OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 September 1996 *

1. In Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam* the Gerechtshof, Amsterdam, seeks a preliminary ruling from the Court on the interpretation of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States (hereafter the 'Tax Directive' or 'the Directive'). [1] In Case C-130/95 *Bernd Giloy* v *Hauptzollamt Frankfurt am Main-Ost* the Hessisches Finanzgericht seeks a ruling on Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereafter 'the Customs Code' or simply 'the Code'). [2] I shall examine both cases in this Opinion because they both raise the issue of the Court's jurisdiction to give preliminary rulings under Article 177 of the Treaty in the context of disputes which fall outside the scope of Community law but to which Community law is rendered applicable by provisions of national law.

The background to the cases and the national courts' questions

Case C-28/95 Leur-Bloem

2. The Gerechtshof, Amsterdam, has asked the Court to give its first ruling on the interpretation of the Tax Directive, in particular the term 'exchange of shares' in Article 2(d) of the Directive.

3. The purpose of the Directive is to remove tax obstacles to intra-Community mergers, divisions, transfers of assets and share exchanges. Under most tax systems disposals of shareholdings and transfers of assets from one company to another give rise to taxable gains for the transferring shareholder or company. In a domestic context relief from tax is often granted where the transaction is connected with a grouping or restructuring operation. However, the relief available varies between Member States and, prior to the adoption of the Directive, sometimes did not extend at all to intra-Community transactions.

* Original language: English.

1 — OJ 1990 L 225, p. 1

2 — OJ 1992 L 302, p. 1.

4. The preamble to the Directive notes that 'mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; ... such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; ... to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level'. [3]

5. The preamble goes on to explain that that objective could be achieved only by introducing a common system of taxation. That system should 'avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company'. [4]

6. Those dual aims are achieved essentially by requiring Member States to defer taxation of gains arising on the disposal of assets or shares in connection with such transactions, while allowing them the possibility of recovering the deferred tax upon the ultimate disposal of the assets by the receiving company or upon the disposal by the shareholders of the new shares received under a share exchange.

7. Article 11 of the Directive allows Member States to withdraw the benefit of the Directive where the principal objective of a transaction or one of its principal objectives is tax evasion or avoidance.

8. The transaction in issue in the main proceedings does not involve companies from different Member States but is purely internal to the Netherlands. Mrs Leur-Bloem is the sole shareholder and director of Phoenix Uitzendorganisatie BV ('Uitzendorganisatie') and Phoenix Industrial BV ('Industrial'). Both companies are licensed to operate temporary recruitment agencies, the licences having a commercial value. Mrs Leur-Bloem intends to acquire the shares of an existing private limited company, Phoenix Holding BV ('Holding'), which has an issued and paid up share capital of HFL 35 000. The company had no assets and short-term debts of HFL 2 779 at 31 December 1991 and neither assets nor debts at 31 December 1992. Mrs Leur-Bloem proposes to exchange her shares in Uitzendorganisatie and Industrial for shares in Holding, which would then become sole owner of the shares in Uitzendorganisatie and Industrial.

3 — First recital.
4 — Fourth recital.

9. In the main proceedings Mrs Leur-Bloem is challenging an advance ruling given on the transaction by the Netherlands tax authorities. Mrs Leur-Bloem considers that the proposed share exchange constitutes a share merger qualifying for relief from tax under Article 14b of the 1964 Netherlands Income Tax Law. Article 14b(1) provides for the exclusion from taxable profits of the gain arising from the disposal of shares as part of a share merger. Article 14b(2) provides that a share merger includes the situation where:

'(a) a company established in the Netherlands acquires, in return for the transfer of a number of its shares together in some cases with an additional payment, possession of a number of shares of another company established in the Netherlands permitting it to exercise more than half the voting rights in the latter company, with a view to combining in a single unit, on a permanent basis from an economic and financial viewpoint, the undertaking of the acquiring company and that of another person'.

10. Article 14b(2)(b) contains an identical definition of share merger for intra-Community transactions. Article 14b(2)(c) contains a similar definition, although with a stricter requirement on voting rights ('all or nearly all the voting rights'), for share mergers involving one or more companies established outside the Community.

11. Article 14b(7) allows the Minister to authorize the tax authorities to apply the provisions of Article 14b by analogy where one (or both) of the two companies mentioned in Article 14b(2)(a) or (b) does (or do) not operate an undertaking.

12. The tax authorities take the view that the proposed transaction does not fulfil the requirements of Article 14b(2)(a) because the purpose of the acquisition of the putative subsidiaries' shares by the putative holding company is not to merge the subsidiaries into a larger unit from a financial and economic point of view. Such a unit already exists because both companies have the same director and sole shareholder.

13. Because it is purely internal to the Netherlands, the transaction in issue in the main proceedings does not fall within the scope of the Directive, which applies only to 'exchanges of shares in which companies from two or more Member States are involved': see Article 1 of the Directive. However, the national court is of the opinion that the Netherlands legislature intended that Article 14b(2)(a) and (b), concerning internal and intra-Community share mergers respectively, should be given the same interpretation. It reaches that conclusion on the basis of the wording of those provisions, which is

the same for domestic and intra-Community transactions, and their legislative history, in particular the second paragraph of point 3.5 of the Explanatory Memorandum of the State Secretary for Finance (Kamerstukken II, 1991-1992, 22 338, No 3). There the State Secretary, after explaining the modifications to be made to the Netherlands legislation in order to comply with the Directive, states that, although Community law does not formally require domestic share mergers to benefit from the same (advantageous) conditions as intra-Community mergers, it is desirable with a view to the achievement of the single market that the treatment of the two categories of transaction should be the same.

