

Extension of the preliminary rulings procedure outside the scope of Community law: 'The Dzodzi line of cases'

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European Court of Justice, competition policy, preliminary rulings, international agreements, reverse discrimination, European law, law

Abstract

'The Dzodzi line of cases' evidence that the functioning of the preliminary rulings procedure under Article 234 EC is not restricted to the scope of Community law, but extends also to the cases governed by national law referring to certain Community provision or concept. Most controversially in the context of this far-reaching pronouncement, the Court dismissed the views expressed by its Advocates General, actually, in all the cases of this type (recently in *Roman Angonese*, 6 June 2000). Ten years after the judgment in *Dzodzi* has been delivered, the future development of the tendency seems to be still open to radically different solutions. A compromise solution may be found in the acceptance of jurisdiction in 'comparable' situations, ascertained on the basis of relationship between the interpretation and the facts of a particular case. This solution should be based on the assessment of the 'ability to provide helpful interpretation' and the possibility to define a legal problem precisely, as a prerequisite for the full exchange of arguments. Then, it could provide a consistent attitude of the Court towards all the cases on the admissibility of references under Article 234 EC. The uncertainty inevitably following such a solution could be outweighed by the need to retain a flexible and cooperative attitude.

Kurzfassung

Die *Dzodzi*-Rechtsprechung macht klar, daß das Vorabentscheidungsverfahren gemäß Artikel 234 EGV nicht nur auf den Anwendungsbereich des Gemeinschaftsrechts beschränkt ist, sondern auch Fälle betreffen kann, die durch nationales Recht bestimmt sind, welches auf bestimmte Gemeinschaftsbestimmungen oder -konzepte verweist. Höchst umstritten im Zusammenhang mit dieser weitreichenden Rechtsprechung ist, daß der Gerichtshof den Stellungnahmen seiner Generalanwälte in all diesen Fällen nicht gefolgt ist (jüngst in *Roman Angonese* am 6. 6. 2000). Zehn Jahre nach dem Urteil in *Dzodzi* ist die zukünftige Entwicklung noch immer offen für radikal andere Lösungen.

Eine Kompromißlösung könnte in der Anwendung der Rechtsprechung zu 'vergleichbaren' Situationen gefunden werden, die auf Basis des Verhältnisses zwischen der Interpretation und den Fakten eines bestimmten Falles festgestellt werden. Diese Lösung sollte als Voraussetzung für den Austausch von Argumenten auf der Bewertung der 'Fähigkeit, eine hilfreiche Interpretation zu liefern' und der Möglichkeit, das rechtliche Problem präzise zu definieren, basieren. So könnte es zu einer konsistenten Haltung des Gerichtshofs gegenüber allen Fällen über die Zulässigkeit von Vorabentscheidungsfragen unter Artikel 234 EGV kommen. Die aus dieser Lösung notwendigerweise resultierende Unsicherheit könnte durch die Notwendigkeit der Aufrechterhaltung einer flexiblen und kooperativen Haltung aufgewogen werden.

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Introduction

The preliminary rulings procedure established under Article 234 EC (former Article 177 of the EC Treaty) was described by D. Anderson as 'both the most fundamental and the most intriguing part of the evolving judicial architecture of Europe', since it 'uniquely, appoints the European Court as meeting-place between the legal order of the Community and those of its Member States'(1).

The procedure under Article 234 EC is *fundamental* to the evolution of the Community based on the simultaneous application of autonomous and directly effective legal systems. The fact that those systems often govern similar or comparable situations inevitably leads to an ‘interconnection’, ‘interlinkage’ or even ‘overlap’ of the rules attributed to formally separate legal orders. The preliminary rulings procedure under Article 234 EC serves as a *meeting-place* for this interconnection. In the ‘overlapping’ areas this situation is solved by the principle of supremacy of Community law. However, the effects of Community law extend also to the areas where national law is exclusively applicable. This may be caused, for instance, by ‘voluntary harmonization’, ‘modeling’ of rules, reception of concepts, application by analogy. It is in this background of close interconnection, that it may be necessary to interpret the Community rule when it is applicable within the exclusive scope of another, national legal system. This is the *intriguing* point.

To which extent the interpretation may then be provided by the European Court of Justice?

1. Development of ‘the Dzodzi line of cases’ [↑]

1.1. Formulation of ‘the Dzodzi principle’ [↑]

Formally, the jurisdiction of the European Court of Justice (hereinafter - the Court) under Article 234 EC is not restricted to the scope of Community law. Practically, such an exercise proves possible in the context of the original procedure under which the interpretation of law is separated from its application. The development of ‘the Dzodzi line of cases’⁽²⁾ is a rather radical example of an exercise of the interpretative jurisdiction outside the scope of Community law. Ten cases, which since *Leur-Bloem* are referred to as ‘the Dzodzi line of cases’, were solved by the Court according to the same principle of jurisdiction. The principle, established in *Dzodzi*⁽³⁾ and confirmed in the subsequent cases, in the most current wording states that the Court ‘has jurisdiction to give preliminary rulings on questions concerning Community provisions ...which have been rendered applicable either by domestic law or merely by virtue of terms in a contract’⁽⁴⁾.

Specific legal situations, which are governed by this principle, are characterised by the existence of a reference to Community law outside the proper scope of application of this law. For instance, the *Dzodzi* case concerned the interpretation of the Community rules governing freedom of movement for workers for their application in a purely internal situation. Such an interpretation was necessary because the Belgian law extended the application of the Community rights to the situations concerning spouses of Belgian nationals who cannot establish a factor connecting their situation to Community law. All the further cases carry the same feature, though factual situations lie outside the scope of Community law, but the interpretation of the Community provision is still necessary to reach a decision in the main proceedings. However, those cases bear significant differences, which are evidenced by the analysis of the nature of references (see [Annex 1](#)).

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The importance of the acceptance of jurisdiction in *Dzodzi* and the subsequent cases is confirmed by the fact, that the Court found it inevitable specifically to justify this acceptance. The justification was found in the need to ensure the uniformity of the effects of Community law in the Member States. The Court declared 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 applied*’⁽⁵⁾. Though the reliance on the uniformity of Community law as the main task of the preliminary rulings procedure seems to be convincing, its interpretation in ‘the Dzodzi line of cases’ gains at least two new and disputable

features. First, the procedure may be used in order to forestall diverging interpretations in future cases rather than to provide a consistent interpretation applicable in the case at hand. Second, the application of the principle of uniform interpretation is not restricted to the scope of Community law as defined by Community law itself, but it extends to any situation in which Community law is applied, even merely through *renvoi*.

The jurisdiction exercised by the Court in 'the Dzodzi line of cases' is restricted by the fact, that the Court is prevented from assessing the national law. Therefore, the disputes over the nature of reference and the problems of application attributable to the fact that the situation falls outside the Community scope are left for the national court to resolve.

However, in one case the Court has indeed assessed the reference and declined the jurisdiction on the basis of its conditional and indirect nature. The judgment in *Kleinwort Benson*(6) proves that the jurisdiction under 'the Dzodzi principle' is not unlimited and may be refused when the reference to Community law in an internal situation includes the express authority of the national court to disregard the interpretative judgment of the Court (for a more extensive analysis of the position of the Court in 'the Dzodzi line of cases', see [Annex 2](#)).

1.2. Controversy over the solution adopted [↑]

It is striking that the Court disregarded the Opinions of its Advocates General, actually, in all the cases of 'the Dzodzi line'. The Advocates General expressed numerous arguments against the acceptance of jurisdiction outside the scope of Community law. Particularly, the step was regarded as inconsistent with the system of preliminary rulings procedure - raising doubts as to the binding effect of the ruling; preventing the assessment of validity of the Community acts; questioning the obligation to refer by the courts against which decisions there is no judicial remedy.

Further, when the situation is purely internal and therefore not intended to be covered by the Community rule, practical problems of interpretation arise, which may prevent the Court from fully exercising its task of providing the interpretation relevant for the dispute in the main proceedings. The interpretation of Community law in the cases falling outside the scope of Community competences, also, raises a problem relating to the application of general principles of Community law and, particularly, to the protection of human rights. In all those cases the preliminary rulings procedure seems to be neither capable of fulfilling its task of assessing the Member States' obligations, supplementary to the infringements procedure under Article 226 EC, nor suitable to protect the Community rights of an individual (for a wider consideration of the arguments against the jurisdiction outside the scope of Community law, see [Annex 3](#)).

The clearly marked difference between the solution adopted by the Court and the negative attitude of the Advocates General created the situation which was described after *Kleinwort Benson* case as 'a halting *dialogue des juges*', raising the question whether the Court will adopt the arguments of its Advocates General and decline the jurisdiction in future cases(7). The position, strongly expressed by the final conclusion of Advocate General Tesauro in *Kleinwort Benson* that 'it would be otiose to embark on an examination of the substance of the case'(8), resulted in some cases where the Court had to deliver the solutions on substance without having the benefit of the Opinions of its Advocates General.

The arguments of the Advocates General in most of the cases in the line have been resumed in the Opinion of Advocate General Jacobs in *Leur-Bloem* and *Giloy*(9). In his extensive Opinion the

Advocate General has proposed to restrict the jurisdiction to the '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'(10). The situations included are not limited to those specifically envisaged by the drafters of Community legislation. They cover all the cases, where Community law has been implemented *within the scope of the obligation to give effect to it*, and only thus implemented it produced certain effects outside the scope of such obligation (see [Annex 4](#)).

However, in its *Leur-Bloem* and *Giloy* judgments the Court did not accept the latter proposal and once again confirmed the reasoning adopted in *Dzodzi*. At first sight, the Court seemed to have reverted to the *Dzodzi* ruling after it stood on its head in *Kleinwort Benson*(11).

After the *Leur-Bloem* and *Giloy* judgments, the development was still severely criticised by some commentators. 'The *Dzodzi* principle' was seriously put in doubt, mainly, having regard to the negative position of the Advocates General(12). Generally, however, the trend was accepted by some authors as remaining within the confines of the interpretative jurisdiction of the Court, although breaking a new ground(13), while others cautiously regarded the arguments of the Advocates General as more compelling(14).

The last case in 'the *Dzodzi* line', *Schoonbroodt*, does not seem either to be a final answer in this debate of the judiciary. Advocate General Jacobs in his Opinion considered the admissibility of reference in a few words, stating that the Community regulation was applicable merely because of the provision of the Belgian law, but the Court had previously accepted jurisdiction in such cases. However, the Advocate General remarked that it might well be that the relevant Community legislation in the main proceedings was the directive harmonizing the concept in question, which the national court did not take into account. Thus, the reference was admissible *in any event*, on the basis of the fact that the national court might wish to apply the directive(15). The Court undertook the jurisdiction making a short reference to 'the *Dzodzi* principle'.

1.3. Reference to 'the *Dzodzi* principle' in specific cases

Apart from the development in 'the *Dzodzi* line of cases', some other specific cases serve as examples of possible use of the preliminary rulings mechanism in non-Community situations. It is particularly so in the situations where the interconnection between the national legal order and that of the Community is most visible - the 'reverse discrimination' situation; the application of national competition law; the interpretation of 'mixed' international agreements.

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The avoidance of 'the reverse discrimination' either by use of a national constitutional principle of equality or in the course of a judicial procedure allowing the assessment of a hypothetical situation may be accepted as an example of a reference to Community law in an internal situation. Though some previous cases also provide certain indications, the situation clearly arose only recently in *Angonese*(16). The acceptance of jurisdiction in this case may serve as an indication of the willingness of the Court to exercise the jurisdiction in the situations involving references of this kind. Remarkably, the potential references in the cases of 'reverse discrimination' cover very wide area of Community law. They mainly relate to the fundamental freedoms of movement in the Community, which constitute a very general and dynamically interpreted standard. These features may add to the difficulties of the exercise of jurisdiction under 'the *Dzodzi* principle' (see [Annex 5](#)).

Competition law of the Member States to a large extent is characterised by the modeling on the

Community rules. Should the reference to the Court for an interpretative ruling on the modeled rule be favoured? In *Oscar Bronner*(17) the Court accepted such a reference in the situation where the direct application of the Community rules seemed to be also possible. However, this solution provides merely a half-response to the problems posed by the concurrent application of two sets of competition rules, thus, doubtfully, ‘the Dzodzi principle’ may be applied in competition cases without any further clarifications (see [Annex 6](#)).

‘The Dzodzi principle’ as invoked in *Hermès*(18) appears to be merely an intermediate solution to the controversy over the jurisdiction to interpret ‘mixed’ international agreements. It provides only limited jurisdiction over ‘mixed’ agreements and draws away the attention from more convincing arguments urging the full acceptance of such a jurisdiction. Moreover, the situation of the provision of a ‘mixed’ agreement applicable both to internal situations and to those covered by Community law, which lies at the basis of the Court’s reasoning in *Hermès*, seems to be distant from *renvoi* in ‘the Dzodzi line of cases’ (see [Annex 7](#)).

The inappropriateness of the reference to *Dzodzi* in the specific areas of Community law may add some doubts to the further development of ‘the Dzodzi solution’. On the other hand, the specific cases show that the potential for the exercise of jurisdiction, which seemed highly exceptional at first sight, is quite extensive and touches upon the most sensitive areas of the division of competences between the Community and its Member States.

The lasting uncertainty over the development of ‘the Dzodzi line of cases’ makes it open to various future solutions. The development has to be assessed in a wider context of the ‘changing’(19) perception of the Court towards its jurisdiction under Article 234 EC. Moreover, it seems inevitable to consider some indications provided in the documents relating to the forthcoming reform of Article 234 EC. The possibility of drawing a line to the controversial jurisdiction may then be considered.

2. ‘The Dzodzi line of cases’ in the light of other recent developments on the admissibility of references [↑]

2.1. Development of the tendency to decline the jurisdiction

Article 234 EC is characterised by the cooperation between the Court and the national courts and by the division of judicial tasks. These features reflect the general position adopted by the Court, that it is, in principle, not empowered ‘either to investigate the facts of the case or to criticise the grounds and purpose of the request for interpretation’(20).

However, the cooperative nature of the preliminary rulings procedure must be interpreted in the light of the specific task of the procedure, that is, to enable the national court to give judgment in a particular case. Accordingly, the jurisdiction of the Court under Article 234 EC is restricted to the cases where it is able to fulfill this task. How far can the Court go in assessing its jurisdiction according to this requirement?

The Court’s attitude is regarded as changing in the direction of ever more strict review. The first controversial development was *Foglia v Novello* case(21). There, the Court emphasised two-sided nature of cooperation, requiring the national court to have regard to the function of the Court under Article 234 EC, which is to assist the administration of justice. Moreover, it is a matter for the Court to determine its jurisdiction, thus, to examine the conditions in which the case has been referred to it

by the national court. This led to the establishment of an exception, that the Court will decline the jurisdiction if it were apparent either that 'the procedure provided for in the Article 177 [now Article 234 EC] had been diverted from its true purpose and sought in fact to lead the Court to give a ruling by means of contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying'(22). Thus, the *abuse* of the procedure was clearly separated from the situation when the interpretation asked would *not be applicable* and relevant to the dispute. The refusal of jurisdiction due to manifestly contrived nature of the proceedings remained highly exceptional(23), though *Foglia v Novello* is still considered to be a good law.

In subsequent cases the Court started to decline the jurisdiction increasingly, while exercising ever more strict control of the necessity for a preliminary ruling in a particular case(24). The changing attitude was not easily accepted by the writers. Generally, the increasing tendency to decline the jurisdiction was considered as disturbing and perplexing(25). The *Meilicke* judgment was criticised, since generally the Court is prevented from appraising the facts of the case under the preliminary rulings procedure. The Court was seen departing to a large extent from its previous cooperative attitude. The more so, while refusing to give an answer even though it was not wholly or manifestly irrelevant to the decision, the Court simply shifted the responsibility on the national court and disregarded the risk of diverging interpretations(26). For the latter reason, particularly, the case-law on the admissibility of preliminary references which lack adequate factual and legal information was regarded as 'threatening the vital partnership' between the national courts and the Court, thus, contrary to 'the spirit of Article 177' (now Article 234 EC). Though the national court may submit another reference providing the lacking information, the measure of declining the jurisdiction was thought as clearly disproportionate(27). Further, some of the judgments were claimed to be based mainly on policy considerations(28). In addition, the trend was thought to be a possible development of some sort of docket control measures(29).

Number of cases, particularly, since 1990, led to the development of what was regarded as newly formulated criteria for the admissibility of references:

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- the issue must not be hypothetical;
- adequate factual and legal information must be provided;
- the questions must be relevant to the actual dispute.(30)

Since the inadmissibility of references under these three headings bear significant differences, they were classified as distinct jurisdiction criteria by commentators. However, the common feature of all the recent case on admissibility is that the Court is increasingly analysing the factual situation, which urged the national court to make a reference. The Court is, at least partially, departing from the proclaimed separation of competences. This development was illustratively described as 'going deep into fact finding domain of the national court' and 'looking over the shoulder of the national judge'(31).

Moreover, the clear-cut distinction between the criteria is hard to make. If the sufficient factual and legal information is not provided, the Court is unable to ascertain that the question is relevant and necessary to resolve the dispute(32). The information on the legal and factual background is inevitable, since the Court is not dealing with abstract issues(33). The hypothetical nature of the questions is confirmed by an insufficient account on the factual and legal background(34). The lack of a genuine dispute and the hypothetical nature of questions may also appear to be 'two sides of the same coin'(35).

2.2. Relation of this tendency to ‘the *Dzodzi* line of cases’

What is the relation of the described attitude of the Court to ‘the *Dzodzi* line of cases’?

‘The *Dzodzi* line of cases’ seems to be an opposite and even a counterbalancing development. This is because under ‘the *Dzodzi* principle’ the Court exercises the jurisdiction in a controversial situation, merely referring to its cooperative attitude and the division of judicial tasks, which were regarded as reconsidered by the Court’s refusal of jurisdiction in other cases over the last decade(36). On the other hand, if the acceptance of reference in *Dzodzi* could be partially explained by an early tolerant approach towards references, the justification provided in that case has substantially weakened, since this approach seems to be altered. The more so, the justification in *Dzodzi*, based merely on the need ‘to forestall future differences of interpretation’, seems to be undermined by recent developments, since ‘it would be of course more useful to provide the national court with the interpretation requested in a hypothetical situation’, than in the cases such as *Dzodzi*.(37)

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Further, the two developments carry substantial contradictions. First, the acceptance of jurisdiction in *Dzodzi* potentially stands in contradiction to the cases where the Court has held references inadmissible due to the absence of a clearly defined legislative and factual framework. In ‘the *Dzodzi* line of cases’, where the factual situations are not governed by Community law, the Court is generally precluded from the knowledge of the national context, which moreover could be of no use to it, therefore, the lack of the said framework is even more clear. However, the Court has never referred to this deficiency as an obstacle to its jurisdiction. Second, recent developments on admissibility evidence that it may appear difficult or even impossible to interpret the rule in the abstract, while the Court seems to be willing to undertake such an exercise in ‘the *Dzodzi* line of cases’(38). In some cases of ‘the *Dzodzi* type’ the Court rules without going deep into the circumstances of the case (since they relate to a non-Community area) and in a hypothetical situation from the Community law point of view (such as in *Dzodzi* or *Leur-Bloem*, involving consideration ‘as if’ the situation were covered by Community law). Thus, in *Dzodzi* the Court is prepared to interpret the rule abstracting it from certain facts or considering a hypothetical situation. However, the Court declines the jurisdiction for that same reason in *Telemarsicabruzzo* or *Meilicke*.

On the other hand, the cases ‘of the *Dzodzi* type’ involve a controversy similar to other recent developments. This controversy relates to the extent to which the Court is ready to consider reasons which stand behind the order for reference. Such a consideration seems inevitable in the exceptional cases of ‘the *Dzodzi* type’, in their substance falling outside the scope of Community law. The more so, since under the rule established in *Kleinwort Benson* the Court is prepared to analyse whether a reference to Community law is direct and unconditional. Therefore, both developments can be regarded as reflections of the same attitude of the Court, that is, going deeper into the facts of the case in order to exercise the control of the jurisdiction.

