OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 28 June 2001 [1]

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1. The Collège Juridictionnel de la Région de Bruxelles-Capitale (Judicial Board of the Brussels-Capital Region), Belgium, has asked the Court of Justice to interpret Article 49 EC and related articles, in order to establish whether they preclude a municipal regulation imposing an annual tax on satellite dishes.

I — The national regulations and facts in the main proceedings

2. The municipal administration of Watermael-Boitsfort, sitting on 24 June 1997, approved a regulation to levy an annual tax on the ownership of satellite dishes [2] (hereinafter 'the regulation') during the financial years 1997 to 2001 inclusive. [3]

2 — Prior to the adoption of that tax regulation, the Municipal Administration had adopted, on 27 February 1997, planning rules relating to the conditions which must be fulfilled by outdoor aerials; this provides, for example, that an aerial must not be fitted in a visible position on a listed building, it must be in keeping with the building's architectural features, under no circumstances may it be fitted at the front of a building, and it must not exceed 1.20 metres in diameter.

3 — As a result of infringement proceedings No 98/4137 brought by the Commission against Belgium for adopting regulations to levy tax on satellite dishes, the Brussels-Capital Region issued a circular informing the municipal administrations that the tax was incompatible with the EC Treaty and asking them to abolish it with effect from 1 January 1999. The Municipal Administration of Watermael-Boitsfort did so by a decision adopted on 21 September that year. However, that abolition has no influence on the present matter, since Mr de Coster's claim is against the assessment for the financial year 1998.

3. Under Article 2 of the regulation, the rate of the tax was set at 5 000 Belgian francs per satellite dish, whatever its size. The tax was due for the whole calendar year, regardless of the date of installation of the dish during the tax year.

4. Article 3 provided that the tax would be payable by the owner [4] of the satellite dish on 1 January of the tax year.

5. On 10 December 1998, Mr de Coster lodged a complaint against the assessment of the tax for that financial year, on the ground that the tax regulation was contrary to the freedom to receive television programmes from other Member States, established in Article 59 of the EC Treaty (now, after amendment, Article 49 EC), concerning freedom to provide services, and Council Directive 89/552/EEC of 3 October 1989 (hereinafter 'the Directive'). [5]

II — The Community legislation

6. Article 49 EC provides that 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

7. The first paragraph of Article 50 EC establishes that services are to be considered to be 'services' within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

8. The Directive states, in its preamble, that television broadcasting constitutes, in normal circumstances, a service within the meaning of the Treaty; Community law provides for free movement of all services normally provided against payment, without exclusion on grounds of their cultural or other content and without any restriction affecting nationals of Member States established in a Community country other than that of the person for whom the services are intended.

It is also stated in the preamble that this right to free movement, as applied to the broadcasting and distribution of television services, is a specific declaration in Community law of freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all

4 — The co-owners, where appropriate.

5 — Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60).

Member States. Accordingly, it is stated that the aim of the Directive is to remove restrictions on freedom to broadcast within the Community, as required by the Treaty.

9. Under Article 2 of the Directive, Member States are to ensure freedom of reception and are not to restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the Directive.

III — The question referred to the Court for a preliminary ruling

10. On 9 December 1999, the Collège Juridictionnel de la Région de Bruxelles-Capitale submitted the following question for a preliminary ruling:

'Are Articles 1 to 3 of the tax regulation on satellite dishes, adopted in a vote by the Municipal Council of Watermael-Boitsfort sitting in public on 24 June 1997, introducing a tax on satellite dishes, compatible with Articles 59 to 66 of the Treaty establishing the European Community of 25 March 1957?'

IV — The admissibility of the question. The definition of court or tribunal

11. The Commission expresses doubts as to whether the Collège Juridictionnel de la Région de Bruxelles-Capitale is a 'national court or tribunal' for the purposes of Article 234 EC; I am therefore required to examine in depth the nature of the body which has made the reference. Both its origin and its structure have very specific features which make it difficult to categorise according to the criteria so far provided by the case-law of the Court of Justice.

