OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 November 2001 [1]

1. This reference by the Finanzgericht (Finance Court), Hamburg, raises an important question about the scope of the jurisdiction of the Court of Justice to rule on questions referred by national courts and provides the Court with the opportunity to reconsider its decisions in *Leur-Bloem* [2] and *Giloy*. [3]

2. The referring court puts a number of detailed questions about the interpretation of certain technical provisions of the Fourth Company Law Directive on company accounts. [4] Those questions arise however in proceedings which concern the accounting treatment for tax purposes — not covered by the Directive — of a provision in the balance sheet of a trader which is outside the scope of the Directive. The provisions of the Directive are therefore relevant only by virtue of a number of complex references and assumptions under national law.

3. The main proceedings concern the tax assessment for 1989 of the Hamburg branch of a French bank. Neither branches nor banks are within the scope of the Fourth Directive. The amount of tax payable depends on the correct valuation of a provision made in the balance sheet dated 31 December 1989. The national legal context which determines the trader's taxable income is essentially as follows:

— German trade tax law refers (subject to specific trade tax provisions) to German corporation and income tax law;

— German corporation tax law refers (subject to specific corporation tax provisions) to German income tax law;

1 — Original language: English.

2 — Case C-28/95 [1997] ECR I-4161.

3 — Case C-130/95 [1997] ECR I-4291.

4 — Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, OJ 1978 L 222, p. 11.

— German income tax law refers (subject to specific income tax provisions) to the 'commercial law principles of proper accounting';

— that concept is assumed to refer to the rules on accounting of the Commercial Code applicable to all traders;

— certain of those rules are assumed to have transposed the provisions of the Fourth Directive at issue into national law, not only as regards those traders to which the Directive applies, but also for all other traders.

4. In my view the question arises — and the national court has expressly referred three questions concerning admissibility — whether in that context the Court has jurisdiction to interpret provisions of the Fourth Directive.

The questions referred

5. The questions referred by the Finanzgericht, Hamburg, are as follows:

'I. Jurisdiction of the Court of Justice to give a preliminary ruling

Does the Court of Justice have jurisdiction in the procedure for preliminary rulings under Article 177 of the EC Treaty (old version) (Article 234 EC in the version in force from 1 May 1999 under the Treaty of Amsterdam of 2 October 1997 (new version)) to interpret the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11, "the Directive") not only where there is doubt as to the application in conformity with the Directive of the national commercial law on accounts of capital companies (in this case, Paragraph 264 et seq. of the German Handelsgesetzbuch (Commercial Code, "the HGB")), but also:

1. where elements of the Directive were taken over when it was transposed into the national commercial accounting law applicable to all traders (in this case Paragraph 238 et seq. of the HGB), even though for them the "true

and fair view" requirement set out in the preamble to and Article 2 of the Directive was not adopted in the wording of the legislation (unlike in the case of capital companies, Paragraphs 264(2) and 289(1) of the HGB);

2. where national tax law (in this case the first sentence of Paragraph 5(1) of the German Einkommensteuergesetz (Income Tax Law, "the EStG") in conjunction with Paragraph 8(1) of the German Körperschaftsteuergesetz (Corporation Tax Law, "the KStG") and Paragraph 7 of the German Gewerbesteuergesetz (Trade Tax Law, "the GewStG")) assumes that the commercial law principles of proper accounting are applicable for ascertaining the profits of traders who draw up balance sheets, and

   (a) where these are regulated in the provisions for all traders (Paragraph 238 et seq. of the HGB) harmonised (by the Directive) or

   (b) where the specific accounting provisions for capital companies (Paragraph 264 et seq. of the HGB) apply;

3. where national tax law refers in another connection to concepts or criteria from commercial accounting law?

II. Balance-sheet treatment of loan risks

1. Where foreign loans have been granted, is a country risk (foreign currency risk or transfer risk) to be included in the balance sheet as a value adjustment — as on the "Assets" side by means of writing down of foreign debts (Articles 19 and 39(1)(b) and (c) of the Directive, Paragraph 253(3) and (4) of the HGB) — also on the "Liabilities" side by means of provisions (Article 20(1) of the Directive, first sentence of Paragraph 249(1) of the HGB) for off-balance-sheet contingent liabilities under guarantees for foreign debts due to third parties (Article 14 of the Directive, Paragraph 251 of the HGB; "risk subparticipation agreement")?

2. Is it compatible with the requirement of separate valuation of balance sheet items (Article 31(1)(e) of the Directive, Paragraph 252(1)(3) of the HGB), instead of taking risks into account purely by individual value adjustments or provisions, alternatively to take them into account by means of globalised value adjustments or provisions, even if a loan default is not preponderantly probable in the individual case:

(a) May a creditworthiness risk which is not acute but merely latent be covered by a global value adjustment, not only in the form of writing down a debt but also by means of a provision for a contingent (guarantee) liability?

(b) May a not preponderantly probable country risk be taken into account by means of a country-related globalised value adjustment (globalised individual value adjustment), not only in the form of writing down a debt but also by means of a provision for a contingent (guarantee) liability?

3. Is it permitted or required to ascertain the country risk on the basis of one's own connections, experience and information, or of knowledge in the sector or by using rating tables, or by a combination of those methods, or by a different estimation?