Meilicke case serves as a specific example of close similarity of the problems involved in both developments. In his opinion in this case Advocate General Tesauro observed that the questions submitted are intended to allow correct application of national law. The matter involved the application of Community law, though the link between the national law and Community law was by no means clear. However, any doubt regarding the jurisdiction of the Court was, in the view of Advocate General, disposed of after the judgment in *Dzodzi*, since the reference to Community law could be traced from the German case-law. However, the Court declared the question hypothetical, without referring to the solution of ‘the *Dzodzi* type’(39).

2.3. 'Ability to provide helpful interpretation' as a workable solution [↑]

Another aspect common to both developments is a call for consistency in exercising the control of jurisdiction under Article 234 EC.

As the evaluation of conditions for cooperation between the national courts and the Court under the preliminary rulings procedure became more rigorous than in the past, the lack of a clearly identifiable trend in the case-law or any clearly defined criteria which might serve as guidance to national courts stood clear⁽⁴⁰⁾. Some years later, though certain directions have been provided⁽⁴¹⁾, practice was still regarded as inconsistent or, at the very least, unpredictable and manifestly unsatisfactory, creating the danger of delay and uncertainty as to the outcome of the request. New case-law appeared to be an effort to erect series of tests for admissibility, without however developing a general system. The typology did not seem to be clear from the judgments. Particularly, the failure to provide sufficient information was regarded as distinct from other criteria of admissibility, due to the possibility of measures, which could remedy the situation, such as an inter-registry dialogue⁽⁴²⁾.

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The same lasting uncertainty features the application of 'the Dzodzi principle'. First, the acceptance of the jurisdiction in the cases of 'the Dzodzi type' is unclear due to the controversies surrounding it. The judgment in *Kleinwort Benson* has indicated the need of drawing a borderline for the jurisdiction in such cases, however, the line proposed by Advocate General Jacobs was not adopted. Second, it is by no means obvious how this development would stand in the light of the new principles of jurisdiction under Article 234 EC.

A clarification of the new jurisdiction criteria was thought to be found in recent cases in the Court's acceptance of the justification based on the ability to provide 'helpful (useful) interpretation of Community law'⁽⁴³⁾. This minimal and flexible 'helpfulness test', requiring to consider the usefulness of the answers which the Court can give on the basis of the legal and factual information provided, seems to be based on the conclusions of Advocate General Jacobs in *Vaneetveld* case⁽⁴⁴⁾. The relaxed attitude was more recently confirmed also in the cases of an alleged hypothetical nature of questions⁽⁴⁵⁾ and where the relevance of the answer to the main proceedings was in doubt⁽⁴⁶⁾. These cases confirm that exceptional circumstances must exist in order to declare the reference inadmissible. Moreover, the Court will extract information from the order for reference, reformulate the questions or answer them partially, in so far as 'helpful interpretation' can be given to the national court seized of a dispute.

This rejection of formalism and turn to a pragmatic assessment may be considered as most in line with the cooperative character of preliminary rulings procedure. The acceptance of this attitude may serve as another reason for the Court to reconsider 'the Dzodzi solution' along the pragmatic approach generally suggested by Advocate General Jacobs⁽⁴⁷⁾. This might help to build a consistent theory justifying the assessment of the jurisdiction of the Court under Article 234 EC in controversial cases.

3. Development of the preliminary rulings jurisdiction in the light of the current reform of the procedure [↑]

The development of jurisdiction under Article 234 EC gains even more importance in the context of reform of the Community judicial system. In 1994, the formal and strict attitude, resting higher

responsibility on the national courts, was thought irreconcilable with the 1995 enlargement. The call for a more lax attitude was raised, as the judges of the new Member States could not be expected to be very well accustomed with the preliminary rulings procedure(48). On the other hand, the approach reflecting decentralization appeared necessary due to the obviously increasing workload. Both arguments gain strength in the course of the current institutional reform.

The growing tendency to decline the jurisdiction was commented as the changing nature of the preliminary rulings procedure. The Court was accused of the departure from horizontal procedure with an emphasis on cooperation towards more vertical and strict attitude. Increasingly strict control of the jurisdiction was regarded as a response to the need to reduce the number of references under Article 234 EC(49).

Constant growth in the number of references is the trend, which is expected to increase rapidly with the widening of competences of the Union and the accession of new members. In the discussion paper presented in May 1999, where the Court reflected on the long-term development of the preliminary rulings procedure(50), all proposals suggested, though to a different extent, the transformation of the procedure into more hierarchical one:

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1. The proposal to limit the number of national courts empowered to make references to the Court of Justice would restrict the dialogue and the cooperation to the supreme judiciaries of the Member States.
2. The introduction of a filtering system would restrict the national court's competence to assess the need for a reference. It would envisage conferring on the Court of Justice the power to decide which of the questions referred need to be answered, on account of their novelty, complexity or importance. This system would be radically different from the current attitude, when the Court is bound to answer every reference, which fulfills the jurisdiction criteria.
3. Another, even more radical solution was to require national courts, before submitting a reference, first to give judgment in the case. Then the parties could request the national court to forward its judgment to the Court of Justice together with a reference for a ruling. The solution would constitute a radical departure from the current dialogue between judiciaries.
4. Conferral of the jurisdiction to decide on the references for preliminary rulings on the Court of First Instance would depart from the direct dialogue between national courts and the Court of Justice, as the supreme court of the Community.
5. Creation or designation of decentralized judicial bodies in each Member State would also constitute a radical change in the current direct dialogue.

While these proposals were put on the table, at the same time the Court was very cautious about the possibility of a radical transformation of the system. Particularly, the second and the third solution could undermine mutual cooperation between the national courts and the Court of Justice 'which, by ensuring uniformity and consistency in the interpretation of Community law, has made such a major contribution to the proper working of the internal market'(51).

This cautious attitude was even stronger marked in the Due Report, presented to the Commission in February 2000. The first and the third of the aforementioned proposals were outright rejected. Particularly, the requirement to give judgment before making a reference would 'debase the entire system of cooperation established by the Treaties ...Its implementation ... would imply that a radical change to the Union's structure had been decided in advance'(52). Grave drawbacks were also found to the other three solutions, consequently, they were not accepted, but left for further re-examination.

Remarkably, the Working Party considered that the success of the preliminary rulings system rests strongly on its current features. Particularly, it is thought desirable that the future Member States could be able to benefit ‘from this exceptional instrument of integration into the Community legal order’ (53). Therefore, instead of sticking to the far going proposals, the Working Party adopted a pragmatic and flexible approach, in line with the idea of cooperation and direct dialogue between the judiciaries. The proposed development of the procedure, without undermining ‘the spirit of cooperation’, would put more burden on the national courts in two aspects.

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First, more emphasis is placed on the need for careful preparation and drafting of references and the avoidance of premature or irrelevant questions. The Court has previously made attempts to tackle this problem, issuing its Note for Guidance of 9 December 1996(54), as well as exercising stricter control on the admissibility of references. The Court has also proposed an immediate amendment to the Rules of Procedure, empowering it to ask the national court for clarification, where the factual or legal context is not sufficiently explained(55). The current proposal of the Working Party is to incorporate clear admissibility criteria in the Rules of Procedure (however, it is not suggested which criteria should be included). This could be supplemented by the recommendations of the Court, for instance, a ‘standard model’ for the formulation of references. Further, national courts could be encouraged, though in no way obliged, to include in request the ‘reasoned grounds for the answers’ which they consider most appropriate(56).

Second, national courts are encouraged ‘to be bolder in applying Community law themselves’. Thus, the essential purpose of the reforms reflects the idea that national courts are increasingly better placed to give informed decisions on questions of Community law in the exercise of their national jurisdiction. This message is reflected in three crucial amendments to Article 234 EC:

- expressly stating the authority of national courts to deal with questions of Community law;
- encouraging, though not restricting, national courts other than those of final instance to make a reference only when it is important in terms of Community law and when the ‘reasonable doubt’ (57) exists;
- relaxing the obligation to refer imposed on the courts of final instance, restricting it to the questions of sufficient importance and imposing the condition of ‘reasonable doubt’.(58)

The attitude taken by the Working Group sheds the light on the further development of the jurisdiction under Article 234 EC, also, on possible development of ‘the Dzodzi principle’. First, the proposed amendments provide a response to the call for more consistency in exercise of the jurisdiction of the Court, since the criteria would be clearly set in the Rules of Procedure. Second, the confirmed willingness to retain the cooperative attitude towards the requests of national courts is most in line with ‘the Dzodzi case law’. The need for reference would still rest on part of the national court, except for the admissibility, which would be assessed under a consistent set of criteria.

This attitude may prove a particular importance after the accession of new Member States. Legal systems of now candidate countries have overcome substantial changes during recent years, adapting to new political and market conditions. This development went hand in hand with the approximation of law to the Community provisions, therefore, the potential of interlinking concepts and rules is even higher than in the legal systems of current Member States. The cooperative attitude and the support of the Court in the interpretation of newly adopted rules would help to ensure the consistency in their application.

4. Drawing a borderline to the jurisdiction outside the scope of

Community law

4.1. Restricting the jurisdiction to the area covered by Community law?

Despite numerous controversies over the solution adopted in *Dzodzi*, still it does not seem appropriate to restrict the jurisdiction of the Court under Article 234 EC to the area directly covered by Community law.

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Formally, Article 220 EC which provides a general ground for the jurisdiction of the Court could be interpreted as restricting the jurisdiction to the field relating to the interpretation *and* application of the Treaty. The existence of law is mainly defined by its (potential) application, then indeed, the Community provision would cease to constitute a part of Community law, when it is incorporated in national law outside the sphere of Community competence. This radical solution, however, proves impractical in several aspects.

First, such a solution would constitute a reversal from the cooperative attitude of the Court, a development which is negatively assessed in the light of importance of preliminary rulings procedure, also, for the future new Member States. Moreover, the justification in *Dzodzi* has a considerable weight, and the uniformity of Community law might indeed prove to be affected by such development. The more so, if the number of situations of interconnection and modeling would increase, which is again likely having in mind the future enlargement and the constant widening of the area covered by Community law.

Second and paradoxical, such a restriction could create more problems than it would solve, since the scope of application of Community law is not easily identifiable. Following situations may serve as examples of borderline cases.

1) Transposition of a directive before the end of the prescribed deadline resembles a voluntary harmonization, which was in issue in 'the *Dzodzi* line of cases'.

The Member State may voluntarily assume its obligation to implement a directive before the end of the period for implementation. Also, the directive, the period of implementation of which had not yet lapsed and which is not yet transposed, may nevertheless be taken as a basis of interpretation of national law⁽⁵⁹⁾. Though the difference between factual situations does not arise, as it does in 'the *Dzodzi* line of cases', the binding effect of the judgment may still be questioned since there is no obligation to give effect to Community law yet⁽⁶⁰⁾.

A private law agreement may also reproduce a provision of the directive not yet transposed. Thus, a private undertaking may be obliged to follow the rules of the Community directive before it is transposed or even before the end of the deadline for its implementation. Such a situation is capable of arising under a concession or a licensing agreement, especially, imposing obligations in the public interest⁽⁶¹⁾. This kind of situations is also possible where the Community directives harmonize some aspects of contract law, as, for instance, in the life-insurance field. Then, Community law is made applicable through a reference by a private agreement, before it becomes effective by force of the transposing national law. Factual situations fall within the scope intended by the Community rules, however, the binding effect of Community law is again disputable.

2) Reference to Community law may be necessary to solve the problem, which pertains exclusively

to national law.

For instance, the interpretation of Community law may be relevant for the ***validity of national legislation under national law***. Such situation arose in *RTI and others* case concerning the 'Television without Frontiers' Directive. The question arose, whether the expression 'advertisement such as direct offers to the public' which was subject to a more favourable regime, covers telepromotions. The Italian implementing legislation did not allow telepromotions to benefit from the exception. Thus, it was necessary to conclude whether the adoption of the more favourable regime was left to the discretion of the Member States, and whether they were able to adopt more strict rules. If it were concluded that the Directive at hand constituted merely a minimum harmonization measure, and Member States remained free to adopt more strict rules regarding the advertising, the further interpretation of the terms of the Directive was not necessary. However, it was argued before the national court that the national transposition measure permitted only 'necessary amendments' to be made to the law previously in force. Even if the Member States were free to exercise the discretion and to adopt more strict rules, this exercise was arguably not 'necessary' for the implementation of Community law, thus, implementing legislation could be void as a matter of national law⁽⁶²⁾. The Court concluded that the latter question is not manifestly irrelevant in resolving the main action, and consequently answered the question which could appear unnecessary from the Community point of view.

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Another example of the situation where the reference to the Community provisions is inevitable though the area may be considered non-harmonised, is given in *Meilicke* case. The case required the assessment of the German concept of 'disguised contributions in kind' in the light of the Second Company Directive. However, the main proceedings arose in the context of the shareholders' right to information. The suggestion of the Commission in the case was that the issue of the entitlement to information under company law is not harmonized at Community level, thus, it is left for exclusively national law to define. Indeed, the national court intended to resolve the dispute by applying national law. However, under the German case law, the right to receive information was subject to the compatibility of the said German concept with Community law, since in the introduction of the concept the German case law referred to the Community provisions. Advocate General Tesaura regarded this as a clear analogy to *Dzodzi* case⁽⁶³⁾.

There are several examples where the Court gave an interpretation of the Community provisions, while the response was not intended to resolve any particular problem of Community law, but ***to clarify the jurisdiction of the national courts under national law***. In *SEIM v Subdirector-Geral dos Alfandegas* the Court was asked: 'does a decision of the national customs authority dismissing an application for remission of duties ...involve the application of substantive tax provisions or provisions of Community administrative law, or was it adopted by the customs service acting as a tax authority or as an administrative authority properly so called? What is the legal nature of that decision?'. The answer whether the decision falls under substantive or procedural law was necessary to assess the jurisdiction of the national court. The Portuguese government and the Commission both concluded that the issue is a matter for domestic law only, and therefore falls outside the jurisdiction of the Court. However, the Court stated that, though 'it is not for the Court to resolve the question of jurisdiction ...in the national judicial system', still 'the Court has power to explain to the national court points of Community law which may help to resolve the problem of jurisdiction'⁽⁶⁴⁾.

3) The provision of Community law may be given retroactive effect under national criminal law.
The Court's acceptance of the jurisdiction under Article 234 EC in such a situation is well established in the case-law of the Court. The ruling of the Court may be requested on the ground that a principle

of criminal law, the retroactive effect of the more favourable criminal provision, may render inapplicable national provisions if they were found incompatible with Community law(65). Since the Court did not come as far as to declare that this constitutes a principle of Community law, the Community provisions acquire retroactive application solely by virtue of national law. In such a situation the scope of application of Community law is defined by national law, similarly to 'the Dzodzi type of cases'. On the other hand, the factual circumstances in the cases of retroactivity by force of national law are perfectly suitable for Community law to apply, since its effects are merely shifted *ratione temporis*.

4) The interpretation of mixed international agreements, though also concerns interconnecting legal systems, constitutes rather conceptually different issue. The arguments presented in the *Hermès* case suggest that all provisions of such agreements could be accepted as a part of Community law. The approach taken by the Court is based on the situation when the provision of the agreement is, at least potentially, applicable both to the situations covered by Community law and by national law. However, in *Hermès* case it was argued that such possibility was far from reality, while on the other hand, theoretically it could apply to all provisions of the TRIPS Agreement(66). The borderline of Community law in this situation is not easily marked.

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5) This line is even more blurred in *competition cases*. There the question is, who is competent to ascertain the effect on intra-Community trade. While at first instance it is a responsibility of the national court, it is not clear, how far this assessment can be questioned by the Court in order to exercise the review of its jurisdiction. The fact that the national court is not bound by its own assessment, and it may still apply national competition law, which could set a standard different from the Community rules, further complicates the situation.

4.2. The solution proposed by Advocate General Jacobs

The fact that the restriction of jurisdiction to the area of Community competence proves impractical evidently states the need of drawing another borderline.

Assuming that the attitude taken by the Court in *Dzodzi* will probably have to be restricted in future, as evidenced by the numerous arguments against the development in *Dzodzi*, the situation leads to a certain degree of uncertainty. While the position of the Court has already been extensively discussed in literature, no views have been expressed so far on the attitude taken by Advocate General Jacobs in his Opinion in *Leur-Bloem* and *Giloy* (67).

The solution suggested by Advocate General Jacobs restricts the jurisdiction of the Court to the interpretation of Community law when it is applied in its 'proper context', although not exclusively within its proper scope. Only then the Court is able to provide 'helpful interpretation' of the rule and thus to fulfil its task. This attitude provides certain degree of flexibility, which is in line with the approach adopted in other recent cases, where the Court declared references inadmissible.

However, this approach loses its flexibility if it is restricted to the cases, where Community law is implemented within the scope of the duty to give effect to it, and only then it produces certain 'vertical' effects on the whole legal system, as finally suggested by the Advocate General. For instance, it is hard to see why the classification of goods under the CCT may only be interpreted in the case concerning import duties, but not the VAT debt.

Moreover, the criterion suggested by the Advocate General could prove not so easily identifiable as it

seems at first sight. In *Fournier* case, which was given by Advocate General Jacobs as an example of 'proper context' (68), the Advocate General himself and the Court concluded that the interpretation provided may prove not to be useful in resolution of the dispute, due to the difference in objectives of the Uniform Agreement compared to the Community rules which were incorporated in it (69). The assessment of what would not constitute 'proper context' may prove highly complex in competition cases, where the scope for application of national law is not clear.

Is there a possibility of less restrictive and more flexible attitude, though still in line with the pragmatic test of the ability to provide helpful interpretation?

4.3. Possibility of a compromise solution

The rationale of Advocate General Jacobs' reasoning rests in the inability of the Court to provide 'helpful interpretation' without having due regard to the factual circumstances. Since in the cases falling outside the Community context the Court is deprived of the possibility of assessing properly the factual situation in the main proceedings, the interpretation may prove unsatisfactory. However, this may appear not necessarily true in all situations lying outside the scope of Community law. The distinction of the cases justifiable under 'the Dzodzi principle' would then depend on several aspects of the relationship between the facts of the case and the interpretation of the rule applicable.

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1) An interpretation is not inevitably based on all the facts of a particular case and may be given *in abstraction from specific circumstances*, still not *in abstracto*.

Normally, an effective interpretation requires to take into account various additional factors and specific circumstances. On the other hand, although all preliminary rulings concern the matters requiring certain interpretation, this does not mean that all cases are equal, as evidenced by the distribution of workload between the full Court and the chambers. The importance of the context of application to the process of interpretation of the rule may differ. For instance, the necessity of careful consideration of the factual situation is emphasised in complex cases, such as competition (70), while the questions relating to specific technical points enable the Court to give a useful interpretation even where the legal and factual situation is not fully presented (71). This conclusion could also apply to 'the Dzodzi line of cases', where the Court is unable to take the national context fully into account.

Indeed, after the acceptance of jurisdiction in *Dzodzi*, the interpretation given was very vague and mainly systematised the provisions to be interpreted (72). The more so, the Court had to state that 'if the implementation of the aforesaid Community provisions were to give rise to difficulty because they had to be applied to the purely internal situation which was at the origin of the main proceedings, the task of resolving that difficulty would fall within the competence of the national court' (73). In a purely internal situation the Court was not able to determine the circumstances in which the provisions regarding the housing which the worker must have available for his family (Article 10 of the Regulation No 1612/68) or the requirements on the minimum periods of residence necessary before granting the right to remain (the Regulation No 1251/70) may be applied. In *Fournier*, the Court recognized that the interpretation in the light of the objective of the Directive may lead to an unsatisfactory conclusion as to the reimbursement, thus 'the terms used in the agreement do not necessarily have to have the same meaning as those used in the Directive' (74). In *Leur-Bloem*, concerning taxation of mergers, the transaction in issue was a domestic one and possibly undertaken for reasons connected with Netherlands tax law, thus, no arguments could be provided to consider the extent to which the conditions imposed by the Netherlands rules might

impede the creation of cross-border corporate structures. Possible problems of application were mentioned by Advocate General Fennelly in *Angonese*, the case concerning the freedom of movement for workers(75).