12. Article 234 EC provides that the Court of Justice is to have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and of the acts of the institutions of the Community. The second paragraph adds that, where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

13. However, the Treaty does not define the term 'national court or tribunal'. Nor does the Court of Justice, which has merely laid down a number of criteria for guidance, such as whether the body is established by law, whether it is permanent and independent, whether its jurisdiction is

compulsory, whether its procedure is *inter partes*, whether the decision is of a judicial nature, and whether it applies rules of law. [6]

14. The result is case-law which is too flexible and not sufficiently consistent, with the lack of legal certainty which that entails. The profound contradictions noted between the solutions proposed by Advocates General in their Opinions and those adopted by the Court of Justice in its judgments illustrate that the path is badly signposted and there is therefore a risk of getting lost. The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted. [7]

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

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

15. I shall now try to describe the path trodden between the *Vaassen-Göbbels* case [8] and the judgment in *Österreichischer Gewerkschaftsbund*; [9] I shall then suggest a change of direction which I believe to be essential and, consequently, propose that the judgment should be delivered in this case by the Court of Justice in plenary session.

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

16. It all began in the *Vaassen-Göbbels* case. A reference for a preliminary ruling had been made by an arbitration tribunal which did not form part of the Netherlands legal system but had jurisdiction to hear appeals brought against the decisions of a social security institution. The Court of Justice set out, for the first time, five of the criteria which it considers determine whether a body constitutes a court or tribunal: statutory origin, permanence, *inter partes* procedure, compulsory jurisdiction, and the application of rules of law. [10]

8 — Case 61/65 *Vaassen-Göbbels* [1966] ECR 377.

9 — Cited in footnote 6 above.

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

17. Since that judgment the Court has, in each case, ascertained whether those requirements are met; it has refined and perfected them, adding others, such as the requirement that the body should be independent, which was mentioned in the judgment in *Pretore di Salò* [11] and adopted unconditionally in the *Corbiau* case. [12] It is significant that the criterion of independence, which is the most important feature that a court must display, should have to wait until 1987 to appear in a judgment of the Court of Justice.

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

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

19. Although reference had already been made in *Pretore di Salò* to independence as one of the conditions for a body to be regarded as a court or tribunal for the purposes of Article 234 EC, the judgment in *Corbiau* was the first to give it its fundamental meaning, requiring that the body seeking the preliminary ruling should act as a third party [13] in relation to the authority which adopts the decision forming the subject-matter of the proceedings. [14]

20. The Court of Justice was equally categorical in *Criminal proceedings against X*, [15] in which the reference for a preliminary ruling had been made by the Procura della Repubblica. The Court declared that it did not have jurisdiction, because the prosecutor did not fulfil the requirement of independence.

21. In the *Dorsch Consult* case, [16] the Court of Justice overlooked the requirement that the body taking the decision should not be linked to the parties and focused on the point that its objective

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

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

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

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

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

16 — Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

should be to carry out its task 'independently' [17] and 'under its own responsibility', [18] which allowed it to consider that the German Federal Public Procurement Awards Supervisory Board was a court even though it was linked to the organisational structure of the Bundeskartellamt (Federal Cartel Office) and the Federal Ministry for Economic Affairs. [19]

22. For the Court of Justice it was crucial that the fundamental provisions of the statute governing the German Judiciary as regards annulment or cancellation of appointments, and also independence and the possibility of dismissal, applied by analogy to the members of the Federal Board. [20]

23. The judgment in *Köllensperger and Atzwanger* [21] took the same approach. The Court of Justice examined whether the Public Procurement Office, Tyrol, Austria, was a court or tribunal and, although it acknowledged that the law governing that body includes a passage referring to the cancellation of the appointments of its members which is too vague, and does not contain any specific provisions on the rejection or withdrawal of members, [22] it stated that the independence of its members was guaranteed by the application of the General Law on Administrative Procedure, which contains very specific provisions on the circumstances in which members of the body in question must withdraw, and expressly prohibits the giving of instructions to members of the Office in the performance of their duties. [23]

24. That judgment not only abandons the requirement that the body should be a third party, but also disregards the absence of specific rules intended to guarantee the independence of its members, [24] and considers that the generic provisions intended to ensure their impartiality or, where appropriate, the independence of the members of courts and tribunals, are adequate.

25. In my view, that reasoning is weak. A general principle of non-interference in the activities of the State's administrative bodies, combined with a duty to withdraw, cannot be enough to guarantee the independence of the person who has to give a

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

18 — Paragraph 35 of the judgment.