4. May a risk be taken into account even if

(a) it already existed when the basic transaction was entered into, and

(b) it is many times greater than the profit or earnings to be made from it (in this case, a guarantee fee for a period of less than one year)?

5. Are the country risk and the creditworthiness risk to be taken into account, if necessary, alongside each other for the same loan by means of a value adjustment or a provision, whether as a single amount or as separate amounts?

6. Is a combination of provisions for risk also permissible if one risk is ascertained individually and the other risk globally?

7. Is double provision for a risk properly avoided by the fact that, after one risk has been taken into account, only the loan amount arithmetically reduced thereby is then used as the basis of assessment of the remaining other risk?

III. Value clarification

1. Must not only increases but also decreases in risks be taken into account as value clarification, going beyond the wording of Article 31(1)(c)(bb) of the Directive (first clause of Paragraph 252(1)(4) of the HGB)?

2. Does a loan repayment between the balance-sheet date and the date on which the balance sheet is drawn up constitute a (retrospectively) value-clarifying fact and not merely a value-influencing fact which has effect only in the year of repayment?

3. For value clarifications of risks which are of relatively slight importance for the undertaking concerned, instead of the period up to the signature of the balance sheet or the establishment of the annual accounts, may the date on which valuation of the relevant balance-sheet item is completed be taken?'

The Fourth Company Law Directive

6. The Fourth Directive initially [5] required implementation in Germany with regard to three types of company: *die Aktiengesellschaft* (public company limited by shares), *die Kommanditgesellschaft auf Aktien* (a form of public company whose directors are personally liable for their debts) and *die Gesellschaft mit beschränkter Haftung* (private company limited by shares). [6] Germany is not required to implement the Directive with regard to other traders including branches of companies incorporated in other Member States. [7] The Directive does not therefore apply to the present case.

7. Moreover the Fourth Directive does not apply to banks and other financial institutions, [8] which are governed by a subsequent

5 — It was subsequently — and after the events giving rise to the main proceedings — amended by Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ 1990 L 317, p. 60) so as to bring within its scope certain other entities including the *GmbH & Co KG*, a limited partnership between a private company and its members.

6 — Article 1(1).

7 — Although it must now require such branches to disclose the accounting documents of their company 'drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed' in accordance with *inter alia* the Fourth Directive: see the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ 1989 L 395, p. 36. The Directive required implementation with effect from 1 January 1993 (Article 16(2)) and is hence on that ground alone irrelevant to the present case.

8 — Article 1(2).

coordinating directive, Directive 86/635,[9] not implemented in Germany at the material time.[10] Pursuant to Directive 86/635, certain provisions of the Fourth Directive, including those at issue in the present case, are to apply to banks and other financial institutions except where Directive 86/635 provides otherwise.[11] Branches of financial institutions are not within the scope of Directive 86/635,[12] although pursuant to Directive 89/117,[13] which required implementation by 1 January 1991,[14] they must publish the accounts of their financial institution.[15] Branches may not be required to publish accounts relating to their own activities.[16]

8. The fourth recital in the preamble to the Fourth Directive states:

'Whereas annual accounts must give a true and fair view of a company's assets and liabilities, financial position and profit or loss...'.

9. Article 2(3) provides:

'The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss.'

10. The Court has stated that compliance with the principle of the true and fair view is the primary objective of the Fourth Directive.[17]

11. The Directive contains rules on *inter alia* the accounting treatment of commitments by way of guarantee (Article 14), the value adjustment of balance sheet items (Articles 19 and 39(1)(b) and (c)), provisions for liabilities and charges (Articles 20(1) and 42), the separate valuation of balance sheet items (Article 31(1)(e)) and the valuation of post-balance-sheet-date liabilities and losses (Article 31(1)(c)(bb)). Some or all of the matters covered by those rules are at

9 — Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions, OJ 1986 L 372, p. 1.

10 — Directive 86/635 required implementation by 31 December 1990. It was implemented in Germany by the Bankbilanzrichtlinie-Gesetz of 30 November 1990, *Bundesgesetzblatt* I, p. 2570 and the Verordnung über die Rechnungslegung der Kreditinstitute (RechKredV) of 10 February 1992, *Bundesgesetzblatt* I, p. 203.

11 — Article 1(1) of Directive 86/635.

12 — Article 2(1).

13 — Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents, 1989 OJ L 44, p. 40.

14 — Article 6(1). Directive 89/117 was implemented in Germany by the RechKredV, cited in note 10.

15 — Article 2(1).

16 — Article 2(3).

17 — Case C-234/94 *Tomberger* [1996] ECR I-3133, paragraph 17 of the judgment.

issue in the main proceedings, although the extent to which they will resolve those proceedings is disputed.

The national legislation on accounts and the first question on jurisdiction

12. The referring court explains in the order for reference that German legislation requiring traders to draw up accounts is divided into provisions applicable to all traders, thus including branches of companies (apparently including banks) incorporated in other States, and those applicable solely to capital companies.