On the other hand, the interpretation in *Thomasdünger* and *Gmurzynska-Bscher* was very clear due to simplicity of the matter, which related to the CCT classification. Indeed, the Court generally accepts its jurisdiction to interpret the CCT classification without imposing a precondition of a particular transaction being in issue(76).

Such a line of distinction, slightly less restrictive than the one proposed by Advocate General Jacobs, seems to be also supported by the positions of the intervening governments and the Commission in 'the Dzodzi line of cases'. The negative attitude towards the jurisdiction of the Court was taken in sensitive cases, such as concerning free movement of workers (the Belgian Government and the Commission in *Dzodzi* strongly contended that the Court has no jurisdiction), or taxation of mergers (similar position of the German and Netherlands Governments and the Commission in *Leur-Bloem*). The attitude was radically different in cases concerning the classification of goods under the CCT.

2) In some cases an interpretation may be given *on the basis of certain typical situations*, without taking into account the existence of specific circumstances in the case at hand. Thus, the Court could solve a particular legal problem relying only on those facts, as extracted from the order for reference, which consideration is necessary to solve certain legal problem(77). The ruling would still be not *in abstracto*, that is, wholly unrelated to existing facts, but on the basis of typical factual situations of general interest to the Community. This solution could raise some doubts relating to its vulnerability to 'test' cases or its hypothetical nature.

However, similar doubts were recently dismissed by Advocate General Jacobs with regard to a special procedure under the Austrian labour law, intended to improve access of employees and employers to the court. The Austrian Oberster Gerichtshof, submitting the reference under Article 234 EC, first raised a question, whether it has power to ask for a preliminary ruling, when the judicial nature of such proceedings is not clear. Under this Austrian procedure the national court gives a declaratory judgment on the basis of a factual situation independent of particular named persons alleged by one party and presumed to be true, while the latter presumption cannot even be contested. The Advocate General, though concluding that such procedure is based on rather original relationship between the law and the facts, was still very positive that it is of the judicial nature. The national court is confronted with 'typical but abstract facts', however, the objections relating to hypothetical cases mostly lose their relevance. Moreover, the ability to deal with 'a condensate of several situations' may even assist the court in separating general and exceptional situations. The decision is relevant in a number of cases represented by the 'typical' one. The possibility of an abuse is low, given the limitation of potential applicants.(78)

The interpretation of Community law under Article 234 EC on the basis of typical situations, without relying on the whole set of facts of a particular case, could be probably also separated from hypothetical cases. The risk of test cases is diminished by the fact that only courts or tribunals are empowered to submit a question. Further, certain 'test cases', real disputes involving legal problem, which is important for a number of situations, have in fact played an important role in the development of Community law(79).

3) In *fully comparable situations*, the facts, though lying outside the scope of Community law, may still be perfectly suitable for its application. The closest example is when the effect of the

Community rules is shifted merely *ratione temporis* by national law, as in the situation of retroactivity to the benefit of the accused or of the implementation of directive before the end of deadline. The same could also prove to be true in more controversial situations, for instance, competition cases, if the application of national competition law were generally intended to be in line with Articles 81 and 82 EC.

It is true that the distinction based on the assessment of relationship between the interpretation and the facts of the case bears some risk of abstract interpretation. For instance, there remains a possibility of far-reaching pronouncements of the Court without an appropriate exchange of legal arguments, since the order for reference could prove not satisfactory to clearly define the legal issue. Also, the interpretation affecting a wide range of future situations could 'preempt choices which might be more fully argued in other factual settings'(80). These problems, however, bear close similarity to the cases, where the Court declined the jurisdiction on the ground that the factual background was not clearly presented, the issue was hypothetical or the relevance of interpretation to the resolution of the main dispute was not established. There, the Court found the functional criterion of its jurisdiction in a flexible assessment of 'the ability to provide helpful interpretation', in addition, stressing the importance of the precise definition of a legal problem, as a prerequisite for the full exchange of arguments(81). The same criteria could be employed to assess the jurisdiction in 'the Dzodzi type of cases'.

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This flexible distinction could lead the Court, contrary to the division of functions in the preliminary rulings procedure, to a closer examination of the factual background of the case. The borderline along complex, 'hard' or sensitive cases may not be determined in the abstract. However, the uncertainty could be avoided by defining the set of situations, when the acceptance of jurisdiction may be reasonably expected. At first instance, this could be established on the basis of the cases, involving the interpretation of certain provisions of Community law, such as the customs rules. On the other hand, the rules of high generality, such as basic freedoms, could prove not always justiciable outside the scope of Community law(82).

At first sight, the described criteria seem to be vague, such as the existence of 'comparable' situations, bearing the necessary facts, which Community law could apply to. However, the application of these criteria probably would not go further than the consideration of the ability to provide an effective interpretation in the other cases before the Court. Finally, the need to retain the spirit of cooperation and to ensure the uniform application of Community law could outweigh uncertainty, which inevitably follows any flexible approach.

Conclusions

The development of 'the Dzodzi line of cases' proves that the functioning of the preliminary rulings procedure under Article 234 EC is not restricted to the scope of Community law. However, numerous controversies over this development call for the necessity to establish clear limits to the jurisdiction outside the scope of Community law. The line drawn by the Court in *Kleinwort Benson*, resting on the criterion of a 'direct and unconditional' reference in an internal situation, was criticised by Advocate General Jacobs in his Opinion in *Leur-Bloem* and *Giloy*. The Advocate General urged the Court to restrict its jurisdiction to the cases, where Community law is applicable 'in its proper context', that is, when Community law is implemented within the scope of the duty to implement, and only then it brings effects outside its scope. Reference to 'the Dzodzi line of cases' in specific situations of interconnection between Community law and national law leads to further controversial solutions. Consequently, the future development of the tendency is open to different solutions.

Recent cases, where the Court has declined the jurisdiction on the basis of the lack of sufficiently presented factual and legal background, the hypothetical nature of questions or their irrelevance to the main proceedings, bear close similarities to the development in ‘the Dzodzi line of cases’. The development in the former cases was finally resolved in the assessment by the Court of the ‘ability to provide helpful (useful) interpretation’. Such a flexible approach is consistent with the trends underlying current proposals for the reform of the preliminary rulings procedure.

The restriction of jurisdiction to the scope of Community law proves to be an impractical solution, hence, the need to draw another borderline on jurisdiction. The extremely cooperative attitude adopted by the Court possibly leads to a number of inconsistencies, its development reveals the necessity of a more restrictive attitude. On the other hand, the approach suggested by Advocate General Jacobs may seem excessively restrictive.

A compromise solution may be found in the acceptance of jurisdiction in ‘comparable’ situations, ascertained on the basis of relationship between the interpretation and the facts of a particular case. In addition, it could be based on the assessment of the ‘ability to provide helpful interpretation’ and of the existence of a sufficiently precisely defined legal problem, as a prerequisite for the full exchange of arguments. This solution would provide a consistent attitude of the Court to most of the controversial cases on the admissibility of references under Article 234 EC. The uncertainty inevitably following such a solution could be outweighed by the need to retain a flexible and cooperative attitude towards references for a preliminary ruling.

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Annex 1. The nature of reference in ‘the Dzodzi line of cases’

- 1. Reference by a provision of national law
- 2. Reference by a clause in a private agreement

1. Reference by a provision of national law

The first type of situations relates to the choice by Member States’ legislatures to apply the rules of Community law in situations not covered by those rules. It is usually denoted as ‘voluntary’ or ‘spontaneous harmonization’ (83). ‘Voluntary’ nature refers to the fact that national authorities are not bound by an obligation to give effect to Community law, Article 10 EC, but they act for internal reasons.

1) First, most of the cases required the interpretation of **the Common Customs Tariff classification or customs procedural rules, applicable by analogy to the turnover taxes** on goods, imported from another Member State.

The facts of the first case of this type to appear before the Court, *Thomasdünger* (84), concerned importation of goods from France to Germany. The situation was clearly outside the scope of the Common Customs Tariff, since customs duties were no longer levied within the common market. However, the Bundesbahn charged different rates for transportation of goods, according to their classification under the Common Customs Tariff. Thus, Community rules were binding by force of the national provision setting rates for charges. German customs authorities issued a binding customs ruling, challenged by *Thomasdünger* before the Bundesfinanzhof, which decided to submit the question for a preliminary ruling.

The case *Gmurzynska-Bscher*(85) also involved the CCT classification. The work of art was imported by Mrs Krystyna Gmurzynska into Germany from the Netherlands. Similarly, the CCT was not applicable as such. The need for an interpretation arose from the fact that the German revenue law refers to the CCT nomenclature for the grant of exemptions from or reductions in turnover tax on imports. Customs tariff ruling was again contested before the Bundesfinanzhof.

In *Tomatis Fulchiron*(86) interpretation of the customs tariff classification was sought by the Italian court in order to determine the VAT liability according to national law. Peculiar to this case was that the tariff classification challenged in the main proceedings was issued by the authorities of another Member State(87).

Giloy(88) case concerned the interpretation of Article 244 of the Customs Code, providing conditions for the suspension of the demand of payment. Again, the case before the national court concerned not import duties, but the VAT debt. Article 69 of the Finanzgerichtsordnung governed the conditions for grant of stay of execution by the tax authorities, which were also to be applied by the finance courts. Though the provisions differed somewhat from the Code, it was recognized by the German case law and literature, that the customs authorities are obliged to apply Article 244 of the Code. Article 21(2) of the German Turnover Tax Law laid down a general rule that the provisions on customs duties are applicable *mutatis mutandis* to VAT on imports. Thus, the reference to Community law involved an analogy confirmed by the general provision in tax law, the German case law and legal doctrine.

In *Schoonbroodt*(89) the Belgian Cour de Cassation requested interpretation of the scope of an exemption from customs duties in respect of motor fuel, contained in Article 112 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of relieves from customs duty. The facts concerned the imposition of national excise duties, but the Belgian law provided that exemptions from excise duties on imports were to be granted only to the same extent and subject to the same conditions as exemptions from import duties. Here, however, the situation did not clearly fall outside the scope of Community law, due to the possibility of application of the Council Directive 92/12/EEC standardizing the provision in issue, which the national court did not take into account.

In nearly all the situations, except *Thomasdünger*, the Community rules were employed to govern the procedure of the collection of import turnover taxes. As the collection of customs duties is comparable to the execution of turnover tax on imports, the application of a similar classification of goods and a single procedure seems reasonable from a viewpoint of national law. All cases involved the challenge of the binding customs classification or procedural steps undertaken by national authorities, which were also responsible for the enforcement of the customs rules, then acting as Community authorities. Therefore, the application of analogy was also relevant from the Community point of view.

2) Second, an interpretation was required where the specific national rule assimilated the situation of own nationals, otherwise not benefiting from the Community rules, to the situation governed by Community law. The **purpose of reference was elimination of different treatment** resulting from the limited scope of applicability of Community law.

In *Dzodzi* two Belgian courts asked for an interpretation of the Community law provisions on freedom of movement for workers, contained in the Regulation No 1251/70 and the Council Directive 64/221/EEC. Mrs Dzodzi was a Togolese married to a Belgian national. After the death of

her husband she sought the grant of residence permit in Belgium. Since it was not a case of an exercise of economic activity by the Community national in another Member State, the situation was purely internal one. The Tribunal de première instance, which submitted the first reference, asked the Court, whether Community law were still directly applicable. Assuming the negative answer, the national court alternatively referred to the provision of the Belgian Law on admission, residence, establishment and expulsion of aliens, which treated the spouse of a Belgian national as an 'alien from within the European Community'. The Belgian rule was introduced specifically to avoid the discrimination of own nationals, who cannot establish the factor connecting their situation to Community law. Accordingly, the national court asked 'could the plaintiff claim a right of residence or a right to remain *if her deceased spouse had been a national of another Member State of the Community?*'(90).

The dispute in the main proceedings in *Leur-Bloem* was dependent on the interpretation of a phrase 'exchange by shares' in Article 2(d) of the Council Directive 90/434/EEC on the common system of taxation of mergers. Actual transaction involved exclusively companies established in the Netherlands, while the Directive is not applicable to purely internal mergers. However, the Netherlands Income Tax Law, implementing the Directive, contains two parallel and identical definitions of a share merger for both intra-Community and domestic transactions. Moreover, the national court submitted that the Netherlands legislature intended to give the same interpretation to both provisions, as evidenced by the wording of the provisions and the *travaux préparatoire*. The reason for the adoption of two similar definitions was to prevent a distortion of competition between groups of companies having the same structure, where only some of them have a Community character. The national court formulated the first question straight: 'May questions be referred to the Court of Justice concerning the interpretation of the provisions and scope of the 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?*'(91).

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Specifically, the reference to Community law in the second type of cases was intended to prevent 'reverse discrimination' or 'unfair competition', arising in purely internal situation. In contrast to previous situations, this analogy has a potential to cover a wide range of the Community rules. Moreover, the interpretation necessarily involves a consideration of a non-existent, hypothetical factor providing the link with Community law.

2. Reference by a clause in a private agreement

Two cases so far involved the interpretation of the Community rule incorporated by a private agreement(92).

Federconsorzi(93) concerned the determination of value of stolen olive oil under the Commission Regulation (EEC) No 3472/85 governing buying-in and storage of olive oil by intervention agencies. Federconsorzi was entrusted with intervention in the olive oil market by the Italian intervention agency. This relationship was outside the scope of the Regulation. However, an agency contract between parties provided that 'the contractor shall be liable ... for any losses for which he is responsible to the amount stipulated by the Community legislation in force'. Accordingly, the dispute was not governed directly by the Regulation, but an agency contract referred to it.

In *Fournier*(94) the Court was asked to interpret the Uniform Agreement between Bureaux in the

field of motor third-party liability insurance. The Community has established a scheme intended to abolish border checks of international motor TPL insurance certificates ('the green card' certificates). The Uniform Agreement is an important element of this scheme, as it provides the conditions of subsequent reimbursements between national insurers' bureaux issuing the 'green card'. However, it is an instrument governed by private law and does not constitute a part of Community law, since neither of Community institutions took part in its conclusion. This assessment is not affected by the fact that entry into force of the said Community scheme was made dependent on the conclusion of agreements, and that the Uniform Agreement was attached as an annex to the Community act. Accordingly, the Court has no jurisdiction to interpret the Uniform Agreement itself⁽⁹⁵⁾. However, the clause disputed in the main proceedings was similar to the proviso in the Council Directive 72/166/EEC.

Remarkably, in both cases the private agreements in issue in the main proceedings were concluded to give effect to the scheme introduced by the Community provisions.

The disputes before the national courts in both cases involved the determination of liability of the parties. In *Federconsorzi* the agreement expressly provided that the extent of liability will be governed by the relevant Community rules, since it was parallel to the extent of the subsequent liability of the Italian Intervention Agency, which was directly governed by Community law. In *Fournier* the reference was by no means expressly agreed, but merely inferred from the fact that the wording of the clause corresponded to the Community provision. The reference was even more disputable, as the objectives of the Uniform Agreement differed from the objectives of the relevant Community legislation. The meaning of the disputed concept of 'the State where the vehicle is normally based' in the directives had to be interpreted in the light of the aim of the system established, namely, to abolish systematic checks of the 'green card' at the frontier in order to facilitate free movement of persons. The Community interest required to avoid any difficulty which might arise from potential disputes over registration of the vehicle, therefore, it was imperative that the State where the vehicle is normally based should be easily identifiable. On the other hand, Community directives had nothing to say on possible reimbursements between the bureaux, which are left to the agreements between them. Moreover, the agreement itself provided the dispute as to the interpretation of this same clause to be submitted to three arbitrators⁽⁹⁶⁾. Further difficulty might arise from the fact that several non-Member States were parties to the same agreement.

The differences of references in 'the Dzodzi line of cases' as indicated above justify the drawing of a line between them in order to restrict the jurisdiction to the situations involving certain kind of references.

Annex 2. The solution adopted by the Court [↑]

- 1. The justification of jurisdiction
- 2. The limits to interpretation
- 3. The refusal of jurisdiction in *Kleinwort Benson*

1. The justification of jurisdiction

The first case of 'the Dzodzi type' coming before the Court was the case of *Thomasdünger*. Then the situation seemed so highly exceptional, that the representative of the Commission observed that he could not understand how the proceedings before the Court arose. Before considering the questions

submitted, the Court addressed an issue, whether the applicant had an interest in instituting the main proceedings and what useful purpose would be served by the interpretation requested. The jurisdiction was accepted under a simple consideration that 'except in exceptional cases, 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'(97). It was fully in line with the early cooperative attitude of the Court, questioning the need for a reference only when Community law manifestly could not apply to the facts of the dispute in the main proceedings.

The matter of jurisdiction was extensively addressed by the full Court in *Dzodzi*. First, the Court provided a justification for the acceptance of jurisdiction in a situation falling outside the scope of Community law. Second, the Court recognized limits to its jurisdiction in such a specific situation. The reasoning goes by the same lines in all of the cases in 'the Dzodzi line'. The most extensively it is provided in *Dzodzi* and restated most recently in *Leur-Bloem* and *Giloy*, other cases merely referring to the established rule. *Kleinwort Benson*(98) case added an exception to 'the Dzodzi principle', confirmed later in *Leur-Bloem* and *Giloy*.

The very fact that the Court found it inevitable to provide the justification for its jurisdiction reflects the controversial nature of the problem and proves that the acceptance of jurisdiction in *Dzodzi* goes further than a mere confirmation of cooperative attitude. The justification itself is condensed in three statements.

First, the Court refers to its previous case law, recalling the cooperative nature of the preliminary rulings procedure and the division of powers between the Court and the national courts. Thus, the national courts are entrusted with power to determine the need for reference, and the Court is, in principle, obliged to give a ruling, except where the interpretation of Community rule is manifestly not in issue.

Second, the Court interprets Article 234 EC (then, Article 177 of the EC Treaty), concluding that '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 preliminary rulings in the cases falling outside the Community competences.

Third, the Court states 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 applied*.'(99).

Reference to the discretion of the national court reflects cooperative attitude of the Court. This attitude confirms that the review of jurisdiction, involving the examination of relevance of the question to the main proceedings, would be undertaken only in exceptional circumstances(100). However, the situation in *Dzodzi* was exceptional, and indeed, the Court did review its jurisdiction. The reference to the wording of the EC Treaty addresses merely the question, whether Article 234 EC is capable of bearing the interpretation that follows.

Consequently, the third statement appears to be the main justification for the acceptance of jurisdiction. The principle of uniform interpretation, 'the spirit of Article 177' (now 234 EC), unquestionably lies at the basis of the Community legal order. However, as invoked in *Dzodzi* and subsequent cases, it gains at least two new and specific features. First, the procedure may be used in order to forestall diverging interpretations in future cases rather than to provide a consistent interpretation applicable in the case at hand. Second, the application of the principle of uniform

interpretation is not restricted to the scope of Community law as defined by Community law itself, but also where it is applicable through *renvoi*.

After the Court's pronouncement of the jurisdiction in *Dzodzi* the views of the commentators were divided. The judgment was criticised as exceeding the limits of Article 234 EC (then, Article 177 of the EC Treaty) and attributing new jurisdiction⁽¹⁰¹⁾.

On the other hand, it was argued that the Court 'not only follows the terms of Article 177 [now Article 234 EC], but also confirms the case law on its interpretation', thus, leaving the relevance of the reference for the national courts to assess, except for exceptional cases⁽¹⁰²⁾. The development was viewed as consistent with the Court's role as the supreme interpreter of the Community legal order, independently of the matter in which it is called to be applied. The solution was welcomed as a clear message confirming that the national courts should not hesitate to submit questions as long as they doubt about the interpretation of the Community provision. Moreover, the institutional role of the Court was regarded as not weakened by being made dependent on the voluntary reference of national law⁽¹⁰³⁾. The justification seemed appropriate, since if 'the national legislator desires the conformity of national and Community law, a disagreement over interpretation would weaken the authority of the latter'⁽¹⁰⁴⁾. More cautiously and admitting that a question whether the Court has jurisdiction is controversial and raising a number of difficulties, it was also accepted that had the Court declined jurisdiction the danger of parallel lines of national case law could influence and jeopardize the uniform application of Community law⁽¹⁰⁵⁾.

