitions of the judicial function contained in the various legal orders.

- 86 To put it the other way round, a body which does not form part of the national court system and has not been granted the power to 'state the law' by interpreting and applying the law¹⁰⁵ in judicial proceedings must not be considered a court or tribunal. As I have already pointed out, the preliminary-ruling procedure is a dialogue by and between courts.
- C. Exception: the inclusion in the definition of those bodies which, although not forming part of the judicial structure, have the final word in the national legal order
- 87 Only as an exception should the Court of Justice accept the questions referred for a preliminary ruling by a body which does not form part of the national court system, when the referring body, although outside the judicial framework, has the last word in the national legal order, because its decision may not be contested. In those circumstances, the purpose and *raison d'être* of the preliminary-ruling procedure make it essential for the Court of Justice to accept and reply to the questions put to it.¹⁰⁶ In spite of the current consolidation of the

¹⁰³ Perhaps the Court was referring to this when it stated in its judgments in *Birra Dreher*, cited in footnote 32, and *Simmenthal*, cited in footnote 34, that the preliminary-ruling procedure is open to any national court or tribunal. Only the judgment in *Corbiau*, cited in footnote 12, would justify a different solution; the Court of Justice held, in that case, that the Luxembourg Director of Direct Taxes and Excise Duties is not a court or tribunal within the meaning of the Treaty, in spite of the fact that he had accorded him that standing (see footnote 14). However, his status as a court is challenged in Luxembourg itself by authoritative legal writers (See points 36 to 39 of Mr Darmon's Opinion).

¹⁰⁴ It should be remembered that, in *Job Centre I*, cited in footnote 66, the Court rejected a *limine* question referred for a preliminary ruling by a court of justice in non-contentious proceedings ('*giurisdizione volontaria*')

¹⁰⁵ Some bodies which are part of the executive power also interpret and apply legal rules, but they do not by virtue of that fact exercise a judicial function. The function of *ius dicere*, of stating what the law is in a specific case, is not restricted to application of the law. It goes further. It 'activates' the potential capacity of the legal order. The court, on some occasions, applies pre-existing legal rules; but, on others, it does more, it extracts them by applying principles of legislative integration and thus creates law. An administrative act never is or can be tantamount to a judgment. Its aim is not to state the law, but to satisfy specific needs; the function it exercises is, because of its objective, metalegal, even though it is channelled and bounded by the law (see Mendizábal, R. de, *Código con un juez sedente*, Real Academia de Jurisprudencia y Legislación, Madrid, 1999, pp. 165 and 166).

¹⁰⁶ On several occasions in this Opinion, I have noted the Court's sensitivity to the need, on the one hand, to extend the use of the preliminary-ruling procedure and, on the other, to ensure that Community law is applied uniformly, by accepting references for

preliminary-ruling procedure, the Court of Justice still needs to ensure that situations governed by Community law do not remain outside its jurisdiction and, consequently, without a uniform interpretation of the rules which regulate them.

- 88 However, such situations, as well as being exceptional, are virtually non-existent, thanks to the recognition of the right to effective legal protection, which requires the abolition of areas exempt from judicial review.

The right of access to the courts is protected by Article 6(1) of the European Convention on Human Rights. Although it is true that this provision expressly regulates only the safeguards of a fair hearing, it is nonetheless true that they would be ineffective if the prior existence of a right to judicial protection were not acknowledged. The primacy of law is inconceivable if there is no access to the courts. 'The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.'¹⁰⁷ Conversely, it is not possible to speak of true judicial protection if the proceedings are deprived of those safeguards. 'Access to the courts' and 'procedural safeguards' therefore constitute an indivisible whole, and we may therefore say that there is no effective judicial protection without those safeguards, amongst the most important of which is that relating to the independence of the body giving judgment and the adversarial nature of the proceedings.

Community case-law has also established the right to obtain a judicial determination,¹⁰⁸ which entitles individuals to seek before the competent court due observance of their rights and legitimate interests under the legal order of the European Union.

The judgments in Johnston¹⁰⁹ and Heylens¹¹⁰ have defined the characteristics of that right, which, as has been said, requires that there must be a means of contesting, by legal process, any decision of a national authority preventing the exercise of a right conferred by the Community legal order. Thus, any citizen of a Member state is entitled to ask the court to protect his rights under Community law.¹¹¹ Consequently, administrative decisions which are not subject to review by a court of law must be the exception rather than the rule in the legal systems of the Member States.

- 89 In order to accept a reference for a preliminary ruling from a body which, under the national legal order, does not form part of the court system, the Court of Justice must adhere rigorously to the criteria laid down in its own case-law and in that of the Strasbourg Court, for the reasons given above, especially the criteria of independence and adversarial proceedings.

- 90 So far as concerns the latter of these requirements, the Court of justice must forget the restrictions which may be observed in its own judgments.¹¹² Except in the most recent and inopportune pronouncements, the principle in question was relaxed in this way only where the absence of adversarial procedure was offset by the fact that the court was equally remote from both parties to the case.

- 91 It is all the more necessary to be rigorous in relation to the requirement of independence of

preliminary rulings from bodies whose decisions were not open to further challenge by legal process.

¹⁰⁷ Judgment of the European Court of Human Rights of 21 February 1975 in *Golder v United Kingdom* (Series A, No.18), paragraph 36.

¹⁰⁸ As Advocate General Darmon states in his Opinion in Case 222/84 *Johnston* [1986] ECR 1651.

¹⁰⁹ Cited in the previous footnote.

¹¹⁰ Case 222/86 *Heylens* [1987] ECR 4097.

¹¹¹ In other words, individuals cannot be deprived, by the effect of national procedural rules, of the right to assert, by means of legal process, the rights conferred on them by the Community legal system. This principle ensures that any infringement of that system by the national authorities is open to judicial review. There cannot be immunity from the courts. Advocate General Darmon pointed out, in point 54 of his Opinion in the *Corbiau* case (cited in footnote 12) that every individual has an inalienable right under Community law to apply to a court or tribunal within the meaning of Article 234 EC whenever a question of the interpretation of Community law is raised, not withstanding any limitation on such remedy under national law.

¹¹² The restriction according to which it is for the national court alone to decide whether it is necessary that a question should be referred for a preliminary ruling only after both sides have been heard. (*Simmenthal and Ligur Carni and Others*, cited in footnotes 33 and 35), or the rule which states, without further ado, that proceedings are *inter partes* when the parties have been heard by the authority which adopted the decision they are contesting before the body which has made the reference for a preliminary ruling, even though there has been no discussion of the case before that body (judgment in *Dorsch Consult*, cited in footnote 16).

the body which has to take the decision and decides to make a reference for a preliminary ruling.¹¹³ The Court of Justice has sometimes gone a very long way in its interpretation of this essential element of the judicial function and has distorted it.¹¹⁴

- 92 Independence is not a fortuitous, but an inherent, element of the judicial function. It has two aspects, one personal and the other functional. The former relates directly to the person who has to give judgment and requires certain safeguards to ensure independence, such as his irremovability. The functional aspect involves the absence of hierarchical links, other than those which are purely procedural in appeals. Independence must be present not only externally, in respect of elements which are irrelevant to the judicial power and the proceedings, but also internally, with regard to the opposing interests. Here, independence is called impartiality. In short, it is not possible to be both judge and party at the same time, and not possible to speak of judicial function without an impartial and independent body.
- 93 To compare the independence of the person who gives judgment between the parties with third party status is to speak in simplistic terms. That third party status is, as I have already pointed out,¹¹⁵ necessary but not enough. Independence is much more than that: it is equidistance from the parties to the case and from the subject-matter of the dispute; that is to say, a lack of any interest in the settlement of the dispute other than the strict application of the law,¹¹⁶ hence the need to establish the grounds for the judge to withdraw or be recused. However, it is also freedom in relation to superiors in the hierarchy and government bodies, other national authorities and social pressures. Irremovability is the basis and the reflection of judicial independence and means that judges cannot be dismissed, suspended, moved or retired except on grounds, and subject to the safeguards, provided by law.¹¹⁷ Finally, the obverse of independence is the judge's personal liability, which also counterbalances the court's submission to the only link which the legal order allows and imposes on it: the law.

Impartiality and independence are fragile virtues which must be very rigorously protected. Bodies whose decisions may be subject, either partially or in theory, to supervision, review or reversal by a non-judicial authority are not wholly independent and, consequently, are unable to afford full judicial protection.¹¹⁸

- 94 Therefore, in order to ascertain whether the body from which it receives a reference for a preliminary ruling is of a judicial nature, the Court of Justice is required to check that it fulfils the safeguard of independence in all its forms and the requirement that it is subject only to the law, by means of clear rules relating to appointment procedures, permanence of function, grounds for the withdrawal, objection to or dismissal of its members, which distance it from the interests at issue and make it immune from any kind of external suggestions, hints or pressures, whether obvious or veiled.
- 95 In short, as a general rule, references for preliminary rulings may be made only by judicial bodies in proceedings in which they must settle a dispute by exercising their power to give judgment. By way of exception, references from other bodies are admissible only where no further legal remedy is available and provided that safeguards of independence and adversarial proceedings are offered.

D. The advantages of the proposal

¹¹³ The recent increase in references for preliminary rulings from administrative bodies with jurisdiction to give judgment in respect of the award of public contracts has contributed to this urgency to a certain extent.

¹¹⁴ The case of *Gabalfrisa and Others*, cited in footnote 27, is, in this respect, the leading case.

¹¹⁵ See footnote 13.

¹¹⁶ This is what P. Calamandrei called the psychological attitude of initial indifference, in *Elogio dei Giudici scritto da un avvocato*, Ponte Alle Grazie, Florence, 1989, pp. XXXIX and 122. The lack of impartiality is 'the negation of the very essence of the judicial process' (judgment 142/1997 of the Spanish Constitutional Court).

¹¹⁷ H.-Sidgwick (to whom R. De Mendizábal refers on p. 201 of the work cited in footnote 106) said, in *The Elements of Politics*, that the independence of judges is not jeopardised merely because they are appointed by the legislature or the executive, provided a condition of their appointment is that they cannot be either removed from office or demoted.

¹¹⁸ Judgments of the European Court of Human Rights in *Van de Hurk v Netherlands*, 1994, Series A, No. 288, paragraph 45, and *Findlay v United Kingdom*, 1997, Series I, paragraph 77.

96 The new approach to the concept of 'national court or tribunal' which I suggest would make the work of the Court of Justice more straightforward and would have the virtue of rendering much clearer results than the present ones. With regard to questions referred for a preliminary ruling by bodies which form part of the court system of a Member State, it would need only to confirm that they were acting in the exercise of their power to give judgment. If the question is referred by a body which is not part of that system, the Court would first have to determine whether the decision it has to take is not open to further judicial review and then check meticulously that it fulfils the criteria characterising a body which exercises a function of a judicial nature.

97 Moreover, it is foreseeable that, if the proposed criteria are applied, the number of references for preliminary rulings will be reduced.

I have already pointed out, in point 41 of the opinion I delivered in the *Kofisa* case,¹¹⁹ that a significant increase in the number of cases in which the Court has to give a ruling might, indirectly, adversely affect the uniform interpretation of Community law which the preliminary-ruling procedure purports to safeguard. The acceptance of questions referred by bodies which do not form part of the national judicial system is likely to increase the Court's workload and delay resolution of the dispute. This protraction of the procedure as a result of unnecessary references for preliminary rulings¹²⁰ might dissuade courts in the Member States from submitting questions which are essential for the uniform application of Community law, and the judicial cooperation established by Article 234 EC would be undermined.

98 Finally, we should not ignore the impact on the sources of law of the powers which the Court of Justice has conferred on the national courts and tribunals. The Court held in *Simmenthal*¹²¹ that courts of the Member States with jurisdiction to apply provisions of Community law are under a duty to give full effect to those provisions, if necessary refusing to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for them to request or await the prior setting aside of such provision by legislative or other constitutional means.

99 In the *Factortame* case,¹²² the Court added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given. In those circumstances, the court is empowered to set aside the national provision.¹²³

100 But, in any event, the broad interpretation which the Court of Justice gives to the definition of court or tribunal under Article 234 EC presents serious problems when it ascribes the status of court to bodies to which it is not ascribed by the national legal system, since it distorts the identity there must be between the person who formulates the question and the person who receives the reply. Although it is conceivable that the Court of Justice may expand the definition, as it unfortunately has done, to include administrative bodies, it is harder to comprehend that, in its reply, it should grant them powers which they do not have under national law, with the consequence that the constitutional system of the Member State in question is undermined. If the Court of Justice grants the national court full jurisdiction as a Community court,¹²⁴ for which we need only recall the apodictic terms of the judgment in

¹¹⁹ Case C-1/99 *Kofisa* [2001] ECR I-0000.

¹²⁰ See point 78 of this Opinion.

¹²¹ Case 106/77 *Simmenthal* [1978] ECR 629.

¹²² Case 213/89 *Factortame* [1990] ECR I-2433.

¹²³ The application of this case-law to bodies with authority to submit questions for preliminary rulings is confirmed in Paragraph 21 of the same judgment. In the following paragraph, the Court adds that the effectiveness of the system established by Article 177 of the EEC Treaty (now Article 234 EC) would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant the interim relief necessary to ensure the effectiveness of the judgment it had to deliver after receiving a reply from the Court of Justice.

¹²⁴ Alonso García, R., *Derecho comunitario. Sistema constitucional y administrativo de la Comunidad Europea*, Ed. Centro de Estudios Ramon Areces, Madrid, 1994, pp. 332 and 333, indicates the confused doctrine stated in the Court's judgment in Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, when it categorically declared that not only the judicial bodies but also the administrative authorities were

Simmenthal, which I have just cited, it is incomprehensible that that jurisdiction should be conferred on bodies which, under national law, do not form part of the judiciary and are considered to be merely administrative authorities. Even more difficult to assimilate is the fact that the Court of Justice, when replying to a body which it considers to be a court or tribunal, even though it has a different status in the State to which it belongs, addresses only bodies which actually are part of the national judicial System.¹²⁵

- 101 I do not think I need to dwell too much on the inexpediency of extending to administrative bodies the power to disapply legal rules. In short, it is just one more indication of the need to restrict the power to make references for preliminary rulings to bodies of a strictly judicial nature, with certain exceptions.

[...]

under an obligation to refrain from applying national law which was incompatible with Community law, committing the serious error of failing to explain that such incompatibility must have the support of the Court of Justice.

¹²⁵ See the work of Barav, A., 'La plénitude de compétence du juge national en sa qualité de juge communautaire', in *L'Europe et le droit. Mélanges en hommage à Jean Boulouis*, Ed. Dalloz, Paris, 1991, pp. 1 et seq.

2. THE DISCRETION TO MAKE A REFERENCE



NOTE AND QUESTIONS

There are two cases in this section:

1. Case 166/73: Rheinmühlen-Düsseldorf I Case 166/73: Rheinmühlen-Düsseldorf I from the Bundesfinanzgericht, the Supreme Finance Court of Germany
2. Case 146/73: Rheinmühlen-Düsseldorf II from the Finanzgericht, the Lower financial Court of Hessen (one of the federal units of Germany)

After having read them try and answer the following questions:

What is the dispute between the two German Courts on the discretion to refer? How is it resolved, if at all, by the European Court of Justice?

2.1 Case 166/73: Rheinmühlen-Düsseldorf I

Rheinmühlen-Düsseldorf
v
Einfuhr- und Vorratsstelle für Getreide und Futtermittel

Case 166/73

Court of Justice

16 January 1974

[1974] ECR 33

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order dated 14 August 1973, filed at the Registry on 4 September 1973, the Bundesfinanzhof referred to the Court under Article 177 of the EEC Treaty the question whether the second paragraph of Article 177 gives 'to a court or tribunal against whose decisions there is a judicial remedy under national law a completely unfettered right to refer questions to the Court of Justice' or 'does it leave unaffected rules of domestic law to the contrary whereby a court is bound on points of law by the judgments of the courts superior to it'?

It appears from the order that the question is put in the context of proceedings directed

against the decision of the Hessisches Finanzgericht requesting from the Court an interpretation of the provisions of Regulation No 19/62 of the Council [citation omitted] in order to be able to judge a case which had been sent back to it by the appellate court, the Bundesfinanzhof, which had reserved an earlier judgment of the Finanzgericht.

Since the interpretation requested by the Finanzgericht concerns the conformity with Community law of the grounds which had led the Bundesfinanzhof to reverse the earlier judgment of the Finanzgericht, the question arises whether Paragraph 126 (5) of the Finanzgerichtsordnung whereby the inferior judge is bound by the ratio decidendi of the superior court, does not preclude the lower court from referring a case to the Court of Justice for a preliminary ruling.

2. Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.

Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.

Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law.

The provisions of Article 177, which enable every national court or tribunal without distinction to refer a case to the Court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light.

3. The provisions of Article 177 are absolutely binding on the national judge and, in so far as the second paragraph is concerned, enable him to refer a case to the Court of Justice for a preliminary ruling on interpretation or validity.

This Article gives national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on a point referred to in the first paragraph of Article 177.

4. It follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part.

It follows from these factors that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.

It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.

If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.

5. The reply must therefore be that the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power provided for by Article 177 of referring cases to the Court.

[...]

2.2 Case 146/73: Rheinmühlen-Düsseldorf II

Rheinmühlen-Düsseldorf
v
Einfuhr- und Vorratsstelle für Getreide und Futtermittel

146/73

Court of Justice

12 February 1974

[1974] ECR 139

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By Order dated 7 May 1973, filed at the Registry on 20 June 1973, the Hessisches Finanzgericht referred to the Court under Article 177 of the EEC Treaty three questions relating respectively to the interpretation of Article 177 of the Treaty and to that of the provisions of EEC Regulation No 19/62 of the Council [citation omitted].

On the first question

2. The first question asks whether a court against whose decisions there is a judicial remedy under national law may refer a doubtful question of European law to the Court of Justice of the European Communities for a preliminary ruling only when the case comes before it for the first time, or whether a reference is also permissible when the case is being reconsidered after a judgment given by such a court sitting at first instance has been quashed by a supreme court.
3. This question is substantially the same as a preliminary question put in the same case by the Bundesfinanzhof, which was the subject of the judgment by the Court given on 16 January 1974 in Case 166/73, to which reference should be made.

According to this judgment a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot on this ground alone deprive the inferior courts of their power, provided for under Article 177, to refer questions to the Court for a preliminary ruling.

However, in the case of a court against whose decisions there is a judicial remedy under national law, Article 177 does not preclude a decision of such a court referring a question to this Court for a preliminary ruling from remaining subject to the remedies normally available under national law.

Nevertheless, in the interests of clarity and legal certainty, this Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked.

[...]

3. **DUTY TO REFER**



NOTE AND QUESTIONS

This issue is clearly the most important one and will be the focus of our discussion in class.

CILFIT is the leading case on the duty to refer and the one to which you should devote your closest attention.

After having read it you should be able to answer the following questions:

1. What are the essential facts and what is the question which is being referred for a Preliminary Ruling?
2. How does the ECJ construe the function of Article 234 (ex Art. 177)?
3. How does the Court explain the meaning of the concept of "necessary" in Article 234 (ex Art. 177)?
4. How does the Court construe and explain the concept of "Where any such question is raised"?
5. Does the Court give a reply to the concept of a court against whose decisions there is no remedy?
6. The Court recalls in Recital 13 its earlier decision in *Da Costa* and cites the Critical Recital. Is there any movement from *Da Costa* (decided in 1963) to *CILFIT* decided in 1983? If your reply is yes (it obviously is) try and explain the reasons which may have prompted the Court to make such a movement.

3.1 Case 283/81: CILFIT

Srl CILFIT, and Lanificio di Gavardo, SpA

v

Ministry of Health

Case 283/81

Court of Justice

6 October 1982

[1982] ECR 3415

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 27 March 1981, which was received at the Court on 31 October 1981, the Corte Suprema di Cassazione [Supreme Court of Cassation] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the third paragraph of Article 177 of the EEC Treaty.
2. That question was raised in connection with a dispute between wool importers and the Italian Ministry of Health concerning the payment of a fixed health inspection levy in respect of wool imported from outside the Community. The firms concerned relied on Regulation (EEC) No. 827/68 of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty [citation omitted]. Article 2 (2) of that regulation prohibits Member States from levying any charge having an effect equivalent to a customs duty on imported "animal products", not specified or included elsewhere, classified under heading 05.15 of the Common Customs Tariff. Against that argument the Ministry for Health contended that wool is not included in Annex II to the Treaty and is therefore not subject to a common organization of agricultural markets.
3. The Ministry of Health infers from those circumstances that the answer to the question concerning the interpretation of the measure adopted by the Community institutions is so obvious as to rule out the possibility of there being any interpretative doubt and thus obviates the need to refer the matter to the Court of Justice for a preliminary ruling. However, the companies concerned maintain that since a question concerning the interpretation of a regulation has been raised before the Corte Suprema di Cassazione, against whose decisions there is no judicial remedy under national law, that court cannot, according to the terms of the third paragraph of Article 177, escape the obligation to bring the matter before the Court of Justice.
4. Faced with those conflicting arguments, the Corte Suprema di Cassazione referred to the Court the following question for a preliminary ruling:
"Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?"

5. In order to answer that question it is necessary to take account of the system established by Article 177, which confers jurisdiction on the Court of Justice to give preliminary rulings on, inter alia, the interpretation of the Treaty and the measures adopted by the institutions of the Community.
6. The second paragraph of that article provides that any court or tribunal of a Member State may, if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.
7. That obligation to refer a matter to the Court of Justice is based on co-operation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177.
8. In this connection, it is necessary to define the meaning for the purposes of Community law of the expression "where any such question is raised" in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.
9. In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.
10. Secondly, it follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.
11. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.
12. The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by the third paragraph of Article 177 might none the less be subject to certain restrictions.
13. It must be remembered in this connection that in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 (*Da Costa v Nederlandse Belastingadministratie* [1963] ECR 31) the Court ruled that: "Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when

the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

14. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.
15. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.
16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.
17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.
18. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.
19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.
20. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.
21. In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning 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, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

[...]

3.2 Case 99/00: Lyckeskog



NOTE AND QUESTIONS

This case interprets the concept of court of last resort under Article 234 EC with regard to the Swedish courts system.

Kenny Roland Lyckeskog

Case 99/00

Court of Justice

4 June 2002

[2002] ECR

<http://www.curia.eu.int/en/content/juris/index.htm>

Judgment

1. By decision of 10 March 2000, received at the Court on 16 March 2000, the Hovrätt för Västra Sverige (Court of Appeal for Western Sweden) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of the third paragraph of Article 234 EC and of Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EC) No 355/94 of 14 February 1994 (OJ 1994 L 46, p. 5) ('Regulation No 918/83').
2. Those questions have arisen in proceedings brought against Mr Lyckeskog on the ground that he had attempted to smuggle into Sweden 500 kg of rice from Norway without declaring that importation.

Community law

3. With regard to the obligations devolving on the court or tribunal making a reference, the third paragraph of Article 234 EC provides:

'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

[...]

National legislation

5. The Swedish hovrätter deliver judgments which may be the subject of appeal to the Högsta domstol (Supreme Court) (Sweden). Such an appeal will always be examined if it is brought by the Public Prosecutor in cases involving the exercise of public authority. In other cases, an appeal will be examined as to its substance only if the Högsta domstol has declared it admissible.

6. Paragraph 10 of Chapter 54 of the Rättegångsbalk (Code of Procedure) provides that the Högsta domstol may declare an appeal admissible only if:

'1. it is important for guidance in the application of the law that the appeal be examined by the Högsta domstol, or

2. there are special grounds for examination of the appeal, such as the existence of grounds of review on a point of law, formal defect, or where the outcome of the case before the hovrätt is manifestly attributable to negligence or serious error.'

The dispute in the main proceedings and the questions submitted for preliminary ruling

7. Mr Lyckeskog was found guilty of attempted smuggling by the Strömstads tingsrätt (District Court, Strömstad) on the ground that he had attempted, in 1998, to import 500 kg of rice from Norway into Sweden. The tingsrätt, basing itself on the fact that Mr Lyckeskog had exceeded the quantity of 20 kg authorised by decision of the customs administration for the duty-free importation of rice, held that the importation by Mr Lyckeskog was of a commercial nature within the meaning of Regulation No 918/83.

8. Mr Lyckeskog appealed against that decision to the Hovrätt för Västra Sverige, which, although taking the view that it could rule on the merits of the case given that there was no difficulty in interpreting the applicable provisions of Community law, expressed uncertainty as to whether it was to be regarded as a court ruling at last instance and for that reason obliged under the third paragraph of Article 234 EC to refer a question for a preliminary ruling to the Court to enable it to interpret the relevant provisions of Regulation No 918/83, as the conditions laid down in the judgment in Case 283/81 CILFIT [1982] ECR 3415 did not appear to be satisfied.

9. It was in those circumstances that the Hovrätt för Västra Sverige referred the following questions to the Court for a preliminary ruling:

'1. Is a national court or tribunal which in practice is the last instance in a case, because a declaration of admissibility is needed in order for the case to be reviewed by the country's supreme court, a court or tribunal within the meaning of the third paragraph of Article 234 EC?

2. May a court or tribunal within the meaning of the third paragraph of Article 234 EC decline to request a preliminary ruling where it considers it clear how the questions of Community law in point must be decided, even if those questions are not covered by the doctrine of *acte clair* or *acte éclairé*?

In the event that the Court of Justice answers the first question in the negative, or the first question in the affirmative and the second question in the negative - but not otherwise - the Hovrätt also wishes to have an answer to the following questions:

[...]

The first question

10. The essence of the first question referred by the Hovrätt för Västra Sverige is whether a national court or tribunal whose decisions will be examined by the national supreme court, before which they are challenged, only if that supreme court declares the appeal to be admissible is to be regarded as a court or tribunal against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 234 EC.