13. Those provisions are to be found in Book III of the Handelsgesetzbuch (Commercial Code; 'HGB') which implements the Fourth Directive in such a way that certain elements are incorporated in Section 1 (Paragraphs 238 to 263), applicable to all traders, and other elements in Section 2 (Paragraphs 264 to 335), applicable specifically to capital companies.

14. The 'true and fair view' requirement in the preamble to and Article 2 of the Directive is not reproduced verbatim in Section 1 of Book III of the HGB, applicable to all traders.

15. Paragraph 238(1) provides in so far as relevant:

'Every trader shall keep accounts recording his business transactions and the state of his assets in accordance with the principles of proper accounting. The accounts must be such as to give a competent third party within a reasonable time an overview of the situation of the undertaking.'

16. Paragraph 239(2) provides:

'The accounting entries and the other records required must be done in a complete, correct, timely and orderly manner.'

17. Paragraph 242(1) provides in so far as relevant:

'A trader must at the start of his business and at the end of each trading year draw up accounts (opening balance, balance sheet) showing his assets and his liabilities.'

18. Paragraph 243(1) and (2) provides:

'(1) The annual accounts must be drawn up in accordance with the principles of proper accounting.

(2) They must be clear.'

19. The referring court states that even though the 'true and fair view' requirement has not been adopted verbatim, the provisions applying to all traders are to be understood as meaning that under the first sentence of Paragraph 242(1) the balance sheet must give a correct picture of the assets and liabilities.

20. The special provisions for the annual accounts of capital companies commence with Paragraph 264 of the HGB and explicitly adopt the 'true and fair view' requirement.

21. Paragraph 264(2) provides:

'The annual accounts of a capital company must, observing the principles of proper accounting, give a true and fair view (*ein den tatsächlichen Verhältnissen entsprechendes Bild*) of the company's assets, financial situation and profit or loss. If particular circumstances have the result that the annual accounts do not give a true and fair view within the meaning of the first sentence, then additional information is to be provided in the notes on the accounts.'

22. Paragraph 289(1) provides in so far as relevant:

'In the annual report, at least the course of business and the situation of the capital company are to be presented in such a way that a true and fair view (*ein den tatsächlichen Verhältnissen entsprechendes Bild*) is given; in addition, the risks of future developments must also be mentioned.'

23. The referring court notes that there is a view that the German legislature intended the Fourth Directive to be implemented solely by Section 2 of Book III of the HGB. It is none the less recognised that certain accounting rules, which had previously applied to all traders and which were also reflected in the Directive, were included in Section 1 of Book III of the HGB. Those rules include the specific provisions of the Directive at issue in the present case. [18]

24. The referring court adds that the Court has accordingly held that it has jurisdiction, in the case of a capital company, to interpret the Directive in the context of the application in accordance with the Directive of a provision from Section 1 of the HGB. [19] The present case however concerns the application of Section 1 of Book III of the HGB to other traders not within the scope of the Fourth Directive but treated by the national legislation in the same way as capital companies.

25. The national court's first question concerning the Court's jurisdiction to give a preliminary ruling on the interpretation of the Fourth Directive arises in that context. More specifically, it asks whether the Court has jurisdiction where, on implementation of the Directive, elements thereof were incorporated into the national commercial accounting law applicable to all traders even though for such traders (in contrast to capital companies) the legislation does not impose the 'true and fair view' requirement set out in the preamble to and Article 2 of the Directive.

26. The referring court considers that the case-law of the Court of Justice so far suggests that the Court has jurisdiction. According to that case-law (*Leur-Bloem* [20] and *Giloy* [21]), the Court has jurisdiction in the preliminary ruling procedure to inter-

18 — Referred to in paragraph 11 above and covered in Section 1 of Book III of the HGB by Paragraphs 251 (Article 14), 253(3) and (4) (Articles 19 and 39(1)(b) and (c)), 249(1) (Article 20(1)), 253(1)(4) (Article 31(1)(c)(bb)) and 252(1)(3) (Article 31(1)(e)).

19 — *Tomberger*, cited in note 17. In fact the HGB is mentioned in neither the question referred nor the judgment; both refer directly to the relevant provisions of the Fourth Directive.

20 — Cited in note 2.

21 — Cited in note 3.

pret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing a directive into national law, has treated purely internal situations in the same way as those governed by the directive, so that it has aligned its domestic legislation to Community law. When making a reference to the Court of Justice, the national court must determine the precise scope of the reference by national law to Community law.

The national tax legislation and the second and third questions on jurisdiction

27. Paragraph 7 of the Gewerbesteuergesetz (Trade tax law) provides in so far as is relevant:

'Trading profit is the profit, determined in accordance with the provisions of the Einkommensteuergesetz or the Körperschaftsteuergesetz, of a business, which is to be taken into account in calculating the income for the... period of assessment.'

28. Paragraph 8(1) of the Körperschaftsteuergesetz (Corporation tax law) provides:

'What constitutes income and how it is to be calculated shall be determined in accordance with the provisions of the Einkommensteuergesetz and of the present law.'

29. The first sentence of Paragraph 5(1) of the EStG provides:

'Traders who are legally required to keep accounting records and regularly draw up accounts or who keep accounting records and regularly draw up accounts although not so required shall at the end of the trading year evaluate the assets (first sentence of Paragraph 4(1)) in accordance with the commercial law principles of proper accounting.'