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

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

Can there be an exchange of shares within the meaning of Article 2(d) of Council Directive 90/434/EEC of 23 July 1990 if the acquiring company within the meaning of Article 2(h) does not itself carry on a business?

Is an exchange of shares within the meaning of Article 2(d) precluded by the fact that the same natural person who was the sole shareholder in, and director of, the acquired company before the exchange is the director of, and sole shareholder in, the acquiring company after the exchange?

Is there an exchange of shares within the meaning of Article 2(d) only if its effect is to merge the business of the acquiring company and that of another permanently in a single unit from a financial and economic point of view?

Is there an exchange of shares within the meaning of Article 2(d) only if its effect is to merge the businesses of two or more

acquired companies permanently in a single unit from a financial and economic point of view?

Is an exchange of shares which is carried out in order to bring about a horizontal setting-off of tax losses between the participant undertakings within a fiscal unit as referred to in Article 15 of the Wet op de Vennootschapsbelasting (Law on Corporation Tax) 1969 a valid commercial reason for the exchange for the purposes of Article 11 of the Directive?'

15. It may be noted that the Netherlands Government disputes the national court's conclusion that subparagraphs (a) and (b) of Article 14b(2) of the 1964 Law must be given the same interpretation. It considers that the national court has placed too much emphasis on the State Secretary's statement.

Case C-130/95 Giloy

16. In this case the Hessisches Finanzgericht seeks a ruling from the Court on the interpretation of Article 244 of the Customs Code, which provides as follows:

'The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. However, such security need not be required where such a requirement would be likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.'

17. The case before the national court is not however concerned with import duties but with VAT, to which the Code is made applicable by provisions of German law. On 28 March 1990 the German customs authorities issued a decision requiring Mr Giloy to

pay DM 293 870.76 by way of VAT on imported goods. Mr Giloy's action for the annulment of that decision is still pending.

18. On 16 August 1994 an order was issued for the attachment of Mr Giloy's earnings from employment. Upon learning of the amount of the debt, his employer terminated his employment by a letter dated 31 August 1994. Since then he has been receiving social assistance. Mr Giloy has applied to the referring court in order to have the implementation of the decision of 28 March 1990 suspended. Referring to his main application, he contends that there is good reason to believe that the decision is unlawful. He also contends that, regardless of the merits of his action, implementation of the decision should be suspended because he is likely to incur, and has already incurred, irreparable damage: the steps taken to enforce the debt through the attachment of his salary have resulted in his losing his job and being forced to rely on social assistance. He claims that his former employer has assured him that he will be taken back in the event of there being no risk of the disputed decision being implemented. He contends further that under the third paragraph of Article 244 of the Code he cannot be required to lodge a security because he is unable to do so on account of his economic situation.

19. The German authorities reply that there are no grounds for believing the disputed decision to be unlawful. Moreover, there is no risk of irreparable damage since the inquiries made to date indicate that further attempts to enforce the debt would for the moment be unsuccessful. Further measures could be taken only if Mr Giloy resumed employment and then only within strict limits in view of the German provisions relating to exemption from attachment; consequently, even if he resumed work he would not suffer irreparable damage.

20. In order to assist it in resolving the dispute the national court has put the following questions to the Court:

'1. Are the two conditions set out in the second paragraph of Article 244 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, namely

— good reason to believe that the disputed decision is unlawful

or

— irreparable damage for the person concerned,

completely independent of each other, with the result that suspension of the implementation of a decision is also to be granted where there is *no* good reason to believe that the payment order whose implementation is sought to be suspended is unlawful but irreparable damage is to be feared for the person concerned?

4. In the event that suspension of the implementation of the decision is granted, is security still to be lodged to the extent of the amount of the duty or does the possibility exist of limiting it to a partial amount having regard to the applicant's overall economic situation?'

If question 1 is answered in the affirmative:

21. The questions are put on the assumption that Article 244 of the Customs Code applies to the VAT debt in issue in the main proceedings. However, the national court wrongly assumes that import VAT is an import duty within the meaning of the Code. By virtue of Article 4(10) of the Code the term 'import duties' is restricted to customs duties and charges having equivalent effect and agricultural levies and other import charges introduced under the common agricultural policy or certain other agricultural provisions. It does not include VAT.

2. Does the presence of the condition mentioned in the second indent inevitably preclude a requirement to lodge security or is this subject to further conditions and, if so, which?

3. Does the danger of losing one's employment — which may possibly have already materialized on account of the claim for duty having become due — constitute "serious economic or social difficulties" even where the necessary minimum for subsistence is secured as a result of domestic legislation, for instance by social welfare?

22. As already noted, however, it seems that Article 244 of the Code is rendered applicable to the present case by provisions of German law. The relevant rules are contained in Article 69 of the Finanzgerichtsordnung. Article 69(2) lays down conditions for the grant of stay of execution by the tax authorities, while Article 69(3) provides that those conditions are to be applied *mutatis mutandis* by the finance courts. In its written observations to the Court the Commission notes that the wording of Article 69(2), which predated the entry into force of the

Code, differs somewhat from that of Article 244 of the Code and ought to have been amended in order to reflect the terms of that provision; it adds however that German case-law and literature recognizes that the customs authorities are obliged to apply Article 244 of the Code. In its replies to the two written questions put by the Court the German Government observes that Article 69(3) of the Finanzgerichtsordnung refers, for the purposes of proceedings before the finance courts, to the rules applicable to the tax authorities; Article 21(2) of the German Turnover Tax Law lays down a general rule that the provisions on customs duties are to apply *mutatis mutandis* to VAT on imports.