2. The limits to interpretation [↑]

Accepting the jurisdiction in 'the *Dzodzi* line of cases', at the same time the Court recognizes the limits to it, which are due to the fact that the factual context of application of the interpreted Community provisions lies outside the scope of Community law. Thus, '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'⁽¹⁰⁶⁾. The Court is not allowed to assess the extent and possible limits of the reference to Community law by national legislation, since the interpretation of national law lies outside its jurisdiction. How this limitation affects the binding effect of the ruling?

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The *Dzodzi* judgment contains a paragraph stating that 'if the implementation of the Community provisions were to give rise to difficulty because they had to be applied to the purely internal situation which was at the origin of the main proceedings, the task of resolving that difficulty would fall within the competence of the national court'. And further, 'whilst the national court is *bound by the guidance and the interpretations* of Community law provided by the Court of Justice, for its part it must determine, in the light of *the scope of the reference made by the national legislation* to the aforesaid Community provisions, *the circumstances in which those provisions may be applied to the purely internal situation* which gave rise to the proceedings of which it is seised.'⁽¹⁰⁷⁾. Consequently, while the national court is, in principle, bound by the interpretation, this is however subject to the factual circumstances and the consideration of the scope of reference by national law.

The same limitation is established in the cases involving a reference by a private agreement, where 'consideration of the limits which national law and the contract may set to the application of Community law is a matter for the national court to assess'⁽¹⁰⁸⁾. However, in *Fournier* case the Court goes even further, stating that 'it is for the national court ...to give to the terms used in the 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'(109).

At first sight, the limitations simply confirm the 'allocation of the judicial functions' between the national courts and the Court, inherent in Article 234 EC and resulting in the inability of the Court to interpret national law. However, in 'the Dzodzi line of cases' such a division of functions relates to the problems involved in the exercise of the jurisdiction. First, in all these cases the Court seems to have no power to rule that its judgment is unconditionally binding the Member State and that the national court is obliged to follow the interpretation given, since the duty to give effect to Community law simply does not exist outside its scope. Second, the interpretation given may be inappropriate, impractical or even impossible to apply in the purely internal situation, falling outside the context in which the rule was intended to apply. Consequently, the relevance of the ruling to the main dispute is by no means clear. Indeed, in the light of these problems the controversy of 'the Dzodzi principle' is revealed, and the main criticism is based upon them.

3. The refusal of jurisdiction in *Kleinwort Benson*

The refusal of jurisdiction in *Kleinwort Benson*(110) added another controversy to the debate. In this case the Court subjected its jurisdiction to the condition that the reference by national law to the Community provision must be *absolute and unconditional*. Thus, the Court confirmed that it is not prevented by the division of judicial tasks from the consideration of the nature of reference. After the judgment in *Leur-Bloem* the condition established in *Kleinwort Benson* seems to be restricted to the situations, where the national courts are expressly empowered to disregard the judgment of the Court.

Kleinwort Benson case concerned the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (the Brussels Convention) in a situation involving a conflict of jurisdiction between the courts of the United Kingdom. The Brussels Convention does not apply to internal conflicts of jurisdiction. However, The Civil Jurisdiction and Judgments Act 1982 governing conflicts of jurisdiction within the United Kingdom refers to the provisions of the Convention reproduced in a modified version in Schedule 4 of the Act(111). Further, the Act provides that in determining any question as to the meaning or effect of those provisions, regard shall be had to any relevant decision by the European Court of Justice.

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On the other hand, the provisions of the Convention were reproduced in a non-dynamic way, the United Kingdom legislature did not adjust the Schedule 4 to the amendments made by the 1989 Accession Convention (although these amendments were not relevant in the case before the Court). Most important, the modifications to Schedule 4 by the courts were expressly allowed by the Act.

Having examined the nature of reference, the Court distinguished the situation from those of 'the Dzodzi type of cases'. The Court held that the provisions of the Convention which the Court is asked to interpret cannot be regarded as 'having been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the contracting state concerned'. The Act does not require national courts to decide 'by applying *absolutely and unconditionally* the interpretation of the Convention provided to them by the Court', but merely to have regard to them.(112)

The reason which prompted the Court to decline the jurisdiction was, mainly, that the interpretation would not be binding on the national court. Relying on its *Opinion 1/91*(113), the Court confirmed that 'it cannot be accepted that the replies given by the Court... are to be purely advisory and without binding effect. That would be to alter the function of the Court'.(114)

The refusal of jurisdiction in *Kleinwort Benson* was met by a number of critical comments. The criticism went from two opposite sides.

On the one hand, the attitude was regarded as excessively restrictive. First, it didn't seem apparent why the Court did not follow 'the Dzodzi principle', and instead, relied on *Opinion I/91*, which dealt with a totally different situation. In the latter situation the ruling would not have been binding neither on Community provisions nor on the EEA provisions, while in *Kleinwort Benson* case 'the ruling of the Court would have had binding effect concerning the interpretation of the Brussels Convention and would have been applicable in the future ...even if it would not have been strictly binding in relation to the application of Schedule 4 to the 1982 Act'(115). Second, the Court was accused of 'exercising judicial self-restraint', an approach having detrimental effects on the cooperative aspect of the preliminary rulings procedure. In the light of its task to support the national court, the Court was obliged to give a ruling, since the national court believed that such a ruling was necessary for it to decide the concrete dispute and the point had not been previously dealt with.(116)

On the other hand, *Kleinwort Benson* was regarded as a step towards reconsideration of previous judgments, which was however not taken at the end, thus providing merely an intermediate solution. Especially, the *Fournier* judgment, expressly providing that the interpretation is not binding, seemed no longer tenable. Moreover, the Court's reasoning as regards the non-binding nature of its ruling was thought to be also perfectly applicable to 'the Dzodzi type of situations', due to the power of Member States to change national rules autonomously, and even more remarkable in the situation of a reference incorporated in private contract(117).

Although the confirmation of 'the Dzodzi principle' in *Leur-Bloem* and *Giloy* cleared some of these doubts and restated *Kleinwort Benson* as rather an exceptional solution, the judgment in *Kleinwort Benson* shows that the Court is not willing to exercise the jurisdiction in all the cases of reference by national law, thereby proving the necessity of drawing a clear borderline to the jurisdiction.

Annex 3. The arguments against the acceptance of jurisdiction



It is striking that in all the judgments in 'the Dzodzi line of cases'(118) the Court went against the conclusions of its Advocates General. On their part, the Advocates General were very consistent in their negative attitude towards the extension of jurisdiction in these cases, which 'in terms of general legal theory ...flies in the face of the logic of the preliminary ruling procedure, actually resulting - let us admit it - in a misuse of a procedure'(119). The latter expression of Advocate General Tesouro illustrates very well the intensity of debate within the Community judiciary. Therefore, the analysis of the Opinions of Advocates General provides a comprehensive overview of the numerous arguments against the jurisdiction of the Court to interpret Community law where it is applicable merely by reference of national law. Though some of the arguments are closely interlinked, they still may be put under several headings.

Article 234 EC prohibits the Court to interpret national law. In *Thomasdünger* case Advocate General Mancini stated that, while at the first sight the case at hand seemed to be involving the interpretation of the Community act, in reality the Court would be 'expressing the opinion on the internal rules in which those [Community law] provisions had been absorbed and by which process they had lost their binding force'(120).

The Court's ruling on interpretation would not be to ensure that Community law has uniform effects. This was first invoked by Advocate General Darmon in *Dzodzi*. He opposed the jurisdiction, while recalling the aim of the preliminary ruling procedure, thus, in the light of the same principle

which served the Court as the justification of the acceptance of jurisdiction. Since there is no Community law outside its field of application and a reference by national law cannot extend the scope of Community law, there is no need to ensure uniformity in such a case. It would be merely 'a *sui generis* operation designed to assist the national court in giving effect to national law alone and outside the field of application of Community law' (121). Moreover, there is no need to ensure uniform application outside the scope of application of Community law, since different interpretation would be normal and in many situations the most appropriate solution. In *Kleinwort Benson* Advocate General Tesauro made a comparison to the reception of legal rules, giving an example of Code Napoleon and contending that 'there is no requirement that a provision based on a model must be interpreted in the same manner as its model' (122). Thus, 'when a legislature takes as its model a provision already existing in another legal order it certainly cannot expect its 'own' provisions at all costs to receive in its 'own' country the same interpretation as is given in the State of origin of the model provision' (123).

This reasoning leads to the conclusion that **the Court's competence can only be based on the scope of Community law**, since the uniformity, which is the basic aim of the procedure established, 'clearly applies only within the field of application of Community law, as it is defined by Community law and by Community law alone' (124). The Court does not have jurisdiction in the situation where Community law does not apply (125). Such a conclusion is supported by the principle of 'limited powers' lying at the basis of the Community legal order. First, the Court is bound by the limits to its jurisdiction, thus, cannot make a contrived interpretation of the Treaty (126). Second, the powers cannot be assigned by the national legislation (127).

The justification of the Court was further opposed on the ground that, although plausible at first sight, **it is not convincing that the uniformity of interpretation of Community law would be threatened**. Thus, Advocate General Darmon acknowledged in *Gmurzynska-Bscher* that the Court may hesitate to give interpretation in the case 'for purely practical reasons' of avoiding future risks to the uniform application of Community law. However, the Advocate General was very assertive that 'it is a fallacious problem which gives rise to a fallacious answer', since 'the national court is the sole arbiter of the rules which it has to apply as part of national law'. Moreover, it would be only potential threat and no greater 'than the fact that the Community legal system allows the national court, except in cases in which it gives judgment from which there is no appeal, to interpret Community law directly' (128).

The argument based on another ground for the jurisdiction under Article 234 EC (or under a similar construction in Article 3 of 1971 Protocol to the Brussels Convention) is that **the ruling is not necessary for the judgment to be given in the main proceedings**. Consequently, one requirement of Article 234 EC is clearly not met. In *Kleinwort Benson* Advocate General Tesauro was very critical on the part of developing attitude of the Court to give ruling 'in full awareness of the fact that its interpretation may be only of contingent *future* usefulness to the Community legal order and may possibly even lack usefulness for the national court itself' (129).

The interpretation given may be even inapplicable to the main dispute, due to the changed purpose of the rules. For instance, when the provisions of Community law (classification of the CCT in this case) 'are used by national authorities, ...they are deprived of at least one of their purposes and acquire others of a different character. Thus, ...it is impossible for the Court to interpret them' (130). Also, in *Kleinwort Benson* the national provisions and the provisions of the Convention on which they were based were considered absolutely distinct 'as to their origin and the context in which they apply... and also the factual situations which they govern' (131). The fact that interpretation may be relevant merely as a future reference was regarded unacceptable. Moreover, it seemed to be in an open contradiction with the Court's well settled case-law on hypothetical or analogous questions' (132).

In addition, the development is hard to reconcile with some basic features of preliminary rulings mechanism. Particularly, Advocate General Darmon in *Dzodzi* indicated three 'grave difficulties which would be involved if the Court of Justice were to embark upon ill-defined cooperation, outside the confines and precise aims of the preliminary ruling mechanism'(133). These were never expressly addressed by the Court.

i) could the courts against whose decisions there is no judicial remedy be bound by an obligation to request for a preliminary ruling in such cases?

Despite some arguments raised in favour, since 'once the Court makes the big step of declaring its jurisdiction, it is necessary and logical that the conditions of applicability of Article 177 [now Article 234 EC] remain unchanged'(134), the obligation to refer 'in the *Dzodzi* type of cases' was generally considered possible to find 'only by a process of legal gymnastics' and to be 'anomalous'(135).

ii) would it be possible to visualize an application to review the validity of Community provisions to which reference is made by national law?

If the answer is negative, a provision void for some purposes would be valid for other, on the other hand, the effect might be to nullify provisions of national law which were based on it(136). It was strongly contended by Advocate General Jacobs that the positive solution would be inappropriate, since the validity of the act may only be assessed in its proper context and not outside the field of its application. Moreover, the relevance of such a ruling would be even more indirect than in the case of a ruling on interpretation(137). Definitely, it is hard to assess whether a reference by national law or a contract is made to Community law 'as it stands at present' or merely the wording of the provision is used as a model. Since the nature of reference is for the national court to assess, the necessity of the ruling of the Court is put in doubt. On the other hand, one might raise an argument of the rule of law. That is, if the national court declared the Community act void, though only for the purpose of application of national law, the effects might seriously distort the uniformity of Community law(138). Moreover, the Court may be obliged to raise some grounds of invalidity of its own motion.

iii) would the national court be legally bound by the ruling?

In all the analysed cases the binding effect is based on the national legal system and not on Community law itself, since the situations lie outside the scope of Community law(139). National law-makers are free to change their law governing these situations, including the rules referring to Community law. Therefore, presumably the binding effect of the ruling relates only to future disputes. Moreover, the Court itself seems to accept that, though the national court is bound by the interpretation, this may be limited by the scope of reference or by the circumstances of the case. In this context the reference of the Court to its

Opinion 1/91 in Kleinwort Benson is disputable.(140)

The fact that the judgment would not be binding in a particular case, was regarded irreconcilable with the character of the preliminary rulings procedure, both under the Protocol to the Brussels Convention and under Article 234 EC. Even where the binding effect could stem from national provisions, 'it would be as if it did not exist, inasmuch as it would not be a requirement which the national legislature could or would be obliged to sanction'(141). However, in *Kleinwort Benson* the Court declared the reference inadmissible mainly on the ground that the ruling would not be binding, but it did not reconsider the *Dzodzi* ruling.

The criticism concentrated on the inconsistency created by the *Kleinwort Benson* solution. The suggestion was that all cases should be decided the same way, either accepting or declining jurisdiction, otherwise, the principle established would be 'a difficult puzzle for the national courts'.

Further, the refusal of jurisdiction seemed the most appropriate solution, since its acceptance creates numerous inconsistencies with the functioning of the preliminary rulings procedure and, generally, with the 'basic doctrines of the Community law architecture'. (142)

It is true, that all 'the Dzodzi type of situations' allow to rethink the binding nature of the ruling under Article 234 EC, however, this development is not necessarily absolutely exceptional. First, when a non-binding act is interpreted, the binding nature of the ruling is likewise not clear(143). Certainly, the difference between two situations is that in the case of a non-binding act the Community rule interpreted was never intended to be binding, as well that still there is an obligation to have regard to it. Second, the requirement that the interpretation has to be applied in a particular case is not always supported by the Community interest. This is true when Community law is employed in order to solve a purely national problem (such as the jurisdiction of national courts) or its application is shifted in time (for instance, in case of a retroactive application to the benefit of the accused). Moreover, the judgment always remains binding on future situations falling within the proper scope of Community law. Finally, a reference by the national judge usually implies that Community law, as well as the judgment, is intended be applied in the main proceedings.

Another doubt might concern **the possibility of application of the general principles of Community law in 'the Dzodzi type of cases'**, particularly, whether the human rights argument can be considered in such a case?

It is well-established case-law of the Court, that it has no such jurisdiction in area falling outside the scope of Community law(144). Moreover, would the application of human rights make sense, as the interpretation of the Court in 'the Dzodzi type of cases' cannot be helpful to assess any obligations of the Member State in the case at hand. On the other hand, the relevance of the interpretation to the future cases might lead to the conclusion that such an assessment is inevitable. Indeed, in *Dzodzi* the Court stated that the interpretation given 'is not incompatible with any general principle of Community law enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or Article 14 of the International Covenant on Civil and Political Rights'(145).

The issue is the more controversial, as it concerns an utmost sensitive area. The Court might be accused of the intervention into the competences of the Member States and the extension of its human rights jurisdiction outside the limits of Community law. In the last case in 'the Dzodzi line', *Schoonbroodt*, Advocate General Jacobs concluded that 'if the case fell directly within the scope of Community law, then a penalty which involved the confiscation of vehicles might also raise an issue under Community law of respect for fundamental rights'(146). The Court did not address the matter at all, thus the attitude taken in *Dzodzi* may be reconsidered.

A response to all those controversies may be that 'these difficulties are probably outweighed by the need to ensure the uniform interpretation of Community law throughout the Member States', and 'they may, in any event, turn out to be largely theoretical'. Moreover, the situations of 'the Dzodzi type' seem to be highly exceptional and the assertion of jurisdiction may lead the Member States to abandon the practice of applying Community rules outside their intended field of application.(147)

The opposite view may give an expression of concerns about the increase in the volume of cases(148). Though the latter concerns seem not to have realized so far, there is a number of situations, which fall very near to 'the Dzodzi type' of circumstances thus where there is no obligation to give effect to Community law, nevertheless, the Community rules are voluntarily incorporated in the national legal order.

The indication of numerous difficulties involved in the solution adopted by the Court led Advocate General Jacobs to suggest a different attitude to 'the Dzodzi type of situations'.

Annex 4. The alternative solution suggested by Advocate General Jacobs [↑]

All the Advocates General submitting their Opinions in ‘the Dzodzi line of cases’ urged the Court not to accept the jurisdiction in the cases where national law refers to Community law outside its scope of application. In *Kleinwort Benson*, where the Court in fact refused the jurisdiction, Advocate General Tesauro proposed the Court to decline the jurisdiction and reconsider its previous rulings, instead, the Court based its refusal on the differences between ‘the Dzodzi type of cases’ and the situation in *Kleinwort Benson*.

On the other hand, in the cases where the reference was incorporated in private agreements, *Federconsorzi* and *Fournier*, Advocates General Van Gerwen and Jacobs proposed the Court to accept the jurisdiction, however, due to the specific nature of the private agreements involved, rather than as a general rule along the reasoning in *Dzodzi*. The arguments presented by the Advocates General in ‘the Dzodzi line of cases’ were resumed by Advocate General Jacobs in his opinion in *Leur-Bloem* and *Giloy* and finally construed as a general solution, which he proposed the Court to adopt in this type of cases.

Advocate General Jacobs started his Opinion in *Leur-Bloem* and *Giloy*(149) by giving a detail analysis of an earlier case-law and resuming the numerous arguments which should prompt the Court to reconsider the *Dzodzi* judgment. However, the Advocate General particularly concentrated on the principle that every legal rule has to be interpreted in its *proper context of application*. Accordingly, in the opinion of Advocate General Jacobs, the Court is not able to provide useful interpretation in a dispute arising in ‘a non-Community context’, thus, following the formula employed by the Court in *Dzodzi*, ‘irrespective of the circumstances in which [Community law] ...is to be applied’. When interpreting the rule outside its proper context, the Court runs the risk ‘not only of failing to consider all relevant issues, but also of being misled by extraneous factors’(150).