30. The referring court explains that under that provision the commercial law 'principles of proper accounting' are decisive where there are no overriding specific fiscal rules concerning the balance sheet.

31. The referring court continues that, by virtue of the above statutory incorporation by reference, the principles of proper accounting apply not only for the income tax of natural persons but also for the bases of assessment of corporation tax for capital companies and of trade tax, at issue in the present case. The reference to principles of proper accounting in the first sentence of Paragraph 5(1) of the EStG extends to the principles of proper accounting which are binding in commercial law on all traders, as mentioned in the first sentence of Paragraph 238(1) [22] and in Paragraph 243(1) [23] of the HGB and as codified in Section 1 of Book III of the HGB. Those principles comprise, in addition to the formal requirements, the rules on the substantive content of the annual accounts and the rules on presentation and valuation, also contained in Section 1 of Book III of the HGB. [24] The principles of proper accounting also therefore apply to the making of provisions and (unless Paragraph 6 of the EStG contains any more specific rule, as to which see below [25]) to their valuation.

32. The national court adds that it is debatable whether or to what extent, in addition to the principles of proper accounting which apply to all traders, the 'true and fair view' requirement applies by virtue of the first sentence of Paragraph 5(1) of the EStG.

22 — Set out in paragraph 15 above.
23 — Set out in paragraph 18 above.
24 — Paragraphs 246 to 256.
25 — Paragraph 38.

33. The national court's second question asks whether the Court has jurisdiction to interpret the Directive where national tax law is based on the premiss that the commercial law principles of proper accounting are applicable for calculating the profits of traders who draw up balance sheets, and

(a) those principles are laid down in the provisions for all traders (Section 1 of Book III of the HGB) which are harmonised by the law implementing the Directive or

(b) the specific accounting provisions for capital companies (Section 2 of Book III of the HGB) apply.

34. With regard to question (a), the referring court considers that the Court has jurisdiction to interpret the Directive in the context of the applicability for tax law purposes of the commercial law principles of proper accounting since the provisions of Section 1 of Book III of the HGB which apply to all traders (i) are covered by the tax-law reference and (ii) transpose elements of the Directive for capital companies and for other traders in the same way.

35. With regard to question (b), it also appears to consider that the Court has jurisdiction and refers to the reasoning of Advocate General Léger in his Opinion in *DE + ES Bauunternehmung*. [26]

36. Finally, the referring court notes in the order for reference that the national legislation on the accounting treatment of provisions, at issue in the main proceedings, distinguishes between a provision for loss and a provision for liability.

37. In the case of a provision for loss, the principles of proper accounting which are applicable by virtue of the first sentence of Paragraph 5(1) of the EStG include the principle that provisions must not exceed the amount which is necessary according to a reasonable commercial assessment. That principle is laid down in Paragraph 253(1) of the HGB and in Article 42 of the Directive.

38. The position is different however in the case of a provision for liability. As indicated above, [27] the principles of proper accounting are applicable pursuant to the first sentence of Paragraph 5(1) of the EStG only where there are no specific overriding fiscal rules. The EStG contains such specific rules [28] governing the valuation of a provision for liability. In essence, they also require a reasonable commercial assessment to be made. According to the referring court, case-law recognises that in the context of those rules also recourse must be had to the principles of proper accounting.

39. In its third question the national court asks whether the Court has jurisdiction to interpret the Directive where national tax law refers in another connection (namely other than by way of the first sentence of Paragraph 5(1) of the EStG) to concepts or criteria from commercial accounting law.

The jurisdiction of the Court

40. The issue of jurisdiction has been the subject of full argument by all those presenting observations — in writing by the Finanzamt für Großunternehmen in Hamburg (the defendant in the main pro-

26 — Case C-275/97 [1999] ECR I-5331, paragraph 26 et seq. The judgment of the Court was delivered after the Finanzgericht Hamburg had made the reference in the present case. See further paragraph 48 below.

27 — See paragraph 30 above.

28 — The national court explains that those specific rules are to be found in Paragraph 6(1)(3) in conjunction with indents 1 and 2 of the EStG, which has specific application thereto under Paragraph 5(5) (now Paragraph 5(6)) of the EStG, applied by analogy.

ceedings), the German Government and the Commission and at the hearing by the German Government and the Commission.

41. In essence, the German Government and the Commission concur in the view that the Court has jurisdiction on the basis of *Leur-Bloem* [29] and *Giloy*, [30] discussed further below. The Finanzamt für Großunternehmen in Hamburg, on the other hand, submits that interpretation of the Fourth Directive is irrelevant to resolution of the dispute. Member States have sole competence to determine the extent to which provisions are deductible for tax purposes. The reference to accounting principles in Paragraph 5(1) of the EStG was first inserted into the EStG in 1934; that version is still in force today. In any event neither the Fourth Directive nor German commercial law prescribes how the acquisition costs of provisions are to be valued. [31] For that reason, the link between commercial and fiscal accounts does not resolve any dispute as to such valuation. The specific rules in the EStG for the evaluation of provisions [32] lay down an autonomous criterion for national fiscal purposes; that autonomy remains even where in the result that criterion substantially or totally coincides with commercial law principles.