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

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

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

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

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

24 — These conditions, by reference to the statute governing the ordinary courts, were fulfilled in the *Dorsch Consult* case.

ruling in the dispute. [25] On the other hand, that fundamental status of a body as a court or tribunal must be guaranteed by provisions which establish, clearly and precisely, the reasons for the withdrawal, rejection and dismissal of its members. [26]

26. The gradual relaxation observed in the case-law of the Court of Justice in relation to the requirement of independence culminates in the judgment in *Gabalfrisa and Others*, [27] in which the Court had to consider the status as courts or tribunals of the Spanish Economic-Administrative Courts (Tribunales Económico-Administrativos), which do not form part of the judiciary but are organically linked to the Ministry of Economic Affairs and Finance, that is, the very administration responsible for the acts which they have to judge.

27. In spite of the views expressed in legal literature [28] and by its Advocate General, the Court of Justice granted them the status of courts or tribunals of a Member State, attributing crucial importance to the separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery and, on the other hand, the economic-administrative courts which rule on complaints lodged against the decisions of those departments without receiving any instructions whatsoever.

28. However, as Advocate General Saggio again pointed out, those circumstances do not provide an adequate guarantee of impartiality. The members of the economic-administrative court are employed

25 — See the Opinion delivered by Advocate General Saggio in Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539. The judgment recognised the status of court or tribunal of a Swedish administrative body, the Överklagandenämnden för Högskolan (Universities' Appeals Board), because it gave judgment without receiving any instructions and in total impartiality. For the Court of Justice, those safeguards endowed it with a status separate from the authorities which adopted the decisions under appeal, and the necessary independence. On the other hand, the Advocate General had proposed, in his Opinion, that the question referred for a preliminary ruling should be declared inadmissible since the referring body was not independent, because there were no specific provisions governing the terms and conditions for cancelling the appointment of its members.

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

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

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

by the administration and appointed by the minister, who has the power to dismiss them without abiding by conditions clearly and categorically laid down by law. It cannot be said, therefore, that the body's rules of operation guarantee the irremovability of its members and, consequently, it seems doubtful that it has a degree of independence which allows it to resist possible undue intervention and pressure from the executive.

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

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

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

Furthermore, the Tribunal Económico-Administrativo Central (Central Economic and Administrative Court) may decline jurisdiction over matters which it considers important, or in which the amount involved is particularly high, and leave the decision to the Minister for Economic Affairs and Finance. One might ask whether, following the judgment in *Gabalfrisa and Others*, the Minister also has the power to refer questions for a preliminary ruling if he takes over the case. [29]

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

29. The court or tribunal not only has to be independent and act independently; it also has to take its decision following *inter partes* proceedings, in which the opposing

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

parties may assert their legally protected rights and interests. However, the scope of the requirement, stated in the Court's judgment in *Vaassen-Göbbels*, [30] that proceedings should be *inter partes*, was very soon reduced.

30. The judgments in *Politi* [31] and *Birra Dreher* [32] confirmed that Article 234 EC does not make references to the Court conditional on whether the proceedings are *inter partes* and that, therefore, a question may be referred for a preliminary ruling even if there is no debate. The decisive factor, therefore, is that the body seeking the help of the Court of Justice is exercising the functions of a court or tribunal and considers that an interpretation of Community law is essential for it to reach a decision. The fact that the proceedings in which the question arises are or are not defended is irrelevant. [33]

31. However, in its judgments in *Simmenthal* [34] and *Ligur Carni and Others* [35] the Court stated that it may prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard. Nevertheless, that qualification did not lead it to go back on its previous position since it takes the view that it is for the national court alone to assess whether it is necessary to make a reference. [36]

30 — Cited in footnote 8.

31 — Case 43/71 *Politi* [1971] ECR 1039. The question was referred by the President of the Tribunale di Torino, in relation to summary proceedings in which the decision is taken without the defendant being given a hearing. It is interesting to note that, owing to the specific nature of the procedure, the status as a court or tribunal of an authority which was part of the judicial organisation of a Member State was called in question.

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

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

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

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

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

32. Consequently, the Court of Justice does not make the adversarial nature of the proceedings a precondition for a reference for a preliminary ruling to be admissible. A question may be admissible if it arises in *ex parte* proceedings or at an *ex parte* stage in adversarial proceedings. The judgments in *Birra Dreher* and *Simmenthal* emphasised what had already been stated in *Politi*, that any court or tribunal of a Member State may refer a question for a preliminary ruling at any stage in the main proceedings.