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

Relevant case-law

24. The issue was first considered by the Court in 1985 in *Thomasdünger*, [5] where the Court was asked to give a ruling on the interpretation of the Common Customs Tariff in proceedings concerning the importation of goods into Germany from France, a situation falling outside the scope of the Tariff. In his Opinion Advocate General Mancini explained that Thomasdünger's interest in seeking a tariff ruling was that certain German authorities, such as the German railways, made use of the tariff classification in fixing charges. He concluded that the Court should not reply to the national court's questions because 'the Court would in appearance be interpreting the provisions mentioned therein but would in reality be expressing an opinion on the internal rules in which those provisions had been absorbed and by which process they had lost their binding force'.

25. However, the Court met that objection with a simple reference to the familiar principle that, 'except in exceptional cases in which it is clear that the provision of Community law which the Court is asked to interpret does not apply to the facts of the dispute in the main proceedings, the Court leaves it to the national court to determine in the light of the facts of each case whether the preliminary ruling is necessary in order to decide the dispute pending before it'.

5 — Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001.

26. The Court addressed the issue more squarely in 1990 in *Dzodzi* [6] and *Gmurzynska-Bscher*. [7] Mrs Dzodzi, a Togolese national, married a Belgian national shortly before his death. Following the death of her husband Mrs Dzodzi sought the grant of a residence permit in Belgium in her capacity as a spouse of a national of a Community Member State. It was clear that the situation was a purely internal one and that there was no factor connecting it with Community law. However, under a rule of Belgian law the foreign spouse of a Belgian national was to be treated as if he or she were a Community national. It seems that the national court interpreted that rule as extending to aliens married to Belgian nationals the benefit of Community rules applicable to the spouses of nationals of other Member States residing in Belgium. Accordingly, in order to assist it in resolving the dispute the national court asked whether Mrs Dzodzi would have had the right to reside and remain in Belgium if her husband had been a national of a Member State other than Belgium.

27. The facts in *Gmurzynska-Bscher* are not dissimilar to those in *Giloy*. The German rules on VAT referred to the Nomenclature of the Common Customs Tariff for the purposes of tax exemptions and reductions. Mrs Gmurzynska-Bscher, who planned to import a work of art from the Netherlands into Germany, sought a tariff classification ruling with a view to determining her liability to VAT.

28. Advocate General Darmon, adhering to Advocate General Mancini's view in *Thomasdünger*, concluded that the Court did not have jurisdiction to reply to the national court's questions in either case. [8] He considered that the aim of the preliminary ruling procedure, namely to ensure that Community law was uniform in its effects, applied only within the field of application of Community law, as defined by Community law and Community law alone; a *renvoi* made to Community law could not extend the scope of Community law and, with it, the jurisdiction of the Court. It would be unacceptable for the Court's role to be reduced to one of delivering opinions or giving advice of the kind which a legal expert is sometimes called upon to give in a domestic court when it is required to apply foreign law.

29. However, the Court for the second time departed from the view of its Advocate General and in both *Dzodzi* and *Gmurzynska-Bscher* replied to the national courts' requests. In *Dzodzi* the Court observed:

'It does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the

6 — Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.
7 — Case C-231/89 [1990] ECR I-4003.

8 — Opinions of 3 July 1990, *Dzodzi*, cited in note 6, at p. I-3763 and *Gmurzynska-Bscher*, cited in note 7, at p. I-4009.

national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State.

On the contrary, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.' [9]

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

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

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

Nevertheless, the jurisdiction of the Court is confined to considering provisions of Community law only. In its reply to the national court, the Court of Justice cannot take account of the general scheme of the provisions of domestic law which, while referring to Community law, define the extent of that reference. Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State.' [10]

9 — Paragraphs 36 and 37 of the judgment.

10 — Paragraphs 40 to 42 of the judgment.

31. The *Dzodzi* and *Gmurzynska-Bscher* judgments were followed shortly afterwards in *Tomatis and Fulchiron*, [11] where the national court sought a ruling on the Common Customs Tariff in order to determine the rate of VAT applicable to certain goods under national law. They were also applied in rather different circumstances in *Fournier* [12] and *Federconsorzi*. [13] In *Fournier* the Court was asked to interpret a Community directive to which — somewhat unusually — effect was given by private-law agreements. The national court had the task of deciding which of a number of national insurance bureaux bore ultimate liability to the Fourniers in respect of a road accident in France. Article 2(2) of Council Directive 72/166 [14] provided for the conclusion between the six national insurers' bureaux of an agreement under which each bureau guaranteed, in accordance with its own national law, settlement of claims in respect of accidents within its territory caused by vehicles normally based in the territory of another Member State. Most of the provisions of the Directive took effect only upon conclusion of the agreement. The national court sought a ruling on the meaning of the term 'territory in which a vehicle is normally based' in Article 1(4) of the Directive in order to assist it in interpreting that term in the agreement entered into by the bureaux.