11. The Danish Government submits that any court or tribunal whose decisions may be the subject of appeal only after a declaration of admissibility has been issued must be considered to be a court or tribunal of the type referred to in the third paragraph of Article 234 EC. It bases its reasoning on, first, the judgment in Case 6/64 Costa [1964] ECR 585, in which the Court pointed out that, under the actual wording of that provision, national courts against whose decisions, as in the main proceedings in that case, there was no judicial remedy, had to refer the matter to the Court so that a preliminary ruling could be given on the interpretation of Community law, and, second, the judgment in Case 107/76 Hoffmann-La Roche [1977] ECR 957, in which the Court ruled that the underlying purpose of Article 234 EC is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph being to prevent a body of national case-law not in accordance with the rules of Community law from coming into existence in any Member State. The requirement of a declaration of admissibility would thus constitute an obstacle to the uniform interpretation of Community law if the supreme court alone were covered by the obligation arising under the third paragraph of Article 234 EC.
12. The judgment in Costa, cited above, is also cited by the Swedish and Finnish Governments in their observations submitted to the Court, but in support of an analysis contrary to that of the Danish Government. Thus, they contend that the mere fact that the decisions of the hovrätter may be subject to appeal suffices to justify the conclusion that those courts are not covered by the third paragraph of Article 234 EC. The mechanism of a declaration of admissibility, they argue, does no more than limit the prospects of an applicant having his appeal examined. It does not, as the United Kingdom Government points out, remove the possibility of lodging an appeal against judgments of the hovrätter. The United Kingdom further submits that, at the stage of considering the admissibility of an appeal, a supreme court can make a reference for a preliminary ruling on a question as to the interpretation of a rule of Community law. The referring court, questioned on this point by the Court, accepts that this is so as regards the Högsta domstol. The Swedish Government points out, moreover, that, in the exceptional cases in which there is no ordinary avenue of appeal against judgments of the hovrätter and those courts therefore, from the formal point of view, rule at final instance, they come within the scope of the third paragraph of Article 234 EC.
13. The Commission takes the same position, basing its reasoning on the fact that, where a court ruling on admissibility at last instance considers that an issue of Community law has not been correctly dealt with, that court is required to refer a question to the Court for a preliminary ruling pursuant to the third paragraph of Article 234 EC, or rely on one of the limits on the obligation to refer defined in the judgment in CILFIT, cited above, or remit the case to a lower court. Thus, the possibility of referring a question for a preliminary ruling will always be preserved and the risk of interference with the uniform interpretation of Community law consequently avoided.
14. The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State (see, *inter alia*, Hoffmann-La Roche, cited above, paragraph 5, and Case C-337/95 Parfums Christian Dior [1997] ECR I-6013, paragraph 25).
15. That objective is secured when, subject to the limits accepted by the Court of Justice (CILFIT), supreme courts are bound by this obligation to refer (Parfums Christian Dior, cited above) as is any other national court or tribunal against whose decisions there is no judicial remedy under national law (Joined Cases 28/62, 29/62 and 30/62 *Da Costa en Schaake* [1963] ECR 31).
16. Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose

decisions there is no judicial remedy under national law' within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

17. That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol against the judgment of a hovrätt, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court.
18. If a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage.
19. The answer to the first question must therefore be that, where the decisions of a national court or tribunal can be appealed to the supreme court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC.

The second question

20. The essence of the second question referred by the Hovrätt för Västra Sverige is whether, in the event that a hovrätt is to be regarded as a court or tribunal within the meaning of the third paragraph of Article 234 EC, it is obliged to refer the matter to the Court even though interpretation of the rule of Community law applicable to the dispute in the main proceedings does not present any difficulty but the conditions required by the judgment in CILFIT for application of the acte clair doctrine are not met.
21. In view of the answer to the first question and to the fact that, under Swedish legislation, the Högsta domstol may, on appeal to it against a decision by a hovrätt, refer a question to the Court for a preliminary ruling, it is unnecessary to reply to the second question.

[...]

3.3 Case C-337/95: Parfums Christian Dior



NOTE AND QUESTIONS

In Dior the ECJ was, among other issues, asked to decide, if the Benelux court, an international court established by a treaty signed in Brussels on 31 March 1965 between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, can ask questions for preliminary ruling under Art 234 and in what circumstances is it under a duty to refer a question to the ECJ.

Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV

Case 337/95

4 November 1997

Court of Justice

[1997] ECR I-6013

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

In Dior, the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands), referred six questions for preliminary ruling to the ECJ. The questions have been raised in proceedings between (i) Parfums Christian Dior SA (Dior France) and Parfums Christian Dior BV (Dior Netherlands) and (ii) Evora BV, concerning advertising carried out by Evora for Dior products which it has put on sale. Parfums Christian Dior SA is the manufacturer of "luxury" perfumes and other cosmetic products, which it sells at premium prices. It utilizes a selective distribution system. Dior Netherlands is Dior France's sole representative in the Netherlands. In addition, Dior France has exclusive trademark rights in Benelux, including illustrations of the packaging of the perfumes.

The defendant, Evora, operates a chain of approximately 300 "health and beauty" retail stores under the subsidiary name Kruidvat. Kruidvat obtained Christian Dior products by means of parallel imports. As part of a 1993 Christmas promotion, Kruidvat advertised several Dior perfumes. The advertisements depicted the packaging and bottles of some Christian Dior. Nevertheless, Dior France had not consented to the advertising and commenced proceedings to prohibit Evora from making any use of its picture trademarks. Taking the view that this advertising did not correspond to the luxurious and prestigious image of the Dior marks, Dior France and Dior Netherlands brought proceedings before the Rechtbank te Haarlem (District Court, Haarlem) for infringement of those marks and for an order requiring Evora to desist and to continue to desist from making use of

Dior picture trade marks and from any publication or reproduction of its products in catalogues, brochures, advertisements or otherwise.

The case eventually reached the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands), which decided that questions on the interpretation of the Uniform Benelux Law on Trade Marks should be referred to the Benelux Court of Justice ('the Benelux Court') and questions on Community law should be referred to the ECJ. In this context, the Hoge Raad has also raised the question whether in this instance it or the Benelux Court is to be regarded as the court or tribunal against whose decisions there is no judicial remedy under national law and which court is therefore obliged under the third paragraph of Article 177 of the Treaty to make a reference to the Court of Justice.

Judgement

[...]

14 The Hoge Raad has therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Where, in proceedings relating to trade marks in one of the Benelux countries in connection with the interpretation of the Uniform Benelux Law on Trade Marks, a question relating to the interpretation of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks arises, is the highest national court or the Benelux Court to be regarded as the court or tribunal of the Member State against whose decisions there is no remedy under national law and which is therefore obliged under the third paragraph of Article 177 of the EC Treaty to make a reference to the Court of Justice?

[...]

The first question

15 According to the judgment referring the question,

- the Benelux Court was established by a treaty signed in Brussels on 31 March 1965 between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands and is composed of judges of the supreme courts of each of those three States, and,

- under Article 6(3) of that treaty and Article 10 of the Benelux Convention on Trade Marks, concluded on 19 March 1962 between the three Benelux Member States, the Hoge Raad is in principle bound to submit to the Benelux Court for a preliminary ruling questions on the interpretation of the Uniform Benelux Law on Trade Marks annexed to that convention.

16 Article 6 of the Treaty establishing the Benelux Court is worded as follows:

1. In the cases specified below, the Benelux Court shall rule on questions of the interpretation of the legal rules designated under Article 1 which arise in proceedings before courts of one of the three countries, sitting in their territory in Europe ...

2. Where it appears that judgment in a case before a national court requires resolution of a point of interpretation of a legal rule designated under Article 1, that court may, if it considers that a ruling on the point is necessary in order for it to give judgment, stay any final judgment, even of its own motion, in order for the Benelux Court to rule on the question of interpretation.

3. In the circumstances set forth in the previous subparagraph, a national court against whose decisions no appeal lies under domestic law shall be bound to refer the question to the Benelux Court. ...'

17 Article 7(2) of the same Treaty provides:

'National courts which then give judgment in the case shall be bound by the interpretation given in the judgment delivered by the Benelux Court.'

18 It is with reference to that legal system that, by its first question, the Hoge Raad asks whether, in a case where a question relating to the interpretation of the Directive is raised in proceedings in one of the Benelux Member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, it is the highest national court or the Benelux Court which is the national court against whose decisions there is no judicial remedy under national law and which is therefore obliged under the third paragraph of Article 177 of the Treaty to make a reference to the Court of Justice.

19 In order to reply to that question, it is necessary to examine first whether a court like the Benelux Court may refer questions to the Court of Justice for a preliminary ruling and, if so, whether it may be obliged to do so.

20 First of all, it appears that the question submitted by the Hoge Raad is based, quite rightly, on the premiss that a court such as the Benelux Court is a court which may submit questions to this Court for a preliminary ruling.

21 There is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.

22 In this regard, particular account must be taken of the fact that the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and of the fact that the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules.

23 To allow a court, like the Benelux Court, faced with the task of interpreting Community rules in the performance of its function, to follow the procedure provided for by Article 177 of the Treaty would therefore serve the purpose of that provision, which is to ensure the uniform interpretation of Community law.

24 Next, as regards the question whether a court like the Benelux Court may be under an obligation to refer a question to the Court of Justice, it is to be remembered that, according to the third paragraph of Article 177 of the Treaty, where a question of Community law is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice.

25 According to the case-law of the Court of Justice, that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice (see, in particular, Case 283/81 CILFIT and Lanificio di Gavardo v Italian Ministry of Health [1982] ECR 3415, paragraph 7). It is also clear from the case-law that the particular purpose of the third paragraph of Article 177 is to prevent a body of national case-law that is not in accord with the rules of Community law from coming into existence in any Member State (see, in particular, Case 107/76 Hoffman-La Roche v Centrafarm [1977] ECR 957, paragraph 5, and Joined Cases 35/82 and 36/82 Morson and Jhanjan v State of the Netherlands [1982] ECR 3723, paragraph 8).

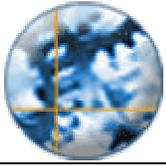
26 In these circumstances, in so far as no appeal lies against decisions of a court like the Benelux Court, which gives definitive rulings on questions of interpretation of uniform Benelux law, such a court may be obliged to make a reference to this Court under the third

paragraph of Article 177 where a question relating to the interpretation of the Directive is raised before it.

- 27 As regards, further, the question whether the Hoge Raad may be obliged to refer questions to this Court, there is no question that such a national supreme court, against whose decisions likewise no appeal lies under national law, may not give judgment without first making a reference to this Court under the third paragraph of Article 177 of the Treaty when a question relating to the interpretation of Community law is raised before it.
- 28 However, it does not necessarily follow that, in a situation such as that described by the Hoge Raad, both courts are actually obliged to make a reference to this Court.
- 29 According to the established case-law of the Court, although the last paragraph of Article 177 unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court any question of interpretation raised before them, the authority of an interpretation provided by the Court under Article 177 may deprive that obligation of its purpose and thus empty it of its substance. This is especially so when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in a similar case (see, in particular, *CILFIT* and *Lanificio di Gavardo*, cited above, paragraph 13, and *Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schaake and Others v Nederlandse Belastingadministratie* [1963] ECR 31). Such is also the case, a fortiori, when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings.
- 30 It follows that, if, prior to making a reference to the Benelux Court, a court like the Hoge Raad has made use of its power to submit the question raised to the Court of Justice, the authority of the interpretation given by the latter may remove from a court like the Benelux Court its obligation to submit a question in substantially the same terms before giving its judgment. Conversely, if no reference has been made to the Court of Justice by a court like the Hoge Raad, a court like the Benelux Court must submit the question to the Court of Justice, whose ruling may then remove from the Hoge Raad the obligation to submit a question in substantially the same terms before giving its judgment.
- 31 The answer to be given to the first question must therefore be that, where a question relating to the interpretation of the Directive is raised in proceedings in one of the Benelux Member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, a court against whose decisions there is no remedy under national law, as is the case with both the Benelux Court and the Hoge Raad, must make a reference to the Court of Justice under the third paragraph of Article 177 of the Treaty. However, that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings.

[...]

4. THE PRELIMINARY REFERENCE FOR VALIDITY (ART 234B) & THE TEMPORAL EFFECT OF PRELIMINARY RULINGS



NOTE AND QUESTIONS

1. What is the effect of a preliminary ruling ex Article 234a (ex Art. 177a)? (What questions do you have to ask to determine the effect of a judgment?)
2. Is there a Doctrine of Stare Decisis in the Community system as regards 234a (ex 177a)?

On **International Chemical Corporation and Foto Frost**:

3. How, if at all, does the duty to refer questions of validity (234 b, ex 177b) of Community law differ from those on interpretation?

Is the decision in Foto Frost compatible with the language of the Treaty? When is there a duty and discretion to refer under 234b (ex 177b)?

On **Zuckerfabrik, Atlanta II and T-Port I**:

4. To what extent do these cases represent a) the development of or b) a departure from Foto Frost? What interpretative and policy issues are involved in the new brace of cases?
5. Is there Stare Decisis in relation to 234b (ex 177b)?
6. Are Preliminary Rulings under 234b (ex 177b) binding inter-partes or erga omnes?

Reflect on the **ONIC case**:

7. What is the problem in considering 234b (ex 177b) in relation to 230 (ex 173)?
8. What are the temporal effects of a ruling ex 234b (177b)? (ex tunc or ex nunc?)
9. Does ONIC solve the problem of 230 -- 234b?
10. In this case the Court prescribed a prospective effect to a holding of invalidity. Why? Is it consistent with the Treaty? Whereas in ONIC the litigant who brought the case and other pending cases were not "caught" by the prospectivity of the judgment, in a later case the prospectivity was held to apply even to the litigant in the case. Critique?

4.1 Case 66/80: *International Chemical Corporation*

SpA International Chemical Corporation
v
Amministrazione delle Finanze dello Stato

Case 66/80

Court of Justice

13 May 1981

[1981] ECR 1191

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 21 January 1980 which was received at the Court on 3 March 1980 the Tribunale Civile di Roma referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions as to the interpretation of Article 177 and as to the interpretation or the validity of various Council or Commission regulations, one concerning the compulsory purchase of skimmed-milk powder held by intervention agencies and the others export refunds on compound feeding-stuffs.
2. Those questions have been raised in the context of a dispute between the Italian Finance Administration and the plaintiff in the main action, a manufacturer of compound feeding-stuffs, which is claiming from that administration, first, the restitution of securities which it has provided or at any rate paid for on behalf of its suppliers and which the Administration has declared forfeit and, secondly, the payment of export refunds which were refused at the time of the exportation of certain compound feeding-stuffs.
3. In order to reduce stocks of skimmed-milk powder by increasing the use of that product in animal feeding-stuffs Council Regulation No. 563/76 of 15 March 1976 [citation omitted] made the grant of certain Community aids in respect of the use of protein products and the release into free circulation in the Community of certain products used in the manufacture of compound feeding-stuffs dependent on the obligation to purchase certain quantities of skimmed-milk powder held by the intervention agencies. To secure compliance with that obligation the grant of aids and release into free circulation were made subject either to proof of purchase of skimmed-milk powder or the prior provision of a security which was forfeited in the event of non-performance of the obligation to purchase.
4. The plaintiff in the main action first provided securities and in addition paid for those provided by certain of its suppliers. It thus obtained the aids provided for but as it has not complied with the obligation to purchase skimmed-milk powder those securities have not been released by the competent Italian administration. At a later date in order to avoid having to provide a security it imported, under the temporary importation procedure rather than under the procedure for release into free circulation, products from non-member countries which it uses in the manufacture of compound feeding-stuffs. The upshot was that when those feeding-stuffs came to be exported to non-member countries and the plaintiff applied for the payment of the export refunds provided for in Article 16 of Regulation No. 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals [citation omitted] those refunds were refused on the ground that the feeding-stuffs contained products which had never been in free circulation in the Community and the condition for the grant of refunds is that those raw materials should originate in the Community or at least be in free

circulation there.

5. By various judgments given on 5 July 1977 in Cases 114/76, 116/76 and Joined Cases 119 and 120/76 [1977] ECR 1211 the Court held when ruling on questions put to it by various national courts that Council Regulation No. 563/76 was not valid because the price at which the milk powder had to be compulsorily purchased was set at a level so disproportionate in comparison to the conditions on the market that it constituted a discriminatory distribution of the burden of costs between the various agricultural sectors and because moreover such an obligation was not necessary in order to attain the objective in view, namely, the disposal of stocks of skimmed-milk powder.
6. The plaintiff in the main action, which was not a party to the actions which led to reference being made to the Court, accordingly took the view that the securities which it had provided or paid for could not be required or a fortiori declared forfeit since they served only to ensure the performance of an obligation which had been unlawfully imposed. It further believes that since it was for the sole purpose of avoiding the provision of those securities that it imported from non-member countries certain compound feeding-stuffs which it manufactures under a temporary importation procedure rather than under a procedure whereby products are released into free circulation, it should be entitled to export refunds on those compound feeding-stuffs as if they were in free circulation in the Community. Finally, on an alternative basis, it argues that it is entitled in any event to refunds on the cereal components, which are of Community origin, contained in the products which it exported. It is claiming from the Italian administration the refund or payment of the amounts equivalent to the securities forfeited and the refunds which have been refused.
7. In order to settle this dispute the national court referred the following questions to the Court:
 - "1. Under Article 177 of the Treaty is a declaration that a Community regulation is null and void effective erga omnes or is it binding only on the court a quo; more particularly, in that case may the principle contained in the judgment of 27 March 1963 in Joined Cases 28, 29 and 30/62 be extended to a declaration of nullity?
 2. Again in the latter case, is Regulation No. 563/76 of 15 March 1976 null and void for the same reasons as those set out in the judgments of 5 July 1977 in Cases 144, 116 and Joined Cases 119 and 120?
 3. If the said regulation is null and void, must the principles on which the Community legal order is based be held to allow or not to allow upon certain terms and within certain time-limits the refund to an individual of a payment which was not due, and if so does the declaration of nullity give the individual himself the right to claim back under the national law of the various States the amount that he has previously paid on the basis of the rule which has been declared null and void and, if so, is this subject to specific terms or time-limits or to given conditions, especially having regard to the case in which the claim is for the reimbursement of sums paid by the plaintiff to his suppliers?
 4. With reference to Community law, and in particular to the Commission's Regulations No. 192/75 of 17 January 1975, No. 2727/75 of 29 October 1975, No. 2743/75 of 29 October 1975, No. 677/76 of 26 March 1976, No. 1871/76 of 30 July 1976, No. 2141/76 of 31 August 1976 and No. 2372/76 of 30 September 1976, must a refund be held to be payable on exports of compound feeding-stuffs in respect of the cereal components alone and does it conflict with the general principles derived from the said provisions for the refund to be granted on exports of compound products and only in respect of certain of their components where the other components were imported only temporarily?"
8. Those questions basically raise three issues. The first concerns the effect of the preliminary rulings given by the Court on 5 July 1977 on third parties, be they private individuals, institutions or national courts (Questions 1 and 2). The second concerns the consequences, in both the legal systems of the Community and of the Member States, of a judgment declaring a regulation void as regards what happens to charges previously imposed on commercial operators by the said regulation (Question 3). The third issue, put in the

alternative and which is more specific in nature, concerns particular features of the rules on export refunds for certain agricultural products (Question 4).

Questions 1 and 2

9. Article 177 of the Treaty provides that the Court shall have jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community, including regulations of both the Council and the Commission. The second and third paragraphs of that provision go on to state that national courts may or must, as the case may be, bring such matters before the Court where they need a decision on that issue in order to give their judgment
10. The scope of judgments given under this head should be viewed in the light of the aims of Article 177 and the place it occupies in the entire system of judicial protection established by the Treaties.
11. The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which need to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.
12. When the Court is moved under Article 177 to declare an act of one of the institutions to be void there are particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of Community law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the Community law applicable.
13. It follows therefrom that although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.
14. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need in particular if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier.
15. If that is not the case national courts are entirely justified in determining the effect on the cases brought before them of a judgment declaring an act void given by the Court in an action between other parties.
16. It should further be observed, as the Court acknowledged in its judgments of 19 October 1977 in Joined Cases 117/76 and 16/77, Ruckdeschel and Diamalt and Joined Cases 124/76 and 20/77, Moulins de Pont-a-Mousson and Providence Agricole [1977] ECR 1753 and 1795, that as those responsible for drafting regulations declared to be void the Council or the Commission are bound to determine from the Court's judgment the effects of that judgment.
17. In the light of the foregoing considerations and in view of the fact that by its second question the national court has asked, as it was free to do, whether Regulation No. 563/76 was void, the answer should be that that is in fact the case for the reasons already stated in the judgments of 5 July 1977.

[...]

4.2 Case 314/85: Foto-Frost

Firma Foto-Frost v Hauptzollamt Lübeck - Ost

Case 314/85

22 October 1987

Court of Justice

[1987] ECR 4199

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY AN ORDER OF 29 AUGUST 1985, WHICH WAS RECEIVED AT THE COURT ON 18 OCTOBER 1985, THE FINANZGERICHT (FINANCE COURT) HAMBURG REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY SEVERAL QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 177 OF THE EEC TREATY, ARTICLE 5*(2) OF COUNCIL REGULATION NO 1697/79 ON 24 JULY 1979 ON THE POST-CLEARANCE RECOVERY OF IMPORT DUTIES OR EXPORT DUTIES (OFFICIAL JOURNAL 1979, L*197, P.*1) AND THE PROTOCOL OF 25 MARCH 1957 ON GERMAN INTERNAL TRADE AND CONNECTED PROBLEMS, AND THE VALIDITY OF A COMMISSION DECISION ADDRESSED ON 6 MAY 1983 TO THE FEDERAL REPUBLIC OF GERMANY FINDING THAT THE POST-CLEARANCE RECOVERY OF IMPORT DUTIES MUST BE EFFECTED IN A PARTICULAR CASE.
- 2 THOSE QUESTIONS WERE RAISED IN PROCEEDINGS BROUGHT BY FIRMA FOTO-FROST, AMMERSBEK (FEDERAL REPUBLIC OF GERMANY), AN IMPORTER, EXPORTER AND WHOLESALE OF PHOTOGRAPHIC GOODS, FOR THE ANNULMENT OF A NOTICE ISSUED BY THE HAUPTZOLLAMT (PRINCIPAL CUSTOMS OFFICE) LUEBECK-OST FOR THE POST-CLEARANCE RECOVERY OF IMPORT DUTIES FOLLOWING A COMMISSION DECISION ADDRESSED TO THE FEDERAL REPUBLIC OF GERMANY ON 6 MAY 1983 IN WHICH IT WAS HELD THAT IT WAS NOT PERMISSIBLE TO WAIVE THE RECOVERY OF IMPORT DUTIES IN THE CASE IN QUESTION.
- 3 THE OPERATION TO WHICH THE RECOVERY OF DUTIES RELATED WERE FOTO-FROST'S IMPORTATION INTO THE FEDERAL REPUBLIC OF GERMANY AND RELEASE FOR FREE CIRCULATION THERE OF PRISMATIC BINOCULARS ORIGINATING IN THE GERMAN DEMOCRATIC REPUBLIC. FOTO-FROST PURCHASED THE BINOCULARS FROM TRADERS IN DENMARK AND THE UNITED KINGDOM, WHICH DISPATCHED THEM TO IT UNDER THE COMMUNITY EXTERNAL TRANSIT PROCEDURE FROM CUSTOMS WAREHOUSES IN DENMARK AND THE NETHERLANDS.
- 4 THE COMPETENT CUSTOMS OFFICES INITIALLY ALLOWED THE GOODS TO ENTER FREE OF DUTY ON THE GROUND THAT THEY ORIGINATED IN THE GERMAN DEMOCRATIC REPUBLIC. FOLLOWING A CHECK, HAUPTZOLLAMT LUEBECK-OST, THE PRINCIPAL CUSTOMS OFFICE, CONSIDERED THAT CUSTOMS DUTY WAS DUE UNDER THE GERMAN CUSTOMS LEGISLATION. HOWEVER, IT TOOK THE VIEW THAT IT WAS NOT APPROPRIATE TO EFFECT THE POST-CLEARANCE RECOVERY OF THE

DUTY ON THE GROUND THAT FOTO-FROST FULFILLED THE REQUIREMENTS SET OUT IN ARTICLE 5*(2) OF COUNCIL REGULATION NO 1697/79, WHICH PROVIDES THAT "THE COMPETENT AUTHORITIES MAY REFRAIN FROM TAKING ACTION FOR THE POST-CLEARANCE RECOVERY OF IMPORT DUTIES OR EXPORT DUTIES WHICH WERE NOT COLLECTED AS A RESULT OF AN ERROR MADE BY THE COMPETENT AUTHORITIES THEMSELVES WHICH COULD NOT REASONABLY HAVE BEEN DETECTED BY THE PERSON LIABLE, THE LATTER HAVING FOR HIS PART ACTED IN GOOD FAITH AND OBSERVED ALL THE PROVISIONS LAID DOWN BY THE RULES IN FORCE AS FAR AS HIS CUSTOMS DECLARATION IS CONCERNED". ACCORDING TO THE ORDER REQUESTING A PRELIMINARY RULING THE HAUPTZOLLAMT TOOK THE VIEW THAT FOTO-FROST HAD COMPLETED THE CUSTOMS DECLARATION CORRECTLY AND COULD NOT HAVE BEEN EXPECTED TO DETECT THE ERROR IN SO FAR AS OTHER CUSTOMS OFFICES HAD CONSIDERED THAT PREVIOUS SIMILAR OPERATIONS DID NOT GIVE RISE TO THE PAYMENT OF DUTY.