33. The requirement that the proceedings should be *inter partes* has gradually lost ground. In *Pretore di Cento* [37] and *Pretura unificata de Torino*, [38] neither of which had defending parties, the Court of Justice did not even query the admissibility of questions referred for a preliminary ruling. [39] The judgment in *Pardini* [40] replied to questions referred by the Pretore di Lucca in proceedings relating to interim measures. [41]

34. Until then the Court of Justice had not attached much importance, if any, to the requirement that the proceedings should be *inter partes*. However, if the facts are studied carefully, it will be noted that the principle was not absent, merely deferred; [42] in any event, the absence of the adversarial element was compensated for by the complete impartiality of the judge and his independence with regard both to the dispute and the parties to it. [43]

35. However, in a number of later judgments, the Court seems to have abandoned that course and, regrettably, has admitted and given preliminary rulings on questions referred in proceedings in which the absence of the adversarial element was not offset by the fundamental independence of the body which raised the question.

36. Indeed, in *Dorsch Consult* [44] the Court admitted questions referred for a preliminary ruling by an administrative body [45] in undefended proceedings. [46]

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

38 — Cited in footnote 33.

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

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

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

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

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

44 — Cited in footnote 16.

45 — The supervisory board set up in Germany to review the decisions of the bodies which monitor the procedures for awarding public contracts.

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

37. In its judgment in *Gabalfrisa and Others*,[47] the Court of Justice considered that proceedings before the Spanish economic-administrative courts[48] are *inter partes* since the parties concerned may lodge submissions and evidence in support of their claims and request a public hearing. Moreover, where an economic-administrative court considers it relevant to adjudicate on matters which were not raised by the persons concerned it must inform the parties to the proceedings and grant them a period of fifteen days to submit their observations.

38. However, as Advocate General Saggio made clear in his Opinion, the proceedings may be considered only partially *inter partes*, in so far as concerns the interested parties, since only limited pleadings and evidence are admitted, and the decision as to whether a public hearing will be held is taken at the discretion of the body itself, with no subsequent appeal.[49]

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

39. Whilst the requirements of independence and the adversarial nature of the proceedings have faded somewhat, the requirement that the decision to be adopted by the referring court must be judicial in nature has always been blurred. It could not be otherwise: to say that a body which gives a judicial ruling is a court or tribunal is like saying nothing at all. That status cannot be equated to the application of legal rules, because it is not exclusive to the bodies which exercise jurisdiction. Administrative bodies act in accordance with legal criteria[50] and, consequently, also apply the law.[51]

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

41. Thus, in the *Borker* case[52] the Conseil de l'Ordre des Avocats à la Cour de Paris (Bar Council of the Cour de Paris) was held not to be a court or tribunal because it had

47 — Cited in footnote 27.

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

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

50 — Article 103(1) of the Spanish Constitution of 1978 provides that the 'Public Administration shall act... wholly in accordance with the law'.

51 — They also interpret the law before applying it.

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

not been called upon to try a case but to give its opinion on a dispute between a member of the Bar and a court or tribunal of another Member State.[53] On similar grounds the Court of Justice, in the *Greis Unterweger* case,[54] denied the status of court or tribunal to the Commissione Consultiva per le Infrazioni Valutarie (Consultative Commission for Currency Offences) which issues opinions in administrative proceedings[55] and, in *Victoria Film*,[56] to the Skatterrättsnämnden (Swedish Revenue Board) because it did not settle any dispute but merely, at the request of a taxpayer, gave a preliminary decision in relation to a tax matter.[57]

42. Similarly, the judgment in *Criminal proceedings against X*[58] held that the Procura della Repubblica could be regarded as a court or tribunal since, amongst other reasons, its role was not to rule on an issue but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body.[59] Nevertheless, the judgment in *Pretore di Salò*[60] acknowledged that body — which, as I have pointed out, combines the functions of an examining magistrate and a prosecutor — to be a court or tribunal, even though it conceded that many of its functions were not of a strictly judicial nature, that it to say, they were not directed towards settling a legal dispute.

43. On the other hand, in *Garofalo and Others*[61] the Court held that a body which submitted an opinion in a procedure in which the decision was taken by a political authority exercised a judicial function. The matter related to the Consiglio di Stato issuing an opinion in the context of an extraordinary petition; however, in fact, it also provides the decision. The opinion, based on the application of rules of law, forms the basis for the decision which will be formally adopted by the President of the Republic, and any departure from the proposed solution may be made only after

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

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

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

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

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

58 — Cited in footnote 15.