32. In my Opinion in that case I suggested that the Court should accept jurisdiction in accordance with the principle laid down in *Dzodzi*. Although that principle would not necessarily extend to all cases which turned on the construction of a private contract incorporating concepts of Community law, here the agreement in question was an essential element in the system set up by Directive 72/166. The conclusion of the agreement not only was contemplated by the Directive but also was a condition precedent to the entry into force of many of its provisions. [15]

33. In its judgment the Court replied to the national court's question without specifically addressing the jurisdiction point. However, in response to an argument concerning the interpretation of the Directive, the Court did emphasize that it was 'for the national court, as the only court with jurisdiction to interpret the agreement, to give to the terms used in that agreement the meaning which it considers appropriate, without being bound in that regard by the meaning which must be attributed to the same expression as used in the Directive'. [16]

34. In *Federconsorzi* an Italian court sought a ruling on the interpretation of certain provisions of Council and Commission regulations on agriculture in the context of a dispute between the Italian intervention agency and Federconsorzi, a contractor entrusted

11 — Case C-384/89 [1991] ECR I-127.

12 — Case C-73/89 *Fournier* v *van Werven* [1992] ECR I-5621.

13 — Case C-88/91 [1992] ECR I-4035.

14 — Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and to the enforcement of the obligation to insure against such liability, OJ, English Special Edition 1972 (II), p. 360.

15 — Paragraph 19 of the Opinion.

16 — Paragraph 23 of the judgment.

with intervention operations in the olive oil sector, regarding the extent of Federconsorzi's liability to the agency in respect of a quantity of olive oil which was stolen from one of Federconcorzi's warehouses. The contract between the parties provided that the contractor was to be liable 'for any losses for which he is responsible to the amount stipulated by the Community legislation in force'.

35. The Court, following the Opinion of Advocate General Van Gerven, held that the principle laid down in *Dzodzi* applied; the contractual provision in issue referred to the content of rules of Community law in order to determine the extent of the liability of one of the parties.

36. In its most recent pronouncement on this issue in *Kleinwort Benson*, [17] a case referred to the Court not under Article 177 of the Treaty but under the Protocol on the interpretation by the Court of the Brussels Convention, [18] the Court took a narrower view of the limits of its jurisdiction. The English Court of Appeal sought an interpretation of the terms 'matters relating to a contract' in Article 5(1) of the Convention and 'matters relating to tort, delict or quasi-delict' in Article 5(3). The Court of Appeal's question was designed to help it apply not the Convention itself but Schedule 4 to the Civil Jurisdiction and Judgments Act 1982, which contained rules modelled closely on the Convention allocating jurisdiction between the courts of the various parts of the United Kingdom. However, the provisions of Schedule 4 were not always identical to those of the Convention in the version in force at any given moment. That was true of Article 5(3) of Schedule 4 (although it did include the term 'matters relating to tort, delict or quasi-delict' appearing in Article 5(3) of the Convention, of which an interpretation was sought). Section 47(1) and (3) of the Act made provision for amendments to Schedule 4, including 'modifications designed to produce divergence between any provisions of Schedule 4 ... and a corresponding provision of Title II of the 1968 Convention'. The Act also laid down different rules on the interpretation of the Convention and Schedule 4. Section 3(1) of the Act provided that 'any question as to the meaning or effect of any provision of the Convention shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court'. By contrast, section 16(3)(a) of the Act provided that, in determining any question as to the meaning or effect of any provision contained in Schedule 4, 'regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title'.

37. Following a detailed analysis of the issues Advocate General Tesauro took the

17 — Case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

18 — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

view that the Court did not have jurisdiction to reply to the Court of Appeal's questions on the interpretation of the Convention and, what is more, proposed that the Court should reconsider the *Dzodzi* line of cases. Later in this Opinion I shall take up directly or indirectly a number of the points raised by Advocate General Tesauro.

38. Although not taking up the Advocate General's invitation to reconsider its previous decisions, the Court held that it did not have jurisdiction to reply to the Court of Appeal's questions. The Court noted that the United Kingdom provisions did not contain a direct and unconditional *renvoi* to provisions of Community law so as to incorporate them into the domestic legal order but merely took them as a model and did not wholly reproduce their terms. Moreover, express provision was made for modifications designed to produce divergence between the domestic provisions and corresponding provisions of the Convention. Accordingly, the provisions of the Convention had not been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the Contracting State concerned.

39. The 1982 Act did not require the United Kingdom courts to decide disputes before them by applying absolutely and unconditionally the interpretation of the Convention provided by the Court; where the Convention was not applicable, those courts were free to decide whether the Court's interpretation was equally valid for the purposes of the national law modelled on the Convention. Consequently, the Court's interpretation would not be binding on the United Kingdom court. Referring to Opinion 1/91, [19] the Court observed that it would be unacceptable for the replies given by the Court to the courts of Contracting States to be purely advisory and without binding effect; that would be to alter the function of the Court as envisaged by the 1971 Protocol, namely that of a court whose judgments were binding.

The arguments put forward in the present cases

Leur-Bloem

40. Written observations have been submitted in this case by Mrs Leur-Bloem, by the German and Netherlands Governments and by the Commission.

41. Mrs Leur-Bloem considers that the request is admissible. Since the purpose of the Directive is 'to create within the Community conditions analogous to those of a single market', it is not possible in Mrs Leur-Bloem's view to accord less favourable treatment to internal transactions

19 — [1991] ECR I-6079.

than to intra-Community transactions. The Netherlands legislature has accepted the principle that both categories of transaction should be treated equally.