42. The question whether the Court is competent to interpret provisions of national legislation which in effect apply Community legislation to situations to which that Community legislation is not required to be applied as a matter of Community law has been considered most fully in *Leur-Bloem* and *Giloy*.

43. In *Leur-Bloem* the Court was asked to interpret the term 'exchange of shares' in Article 2(d) of the Merger Directive. [33] The purpose of that directive is to remove tax obstacles to intra-Community mergers, divisions, transfers of assets and share exchanges. The directive applies only to 'exchanges of shares in which companies from two or more Member States are involved'. [34] The transaction in issue in the main proceedings did not involve companies from different Member States but was purely internal to the Netherlands and hence not within the material scope of the Directive. The referring court however was of the opinion that the Netherlands legislature intended that the national legislation concerning internal and intra-Community

29 — Cited in note 2.

30 — Cited in note 3.

31 — *DE + ES Bauunternehmung*, cited in note 26.

32 — See note 28.

33 — Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States, OJ 1990 L 225, p. 1

34 — Article 1.

share mergers should be given the same interpretation. It reached that conclusion on the basis of the wording of the respective provisions, which was the same for domestic and intra-Community transactions, and their legislative history, in particular a statement in the Explanatory Memorandum of the State Secretary for Finance to the effect that, although Community law did not formally require domestic share mergers to benefit from the same conditions as intra-Community mergers, it was desirable with a view to the achievement of the single market that the treatment of the two categories of transaction should be the same.

44. The Court stated as follows:

'According to settled case-law, the procedure provided for in Article 177 of the Treaty is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court (see, in particular, the judgments in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 33 and 34, and in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 18 and 19).

Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling (see *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 35 and 20 respectively). Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (see *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 36 and 25 respectively).

A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indi-

rectly, to the circumstances of the case referred to the Court (see, to this effect, *Dzodzi* and *Gmurzynska-Bscher*, cited above, paragraphs 40 and 23).

Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract (see, as regards the application of Community law by domestic law, *Dzodzi* and *Gmurzynska-Bscher*, cited above; Case 166/84 *Thomasdünger* [1985] ECR 3001; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127 and, as regards the application of Community law by the effect of contractual provisions, Case C-88/91 *Federconsorzi* [1992] ECR I-4035 and Case C-73/89 *Fournier* [1992] ECR I-5621, all those cases being hereinafter referred to as 'the *Dzodzi* line of cases'). In those cases, the provisions of domestic law and the relevant contractual terms, which incorporated Community provisions, clearly did not limit application of the latter.

On the other hand, in its judgment in Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, the Court held that it had no jurisdiction to give a preliminary ruling on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32, hereinafter 'the Convention').

In *Kleinwort Benson*, the Court observed, in paragraph 19, that, unlike the situation in the *Dzodzi* line of cases, the provisions of the Convention which the Court was asked to interpret had not been rendered applicable as such by the law of the contracting State concerned. In paragraph 16 of its judgment in *Kleinwort Benson* the Court pointed out that the Act of Parliament in question took the Convention only as a model and only partially reproduced its terms. It went on to note, in paragraph 18, that express provision was made in the Act for the authorities of the contracting State concerned to adopt modifications "designed to produce divergence" between provisions of the Act and the corresponding provisions of the Convention. Furthermore, the Act also made an express distinction between the provisions applicable to Community situations and those applicable to domestic situations. In the first case, in interpreting the relevant provisions of the Act, the national courts were bound by the case-law of the Court on the Convention, whereas in the second case they had only to take account of it, so that they could set it aside.

However, this is not the situation in the present case.

The national court considers that the concept of "merger by exchange of shares", taken in its Community context, needs to be interpreted in order to resolve the dispute before it, that this concept is contained in the Directive, that it has been incorporated into the domestic Law transposing it and that it has been extended to similar, purely internal, situations.

In those circumstances, where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to this effect, the judgment in *Dzodzi*, cited above, paragraph 37).

In such a case, and pursuant to the allocation of judicial functions between national courts and the Court of Justice under Article 177, it is for the national court alone to assess the precise scope of that reference to Community law, the jurisdiction of the Court being confined to considering provisions of Community law only (*Dzodzi and Federconsorzi*, cited above, paragraphs 41 to 42 and paragraph 10 respectively). Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member State (*Dzodzi*, cited above, paragraph 42 and the judgment in Case C-73/89 *Fournier* [1992] ECR I-5621, paragraph 23).

It follows from all the foregoing considerations that the answer to the first question must be that the Court of Justice has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law.' [35]

45. In *Giloy* the Court was asked to interpret a provision of the Customs Code. [36] The main proceedings however were concerned not with import duties but with VAT, to which the Code was made applicable by the German Turnover Tax Law, which laid down a general rule that the provisions on customs duties were to apply *mutatis mutandis* to VAT on imports.

46. The Court repeated paragraphs 24 to 29 of its judgment in *Leur-Bloem* (the first six paragraphs of the extract set out above). [37] It then continued:

'In the present case, nothing in the file suggests that the main proceedings will not

35 — Paragraphs 24 to 34 of the judgment.

36 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302, p. 1.