- 5 SINCE THE AMOUNT OF THE DUTY INVOLVED WAS GREATER THAN 2*000*ECU, UNDER COMMISSION REGULATION NO 1573/80 OF 20 JUNE 1980 LAYING DOWN PROVISIONS FOR THE IMPLEMENTATION OF ARTICLE 5*(2) OF THE AFOREMENTIONED COUNCIL REGULATION NO 1697/79 (OFFICIAL JOURNAL 1980, L*161, P.*1) THE HAUPTZOLLAMT ITSELF WAS NOT EMPOWERED TO TAKE THE DECISION NOT TO EFFECT POST-CLEARANCE RECOVERY. CONSEQUENTLY, AT THE HAUPTZOLLAMT' S REQUEST, THE FEDERAL MINISTER FOR FINANCE REQUESTED THE COMMISSION TO DECIDE UNDER ARTICLE 6 OF THE AFORESAID REGULATION NO 1573/80 WHETHER THE POST-CLEARANCE RECOVERY OF THE DUTY IN QUESTION COULD BE WAIVED.
- 6 ON 6 MAY 1983 THE COMMISSION ADDRESSED TO THE FEDERAL REPUBLIC OF GERMANY A DECISION TO THE EFFECT THAT IT COULD NOT. THE GROUNDS GIVEN FOR THE DECISION WERE THAT "THE CUSTOMS OFFICES CONCERNED DID NOT THEMSELVES MAKE AN ERROR IN THE APPLICATION OF THE PROVISIONS GOVERNING INTER-GERMAN TRADE BUT MERELY ACCEPTED AS CORRECT, WITHOUT IMMEDIATE QUESTION, THE INFORMATION GIVEN ON THE DECLARATIONS PRESENTED BY THE IMPORTER; ... THIS PRACTICE IN NO WAY PREVENTS THOSE AUTHORITIES FROM SUBSEQUENTLY MAKING A CORRECTION IN RESPECT OF CHARGES, THIS POSSIBILITY BEING EXPRESSLY PROVIDED FOR IN ARTICLE 10 OF COUNCIL DIRECTIVE 79/695/EEC OF 24 JULY 1979 ON THE HARMONIZATION OF PROCEDURES FOR THE RELEASE OF GOODS FOR FREE CIRCULATION" (OFFICIAL JOURNAL 1979, L*205, P.*19). IT FURTHER CONSIDERED THAT "THE IMPORTER WAS IN A POSITION TO CONSIDER THE CIRCUMSTANCES OF THE IMPORT OPERATIONS IN QUESTION IN THE LIGHT OF THE PROVISIONS GOVERNING INTER - GERMAN TRADE, THE APPLICATION OF WHICH HE WAS CLAIMING; ... HE COULD THUS DETECT ANY ERROR IN IMPLEMENTING THESE PROVISIONS; ... IT HAS BEEN ESTABLISHED THAT HE DID NOT COMPLY WITH ALL THE PROVISIONS LAID DOWN BY THE RULES IN FORCE AS REGARDS THE CUSTOMS DECLARATIONS".
- 7 FOLLOWING THAT DECISION THE HAUPTZOLLAMT ISSUED THE NOTICE FOR THE POST-CLEARANCE RECOVERY OF DUTY WHICH FOTO-FROST IS CONTESTING IN THE MAIN PROCEEDINGS.
- 8 FOTO-FROST APPLIED TO THE FINANZGERICHT HAMBURG FOR AN ORDER SUSPENDING THE OPERATION OF THAT NOTICE. THE FINANZGERICHT ALLOWED THE APPLICATION ON THE GROUND THAT THE OPERATIONS IN QUESTION APPEARED TO FALL WITHIN THE AMBIT OF GERMAN INTERNAL TRADE AND WERE

THEREFORE EXEMPT FROM CUSTOMS DUTY UNDER THE PROTOCOL ON GERMAN INTERNAL TRADE

- 9 FOTO-FROST THEN APPLIED TO THE FINANZGERICHT HAMBURG FOR THE ANNULMENT OF THE NOTICE FOR THE POST-CLEARANCE RECOVERY OF DUTY. THE FINANZGERICHT TOOK THE VIEW THAT THE VALIDITY OF THE COMMISSION' S DECISION OF 6 MAY 1983 WAS DOUBTFUL ON THE GROUND THAT ALL THE REQUIREMENTS SET OUT IN ARTICLE 5*(2) OF COUNCIL REGULATION NO 1697/79 FOR REFRAINING FROM TAKING ACTION FOR THE POST-CLEARANCE RECOVERY OF DUTY WERE FULFILLED. SINCE THE CONTESTED NOTICE WAS BASED ON THE COMMISSION' S DECISION, THE FINANZGERICHT CONSIDERED THAT IT COULD NOT ANNUL IT UNLESS THE COMMUNITY DECISION WAS ITSELF INVALID. THE FINANZGERICHT THEREFORE REFERRED THE FOLLOWING FOUR QUESTIONS TO THE COURT FOR A PRELIMINARY RULING:

"(1) CAN THE NATIONAL COURT REVIEW THE VALIDITY OF A DECISION ADOPTED BY THE COMMISSION PURSUANT TO ARTICLE 6 OF COMMISSION REGULATION (EEC) NO 1573/80 OF 20 JUNE 1980 (OFFICIAL JOURNAL L*161, P.*1) ON WHETHER THE POST-CLEARANCE RECOVERY OF IMPORT DUTIES SHOULD BE WAIVED PURSUANT TO ARTICLE 5*(2) OF COUNCIL REGULATION (EEC) NO 1697/79 OF 14 JULY 1979 (OFFICIAL JOURNAL L*197, P.*1), WHICH DECISION HELD THAT THERE WAS NO JUSTIFICATION FOR WAIVING THE RECOVERY OF THE IMPORT DUTIES, AND CAN IT, IF APPROPRIATE, HOLD IN PROCEEDINGS CHALLENGING SUCH A DECISION THAT RECOVERY OF THE DUTIES SHOULD BE WAIVED?

(2) IF THE NATIONAL COURT CANNOT REVIEW THE VALIDITY OF THE COMMISSION'S DECISION, IS THE COMMISSION' S DECISION OF 6 MAY 1983 (ECR 3/83) VALID?

(3) IF THE NATIONAL COURT CAN REVIEW THE VALIDITY OF THE COMMISSION'S DECISION, IS ARTICLE 5*(2) OF REGULATION NO 1697/79 TO BE INTERPRETED AS CONFERRING A POWER TO ADOPT A DISCRETIONARY DECISION, WHICH MAY BE REVIEWED BY THE COURT ONLY AS REGARDS ABUSES OF THAT DISCRETION (AND IF SO, WHICH ABUSES?) WITHOUT ANY POSSIBILITY OF SUBSTITUTING ITS OWN DISCRETION, OR DOES IT CONFER THE POWER TO ADOPT A MEASURE OF EQUITABLE RELIEF, WHICH IS FULLY SUBJECT TO REVIEW BY THE COURT?

(4) IF THE ASSESSMENT TO CUSTOMS DUTIES CANNOT BE WAIVED PURSUANT TO ARTICLE 5*(2) OF REGULATION NO 1697/79, DO GOODS ORIGINATING IN THE GERMAN DEMOCRATIC REPUBLIC WHICH HAVE BEEN INTRODUCED INTO THE FEDERAL REPUBLIC OF GERMANY VIA A MEMBER STATE OTHER THAN GERMANY BY WAY OF THE EXTERNAL COMMUNITY TRANSIT PROCEDURE FALL WITHIN THE AMBIT OF GERMAN INTERNAL TRADE WITHIN THE MEANING OF THE PROTOCOL ON GERMAN INTERNAL TRADE AND CONNECTED PROBLEMS OF 25 MARCH 1957, WITH THE CONSEQUENCE THAT WHEN THEY ARE IMPORTED INTO THE FEDERAL REPUBLIC OF GERMANY THEY ARE LIABLE NEITHER TO CUSTOMS DUTIES NOR TO IMPORT TURNOVER TAX, OR ARE SUCH CHARGES TO BE LEVIED AS IN THE CASE OF IMPORTS FROM NON-MEMBER COUNTRIES, SO THAT COMMUNITY CUSTOMS DUTIES, IN ACCORDANCE WITH THE RELEVANT CUSTOMS LEGISLATION, AND IMPORT TURNOVER TAX, IN ACCORDANCE WITH ARTICLE 2*(2) OF THE SIXTH COUNCIL DIRECTIVE ON THE HARMONIZATION OF TURNOVER TAXES IN THE EUROPEAN COMMUNITIES, ARE TO BE LEVIED?"

- 10 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER DESCRIPTION OF THE FACTS AND OF THE APPLICABLE PROVISIONS OF

COMMUNITY LAW AND FOR AN ACCOUNT OF THE OBSERVATIONS SUBMITTED BY FOTO-FROST, HAUPTZOLLAMT LUEBECK-OST, THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION.

THE FIRST QUESTION

- 11 IN ITS FIRST QUESTION THE FINANZGERICHT ASKS WHETHER IT ITSELF IS COMPETENT TO DECLARE INVALID A COMMISSION DECISION SUCH AS THE DECISION OF 6 MAY 1983. IT CASTS DOUBT ON THE VALIDITY OF THAT DECISION ON THE GROUND THAT ALL THE REQUIREMENTS LAID DOWN BY ARTICLE 5*(2) OF REGULATION NO 1697/79 FOR TAKING NO ACTION FOR THE POST-CLEARANCE RECOVERY OF DUTY SEEM TO BE FULFILLED IN THIS CASE. HOWEVER, IT CONSIDERS THAT IN VIEW OF THE DIVISION OF JURISDICTION BETWEEN THE COURT OF JUSTICE AND THE NATIONAL COURTS SET OUT IN ARTICLE 177 OF THE EEC TREATY ONLY THE COURT OF JUSTICE IS COMPETENT TO DECLARE INVALID ACTS OF THE COMMUNITY INSTITUTIONS.
- 12 ARTICLE 177 CONFERS ON THE COURT JURISDICTION TO GIVE PRELIMINARY RULINGS ON THE INTERPRETATION OF THE TREATY AND OF ACTS OF THE COMMUNITY INSTITUTIONS AND ON THE VALIDITY OF SUCH ACTS. THE SECOND PARAGRAPH OF THAT ARTICLE PROVIDES THAT NATIONAL COURTS MAY REFER SUCH QUESTIONS TO THE COURT AND THE THIRD PARAGRAPH OF THAT ARTICLE PUTS THEM UNDER AN OBLIGATION TO DO SO WHERE THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW AGAINST THEIR DECISIONS.
- 13 IN ENABLING NATIONAL COURTS, AGAINST THOSE DECISIONS WHERE THERE IS A JUDICIAL REMEDY UNDER NATIONAL LAW, TO REFER TO THE COURT FOR A PRELIMINARY RULING QUESTIONS ON INTERPRETATION OR VALIDITY, ARTICLE 177 DID NOT SETTLE THE QUESTION WHETHER THOSE COURTS THEMSELVES MAY DECLARE THAT ACTS OF COMMUNITY INSTITUTIONS ARE INVALID.
- 14 THOSE COURTS MAY CONSIDER THE VALIDITY OF A COMMUNITY ACT AND, IF THEY CONSIDER THAT THE GROUNDS PUT FORWARD BEFORE THEM BY THE PARTIES IN SUPPORT OF INVALIDITY ARE UNFOUNDED, THEY MAY REJECT THEM, CONCLUDING THAT THE MEASURE IS COMPLETELY VALID. BY TAKING THAT ACTION THEY ARE NOT CALLING INTO QUESTION THE EXISTENCE OF THE COMMUNITY MEASURE.
- 15 ON THE OTHER HAND, THOSE COURTS DO NOT HAVE THE POWER TO DECLARE ACTS OF THE COMMUNITY INSTITUTIONS INVALID. AS THE COURT EMPHASIZED IN THE JUDGMENT OF 13 MAY 1981 IN CASE 66/80 INTERNATIONAL CHEMICAL CORPORATION V AMMINISTRAZIONE DELLE FINANZE ((1981)) ECR 1191, THE MAIN PURPOSE OF THE POWERS ACCORDED TO THE COURT BY ARTICLE 177 IS TO ENSURE THAT COMMUNITY LAW IS APPLIED UNIFORMLY BY NATIONAL COURTS . THAT REQUIREMENT OF UNIFORMITY IS PARTICULARLY IMPERATIVE WHEN THE VALIDITY OF A COMMUNITY ACT IS IN QUESTION. DIVERGENCES BETWEEN COURTS IN THE MEMBER STATES AS TO THE VALIDITY OF COMMUNITY ACTS WOULD BE LIABLE TO PLACE IN JEOPARDY THE VERY UNITY OF THE COMMUNITY LEGAL ORDER AND DETRACT FROM THE FUNDAMENTAL REQUIREMENT OF LEGAL CERTAINTY.
- 16 THE SAME CONCLUSION IS DICTATED BY CONSIDERATION OF THE NECESSARY COHERENCE OF THE SYSTEM OF JUDICIAL PROTECTION ESTABLISHED BY THE TREATY. IN THAT REGARD IT MUST BE OBSERVED THAT REQUESTS FOR

PRELIMINARY RULINGS, LIKE ACTIONS FOR ANNULMENT, CONSTITUTE MEANS FOR REVIEWING THE LEGALITY OF ACTS OF THE COMMUNITY INSTITUTIONS . AS THE COURT POINTED OUT IN ITS JUDGMENT OF 23 APRIL 1986 IN CASE 294/83 PARTI ECOLOGISTE "LES VERTS" V EUROPEAN PARLIAMENT ((1986)) ECR 1339), "IN ARTICLES 173 AND 184, ON THE ONE HAND, AND IN ARTICLE 177, ON THE OTHER, THE TREATY ESTABLISHED A COMPLETE SYSTEM OF LEGAL REMEDIES AND PROCEDURES DESIGNED TO PERMIT THE COURT OF JUSTICE TO REVIEW THE LEGALITY OF MEASURES ADOPTED BY THE INSTITUTIONS".

- 17 SINCE ARTICLE 173 GIVES THE COURT EXCLUSIVE JURISDICTION TO DECLARE VOID AN ACT OF A COMMUNITY INSTITUTION, THE COHERENCE OF THE SYSTEM REQUIRES THAT WHERE THE VALIDITY OF A COMMUNITY ACT IS CHALLENGED BEFORE A NATIONAL COURT THE POWER TO DECLARE THE ACT INVALID MUST ALSO BE RESERVED TO THE COURT OF JUSTICE.
- 18 IT MUST ALSO BE EMPHASIZED THAT THE COURT OF JUSTICE IS IN THE BEST POSITION TO DECIDE ON THE VALIDITY OF COMMUNITY ACTS. UNDER ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OF THE EEC, COMMUNITY INSTITUTIONS WHOSE ACTS ARE CHALLENGED ARE ENTITLED TO PARTICIPATE IN THE PROCEEDINGS IN ORDER TO DEFEND THE VALIDITY OF THE ACTS IN QUESTION. FURTHERMORE, UNDER THE SECOND PARAGRAPH OF ARTICLE 21 OF THAT PROTOCOL THE COURT MAY REQUIRE THE MEMBER STATES AND INSTITUTIONS WHICH ARE NOT PARTICIPATING IN THE PROCEEDINGS TO SUPPLY ALL INFORMATION WHICH IT CONSIDERS NECESSARY FOR THE PURPOSES OF THE CASE BEFORE IT.
- 19 IT SHOULD BE ADDED THAT THE RULE THAT NATIONAL COURTS MAY NOT THEMSELVES DECLARE COMMUNITY ACTS INVALID MAY HAVE TO BE QUALIFIED IN CERTAIN CIRCUMSTANCES IN THE CASE OF PROCEEDINGS RELATING TO AN APPLICATION FOR INTERIM MEASURES; HOWEVER, THAT CASE IS NOT REFERRED TO IN THE NATIONAL COURT' S QUESTION.
- 20 THE ANSWER TO THE FIRST QUESTION MUST THEREFORE BE THAT THE NATIONAL COURTS HAVE NO JURISDICTION THEMSELVES TO DECLARE THAT ACTS OF COMMUNITY INSTITUTIONS ARE INVALID.

[...]

4.3 Cases 143/88 and 92/89: Zuckerfabrik

Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH

v

Hauptzollamt Paderborn

Cases 143-88 and 92-89

21 February 1991

Court of Justice

[1991] ECR 415

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 31 March 1988, which was received at the Court registry on 20 May 1988, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under article 177 of the EEC Treaty two questions relating, on the one hand, to the jurisdiction of national Courts, in proceedings for interim relief, to suspend the enforcement of a national measure based on a Community regulation and, on the other hand, to the validity of Council regulation (EEC) no 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (official journal L 183, p. 5).
- 2 Those questions were raised in proceedings between Zuckerfabrik Süderdithmarschen, a sugar producer, and the Hauptzollamt (principal customs office) Itzehoe. By decision of 19 October 1987 the Hauptzollamt Itzehoe required Zuckerfabrik Süderdithmarschen to pay DM 1 982 942.66 in respect of the special elimination levy for the 1986/87 sugar marketing year.
- 3 The object of that levy, which was introduced by way of the abovementioned regulation no 1914/87, adopted on the basis of article 43 of the Treaty, is to eliminate in full the losses suffered by the Community in the sugar sector during the marketing year which ran from 1 July 1986 to 30 June 1987. Those losses had been occasioned by the particularly high export refunds which the Community was required to pay during that marketing year in order to ensure that excess sugar production within the Community could be disposed of in non-member countries.
- 4 Zuckerfabrik Süderdithmarschen lodged an objection against that decision, but this was rejected. It thereupon brought proceedings before the Finanzgericht Hamburg seeking suspension of enforcement of that decision. It also brought an action for annulment of that decision before the same Court. In support of its actions, Zuckerfabrik Süderdithmarschen claimed that regulation no 1914/87, on which the Hauptzollamt's decision was based, was invalid.
- 5 The Finanzgericht Hamburg granted the application for suspension of enforcement of the decision taken by the Hauptzollamt Itzehoe and referred the following questions to the Court of Justice for a preliminary ruling:

"(1) (a) is the second paragraph of article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in member states does not preclude the powers of national Courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?

(b) if so, under what conditions may national Courts adopt interim measures? is there an applicable criterion of community law and if so which? or do interim measures depend on national law?

(2) is Council regulation (EEC) no 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year valid? in particular, is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?"

6 The Finanzgericht Hamburg also ordered that the proceedings on the substance of the case should be stayed pending a preliminary ruling by the Court of justice on the two questions referred to it.

7 In addition, the Finanzgericht Düsseldorf, by order of 19 October 1988 received at the Court on 20 March 1989, referred to the Court for a preliminary ruling under article 177 of the EEC Treaty five questions which also concern the validity of Council regulation no 1914/87.

8 Those five questions were raised in proceedings between ZUCKERFABRIK Soest GmbH, which is also a sugar producer, and the Hauptzollamt Paderborn. By a decision of 20 October 1987 the Hauptzollamt Paderborn required ZUCKERFABRIK Soest to pay dm 1 675 013.71 in respect of the special elimination levy already referred to.

9 Zuckerfabrik Soest lodged an objection against that decision, but this was rejected. It then brought proceedings before the Finanzgericht Düsseldorf seeking suspension of enforcement of the decision taken by the Hauptzollamt Paderborn. It also brought an action for annulment of that decision before the same Court. In support of its application for suspension and its action for annulment, ZUCKERFABRIK Soest claimed, as did ZUCKERFABRIK SUEDERDITHMARSCHEN in the other proceedings, that the regulation introducing the special elimination levy, on which the Hauptzollamt Paderborn had based its decision, was invalid.

10 By order of 10 February 1988 the Finanzgericht Düsseldorf, adjudicating on the application for interim relief, granted the application for suspension of enforcement of the decision adopted by the Hauptzollamt Paderborn on the ground that serious doubts existed as to the validity of the regulation introducing the special elimination levy.

11 By order of 19 October 1988 that Court also stayed the proceedings on the substance of the case and requested the Court of justice to give a preliminary ruling on the following questions:

"(1) is regulation no 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (official journal 1987 I 183, p. 5) invalid because the special elimination levy constitutes a financing levy which could be introduced only on the basis of article 201 of the treaty?

in the alternative,

(2) is the introduction of the special elimination levy in the sugar sector for the 1986/87 marketing year by regulation no 1914/87 compatible with the limitation on self-financing

which is laid down in article 28 of regulation no 1785/81 and with the principle of non-interference with the legislative system of the community?

in the alternative,

(3) is the introduction of the special elimination levy in the sugar sector for the 1986/87 marketing year compatible with the prohibition on subjecting a sector of the economy to risks which constitute extraneous risks within the context of an organization of the market and with the principle of the prohibition of unreasonable financial burdens?

in the alternative,

(4) does article 1 of regulation no 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year conflict with the prohibition of discrimination (second subparagraph of article 40(3) of the EEC treaty) because the levy applied to b sugar is considerably higher than that applied to a sugar?

in the alternative,

(5) does article 1 of regulation no 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year conflict in such cases with fundamental rights applying in community law, namely the right to property and freedom to pursue economic activities, when the levy can no longer be financed out of earned profits but only out of reserves and as a result the existence of the undertaking concerned is threatened?"

- 12 Reference is made to the report for the hearing for a fuller account of the facts in the main proceedings, the provisions of community law at issue, the course of the procedure before the Court and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 13 Having regard to the similarity of subject-matter in and the connection between the two cases, which were confirmed by the oral argument presented to the Court, it is appropriate to join the cases for the purposes of the judgment, in accordance with article 43 of the rules of procedure.

Suspension of enforcement of a national measure based on a community regulation the principle

- 14 The Finanzgericht Hamburg first seeks, in substance, to ascertain whether the second paragraph of article 189 of the EEC treaty must be interpreted as meaning that it denies to national Courts the power to suspend enforcement of a national administrative measure adopted on the basis of a community regulation.
- 15 In support of the existence of the power to grant such a suspension, the Finanzgericht Hamburg states that such a measure merely defers any implementation of a national decision and does not call in question the validity of the community regulation. However, by way of explanation of the reason for its question, it points out, as a ground for denying that national Courts have such jurisdiction, that the granting of interim relief, which may have far-reaching effects, may constitute an obstacle to the full effectiveness of regulations in all the member states, in breach of the second paragraph of article 189 of the treaty.
- 16 It should first be emphasized that the provisions of the second paragraph of article 189 of the treaty cannot constitute an obstacle to the legal protection which community law confers on

individuals. In cases where national authorities are responsible for the administrative implementation of community regulations, the legal protection guaranteed by community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national Courts and to induce those Courts to refer questions to the Court of justice for a preliminary ruling.

- 17 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a community regulation is invalid (see judgment in case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199, at paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.
- 18 As the Court pointed out in its judgment in Foto-frost, cited above, (at paragraph 16), requests for preliminary rulings which seek to ascertain the validity of a measure, like actions for annulment, constitute means for reviewing the legality of acts of the community institutions. In the context of actions for annulment, article 185 of the EEC treaty enables applicants to request suspension of the enforcement of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national Courts should also be able to order suspension of enforcement of a national administrative measure based on a community regulation, the legality of which is contested.
- 19 Furthermore, in its judgment in case c-213/89 (the queen v secretary of state for transport, ex parte Factortame Ltd and others [1990] ECR i-2433), delivered in a case concerning the compatibility of national legislation with community law, the Court, referring to the effectiveness of article 177, took the view that the national Court which had referred to it questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility, had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with article 177.
- 20 The interim legal protection which community law ensures for individuals before national Courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with community law or the validity of secondary community law, in view of the fact that the dispute in both cases is based on community law itself.
- 21 It follows from the foregoing considerations that the reply to the first part of the first question must be that article 189 of the treaty has to be interpreted as meaning that it does not preclude the power of national Courts to suspend enforcement of a national administrative measure adopted on the basis of a community regulation.

Conditions for suspension

- 22 The Finanzgericht Hamburg then goes on to ask under what conditions national Courts may order the suspension of enforcement of a national administrative measure based on a community regulation, in view of the doubts which they may have as to the validity of that regulation.
- 23 It must first of all be noted that interim measures suspending enforcement of a contested measure may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national Court that serious doubts exist as to the validity of the community regulation on which the contested administrative measure is based.

Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures.

- 24 It should next be pointed out that suspension of enforcement must retain the character of an interim measure. The national Court to which the application for interim relief is made may therefore grant a suspension only until such time as the Court has delivered its ruling on the question of validity. Consequently, it is for the national Court, should the question not yet have been referred to the Court of justice, to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid.
- 25 As regards the other conditions concerning the suspension of enforcement of administrative measures, it must be observed that the rules of procedure of the Courts are determined by national law and that those conditions differ according to the national law governing them, which may jeopardize the uniform application of community law.
- 26 Such uniform application is a fundamental requirement of the community legal order. It therefore follows that the suspension of enforcement of administrative measures based on a community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the member states be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned.
- 27 Since the power of national Courts to grant such a suspension corresponds to the jurisdiction reserved to the Court of justice by article 185 in the context of actions brought under article 173, those Courts may grant such relief only on the conditions which must be satisfied for the Court of justice to allow an application to it for interim measures.
- 28 In this regard, the Court has consistently held that measures suspending the operation of a contested act may be granted only in the event of urgency, in other words, if it is necessary for them to be adopted and to take effect before the decision on the substance of a case, in order to avoid serious and irreparable damage to the party seeking them.
- 29 With regard to the question of urgency, it should be pointed out that damage invoked by the applicant must be liable to materialize before the Court of justice has been able to rule on the validity of the contested community measure. With regard to the nature of the damage, purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national Court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the community act were to be declared invalid.
- 30 It should also be added that a national Court called upon to apply, within the limits of its jurisdiction, the provisions of community law is under an obligation to ensure that full effect is given to community law and, consequently, where there is doubt as to the validity of community regulations, to take account of the interest of the community, namely that such regulations should not be set aside without proper guarantees.
- 31 In order to comply with that obligation, a national Court seised of an application for suspension must first examine whether the community measure in question would be deprived of all effectiveness if not immediately implemented.

- 32 If suspension of enforcement is liable to involve a financial risk for the community, the national Court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security.
- 33 It follows from the foregoing that the reply to the second part of the first question put to the Court by the Finanzgericht Hamburg must be that suspension of enforcement of a national measure adopted in implementation of a community regulation may be granted by a national Court only:
- (i) if that Court entertains serious doubts as to the validity of the community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court;
 - (ii) if there is urgency and a threat of serious and irreparable damage to the applicant;
 - (iii) and if the national Court takes due account of the community' s interests.

[...]