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

60 — Cited in footnote 11.

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

deliberation within the Council of Ministers and must be duly reasoned.

44. The Court of Justice, relying on the judgment in *Nederlandse Spoorwegen*, [62] held that the Italian Council of State is a court or tribunal within the meaning of the Treaty. [63] In contrast, in the Orders in *ANAS* [64] and *RAI* [65] it denied that status to the Italian Court of Auditors, since the power of review which it exercised in the main proceedings consisted essentially in the evaluation and verification of the results of administrative action, from which the Court inferred that, in the context in which the reference was made, the aforementioned auditing body was not performing judicial functions.

45. Until the judgment in *Job Centre I*, [66] it seemed apparent from the case-law of the Court of Justice that, where a reference for a preliminary ruling is received from a body which forms part of the national judicial organisation, the question is admissible, even if that body is not giving a ruling in a dispute. [67] Since that judgment, the position has not been so clear.

46. In that case the Tribunale Civile e Penale, Milan, referred two questions for a preliminary ruling in non-contentious proceedings [68] and the Court of Justice adopted a restrictive criterion. It held that a national court may seek a ruling from the Court only if there is a case pending before it and if it is called upon to render 'a decision of a judicial nature'.

47. It is not enough, therefore, for the Court of Justice, that the referring body is part of the judicial power of a Member State; it also has to give a ruling in a case, [69] and a case exists where there is a legal dispute with another, even if that other is a

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

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

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

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

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

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

68 — Previously, in Case 32/74 *Haaga* [1974] ECR 1201, the Court had accepted, albeit without examining the question of admissibility, a reference for a preliminary ruling in a similar case. Advocate General Mayras proposed that the Court should accord the referring body the status of a court or tribunal.

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

judicial body whose decision it is sought to review; [70] consequently, in its judgment in *Job Centre I*, the Court declared that a body seised of an appeal brought against a decision adopted in non-contentious proceedings exercises a judicial function. [71] That was the position in *Haaga*. [72]

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

48. One of the factors which, since the judgment in *Vaassen-Göbbels*, [73] defines a court or tribunal within the meaning of Article 234 EC is whether its jurisdiction is compulsory.

49. This factor left arbitration tribunals out of the picture. In the *Nordsee* case, [74] the Court declared that it had no jurisdiction to give a ruling on the questions referred by a German arbitration court to which the parties were under no obligation to refer their disputes [75] and stated that, if questions of Community law are raised in an arbitration resorted to by agreement, it is for the ordinary courts to refer a question for a preliminary ruling, if they consider it necessary, either in the context of their collaboration with the arbitration tribunals or in the course of reviewing the arbitration award. [76]

50. After the *Nordsee* judgment, it seemed that, if reference to the arbitration tribunal were compulsory and at last instance, a reply would be given to the question. That happened in the *Danfoss* case, [77] in which the reference for a preliminary ruling was made by a Danish arbitration court granted

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

71 — After the Court of Justice had given its judgment in *Job Centre I*, declaring that it lacked jurisdiction to reply to the questions referred for a preliminary ruling, the Tribunale civile e penale, Milan, gave a ruling in the case. An appeal was lodged against its decision before the Corte d'appello, Milan, which referred three questions for a preliminary ruling. In its judgment of 11 December 1997 in Case C-55/96 *Job Centre II* ECR I-7119, the Court accepted jurisdiction and replied to the questions put to it.

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

73 — Cited in footnote 8.

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

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

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

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

final jurisdiction by law in disputes relating to collective agreements between employees' organisations and employers, where the jurisdiction did not depend on the agreement between the parties since either might bring a case before it despite the objections of the other, and the decision was binding on everybody.

51. In its judgment in *Almelo*,[78] where it did adopt a consistent approach, the Court of Justice accepted jurisdiction to reply to the questions referred for a preliminary ruling by a judicial body determining, according to what appeared fair and reasonable, an appeal from an arbitration award, because it was required to observe the rules of Community Law.[79]

52. However, because it focused so much on the requirement that the jurisdiction should be compulsory, the Court overlooked the other features which, according to its stated views, define a court or tribunal for the purposes of Article 234 EC and, in the *Danfoss* case, it acknowledged as such an arbitration board whose composition and operation are not determined in detail by statute. An arbitration board is composed on an *ad hoc* basis, and the proceedings are conducted on the basis agreed between the parties, within the framework of the law.[80]

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

53. In its judgments in *Kaefer and Procacci*[81] and *Leplat*,[82] the Court of Justice acknowledged that a reference for a preliminary ruling could be made by the courts or tribunals of overseas countries and territories which form part of the French judicial system.