37 — The equivalent paragraphs are numbered 20 to 25 in the judgment in *Giloy*.

be settled by application of rules of Community law.

Indeed, the file indicates that the provisions of domestic law in question apply without distinction to situations governed by domestic law and to situations governed by Community law, and sometimes to both simultaneously. In German domestic law, those provisions must be interpreted and applied uniformly, whether the applicable law is domestic law or Community law. For the purposes of their application to situations governed by Community law, the provisions in question are to be interpreted and applied in accordance with Article 244 of the Code. Consequently, German law requires that the domestic provisions in question should always be applied in accordance with that article.

In those circumstances, where, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to this effect, the judgment in *Dzodzi*, cited above, paragraph 37).

It follows from all the foregoing that the Court has jurisdiction to rule on the questions submitted to it.' [38]

47. In the present case the Court has been given what the Commission described at the hearing as a golden opportunity to reconsider its decisions in *Leur-Bloem* and *Giloy*: the national court has explicitly asked whether it has jurisdiction to rule in an analogous context. The Court, which has decided to hear the present case in plenary formation, should to my mind make good use of that opportunity and resist any temptation to avoid grasping the nettle of admissibility.

48. Admittedly the Court has assumed jurisdiction to interpret Community legislation applied by national legislation to situations beyond the scope of the Community legislation in several judgments [39] since the decisions in *Leur-Bloem* and *Giloy*. Those decisions may be thought therefore to have been affirmed and may thus appear to have coalesced into consistent case-law. That consistency however is to my mind more apparent than real. *Schoonbroodt* was a judgment of the First Chamber and *Adam* of the Second Chamber; in both cases the judgment merely referred to the earlier decisions as authority for the Court's assumption of

38 — Paragraphs 26 to 29 of the judgment.

39 — Case C-247/97 *Schoonbroodt* [1998] ECR I-8095, *DE + ES Bauunternehmung*, cited in note 26; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, and Case C-267/99 *Adam* ECR I-7467.

jurisdiction without questioning their merits. In *DE + ES Bauunternehmung* the Fifth Chamber did not consider the issue at all, simply ruling on the substance. Only in *Kofisa* did the Court explore the question whether it had jurisdiction. That case however was also decided by a chamber (again the Fifth Chamber), which may well have felt bound by the earlier rulings. The judgment moreover largely recites dicta from *Giloy*; to the extent that it seeks to grapple with the question, it limits itself to reiterating arguments which had been persuasively demonstrated by Advocate General Ruiz-Jarabo Colomer to be unconvincing, while ignoring altogether the powerful arguments against jurisdiction. Similarly the judgment in *Adam* makes no reference to the thoughtful and compelling analysis of Advocate General Tizzano, who concluded that the Court had no jurisdiction.

49. Even apart from the above reservations, I do not consider that it is correct to read total consistency in the Court's case-law. It must not be forgotten that in *Kleinwort Benson* the Court concluded that it did not have jurisdiction to interpret the Brussels Convention in circumstances where, rather than having been rendered applicable as such by national law, that Convention had been taken as a model and only partially reproduced. It is clear from the judgment of the Court that it considered two features of the national legislation at issue to be insuperable obstacles to its assuming jurisdiction: first, the legislation contained no 'direct and unconditional *renvoi* to provisions of Community law so as to incorporate them into the domestic legal order' [40] and, second, it did not require the national courts to decide disputes before them 'by applying absolutely and unconditionally the interpretation' provided by the Court. [41]

50. Kleinwort Benson was not mentioned by the Court in *Schoonbroodt*. It was distinguished in *Kofisa* — and indeed in *Leur-Bloem* and *Giloy* — on the grounds that in *Kleinwort Benson* the national legislation at issue provided for amendment 'designed to produce divergence' between that legislation and the corresponding provisions of the Convention and that the national courts were not bound by the case-law of the Court on the Convention. However, it seems to me that a national legislature will always be able to amend domestic legislation which goes beyond the required implementation of a directive, whether or not it is expressly empowered to do so in the legislation itself. As for the binding effect on national courts deciding disputes arising under such legislation of decisions of the Court on the parallel Community legislation, the parties submitting oral observations in the present case

40 — Paragraph 16 of the judgment.
41 — Paragraph 20 of the judgment.

were unable to put forward a satisfactory explanation of the position of the German courts, despite having been expressly asked by the Court to focus on that issue at the hearing. That the matter is controversial seems corroborated by the recent judgment of the Bundesfinanzhof, referred to by the Commission at the hearing, [42] in which that court — against whose decisions no appeal lies — took the view that in such a case it was not obliged to seek a preliminary ruling from the Court on the interpretation of the Community legislation since it was the application of national law that was at issue.

51. Even however if it is assumed that the principle laid down in *Leur-Bloem* and *Giloy* has the gravitas of consistent case-law, the present case to my mind well illustrates the problems to which that case-law gives rise.