4.4 Case C-465/93: Atlanta II

Atlanta Fruchthandelsgesellschaft mbH and others

v

Bundesamt für Ernährung und Forstwirtschaft

C-465/93

9 November 1995

Court of Justice

[1995] ECR I-3799

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 1 December 1993 received at the Court registry on 14 December 1993, the Verwaltungsgericht (administrative Court) Frankfurt am Main referred to the Court for a preliminary ruling under article 177 of the EC treaty two questions on the interpretation of article 189 of the EC treaty, and more particularly on the national Court's power to order interim measures disapplying a regulation pending a preliminary ruling by the Court on its validity.
- 2 Those questions arose in proceedings between Atlanta Fruchthandelsgesellschaft mbH and 17 other companies in the Atlanta group (hereinafter "the Atlanta companies") and the Bundesamt fuer Ernaehrung und Forstwirtschaft (federal office of food and forestry, hereinafter "the Bundesamt") on the allocation of import quotas for third-country bananas.
- 3 Council regulation (EEC) no 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 I 47, p. 1, hereinafter "the regulation") established from 1 July 1993 a common import regime replacing the various national arrangements.
- 4 Title iv of the regulation, on trade with third countries, provides in article 18 that a tariff quota of two million tonnes (net weight) is to be opened each year for imports of third-country bananas and non-traditional ACP bananas. Within the framework of that quota, imports of non-traditional ACP bananas are to be subject to a zero duty and imports of third-country bananas to a levy of ECU 100 per tonne. Outside that quota, imports of non-traditional ACP bananas are to be subject to a levy of ECU 750 per tonne and imports of third-country bananas to a levy of ECU 850 per tonne.
- 5 Article 19(1) subdivides the tariff quota: 66.5% is to be opened to the category of operators who have marketed third-country and/or non-traditional ACP bananas, 30% to the category of operators who have marketed Community and/or traditional ACP bananas, and 3.5% to the category of operators established in the Community who have started marketing bananas other than Community and/or traditional ACP bananas from 1992.
- 6 Article 21(2) of the regulation discontinues the annual duty-free import quota for bananas enjoyed by the federal republic of Germany under the protocol annexed to the implementing convention on the association of the overseas countries and territories with the Community provided for in article 136 of the treaty.

- 7 In accordance with the Community legislation, the Atlanta companies, which were traditional importers of third-country bananas, received from the Bundesamt provisional import quotas for third-country bananas for the period from 1 July to 30 September 1993.
- 8 Since they considered that the regulation had limited their import possibilities, the Atlanta companies lodged complaints with the Bundesamt.
- 9 The Atlanta companies brought an action against the decisions rejecting those complaints before the Verwaltungsgericht Frankfurt am Main.
- 10 Since the Verwaltungsgericht shared the Atlanta companies' doubts as to the validity of the regulation, by a first order, made on 1 December 1993, it stayed the proceedings pending a preliminary ruling by the Court of justice on its validity (case c-466/93).
- 11 The Atlanta companies sought interim relief from the Verwaltungsgericht in the form of an order that the Bundesamt grant additional import licences for third-country bananas for the second half of 1993, over and above the quantities already allocated, until the Court of justice's decision in the proceedings for a preliminary ruling on the question of validity.
- 12 By a second order, which was also made on 1 December 1993 and is the origin of the present reference for a preliminary ruling, the Verwaltungsgericht asked the Court to rule on the following questions:

"1) may a national Court which entertains serious doubts as to the validity of a Community regulation, and has therefore referred the question of the validity of the Community regulation to the Court of justice under the preliminary-ruling procedure, by making an interim order provisionally settle or regulate the disputed legal positions or relationships, with reference to an administrative act of a national authority based on the Community regulation in respect of which the reference has been made, for the period until the Court of justice gives its ruling?

2) If question 1 is answered in the affirmative: under what conditions is a national Court empowered in such cases to make an interim order? must a distinction be drawn, with respect to the conditions for making an interim order, between an interim order which is intended to preserve an already existing legal position and one which is intended to create a new legal position?"
- 13 In the same order the Verwaltungsgericht ordered the Bundesamt provisionally to grant the applicants additional import licences for November and December 1993 at a customs duty of ECU 100 per tonne.
- 14 The issue of the licences was made subject to the condition that the applicants would for the time being make no use of the import licences which had been allocated to them for 1994 for the importation of third-country bananas at a rate of duty of ECU 100 per tonne, to the extent that, in accordance with the order, they were provisionally granted additional import licences over and above the definitive quota. That condition was intended to ensure that if the applicants lost their case, the additional quotas allocated them for 1993 could be set off against the quotas they were entitled to for 1994.
- 15 In the order for reference the Verwaltungsgericht observes that in its judgment in joined cases c-143/88 and c-92/89 Zuckerfabrik SUEDERDITHMARSCHEN and Zuckerfabrik SOEST [1991] ECR i-415 the Court held that the coherence of interim legal protection of individuals requires that a national Court which has made a reference to the Court of justice for a preliminary ruling on the validity of a regulation should be able to order suspension of

enforcement of a national administrative measure based on that regulation. It notes that the Court has not yet ruled, however, on the power of a national Court in such circumstances to order interim measures which create a new legal position for the benefit of the person seeking legal protection. The Verwaltungsgericht suggests that the grant of such interim relief may call into question the full effectiveness of the regulation in all the member states.

- 16 The grant of interim relief in the present case is based on the consideration that a refusal would be contrary to the guarantee of legal protection enshrined in article 19(4) of the Grundgesetz (basic law). If the Verwaltungsgericht did not have jurisdiction to grant interim protection against administrative measures of the national authorities which were based on Community law, it would have to refer to the Bundesverfassungsgericht (federal constitutional Court) the question of the compatibility with article 19(4) of the Grundgesetz of the national law approving the EEC treaty. With reference to the conditions for the grant of interim relief, the Verwaltungsgericht refers to article 186 of the EC treaty.
- 17 By order of 29 June 1993 (case c-280/93 R Germany v Council [1993] ECR I-3667) the Court, holding that the conditions for the grant of interim measures sought were not met, dismissed an application for interim relief which would permit the federal republic of Germany to import the same annual quantities of third-country bananas free of customs duty as in 1992 until the Court's decision on the substance of the case.
- 18 By judgment of 5 October 1994 (case c-280/93 Germany v Council [1994] ECR I-4973) the Court dismissed the application for annulment of the regulation.

Question 1: the principle of the grant of interim relief

- 19 By its first question the Verwaltungsgericht essentially asks whether article 189 of the treaty is to be interpreted as precluding national Courts from ordering interim measures to settle or regulate contested legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.
- 20 The Court held in Zuckerfabrik that the provisions of the second paragraph of article 189 of the treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals. In cases where national authorities are responsible for administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national Courts and to request those Courts to refer questions to the Court for a preliminary ruling (paragraph 16).
- 21 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare a Community regulation invalid (see case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199, paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered inoperative as regards them (Zuckerfabrik, paragraph 17).
- 22 As the Court pointed out in Foto-Frost (paragraph 16), references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, article 185 of the EC treaty enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national Courts should also be able to order

suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested (Zuckerfabrik, paragraph 18).

- 23 Furthermore, in its judgment in case c-213/89 the Queen v Secretary of State for transport, ex parte Factortame and others [1990] ECR I-2433, delivered in a case concerning the compatibility of national legislation with Community law, the Court, referring to the effectiveness of article 177, held that the national Court which had referred questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with article 177 (Zuckerfabrik, paragraph 19).
- 24 The interim legal protection which Community law ensures for individuals before national Courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself (Zuckerfabrik, paragraph 20).
- 25 The Court accordingly held in Zuckerfabrik that article 189 is to be interpreted as not precluding national Courts from suspending enforcement of a national administrative measure adopted on the basis of a Community regulation.
- 26 In the present proceedings for a preliminary ruling, the national Court asks the Court for a ruling, not on the question of suspension of enforcement of a national measure adopted on the basis of a Community regulation, but on the making of a positive order provisionally disapplying that regulation.
- 27 In the context of an action for annulment, the treaty not only, in article 185, authorizes the Court to order application of the contested act to be suspended, but also, in article 186, confers on it the power to prescribe any necessary interim measures.
- 28 The interim legal protection which the national Courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit.
- 29 Contrary to the submissions of the Spanish and Italian governments, the grant of such interim relief does not as such have more radical consequences for the Community legal order than the mere suspension of enforcement of a national measure adopted on the basis of a regulation. The consequences of the interim measure, whatever it may be, for the Community legal order must be assessed as part of the balancing exercise between the Community interest and the interests of the individual which is the subject of the Verwaltungsgericht's second question.
- 30 In the light of the above considerations, the answer to the first question must therefore be that article 189 of the treaty is to be interpreted as not precluding national Courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity.

Question 2: the conditions for the grant of interim relief

- 31 The Verwaltungsgericht goes on to ask under what conditions national Courts can grant such interim relief.
- 32 The Court held in Zuckerfabrik that suspension of enforcement of a national administrative measure adopted in implementation of a Community regulation may be granted by a national Court only if that Court entertains serious doubts as to the validity of the Community act and, where the validity of the contested measure is not already in issue before the Court of justice, itself refers that question to the Court; if there is urgency and a threat of serious and irreparable damage to the applicant; and if the national Court takes due account of the Community interest.
- 33 Those conditions must be observed when a national Court orders any interim relief, including a positive measure rendering the regulation whose validity is challenged provisionally inapplicable as regards the individual.
- 34 The present case affords the Court an opportunity to clarify those conditions.
- 35 In Zuckerfabrik (paragraph 23) the Court held that interim measures may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national Court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the grant of interim relief.
- 36 That requirement means that the national Court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid.
- 37 The national Court must take into account here the extent of the discretion which, having regard to the Court's case-law, the Community institutions must be allowed in the sectors concerned.
- 38 The Court further held in Zuckerfabrik (paragraph 24) that the grant of relief must retain the character of an interim measure. The national Court to which the application for interim relief is made may therefore order interim measures and maintain them only for so long as the Court has not ruled that consideration of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of the regulation in question.
- 39 Since the power of national Courts to order interim relief corresponds to the jurisdiction reserved to the Court of justice by article 186 in the context of actions brought under article 173 of the treaty, those national Courts may grant such relief only on the same conditions as apply when the Court of justice is dealing with an application for interim measures (Zuckerfabrik, paragraph 27).
- 40 In that respect the Court held in Zuckerfabrik (paragraph 28), on the basis of settled case-law, that interim measures may be ordered only where they are urgent, that is to say, where it is necessary for them to be adopted and take effect before the decision on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them.
- 41 As to urgency, the damage relied on by the applicant must be such as to materialize before the Court of justice has been able to rule on the validity of the contested Community act. as

to the nature of the damage, purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national Court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure with respect to which the application for interim relief is made would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid (Zuckerfabrik, paragraph 29).

- 42 Furthermore, a national Court called upon to apply, within the limits of its jurisdiction, the provisions of Community law is under an obligation to ensure that full effect is given to Community law and, consequently, where there is doubt as to the validity of Community regulations, to take account of the interest of the Community, namely that such regulations should not be set aside without proper guarantees (Zuckerfabrik, paragraph 30).
- 43 In order to comply with that obligation, the national Court to which an application for interim relief has been made must first examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented (Zuckerfabrik, paragraph 31).
- 44 In that respect the national Court must take account of the damage which the interim measure may cause the legal regime established by that regulation for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of Courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish him from the other operators concerned.
- 45 If the grant of interim relief represents a financial risk for the Community, the national Court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security (Zuckerfabrik, paragraph 32).
- 46 When assessing the conditions for the grant of interim relief, the national Court is obliged under article 5 of the treaty to respect what the Community Court has decided on the questions at issue before it. Thus if the Court of justice has dismissed on the merits an action for annulment of the regulation in question or has held, in the context of a reference for a preliminary ruling on validity, that the reference disclosed nothing to affect the validity of that regulation, the national Court can no longer order interim measures or must revoke existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. The same applies if the Court of first instance, in a judgment which has become final and binding, has dismissed on the merits an action for annulment of the regulation or a plea of illegality.
- 47 In the present case the Court, adjudicating on the same factual situation as that which gave rise to the proceedings before the national Court, has held that the member states which bring an action for annulment of the regulation, being responsible for the interests, in particular those of an economic and social nature, which are regarded as general interests at national level, are entitled to take judicial proceedings to defend such interests. They may therefore invoke damage affecting a whole sector of their economy, in particular when the contested Community measure may entail unfavourable repercussions on the level of employment and the cost of living (order in Germany v Council, cited above, paragraph 27).
- 48 The national Court, when called upon to protect the rights of individuals, may indeed assess the extent to which refusal to order an interim measure may be liable to have a serious and irreparable effect on important individual interests.

- 49 However, if an applicant is unable to show a specific situation which distinguishes him from other operators in the relevant sector, the national Court must accept any findings already made by the Court of justice concerning the serious and irreparable nature of the damage.
- 50 The national Court' s obligation to respect a decision of the Court of justice applies in particular to the Court' s assessment of the Community interest and the balance between that interest and that of the economic sector concerned.
- 51 Accordingly, the answer to the second question put to the Court by the Verwaltungsgericht Frankfurt am Main must be that interim relief, with respect to a national administrative measure adopted in implementation of a Community regulation, can be granted by a national Court only if:
- (1) that Court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of justice, itself refers the question to the Court of justice;
 - (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief ;
 - (3) the Court takes due account of the Community interest; and
 - (4) in its assessment of all those conditions, it respects any decisions of the Court of justice or the Court of first instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.

[...]

4.5 Case C-68/95: T-Port I

T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung

C-68/95

26 November 1996

Court of Justice

[1997] ECR I-6088

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Regulation 404/93 introduced common arrangements for the importation of bananas, thereby replacing the various national arrangements which had previously existed. Importers were granted quotas based on the amounts of bananas which they had sold in previous reference years. Articles 16(3) and 30 of the regulation provided that the quotas could be increased by the Commission in certain circumstances. TP, a banana importer, brought an action before the German courts against the national authority responsible for administering the market in bananas in Germany claiming the grant of an increased quota. TP claimed that the quota which it had been allocated was too small because, in the reference years used to determine the quotas, TP had received an unusually low amount of bananas due to a breach of contract by one of its suppliers. The quota system introduced by the regulation would, it was argued, make TP bankrupt unless an increased quota was awarded. Following an appeal to the German Federal Constitutional Court, an interim order was made granting TP an increased quota. This interim order was made in light of the financial damage faced by TP and also because the Constitutional Court considered that the regulation was capable of dealing with the type of hardship faced by TP. A preliminary ruling was sought as to whether either Article 16(3) or Article 30 placed the Commission under a duty to deal with such cases of hardship. It was also asked whether, assuming that the Commission was under such a duty, the national court was able to give interim relief until such time as the Commission had adopted rules dealing with cases of hardship.

Judgment:

[...]

23 In its order of 9 February 1995 the Hessischer Verwaltungsgerichtshof also referred the following questions to the Court for a preliminary ruling:

1. Does Article 16(3) or Article 30 of Council Regulation 404/93 ([1993] OJ L47/1.) put the Commission under a duty to deal with cases of hardship arising because operators of category A have difficulties in continuing trading owing to the fact that, on the basis of the reference years to be taken into account under Article 19(2) of that regulation, they are

allocated an exceptionally low quota and cannot switch to the market for ACP and Community bananas?

2. Is Article 19(2) of Regulation 404/93 invalid in so far as it makes no provision for taking other reference years into account in cases of hardship in the transitional period?

3. In the event that one of the above two questions is answered in the affirmative: on what conditions is the national court authorised to take provisional measures in proceedings for the grant of interim relief until such time as hardship arrangements are introduced or Article 19 of Regulation 404/93 is amplified?

24. In Case C-465/93 ATLANTA FRUCHTHANDELSGESELLSCHAFT AND OTHERS (I) v BUNDESANSTALT FÜR LANDWIRTSCHAFT ([1995] I ECR 3761, [1996] 1 CMLR 575.) (hereinafter "ATLANTA"), the Court specified the conditions in which a national court may, in relation to a national administrative measure based on a Community regulation which is itself the subject of a reference for a preliminary ruling on its validity, grant interim measures to settle or regulate contested legal situations or relationships.

25. When asked to assess whether it was necessary, in the light of that judgment, for a reply to be given to its third question, the Hessischer Verwaltungsgerichtshof, by order of 10 January 1996, maintained its third question, reformulating it as follows:

If the first question is answered in the affirmative: on what conditions is the national court authorised to take provisional measures in proceedings for the grant of interim relief until such time as hardship arrangements are introduced in accordance with Article 16(3) or Article 30 of Regulation 404/93?

[...]

The third question: adoption of interim measures

46. By this question the Verwaltungsgerichtshof seeks to ascertain whether the Treaty authorises national courts to order provisional measures in proceedings for the grant of interim relief to the traders concerned until such time as the Commission has adopted an act with legal effect to deal, in accordance with Article 30 of the Regulation, with cases of hardship affecting the traders.

47. In its judgments in Joined Cases C-143/88 and C-92/89 ZUCKERFABRIK SUDERDITHMARSCHEN and ZUCKERFABRIK SOEST ([1991] I ECR 415, [1993] 3 CMLR 1.) (hereinafter "ZUCKERFABRIK"), and ATLANTA the Court acknowledged that national courts have the power to grant interim relief in the context of the implementation of a national measure based on a Community regulation.

48. As regards the conditions under which that power may be exercised, the Court held in ATLANTA that such interim relief can be ordered by the national court only if:

- that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice; -- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
- the court takes due account of the Community interest; and

- in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.
49. As the Court has held in particular in ZUCKERFABRIK references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 185 EC enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested.
 50. The Court also observed in ZUCKERFABRIK that in Case C-213/89, FACTORTAME AND OTHERS, ([1990] I ECR 2433, [1990] 3 CMLR 375.) which concerned the compatibility of national legislation with Community law, the Court had held, with reference to the effectiveness of Article 177, that the national court which had referred questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility had to be able to grant interim relief and to suspend application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 177.
 51. The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself (ZUCKERFABRIK).
 52. However, the situation now raised by the national court is different from the situation at issue in those cases. The present case is not about granting interim measures in the context of the implementation of a Community regulation whose validity is being contested, in order to ensure interim protection of rights which individuals derive from the Community legal system, but about granting traders interim judicial protection in a situation where, by virtue of a Community regulation, the existence and scope of traders' rights must be established by a Commission measure which the Commission has not yet adopted.
 53. The Treaty makes no provision for a reference for a preliminary ruling by which a national court asks the Court of Justice to rule that an institution has failed to act. Consequently, national courts have no jurisdiction to order interim measures pending action on the part of the institution. Judicial review of alleged failure to act can be exercised only by the Community judiciary.
 54. In a situation such as that in the present case, only the Court of Justice or the Court of First Instance, as the case may be, can ensure judicial protection for the persons concerned.
 55. It is to be remembered that, under the procedure provided for in Article 27 of the Regulation, the Commission is to adopt transitional measures following an opinion of the Management Committee before which the matter is brought by a representative of the Commission or of a Member State.
 56. In circumstances such as those in the main proceedings, it is for the relevant Member State, urged if necessary by the trader concerned, to request initiation of the Management Committee procedure, should this be necessary.

57. Having regard to the hardship which the applicant in the main proceedings claims to be suffering, the applicant may also approach the Commission directly and request it to adopt, in accordance with the Article 27 procedure, the specific measures which its situation requires.
58. Where the Community institution fails to act, the Member State may bring an action for failure to act before the Court of Justice. Likewise, the trader concerned, who would be the addressee of the measure which the Commission is alleged to have failed to adopt, or at least directly and individually concerned by it, could bring such an action before the Court of First Instance (see Case C-107/91, *ENU v EC COMMISSION* ([1993] I ECR 599.)).
59. It is true that the third paragraph of Article 175 of the Treaty entitles legal and natural persons to bring an action for failure to act when an institution has failed to address to them any act other than a recommendation or an opinion. The Court has, however, held that Articles 173 and 175 merely prescribe one and the same method of recourse (Case 15/70, *CHEVALLEY v EC COMMISSION* ([1970] ECR 975, para [6].)). It follows that, just as the fourth paragraph of Article 173 allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 175 must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way. The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.
60. In such actions for failure to act, the Community judicature could, at the applicants' request, adopt interim measures under Article 186 of the Treaty. Firstly, that provision is framed in general terms and does not exclude any particular procedures (see, to that effect, the order in Case C-120/94 R, *EC COMMISSION v GREECE* ([1994] I ECR 3037, para [42].)). Secondly, since the order in Cases 31 & 53/77 R, *EC COMMISSION v UNITED KINGDOM* ([1977] ECR 921.) it is well settled that the Court may order interim measures in proceedings in which a declaration is sought.
61. Moreover, where the Commission expressly refuses to act or adopts a measure different from that which the persons concerned sought or considered to be necessary, the Member State or the trader concerned may seek annulment of that measure by the Court of Justice or the Court of First Instance (see Case 8/71, *DEUTSCHER KOMPONISTENVERBAND v EC COMMISSION* ([1971] ECR 705, [1973] CMLR 902.); Joined Cases 166 & 220/86, *IRISH CEMENT v EC COMMISSION* ([1988] ECR 6473, [1989] 2 CMLR 57.); *ENU v EC COMMISSION*).
62. The answer to the third question must therefore be that the Treaty does not authorise national courts to order provisional measures in proceedings for the grant of interim relief until such time as the Commission has adopted an act with legal effect to deal, in accordance with Article 30 of the Regulation, with cases of hardship affecting traders.

[...]

4.6 Case 24/86: Blaizot

Vincent Blaizot and others v University of Liège and others

Case 24/86

2 February 1988

Court of Justice

[1988] ECR 379

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY AN ORDER OF 27 JANUARY 1986, WHICH WAS RECEIVED AT THE COURT REGISTRY ON 30 JANUARY 1986, THE PRESIDENT OF THE TRIBUNAL DE PREMIERE INSTANCE, LIEGE, REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION MAINLY CONCERNING THE INTERPRETATION OF ARTICLE 7 OF THE TREATY, WITH A VIEW TO RESOLVING A PROBLEM REGARDING THE FINANCIAL CONDITIONS GOVERNING ADMISSION TO UNIVERSITY.
- 2 THAT QUESTION WAS RAISED IN THE COURSE OF SUMMARY PROCEEDINGS BROUGHT BY MR BLAIZOT AND 16 OTHER PLAINTIFFS (HEREINAFTER REFERRED TO AS "THE PLAINTIFFS ") AGAINST THE REFUSAL OF THE UNIVERSITY OF LIEGE, THE CATHOLIC UNIVERSITY OF LOUVAIN, THE FREE UNIVERSITY OF BRUSSELS AND THE UNIVERSITY CENTRE OF NOTRE DAME DE LA PAIX, NAMUR, (HEREINAFTER REFERRED TO AS "THE DEFENDANTS") TO REPAY THE SUPPLEMENTARY ENROLMENT FEES ("MINERVAL") WHICH THEY HAD PAID BEFORE 13 FEBRUARY 1985, THE DATE ON WHICH JUDGMENT WAS DELIVERED IN THE GRAVIER CASE (CASE 293/83 ((1985)) ECR 606). THE DEFENDANTS BROUGHT THIRD PARTY PROCEEDINGS AGAINST THE BELGIAN STATE.
- 3 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT THE PLAINTIFFS ARE ALL FRENCH NATIONALS WHO OBTAINED RESIDENCE PERMITS AS STUDENTS ALLOWING THEM TO RESIDE IN BELGIUM FOR THE SOLE PURPOSE OF STUDYING VETERINARY MEDICINE AT UNIVERSITY. THE COURSE INVOLVES THREE YEARS OF STUDY LEADING TO THE AWARD OF A PRELIMINARY DIPLOMA (" CANDIDATURE ") AND A FURTHER THREE YEARS LEADING TO THE AWARD OF A DOCTORATE. IN EACH ACADEMIC YEAR THEY WERE REQUIRED TO PAY, IN ADDITION TO THE ENROLMENT FEE PAID BY ALL STUDENTS, A SUPPLEMENTARY ENROLMENT FEE AS A PERSONAL CONTRIBUTION TO RUNNING COSTS, WHICH BELGIAN STUDENTS WERE NOT CHARGED. PURSUANT TO THE ROYAL DECREES ON THE APPLICATION OF THE SUPPLEMENTARY ENROLMENT FEE, ITS AMOUNT VARIES BETWEEN BFR 80 000 AND BFR 265 000 PER ACADEMIC YEAR.
- 4 IN ITS JUDGMENT OF 13 FEBRUARY 1985, REFERRED TO ABOVE, THE COURT HELD THAT THE IMPOSITION ON STUDENTS WHO ARE NATIONALS OF OTHER MEMBER STATES OF A CHARGE, A REGISTRATION FEE OR THE MINERVAL AS A CONDITION

OF ACCESS TO VOCATIONAL TRAINING, WHERE THE SAME FEE IS NOT IMPOSED ON STUDENTS WHO ARE NATIONALS OF THE HOST MEMBER STATE, CONSTITUTES DISCRIMINATION ON GROUNDS OF NATIONALITY CONTRARY TO ARTICLE 7 OF THE TREATY.

5 AFTER THE DELIVERY OF THAT JUDGMENT, THE PLAINTIFFS BROUGHT INTERLOCUTORY PROCEEDINGS CLAIMING THE REPAYMENT OF THE SUPPLEMENTARY ENROLMENT FEES WHICH THEY HAD PAID. AT THE HEARING, THE PROCEEDINGS WERE STAYED PENDING THE AMENDMENT OF THE RELEVANT BELGIAN LEGISLATION. THE AMENDMENT WAS CONTAINED IN THE LAW OF 21 JUNE 1985 ON EDUCATION (MONITEUR BELGE OF 6 JULY 1985).

6 ACCORDING TO THAT LAW, SUPPLEMENTARY ENROLMENT FEES CHARGED BETWEEN 1 SEPTEMBER 1976 AND 31 DECEMBER 1984 ARE IN NO EVENT TO BE REFUNDED; AN EXCEPTION IS MADE FOR SUCH FEES PAID BY PUPILS AND STUDENTS WHO ARE NATIONALS OF A MEMBER STATE OF THE COMMUNITY AND HAVE UNDERTAKEN VOCATIONAL TRAINING, WHICH ARE TO BE REFUNDED IN ACCORDANCE WITH JUDICIAL DECISIONS MADE IN PROCEEDINGS FOR REPAYMENT BROUGHT BEFORE THE COURTS BEFORE 13 FEBRUARY 1985, THE DATE ON WHICH THE JUDGMENT IN GRAVIER WAS DELIVERED.