42. The German and Netherlands Governments and the Commission consider that the Court has no jurisdiction to reply to the questions. The Netherlands Government contends that, although the national provisions in question also cover internal transactions, the State Secretary's Explanatory Memorandum merely indicates that it was considered desirable that internal transactions should benefit from the same treatment as intra-Community transactions. Neither that memorandum nor the provision itself provides explicitly for the application of the provisions of the Directive to internal transactions. It therefore considers that the Court should decline jurisdiction for the reasons which it gave in *Kleinwort Benson*.

43. The Commission considers that, while it is desirable that Member States should model their national provisions on Community law, thereby ensuring spontaneous harmonization, that does not mean that the national rules are subject to the institutional rules of the Treaty, in particular Article 177, even though the interpretation of the concept of share exchanges is necessary for the resolution of the dispute. The Commission notes that Article 14b(2) of the Law does not refer to the Directive or render it applicable but merely reproduces — and then not word for word — the terms of Article 2(d). There would be nothing to prevent the Netherlands legislature from amending its legislation. By contrast with the legislation in issue in *Kleinwort Benson*, the Netherlands legislation does not even require the national court to have regard to the case-law of the Court.

44. The Commission considers the counter-argument based on the need to ensure uniform application of Community law convincing neither in theory nor in practice. The limits of the Court's jurisdiction necessarily coincide with the limits of Community law. There are serious institutional objections to the contrary view. The Court's jurisdiction would be determined by the legislative choice of a Member State. Moreover, since the Netherlands legislation uses the same definition of share exchange for transactions involving companies established outside the Community, the Court's jurisdiction would extend to share exchanges involving one or more companies from non-member countries. The Commission adds finally that it would hardly be possible for the Commission to institute proceedings against the Netherlands under Article 169 of the Treaty simply because of a choice of the Netherlands legislature.

Giloy

45. In this case written observations were submitted by the Commission alone. Taking the opposite view from that which it takes in

Leur-Bloem, the Commission considers that, notwithstanding the absence of an express reference to Article 244 of the Customs Code in the German legislation, it is clear that Article 244 of the Code is applicable in the German legal order. The Community rule is therefore absolutely and unconditionally incorporated into German law, as required by the Court's judgment in *Kleinwort Benson*.

46. In its replies to the Court's written questions, the German Government also takes a different view from that which it takes in *Leur-Bloem*. It distinguishes the German legislation from the Netherlands legislation in issue in *Leur-Bloem* on the ground that the Customs Code is a dynamic component of German law by virtue of Article 21(2) of the German Turnover Tax Law. The German legislature has opted for the application of the Code and recognized the competence of the Court, because import VAT and customs duties are often levied according to a single procedure and by a single decision. It is therefore essential that the provisions on customs duties and VAT should be interpreted in the same way.

Appraisal of the jurisdiction issue

The scope of Community law and the purpose of Article 177

47. It might at first sight seem surprising that the Court, whose function under the Treaty is to 'ensure that in the interpretation and application of [the] Treaty the law is observed' (Article 164), should have assumed jurisdiction in cases in which Community law does not apply. Like other legal systems, Community law defines its own field of application, and it might seem reasonable to assume that all Community law, including Article 177, is intended to apply solely within that field. The purpose of Article 177, within the scheme of the Treaty, is to ensure that Community law is uniformly applied in all the Member States. It is not immediately clear how it would serve that purpose for the Court to rule in disputes in which a Community rule is borrowed by a Member State and transposed to a non-Community context. In such disputes the rules which national courts are called upon to apply are rules of national law rather than Community law; there can therefore be no immediate threat to the uniform application of Community law.

48. In *Dzodzi* the Court sought to meet that difficulty by arguing that 'it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied'. [20] In other words, by ruling in disputes arising in a non-Community context the Court might forestall the incorrect application of Community

20 — Paragraph 37.

law in the future. At first sight there is some force in that argument. If a national court considers it necessary to interpret a Community rule in order to give judgment, it will be obliged to try to interpret the rule itself in the absence of authoritative guidance from the Court. If it were to place an incorrect interpretation on the Community rule, the proper application of Community law might be threatened indirectly: although adopted in a non-Community context, that interpretation might well be followed in the Member State concerned by other courts and by administrative authorities when the rule in question was applied in a Community context.

49. Ultimately, however, that argument is not convincing. In such circumstances the threat to the proper application of Community law in the State concerned would at most be only indirect and temporary. It would be clear that any interpretation given to a Community rule by a national court would not be based on a ruling from the Court and that, as soon as that interpretation was applied in a Community context, it would be open to challenge. Moreover, the Court's concern about such remote threats to the uniform application of Community law is difficult to reconcile with the fact that Article 177 envisages that Community law will be interpreted and applied primarily by national courts. Community law is applied every day by national courts; only in the relatively small number of cases heard by final appeal courts is there an obligation to refer.

50. Moreover it is not easy to see how any legal rule can be interpreted out of its context or, to use the phrase employed in *Dzodzi*, 'irrespective of the circumstances in which it is to be applied'. The Court's ruling in *Dzodzi* can perhaps be partly explained by the tolerant approach which the Court adopted at that time to national courts' requests in general. The Court would question the necessity of the ruling sought by a national court only very exceptionally, in particular where it seemed apparent that the ruling was being sought improperly by means of a contrived dispute or that the provision whose interpretation was sought was manifestly incapable of applying to the dispute.