On this ground Advocate General Jacobs also criticised the distinction made in *Kleinwort Benson* and the test of direct and unconditional *renvoi*, as merely an intermediate solution intended to shield the Court from the cases in which the above-mentioned disparity of contexts is most marked. The solution did not remove the risk of interpreting the rule outside its proper context. It was, in the view of the Advocate General, ‘something of an uneasy compromise’, having ‘no sound theoretical foundation’. Several arguments stood for that. First, according to the rule established in *Kleinwort Benson*, the scope of jurisdiction would be determined by national legislation, would vary widely between the Member States, thus, the Court did not achieve what was sought, the uniformity in application of Community law. Second, there was no guarantee that the ruling would be applied by the national court even where *renvoi* was express, since different interpretations might later appear necessary, therefore, the justification of the refusal based on the non-binding effect of the judgment was not convincing. Third, the test established in *Kleinwort Benson* is hard to apply as, moreover, ‘it would be arbitrary to base any distinction on the manner by which a Member State transposes a Community rule to a national context’. Finally, in any event it is not for the Court to interpret the national legislation, which alone is applicable in the disputes in this type of cases. Consequently, the *Kleinwort Benson* solution was thought as ‘likely to entail considerable uncertainty, possible to resolve only after the procedure before the Court has run its full course, as well as further uncertainty, as to whether the national court should apply the ruling, having regard to the different contexts’.(151)

Having found the distinction made in *Kleinwort Benson* unsatisfactory, the Advocate General proposed the Court to draw *a different line*. According to Advocate General Jacobs, the Court should

refrain from ruling in cases such as *Dzodzi*, however, not in cases such as *Federconsorzi* and *Fournier*. The fundamental difference between those cases was that contractual arrangements in question in the latter two cases were entered into in pursuance of the Community rules. Thus, in *Fournier* case Advocate General Jacobs proposed to accept the jurisdiction himself, 'because the agreement between national insurers' bureaux, far from being an ordinary contract governed by private law, is an essential element in the system set up by Directive 72/166'(152). The facts of *Federconsorzi* and *Fournier* fell squarely *within the contemplation of the Community rules*, although outside the field of their direct application. The Advocate General seems to suggest that in such cases, particularly in *Fournier*, contracts may be deemed to implement Community law in its proper context, though apart of the obligation to implement. Thus, though the interpretation of contracts in such a case is exclusively a matter for national law, this is also true when the interpretation is relevant to national implementing rule. In both cases a common feature is that 'the rule or contractual provision applies within a Community context'(153).

Accordingly, Advocate General Jacobs makes distinction between the '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'(154). The first type of situations is not limited to those situations specifically envisaged by the drafters of Community legislation, however, the distinction is identifiable. It restricts the jurisdiction to the cases, where Community law *has been implemented within the scope of the obligation to give effect to it*, and only thus implemented it produced certain effects outside this scope. Thus, a workable criterion of jurisdiction is provided. The distinction is denoted by the Advocate General as 'vertical' and 'horizontal' effects of Community law in a national legal system. The jurisdiction of the Court is restricted to the 'vertical' situations when, while Community law is implemented only to the intended extent, it still produces effects 'that flow foreseeably down through national law from that implementation'.(155)

Annex 5. Reference to Community law in the situation of 'reverse discrimination' [↑]

- 1. The nature of reference in the 'reverse discrimination' situation
- 2. A principle of equality invoked in *Pistre and Others*
- 3. The reliance on a hypothetical infringement in *Angonese*

1. The nature of reference in the 'reverse discrimination' situation

It is well-established principle that the fundamental provisions of Community law are not applicable to the situation wholly confined to the single Member State. Member State's own nationals may claim the Community rights only if the factor connecting the situation to Community law is provided, otherwise, the situation remains purely domestic and not governed by Community law(156). This leads to the situation of 'reverse discrimination', when a national of a Member State is disadvantaged because he or she may not invoke a provision of Community law, while a national of another Member State, in otherwise similar situation, could rely on the same provision(157). On the other hand, Community law does not prevent the Member States from extending the benefit of Community rules to purely internal situations(158). Various national solutions were developed to eliminate the discriminating treatment of own nationals.

The courts may be somehow puzzled in the assessment of the difference in treatment resulting from the 'reverse discrimination'. The case-law of the Italian courts provides a good example. In 1995, the Corto Costituzionale ruled that while the Treaty provisions do not apply to purely internal

situations, their application is extended to domestic situations by the judgments of the Court of Justice 'in order to avoid unreasonable discrimination at the level of Community law'. Various solutions were followed by the ordinary courts. The reasoning was criticised as a clearly incorrect interpretation of the case law of the Court of Justice. Then the Italian Constitutional Court stated in its ruling in 1997 that such a difference in treatment, although irrelevant under Community law, is prohibited by the Italian Constitution. Also, the Consiglio di Stato, in its Opinion in 1995, confirmed that the Constitution requires the national provisions implementing the Community directives to be extended to the Italian citizens in order to avoid the less favourable treatment.(159)

The approach of invoking the constitutional principle of equality is evidenced in the practice of the German, the French, the Dutch courts(160).

In the Netherlands the difference in treatment was challenged under 'onsplitsbare wilsverklaring' doctrine, specific to the Dutch law. The doctrine, by which the intention of the legislature is deemed indivisible, states that even where only part of the legislation is defective the courts may declare the legislation in question to be wholly without effect. This allows citizens to challenge the provisions of national law in conflict with Community law, even when those particular provisions fall outside the scope of Community law(161).

Generally, all these situations require the consideration of a hypothetical factor, the treatment of situation *as if* it would be covered by the Community provisions. The assessment of a non-existent link to Community law may also be possible in the cases governed by civil law. For instance, a civil law provision on the validity of contracts may allow to declare void the contract infringing the rights of hypothetical third parties(162). The law of civil procedure may allow declaratory remedies, such as preventive action to avert imminent damage, which inevitably involve a hypothetical assessment(163).

Will the Court give preliminary rulings in the situations described above? While these situations fall outside the scope of Community law, the Court may still accept the jurisdiction under the rule established in *Dzodzi*, since they certainly involve the interpretation of Community law. Moreover, *Dzodzi* case in fact concerned a similar situation, where the Community rules were extended to cover an internal situation. On the other hand, the situations described above differ from *Dzodzi* case. Particularly, the reference to Community law in these situations is not made by a specific provision of national law, but by a rule of a very general scope. Since such reference has a very wide scope of applicability, the acceptance of jurisdiction in such cases might even result in a comprehensive system for the elimination of 'reverse discrimination', in which the Court would also take part. Then, inapplicability of Community law to internal situations might then be remedied by its general applicability through medium of national law.

2. A principle of equality invoked in *Pistre and Others* ↑

The issue of reference to Community law by a national principle of equality was addressed by Advocate General Jacobs in *Pistre and Others*(164). These four cases involved French nationals managing companies established in France, the products in question were manufactured by those companies in France and marketed only in French territory. The defendants in the main proceedings were prosecuted for marketing of cooked meats under various denominations making reference to the word 'mountain', for use of which an authorization is required under the French law. The legislation theoretically could apply to imports but it had never been so applied in practice. However, having in mind that the law which violates Community law cannot be remedied by a simple administrative practice, the question arose whether the rule as such would be prohibited by Article 28 EC (then, Article 30 of the EC Treaty).

The French Government and the Commission referred to the purely internal character of the situation

and contended that Article 28 EC (then, Article 30 of the EC Treaty) was not applicable. Advocate General Jacobs also suggested that 'the Court should decline to rule on the application of Article 30 [now Article 28 EC] to imports when it is clear from the facts that a situation is wholly confined to national territory'. He cited the Opinion of Advocate General Cosmas in *Belgapom* case(165), stating that 'the connecting factor bringing a given situation within the ambit of Article 30 [now Article 28 EC] of the Treaty should be sought in the provenance of goods allegedly affected in *the specific case*, by a given national measure'. In the view of Advocate General Jacobs, the fact that Article 28 EC may be potentially infringed in future was not sufficient to justify the jurisdiction of the Court.

Further, the Advocate General stated that the question submitted by the national court appeared to be prompted by the need to assess the appellant's argument on the avoidance of the 'reverse discrimination', which was possible under the case-law of the French courts and, indeed, had been accepted by the court of the first instance in the main proceedings. According to this case-law, if the national law were unenforceable vis-à-vis imports by virtue of being in breach of Article 28 EC, it should also be rendered unenforceable vis-à-vis domestic products to avoid the situation, which would be less favourable for domestic products. Thus, Advocate General Jacobs turned to the question, whether the Court should exercise the jurisdiction where the Treaty provision can only apply indirectly by reference by a principle of national law and to a purely internal matter.

The Advocate General answered this question negatively. His conclusion was based on the arguments expressed in his earlier Opinion in *Leur-Bloem* and *Giloy* (the cases still pending before the Court at that time), particularly, on the necessity of interpretation of the rule 'in its proper context'. If the Court accepted the jurisdiction, difficult issues would arise. For instance, the justification of the reliance on Article 28 EC could only be addressed in a factual context which genuinely raised this question, thus only in the situation involving imported goods. Consequently, the Court should decline to rule in a situation concerning merely a hypothetical exercise of the Community rights.(166)

The Court adopted a different approach. Referring to *Dassonville* case(167), the Court reminded that Article 28 EC (then, Article 30 of the EC Treaty) covered all trading rules enacted by Member States and capable of hindering, 'directly or indirectly, actually or potentially', intra-Community trade. Thus, this provision could be applicable even if all the facts of a particular case were confined to a single Member State. In the situation at hand, the effect on the free movement of goods was given, because the measure in question facilitated 'the marketing of goods of domestic origin to the detriment of imported goods'. The application of certain measure to domestic situation created itself the difference of treatment hindering intra-Community trade at least potentially. The situation would be different only if the national rule in question were of no relevance to imports, while in the case at hand national law had not expressly excluded imported products from its scope of application. Consequently, the rule was declared discriminatory, in so far as it reserved use of description 'mountain' to domestic products.(168)

Under the solution adopted by the Court, the situation fell within the scope of Community law, thus, there was no need to consider the issue of the application of the provisions on free movement of goods through the reference of the French case-law preventing 'reverse discrimination'. Advocate General Jacobs suggested that the Court has no jurisdiction if Community law were applicable by such reference, though his arguments were substantially the same as later rejected by the Court in *Leur-Bloem* and *Giloy*.

3. The reliance on a hypothetical infringement in *Angonese* ↑

Angonese(169), recently decided by the Court, concerned a very similar issue. The main proceedings involved the challenge of the recruitment condition imposed by a private employer in accordance with the collective agreement. The condition challenged required that candidates for a position

possess a certificate of competence in German and Italian ('patentino'), which is specific to the Italian province of Bolzano and is issued by provincial authorities. Mr Angonese is perfectly bilingual, however, not in a possession of the patentino. On this ground, his application for the post has been rejected. The said certificate is issued exclusively by a public authority at a single examination centre, on completion of a procedure of considerable duration, thus, it is hardly obtainable by non-residents of the region. The recruitment condition was contested as discriminatory under Article 48 of the EC Treaty (now Article 39 EC) and the Council Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.

Since Mr Angonese is an Italian national, as a factor connecting the situation with Community law he invoked his period of studies in English, Polish and certain other Slavic languages in Austria, which however he has not completed. The conclusion of the Advocate General Fennelly was, generally, that this factor proved to be insufficient, since it was not relevant to the post sought.

Alternatively, the national court stated that if the contested clause were contrary to Community law, even through a hypothetical breach of the rights of third parties who were nationals of another Member States, it would be null and void by virtue of Article 1418 of the Italian Civil Code. Article 1421 of the Code provided that the 'nullity may be relied upon by anyone with an interest therein and may be established by the court of its own motion'. If the contested clause were discriminatory, the applicant could rely upon the nullity even if the situation had no connection to Community law. The Italian rule permitted the applicant to benefit from nullity *erga omnes* of the contested clause, if it were established that it infringed the rights of other, perhaps entirely hypothetical, third parties. This made the question submitted inevitable for the national court to reach the solution of the dispute.

The defendant in the main proceedings and the Italian Government considered that the provision on nullity in the Civil Code could not remedy the hypothetical character of reference.

Advocate General Fennelly referred to the *Dzodzi* case law, stating, however, that the present case was not comparable to 'the Dzodzi type of cases'. Those cases 'have involved the *express extension* of substantive *secondary provisions of Community law* to purely internal situations which are *comparable* to the situations originally governed by the Community rules in question'. In such cases the Community rules are applied 'always to *concrete* situations, which give rise to the questions referred by the national courts'. Then, the Court is able to answer the questions '*as if* the rules are being interpreted for application in their Community context, *but on the basis of facts* which are relevant to a dispute of a purely internal character *to which those rules are also applicable*'. On the contrary, in the present case, the Community rules in issue 'lay down a standard of great generality, whose applicability and effects may vary according to the circumstances', they have not been 'expressly extended' by Italian law to the situation of the applicant. Therefore, it 'would amount to contrived and artificial procedure, quite different from case like *Dzodzi* and *Giloy*, for the Court to seek to determine whether those rules could, none the less, be of direct benefit to the applicant by virtue of the general effect in Italian law of a finding of nullity, simply because those rules would protect a person in quite different situation'.⁽¹⁷⁰⁾

The solution proposed by the Advocate General seemed to raise a test to assess the jurisdiction of the Court in similar cases. The assessment would relate to:

- the nature of reference by national law, which must be express;
- the nature of the Community provisions to be interpreted. They must be precise provisions of secondary law rather than the provisions of the Treaty on fundamental freedoms, which lay down a general standard subject to the interpretation which is highly dependent on the circumstances of the case;
- the nature of the factual situation, as referred to the Court. It must be concrete, comparable to Community situations and contain the facts which are sufficient to reach interpretation and to

which Community rules might be hypothetically applicable.

The requirement of the express reference by national law is rather controversial. First, since the Court is unable to interpret national law, the assessment of the nature of reference must, in principle, be left to the national court. The different solution, as one in *Kleinwort Benson*, may be adopted when the conditional nature of reference is manifest, while in the present case nothing can suggest that the reference is questionable. The assessment of the nature of reference by the Court may, moreover, create uncertainty as to the acceptance of the jurisdiction in future cases(171). Second, the nature of reference in some previous cases was by no means always express. The reference was questionable in *Fournier* case. In *Leur-Bloem* the Commission and all the intervening governments with the Netherlands government in the first place, concluded that there is no *renvoi*. Third, examples of other uncertainties preventing a clear distinction of references may be drawn from *Leur-Bloem* case. Mrs Leur-Bloem referred to the principle of equal treatment to prove the jurisdiction of the Court in her case, but the Court did not accept such justification. However, after the preliminary ruling was delivered, the Hoge Raad on its part relied on that principle to justify the application of interpretation provided by the Court(172). Thus, the national court in its judgment may rely on another reference to Community law, than the one relied on by the Court, or assess it differently. The same arguments apply to even less plausible justification based on the distinction between the reference of a general nature (such as principle of equality) and that of specific nature (a provision of national law referring to or transposing a particular Community provision).

The refusal of jurisdiction due to the complex and general nature of the Community provision could lead to the conclusion, that 'hard cases' are not justiciable under 'the Dzodzi principle'. However, this justification is not easy to interpret as a criterion for the jurisdiction of the Court. It could also be regarded as a first step to the conclusion that the Court is generally not able to entertain the jurisdiction in 'the Dzodzi type of cases'. The same applies to the assessment of the nature of factual situation, which may seem to have merely a tenuous link with Community law. On the other hand, the jurisdiction criterion based on the distinction of 'comparable' situations, providing necessary facts to teach the interpretation may indeed appear to be an acceptable compromise solution to 'the Dzodzi type of cases'.

The question asked by the national court could seem hypothetical. On the other hand, the case concerned the real dispute, at least, no more hypothetical than the situation in *Dzodzi* case, simply requiring to interpret 'as if ' Mr Angonese in fact was a national of Austria rather than merely studied there. The hypothetical nature of the questions in such a case was emphasised by Advocate General Jacobs in *Pistre and others*, however, there he proposed to decline the jurisdiction in all cases of 'the Dzodzi type'.

The Court once again in this kind of cases dismissed the conclusions of the Advocate General. The issue of admissibility was considered briefly. First, the Court reminded the cooperative nature of the preliminary rulings procedure, regarding the rejection of a reference as an exceptional possibility. Second, the Court concluded that, whether or not the reasoning of the national court is well founded, 'it is far from clear that the interpretation of Community law it seeks has no relation to the actual facts of the case or to the subject-matter of the main action'(173). Consequently, the Court accepted the jurisdiction.

At first sight, the latter pronouncement confirms the cooperative attitude taken in *Dzodzi*. However, the Court referred neither to 'the Dzodzi case law', nor to the justification provided there. In fact, the Court refused to give any justification of its jurisdiction, possibly avoiding a controversial issue. However, the acceptance of jurisdiction in *Angonese* indicates that the Court is, in principle, prepared to exercise the jurisdiction in the situations involving a reference by the rule or practice of a general scope, aimed at the elimination of reverse discrimination.

Annex 6. Application of ‘the Dzodzi principle’ in competition cases [↑]

- 1. The co-existence of two systems of competition law
- 2. Oscar Bronner – the acceptance of jurisdiction in a situation of a potential conflict
- 3. The division based on the potential applicability of Community law

1. The co-existence of two systems of competition law

The borderline between the application of Community competition law applicable to private undertakings, Articles 81 and 82 EC, and national competition law is defined by the condition that an uncompetitive practice ‘may affect trade between Member States’. This condition is interpreted widely by the Court(174).

However, the area of the application of two legal systems is not clearly delimited, since factual and legal situations may be interdependent, not allowing for a clear-cut distinction between Community and national situations. The resulting parallel application of two different sets of rules leads to a potential conflict. The rule resolving this conflict, established as early as in 1969 in *Walt Wilhelm* case, states that ‘the parallel application of national system can only be allowed in so far as it does not prejudice the uniform application of the Community rules and of the full effect of the measures adopted in implementation of these rules’(175). Thus in the ‘overlapping legal orders’ due regard must be given to the supremacy of Community law.

On the other hand, while there is no Community obligation to harmonize competition rules, virtually all Member States have voluntarily modeled substantive provisions on Articles 81 and 82 EC, particularly, in order to avoid the risk of inconsistent competition enforcement between national law and the Community rules. Moreover, national law may provide that these provisions should be interpreted in accordance with the case law of the Court of Justice(176).

The modeling of national provisions on Community competition law evidently reminds ‘the Dzodzi type of situations’. For instance, the Dutch competition law was regarded by Betlem to be in future a fertile ground for the exercise of the jurisdiction under ‘the Dzodzi principle’. Advocate General Tesauro addressed this situation in his opinion in *Kleinwort Benson*, stating – ‘I do not believe that the Italian court could ask the Community judicature for an interpretation of Article 85 of the Treaty [now Article 81 EC] in order to apply the corresponding national provision; and I am even more certain that in any event it would not receive the reply from the Court that it was seeking’.(177)

What is the jurisdiction of the Court under Article 234 EC in the situation when national competition law is applied in the proceedings before the national court?

2. Oscar Bronner – the acceptance of jurisdiction in a situation of a potential conflict [↑]

The issue arose in *Oscar Bronner*(178) case. The main proceedings in the case involved the alleged abuse of the dominant position, the refusal by a newspaper group holding a substantial share of the market in daily newspapers to allow the publisher of competing newspaper access to its home-delivery network. Though concluding that the effect on intra-Community trade was established, the Austrian Kartellsgericht regarded itself competent solely to apply the national rules. Paragraph 35 of the Austrian Kartellgesetz was invoked in the main proceedings. As it was analogous to Article 82 EC, the Kartellsgericht concluded that, if the conduct fell under Article 82 EC, it

logically had to constitute an abuse within the meaning of the Kartellgesetz. In addition, the interpretation of Community law was necessary, since the conduct forbidden under Community law could not be tolerated under national law, due to the supremacy of the former.

The Commission and the defendant in the main proceedings contended that the reference was inadmissible as solely national law was applicable. Also, the Kartellsgericht was not competent to apply Community law, which moreover it could not apply directly. In their view, national law applies in parallel with, and independently of, Community law. In accordance with the ruling in *Walt Wilhelm* it is only when the implementation of national law threatens the uniform application of Community competition rules and the full effectiveness of the measures taken on the basis of those rules that it is necessary to invoke primacy of Community law. In a situation such as in the main proceedings, only national authority was seized of the matter, and the decision based on the Kartellgesetz would not prevent the Commission from applying the Community rules at some later time. The interpretation of Community law requested bore no relation to the actual facts of the case or to the subject matter of the main action. Moreover, the questions posed seemed hypothetical, since the requirement of the effect on the trade between Member States had unlikely been met.

Advocate General Jacobs disagreed. He concluded that the Kartellsgericht was a court, as confirmed by the Court's case law on the meaning of 'a court or tribunal of a Member State' under Article 234 EC (then, Article 177 of the EC Treaty) and, therefore, it had to be competent to apply Article 82 EC (then, Article 86 of the EC Treaty) directly according to the principle of effectiveness of Community law(179).