7 THE NATIONAL COURT STAYED THE PROCEEDINGS AND REFERRED THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING:

"DO THE FINANCIAL CONDITIONS GOVERNING ACCESS TO UNIVERSITY COURSES LEADING TO THE AWARD OF A PRELIMINARY DIPLOMA (' CANDIDATURE') AND A FINAL DEGREE (' DOCTORAT') IN VETERINARY MEDICINE FALL WITHIN THE SCOPE OF APPLICATION OF THE TREATY, WITHIN THE MEANING OF ARTICLE 7 THEREOF, AS REGARDS BOTH THE 1985/86 ACADEMIC YEAR AND THE ACADEMIC YEARS FROM 1979 TO 1985?"

[...]

9 IT MUST BE OBSERVED FIRST OF ALL THAT IN ITS SINGLE QUESTION THE NATIONAL COURT HAS IN FACT RAISED TWO SEPARATE ISSUES:

(I) THE FIRST ISSUE IS WHETHER UNIVERSITY STUDIES IN VETERINARY MEDICINE FALL WITHIN THE MEANING OF THE TERM "VOCATIONAL TRAINING", SO THAT A SUPPLEMENTARY ENROLMENT FEE CHARGED TO STUDENTS WHO ARE NATIONALS OF OTHER MEMBER STATES AND WISH TO ENROL FOR SUCH STUDIES CONSTITUTES DISCRIMINATION ON GROUNDS OF NATIONALITY CONTRARY TO ARTICLE 7 OF THE EEC TREATY;

(II) THE SECOND ISSUE IS WHETHER, IF THAT IS THE CASE, THAT INTERPRETATION IS VALID ONLY IN RESPECT OF THE PERIOD AFTER DELIVERY OF THE JUDGMENT OR WHETHER IT APPLIES ALSO TO THE PAST.

[...]

24 WITH REGARD TO THE FIRST ISSUE RAISED, THE ANSWER TO THE QUESTION REFERRED BY THE NATIONAL COURT MUST THEREFORE BE THAT UNIVERSITY STUDIES IN VETERINARY MEDICINE FALL WITHIN THE MEANING OF THE TERM "VOCATIONAL TRAINING", AND CONSEQUENTLY A SUPPLEMENTARY ENROLMENT FEE CHARGED TO STUDENTS WHO ARE NATIONALS OF OTHER MEMBER STATES

AND WISH TO ENROL FOR SUCH STUDIES CONSTITUTES DISCRIMINATION ON GROUNDS OF NATIONALITY CONTRARY TO ARTICLE 7 OF THE EEC TREATY.

THE EFFECT RATIONE TEMPORIS OF THE INTERPRETATION OF THE TERM "VOCATIONAL TRAINING"

- 25 THE APPLICANTS AND THE COMMISSION EMPHASIZE THAT AS A MATTER OF PRINCIPLE INTERPRETATIVE JUDGMENTS DELIVERED IN REPLY TO A REFERENCE FOR A PRELIMINARY RULING HAVE RETROACTIVE EFFECT . THE INTERPRETATION OF ARTICLE 7 OF THE EEC TREATY GIVEN IN THE JUDGMENT OF 13 FEBRUARY 1985, REFERRED TO ABOVE, MUST BE OBSERVED BY ALL NATIONAL COURTS EVEN WITH REGARD TO APPLICATIONS FOR VOCATIONAL TRAINING COURSES FOR THE PERIOD FROM 1 SEPTEMBER 1976 TO 31 DECEMBER 1984 . A MEMBER STATE CANNOT ADOPT LEGISLATION IMPOSING A TEMPORAL RESTRICTION ON THE EFFECT OF SUCH A JUDGMENT WHERE THE COURT DID NOT LAY DOWN SUCH A RESTRICTION IN ITS JUDGMENT.
- 26 THE DEFENDANTS, ON THE OTHER HAND, EMPHASIZE THAT THE JUDGMENT OF 13 FEBRUARY 1985 CONSTITUTES A NEW DEVELOPMENT IN COMMUNITY LAW AND WOULD HAVE SERIOUS REPERCUSSIONS IF IT WERE TO HAVE EFFECT FROM 1 SEPTEMBER 1976 ONWARDS. THE SITUATION, THEY SAY, IS THUS COMPARABLE TO THAT IN CASE 43/75 (JUDGMENT OF 8 APRIL 1976 DEFRENNE V SABENA ((1976)) ECR 455).
- 27 AS THE COURT HAS HELD (SEE IN PARTICULAR THE JUDGMENT OF 27 MARCH 1980 IN CASE 61/79 AMMINISTRAZIONE DELLE FINANZE DELLO STATO V DENKAVIT ITALIANA ((1980)) ECR 1205), THE INTERPRETATION WHICH, IN THE EXERCISE OF THE JURISDICTION CONFERRED UPON IT BY ARTICLE 177, THE COURT GIVES TO A RULE OF COMMUNITY LAW CLARIFIES AND DEFINES WHERE NECESSARY THE MEANING AND SCOPE OF THAT RULE AS IT MUST BE OR OUGHT TO HAVE BEEN UNDERSTOOD AND APPLIED FROM THE TIME OF ITS COMING INTO FORCE. IT FOLLOWS THAT THE RULE AS THUS INTERPRETED MAY, AND MUST, BE APPLIED BY THE COURTS EVEN TO LEGAL RELATIONSHIPS ARISING AND ESTABLISHED BEFORE THE JUDGMENT RULING ON THE REQUEST FOR INTERPRETATION, PROVIDED THAT IN OTHER RESPECTS THE CONDITIONS ENABLING AN ACTION RELATING TO THE APPLICATION OF THAT RULE TO BE BROUGHT BEFORE THE COURTS HAVING JURISDICTION ARE SATISFIED.
- 28 AS THE COURT RECOGNIZED IN ITS JUDGMENT OF 8 APRIL 1976, REFERRED TO ABOVE, IT IS ONLY EXCEPTIONALLY THAT IT MAY, IN APPLICATION OF THE GENERAL PRINCIPLE OF LEGAL CERTAINTY INHERENT IN THE COMMUNITY LEGAL ORDER, BE MOVED TO RESTRICT FOR ANY PERSON CONCERNED THE OPPORTUNITY OF RELYING UPON THE PROVISION AS THUS INTERPRETED WITH A VIEW TO CALLING IN QUESTION LEGAL RELATIONSHIPS ESTABLISHED IN GOOD FAITH. AS THE COURT HAS CONSISTENTLY HELD, SUCH A RESTRICTION MAY BE ALLOWED ONLY IN THE ACTUAL JUDGMENT RULING UPON THE INTERPRETATION SOUGHT.
- 29 THIS JUDGMENT DEALS FOR THE FIRST TIME WITH THE QUESTION WHETHER UNIVERSITY EDUCATION MAY BE REGARDED AS CONSTITUTING VOCATIONAL TRAINING FOR THE PURPOSES OF ARTICLE 128 OF THE EEC TREATY.
- 30 AS THE COURT HAS HELD (SEE IN PARTICULAR THE JUDGMENT OF 8 APRIL 1976), IN DETERMINING WHETHER OR NOT TO LIMIT THE TEMPORAL EFFECT OF A

JUDGMENT IT IS NECESSARY TO BEAR IN MIND THAT ALTHOUGH THE PRACTICAL CONSEQUENCES OF ANY JUDICIAL DECISION MUST BE WEIGHED CAREFULLY, THE COURT CANNOT GO SO FAR AS TO DIMINISH THE OBJECTIVITY OF THE LAW AND COMPROMISE ITS FUTURE APPLICATION ON THE GROUND OF THE POSSIBLE REPERCUSSIONS WHICH MIGHT RESULT, AS REGARDS THE PAST, FROM A JUDICIAL DECISION.

- 31 THIS CASE MARKS A DEVELOPMENT WITH REGARD TO THE INCLUSION OF UNIVERSITY STUDIES IN THE SCOPE OF THE TERM "VOCATIONAL TRAINING" FOR THE PURPOSES OF COMMUNITY LAW. AS THE COURT POINTED OUT IN ITS JUDGMENT OF 13 FEBRUARY 1985, THE COMMON VOCATIONAL TRAINING POLICY REFERRED TO IN ARTICLE 128 OF THE TREATY IS GRADUALLY BEING ESTABLISHED. IT IS ONLY ON THE BASIS OF THAT DEVELOPMENT THAT IT HAS BECOME POSSIBLE TO REGARD UNIVERSITY STUDIES PREPARATORY TO THE EXERCISE OF A TRADE OR PROFESSION AS BEING COVERED BY THE TERM "VOCATIONAL TRAINING".
- 32 INDEED, WITH REGARD TO UNIVERSITY EDUCATION, THAT DEVELOPMENT IS REFLECTED IN THE CONDUCT OF THE COMMISSION. LETTERS SENT BY THE COMMISSION TO BELGIUM IN 1984 SHOW THAT AT THAT TIME THE COMMISSION DID NOT CONSIDER THE IMPOSITION OF THE SUPPLEMENTARY ENROLMENT FEE TO BE CONTRARY TO COMMUNITY LAW. IT WAS NOT UNTIL 25 JUNE 1985, IN THE COURSE OF AN INFORMAL MEETING WITH OFFICIALS OF THE BELGIAN EDUCATION MINISTRIES, THAT THE COMMISSION STATED THAT IT HAD CHANGED ITS POSITION. TWO DAYS LATER, MORE THAN FOUR MONTHS AFTER THE DELIVERY OF THE JUDGMENT OF 13 FEBRUARY 1985, IT STATED DURING A MEETING OF THE EDUCATION COMMITTEE ESTABLISHED BY THE COUNCIL THAT IT HAD NOT COMPLETED ITS REVIEW OF THE MATTER; THAT IS TO SAY, IT HAD NOT YET FORMED A DEFINITE OPINION OF THE CONCLUSIONS TO BE DRAWN FROM THAT JUDGMENT, WHICH ITSELF CONCERNED TECHNICAL EDUCATION, AS WAS POINTED OUT ABOVE.
- 33 THE ATTITUDE THUS ADOPTED BY THE COMMISSION MIGHT REASONABLY HAVE LED THE AUTHORITIES CONCERNED IN BELGIUM TO CONSIDER THAT THE RELEVANT BELGIAN LEGISLATION WAS IN CONFORMITY WITH COMMUNITY LAW.
- 34 IN THOSE CIRCUMSTANCES, PRESSING CONSIDERATIONS OF LEGAL CERTAINTY PRECLUDE ANY REOPENING OF THE QUESTION OF PAST LEGAL RELATIONSHIPS WHERE THAT WOULD RETROACTIVELY THROW THE FINANCING OF UNIVERSITY EDUCATION INTO CONFUSION AND MIGHT HAVE UNFORESEEABLE CONSEQUENCES FOR THE PROPER FUNCTIONING OF UNIVERSITIES.
- 35 WITH REGARD TO THE SECOND ISSUE RAISED, THE ANSWER TO THE QUESTION REFERRED BY THE NATIONAL COURT MUST THEREFORE BE THAT, IN SO FAR AS ACCESS TO UNIVERSITY STUDIES IS CONCERNED, THE DIRECT EFFECT OF ARTICLE 7 OF THE EEC TREATY MAY NOT BE RELIED ON IN SUPPORT OF CLAIMS REGARDING SUPPLEMENTARY ENROLMENT FEES IMPROPERLY CHARGED PRIOR TO THE DATE OF THIS JUDGMENT, EXCEPT IN RESPECT OF STUDENTS WHO BROUGHT LEGAL PROCEEDINGS OR SUBMITTED AN EQUIVALENT CLAIM BEFORE THAT DATE.

[...]

4.7 Case 4/79: ONIC

Société Coopérative "Providence Agricole de la Champagne"

v

Office National Interprofessionnel des Céréales (ONIC)

Case 4/79

15 October 1980

Court of Justice

[1980] ECR 2823

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By judgment of 12 December 1978, which was received at the Court on 2 January 1979 and was amended and supplemented by a judgment of 2 May 1979, received at the Court on 15 May 1979, the Tribunal Administratif [Administratif Court] Chalons-sur-Marne, requested the Court to deliver a preliminary ruling under Article 177 of the EEC Treaty on the validity of Regulation (EEC) No 2744/75 of the Council of 29 October 1975 on the import and export system for products processed from cereals and from rice [citation omitted], of Commission Regulations (EEC) Nos 1910/76 of 30 July 1976 [citation omitted] and 2466/76 of 8 October 1976 [citation omitted] altering the monetary compensatory amounts to be charged or granted, as the case may be, on the import or export of certain cereal products and of those regulations which subsequently altered the said amounts in the circumstances hereinafter considered.
2. The question is raised, first, whether Regulation No 2744/75 of the Council is not invalid in that it is in breach of "the principle of free competition and the principle of equality of treatment between undertakings within the Community". The question put thereafter is whether, by employing the coefficient 1.8, which is laid down in Regulation No 2744/75 of the Council in connection with levies and refunds, in order to fix the rate of the monetary compensatory amounts for maize groats and maize meal, the Commission regulations referred to did not contravene Regulation No 974/71 of the Council, in particular Article 2 (2) thereof, as well as the principle of nondiscrimination between producers which is laid down in Article 40 (3) of the Treaty of Rome.
3. These questions have been submitted in the context of a dispute between the plaintiff in the main action and the Office National Interprofessionnel des Cereales, the French institution entrusted with implementing Community provisions on the common organization of the market in cereals. Between 10 August 1976 and 28 July 1977 the plaintiff exported quantities of maize groats and maize meal and the Office National Interprofessionnel des Cereales thereupon claimed payment from it of the monetary compensatory amounts fixed, in implementation of Regulation No 974/71 of the Council, by various Commission regulations.
4. During the period in which the exports in question took place the monetary compensatory amounts to be charged on the exportation of maize (subheading 10.05 B of the Common Customs Tariff) and of maize groats and maize meal (subheadings 11.02 A V (a) (1) and

11.02 A V (a) (2) of the Common Customs Tariff) by French exporters were successively fixed by three Commission regulations at the amounts per tonne set out below:

[...]

5. The fixing of the monetary compensatory amount on one tonne of maize meal at an amount equal to the monetary compensatory amount on one tonne of maize multiplied by the coefficient 1.8 is in implementation of Articles 1 and 2 of Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition, 1971 (I), p. 257) in the version in force at the time.

[...]

6. It is the incidence of the application of the monetary compensatory amount on maize (the basic product) on the price of meal (the dependent product) which the coefficient 1.8 is intended to represent in the regulations in question. That is on the view that 1.8 tonnes of maize are required in order to produce 1 tonne of meal and that accordingly, in order to avoid distortion of competition and deflection of trade both in trade between Member States and with non-member countries, a monetary compensatory amount equal to that charged or granted on 1.8 tonnes of maize must be charged or granted? as the case may be, on one tonne of meal.

[...]

C -- Consequences of the invalidity

42. It should nevertheless be noted that the invalidity found to exist does not lead to the conclusions which the plaintiff in the main action seeks to draw regarding the reduction in the sums which it was charged by way of compensatory amounts on the exports of meal which it effected during the aforementioned period. The plaintiff in fact proceeds on the mistaken assumption that reducing the monetary compensatory amounts on the various processed products in such a way that their total does not exceed the monetary compensatory amount on the quantity of maize from which they are produced must operate for the benefit of maize meal alone or in any event be effected in accordance with a formula which represents the proportions of derived products which, according to the plaintiff, are obtained in France from 1.8 tonnes of maize. It has been stated above that such a purely quantitative approach, based on technical information which is peculiar to a single Member State -- and which is furthermore open to question since the government of that Member State puts forward different figures -- cannot be accepted. In observing the above-mentioned ceiling the Commission in fact enjoys a discretion in the allocation of the compensatory amounts on the various processed products whose prices depend on that of the basic product.
43. Secondly, the complicated nature of the factors which may determine the allocation, within the above-mentioned ceiling, of the incidence of the monetary compensatory amount fixed on the basic product amongst the various dependent products requires an examination, within the context of these proceedings, of the effects of the invalidity of the system of calculation adopted by the Commission.
44. Although the Treaty does not expressly lay down the consequences which flow from a declaration of invalidity within the framework of a reference to the Court for a preliminary ruling, Articles 174 and 176 contain clear rules as to the effects of the annulment of a regulation within the framework of a direct action. Thus Article 176 provides that the institution whose act has been declared void shall be required to take the necessary measures to comply with the judgment of the Court of Justice. In its judgments of 19 October

1977 in Joined Cases 117/76 and 16/77 (Ruckdeschel and Hansa-Lagerhaus Stroh (Quellmehl) [1977] ECR 1753) and in Joined Cases 124/76 and 20/77 (Moulins et Huileries dePont-a-Mousson and Providence Agricole de la Champagne (Maize groats and meal) [1977] ECR 1975) the Court has already referred to that rule within the context of a reference to it for a preliminary ruling.

45. In this case it is necessary to apply by analogy the second paragraph of Article 174 of the Treaty, whereby the Court of Justice may state which of the effects of the regulation which it has declared void shall be considered as definitive, for the same reasons of legal certainty as those which form the basis of that provision. On the one hand the invalidity of the regulation in this case might give rise to the recovery of sums paid but not owed by the undertakings concerned in countries with depreciated currencies and by the national authorities in question in countries with hard currencies which, in view of the lack of uniformity of the relevant national legislation, would be capable of causing considerable differences in treatment, thereby causing further distortion in competition. On the other hand, it is impossible to appraise the economic disadvantages resulting from the invalidity of the fixing of the monetary compensatory amounts under the system of calculation adopted by the Commission without making assessments which that institution alone is required to make under Regulation No 974/71, having regard to other relevant factors, for example the allocation of the maximum permissible amount amongst the various derived or dependent products.
46. For these reasons it must be held that the fact that the fixing of the monetary compensatory amounts which result from the system of calculating those compensatory amounts on products processed from maize contained in Regulations Nos 1910/76, 2466/76 and 938/77 has been found invalid does not enable the charging or payment of monetary compensatory amounts by the national authorities on the basis of those regulations to be challenged as regards the period prior to the date of this judgment.

[...]

5. THE JURISDICTION OF THE COURT

5.1 Case C-515/99: Reisch



NOTE AND QUESTIONS

In Reisch the Court transposed the so called Guimont case law on "purely internal situations" to the field of capital. One of the interveners before the Court had submitted that the reference for a preliminary ruling was inadmissible. What did the Court find?

Hans Reisch and Others (joined cases C-515/99 and C-527/99 to C-540/99)

v

Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others (joined cases C-519/99 to C-524/99 and C-526/99)

v

Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg

5 March 2002

Court of Justice

[2002] ECR I-02157

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

The legal background

Community law

4 Article 56(1) EC provides:

'Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

National legislation

- 5 Under Austrian law, ownership of immovable property is acquired by means of an entry in the land register confirmed by the Grundbuchsgericht (Land Registry Court), which is required to determine whether authorisation is necessary for the transfer and, if so, whether that authorisation has been granted.
- 6 In the Land of Salzburg, Paragraph 12 of the SGVG provides that certain legal transactions relating to building plots, such as the transfer of ownership or the grant of a right to build, are permissible only where the acquirer of title submits a declaration stating, first, that he is an Austrian national, or a national of another Member State exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area. The acquirer of title must, secondly, declare that the land will be used as his principal residence or to meet a commercial need. Use of the land as a secondary residence is possible only if the land was already used for that purpose before 1 March 1993 or if it is located in an area in which secondary residences are permitted.
- 7 On the basis of the declaration referred to in the preceding paragraph, the Grundverkehrsbeauftragter issues confirmation. He may only refuse to do so if there are grounds for suspecting that the property will not be used for the purpose stated in the declaration or if the acquisition is inconsistent with the aims of the SGVG. In that case the Grundverkehrsbeauftragter refers the acquirer of title to the Grundverkehrslandeskommission, which may authorise the transfer after ascertaining that the same substantive criteria relating to prohibition of use as a secondary residence have been met.
- 8 In the absence of confirmation from the Grundverkehrsbeauftragter or authorisation from the Grundverkehrslandeskommission no land may be acquired in the Land of Salzburg.
- 9 Paragraph 19 of the SGVG requires the acquirer of title to use the land in accordance with the declaration referred to in Paragraph 12 of the SGVG. Paragraph 19 also enables the Grundverkehrslandeskommission to attach conditions and requirements to its authorisation in order to ensure that the acquirer of title uses the land for the stated purpose, in particular by requiring security in an amount not exceeding the purchase price or the value of the land.
- 10 Paragraph 36 of the SGVG lays down the time-limits within which the acquirer of title must lodge the declaration of acquisition.
- 11 Under Paragraph 42 of the SGVG the Grundverkehrsbeauftragter may bring before the national court an action for annulment of the property transaction where this is intended to circumvent the application of the SGVG.
- 12 Paragraph 43 of the SGVG provides for fines of up to ATS 500 000 and sentences of imprisonment of up to six weeks, inter alia where the acquirer of title has failed to submit the necessary declaration or to apply for the necessary authorisation, or if he uses the land for an unauthorised purpose.

[...]

- 17 Accordingly, the Unabhängiger Verwaltungssenat Salzburg referred to the Court for a preliminary ruling the following questions:

In Cases C-515/99 and C-527/99 to C-540/99:

'Are the provisions of Article 56 EC et seq. to be interpreted as precluding the application of Paragraphs 12, 36 and 43 of the SGVG 1997 in the version published in LGBl. No 11/99, whereby any person who wishes to acquire a building plot in the federal Land of Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedoms of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?'

In Cases C-519/99 to C-524/99 and C-526/99:

'Are the provisions of Article 56 EC et seq. to be interpreted as precluding the application of Paragraphs 12 to 14 of the SGVG 1997 in the version published in LGBl. No 11/99, whereby any person who wishes to acquire a building plot in the federal Land of Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedoms of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?'

[...]

The questions referred for a preliminary ruling

Admissibility

- 20 GWP Gewerbeparkentwicklung GmbH submits, first, that the question referred for a preliminary ruling in Cases C-519/99 to C-524/99 and C-526/99 is inadmissible since it does not concern the interpretation of the Treaty, but the interpretation or assessment of the validity of the provisions of the SGVG, which are matters for the national court alone.
- 21 Secondly, it considers that the main proceedings to which it is a party, which concern only the conditions for the acquisition by an Austrian company of land in Austria pursuant to the SGVG, have no connection with Community law and relate to a purely internal situation, thereby making the reference for a preliminary ruling inadmissible.
- 22 It will be recalled in respect of the first submission that, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case 20/87 Gauchard [1987] ECR 4879, paragraph 5).
- 23 In the main proceedings, the referring court asks the Court to interpret Treaty provisions solely for the purposes of determining whether those provisions are capable of affecting the effects of national rules which the referring court is required to apply. It cannot therefore be maintained that the purpose of the question referred for a preliminary ruling in each of the cases is anything other than the interpretation of provisions of the Treaty.
- 24 As for the second submission, it is apparent from the documents in the case file, and it is not, moreover, in dispute, that all the facts in the main proceedings are confined to a single Member State. National legislation such as the SGVG, which applies without distinction to Austrian nationals and to nationals of Member States of the European Communities, may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 Oosthoek's Uitgeversmaatschappij [1982] ECR 4575, paragraph 9, and Case 98/86 Mathot [1987] ECR 809, paragraphs 8 and 9).

- 25 However, that finding does not mean that there is no need to reply to the questions referred to the Court for a preliminary ruling in this case. In principle, it is for the national courts alone to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court (see Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 22). A reference for a preliminary ruling from a national court may be rejected by the Court only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18).
- 26 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the referring court. Such a reply might be useful to it if its national law were to require that an Austrian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (*Guimont*, cited above, paragraph 23).
- 27 Accordingly, it is necessary to consider whether the provisions of the Treaty, interpretation of which is sought, preclude the application of national legislation such as that in issue in the main proceedings to the extent that it is applied to persons resident in other Member States.

[...]

5.2 Case 13/68: Salgoil

SpA Salgoil
v
Italian Ministry for Foreign Trade

Case 13/68

19 December 1968

Court of Justice

[1968] ECR 453

<http://www.curia.eu.int/en/content/juris/index.htm>

- [1.] By order of 9 July 1968, which reached the registry of the Court of Justice on 11 July 1968, the Corte d' Appello, Rome, referred, under Article 177 of the Treaty establishing the EEC, two questions on the interpretation of Articles 30 et seq. of the said Treaty.

I - The Jurisdiction of the Court

- [2.] The Italian Ministry for foreign trade, the defendant in the main action, alleges that since the court making the reference did not state that the main action concerns trade between member states, the questions referred are inadmissible as a whole: the said action in fact concerns products originating in third countries.
- [3.] Article 177 is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of Justice on the other, and it does not give the Court jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference. Therefore, when a national court or tribunal refers a provision of Community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action. Thus the court cannot require the national court or tribunal to state expressly that the provision which appears to that court or tribunal to call for an interpretation is applicable. In so far as the quotation of the provision in question is not incorrect on the face of it, there is a valid reference to the Court. The Court of Justice has no jurisdiction to decide whether one or other of the provisions referred for an interpretation is applicable to the case at issue; this is a matter for the court making the reference.
- [4.] Thus the objection raised cannot be upheld.

[...]

5.3 Case 104/79: Foglia-Novello I



NOTE AND QUESTIONS

The early Foglia-Novello cases excited a huge controversy and the ECJ came under considerable criticism.

1. What was the precise nature of the transaction and dispute between Foglia and Novello? Why was it called a false dispute? (Woe to anyone who does not get a good grip on the facts here ...)
2. What did the Court decide here and how did it reason it? List the reasons.
3. Is the decision consistent with Salgoil?