51. However, the ruling in *Dzodzi* no longer reflects the Court's position. In a series of recent cases beginning with its ruling in 1993 in *Telemarsicabruzzo* [21] the Court has placed more emphasis on the need to give a ruling within the context of the factual situation of the case and has accordingly been more strict in demanding that national courts clearly specify the factual and legislative context in which a ruling is sought. [22] That they do so is important not only to ensure that the

21 — Joined Cases C-320/90 to C-322/90 [1993] ECR I-393; see also Case C-157/92 *Banchero* [1993] ECR I-1085, Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, Case C-378/93 *La Pyramide* [1994] ECR I-3999 and Case C-458/93 *Saddik* [1995] ECR I-511.

22 — See most recently the Order of the Court of 19 July 1996 in Case C-191/96 *Mario Modesti*.

Court provides a national court with a reply that is relevant to the dispute before it but also because it is often difficult or even impossible to interpret a rule in the abstract.

The different contexts of the Community and national rules

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

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

54. As regards more particularly the national court's final question on the interpretation of the concept of tax avoidance in Article 11 of the Directive, it would concern me that it is not clear from the documents before the Court whether the tax advantage referred to, namely the horizontal setting off of losses, would be an issue in an intra-Community context. In order to place the question of interpretation put to the Court firmly in context it might therefore be necessary to imagine a comparable situation which could undoubtedly arise in an intra-Community context, comparable in the sense that the tax advantage would arise not from the share

exchange itself but from the resulting corporate structure. For example, one might imagine a situation in which, as part of a cross-border grouping operation undertaken for commercial reasons, a holding company was established in a Member State partly for tax reasons, for example in order to average the rate of tax incurred on the profits of subsidiaries in various countries or to gain the benefit of a tax treaty entered into by the Member State concerned. Again it is apparent that the factual situation in *Leur-Bloem* has scarcely provided a focus for debate on all the issues that might be relevant to the interpretation of the concept of tax avoidance in Article 11, a concept whose scope has important consequences for the application of the Directive.

55. It is true that there is never any guarantee that the factual situation in a case will allow all relevant issues to be considered; on occasions where the Court has found it necessary to qualify or depart from previous decisions, it is often because it was not possible fully to foresee the consequences of a ruling. The risks would be significantly increased, however, if the Court were to assert jurisdiction in a category of cases in which it would systematically be required to interpret provisions outside their proper context. It seems to me to be inherently unsatisfactory that it should be necessary to take into account, by a process of extrapolation, fictitious situations — having no real connection with the one in the main proceedings — in order to provide the necessary focus. It will be easier in some cases than in others to imagine a genuine Community context. Even so there would still be the risk of inadvertently missing relevant factors or being misled by extraneous factors. For example, as I shall explain below, even in the apparently closely related contexts of import duties and VAT different considerations may apply. Moreover, it will often be necessary to allow the procedure before the Court to run its course before the Court is able to establish with a sufficient degree of certainty that it is able to rule.

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

56. Even on the assumption that the Court is able to provide a proper interpretation of Community law in a dispute arising in a non-Community context, there is no certainty that the Court's ruling will be relevant to that dispute. The Court has consistently emphasized the importance of interpreting Community provisions in their context, and it is clear that even two identically worded provisions of Community law may require different interpretations by reason of their different contexts. As the Court held in *Metalsa*: [23]

'It is clear ... that the extension of the interpretation of a provision in the Treaty to a

23 — Case C-312/91 [1993] ECR I-3751, paragraph 11 of the judgment. See also Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329.

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

57. It seems to me that the same applies *a fortiori* to similarly or identically worded rules of Community and national law. Considerations relevant to the interpretation of a Community rule, such as its purpose and its place within the scheme and aims of the Treaty, may be of no relevance to the interpretation of the national rule. The difference in the contexts in which Community and national rules apply may therefore dictate different interpretations of those rules.

58. For example, the dual aims of the Directive in issue in *Leur-Bloem* are to remove tax obstacles to cross-border grouping of undertakings by establishing common rules on tax relief, while safeguarding the financial interests of Member States by allowing for the possibility of recovery of the tax deferred notwithstanding the cross-border element. Those aims have no relevance in an internal context.

59. The same applies to the extension of the Community rules governing one area of law to another area not harmonized at Community level. For example, in *Giloy* the German legislation establishes a close link between import duties and VAT on imports. Even there, however, as the Court's recent judgment in *Pezzullo* [24] shows, different considerations may nevertheless apply. In that case the Court held that the relevant Community directive [25] allowed the Member States to provide that, in the case of release for home use in the Community of goods previously subject to inward processing arrangements, the agricultural levy payable on importation was to bear default interest for the period between temporary importation and definitive importation; by contrast, under the Sixth VAT Directive interest could begin to accrue only from the moment when the goods ceased to be subject to inward processing arrangements and were declared for home use. In my Opinion I suggested that the rationale for the distinction might lie in the deduction mechanism that applies in the case of VAT but does not apply to import levies. The judgment also demonstrates that the difference in context may become apparent only once the Court has interpreted the provision in question.

60. That a national court might, after obtaining a ruling from the Court, choose to disre-

24 — Case C-166/94 *Pezzullo Molini Pastifici Mangimifici* v *Ministero delle Finanze*, judgment of 8 February 1996.