The Advocate General took a negative attitude towards other possible justifications of the jurisdiction of the Court.

First, the Advocate General did not propose to invoke 'the Dzodzi principle' and avoided further examination whether the Court should rule 'on Article 86 [now Article 82 EC] *on the basis that it is not applicable as such* but that a ruling might assist the national court to apply its national law'(180). That question could arise if the national court were not competent to apply Article 82 EC. Moreover, the Commission pointed out that the Austrian provisions on competition were not based directly on Community competition law and did not refer to it. The Austrian law gave entirely different definition of dominance, the abuse was prohibited only after the order of the Kartellsgericht to terminate it was given, special provisions existed to define the dominance in relation to media. In the view of the Advocate General, this made *Oscar Bronner* case different from those, where there was a direct link between national law and Community law, such as *Leur-Bloem* and *Giloy*.

Second, the Advocate General turned to a specific feature of competition law, that of the potentially overlapping legal systems, which could have lead the Court to give a ruling. The Court might be justified in accepting the jurisdiction at least in the cases where there was an effect on intra-Community trade and where, though the national court would propose to apply national law, Community competition law would be also applicable. Thus, even though the supremacy of Community law was not clearly applicable to the case, a consistent interpretation of national law would have to be favoured. However, in the view of the Advocate General, the discussion on such a justification was purely hypothetical as the national court had to be able of applying Article 82 EC directly.(181)

In the Advocate's General view, the fact that Article 82 EC had not been invoked before the national court in the main proceedings did not call in question the Court's jurisdiction to provide the ruling sought. The preliminary finding by the national court that the requirement of the effect on trade was met was sufficient to make the reference admissible, while the defendant's in the main proceedings and the Commission's observations proved to be insufficient to conclude that the national court's questions were obviously unconnected with the dispute before it, or that the trade between the

Member States evidently had not been affected.(182)

The Court did not follow this reasoning and instead accepted the jurisdiction referring to ‘the Dzodzi principle’ as reinforced by the need to ensure the supremacy of Community law under the rule established in *Walt Wilhelm*.

In its justification, the Court once again confirmed its cooperative attitude allowing the Court to refuse the answer only when the questions posed by the national court were manifestly irrelevant. Then, the Court referred to the *Walt Wilhelm* ruling, stating the need to ensure the supremacy of Community law in potentially conflicting legal situations. As to the requirement of effect on the trade between Member States, it relates to the factual situation in the main proceedings, thus, it is for the national court to assess and is irrelevant for the purpose of verifying whether questions referred to the Court are admissible.

Consequently, ‘in those circumstances, the fact that a national court is dealing with a restrictive practices dispute *by applying national competition law* should not prevent it from making reference to the Court on the interpretation of Community law on the matter, and in particular on the interpretation of Article 86 of the Treaty [now Article 82 EC] in relation to that same situation, *when it considers that a conflict between Community law and national law is capable of arising.*’(183)

3. The division based on the potential applicability of Community law

Special features of competition cases allow the distinction of two situations along the lines indicated by the Court in *Oscar Bronner*, as a divisive solution to the jurisdiction of the Court. Where the Community competition rules are applicable, the uniformity argument is supported by the need not to disturb the effect of Community law, the supremacy argument. The binding effect of the judgment could flow from the supremacy of Community law, also, factual circumstances would be perfectly suitable for the application of Community rules and could be regarded as their ‘proper context’. This justification applies to the wide area, since the requirement of the effect on the trade between Member States is interpreted widely. However, in the situation where Community law cannot apply even potentially the solution would appear more difficult.

Then, who is to assess, whether the trade between Member States is affected? In *Oscar Bronner* case the national court contended that this requirement was met, nevertheless, it was clear that the national court intended to apply solely national law. Though the Commission contended that there was no reason to raise the supremacy argument in this particular case, the assessment of the national court was regarded decisive. This solution is in line with the division of functions under Article 234 EC(184).

The Court even stated that the assessment of the effect on trade between the Member States was irrelevant to define its jurisdiction. However, under the divisive solution, how the Court could ascertain that it had jurisdiction, without concluding itself that the Community rules were potentially applicable? A response could be that the solution adopted was in fact not divisive, the jurisdiction was not dependent on the potential applicability of Community law, and it could have been accepted also in a clearly internal situation.

Then, though *Oscar Bronner* case does not indicate whether the Court is willing to give uniform interpretation of Community competition rules to the largest extent, and the Court even seems to restrict its jurisdiction to the area of concurrent applicability of two legal orders, however, the fact that the assessment of the existence of effect on intra-Community trade is left to the national court may lead to a totally different conclusion.

Therefore, the reference to ‘the Dzodzi principle’ does not seem to solve the matter in a

comprehensive way. If the jurisdiction of the Court would remain restricted to the area of potential applicability of Community law, oddly, it could entirely depend on the assessment of the national court. The extension of jurisdiction to cases covered exclusively by national competition law seems even more controversial than in ‘the Dzodzi type of cases’, due to the potential difference between the objectives of national competition systems and the Community interest which has to be taken into account.

Moreover, it is not clear why the Court did not follow the reasoning of Advocate General Jacobs, emphasising the fact that the national court could also apply Community rules directly, not only by medium of national law. The reason which prompted the Court to adopt different solution could be the fact, that the latter conclusion might have suggested that the national court is obliged to apply Community law rather than national law, where the trade between Member States was indeed affected. Also, the judgment in *Oscar Bronner* does not seem to solve the question, whether in the interpretation of national competition law the consistency with Community law should be favoured generally(185). The reliance on ‘the Dzodzi principle’ without any further clarification does not solve the problems inherent in the concurrent application of national competition law and Community law, thus, providing merely a half-solution to them.

Annex 7. Relevance of ‘the Dzodzi principle’ to the interpretation of ‘mixed’ international agreements [↑]

- 1. Controversy over the jurisdiction to interpret mixed agreements
- 2. *Hermès* - interpretation of a provision applicable both to Community and national situations
- 3. Criticism of the *Hermès* solution

1. Controversy over the jurisdiction to interpret mixed agreements

The Court has consistently held that it has jurisdiction to give preliminary rulings on the interpretation of international agreements between the Community and non-member states. This is also true for the agreements concluded jointly by the Community and the Member States on the one side and the non-Member State on the other(186). However, the question whether this jurisdiction extends to the provisions falling exclusively within the Member States’ competences is still controversial.

In principle, the jurisdiction of the Court needs not to be determined by the question who has the power to implement the agreement. As the Community can be considered to have assumed responsibility for the due performance of the mixed agreement as a whole, this would suggest that there is no difference between mixed and other agreements, since both constitute a part of Community law. According to this interpretation, Member States may appear less free than the existence of shared powers would suggest. The acceptance could diminish the willingness to conclude mixed agreements, interfere with the Member States powers and provide clarification of division of powers not intended to occur. This could justify cautious attitude of the Court.(187)

According to the opposite approach, the Community may be required to comply with the provisions of mixed agreement only as regards matters within its competence, and its obligation in that connection should end there. Consequently, only the provisions falling within the Community competence would be considered an ‘integral part of Community law’, and the Court would have the jurisdiction to interpret only those provisions. Moreover, how the interpretation may be binding on the national court, if the area is falling within the competence of the Member State, thus, outside the obligation to give effect to Community law.(188)

Without impeding the division of powers, the reason to accept the jurisdiction may be found in the need to ensure uniform interpretation and application of the agreement as a whole. First, though the provision falling within the Member States' competences may be considered to be outside Community law, its interpretation may affect the application of other provisions. Second, the provision may be applicable both to the situations arising under national law and the situations within the scope of Community law. This justification falls close to the attitude adopted in 'the Dzodzi type of cases'. Though the situation remains outside the scope of Community law, still the jurisdiction is accepted due to the need to ensure uniform interpretation of Community law. Indeed, this approach was taken by the Court in *Hermès* case.

2. *Hermès* - interpretation of a provision applicable both to Community and national situations [↑]

Hermès(189) case concerned the interpretation of Article 50(6), concerning the adoption of provisional measures, of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The French company *Hermès*, proprietor of the trade mark applicable to neck-ties, applied to the Dutch court asking for an interim order requiring the Dutch company to cease infringement of its trade mark. This was granted according to the Dutch Code of Civil Procedure, however, the question arose, whether a period should be fixed within which *Hermès* would be obliged to initiate proceedings on the merits. This would be required under the TRIPS Agreement, if the interim order granted would fall under the notion 'provisional measure' of Article 50(6) of the TRIPS.

The national court had no doubts that the TRIPS Agreement, having been also ratified by the Community, forms part of Community law. On the contrary, the Netherlands, the French and the United Kingdom governments took view that the Court has no jurisdiction, since the situation does not fall within the scope of application of Community law.

The Commission raised four arguments in favour of the jurisdiction of the Court:

- there is no absolute parallelism between the competence to conclude an act (which must be based on present and effective Community powers) and the interpretative jurisdiction of the Court (which may be based on 'potential' Community powers, and, moreover, on the need for uniform interpretation and application throughout the Community);
- the Member States and the Community constitute a single contracting party;
- the interpretation of Community provisions which have harmonized the sector, albeit to a limited extent, must be consistent with the interpretation of provisional measures;
- the WTO agreements form a whole requiring uniform interpretation on questions of major importance, such as direct effect.(190)

Advocate General Tesauro in his Opinion first ascertained that 'in the present case, the provision of the TRIPS Agreement that the Court has been asked to interpret concerns ...an area in which the Community has not yet (effectively) exercised its (potential) competence at internal level and thus an area which is still in principle within the competence of the Member States'. However, he concluded that the Court has nevertheless the jurisdiction to give interpretation. The Advocate General recalls *Opinion I/94*, where the Court stated that the Member States and the Community have a joint competence to conclude the TRIPS Agreement(191). However, 'the Member States and the Community constitute, vis-à-vis contracting non-member States, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement'. The division of competence is a purely internal matter of the Community, particularly as it may change in the course of time.

Having this in mind, if the Court declined the jurisdiction, this might 'impede the administration of the agreement'. Several arguments stood for that:

- first, the provisions may be interconnected, thus, respective competences not easy to separate. Moreover, an application of a single provision may affect the application of the other provisions or of the system established by the agreement as a whole. Therefore, the requirement of the uniformity in application of all provisions of the agreement is fundamental;
- second, since the Community is a party to the agreement as a whole, international responsibility of the Community might arise irrespective of who has infringed the provisions in question. Thus, the requirement of uniformity is strengthened by the need to protect interest of the Community;
- third, the centralized interpretation is necessary in view of the obligation of cooperation and the requirement of unity in the international representation in fulfillment of the mixed agreements emphasised in *Opinion 1/94*. The emergence of diverging interpretations might undo the results of the cooperation in the negotiation and conclusion of the agreement;
- fourth, while the Community legal system is characterized by the simultaneous application of provisions of various origins, international, Community and national, it nevertheless seeks to function and to represent itself to the outside world as a unified system, since 'that is ...the inherent nature of the system ...to achieve a unified modus operandi'.(192)

The Court indeed declared that it has the jurisdiction, however, the line of reasoning and the justification was substantially different from that of the Advocate General. Having stated that the WTO agreement was concluded without any allocation between the Community and its Member States of their respective obligations towards the other contracting parties, the justification was found in the fact that the TRIPS Agreement is applicable to Community trade marks as well as national trade marks. Consequently, future differences of interpretation might impede the application of Community law, namely, the Community trade mark Regulation (the Council Regulation (EC) No 40/94). Article 99 of the Regulation relates to the adoption of provisional measures to safeguard the Community trade mark. Since the Community is a party to the TRIPS, and the Agreement is applicable to Community trade marks, the national courts, 'when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and the purpose of Article 50 of the TRIPS Agreement'. Thus, the Court has jurisdiction to interpret Article 50 of the TRIPS Agreement.(193)

But does it have the jurisdiction in the proceedings concerning the Benelux trade mark? Here, the Court followed the reasoning developed in *Dzodzi* case. First, in principle it is a competence of the national court to assess the necessity for a preliminary ruling. Second, 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the interest of the Community, *in order to forestall future differences of interpretation*, that provision should be interpreted uniformly, *whatever the circumstances in which it is to apply*'(194).

3. Criticism of the *Hermès* solution

The justification of the Court seems clearly in line with its previous case law in 'the *Dzodzi* line of cases', merely extending the principle developed for national law to mixed agreements. However, it was argued that in practice it is difficult to imagine a situation in which Article 50(6) of the TRIPS Agreement might become relevant to the interpretation of Article 99 of the Regulation. Moreover, the extension of jurisdiction might be better justified by the consideration of the costs of diverging interpretations, particularly, with regard to the international responsibility, as proposed by the Advocate General.(195)

Apart from being less convincing than the arguments of Advocate General Tesauro, the reference to ‘the Dzodzi type of cases’ was regarded as not accurate, since the TRIPS agreement does not recall, refer to or reproduce any Community provisions. The extension is even less convincing, as the solution in *Leur-Bloem* is not generally accepted, having regard to the opposite view of the Advocate General. Moreover, the justification adopted is still controversial, since it is difficult to find a provision in the TRIPS not applicable to both Community and national trademarks. Finally, reliance on the previous jurisprudence on the interpretation of mixed agreements would have better secured uniformity. On the other hand, the underlying problem in *Hermès* and *Leur-Bloem* is the same, namely, the need to avoid danger that the same provision would be given different meaning in Community and national context.

Moreover, the reference to ‘the Dzodzi principle’ may limit the Court’s application of its previous jurisprudence on mixed agreements. The reference to *Dzodzi* is filling the gap without questioning the Member States exclusive competence in the execution of mixed international agreements, while the same conclusion is not possible under previous justification of the jurisdiction on interpretation of mixed agreements.⁽¹⁹⁶⁾

The reason which led the Court merely to refer to ‘the Dzodzi principle’, without stating further and, possibly, stronger arguments might be found in the controversial and disputed nature of the issue. The reasoning of the Court may seem less plausible, but it is also less assertive and, thus, less controversial than the one proposed by the Advocate General. However, the mere existence of the further arguments, particularly, not clear division of competences due to possible Community responsibility for the agreement as a whole, puts *Hermès* case in different line of cases than ‘the Dzodzi type of cases’. In the light of the arguments of the Advocate General, the main difficulties inherent in ‘the Dzodzi solution’ may lose their meaning. The binding effect of the judgment may be found in Community law, since the agreement forms part of this law, the difference in factual contexts seems also non-existent.

Therefore, the main criticism of the judgment seems to be based on its scarce answer to the controversy which still remains open, namely, whether the duty of cooperation and the obligation to enforce Community law extends to the mixed agreement as a whole. In the light of the arguments to accept positive answer, the reference to ‘the Dzodzi principle’ may be regarded as an intermediate and non-accurate solution, moreover, potentially leading to the limitation of the previous case law on the interpretation of mixed agreements.

References [↑]

‘The Dzodzi line of cases’:

Case 166/84 *Thomasdünger v Oberfinanzdirektion Frankfurt am Main* [1985] E.C.R. 3001.

Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] E.C.R. I-3763.

Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] E.C.R. I-4003.

Case C-384/89 *Tomatis and Fulchiron* [1991] E.C.R. I-127.

Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621.

Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035.

Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615.

Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161.

Case C-130/95 *Giloy* [1997] E.C.R. I-4291.

Case C-247/97 *Schoonbrodt* [1998] E.C.R. I-8112.

Other cases involving a reference to ‘the Dzodzi principle’:

Opinion of the Advocate General in Case C-83/91 *Meilicke v Meyer* [1992] E.C.R. I-4871.

Opinion of the Advocate General in Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others v Ministero delle Poste e Telecomunicazioni* [1996] E.C.R. I-6471.

Opinion of the Advocate General in C-122/96 *Saldanha and MTS Securities v Hiross Holding* [1997] E.C.R. I-5325.

Case C-53/96 *Hermès v FHT* [1998] E.C.R. I-3603.

Case C-7/97 *Oscar Bronner v Mediaprint and Others* [1998] E.C.R. I-7791.

Opinion of the Advocate General in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r.

Endnotes [↑]

(*) I would like to thank prof. S. Biernat at the Jagiellonian University for the indication of this rather exceptional legal problem and Mr. E. Röder at the Centre for European Integration Studies (ZEI) for his invaluable comments on an earlier draft of this article.

(1) Anderson D. *References to the European Court*, London, Sweet and Maxwell, 1995, p. ix.

(2) Case 166/84 *Thomasdünger v Oberfinanzdirektion Frankfurt am Main* [1985] E.C.R. 3001; Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] E.C.R. I-3763; Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] E.C.R. I-4003; Case C-384/89 *Tomatis and Fulchiron* [1991] E.C.R. I-127; Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621; Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035; Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161; Case C-130/95 *Giloy* [1997] E.C.R. I-4291; Case C-247/97 *Schoonbrodt* [1998] E.C.R. I-8112.

(3) *Dzodzi*, see [note 2](#).

(4) *Leur-Bloem*, see [note 2](#), para. 27.

(5) *Dzodzi*, see [note 2](#), paras. 34-37 (emphases added).

(6) Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615.

(7) Betlem G., (1996) 33 C.M.L.Rev., p. 147.

(8) Para. 28 of the Opinion of Advocate General in *Kleinwort Benson*, see note 6.

(9) Both cases were considered in one Opinion, see note 2.

(10) *Ibidem*, para. 81 (emphasis added).

(11) O’Keefe D. *Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility*, (1998) 23 E.L.Rev., pp. 518-519.

(12) Betlem G., (1999) 36 C.M.L.Rev., pp. 165-178. Gagliardi A.F. *The right of individuals to invoke the provisions of mixed agreements before the national courts: a new message from Luxembourg?*, (1999) 24 E.L.Rev., p. 287.

(13) Lenaerts K., Arts D. *Procedural Law of the European Union*, 1999, para. 6-023.

(14) Arnall A. *The European Union and its Court of Justice*, Oxford University Press, 1999, pp. 55-56.

(15) Paras. 18-20 of the Opinion of Advocate General in *Schoonbroodt*, see note 2.

(16) Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r.

(17) Case C-7/97 *Oscar Bronner v Mediaprint and Others* [1998] E.C.R. I-7791.

(18) Case C-53/96 *Hermès v FHT* [1998] E.C.R. I-3603.

(19) Barnard C., Sharpston E. *The Changing Face of Article 177 References*, (1997) 34 C.M.L.Rev., pp. 1113-1171.

(20) Case 6/64 *Costa v ENEL* [1964] E.C.R. 585, at 593. The choice of questions and their relevance is 'excluded from review by the Court of Justice', Case 26/62 *Van Gend en Loos v Nederlandse administratie der belastingen* [1963] E.C.R. 1, at 11.

(21) Case 104/79 *Foglia v Novello (No1)* [1980] E.C.R. 745.

(22) As confirmed in *Dzodzi*, see note 2., para. 41.

(23) Lenaerts K., Arts D. *Procedural Law of the European Union*, 1999, p. 44. In Case C-83/91 *Meilicke v Meyer* [1992] E.C.R. I-4871, Advocate General Tesouro concluded, at para. 5 of his Opinion, that the ‘Meilicke case’ may be summarised as follows: (a) the dispute before the national court has been visibly orchestrated by Mr Meilicke himself’, however, he did not propose the Court to decline the jurisdiction on this ground (for a wider description of the fact of the case see note.....). For a recent example see para. 13 of the Opinion of Advocate General Fennelly in *Jägerskiöld v Gustafsson*, where his conclusion was that though ‘it is possible to entertain some doubts about the genuine nature of the dispute in the present case, but there is, in my view insufficient evidence to support a conclusion that the proceedings are obviously artificial or collusive’, the attitude was followed by the Court, Case C-97/98 *Jägerskiöld v Gustafsson* [1999] E.C.R. I-7319.

(24) A major article by Barnard C., Sharpston E. *The Changing Face of Article 177 References*, (1997) 34 C.M.L.Rev., pp. 1113-1171, referring to 20 cases in which the Court has declined

jurisdiction since 1990, at p. 1126.