Pasquale Foglia v Mariella Novello

Case 104/79

11 March 1980

Court of Justice

[1980] ECR 745

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By an order of 6 June 1979 which was received at the Court on 29 June 1979 the Pretura di Bra referred to the Court pursuant to Article 177 of the EEC Treaty five questions on the interpretation of Articles 92, 95 and 177 of the Treaty.
2. The proceedings before the Pretura di Bra concern the costs incurred by the plaintiff, Mr Foglia a wine-dealer having his place of business at Santa Vittoria d'Alba, in the province of Cuneo, Piedmont, Italy in the dispatch to Menton, France of some cases of Italian liqueur wines which he sold to the defendant, Mrs Novello.
3. The file on the case shows that the contract of sale between Foglia and Novello stipulated that Novello should not be liable for any duties which were claimed by the Italian or French authorities contrary to the provisions on the free movement of goods between the two countries or which were at least not due. Foglia adopted a similar clause in his contract with the Danzas undertaking to which he entrusted the transport of the cases of liqueur wine to

Menton; that clause provided that Foglia should [sic] not be liable for such unlawful charges or charges which were not due.

4. The order making the reference finds that the subject-matter of the dispute is restricted exclusively to the sum paid as a consumption tax when the liqueur wines were imported into French territory. The file and the oral argument before the Court of Justice have established that that tax was paid by Danzas to the French authorities, without protest or complaint; that the bill for transport which Danzas submitted to Foglia and which was settled included the amount of that tax and that Mrs Novello refused to reimburse the latter amount to Foglia in reliance on the clause on unlawful charges or charges which were not due expressly included in the contract of sale.
5. In the view of the Pretura the defences advanced by Novello entail calling in question the validity of French legislation concerning the consumption tax on liqueur wines in relation to Article 95 to the EEC Treaty.
6. The attitude of Foglia in the course of the proceedings before the Pretura may be described as neutral. Foglia has in fact maintained that he could not in any case be liable for the amount corresponding to the French consumption tax since, if it was lawfully charged, it should have been borne by Novello whilst Danzas would be liable if it were unlawful.
7. This point of view prompted Foglia to request the national court to increase the scope of the proceedings and to summon Danzas as a third party having an interest in the action. The court nevertheless considered that before it could give a ruling on that request it was necessary to settle the problem whether the imposition of the consumption tax paid by Danzas was in accordance with the provisions of the EEC Treaty or not.
8. The parties to the main action submitted a certain number of documents to the Pretura which enabled it to investigate the French legislation concerning the taxation of liqueur wines and other comparable products. The court concluded from its investigation that such legislation created a "serious discrimination" against Italian liqueur wines and natural wines having a high degree of alcoholic strength by means of special arrangements made for French liqueur wines termed "natural sweet wines" and preferential tax treatment accorded certain French natural wines with a high degree of alcoholic strength and bearing a designation of origin. On the basis of that conclusion the court formulated the questions which it has submitted to the Court of Justice.
9. In their written observations submitted to the Court of Justice the two parties to the main action have provided an essentially identical description of the tax discrimination which is a feature of the French legislation concerning the taxation of liqueur wines; the two parties consider that that legislation is incompatible with Community law. In the course of the oral procedure before the Court Foglia stated that he was participating in the procedure before the Court in view of the interest of his undertaking as such and as an undertaking belonging to a certain category of Italian traders in the outcome of the legal issues involved in the dispute.
10. It thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking's bill which included a sum paid in respect of that tax.

11. The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty.
12. This means that the questions asked by the national court, having regard to the circumstances of this case, do not fall within the framework of the duties of the Court of Justice under Article 177 of the Treaty.
13. The Court of Justice accordingly has no jurisdiction to give a ruling on the questions asked by the national court.

[...]

5.4 Case 244/80: Foglia-Novello II



NOTE AND QUESTIONS

1. What was the question referred in this case?
2. Does the answer or the reasoning in this case differ from that in Foglia-Novello I? Was there any movement in the Court's decision? Did it raise new issues to justify its decision? (yes it did!) List them citing Chapter and Recital.

Pasquale Foglia v Mariella Novello

Case 244/80

16 December 1981

Court of Justice

[1981] ECR 3045

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By an order of 18 October 1980 which was received at the Court on 5 November 1980 the Pretore [District Magistrate], Bra, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions as to the interpretation of Articles 177 and 95 of the Treaty.
2. That order was made within the framework of a case pending before the Pretore which has already given rise to a first series of preliminary questions as to the interpretation of Articles 92 and 95 of the Treaty and which formed the subject-matter of a judgment of the Court dated 11 March 1980 (Foglia v Novello, Case 104/79 [1980] ECR 745).

[...]

7. In its above-mentioned judgment of 11 March 1980 the Court ruled that it had no jurisdiction to give a ruling on the questions submitted by the national court. In its judgment it stated that:

"The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies

available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty."

8. The order making the reference shows that the judgment of the Court of Justice was challenged by the defendant in the main action who considered that in making such an appraisal the Court had intervened in the discretion reserved to the Italian court. She considered that such an application of Article 177 by the Court gave rise at national level to a question of a constitutional nature. In the alternative she submitted a question concerning the interpretation of Article 177 of the EEC Treaty and further requested that the French Republic should be joined in the proceedings.
9. When these claims were submitted to him the Pretore considered that it was necessary to refer the matter again to the Court of Justice and to submit to it certain questions on the interpretation of Article 177 of the Treaty in order to obtain a clearer and more precise appraisal of the scope and meaning of the judgment of 11 March 1980.
10. Since the Pretore considered that a misunderstanding might have arisen from the wording of his first order he laid particular emphasis on a factor which, according to him, was not made clear in the order. The defendant, from the first hearing at which she appeared, in fact refused to restrict her case to the mere rejection of the plaintiff's application. Through a procedure which is by no means uncommon in the Italian legal system she submitted "a claim, which is to a certain degree independent, for a declaratory judgment in relation to the particular legal situation in that case and in general".
11. For these reasons the Pretore, Bra, decided to refer the matter again to the Court and submitted the following questions:

"1. What interpretation must be placed upon Article 177 of the EEC Treaty with regard to the power of appraisal of the Court of Justice in relation to the wording of requests for interpretative rulings submitted to it and in particular in relation to their function in the context of the main action? More particularly, what are the respective powers of the Court of Justice and of the courts which refer questions for a preliminary ruling, having regard above all to the powers possessed by the latter under their various national legal systems, in relation to the evaluation of all the matters of fact and of law relevant to the disputes as to the substance and of the questions raised therein, above all when the claim in the main action is for a declaratory judgment?

2. If the Court of Justice in connection with a reference for a preliminary ruling declares for any reason whatever that it does not have jurisdiction to give a ruling on the questions submitted to it, may the court referring the questions, which is bound under its own national legal system to administer justice to the parties, also undertake the interpretation of Community law, and if so within what limits and according to what criteria, or must it instead give a ruling exclusively in terms of national law?

3. Within the framework of the criteria for interpretation of Article 177 of the EEC Treaty is there within the legal order of the Community a general principle which requires or permits the national courts before which proceedings are instituted wherein questions of interpretation of Community law arise also involving national provisions, which may pertain to legal systems other than that of the court in question, to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice?

4. At all events, wherever a question of interpretation is raised before or by the national courts in proceedings between private persons which directly concerns the individual rights of

nationals or traders of one of the Member States, do such individual rights under substantive Community law obtain a degree of protection which is different from and at all events less than that which the same individual rights might obtain if the administrations of the Member States whose laws form the subject-matter of the requests for interpretation in relation to their compatibility with the EEC Treaty were represented and entered an appearance before either the national court or the Court of Justice?

5. Must Article 95 of the EEC Treaty be interpreted as meaning that the prohibition of the imposition of internal taxation differentiated according to the origin and provenance of a product encompasses situations such as that of the French provisions on the taxation of liqueur wines which are described in detail in Case 104/79?"

The first, third and fourth questions

12. In his first question the Pretore requested clarification of the limits of the power of appraisal reserved by the Treaty to the national court on the one hand and the Court of Justice on the other with regard to the wording of references for a preliminary ruling and of the appraisal of the circumstances of fact and of law in the main action, in particular where the national court is requested to give a declaratory judgment.
13. The third and fourth questions concern more particularly the case in which questions of interpretation are submitted in order to permit the court to resolve disputes concerning the compatibility with Community law of national legislation enacted either by the State in which the court is situated or, as in this case, by another Member State. In that connection the question is raised
 - Whether, where the legislation of one Member State is called in question before the courts of another Member State, there is within the Community legal order a general principle which requires or permits the court before which such a dispute is brought to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice;
 - Whether the degree of protection for individuals in proceedings under Article 177 differs depending on whether that issue is raised within the framework of proceedings between private persons or in proceedings to which the administration of the State whose legislation is called in question is a party.
14. With regard to the first question it should be recalled, as the Court has had occasion to emphasize in very varied contexts, that Article 177 is based on co-operation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States.
15. With this in view it is for the national court - by reason of the fact that it is seised of the substance of the dispute and that it must bear the responsibility for the decision to be taken - to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment.
16. In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it maintains within the framework of Article 177 with the Court of Justice are governed exclusively by the provisions of Community law.

17. In order that the Court of Justice may perform its task in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment.
18. It must in fact be emphasized that the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.
19. Furthermore, it should be pointed out that, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in position to make any assessment inherent in the performance of its own duties in particular order to check, as all courts must, whether it has jurisdiction. Thus the Court, taking into account the repercussions of its decisions in this matter, must have regard, in exercising the jurisdiction conferred upon it by Article 177, not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States. Accordingly it cannot, without disregarding the duties assigned to it, remain indifferent to the assessments made by the courts of the Member States in the exceptional cases in which such assessments may affect the proper working of the procedure laid down by Article 177.
20. Whilst the spirit of co-operation which must govern the performance of the duties assigned by Article 177 to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court's proper responsibilities, it implies at the same time that the national court, in the use which it makes of the facilities provided by Article 177, should have regard to the proper function of the Court of Justice in this field.
21. The reply to the first question must accordingly be that whilst, according to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, is a matter for the national court it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court.
22. As the Pretore has properly indicated in his third and fourth questions, special problems may arise concerning the application of Article 177 when questions of interpretation are submitted by the national court in order to enable it to establish whether the legislative provisions of a Member State are in accordance with Community law. In this connection the Pretore has indicated two distinct categories of problems.
23. The third question concerns circumstances in which, in proceedings between individuals before a court of a Member State, a dispute arises as to the compatibility with Community law of the legislation of a Member State other than that of the State in which that court is situated. The Pretore has submitted in this connection the question whether in such a case the Member State whose legislation is at issue may be joined in the proceedings instituted before the court in question.

24. The reply on this point must be that in the absence of provisions of Community law in the matter, the possibility of taking proceedings before a national court against a Member State other than that in which that court is situated depends both on the laws of the latter and on the principles of international law.
25. In the fourth question the Pretore has asked whether the protection provided for individuals by the procedure under Article 177 is different, or indeed diminished, when such a question is raised in proceedings between individuals as opposed to proceedings between an individual and the administration.
26. In answer to the question thus raised it must be emphasized that all individuals whose rights are infringed by measures adopted by a Member State which are contrary to Community law must have the opportunity to seek the protection of a court possessed of jurisdiction and that such a court, for its part, must be free to obtain information as to the scope of the relevant provisions of Community law by means of a procedure under Article 177. In principle the degree of protection afforded by the courts therefore must not differ according to whether such a question is raised in proceedings between individuals or in an action to which the State whose legislation is challenged is a party in one form or another.
27. Nevertheless, as the Court has stated in its reply set out above to the first question it is for the Court of Justice to appraise the conditions in which a case is referred to it by a national court in order to confirm that it has jurisdiction. In that connection the question whether the proceedings are between individuals or are directed against the State whose legislation is called in question is not in all circumstances irrelevant.
28. On the one hand it must be pointed out that the court before which, in the course of proceedings between individuals, an issue concerning the compatibility with Community law of legislation of another Member State is brought is not necessarily in a position to provide for such individuals effective protection in relation to such legislation.
29. On the other hand, regard being had to the independence generally ensured for the parties by the legal systems of the Member States in the field of contract, the possibility arises that the conduct of the parties may be such as to make it impossible for the State concerned to arrange for an appropriate defence of its interests by causing the question of the invalidity of its legislation to be decided by a court of another Member State. Accordingly, in such procedural situations it is impossible to exclude the risk that the procedure under Article 177 may be diverted by the parties from the purposes for which it was laid down by the Treaty.
30. The foregoing considerations as a whole show that the Court of Justice for its part must display special vigilance when, in the course of proceedings between individuals a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law.
31. The reply to the fourth question must accordingly be that in the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the State whose legislation is called in question is a party, but that in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 is not employed for purposes which were not intended by the Treaty.

The fifth question

32. In the fifth question the Pretore, Bra, repeats in abbreviated form the first question submitted in his first order concerning the interpretation of Article 95 of the Treaty. In its above-mentioned judgment of 11 March 1980 the Court of Justice found that the parties took the same view as to the lawfulness of the French legislation at issue and in reality sought to obtain by the device of a special clause inserted in their contract a ruling by an Italian court that the French legislation was unlawful although French law provided appropriate remedies. The Court of Justice concluded that to reply to the questions submitted in such circumstances would be to exceed the duty entrusted to it by Article 177 of the Treaty, which is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. It accordingly declared that it had no jurisdiction to give a ruling on the questions raised.
33. In his second order making a reference to the Court the Pretore has specially emphasized that the defendant had requested him to deliver a declaratory judgment. In this connection it must be pointed out that the conditions in which the Court of Justice performs its duties in this field are independent of the nature and objective of proceedings brought before the national courts. Article 177 refers to the "judgment" to be given by the national court without laying down special rules in terms of the nature of such judgments.
34. The circumstance referred to by the national court in its second order for reference does not appear to constitute a new fact which would justify the Court of Justice in making a fresh appraisal of its jurisdiction. It is therefore for the Pretore, within the framework of the collaboration between a national court and the Court of Justice to ascertain in the light of the foregoing considerations whether there is any need to obtain an answer from the Court of Justice to the fifth question and, if so, to indicate to the Court any new factor which might justify it in taking a different view of its jurisdiction.

The second question

35. Having regard to the foregoing it is unnecessary to reply to the second question.

[...]

5.5 Case 14/86: Pretore di Salò



NOTE AND QUESTIONS

1. Does the Pretore di Salò case "reverse" Foglia-Novello altogether?

Pretore di Salò v. Persons Unknown

Case 14/86

11 June 1987

Court of Justice

[1987] ECR 2545

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 13 January 1986, which was received at the Court on 21 January 1986, the Pretore di Salò referred to the Court for a preliminary ruling under Article 177 EEC a question on the interpretation of Council Directive 78/659 of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life ([1978] OJ L222/1).
2. Those questions were raised in criminal proceedings against persons unknown concerning certain offences contrary to a number of legislative provisions relating to the protection of waters.
3. The proceedings were initiated following a report submitted by an anglers' association as a result of the death of many fish in the River Chiese, due essentially to the many dams placed in the river for hydro-electric and irrigation purposes, which were said to cause significant and sudden changes in the water level. Other anglers' associations had already submitted reports on the same matters and on the discharge of noxious substances into the same river, but it had been decided that no action was to be taken on those reports.
4. In the context of the preparatory inquiry in the aforementioned criminal proceedings, the Pretore di Salò considered it necessary to refer the following questions to the Court of Justice:
 1. Is the existing system of rules established by the Italian Republic for the protection of waters from pollution consistent with the principles and quality objectives laid down in Directive 78/659 of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life?

2. Do the quality objectives, as laid down in the directive presuppose the comprehensive management of water resources -- that is to say a system of regulating the discharge and the volume of water -- and, consequently, the need for rules which apply to water basins or watercourses and are capable of ensuring a constant flow with a view to preserving the minimum volume of water which is essential for the development of fish species?

[...]

6. Without expressly arguing that the Court does not have jurisdiction to reply to the questions referred to it, the Italian Government draws the Court's attention to the nature of the functions performed in this case by the Pretore, which are both those of a public prosecutor and those of an examining magistrate. The Pretore carries out preliminary investigations in his capacity as public prosecutor and, where these disclose no grounds for continuing the proceedings, makes an order accordingly in the place of an examining magistrate. That order is not a judicial act because it cannot acquire the force of *res judicata* or create an irreversible procedural situation and because no reasons need be given for it, whereas Article 111 of the Italian Constitution imposes an obligation to state reasons in the case of judicial acts.
7. It must be observed that the Pretori are judges who, in proceedings such as those in which the questions referred to the Court in this case were raised, combine the functions of a public prosecutor and an examining magistrate. The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which give rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature.
8. At the hearing, the Italian Government also maintained that, having regard to the present stage of the proceedings, at which the facts have not been sufficiently established and those who may be responsible have not yet been identified, a reference for a preliminary ruling is premature.
9. The Commission considers that the reference for a preliminary ruling is inadmissible because in criminal proceedings against persons unknown it is possible that a decision may never be given on the substance of the case. All that is required for that to be the case is for those responsible never to be identified. At the hearing, the Commission also relied on another argument in support of the proposition that the Court does not have jurisdiction: if, after the Court's decision, the persons responsible were identified, they would be prevented from defending before the Court the interpretation of Community law most in conformity with their interests. That would constitute a violation of the right to a fair hearing.
10. It must be pointed out first that, as the Court decided in *Joined Cases 36 and 71/80, Irish creamery milk suppliers' association v Ireland* ([1981] ECR 735, [1981] 2 CMLR 455), if the interpretation of Community law is to be of use to the national court, it is essential to define the legal context in which the interpretation requested should be placed. In that perspective, it might be convenient in certain circumstances for the facts of the case to be established and for questions of purely national law to be settled at the time when the reference is made to the Court of Justice so as to enable the latter to take cognizance of all the matters of fact and law which may be relevant to the interpretation of Community law which it is called upon to give.
11. However, as the Court has already held (see the same judgment and, most recently, *Case 72/83, Campus Oil v Minister for industry and energy* ([1984] ECR 2727, [1984] 3 CMLR 544), those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties,

which will have to take responsibility for giving judgment in the case and which is therefore in the best position to appreciate at what stage of the proceedings it requires a preliminary ruling from the Court of Justice. The decision at what stage in proceedings a question should be referred to the Court of Justice for a preliminary ruling is therefore dictated by considerations of procedural economy and efficiency to be weighed only by the national court and not by the Court of Justice.

12. It should also be pointed out that the Court has consistently held that the fact that judgments delivered on the basis of references for a preliminary ruling are binding on the national courts does not preclude the national court to which such a judgment is addressed from making a further reference to the Court of Justice if it considers it necessary in order to give judgment in the main proceedings. Such a reference may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier (see, most recently, the order of 5 March 1986 in Case 69/85, *Wunsche v Germany* ([1986] ECR 947)).
13. It follows that where the accused are identified after the reference for a preliminary ruling and if one of the abovementioned conditions arises, the national court may once again refer a question to the Court of Justice and thereby ensure that due respect is given to the right to a fair hearing.

In those circumstances, the objections raised by the Commission and the Italian Government concerning the jurisdiction of the Court must be rejected.

[...]

5.6 Case C-379/98: Preussenelektra



NOTE AND QUESTIONS

This case is essentially dealing with state aid (and if that is something you are interested in, you should study the full text version), which is why you should not spend too much time on the facts – we included them only for reasons of consistency. Instead focus on the Courts conclusions on admissibility.

Compare the Court's decision in Preussenelektra with its earlier Foligia-Novello ruling.

PreussenElektra AG and Schlesweg AG

C-379/98

13 March 2001

Court of Justice

[2001] ECR I-

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

PreussenElektra is an electricity supplier which operates more than 25 conventional and nuclear power stations in Germany as well as a maximum-voltage and high-voltage electricity distribution network.

*A German statute dating from 1990 and amended in 1994 and 1998 (the *Stromeinspeisungsgesetz*) requires public electricity supply undertakings (which may be either public sector or private sector) to purchase electricity produced within their area of supply from renewable sources, including wind energy, at minimum prices which are higher than the real economic value of that type of electricity. When the German Government notified the initial draft law to the Commission in 1990, the latter authorised it, holding it to be in accordance with the energy policy aims of the Communities. That system was amended in 1998: a mechanism for allocating extra costs due to that purchase obligation between electricity supply undertakings and upstream electricity network operators was established.*

Schlesweg, which is a regional electricity supply undertaking in the Land Schleswig-Holstein, is required to purchase electricity produced within its area of supply from renewable energy sources.

That purchase obligation involved an additional cost which rose from DEM 5.8 million in 1991 to about DEM 111.5 million in 1998. Pursuant to the allocation mechanism laid down by the German statute, Schlesweg applied to PreussenElektra for payment of certain sums which it had already spent in accordance with its purchase obligation. PreussenElektra brought an action before the Landgericht Kiel (Regional Court, Kiel) for recovery of DEM 500,000, representing the sum paid to Schlesweg in compensation for the additional costs caused by the purchase of wind electricity. PreussenElektra considers that that payment was contrary to Community law since it amounted to applying an amended system of State aid that had not been notified to the Commission.

The Landgericht Kiel asked the Court of Justice of the European Communities whether the amendment of the statutory system did indeed constitute an amendment of aid within the meaning of Community law, and whether, moreover, the system thus established was contrary to the prohibition on quantitative restrictions on trade.

Judgement:

[...]

28. Windpark and Land Schleswig-Holstein ('the interveners in the main proceedings) and the German Government challenge the admissibility of all or part of the reference for a preliminary ruling.
29. First, the interveners in the main proceedings argue that there are a number of omissions or errors of fact in the order for reference.
30. They submit that the referring court was wrong to hold, first, that the Commission had not been informed of the amendments made to the Stromeinspeisungsgesetz by the 1998 Law and, secondly, that electricity supply undertakings could not, for practical and legal reasons, pass on to final consumers the expenses borne by them by way of the compensation referred to in Paragraph 3 of the amended Stromeinspeisungsgesetz.
31. Second, the interveners in the main proceedings and the German Government maintain that the dispute in the main proceedings is not a genuine dispute but a spurious one.
32. The plaintiff and the defendant in the main proceedings agree that the combined provisions of Paragraphs 2 to 4 of the amended Stromeinspeisungsgesetz are contrary to Community law. PreussenElektra nevertheless made the compensatory payment provided for in Paragraph 4 of the amended Stromeinspeisungsgesetz, but immediately demanded partial repayment. Furthermore, PreussenElektra is the main shareholder in Schlesweg and therefore has a dominant influence on the decisions and legal positions of the latter.
33. Third, the interveners in the main proceedings and the German Government argue that the questions referred are not relevant for the purposes of resolving the dispute in the main proceedings.
34. As to the questions concerning the interpretation of Articles 92 and 93 of the Treaty, the interveners in the main proceedings point out that, in accordance with the case-law of the Court of Justice (Case 120/73 Lorenz [1973] ECR 1471, paragraph 9), it is for the internal legal system of every Member State to determine the legal procedure which will ensure that the third sentence of Article 93(3) of the Treaty has direct effect. The referring court has not indicated whether, and on what conditions, PreussenElektra might be entitled in German law to repayment of the sums it claims, and has therefore not demonstrated the relevance of the questions referred in relation to national law.
35. The interveners in the main proceedings further argue that, according to settled case-law (see, in particular, Joined Cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR I-887,

paragraphs 11 and 12), the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only where the preliminary examination procedure provided for in Article 93(3) of the Treaty has not been complied with. However, in the first place the initial version of the *Stromeinspeisungsgesetz* was notified to the Commission and authorised by it and in the second place the amendments made to it by the 1998 Law did not alter the aid within the meaning of Article 93(3) of the Treaty, which would have required fresh notification. In any event, the exchange of correspondence which took place before and after the adoption of the 1998 Law between the German authorities and the Commission was equivalent to, on the one hand, notification by the German Government of the amendments which that law had made to the *Stromeinspeisungsgesetz*, and, on the other, implied authorisation by the Commission of those amendments.

36. The German Government takes the view that a reply to the questions concerning Article 92 of the Treaty is not necessary in order to enable the referring court to give judgment because the only decisive question in the main proceedings was whether Schleswag was entitled to a compensatory payment under Paragraph 4 of the amended *Stromeinspeisungsgesetz*, a provision which, however, governed merely the distribution of the costs resulting from the payment of compensation for the feeding in of the electricity and did not include any aid for the benefit of the persons to whom that compensation was directed.
37. As for the question concerning Article 30 of the Treaty, the interveners in the main proceedings and the German Government argue that the dispute in the main proceedings has no cross-border element, and furthermore the plaintiff and the defendant in those proceedings have not demonstrated that the amended *Stromeinspeisungsgesetz* prevents them from importing electricity from other Member States.
38. It should be remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty 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. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).
39. Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, paragraph 61; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-322/98 *Kachelmann* [2000] ECR I-0000, paragraph 17).
40. In this case, as regards, first, the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, in particular, Case C-435/97 *World Wildlife Fund* [1999] ECR I-5613, paragraph 32).
41. Second, it should be noted that the action brought by *PreussenElektra* seeks repayment of the sum which it had to pay to Schleswag to compensate for the additional cost arising for the latter from the purchase of wind-generated electricity, made pursuant to the purchase obligation laid down by the amended *Stromeinspeisungsgesetz*, from producers of that type of electricity established in its area of supply.