25 — Council Directive 69/73/EEC on the harmonization of provisions laid down by law, regulation or administrative action in respect of inward processing, OJ, English Special Edition, Vol. I 69(I), p. 75.

gard it on the ground that the contexts of the Community and national rules differ was a factor which influenced the Court in *Kleinwort Benson*. There the Court noted that, since the United Kingdom legislation had not rendered the provisions of the Brussels Convention applicable as such in internal situations, the United Kingdom courts would be free to decide whether the Court's interpretation was equally valid for the purposes of the domestic provisions. The Court referred in that regard to the following passage in Opinion 1/91:

'... it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article.'

61. Even if the analogy with the EEA Agreement is not complete, it cannot be denied that the principle that the Court's rulings are binding on national courts is fundamental in ensuring the uniform application of Community law. That the Court should accept that a national court is in practice free to ignore its rulings in certain categories of cases on grounds of the different context would seriously undermine that principle.

62. Moreover, the absence of any guarantee that the Court's ruling will be relevant to the dispute, together with the fact that there is no immediate threat to the uniform application of Community law, substantially weakens the case for extending the Article 177 procedure — with the attendant delay in the resolution of the dispute and costs for the parties, for the Commission and Member States and for the Court — to the potentially large number of cases in which Member States may decide to borrow Community rules.

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

Further conceptual and practical difficulties in the application of Article 177

64. There are moreover several other problems associated with extending the Article 177 procedure to disputes arising in a non-Community context. First, in such cases it is only by a process of legal gymnastics that it is possible to found, for courts against whose decisions there is no judicial remedy, an obligation to refer under the third paragraph of Article 177. It would be necessary to argue that Article 177 imposed such an obligation, even though the need for an interpretation of Community law arose not from Community law but from national law. Moreover, there is likely to be considerable uncertainty on the part of supreme courts as to the scope of their obligation to refer.

65. Secondly, Article 177 also provides for rulings on the validity of Community acts. It would be particularly inappropriate for the Court to give such a ruling in a dispute falling outside the field of application of an act. Moreover, the relevance of such a ruling to the dispute would be even more indirect than in the case of a ruling on interpretation.

66. Finally, on a practical level I share the concerns expressed by Advocate General Tesauro [26] concerning the potential volume of cases in which a national court might identify a link between national and Community rules and decide to seek a ruling. As he points out, it is increasingly common for domestic rules or conventions with non-member countries to be based on, or inspired by, Community law.

The Kleinwort Benson *judgment*

67. In *Kleinwort Benson* the Court sought an intermediate solution by introducing the requirement that the national rule must contain a direct and unconditional *renvoi* to the provisions of Community law so as to incorporate them into the domestic legal order. That test possibly has some advantages: it will shield the Court from cases which have only a tenuous link with Community law and in which the disparity in contexts is most marked.

68. However, the solution in *Kleinwort Benson* is something of an uneasy compromise. It does not, first of all, have any sound theoretical foundation. I do not think the criteria laid down distinguish between conceptually

26 — See paragraph 26 of his Opinion in *Kleinwort Benson*, cited in note 17.

distinct categories. Where the authors of the Treaty or of Community legislation choose not to extend Community law to a particular area, Member States may take different views on the need to do so unilaterally in their domestic legislation. A Community rule which, for one Member State, dictates the content of related national rules may be seen by another Member State as no more than a potentially interesting model with a convenient body of case-law.

69. Notwithstanding the legislative choice which a Member State may make, the Community and national legal orders remain distinct. In the absence of an express indication in Article 177, I do not think the Court should permit the scope of its jurisdiction to be determined by national legislation. Were it to do so its jurisdiction would vary widely between the Member States.

70. Secondly, I do not think the ruling in *Kleinwort Benson* achieves what it sets out to do, namely to guarantee that the Court's ruling will be applied by the national court. Even where national legislation contains an express *renvoi* to Community law, so that the wording of the Community and national rules are identical, it would still be open to the national court to conclude that the different contexts of the two provisions dictated different interpretations. As already noted, even two identically worded provisions of Community law may require different interpretations by reason of their different contexts.

71. Thirdly, as I have already explained, notwithstanding the close link between the Community and national rules, there remain the risks and difficulties inherent in interpreting Community rules outside their proper context.

72. Fourthly, as the present cases show, the requirement of a direct and unconditional *renvoi* to Community law is hard to apply and is arbitrary. In *Giloy* it appears to be common ground that the German customs authorities are required to apply Article 244 of the Code to the collection of import VAT; yet that requirement is not at all clear from the legislation but stems partly from case-law and legal writings. It is in any event not for the Court to interpret the German legislation — that is a matter for the national court alone. In *Leur-Bloem* there is certainly no direct and unconditional *renvoi* to Community law in the Netherlands legislation. However, that may simply be because of the nature of the Community instrument. While a national rule may conceivably contain an express reference to a Community regulation

or convention, a Member State wishing to transpose the rules contained in a directive to a non-Community context may simply extend the scope of its national implementing legislation. As in *Leur-Bloem*, the link with the Community rule may be inferred by the national court from the wording and purpose of the national provisions, possibly by reference to the *travaux préparatoires*. That Article 14b(2)(a) of the Netherlands Law of 1964 does not, as the Commission points out, reproduce word for word the text of the Tax Directive is hardly surprising — neither does Article 14b(2)(b), which purports to implement the Directive.