(25) Tesauro G. *The European Court and National Courts*, (1993) 13 Y.E.L., pp. 12-15. Arnulf A. *The evolution of the Court's jurisdiction under Article 177 EEC*, (1993) 18 E.L.Rev., pp. 129-137.

(26) Arnulf A., (1993) 30 C.M.L.Rev., pp. 613-622. Case C-83/91 *Meilicke v Meyer* [1992] E.C.R. I-4871, on this case see also notes 39, 63.

(27) O'Keeffe D. *Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility*, (1998) 23 E.L.Rev., pp. 509-536.

(28) Particularly, Case C-83/91 *Meilicke v Meyer* [1992] E.C.R. I-4871 (Wooldridge F. *Disguised Contributions in Kind; The European Court Refuses a Preliminary Ruling on Hypothetical Questions*, (1993) 2 L.I.E.I., pp. 69-81), Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others v Circostel and Others* [1993] E.C.R. I-393 (Anderson D. *The Admissibility of Preliminary References*, (1994) 14 Y.E.L., pp. 179-202.).

(29) Kennedy T. *First steps towards a European certiorari?*, (1993) 18 E.L.Rev., pp. 121-129.

(30) Barnard C., Sharpston E. *The Changing Face of Article 177 References*, (1997) 34 C.M.L.Rev., pp. 1113-1171. Slightly different classification was adopted by Advocate General Lenz, distinguishing cases (1) where sufficient information was not provided, (2) where the question had no connection to the dispute, (3) where the procedure was abused, including hypothetical nature of the questions submitted (though the latter cases could be put in the second group as well, since the boundaries between the second and the third group are not clear). Para. 70 of his Opinion in Case 415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman and Others* [1995] E.C.R. I-4921. The inadmissibility of reference and the lack of jurisdiction are both used interchangeably by the Court.

(31) Arnulf A. *The evolution of the Court's jurisdiction under Article 177 EEC*, (1993) 18 E.L.Rev., pp. 129-137.

(32) *Telemarsicabruzzo*, see note 30, para. 6. Advocate General Gulmann proposed to decline to answer the question on the ground that the national court manifestly lacked jurisdiction, thus, the interpretation will not affect the outcome of the proceedings, and the question is irrelevant.

(33) Para. 19 of the Opinion of Advocate General in *Telemarsicabruzzo*, see note 28.

(34) *Meilicke*, see note 28, para. 31. In its Order in Case C-458/93 *Saddik* [1995] E.C.R. I-511, at para. 18, the Court declared reference inadmissible 'because the order for reference is too vague about the legal and factual situations ...or because the situations are purely hypothetical' (emphasis added). Also, Advocate General Lenz mentioned the blurred distinction between these two jurisdiction criteria, para. 70 of his Opinion in Case 415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman and Others* [1995] E.C.R. I-4921.

(35) As a comparison of *Foglia* and *Meilicke* may evidence. Barnard C., Sharpston E., *Opus cit.*, p. 1141.

(36) Tesauro G., *Opus cit.*, p. 14; O'Keeffe D., *Opus cit.*, p.519; Arnulf A., *Opus cit.*, p. 137.

(37) Para. 50 of the Opinion of Advocate General Jacobs in *Leur-Bloem*, see note 2. Also, Arnulf A. *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 58.

(38) Paras. 25-27 of the Opinion of Advocate General Tesouro in *Kleinwort Benson*, see note 6; Paras. 50-51 of the Opinion of Advocate General Jacobs in *Leur-Bloem*, see note 2 (referring to *Meilicke* and *Foglia*).

(39) Para. 7 of the Opinion of Advocate General Tesouro in *Meilicke*, see note 28. The argument was considered to have much force by Wooldridge F., *Opus cit.*, p. 73. The Court declined the jurisdiction on the ground that the judgment could appear to be of no relevance to the main proceedings if the national court were to decide *under national law* that the challenged concept was not applicable to the facts, Lenaerts K., Arts D. *Procedural Law of the European Union*, London, Sweet and Maxwell, 1999, para. 2-025. Thus, the Court in fact considered that the reference is not unconditional.

(40) Tesouro G., *Opus cit.*, p. 15.

(41) O'Neill M. *Article 177 and Limits to the Right to Refer: an End to the Confusion?*, (1996) 21 E.P.L. 3, pp. 375-391. Most of then recent decisions were considered to be ambiguous and lead to confusion, while *Leclerc-Siplec* provided welcome clarification, p. 375. There, though the doubts were raised as to the existence of the dispute, particularly, by the Commission, the Court still ruled in so far, as the answer was 'objectively necessary to the outcome of the proceedings'. Case C-412/93 *Leclerc-Siplec* [1995] E.C.R. I-179, para. 15.

(42) O'Keeffe D., *Opus cit.*, p. 509.

(43) Order in Case C-458/93 *Saddik* [1995] E.C.R. I-511, para. 14. Also, Order in Case C-157/92 *Banchemo (No 1)* [1993] E.C.R. I-1086, where the reference was declared manifestly inadmissible and Case C-387/93 *Banchemo (No 2)* [1995] E.C.R. I-4663, where some questions were answered, since minimum information regarded sufficient for the Court to provide 'useful answer' at least partially. Recently, see Joined Cases C-51/96 and C-191/97 *Delige*, judgment of 11 April 2000, n.y.r., paras. 30-36; Case C-176/96 *Lehtonen*, judgment of 13 April 2000, n.y.r., paras. 22-28.

(44) Case C-316/93 *Vaneetveld v Le Foyer* [1994] E.C.R. I-763, para. 14. The Court seems to be strongly influenced by the arguments of the Advocate General in this case, O'Keeffe D., *Opus cit.*, pp. 511-514. A recent example, the Opinion of Advocate General Jacobs in Case C-421/97 *Tarantik v Direction des Services Fiscaux de Seine-et-Maine* [1999] E.C.R. I-3633. The Advocate General noticed that this case is one of a number of claims which resulted in references to the Court, 'instigated by an association orchestrating resistance to the French road tax system', thus, 'the questions arises whether the proper use is being made of the system of references for preliminary rulings', at para. 26. Moreover, the scarce information provided by the order was perfectly illustrated by the fact that certain of the Commission's arguments were based on a misconception of the facts, at para. 62. However, the conclusion was that 'the issue is not fatal since ...the questions ...may be answered on the basis of existing case law', thus, 'in so far as the national court's questions can be reformulated so as to present *replies which will enable that court to resolve the dispute before it*, it may be appropriate for the Court to answer the questions *notwithstanding the manifest inadequacy of the order for reference*', at paras. 24-25 (emphases added).

(45) For instance, several cases involved the reference from Swedish Skatterättsnämnden (the Revenue Board), which procedure allows hypothetical matters to arise (the future possibility to carry out a transaction under certain conditions). The conclusion of the Court in Case C-200/98 *X AB, Y AB v Riksskatteverket* [1999] E.C.R. I-8261, at para. 22, was that 'far from being asked to rule on a hypothetical problem, the Court has *sufficient information at its disposal* regarding the circumstances with which the main proceedings are concerned to enable it to interpret the rules of Community law and *to give a helpful answer to the question submitted to it*' (emphases added). In another case Advocate General Fennelly suggested an 'analogy with the many cases on customs classification

where the Court gives preliminary rulings without imposing any precondition of a particular import or export transaction being in issue', see his Opinion in Case C-134/97 *Victoria Film v Riksskatteverket* [1998] E.C.R. I-7023, para. 25. There, however the Court concluded that 'Skatterättsnämnden ...acts in an administrative capacity when giving a preliminary binding decision, which serves the taxpayer's interest inasmuch as he is better able to plan his activities, but it is not called upon to decide a dispute', comparing the situation merely to that of preliminary decisions by customs authorities, at paras. 17-18.

(46) In *D.M.Transport* Advocate General Jacobs reminded in para.19 of his Opinion 'the need to respect the assessment of the national court even if it is difficult to see how the answers which the Court is asked to give can influence the decision in the main proceedings'. The Court accepted this attitude. Case C-256/97 *D.M.Transport* [1999] E.C.R. I-3913.

(47) Similar approach by Advocate General Jacobs, relating to the division of jurisdiction between national and Community judiciaries and the distinction between procedures under Articles 230 and 234 EC, which is due to different ability to examine properly factual and legal situations at hand, in para. 20 of his Opinion in Case C-188/92 *TWD* [1994] E.C.R. I-833, also his Opinion in Case C-178/95 *Wiljo* [1997] E.C.R. I-585.

(48) Arnulf A., (1994) 31 C.M.L.Rev., p. 385.

(49) The number of pending references has almost doubled from 209 in 1990 to 413 in 1998. While the Court completes substantially more cases yearly (in 1998 the Court has completed 246 cases, compared to 162 in 1990), the duration of the proceedings is constantly increasing. The Future of the Judicial System of the European Union, May 1999 (The Discussion Paper presented by the Court of Justice and the Court of First Instance), <http://www.curia.eu.int/en/txts/intergov/ave.pdf>. Also, see <http://www.curia.eu.int/en/stat/st98cr.pdf>.

(50) The Future of the Judicial System of the European Union, May 1999 (The Discussion Paper presented by the Court of Justice and the Court of First Instance), <http://www.curia.eu.int/en/txts/intergov/ave.pdf>, pp. 21-27.

(51) *Ibidem*, p. 25.

(52) Report by the Working Party on the Future of the European Communities' Court System (Due Report), 19 January 2000, http://www.europa.eu.int/en/comm/sj/du_e_en.pdf, pp. 13-14.

(53) *Ibidem*, p. 12.

(54) Note for Guidance on References by National Courts for Preliminary Rulings, 9 December 1996 (Notice of the Court of Justice No 34/96), <http://www.curia.eu.int/en/txts/others/txt8.pdf>.

(55) The Future of the Judicial System of the European Union, May 1999 (The Discussion Paper presented by the Court of Justice and the Court of First Instance), <http://www.curia.eu.int/en/txts/intergov/ave.pdf>, p. 12. Proposals for Amendments to the Rules of Procedure of the Court of Justice, 1 July 1999, <http://www.curia.eu.int/en/txts/propositions/txt5a.pdf>. The proposals have been included in the recently adopted amendments, Amendments to the Rules of Procedure of the Court of Justice of 16 May 2000, O.J. 2000, L 122/43.

(56) Report by the Working Party on the Future of the European Communities' Court System (Due Report), 19 January 2000, http://www.europa.eu.int/en/comm/sj/du_e_en.pdf, pp. 17-18. Also recently, the amendment of Articles 245(3) EC and Article 225(4) EC was proposed, removing the requirement of unanimity in the Council for the approval of the Rules of Procedure. Contribution by

the Court of Justice and the Court of First Instance to the Intergovernmental Conference, 1 March 2000, <http://www.curia.eu.int/en/txts/intergov/cig.pdf>.

(57) Along ‘*Cilfit* criteria’. Case 283/81 *Cilfit* [1982] E.C.R. 3415.

(58) Report by the Working Party on the Future of the European Communities’ Court System (Due Report), 19 January 2000, http://www.europa.eu.int/en/comm/sj/due_en.pdf, pp. 14-17. In addition, the explicit statement of the rule established in *Foto-Frost* in the final paragraph was added in the light of the other amendments, in order to clear the doubts which could obstruct the functioning of this rule, Case C 314/85 *Foto-Frost* [1987] E.C.R. 4199. The proposed new wording of Article 234 EC reads (amendments underlined):

1. Subject to the provisions of this Article, the courts of the Member States shall rule on the questions of Community law which they encounter in the exercise of their national jurisdiction.
2. 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.
3. Where such a question is raised before any national court or tribunal, 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. When determining whether to consult the Court of Justice, the national court or tribunal shall in particular take into account of how important the question is to Community law and whether or not there is reasonable doubt as to the answer to that question.
4. Where any such question 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 shall bring the matter before the Court of Justice, provided that the question is of sufficient importance to Community law and that there is reasonable doubt as to the answer to that question
5. A national court or tribunal shall consult the Court of Justice where it proposes not to apply an act of Community law on the ground that the latter is invalid.

(59) Hartley T.C. *The Foundations of European Community Law*, 1998, pp. 203-204, concluding that the interpretation or even the validity of the national measure may then be affected by the directive, *as a matter of national law*. Such case was described in Jääskinen N., *Application of Community Law in Finland: 1995-1998*, (1999) 36 C.M.L.Rev, p. 426, however, the reference for preliminary ruling was not considered necessary by the Finnish court

(60) Although the Member States are required to refrain, during the period laid down for the implementation of the directive, from adopting measures liable seriously to compromise the result prescribed. Also, if the provisions of national law are intended to constitute full and definite transposition of the directive (which is for the national court to assess), their incompatibility with the directive might give rise to the presumption of the breach of this obligation. Case C-129/96 *Inter-Environnement Wallonie* [1997] E.C.R. I-7411, paras. 45, 48.

(61) Jääskinen N., *Opus cit.*, p. 423, remarking that the situation falls close to the recognition of the horizontal direct effect of the directives.

(62) The Opinion of Advocate General Jacobs in Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others v Ministero delle Poste e Telecomunicazioni* [1996] E.C.R. I-6471, para. 16. The Advocate General concluded that the question is not irrelevant, since it turns upon the interpretation of the Directive and arises from the facts of the case.

(63) Paras. 7-8 of the Opinion of Advocate General, *Meilicke*, see note 28.

(64) Case C-446/93 *SEIM v Subdirector-Geral dos Alfandegas* [1996] I-73, paras. 32-33. See also Case 179/84 *Bozzetti* [1985] E.C.R. 2301.

(65) Since 'Community law does not prevent the national court from taking into account, in accordance with a principle of its national law, of the more favourable provisions [of Community law] ...for the purposes of the application of national law, even though ...Community law imposes no obligation to that effect'; Case C-230/97 *Awoyemi* [1998] E.C.R. I-6781, para. 38. See also Case C-319/97 *Kortas* [1999] E.C.R. I-3143; Joined Cases 358/93, 416/93 *Bordessa and Others* [1995] E.C.R. I-361; Joined Cases C-163/94, C-165/94, C-250/94 *Sanz de Lera and Others* [1995] E.C.R. I-4821; Case C-193/94 *Skanavi and Chryssanthakopoulos* [1995] E.C.R. I-929. The latter two cases involved the interpretation of the provisions of the EC Treaty as amended by the Maastricht Treaty, while the factual situations occurred before their entry into force. The retroactive application may involve some difficulties as the scope of Community law is widening. In *Skanavi and Chryssanthakopoulos* the Court mentioned that the interpretation would be different if the Directive 91/439/EEC would be taken into account. The Member States were obliged to give effect to the Directive as from 1 July 1996, while the judgment was delivered a few months before that date.

(66) Gagliardi A.F. *The right of individuals to invoke the provisions of mixed agreements before the national courts: a new message from Luxembourg?*, (1999) 24 E.L.Rev., pp. 286-287.

(67) See note 9.

(68) Para. 77 of the Opinion of Advocate General, *Leur-Bloem*, see note 2.

(69) Para. 29 of the Opinion of Advocate General; paras. 22-23 of the Judgment; *Fournier*, see note 2.

(70) The requirement to define the factual and legislative context is 'of particular importance in the field of competition, which is characterised by complex factual and legal situations', para. 7 of the judgment in *Telemarsicabruzzo*, see note 28. Recently, Joined Cases C-51/96 and C-191/97 *Delige*, judgment of 11 April 2000, n.y.r., paras. 30-36; Case C-176/96 *Lehtonen*, judgment of 13 April 2000, n.y.r., paras. 22-28.

(71) Case C-316/93 *Vaneetveld v Le Foyer* [1994] E.C.R. I-763, para. 13. Lenaerts K., Arts D. *Procedural Law of the European Union*, London, Sweet and Maxwell, 1999, para. 2-023.

(72) Bravo-Ferrer Delgado M., La Casta Munoa N., (1992) C.M.L.Rev., p. 159.

(73) *Dzodzi*, see note 2, para. 54.

(74) *Fournier*, see note 2, para. 22.

(75) Paras. 34-36 of the Opinion of Advocate General in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r.

(76) Para. 25 of the Opinion of Advocate General in Case C-134/97 *Victoria Film v Riksskatteverket* [1998] E.C.R. I-7023.

(77) For instance, in *Angonese* the Court has made two important clarifications – first, that the prohibition of indirect discrimination under Article 39 EC applies to private persons, and second, that

the restriction of available proof of the language knowledge to one particular diploma, which is more difficult to obtain for non-residents of a certain part of a Member State, constitutes a discriminatory recruitment condition. However, the Court failed to state how this ruling should apply to specific facts of the *Angonese* case. The reasons for this omission could be found in the fact that the situation was possibly an internal one. Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r.

(78) Paras. 50-58 of the Opinion of Advocate General Jacobs delivered on 27 January 2000 in Case C-195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich*, the case still pending before the Court. A comparison to the preliminary rulings procedure was made by the Advocate General in relation to the effect of the judgment on a number of cases raising identical issues.

(79) Arnulf A. *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 59.

(80) Lenaerts K. *Form and Substance of the Preliminary Rulings Procedure // Institutional Dynamics of European Integration*, Essays in Honour of Henry G. Schermers, Martinus Nijhoff Publishers, 1994, Vol.II, pp. 363, 379.

(81) See, for instance, Joined Cases C-51/96 and C-191/97 *Delige*, judgment of 11 April 2000, n.y.r., paras. 30-36; Case C-176/96 *Lehtonen*, judgment of 13 April 2000, n.y.r., paras. 22-28.

(82) Para. 36 of the Opinion of Advocate General Fennelly in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r. Though the Court has not accepted this solution in its judgment.

Endnotes Annex 1:

(83) Betlem G., (1999) 36 C.M.L.Rev., p. 165.

(84) Case 166/84 *Thomasdünger v Oberfinanzdirektion Frankfurt am Main* [1985] E.C.R. 3001.

(85) Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] E.C.R. I-4003.

(86) Case C-384/89 *Tomatis and Fulchiron* [1991] E.C.R. I-127.

(87) The case thus involved problematic issue, since as a general rule Member States have no power reclassify the goods put into free circulation in the Common Market or to levy additional duty. In the situation falling outside the scope of Community law the Court had to make an exception and decided that the 'classification given to a product under the CCT by the authorities of the Member State where the product entered the Community is not binding on the authorities of another Member State who are called upon to classify that product under the CCT *for the purposes of their national law*', Case C-384/89 *Tomatis and Fulchiron* [1991] E.C.R. I-127 (emphasis added).

(88) Case C-130/95 *Giloy* [1997] E.C.R. I-4291.

(89) Case C-247/97 *Schoonbrodt* [1998] E.C.R. I-8112.

(90) The answer was positive, accordingly the Community rules were applicable by reference. Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] E.C.R. I-3763 (emphasis added).

(91) Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161 (emphasis added). This led the Court to rule expressly that: ‘The Court of Justice has jurisdiction under Article 177 of the EC Treaty [now Article 234 EC] to interpret Community law where the situation in question is not governed directly by Community law but the national, 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’.

(92) That is, when the Community provision thus incorporated becomes applicable outside the scope of Community law. The situation was different in the cases where an agreement referred to Community law as applicable within its scope, for instance, Case 93/78 *Mattheus v Doego* [1978] E.C.R. 2203; Case 104/79 *Foglia v Novello (No1)* [1980] E.C.R. 745; Case 46/80 *Vinal v Orbat* [1981] E.C.R. 77.

(93) Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035.

(94) Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621.

(95) Case 152/83 *Demouche* [1987] E.C.R. 3833.

(96) The French national bureau argued that while ‘any dispute between national bureaux as to the interpretation of the concept of ‘normally based’ ... shall be submitted to three arbitrators’, nevertheless, the arbitration thus provided for enables specific problems to be settled, but not problems of wider scope such as the interpretation to be given to certain terms of relevant Community directives. Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621, para. 31 of the Report for the Hearing.

Endnotes Annex 2:

(97) Case 166/84 *Thomasdünger v Oberfinanzdirektion Frankfurt am Main* [1985] E.C.R. 3001, para. 11.

(98) Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615.

(99) Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] E.C.R. I-3763, paras. 34-37 (emphases added).