52. In matters of interpretation, the context is, as the Court has generally recognised, of supreme importance.

53. The Court is being asked to interpret highly technical provisions of the Fourth Directive, enacted by the Community legislature with a view to mandatory disclosure of accounts by (at the material time) companies excluding their branches and excluding banks. [43] Those provisions are implemented in Germany in legislation requiring all traders, thus including branches of banks established in another Member State, to prepare and publish accounts in accordance with certain requirements. Those requirements do not explicitly require the accounts of traders other than companies to give a true and fair view of their financial position; the Fourth Directive and other German implementing provisions require companies' accounts so to do. German tax legislation requires traders to evaluate their assets for fiscal purposes in accordance with the commercial law principles of proper accounting. However, it admits of important exceptions to the application of those principles. [44]

54. There appears to be no consensus as to whether those principles of proper accounting include, with regard to non-corporate traders, the principle that the accounts should give a true and fair view of a non-corporate trader's financial position. The referring court states — although the Finanzamt disputes — that those principles include the legislative requirements with which all traders are required to comply when they draw up commercial accounts.

42 — Decision of 28 March 2000, VIII R 77/96, BFHE 191, p. 339.

43 — Although banks were subsequently made subject to many equivalent requirements by virtue of Directive 86/635 (cited in note 9), it appears that that directive had not been implemented in Germany at the time of the events giving rise to the main proceedings: see note 10.

44 — See paragraph 38 above.

55. Moreover the Finanzamt disputes the referring court's view that the reference to the principles of proper accounting is a sufficient link with the legislation implementing the Fourth Directive, pointing out that that reference pre-dated the Directive by several decades; it appears also from the Commission's observations at the hearing that the Bundesfinanzhof is of the view that in the present type of case the link with Community law is not sufficient to justify a reference to this Court. [45] The Finanzamt also states that in its view the Directive does not in any event resolve the substantive issue before the national court. Finally, the national tax legislation lays down its own rules for valuing a provision in the accounts for a liability; national case-law apparently recognises that in applying those rules recourse must be had to the principles of proper accounting; that case-law however has not been fully explained to the Court.

56. The context in which the provisions at issue apply to the dispute which gave rise to the main proceedings is thus manifestly distant — at several removes — from that envisaged by the Fourth Directive. That Directive is based on Article 54(3)(g) of the EC Treaty (now Article 44(2)(g) EC), which — in the context of companies' rights of establishment — empowers the Council and the Commission to coordinate 'the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms... with a view to making such safeguards equivalent throughout the Community'. The preamble to the Directive repeats the theme of the protection of members and third parties [46] by mandatory disclosure of comparable information. [47] The Directive does not seek to regulate the content and presentation of national tax returns, and legislation governing tax returns may, as I shall suggest, [48] have very different aims from legislation on accounting for the purpose of company accounts.

57. It seems to me moreover that similar difficulties are likely to arise wherever a directive is transposed by national law outside its intended context: it will be necessary to examine, for example, whether the directive is transposed in its entirety, to scrutinise the national legislative context and to consider whether the ruling of the Court of Justice will be binding on national courts as a matter of national law. That exercise will frequently require the Court to take a view on questions of national law which may well be — as in the present case — both complex and controversial.

58. It is now open to the Court to reconsider the conclusion it reached in *Leur-Bloem* and *Giloy* — or at the very least to reconsider the scope of that conclusion — in the light of the present case; the factors mentioned above in my view show that such an exercise is necessary. Since the

45 — Decision cited in note 42.

46 — Recital 1.

47 — Recitals 3, 4, 5 and 6.

48 — See paragraph 60 below.

arguments against the assumption of jurisdiction by the Court in this type of case are fully set out in my Opinion in *Leur-Bloem* and *Giloy*, and cogently reinforced in the Opinion of Advocate General Ruiz-Jarabo Colomer in *Kofisa*,[49] I will not reiterate them in this Opinion. I would however note that in my view the present case brings into sharper focus some of the arguments against jurisdiction there set out. In particular I would mention the following points.

59. First, it is difficult to see how it serves the purpose of Article 234 EC, which confers jurisdiction on the Court to give preliminary rulings concerning the validity and interpretation of acts of the institutions of the Community, for the Court to interpret Community provisions in so far as they are taken over by national legislation and applied to a situation manifestly outside the scope of those provisions and hence beyond their intended reach. For the Court to assume such jurisdiction looks dangerously like taking on tasks not imposed by the Treaties, particularly in fields such as direct taxation which might be regarded as for the time being within the competence of the Member States.

60. It is clear from what has been said above that the aims and the material and personal scope of the Fourth Directive are radically different from those of the fiscal legislation at issue in the main proceedings. That difference of context brings me to my second point, namely that the present case perfectly illustrates the principle that apparently identical provisions may have different meanings in different contexts. Company law rules regulating company accounts — now harmonised at Community level — seek to protect shareholders and third parties (for example, actual and potential creditors and employees) by the mandatory disclosure of prescribed information. National rules concerning the drawing up of accounts for fiscal purposes seek on the other hand to enhance and protect State revenue. The two contexts are thus manifestly different; indeed in several Member States wholly separate accounts are drawn up for tax purposes and company accounts purposes.