42. The dispute in the main proceedings cannot, therefore, be regarded as hypothetical in character.
43. It is true that, like PreussenElektra, Schleswig has an interest in Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, laying down that purchase obligation and fixing the price to be paid in consequence, being regarded as constituting unlawful aid, thereby enabling it to escape payment. However, the dispute in the main proceedings does not concern the aid which, pursuant to Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz, Schleswig allegedly gives to the producers of electricity from renewable energy sources, but the part of that alleged aid which PreussenElektra has had to reimburse to Schleswig by virtue of Paragraph 4 of the amended Stromeinspeisungsgesetz.
44. Since those obligations on Schleswig and PreussenElektra flow directly from the amended Stromeinspeisungsgesetz, the dispute in the main proceedings between the plaintiff and the defendant cannot be regarded as a procedural device arranged by the parties to the main action in order to induce the Court of Justice to take a position on certain problems of Community law that do not serve any objective requirement inherent in the resolution of the dispute.
45. That conclusion is supported by the fact that the referring court allowed Windpark and Land Schleswig-Holstein to intervene in the main proceedings in support of Schleswig, arguing that Paragraphs 2 and 3 of the amended Stromeinspeisungsgesetz are lawful.
46. In those circumstances, the fact that PreussenElektra is Schleswig's main shareholder is not capable of depriving the dispute between them of its genuine character.
47. Finally, it should be noted that, in its order for reference, the Landgericht sufficiently defined the national legislative background and clearly explained why it considers that the questions which it raises are relevant and that a reply to those questions is necessary for resolving the dispute.
48. Concerning, first, the questions relating to Articles 92 and 93, the referring court has indicated in particular, as is apparent from paragraph 26 of this judgment, that the question whether the amended Stromeinspeisungsgesetz constitutes aid needs to be resolved before going on to consider whether the amendments which the 1998 Law made to the initial version of the Stromeinspeisungsgesetz constitute an alteration of aid, within the meaning of Article 93(3) of the Treaty, requiring implementation of the procedure laid down in that provision in order to adopt the alteration.
49. The referring court has also explained that if, wrongly, the preliminary examination procedure has not been complied with, it will be its responsibility, in accordance with its national law, to draw the consequences from the direct effect of the third sentence of Article 93(3) of the Treaty by holding the altered scheme in the Stromeinspeisungsgesetz inapplicable and ordering return of the payments made by PreussenElektra to Schleswig.
50. As the interveners in the main proceedings themselves acknowledge, the argument that the Court of Justice has jurisdiction to interpret the concept of aid within the meaning of Article 92 of the Treaty only when the preliminary examination procedure under Article 93(3) has not been complied with requires an interpretation of the criterion of 'alteration of aid or of the scope of the suspensory effect of the third sentence of Article 93(3)', and such interpretation is precisely the subject-matter of some of the questions referred.
51. The same applies to the argument of the German Government that a reply to the questions concerning Article 92 of the Treaty is unnecessary in so far as, in the main proceedings, only Paragraph 4 of the amended Stromeinspeisungsgesetz governs relations between PreussenElektra and Schleswig. Indeed, the questions concerning Article 92 of the Treaty concern precisely the point whether Paragraph 4 of the amended Stromeinspeisungsgesetz constitutes, on its own or in combination with Paragraphs 2 and 3, a system of aid for the purposes of that provision.
52. As for the question concerning Article 30 of the Treaty, suffice it to say that it is not obvious

that the interpretation sought bears no relation to the actual facts of the main action or its purpose.

53. It follows from the above considerations that answers must be given to the questions referred.

[...]

5.7 Case C-28/95: Leur-Bloem



NOTE AND QUESTIONS

The following case is the last of a series of cases where the Court had to deal with the question of jurisdiction. You'll find them summarized in AG Jacobs' opinion hereafter.

AG Jacobs also deals with a second case - Giloy - which I have left out here because neither in his opinion nor in the Court's decision is the legal question viewed as differing from the one in Leur Bloem.

Focus instead on the differences between Jacobs' and the Court's interpretation of the existing case-law.

After having read the case you should be able to answer the following questions:

1. Who draws which boundaries of jurisdiction?
2. What is the new issue on "jurisdiction" which this kind of case raises? Understand the outcomes and explain any tension and/or contradiction between these outcomes. Read in particular rec. 31 of the decision: is the reasoning of the ECJ convincing? As a matter of law and policy how would you resolve the issue?

5.7.1 Opinion of AG Jacobs

A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2

Case C-28/95

17 July 1997

Advocate General Jacobs

[1998] ECR I-04161

<http://www.curia.eu.int/en/content/juris/index.htm>

(Footnotes omitted)

1. In Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam the Gerechtshof, Amsterdam, seeks a preliminary ruling from the Court on the interpretation

of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States (hereafter the 'Tax Directive' or 'the Directive'). ' In Case C-130/95 *Bemd Giloy v Hauptzollamt Frankfurt am Main-Ost* the Hessisches Finanzgericht seeks a ruling on Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereafter 'the Customs Code' or simply 'the Code'). I shall examine both cases in this Opinion because they both raise the issue of the Court's jurisdiction to give preliminary rulings under Article 177 of the Treaty in the context of disputes which fall outside the scope of Community law but to which Community law is rendered applicable by provisions of national law.

The background to the cases and the national courts' questions

Case C-28/95 *Leur-Bloem*

2. The Gerechtshof, Amsterdam, has asked the Court to give its first ruling on the interpretation of the Tax Directive, in particular the term 'exchange of shares' in Article 2(d) of the Directive.
 3. The purpose of the Directive is to remove tax obstacles to intra-Community mergers, divisions, transfers of assets and share exchanges [...]
 4. The preamble to the Directive notes that 'mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; ... such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; ... to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level'.
- [...]
8. The transaction in issue in the main proceedings does not involve companies from different Member States but is purely internal to the Netherlands. Mrs Leur-Bloem is the sole shareholder and director of Phoenix Uitzendorganisatie BV ('Uitzendorganisatie') and Phoenix Industrial BV ('Industrial'). Both companies are licensed to operate temporary recruitment agencies, the licences having a commercial value. Mrs Leur-Bloem intends to acquire the shares of an existing private limited company, Phoenix Holding BV ('Holding'), which has an issued and paid up share capital of HFL 35 000. The company had no assets and short-term debts of HFL 2 779 at 31 December 1991 and neither assets nor debts at 31 December 1992. Mrs Leur-Bloem proposes to exchange her shares in Uitzendorganisatie and Industrial for shares in Holding, which would then become sole owner of the shares in Uitzendorganisatie and Industrial.
 9. In the main proceedings Mrs Leur-Bloem is challenging an advance ruling given on the transaction by the Netherlands tax authorities. Mrs Leur-Bloem considers that the proposed share exchange constitutes a share merger qualifying for relief from tax under Article 14b of the 1964 Netherlands Income Tax Law. Article 14b(1) provides for the exclusion from taxable profits of the gain arising from the disposal of shares as part of a share merger. Article 14b(2) provides (...)
 12. The tax authorities take the view that the proposed transaction does not fulfil the requirements of Article 14b(2)(a) because the purpose of the acquisition of the putative subsidiaries' shares by the putative holding company is not to merge the subsidiaries into a larger unit from a financial and economic point of view. Such a unit already exists because both companies have the same director and sole shareholder.
 13. Because it is purely internal to the Netherlands, the transaction in issue in the main proceedings does not fall within the scope of the Directive, which applies only to 'exchanges

of shares in which companies from two or more Member States are involved': see Article 1 of the Directive. However, the national court is of the opinion that the Netherlands legislature intended that Article 14b(2)(a) and (b), concerning internal and intra-Community share mergers respectively, should be given the same interpretation. It reaches that conclusion on the basis of the wording of those provisions, which is the same for domestic and intra-Community transactions, and their legislative history, in particular the second paragraph of point 3.5 of the Explanatory Memorandum of the State Secretary for Finance (Kamerstukken II, 1991-1992, 22 338, No 3). There the State Secretary, after explaining the modifications to be made to the Netherlands legislation in order to comply with the Directive, states that, although Community law does not formally require domestic share mergers to benefit from the same (advantageous) conditions as intra-Community mergers, it is desirable with a view to the achievement of the single market that the treatment of the two categories of transaction should be the same.

14. The national court concludes that the question whether in the present case there is a share merger within the meaning of Article 14b(2)(a) of the Law must be assessed by reference to the provisions and scope of the Directive. It has therefore put the following questions to the Court:

'May questions be referred to the Court of Justice concerning the interpretation of the provisions and scope of a directive of the Council of the European Communities even where the directive is not directly applicable to the specific circumstances of the case but it is the national legislature's intention that those circumstances are to be treated in the same manner as a situation to which the directive does apply?

[...]

Case C-130/95 Giloy

[...]

23. Both cases raise the issue whether the Court has jurisdiction under Article 177 of the Treaty to reply to questions put by a national court on the interpretation of Community law where those questions arise in the context of a dispute in which Community law does not apply qua Community law but is transposed to a non-Community context by national law. That issue has arisen in a number of earlier cases, and it may be helpful first to give a brief account of the Court's previous rulings.

Relevant case-law

24. The issue was first considered by the Court in 1985 in *Thomasdunger*, where the Court was asked to give a ruling on the interpretation of the Common Customs Tariff in proceedings concerning the importation of goods into Germany from France, a situation falling outside the scope of the Tariff. In his Opinion Advocate General Mancini explained that *Thomasdunger's* interest in seeking a tariff ruling was that certain German authorities, such as the German railways, made use of the tariff classification in fixing charges. He concluded that the Court should not reply to the national court's questions because 'the Court would in appearance be interpreting the provisions mentioned therein but would in reality be expressing an opinion on the internal rules in which those provisions had been absorbed and by which process they had lost their binding force'.
25. However, the Court met that objection with a simple reference to the familiar principle that, 'except in exceptional cases in which it is clear that the provision of Community law which the Court is asked to interpret does not apply to the facts of the dispute in the main proceedings, the Court leaves it to the national court to determine in the light of the facts of each case whether the preliminary ruling is necessary in order to decide the dispute pending before it'.
26. The Court addressed the issue more squarely in 1990 in *Dzodzi and Gmurzynska -Bscher*. ' Mrs Dzodzi, a Togolese national, married a Belgian national shortly before his death. Following the death of her husband Mrs Dzodzi sought the grant of a residence permit in

Belgium in her capacity as a spouse of a national of a Community Member State. It was clear that the situation was a purely internal one and that there was no factor connecting it with Community law. However, under a rule of Belgian law the foreign spouse of a Belgian national was to be treated as if he or she were a Community national. It seems that the national court interpreted that rule as extending to aliens married to Belgian nationals the benefit of Community rules applicable to the spouses of nationals of other Member States residing in Belgium. Accordingly, in order to assist it in resolving the dispute the national court asked whether Mrs Dzodzi would have had the right to reside and remain in Belgium if her husband had been a national of a Member State other than Belgium.

27. The facts in *Gmurzynska-Bscher* are not dissimilar to those in *Giloy*. The German rules on VAT referred to the Nomenclature of the Common Customs Tariff for the purposes of tax exemptions and reductions. Mrs *Gmurzynska-Bscher*, who planned to import a work of art from the Netherlands into Germany, sought a tariff classification ruling with a view to determining her liability to VAT.
28. Advocate General Darmon, adhering to Advocate General Mancini's view in *Thomasdunger*, concluded that the Court did not have jurisdiction to reply to the national court's questions in either case. He considered that the aim of the preliminary ruling procedure, namely to ensure that Community law was uniform in its effects, applied only within the field of application of Community law, as defined by Community law and Community law alone; a *renvoi* made to Community law could not extend the scope of Community law and, with it, the jurisdiction of the Court. It would be unacceptable for the Court's role to be reduced to one of delivering opinions or giving advice of the kind which a legal expert is sometimes called upon to give in a domestic court when it is required to apply foreign law.
29. However, the Court for the second time departed from the view of its Advocate General and in both *Dzodzi* and *Gmurzynska-Bscher* replied to the national courts' requests. In *Dzodzi* the Court observed:

'It does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State.

On the contrary, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.'

30. The Court noted that its role was confined to deducing the meaning of Community provisions from their letter and spirit and that it was for the national courts alone to apply the Community provisions thus interpreted in the light of the factual and legal circumstances of the case. The Court was in principle not obliged to look into the circumstances in which national courts were prompted to submit questions to it and envisaged applying the Community provision whose interpretation was sought. The Court added:

'The matter would be different only if it were apparent either that the procedure provided for in Article 177 had been diverted from its true purpose and sought in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying.

Where Community law is made applicable by national provisions, it is for the national court alone to assess the precise scope of that reference to Community law. If it takes the view that the content of a provision of Community law is applicable, by virtue of that reference, to the purely internal situation underlying the dispute brought before it, the national court is entitled to request the Court for a preliminary ruling on the terms laid down by the provisions of Article 177 as a whole, as they have been interpreted in the case-law of the Court of Justice.

Nevertheless, the jurisdiction of the Court is confined to considering provisions of Community law only. In its reply to the national court, the Court of Justice cannot take account of the general scheme of the provisions of domestic law which, while referring to Community law, define the extent of that reference. Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State.'

31. The Dzodzi and Gmurzynska-Bscher judgments were followed shortly afterwards in Tomatis and Fulchiron, " where the national court sought a ruling on the Common Customs Tariff in order to determine the rate of VAT applicable to certain goods under national law. They were also applied in rather different circumstances in Fournier and Federconsorzi. In Fournier the Court was asked to interpret a Community directive to which - somewhat unusually - effect was given by private-law agreements. The national court had the task of deciding which of a number of national insurance bureaux bore ultimate liability to the Fourniers in respect of a road accident in France. Article 2(2) of Council Directive 72/166 provided for the conclusion between the six national insurers' bureaux of an agreement under which each bureau guaranteed, in accordance with its own national law, settlement of claims in respect of accidents within its territory caused by vehicles normally based in the territory of another Member State. Most of the provisions of the Directive took effect only upon conclusion of the agreement. The national court sought a ruling on the meaning of the term 'territory in which a vehicle is normally based' in Article 1(4) of the Directive in order to assist it in interpreting that term in the agreement entered into by the bureaux.
32. In my Opinion in that case I suggested that the Court should accept jurisdiction in accordance with the principle laid down in Dzodzi. Although that principle would not necessarily extend to all cases which turned on the construction of a private contract incorporating concepts of Community law, here the agreement in question was an essential element in the system set up by Directive 72/166. The conclusion of the agreement not only was contemplated by the Directive but also was a condition precedent to the entry into force of many of its provisions.
33. In its judgment the Court replied to the national court's question without specifically addressing the jurisdiction point. However, in response to an argument concerning the interpretation of the Directive, the Court did emphasize that it was 'for the national court, as the only court with jurisdiction to interpret the agreement, to give to the terms used in that agreement the meaning which it considers appropriate, without being bound in that regard by the meaning which must be attributed to the same expression as used in the Directive'.
34. In Federconsorzi an Italian court sought a ruling on the interpretation of certain provisions of Council and Commission regulations on agriculture in the context of a dispute between the Italian intervention agency and Federconsorzi, a contractor entrusted with intervention operations in the olive oil sector, regarding the extent of Federconsorzi's liability to the agency in respect of a quantity of olive oil which was stolen from one of Federconcorzi's warehouses. The contract between the parties provided that the contractor was to be liable for any issues for which he is responsible to the amount stipulated by the Community legislation in force'.
35. The Court, following the Opinion of Advocate General Van Gerven, held that the principle laid down in Dzodzi applied; the contractual provision in issue referred to the content of rules of Community law in order to determine the extent of the liability of one of the parties.
36. In its most recent pronouncement on this issue in Kleinwort Benson, a case referred to the Court not under Article 177 of the Treaty but under the Protocol on the interpretation by the Court of the Brussels Convention, the Court took a narrower view of the limits of its jurisdiction. The English Court of Appeal sought an interpretation of the terms 'matters relating to a contract' in Article 5(1) of the Convention and 'matters relating to tort, delict or quasi-delict' in Article 5(3). The Court of Appeal's question was designed to help it apply not the Convention itself but Schedule 4 to the Civil Jurisdiction and Judgments Act 1982, which

contained rules modelled closely on the Convention allocating jurisdiction between the courts of the various parts of the United Kingdom. However, the provisions of Schedule 4 were not always identical to those of the Convention in the version in force at any given moment. That was true of Article 5(3) of Schedule 4 (although it did include the term 'matters relating to tort, delict or quasi-delict' appearing in Article 5(3) of the Convention, of which an interpretation was sought). Section 47(1) and (3) of the Act made provision for amendments to Schedule 4, including 'modifications designed to produce divergence between any provisions of Schedule 4 ... and a corresponding provision of Title II of the 1968 Convention'. The Act also laid down different rules on the interpretation of the Convention and Schedule 4. Section 3(1) of the Act provided that 'any question as to the meaning or effect of any provision of the Convention shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court'. By contrast, section 16(3)(a) of the Act provided that, in determining any question as to the meaning or effect of any provision contained in Schedule 4, 'regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title'.

37. Following a detailed analysis of the issues Advocate General Tesauro took the view that the Court did not have jurisdiction to reply to the Court of Appeal's questions on the interpretation of the Convention and, what is more, proposed that the Court should reconsider the Dzodzi line of cases. Later in this Opinion I shall take up directly or indirectly a number of the points raised by Advocate General Tesauro.
38. Although not taking up the Advocate General's invitation to reconsider its previous decisions, the Court held that it did not have jurisdiction to reply to the Court of Appeal's questions. The Court noted that the United Kingdom provisions did not contain a direct and unconditional renvoi to provisions of Community law so as to incorporate them into the domestic legal order but merely took them as a model and did not wholly reproduce their terms. Moreover, express provision was made for modifications designed to produce divergence between the domestic provisions and corresponding provisions of the Convention. Accordingly, the provisions of the Convention had not been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the Contracting State concerned.
39. The 1982 Act did not require the United Kingdom courts to decide disputes before them by applying absolutely and unconditionally the interpretation of the Convention provided by the Court; where the Convention was not applicable, those courts were free to decide whether the Court's interpretation was equally valid for the purposes of the national law modelled on the Convention. Consequently, the Court's interpretation would not be binding on the United Kingdom court. Referring to Opinion 1/91, the Court observed that it would be unacceptable for the replies given by the Court to the courts of Contracting States to be purely advisory and without binding effect; that would be to alter the function of the Court as envisaged by the 1971 Protocol, namely that of a court whose judgments were binding.

The arguments put forward in the present cases

[...]

Appraisal of the jurisdiction issue

The scope of Community law and the purpose of Article 177

47. It might at first sight seem surprising that the Court, whose function under the Treaty is to 'ensure that in the interpretation and application of [the] Treaty the law is observed' (Article 164), should have assumed jurisdiction in cases in which Community law does not apply. Like other legal systems, Community law defines its own field of application, and it might seem reasonable to assume that all Community law, including Article 177, is intended to apply solely within that field. The purpose of Article 177, within the scheme of the Treaty, is

to ensure that Community law is uniformly applied in all the Member States. It is not immediately clear how it would serve that purpose for the Court to rule in disputes in which a Community rule is borrowed by a Member State and transposed to a non-Community context. In such disputes the rules which national courts are called upon to apply are rules of national law rather than Community law; there can therefore be no immediate threat to the uniform application of Community law.

48. In *Dzodzi* the Court sought to meet that difficulty by arguing that 'it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied'. In other words, by ruling in disputes arising in a non-Community context the Court might forestall the incorrect application of Community law in the future. At first sight there is some force in that argument. If a national court considers it necessary to interpret a Community rule in order to give judgment, it will be obliged to try to interpret the rule itself in the absence of authoritative guidance from the Court. If it were to place an incorrect interpretation on the Community rule, the proper application of Community law might be threatened indirectly: although adopted in a non-Community context, that interpretation might well be followed in the Member State concerned by other courts and by administrative authorities when the rule in question was applied in a Community context.
49. Ultimately, however, that argument is not convincing. In such circumstances the threat to the proper application of Community law in the State concerned would at most be only indirect and temporary. It would be clear that any interpretation given to a Community rule by a national court would not be based on a ruling from the Court and that, as soon as that interpretation was applied in a Community context, it would be open to challenge. Moreover, the Court's concern about such remote threats to the uniform application of Community law is difficult to reconcile with the fact that Article 177 envisages that Community law will be interpreted and applied primarily by national courts. Community law is applied every day by national courts; only in the relatively small number of cases heard by final appeal courts is there an obligation to refer.
50. Moreover it is not easy to see how any legal rule can be interpreted out of its context or, to use the phrase employed in *Dzodzi*, 'irrespective of the circumstances in which it is to be applied'. The Court's ruling in *Dzodzi* can perhaps be partly explained by the tolerant approach which the Court adopted at that time to national courts' requests in general. The Court would question the necessity of the ruling sought by a national court only very exceptionally, in particular where it seemed apparent that the ruling was being sought improperly by means of a contrived dispute or that the provision whose interpretation was sought was manifestly incapable of applying to the dispute.
51. However, the ruling in *Dzodzi* no longer reflects the Court's position. In a series of recent cases beginning with its ruling in 1993 in *Telemarsicabruzzo* the Court has placed more emphasis on the need to give a ruling within the context of the factual situation of the case and has accordingly been more strict in demanding that national courts clearly specify the factual and legislative context in which a ruling is sought. That they do so is important not only to ensure that the Court provides a national court with a reply that is relevant to the dispute before it but also because it is often difficult or even impossible to interpret a rule in the abstract.

The different contexts of the Community and national rules

52. The ruling in *Dzodzi* is irreconcilable with the abovementioned case-law. Where the factual situation underlying a reference does not even fall within the contemplation of a Community rule, the Court is *ex hypothesi* being asked to interpret the rule outside its proper context. In consequence the Court runs the risk not only of failing to consider all relevant issues but also of being misled by extraneous factors.
53. Even where there is a close link between the Community and national rules, the context in

which the interpretation of a Community rule is sought may be materially different from its proper context. For example in *Leur-Bloem*, where the national court considers that the Netherlands legislature has in effect extended the scope of the Community rule, the transaction in issue is a domestic one involving a purely legal restructuring of the ownership of companies, possibly undertaken for reasons connected with Netherlands tax law. I would have serious misgivings about seeking to interpret terms used in the Tax Directive - particularly for the first time - against the background of such a transaction, which appears to have little to do with the type of transaction contemplated by the Directive, namely cross-border mergers and share exchanges designed to promote cross-border grouping of undertakings. In answering the national court's questions it would be necessary, in order to place the relevant provisions of the Directive in their proper context, to consider the extent to which the conditions imposed by the Netherlands rules might impede the creation of cross-border corporate structures which might be adopted in the event of undertakings grouping together for commercial reasons. The factual situation in *Leur-Bloem* has hardly provided a focus for argument on such issues, as is apparent from the written and oral argument presented to the Court.

54. As regards more particularly the national court's final question on the interpretation of the concept of tax avoidance in Article 11 of the Directive, it would concern me that it is not clear from the documents before the Court whether the tax advantage referred to, namely the horizontal setting off of losses, would be an issue in an intra-Community context. In order to place the question of interpretation put to the Court firmly in context it might therefore be necessary to imagine a comparable situation which could undoubtedly arise in an intra-Community context, comparable in the sense that the tax advantage would arise not from the share exchange itself but from the resulting corporate structure. For example, one might imagine a situation in which, as part of a cross-border grouping operation undertaken for commercial reasons, a holding company was established in a Member State partly for tax reasons, for example in order to average the rate of tax incurred on the profits of subsidiaries in various countries or to gain the benefit of a tax treaty entered into by the Member State concerned. Again it is apparent that the factual situation in *Leur-Bloem* has scarcely provided a focus for debate on all the issues that might be relevant to the interpretation of the concept of tax avoidance in Article 11, a concept whose scope has important consequences for the application of the Directive.
55. It is true that there is never any guarantee that the factual situation in a case will allow all relevant issues to be considered; on occasions where the Court has found it necessary to qualify or depart from previous decisions, it is often because it was not possible fully to foresee the consequences of a ruling. The risk would be significantly increased, however, if the Court were to assert jurisdiction in a category of cases in which it would systematically be required to interpret provisions outside their proper context. It seems to me to be inherently unsatisfactory that it should be necessary to take into account, by a process of extrapolation, fictitious situations - having no real connection with the one in the main proceedings - in order to provide the necessary focus. It will be easier in some cases than in others to imagine a genuine Community context. Even so there would still be the risk of inadvertently missing relevant factors or being misled by extraneous factors. For example, as I shall explain below, even in the apparently closely related contexts of import duties and VAT different considerations may apply. Moreover, it will often be necessary to allow the procedure before the Court to run its course before the Court is able to establish with a sufficient degree of certainty that it is able to rule.

The relevance of the Court's ruling to the interpretation of a national rule

56. Even on the assumption that the Court is able to provide a proper interpretation of Community law in a dispute arising in a non-Community context, there is no certainty that the Court's ruling will be relevant to that dispute. The Court has consistently emphasized the importance of interpreting Community provisions in their context, and it is clear that even two identically worded provisions of Community law may require different interpretations by reason of their different contexts. As the Court held in *Metalsa*:

'It is clear ... that the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, inter alia, on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard.'

57. It seems to me that the same applies a fortiori to similarly or identically worded rules of Community and national law. Considerations relevant to the interpretation of a Community rule, such as its purpose and its place within the scheme and aims of the Treaty, may be of no relevance to the interpretation of the national rule. The difference in the contexts in which Community and national rules apply may therefore dictate different interpretations of those rules.
58. For example, the dual aims of the Directive in issue in *Leur-Bloem* are to remove tax obstacles to cross-border grouping of undertakings by establishing common rules on tax relief, while safeguarding the financial interests of Member States by allowing for the possibility of recovery of the tax deferred notwithstanding the cross-border element. Those aims have no relevance in an internal context.
59. The same applies to the extension of the Community rules governing one area of law to another area not harmonized at Community level. For example, in *Giloy* the German legislation establishes a close link between import duties and VAT on imports. Even there, however, as the Court's recent judgment in *Pezullo* shows, different considerations may nevertheless apply. In that case the Court held that the relevant Community directive allowed the Member States to provide that, in the case of release for home use in the Community of goods previously subject to inward processing arrangements, the agricultural levy payable on importation was to bear default interest for the period between temporary importation and definitive importation; by contrast, under the Sixth VAT Directive interest could begin to accrue only from the moment when the goods ceased to be subject to inward processing arrangements and were declared for home use. In my Opinion I suggested that the rationale for the distinction might lie in the deduction mechanism that applies in the case of VAT but does not apply to import levies. The judgment also demonstrates that the difference in context may become apparent only once the Court has interpreted the provision in question.
60. That a national court might, after obtaining a ruling from the Court, choose to disregard it on the ground that the contexts of the Community and national rules differ was a factor which influenced the Court in *Kleinwort Benson*. There the Court noted that, since the United Kingdom legislation had not rendered the provisions of the Brussels Convention applicable as such in internal situations, the United Kingdom courts would be free to decide whether the Court's interpretation was equally valid for the purposes of the domestic provisions. The Court referred in that regard to the following passage in Opinion 1/91:

'... it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article.'
61. Even if the analogy with the EEA Agreement is not complete, it cannot be denied that the principle that the Court's rulings are binding on national courts is fundamental in ensuring the uniform application of Community law. That the Court should accept that a national court is in practice free to ignore its rulings in certain categories of cases on grounds of the different context would seriously undermine that principle.
62. Moreover, the absence of any guarantee that the Court's ruling will be relevant to the dispute, together with the fact that there is no immediate threat to the uniform application of Community law, substantially weakens the case for extending the Article 177 procedure - with the attendant delay in the resolution of the dispute and costs for the parties, for the

Commission and Member States and for the Court - to the potentially large number of cases in which Member States may decide to borrow Community rules.