73. More generally, I think it would be arbitrary to base any distinction on the manner by which a Member State transposes a Community rule to a national context. For example, the result achieved by extending to domestic situations certain advantages granted by a directive applicable solely to intra-Community situations might equally be achieved by an appropriately worded rule prohibiting reverse discrimination. Whatever the means employed, the fact remains that in disputes such as the present the rule applicable is ultimately one of national law. Such disputes do not concern rights or obligations arising from Community law.

74. Finally, as we have seen in the present cases, an intermediate solution such as that adopted in *Kleinwort Benson* is likely to entail considerable uncertainty. The result will inevitably be systematic challenges to the Court's jurisdiction which in many cases it will be possible to resolve only after the procedure before the Court has run its full course. Moreover there will be further uncertainty, if the Court does exercise jurisdiction, as to whether the national court should apply the ruling, having regard to the different contexts.

The limits of the Court's jurisdiction under Article 177

75. My conclusion, therefore, is that the Court should only rule in cases in which it is aware of the factual and legislative context of the dispute and in which that context is one contemplated by the Community rule. It seems to me that that view is the only one which is consistent with legal principle and with the purpose of Article 177; which guarantees the relevance of the Court's ruling to the determination of the dispute; and which avoids the risk of the Court being asked to interpret a Community rule outside its proper context. It also provides a workable and clear criterion which will provide national courts with the requisite degree of certainty concerning the scope of the Court's jurisdiction.

76. Consequently, I take the view that the Court should rule in neither of the present cases. In both cases the national legislature has borrowed a Community rule and transposed it to a context outside its contemplation.

77. As far as previous cases are concerned, I share Advocate General Tesauro's view that the Court should no longer rule in cases such as *Thomasdünger*, *Dzodzi*, *Gmurzynska-Bscher* and *Tomatis and Fulchiron*. On the other hand, it seems to me that the *Fournier* and *Federconsorzi* cases were correctly decided. In those cases there was the fundamental difference that the contractual arrangements in question were entered into in pursuance of the Community rules. The facts of both cases therefore fell squarely within the contemplation of the Community rules, and it was consistent with both the purpose of Article 177 and the requirement that the Court should rule in a relevant context for the Court to reply to the national courts' questions.

78. It is true, as Advocate General Tesauro noted in *Kleinwort Benson*, that the interpretation of the contracts in question in *Fournier* and *Federconsorzi* was a matter for national law. However, that is also true where the interpretation to be given to a Community rule is relevant to the interpretation of a national implementing rule. Nevertheless there is in both cases the common feature that the rule or contractual provision applies within a Community context.

79. I should emphasize that I am not proposing that the Court should decline jurisdiction in all cases in which the relevance of a question arises because of a possible breach of national law. Take, for example, a situation in which a Member State has exercised a discretion reserved to it by a directive to impose stricter requirements than those stipulated by that directive, but the national implementing legislation entitles the competent authority of the Member State only to adopt the provisions which are absolutely necessary as a matter of Community law for the implementation of the directive (a situation which is similar to that in the case of *RTI* [27]). In such a situation the national court may wish to ascertain the minimum requirements imposed by the directive, and refer a question to the Court to that effect, in order to address an argument that the Member State acted beyond the powers conferred upon it by the national legislation. In such circumstances, I consider that the Court should assume jurisdiction since the national law has not transposed the Community rules into a different context; there is thus no danger of the Court answering a question out of context.

80. It may be useful to think in terms of a distinction between the 'vertical' and 'horizontal' effects of Community law in a national legal system. In cases in which national law has transposed Community law into a domestic context to which the Community law itself does not apply, one is dealing with what might be termed a 'horizontal' situation: Community law is only relevant because it has been extended by choice of national law to a domestic situation to which

27 — See my Opinion of 11 July 1996 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 and Garante per la Radiodiffusione e l'Editoria* [1996] ECR I-6471.

it was not intended to apply; such extension may be effected by means of an express extension or mirroring of the Community rules, or by means of some general provision of national law prohibiting reverse discrimination or unfair competition. On the other hand, when Community law is implemented only to the extent envisaged by the Community legislation, effects that flow foreseeably down through national law from that implementation, even if remote, can be said to be within the contemplation of Community law. These might be regarded as 'vertical' effects. In my view, for example, the Court would have jurisdiction in a case such as *Federconsorzi* even if the litigation were one step further down the chain of events in the sense that a company in similar circumstances had paid up without dispute but its insurers had contested the sum paid when it sought to claim under its insurance contract, resulting in a reference to the Court on the meaning of the same Community provision as that in issue in *Federconsorzi*.

81. By using the expression 'within the contemplation of Community law', I do not mean to limit the category of justiciable references to situations specifically envisaged by the drafters of Community legislation: I suspect that they may not, for example, have envisaged the need as a result of the theft of olive oil in the case of *Federconsorzi* to interpret a contractual term referring to the Community provision. I simply mean to refer to situations which can be said to have resulted naturally from the implementation of Community law and not from Community law being shifted sideways into a situation in which its application was never intended.

Conclusion

82. Accordingly, I am of the opinion that the Court should reply as follows to the questions put by the Gerechtshof, Amsterdam, in Case C-28/95 *Leur-Bloem* and by the Hessisches Finanzgericht in Case C-130/95 *Giloy*:

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