(100) The Court expressly confirmed the possibility of such review in its ruling in Case 244/80 *Foglia v Novello (No2)* [1981] E.C.R. 3045.

(101) Martin D. *Du bon usage de l'article 177* (1991) *Revue de jurisprudence de Liege*, p.189, cited in case *Kleinwort Benson*, see note 98, at 631.

(102) Bravo-Ferrer Delgado M., *La Casta Munoa N.*, (1992) *C.M.L.Rev.*, p. 158.

(103) *Ibidem*, pp. 158-159.

(104) Voss R. *The National Perception of the Court of First Instance and the European Court of Justice*, (1993) *30 C.M.L.Rev.*, p. 1123.

(105) Arnall A. *The evolution of the Court's jurisdiction under Article 177 EEC*, (1993) *18 E.L.Rev.*, pp. 134-137.

(106) *Dzodzi*, see [note 99](#), para. 42.

(107) *Ibidem*, paras. 54-55 (emphases added).

(108) Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035, paras. 5-9.

(109) Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621, para. 23.

(110) *Kleinwort Benson*, see [note 98](#).

(111) Similar solution was adopted in Contracts (Applicable Law) Act 1990, Section 2(3) with regard to the Rome Convention on the Law Applicable to Contractual Obligations. See Anderson D. *References to the European Court*, London, Sweet and Maxwell, 1995, para. 3-054.

(112) *Kleinwort Benson*, see [note 98](#), paras. 19-20 (emphases added).

(113) *Opinion 1/91* [1991] E.C.R. I-6084.

(114) *Ibidem*, paras. 23-24.

(115) Bishop E.M. *Kleinwort Benson: A good Example of Judicial Self-restraint?*, (1995) 20 *E.L.Rev.*, p. 499.

(116) Thus, 'it is hard to see why the Court of Justice should deny its assistance, unless the judgment could obviously not be of value for the national court in the dispute in question', Bishop E.M., *Opus cit.*, pp. 500-501.

(117) Betlem G., (1996) 33 *C.M.L.Rev.*, pp. 144-145.

Endnotes Annex 3:

(118) Case 166/84 *Thomasdünger v Oberfinanzdirektion Frankfurt am Main* [1985] E.C.R. 3001; Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] E.C.R. I-3763; Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] E.C.R. I-4003; Case C-384/89 *Tomatis and Fulchiron* [1991] E.C.R. I-127; Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621; Case C-88/91 *Federconsorzi* [1992] E.C.R. I-4035; Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615; Case C-28/95 *Leur-Bloem* [1997] E.C.R. I-4161; Case C-130/95 *Giloy* [1997] E.C.R. I-4291; Case C-247/97 *Schoonbrodt* [1998] E.C.R. I-8112.

(119) Para. 27 of the Opinion of Advocate General in Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615.

(120) Para. 2 of the Opinion of Advocate General in *Thomasdünger*, see [note 118](#). Also, Brown L.N., Kennedy T. *The Court of Justice of the European Communities*, London, Sweet and Maxwell, 1994, p. 206.

(121) Paras. 8-11 of the Opinion of Advocate General in *Dzodzi*, see [note 118](#).

(122) Para. 20 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#).

(123) *Ibidem*, paras. 21-22. The argument is supported by the fact that, if the provisions of the agreement with non-Member State and the corresponding Community provisions are identically worded, this does not mean that they must necessarily be interpreted identically, since they must be interpreted 'in their own context' and 'cannot be applied by way of simple analogy', Case 104/81 *Kupferberg* [1982] E.C.R. 3641, paras. 29-30. Legal concepts 'do not necessarily have the same meaning in Community law and in the law of various Member States', since every provision must be placed in its context and the regard has to be had to its objectives, Case 283/81 *Cilfit* [1982] E.C.R. 3415, paras. 19-20.

(124) Para. 10 of the Opinion of Advocate General in *Dzodzi*, see [note 118](#).

(125) Para. 19 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#). Also, para. 11 of the Opinion of Advocate General in *Dzodzi*, see [note 118](#).

(126) Though the extension of powers may be justified by the Community interest, Arnall A. *Does the Court of Justice Have Inherent Jurisdiction?*, (1990) 27 C.M.L.Rev., pp. 683-708. For the opposite view, Betlem G., (1999) 36 C.M.L.Rev., pp. 165-178. Further argument is that if Community legislation decided not to harmonize certain fields (as purely domestic mergers in *Leur-Bloem*) it is hard to see a clear interest of the Community, or the Court, to interpret the rules governing those very aspects.

(127) According to Arnall, after the *Dzodzi* judgment the areas in which the Court might be led to intervene will in principle be unlimited, factors such as the purpose of the provisions, the scheme and objectives of the Treaty, might be beside the point. The jurisdiction of the Court would be extended without clear limits, what may not stand well with the principle of limited powers. On the other hand, the jurisdiction in fact would be unilaterally determined by national legislatures, the fact which does not stand well with the autonomous nature of Community law. Arnall A. *The evolution of the Court's jurisdiction under Article 177 EEC*, (1993) 18 E.L.Rev., pp. 129-137. For the conclusion (though draw in the context of the action for annulment) that the admissibility cannot depend on the desire of the national legislature, see Case T-122/96 *Federazione Nazionale del Commercio Oleario (Federolio) v Commission* [1997] E.C.R. II-1559, at 1581-1582.

(128) Paras. 10-12 of the Opinion of Advocate General in *Gmurzynska-Bscher*, see [note 118](#). The latter argument was later taken up by Advocate General Jacobs, also arguing that 'the threat would at most be only indirect and temporary', para. 49 of the Opinion of Advocate General in *Leur-Bloem*, see [note 118](#).

(129) Para. 15 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#). This also as seems to be acknowledged by the Court itself in *Fournier*, see [note 118](#).

(130) Para. 2 of the Opinion of Advocate General in *Thomasdünger*, see [note 118](#). In this case, the task of ensuring that goods coming from non-member countries meet the Community's minimum requirements was not relevant, as the rule was used for the other purpose, the calculation of the charges for transportation of goods. Particularly, the teleological interpretation may appear difficult, due to the changed purpose of the rules.

(131) Para. 19 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#). Para. 11 of the Opinion of Advocate General in *Dzodzi*, see [note 118](#).

(132) Para. 25 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#).

(133) Para. 12 of the Opinion of Advocate General in *Dzodzi*, see [note 118](#).

(134) Bravo-Ferrer Delgado M., La Casta Munoa N., (1992) C.M.L.Rev., p. 158.

(135) Para. 64 of the Opinion of Advocate General Jacobs in *Leur-Bloem*, see [note 118](#). Betlem G., (1999) 36 C.M.L.Rev., p. 176.

(136) Arnall A. *The evolution of the Court's jurisdiction under Article 177 EEC*, (1993) 18 E.L.Rev., pp. 129-137.

(137) Para. 65 of the Opinion of Advocate General Jacobs in *Leur-Bloem*, see [note 118](#).

(138) Betlem G., (1999) 36 C.M.L.Rev., p. 176. Also, see Brown L.N., Kennedy T., *Opus cit.*, p. 206. The requirement of uniformity is particularly imperative when the validity of a Community act is in question, Case C 314/85 *Foto-Frost* [1987] E.C.R. 4199, para. 15.

(139) It is rather obvious that, 'when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation', Case C-246/96 *Imperial Chemical Industries* [1998] E.C.R. I-4695, para. 34. Doubts in this case were due to the close similarity of situations falling within or outwith the scope of Community law, the distinction made by the Court was based on the assessment, 'whether the business of the holding company belonging to the consortium consists *wholly or mainly* in holding shares in subsidiaries' having their seat in the Member States, at para. 32 (emphasis added).

(140) Betlem G., (1999) 36 C.M.L.Rev., p. 173.

(141) Paras. 23-24 of the Opinion of Advocate General in *Kleinwort Benson*, see [note 119](#). In *Fournier* the Court was near to accept that its ruling under Article 234 EC could be non-binding, *Fournier*, see note 1, para. 23. In the view of Advocate General, this 'cannot but raise serious doubts', 'it is contrary to the very logic of the preliminary ruling machinery to acknowledge that the interpretation of Community law requested and given is not binding on the national court'. The reference is made to the *Opinion I/91* where the Court regarded as '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 any 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', [1991] E.C.R. I-6084, para. 61.

(142) Betlem G., (1999) 36 C.M.L.Rev., p. 178., also arguing that the test of the unconditional and express reference is even less plausible, as the conditionality and implied nature of reference is clear in *Leur-Bloem*, where national law is itself silent on the point of reference and merely explanatory memorandum holds that internal mergers should be treated the same as international ones, also, in *Giloy*, where the reference is traced from the German case law and legal doctrine. *Ibidem*, pp. 171-172.

(143) Thus, in Case 322/88 *Grimaldi* [1989] E.C.R. 4407, para. 19, involving the interpretation of the Commission recommendation, the Court stated that 'national courts are *bound to take those recommendations into consideration* ...in particular when they are capable of casting the light on the interpretation of other provisions of national or Community law'. Similar obligation was established in respect of the non-binding act of an administrative body set up under international agreement (Convention on a Common EEC/EFTA Transit Procedure) concluded by the Community with non-Member States, especially, when its provisions 'are of relevance in interpretation of the provisions of the Convention', Case C-188/91 *Deutsche Shell* [1993] E.C.R. I-363, para. 18.

(144) Case C-299/95 *Kremzow* [1997] E.C.R. I-2629, para. 15.

(145) *Dzodzi*, see note 118, para. 68. Recently, in *Grant* case the Court referred to *Dzodzi*, stating that human rights contained in the UN Covenant form part of Community law. Paradoxical, in the next paragraph the Court confirmed that human rights ‘cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community’. Case C-249/96 *Grant v South West Trains* [1998]] E.C.R. I-621, paras. 44-45.

(146) *Schoonbroodt*, see [note 118](#), para. 49

(147) Arnall A. *The evolution of the Court’s jurisdiction under Article 177 EEC*, (1993) 18 E.L.Rev., p. 135.

(148) Concerns were expressed about potential volume of cases by Advocate General Jacobs, para. 66 of his Opinion in *Leur-Bloem*, see [note 118](#).

Endnotes Annex 4:

(149) Both cases examined in one Opinion, [1996] E.C.R. I-4161.

(150) Paras. 50-53 of the Opinion of Advocate General in *Leur-Bloem*, see [note 149](#).

(151) *Ibidem*, paras. 68-74.

(152) Para. 19 of the Opinion of Advocate General in Case C-73/89 *Fournier v Van Werven* [1992] E.C.R. I-5621.

(153) Paras. 77-78 of the Opinion of Advocate General in *Leur-Bloem*, see [note 149](#).

(154) *Ibidem*, para. 81 (emphasis added).

(155) *Ibidem*, para. 80.

Endnotes Annex 5:

(156) It is however not entirely clear how this situation is affected by Articles 14 and 18 EC (former Articles 7 a and 8a of the EC Treaty), due to uncertainty about the direct effect of these provisions. See, for instance, Case C-378/97 *Florus Ariel Wijzenbeek* [1999], judgment delivered on 21 September 1999, particularly, para. 43, where the Court refused to state expressly, whether under these two provisions nationals of the Member States have an unconditional right to move freely within the territory of the Member States.

(157) The jurisprudence of the Court continuously confirmed this principle, despite certain criticism. According to Pickup, ‘the just and common sense principle must be that the nationals of all Member States are entitled to the same treatment by any given Member State’. To say otherwise was even regarded the same as ‘to promote discrimination’. Pickup D. *Reverse Discrimination and Freedom of Movements for Workers*, (1986) 23 C.M.L.Rev., pp. 154-156. Also, an extensive study by E. Cannizzaro, *Producing ‘Reverse Discrimination’ Through the Exercise of EC Competences*, (1997) 17 Y.E.L., s. 29-46.

(158) Case C-132/93 *Steen v Deutsche Bundespost* [1994] E.C.R. I-2715.

(159) Adinolfi A. *The Judicial Application of Community Law in Italy*, (1998) 35 C.M.L.Rev., pp. 1325-1327.

(160) Article 3(1) of the Grundgesetz invoked before the Arbeitsgericht as apparent in Case C-132/93 *Steen v Deutsche Bundespost* [1994] E.C.R. I-2715. The principle of equality accepted in criminal cases by the French courts, Joined Cases C-321/94 to 324/99 *Pistre and Others* [1996] E.C.R. I-2343. Also, the justification under the principle of equality was accepted by the Hoge Raad, see Betlem G., (1999) 36 C.M.L.Rev., p. 177.

(161) Jans J.H. *Dutch Idiosyncrasies and the Direct Effect of EC Law*, (1996) 1 L.I.E.I., pp. 93-99.

(162) This ground is invoked under Articles 1218 and 1221 of the Italian Civil Code in *Angonese* case, the Opinion of Advocate General Fennelly delivered on 25 November 1999 in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, n.y.r.

(163) On this ground, under Article 18 of the Belgian Judicial Code, the justification was found to the necessity of the second question in Case 415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman and Others* [1995] E.C.R. I-4921. However, it is not clear whether the justification would be accepted by the Court, if Mr Bosman would not be in a position to establish any other factor connecting his situation to Community law.

(164) Joined Cases C-321/94 to 324/99 *Pistre and Others* [1996] E.C.R. I-2343.

(165) Para. 13 of the Opinion of Advocate General, Case C-36/94 *Belgapom v ITM and Vocarex* [1995] E.C.R. I-2647.

(166) Paras. 34-42 of the Opinion of Advocate General, *Pistre and Others*, see [note 164](#).

(167) Case 8/74 *Procureur du Roi v Dassonville* [1974] E.C.R. 837.

(168) *Pistre and Others*, see [note 164](#), paras. 43-45.

(169) Opinion of Advocate General Fennelly delivered on 25 November 1999 in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, n.y.r.; particularly, paras. 7-9 and 34-37.

(170) *Ibidem*, at paras. 36-37 (emphases added).

(171) Advocate General Jacobs concluded in *Pistre and Others* that 'it is important that the Court should adopt a consistent approach when deciding whether to exercise jurisdiction, ...the most coherent approach is to decline to rule on a question of Community law in all cases in which the relevance of the question arises from the fact that national law has transposed Community rules into a purely domestic context in which they do not apply as a matter of Community law. Whether that transposition arises by means of specific national legislation mirroring or extending the scope of the Community rules... or by means of a general provision of national law prohibiting reverse discrimination or unfair competition... should make no difference.' Para. 41 of the Opinion of Advocate General Jacobs in *Pistre and Others*, see [note 164](#).

(172) Betlem G., (1999) 36 C.M.L.Rev., p. 177.

(173) Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*, judgment delivered on 6 June 2000, n.y.r.

Endnotes Annex 6:

(174) Thus, it is sufficient for the Community trade to be affected ‘actually or potentially, directly or indirectly’. Also, it may be ‘a result of a combination of factors which taken in isolation would not necessarily be decisive’. C-399/93 *Oude Luttikhuis and Others v Coberco* [1995] E.C.R. I-4520.

(175) Case 14/68 *Walt Wilhelm* [1969] E.C.R. 1. Also, Joined Cases 253/78, 1/79, 3/79 *Procureur de la Republique v Giry and Guerlain* [1980] E.C.R. 2327, para. 16. The interconnection of the legal orders created also other problematic issues, such as, the use by the authorities of the Member State of the information supplied to the Commission on Form A/B or acquired by the Commission in the exercise of its powers under Article 11 of the Regulation No 17 for the purposes of the criminal proceedings under national competition law, see Case C-67/91 *Asociacion Espanola de Banca Privada and Others* [1992] E.C.R. I-4785.

(176) The pioneer measure is claimed to be Italian Law of 27 September 1990. Siragusa M., Scassellati-Sforzolini G. *Italian and EC Competition Law: A New Relationship - Reciprocal Exclusivity and Common Principles*, (1992) 29 C.M.L.Rev., pp. 93-131. The examples of modeling of national competition law on Community provisions, see *Competition Laws of Europe* (ed. Julian Maitland-Walker), Butterworths, 1995.

(177) Para. 26 of the Opinion of Advocate General in Case C-346/93 *Kleinwort Benson* [1995] E.C.R. I-615. Also, Betlem G., (1999) 36 C.M.L.Rev., p. 178.

(178) Case C-7/97 *Oscar Bronner v Mediaprint and Others* [1998] E.C.R. I-7791.

(179) The principle of the effectiveness of Community law requires that any court competent to hear a claim concerning facts to which a Community rule applies should be able to apply that rule, Case 35/76 *Simmmenthal v Italian Minister for Finance* [1976] E.C.R. 1871, para. 14.

(180) Para. 19 of the Opinion of Advocate General in *Oscar Bronner*, see [note 178](#)

(181) *Ibidem*, paras. 22-23.

(182) *Ibidem*, paras. 25-27.

(183) *Ibidem*, para. 16-21 (emphases added).

(184) Even under clear separation of two sets of competition rules (for instance, defined thresholds), the assessment would still be a matter for the national court, as confirmed in public procurement field. There, ‘the Court cannot substitute its own appraisal in regard to the calculation of the value of the contract for that of the national court and conclude, on the basis of its appraisal, that the reference for a preliminary ruling is inadmissible’, Case C-107/98 *Teckal* [1999], judgment delivered on 18 November 1999, n.y.r., para. 32.

(185) Recently, the doubts were raised about the appropriateness of the *Walt Wilhelm* solution and the concurrent application, which could be replaced by a rule clearly separating two legal systems. Thus, national law would not be applicable whenever there is a room for application of Community law. Walz R. *Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law*, (1996) 21 E.L.Rev., pp. 446-464. Stuyck J. *Competition Law in the European Community and in the Member States // Festschrift für Ulrich Everling*, Nomos Verlagsgesellschaft,

Baden-Baden, 1995, pp. 1511-1527. Hence, the argument that in the overlapping field 'one should favour the interpretation which limits, as much as possible, the application of national law, Stuyck J., *Opus cit.*, p. 1526.

Endnotes Annex 7:

(186) Case 181/73 *Haegeman* [1974] E.C.R. 449.

(187) Case 12/86 *Demirel* [1987] E.C.R. 3719. Neuwahl N.A. *Joint Participation in International Treaties and the Exercise of Power by the EEC and Its Member States: Mixed Agreements*, (1991) 28 C.M.L.Rev., pp. 734-737.

(188) Paras. 15-19 of the Opinion of Advocate General in Case C-53/96 *Hermès* [1998] E.C.R. I-3603, presenting the controversies surrounding the question of jurisdiction. In *Demirel* case even the Commission considered 'illogical' to refer for review provisions falling within the exclusive competence of the Member States, Case 12/86 *Demirel* [1987] E.C.R. 3719, at 3738. According to Anderson, this is certainly true where the provision of a mixed agreement falling outside the scope of Community law is severable and intended to bind only one or more Member States, see Anderson D. *References to the European Court*, London, Sweet and Maxwell, 1995, para. 3-038.

(189) Case C-53/96 *Hermès v FHT* [1998] E.C.R. I-3603.

(190) In fact, only the first point was accepted by the Court; as to the fourth, the Court avoided to rule on the direct effect of the TRIPS provision in question.

(191) *Opinion 1/94* [1994] E.C.R. I-5267.

(192) Paras. 20-21 of the Opinion of Advocate General in *Hermès*, see [note 189](#).

(193) *Hermès*, see [note 189](#), paras. 24-28.

(194) *Ibidem*, para. 32 (emphases added).

(195) As noted in von Bogdandy A., (1999) 36 C.M.L.Rev., p. 668. First, if the alleged infringement of the Agreement would be based on the preliminary ruling of the Court, a dispute settlement procedure according to the WTO practice would take place against the Community rather than the Member State, therefore, this would help to avoid fragmentation. Second, consistent interpretation of the TRIPS by countries with advanced economies would help forwarding the aim of the protection of intellectual property, as it sets standards for the rest of the world.

(196) Gagliardi A.F. *The right of individuals to invoke the provisions of mixed agreements before the national courts: a new message from Luxembourg?*, (1999) 24 E.L.Rev., pp. 286-287.