63. Finally on this point, it might be wondered what relevance a ruling would have where the national rule in question proved incapable of bearing the interpretation given by the Court to the corresponding Community rule. *Leur-Bloem* is a case in point. Let us suppose that the Court, accepting Mrs *Leur-Bloem's* submissions, interpreted the Tax Directive in such a way as to make it clear that the conditions imposed by the Netherlands legislation on share mergers were too restrictive. In the case of an intra-Community transaction covered by the Directive the national court would be obliged, on the assumption that the relevant provisions of the Directive had direct effect, to set aside the Netherlands legislation and apply the Community provisions. There would be no such obligation in the circumstances of the present case. We would therefore be faced with the curious situation in which a ruling by the Court might at most be of relevance to a national court if, according to the principles of interpretation laid down by national law, the national rule were capable of bearing the interpretation given by the Court.

Further conceptual and practical difficulties in the application of Article 177

64. There are moreover several other problems associated with extending the Article 177 procedure to disputes arising in a non-Community context. First, in such cases it is only by a process of legal gymnastics that it is possible to found, for courts against whose decisions there is no judicial remedy, an obligation to refer under the third paragraph of Article 177. It would be necessary to argue that Article 177 imposed such an obligation, even though the need for an interpretation of Community law arose not from Community law but from national law. Moreover, there is likely to be considerable uncertainty on the part of supreme courts as to the scope of their obligation to refer.
65. Secondly, Article 177 also provides for rulings on the validity of Community acts. It would be particularly inappropriate for the Court to give such a ruling in a dispute falling outside the field of application of an act. Moreover, the relevance of such a ruling to the dispute would be even more indirect than in the case of a ruling on interpretation.
66. Finally, on a practical level I share the concerns expressed by Advocate General Tesouro concerning the potential volume of cases in which a national court might identify a link between national and Community rules and decide to seek a ruling. As he points out, it is increasingly common for domestic rules or conventions with non-member countries to be based on, or inspired by, Community law.

The *Kleinwort Benson* judgment

67. In *Kleinwort Benson* the Court sought an intermediate solution by introducing the requirement that the national rule must contain a direct and unconditional renvoi to the provisions of Community law so as to incorporate them into the domestic legal order. That test possibly has some advantages: it will shield the Court from cases which have only a tenuous link with Community law and in which the disparity in contexts is most marked.
68. However, the solution in *Kleinwort Benson* is something of an uneasy compromise. It does not, first of all, have any sound theoretical foundation. I do not think the criteria laid down distinguish between conceptually distinct categories. Where the authors of the Treaty or of Community legislation choose not to extend Community law to a particular area, Member States may take different views on the need to do so unilaterally in their domestic legislation. A Community rule which, for one Member State, dictates the content of related national rules may be seen by another Member State as no more than a potentially interesting model with a convenient body of case-law.
69. Notwithstanding the legislative choice which a Member State may make, the Community and national legal orders remain distinct. In the absence of an express indication in Article 177, I do not think the Court should permit the scope of its jurisdiction to be determined by national legislation. Were it to do so its jurisdiction would vary widely between the Member States.

70. Secondly, I do not think the ruling in *Kleinwort Benson* achieves what it sets out to do, namely to guarantee that the Court's ruling will be applied by the national court. Even where national legislation contains an express renvoi to Community law, so that the wording of the Community and national rules are identical, it would still be open to the national court to conclude that the different contexts of the two provisions dictated different interpretations. As already noted, even two identically worded provisions of Community law may require different interpretations by reason of their different contexts.
71. Thirdly, as I have already explained, notwithstanding the close link between the Community and national rules, there remain the risks and difficulties inherent in interpreting Community rules outside their proper context.
72. Fourthly, as the present cases show, the requirement of a direct and unconditional renvoi to Community law is hard to apply and is arbitrary. In *Giloy* it appears to be common ground that the German customs authorities are required to apply Article 244 of the Code to the collection of import VAT; yet that requirement is not at all clear from the legislation but stems partly from case-law and legal writings. It is in any event not for the Court to interpret the German legislation - that is a matter for the national court alone. In *Leur-Bloem* there is certainly no direct and unconditional renvoi to Community law in the Netherlands legislation. However, that may simply be because of the nature of the Community instrument. While a national rule may conceivably contain an express reference to a Community regulation or convention, a Member State wishing to transpose the rules contained in a directive to a non-Community context may simply extend the scope of its national implementing legislation. As in *Leur-Bloem*, the link with the Community rule may be inferred by the national court from the wording and purpose of the national provisions, possibly by reference to the travaux préparatoires. That Article 14b(2)(a) of the Netherlands Law of 1964 does not, as the Commission points out, reproduce word for word the text of the Tax Directive is hardly surprising - neither does Article 14b(2)(b), which purports to implement the Directive.
73. More generally, I think it would be arbitrary to base any distinction on the manner by which a Member State transposes a Community rule to a national context. For example, the result achieved by extending to domestic situations certain advantages granted by a directive applicable solely to intra-Community situations might equally be achieved by an appropriately worded rule prohibiting reverse discrimination. Whatever the means employed, the fact remains that in disputes such as the present the rule applicable is ultimately one of national law. Such disputes do not concern rights or obligations arising from Community law.
74. Finally, as we have seen in the present cases, an intermediate solution such as that adopted in *Kleinwort Benson* is likely to entail considerable uncertainty. The result will inevitably be systematic challenges to the Court's jurisdiction which in many cases it will be possible to resolve only after the procedure before the Court has run its full course. Moreover there will be further uncertainty, if the Court does exercise jurisdiction, as to whether the national court should apply the ruling, having regard to the different contexts

The limits of the Court's jurisdiction under Article 177

75. My conclusion therefore is that the Court should only rule in cases in which it is aware of the factual and legislative context of the dispute and in which that context is one contemplated by the Community rule. It seems to me that that view is the only one which is consistent with legal principle and with the purpose of Article 177: which guarantees the relevance of the Court's ruling to the determination of the dispute; and which avoids the risk of the Court being asked to interpret a Community rule outside its proper context. It also provides a workable and clear criterion which will provide national courts with the requisite degree of certainty concerning the scope of the Court's jurisdiction.
76. Consequently, I take the view that the Court should rule in neither of the present cases. In both cases the national legislature has borrowed a Community rule and transposed it to a context outside its contemplation.
77. As far as previous cases are concerned, I share Advocate General Tesaurò's view that the

Court should no longer rule in cases such as *Thomasdunger*, *Dzodzi*, *Gmuryńska-Bscher* and *Tomatis and Fulchiron*. On the other hand, it seems to me that the *Foumier* and *Federconsorzi* cases were correctly decided. In those cases there was the fundamental difference that the contractual arrangements in question were entered into in pursuance of the Community rules. The facts of both cases therefore fell squarely within the contemplation of the Community rules, and it was consistent with both the purpose of Article 177 and the requirement that the Court should rule in a relevant context for the Court to reply to the national courts' questions.

78. It is true, as Advocate General Tesauro noted in *Kleinwort Benson*, that the interpretation of the contracts in question in *Foumier* and *Federconsorzi* was a matter for national law. However, that is also true where the interpretation to be given to a Community rule is relevant to the interpretation of a national implementing rule. Nevertheless there is in both cases the common feature that the rule or contractual provision applies within a Community context.
79. I should emphasize that I am not proposing that the Court should decline jurisdiction in all cases in which the relevance of a question arises because of a possible breach of national law. Take, for example, a situation in which a Member State has exercised a discretion reserved to it by a directive to impose stricter requirements than those stipulated by that directive, but the national implementing legislation entitles the competent authority of the Member State only to adopt the provisions which are absolutely necessary as a matter of Community law for the implementation of the directive (a situation which is similar to that in the case of *RTI*). In such a situation the national court may wish to ascertain the minimum requirements imposed by the directive, and refer a question to the Court to that effect, in order to address an argument that the Member State acted beyond the powers conferred upon it by the national legislation. In such circumstances, I consider that the Court should assume jurisdiction since the national law has not transposed the Community rules into a different context; there is thus no danger of the Court answering a question out of context.
80. It may be useful to think in terms of a distinction between the 'vertical' and 'horizontal' effects of Community law in a national legal system. In cases in which national law has transposed Community law into a domestic context to which the Community law itself does not apply, one is dealing with what might be termed a 'horizontal' situation: Community law is only relevant because it has been extended by choice of national law to a domestic situation to which it was not intended to apply; such extension may be effected by means of an express extension or mirroring of the Community rules, or by means of some general provision of national law prohibiting reverse discrimination or unfair competition. On the other hand, when Community law is implemented only to the extent envisaged by the Community legislation, effects that flow foreseeably down through national law from that implementation, even if remote, can be said to be within the contemplation of Community law. These might be regarded as 'vertical' effects. In my view, for example, the Court would have jurisdiction in a case such as *Federconsorzi* even if the litigation were one step further down the chain of events in the sense that a company in similar circumstances had paid up without dispute but its insurers had contested the sum paid when it sought to claim under its insurance contract, resulting in a reference to the Court on the meaning of the same Community provision as that in issue in *Federconsozi*.
81. By using the expression 'within the contemplation of Community law', I do not mean to limit the category of justiciable references to situations specifically envisaged by the drafters of Community legislation: I suspect that they may not, for example, have envisaged the need as a result of the theft of olive oil in the case of *Federconsorzi* to interpret a contractual term referring to the Community provision. I simply mean to refer to situations which can be said to have resulted naturally from the implementation of Community law and not from Community law being shifted sideways into a situation in which its application was never intended.
82. Accordingly I am of the opinion that the Court should reply as follows to the questions put by

the Gerechtshof Amsterdam, in Case C-28/95 Leur-Bloem and by the Hessische Finanzgericht in Case C-130/95 Giloy:

The Court does not have jurisdiction under Article 177 of the Treaty to reply to the questions put to it.

5.7.2 *Judgement of the Court of Justice*

A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2

Case C-28/95

17 July 1997

Court of Justice

[1998] ECR I-04161

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

The first question

16. By its first question the national court asks in effect whether the Court has jurisdiction under Article 177 of the Treaty to interpret Community law where Community law does not directly govern the situation in question but the national legislature has chosen, in transposing provisions of a directive into domestic law, to treat purely internal situations and those governed by the Directive in the same way, so that it has aligned its legislation to Community law.

[...]

23. Under Article 177 of the Treaty the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions.
24. According to settled case-law, the procedure provided for in Article 177 of the Treaty is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see, in particular, the judgments in Dzodzi, cited above, paragraphs 33 and 34, and in Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003, paragraphs 18 and 19).
25. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling (see Dzodzi and Gmurzynska-Bscher, cited above, paragraphs 35 and 20 respectively). Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a

preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (see Dzodzi and Gmurzynska-Bscher, cited above, paragraphs 36 and 25 respectively).

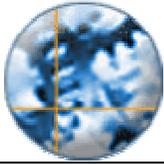
26. A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court (see, to this effect, Dzodzi and Gmurzynska-Bscher, cited above, paragraphs 40 and 23).
27. Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract (see, as regards the application of Community law by domestic law, Dzodzi and Gmurzynska-Bscher, cited above; Case 166/84 *Thomasdüngr* [1985] ECR 3001; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127 and, as regards the application of Community law by the effect of contractual provisions, Case C-88/91 *Federconsorzio* [1992] ECR I-4035 and Case C-73/89 *Fournier* [1992] ECR I-5621, all those cases being hereinafter referred to as 'the Dzodzi line of cases'). In those cases, the provisions of domestic law and the relevant contractual terms, which incorporated Community provisions, clearly did not limit application of the latter.
28. On the other hand, in its judgment in Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, the Court held that it had no jurisdiction to give a preliminary ruling on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32, hereinafter 'the Convention').
29. In *Kleinwort Benson*, the Court observed, in paragraph 19, that, unlike the situation in the Dzodzi line of cases, the provisions of the Convention which the Court was asked to interpret had not been rendered applicable as such by the law of the contracting State concerned. In paragraph 16 of its judgment in *Kleinwort Benson* the Court pointed out that the Act of Parliament in question took the Convention only as a model and only partially reproduced its terms. It went on to note, in paragraph 18, that express provision was made in the Act for the authorities of the contracting State concerned to adopt modifications 'designed to produce divergence' between provisions of the Act and the corresponding provisions of the Convention. Furthermore, the Act also made an express distinction between the provisions applicable to Community situations and those applicable to domestic situations. In the first case, in interpreting the relevant provisions of the Act, the national courts were bound by the case-law of the Court on the Convention, whereas in the second case they had only to take account of it, so that they could set it aside.
30. However, this is not the situation in the present case.
31. The national court considers that the concept of 'merger by exchange of shares', taken in its Community context, needs to be interpreted in order to resolve the dispute before it, that this concept is contained in the Directive, that it has been incorporated into the domestic Law transposing it and that it has been extended to similar, purely internal, situations.
32. In those circumstances, where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to this effect, the judgment in *Dzodzi*, cited above, paragraph 37).
33. In such a case, and pursuant to the allocation of judicial functions between national courts and the Court of Justice under Article 177, it is for the national court alone to assess the precise scope of that reference to Community law, the jurisdiction of the Court being

confined to considering provisions of Community law only (Dzodzi and Federconsorzi, cited above, paragraphs 41 to 42 and paragraph 10 respectively). Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State (Dzodzi, cited above, paragraph 42 and the judgment in Case C-73/89 Fournier [1992] ECR I-5621, paragraph 23).

34. It follows from all the foregoing considerations that the answer to the first question must be that the Court of Justice has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law.

[...]

5.8 Case C-318/00: Bacardi-Martini



NOTE AND QUESTIONS

One of the issues the recent Bacardi-Martini decision raises is admissibility of preliminary references. It concerned, in particular, the special case of a reference to the Court with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law.

The Court ruled on the same issues only a couple months before the Bacardi-Martini case was decided (see Case C-153/00: Paul der Weduwe where the Court declared inadmissible a preliminary reference from a Belgian court concerning the Luxembourg legislation on banking secrecy.)

Bacardi-Martini SAS and Cellier des Dauphins

v

Newcastle United Football Company Ltd.

Case 318/00

21 January 2003

Court of Justice

[2003] ECR I-905

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Bacardi-Martini SAS and Cellier des Dauphins are companies governed by French law carrying on the business of manufacturing and marketing alcoholic beverages. Newcastle United Football Club Ltd ('Newcastle') is a limited company governed by English law; it owns and manages a football club and a football ground. Under an agreement concluded in 1994 between, on the one hand, the Football Association and a number of football clubs, including Newcastle, and, on the other hand, Dorna Marketing (UK) Ltd ('Dorna'), Dorna was responsible for selling and displaying advertising around the touchline of each of the clubs' pitches for each home match played by the clubs' first teams. Dorna sold advertising time to Bacardi-Martini and Cellier des Dauphins on its revolving electronic display system during a match between Newcastle and Metz, a French football club, to be played on 3 December 1996 in the third round of the UEFA Cup. That match was to be televised live in the United Kingdom and in France. The advertisements which were to be displayed during the match complied with the requirements of English law.

Shortly before the start of the match, Newcastle became aware that Dorna had sold advertising space to Bacardi-Martini and Cellier des Dauphins with the aim of displaying adverts for alcoholic beverages during the match. Newcastle therefore instructed Dorna that, as the match was to be broadcast by a French television channel, the French regulations restricting the advertising of alcoholic beverages (Loi Evin) would be applicable and that Dorna must therefore remove the claimants' advertisements from its advertising hoardings in order to comply with those regulations. As the advertisements in question could not be removed from the rotating hoardings before the match began, the display system was programmed in such a way that those advertisements appeared for only 1 to 2 second intervals during the match. The match was broadcast live on the French television Canal+.

On 23 July 1998, Bacardi-Martini and Cellier des Dauphins commenced proceedings against Dorna and Newcastle in the High Court (England and Wales), Queen's Bench Division, seeking damages and injunctive relief. The claims against Dorna were withdrawn.

Judgement:

[...]

- 31 In those circumstances, the High Court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
- 1. Are Articles L.17 to L.21 of the Code des débits de boissons (the so-called "Loi Évin" provisions), Article 8 of Decree No 92-280 of 27 March 1992 and the provisions of the code of conduct of 28 March 1995 contrary to Article 59 of the EC Treaty (now, after amendment, Article 49 EC) in so far as they prevent or restrict
 - (a) the advertising of alcoholic drinks at sporting events taking place in Member States other than France when the events are to be televised in France and
 - (b) the broadcasting in France of sporting events taking place in other Member States at which there is advertising of alcoholic beverages?
 - 2. If not, is the manner in which these provisions are interpreted and applied in practice by the Conseil supérieur de l'audiovisuel contrary to Article 59 of the EC Treaty (now, after amendment, Article 49 EC) in so far as they prevent or restrict
 - (a) the advertising of alcoholic drinks at sporting events taking place in Member States other than France when the events are to be televised in France and
 - (b) the broadcasting in France of sporting events taking place in other Member States at which there is advertising of alcoholic beverages?'
- 32 Since it considered that it was not clear on the basis of the documents submitted to the Court why an answer to the questions referred was necessary to enable the national court to give judgment in the main proceedings, the Court, pursuant to Article 104(5) of the Rules of Procedure, requested the national court to explain more fully the basis on which Newcastle could rely on the Loi Évin - assuming it to be compatible with Article 59 of the Treaty - as a defence to the claim against it.
- 33 In answer to that request, the High Court stated that the claims brought against Newcastle were based on 'the tort of inducing breach of contract'. It was well established in English law that a party could submit that such an interference with a contract was justified. The question of what constitutes justification in this context was a matter for the national court to decide, taking account of all the circumstances.
- 34 In the present case, Newcastle had submitted that it was entitled to give instructions to remove the advertisements in the stadium, inter alia because 'such instructions were given in the reasonable anticipation that a failure to give them would result in a breach of French

law'.

- 35 The claimants for their part submitted that this defence was unacceptable as a matter of Community law, since the Loi Évin was in any event contrary to Article 59 of the Treaty.
- 36 The High Court therefore considered that it was appropriate to seek a preliminary ruling from the Court on the issue of Community law raised.

Admissibility

Observations submitted to the Court

- 37 The French Government and the Commission submit that the questions referred are inadmissible. According to the French Government, there is no extra-territorial application of French law. It is the French television station which bought the television rights which would have had to answer for a possible breach of French law when the match which was played in England was broadcast in France. In relying on the application of French law, Newcastle's sole motive was the fear of losing the payment for the television rights.
- 38 The Commission adds that the High Court has not explained whether and how such financial considerations could justify inducing a breach of contract. More generally, the High Court has given the Court no indication of how the answers to the questions referred could help it to decide the case before it.
- 39 According to the claimants, on the other hand, the admissibility of the reference for a preliminary ruling derives from the fact that the national court must examine all the justifications put forward. It is not disputed that Newcastle's decision was motivated by the existence and effects of the French law. The claimants submit that this attempt at justification is invalid in that the Loi Évin is incompatible with Article 59 of the Treaty.
- 40 The United Kingdom Government agrees with that argument and adds that, if it were an express or implied term of the contract between Newcastle and CSI that the broadcast of the match would comply with French law, the compatibility of the French law with Article 59 of the Treaty would indeed be of relevance for the main proceedings. In any event, the requirement imposed on the French broadcaster to negotiate compliance with the Loi Évin when matches taking place abroad are broadcast gives that law extraterritorial effect.

Findings of the Court

- 41 It is settled case-law that 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. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Case C-153/00 *Der Weduwe* [2002] ECR I-0000, paragraph 31).
- 42 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court (see, to that effect, *PreussenElektra*, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Bosman*, paragraph 60, and *Der Weduwe*, paragraph 32).
- 43 Thus the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material

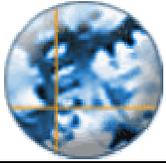
necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52; and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20).

- 44 In order that the Court may perform its task in accordance with the Treaty, it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17). Thus the Court has held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16).
- 45 Moreover, the Court must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law (*Foglia*, paragraph 30).
- 46 In the present case, as the questions referred are intended to enable the national court to assess the compatibility with Community law of the legislation of another Member State, the Court must be informed in some detail of that court's reasons for considering that an answer to the questions is necessary to enable it to give judgment.
- 47 It appears from the High Court's account of the legal context that it has to apply English law in the main proceedings. It nevertheless considers that 'the issue of the legality of the *Loi Évin* provisions is central to resolution of the proceedings before [it]'. It does not, however, state positively that an answer to that question is necessary to enable it to give judgment.
- 48 On being requested by the Court to explain more fully the basis on which Newcastle could rely on the *Loi Évin*, the High Court has essentially confined itself to repeating the defendant's argument that it could reasonably anticipate that a failure to give instructions to remove the advertisements in the stadium would result in a breach of French law.
- 49 On the other hand, the High Court has not said whether it itself considered that Newcastle could reasonably suppose that it was obliged to comply with the French legislation, and there is nothing else to that effect before the Court.
- 50 The United Kingdom Government has contended that the premiss for concluding that the questions referred are material could be the existence of an obligation on the part of Newcastle, in terms of its contract with CSI for the broadcast of the Newcastle-Metz match by a French television station, to comply with the French legislation. On this point, it suffices to state that the national court has not mentioned the existence of any such contractual obligation.
- 51 Furthermore, as the Advocate General rightly observes in point 34 of his Opinion, even if the national court were to consider that Newcastle could reasonably suppose that compliance with the French legislation required it to intervene in the contracts in question, it is not clear why that would no longer be the case if the provision with which Newcastle wished to ensure compliance turned out to be contrary to Article 59 of the Treaty.
- 52 The order for reference contains no information on this point either.
- 53 In those circumstances, the conclusion must be that the Court does not have the material before it to show that it is necessary to rule on the compatibility with the Treaty of legislation of a Member State other than that of the court making the reference.
- 54 The questions referred to the Court for a preliminary ruling are therefore inadmissible.

[...]

6. THE FUTURE OF ARTICLE 234

6.1 Modifications by the Treaty of Nice



NOTE AND QUESTIONS

All the preliminary references are currently heard by the ECJ, although the Treaty of Nice amended article 225 to make it possible for certain types of preliminary rulings to be transferred to the CFI.

Article 225(3) as amended by the Treaty of Nice reads:

3. The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 in specific areas laid down by the Statute.

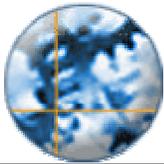
Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of the Community law being affected.

The practice of the ECJ regarding preliminary rulings survived the rebellion of national courts. Now it has to survive the overwhelming growth of references. The Treaty of Nice adopted one of the possible “systems”.

1. What problems did the “Nice solution” not address? What other solutions can you think of (consider pros and cons for each)?

6.2 Treaty establishing a Constitution for Europe



NOTE AND QUESTIONS

The essence of Article 234 remains unchanged in the draft Constitution - except that the specific reference to the ECB can be deleted.

When the draft Articles concerning JHA were examined, a Convention member submitted an amendment to the effect that the Court of Justice would have to rule within a maximum of three months where the national proceedings involved a person held in custody. The preliminary ruling procedure does indeed have the effect of suspending the national proceedings, and this is especially important where the national proceedings involve a person held in custody.

The Praesidium thought it advisable to adopt this idea, which appears as the last paragraph and to replace the three-month period with "with the minimum of delay". In fact, the Court can already use "expedited procedures" in certain cases, "where the particular urgency of the case requires the Court to give its ruling with the minimum of delay" (see Article 62a of the Rules of Procedure of the Court of Justice). Such procedure has been used for the first time in a judgment of the Court of First Instance in Joined Cases T-195/01 and T-207/01: *Government of Gibraltar v Commission*. In the context of the expedited procedure, the Court of First Instance was able to hold the public hearing on 5 March 2002, ie four months after application for that particular procedure was made. The judgment of 30 April 2002 has thus closed a judicial procedure relating to State aid which lasted only eight months, whereas the average duration of a case before the Court of First Instance in 2001 was 19½ months. (after this first case the expedited procedure has been used by the CFI again on a couple more occasions: in Case T-211/02: *Tideland Signal Limited*, Case T-77/02: *Schneider Electric SA*, Case T-80/02: *Tetra Laval BV*, Case T-5/02: *Tetra Laval BV*, Case T-119/02: *Royal Philips Electronics NV*). The Court of justice decided its first case using the expedited procedure only a few months ago; in Case C-39/03 P: *Commission of the European Communities v Artegoda GmbH et al.*, but we are likely to see it more and more often in the future.

Moreover, it would be possible to set a time limit for such preliminary-ruling proceedings, in which case the Praesidium thought that the time limit might be stipulated by the Statute of the Court of Justice.

1. Even though the preliminary reference mechanism might appear to work rather well, it entails a high price. That price is the delay in awaiting a response from the Court of Justice. On average you would wait 18 months for the Court to rule in a preliminary reference case (and you should not forget to add the delay already present in the national courts system).

After all the debates that preceded IGCs and which took place within the Convention on the Future of Europe again not much has been done to reform the "preliminary reference

system” in order to “solve” or at least ease this problem. A wise decision or another lost opportunity?

When trying to find your answer to this question you should consider that the Union enlarged to a Union of 25 Member States in May 2004.

2. Why do you suppose the Community has been slow to confer preliminary reference jurisdiction on the Court of First instance? (note: as explained above, a first step has been made in Nice, but the situation has not changed since)

Article III-369

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of the Constitution;
- b) the validity and interpretation of acts of the institutions, **bodies, offices and 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.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.

(emphasis added)