61. Third, the referring court will not as a matter of Community law be bound by the Court's judgment, which will thus inevitably be (again as a matter of Community law) purely advisory. Such a consequence clearly alters the function of the Court as

49 — See also the Opinions of Advocate General Tesauro in *Kleinwort Benson* and Advocate General Tizzano in *Adam*, together with the earlier Opinions of Advocate General Mancini in Case 166/84 *Thomasdünger* [1985] ECR 3001 and Advocate General Darmon in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763.

envisaged in the Treaty.[50] It also raises questions concerning the proper allocation of judicial resources.[51]

62. Fourth, the jurisdiction of the Court, far from being conferred by the Treaty, would be wholly dependent on national law, in the present case by way of a series of references the precise scope of which appears to be a matter of some debate at national level. That tenuous connection perfectly illustrates that the possible relevance of Community law in such a context is itself a matter of national law, which may well be controversial.

63. Fifth, the present case demonstrates that the Community interest may, when invoked as a justification for the assumption of jurisdiction by the Court in analogous cases, prove to be a two-edged sword. The Court stressed in *Leur-Bloem* and *Giloy* that it was 'clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply'.[52] In cannot however be in the Community interest for the Court's jurisdiction in any given case to depend solely on national law or for the Court to give a ruling which the national court to which it is directed is not bound to apply.

64. Finally, the points addressed above together with the observations submitted by the parties in the present case illustrate that the criterion laid down by the Court in *Leur-Bloem* and *Giloy* lacks legal certainty. The Commission stated at the hearing that there was much uncertainty about the circumstances in which the Court would or would not have jurisdiction in this type of case and asked the Court to resolve that uncertainty by reaffirming its ruling in *Leur-Bloem*. Given however that it is precisely that ruling which has led to such uncertainty, I cannot see how a simple affirmation of that judgment would help.

65. I thus remain persuaded that the objections to the Court's assuming jurisdiction to interpret provisions of Community legislation which apply by virtue of national law to persons or situations not within the scope of the Community legislation in question are compelling. Those objections, it may be added, seem sufficiently forceful even without considering the further practical difficulties to which the assumption of jurisdiction in such cases would certainly give rise, such as for example the greater difficulty of deciding the issues, the significant increase in the Court's case-load and the consequential drain on limited judicial resources.

50 — See Opinion 1/91 [1991] ECR I-6079, paragraph 61.

51 — See further paragraph 65 below.

52 — Paragraph 32 of the judgment in *Leur-Bloem* and paragraph 28 of the judgment in *Giloy*.

66. It may additionally be noted that the objections discussed above are reinforced by legal scholars: the decisions of the Court in *Leur-Bloem* and *Giloy* have generally been critically received by commentators. [53]

67. In my view therefore the Court should take the opportunity proffered by the present case to reverse its rulings in *Leur-Bloem* and *Giloy* (and the associated case-law) in which it assumed jurisdiction to interpret provisions of Community legislation which apply by virtue of national law to persons or situations not within the scope of the Community legislation in question.

68. If however the Court were not convinced of the need to go so far as to reverse those decisions, there is an alternative approach which would in my view, if not resolve, at least mitigate the difficulties which the earlier rulings entail. That alternative would be for the Court to affirm the criteria which it laid down in *Kleinwort Benson* [54] (and then passed over in the later cases), namely that, in order for the Court to be able to assume jurisdiction, the national legislation at issue must both contain a 'direct and unconditional *renvoi* to provisions of Community law' and require the national courts to decide disputes before them by applying 'absolutely and unconditionally' the interpretation provided to them by the Court. That solution, it may be noted, was the approach preferred by Advocate General Ruiz-Jarabo Colomer in *Kofisa*. [55]

69. That approach too would of course mean that the present case was inadmissible, since neither condition applies. But even if the Court were to choose to affirm its rulings in *Leur-Bloem* and *Giloy*, it is to my mind doubtful, in the light of the uncertainty as to their scope and as to the relevance in the present case of the Directive in national law, whether those rulings would in any event apply to the present case.

70. It might be thought that there is consequently no need to reconsider *Leur-Bloem* and *Giloy* but that the present case could rather be distinguished from the earlier ones. In my view however a failure by the Court unequivocally to resolve the issue now will continue to generate uncertainty in future cases. Moreover the present case shows — again for the reasons discussed above — that there are good reasons to reconsider the earlier rulings.

53 — See for example Anthony Arnull, *The European Union and its Court of Justice* (1999), pp. 53-56; Hjalte Rasmussen, 'Remedying the crumbling EC judicial system', 37 *Common Market Law Review* 1071, at pp. 1082-3 (2000); G. Tesauro, *Diritto Comunitario* (2001), pp. 275-7 and Peter Oliver, 'La recevabilité des questions préjudicielles: la jurisprudence des années 1990', [2000] *Cahiers de droit européen* 15, at pp. 35-38.

54 — See paragraphs 16 and 20 of the judgment.

55 — Cited in note 39, paragraphs 38, 50 and 51 of the Opinion. See however my objections to the *Kleinwort Benson* approach, set out in my Opinion in *Leur-Bloem* and *Giloy* at paragraphs 67 to 74.

Conclusion

71. I accordingly conclude that the correct response to the questions referred by the Finanzgericht, Hamburg, would be for the Court to rule that it has no jurisdiction to interpret provisions of Community legislation which apply by virtue of national law to persons or situations not within the scope of those provisions.