54. Furthermore, in *Barr and Montrose Holdings*[83] it recognised the right to refer questions for a preliminary ruling of the courts and tribunals of the Isle of Man, even though they do not form part of the

78 — Cited in footnote 26.

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

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

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

82 — Case C-260/90 *Leplat* [1992] ECR I-643.

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

court system of the United Kingdom.[84] Subsequently, in *Pereira Roque*,[85] the Court, without considering admissibility, gave a preliminary ruling on a reference from a judicial body of the Bailiwick of Jersey, whose courts and tribunals likewise do not form part of the judicial system of the United Kingdom.[86]

55. Although Article 234 EC refers to the courts and tribunals of a Member State, the judgment in *Parfums Christian Dior*[87] declared that the Benelux Court had not only the right to make a reference for a preliminary ruling but the obligation to do so, as a judicial body giving judgments against which no appeal lies under national law. The absence of subsequent proceedings against that court's decision, which gives a definitive interpretation of the common Benelux rules, led the Court of Justice to accept the reference.

56. Those pronouncements, in which the status of court or tribunal of a Member State is, without doubt, extended to bodies which are not courts or tribunals, reflects the need to ensure that Community law is applied uniformly, in such a way that all judicial bodies that settle disputes in which the *norma decidendi* is a rule of that law may use the tool provided by Article 234 EC.

57. For similar reasons, and conversely, the national law must not prohibit a judicial body from referring questions for preliminary rulings. In its judgment in *Rheinmülen*,[88] the Court of Justice held that the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power of referring cases to the Court.

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

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

58. The foregoing points are not meant to be a sterile scholarly work. They show that the Court's approach to this matter is not only excessively casuistic, as I have pointed out above, but also lacks the clear and precise features required for the definition of a Community concept. Far from providing a reliable frame of reference, the case-law offers a confused and inconsistent

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

85 — Case C-171/96 *Pereira Roque* [1998] ECR I-4607.

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

87 — Case 337/95 *Parfums Chistian Dior* [1997] ECR I-6013.

88 — Case 166/73 *Rheinmülen* [1974] ECR 33.

panorama, which causes general uncertainty. [89] The frequent disparity between the solutions suggested by the Advocates General and the pronouncements of the Court illustrate the legal uncertainty surrounding the concept of court or tribunal of a Member State.

59. The principal victim of the situation has been the Court of Justice itself, which has been hesitant with respect to the judicial nature of many bodies which have made preliminary references, and has sometimes failed to give its reasons for going in one direction or the other. [90]

60. It may be observed that where the Court of Justice has seemed uncertain is, as I have already pointed out, in relation to the elements which distinguish a body which is a court or tribunal from one which is not, since legal origin, permanence and taking decisions in accordance with legal criteria are also characteristics of bodies within the administrative structure.

B. The requirement that, as a matter of public policy, the national authority must have the status of a court or tribunal if the Court of Justice is to have jurisdiction

61. If uncertainty in legal relations is disturbing, the sense of unease is all the greater when it concerns a notion which, like that in Article 234 EC, is a matter of public policy. The concept of national court or tribunal determines whether the Court of Justice has jurisdiction to expedite proceedings which, like the preliminary-ruling procedure, have turned out to be essential to the gradual construction and consolidation of the Community legal order. The Court of Justice cannot have control of its own jurisdiction. The ground rules must be clearly defined in a Community governed by the rule of law. The national courts and Community citizens are entitled to know, in advance, who may be deemed to be courts or tribunals for the purposes of Article 234 EC.

62. The greater or lesser laxity with which the concept is addressed determines the breadth of the range of persons who may seek the cooperation of the Court of Justice

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

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

and, consequently, the number of its preliminary rulings. This circumstance is relevant to the task of harmonising the interpretation and application of Community law. When showing the way, by making pronouncements which everyone else is to follow, it is necessary to act cautiously and carefully. One well-thought-out and well-founded decision resolves more problems than a large number of hasty judgments which do not go deeply into the reasoning and do not come to grips with the questions submitted to them.

63. In order to further the uniform dissemination and application of Community law, in the early years of its development, the Court of Justice encouraged the use of the preliminary-ruling procedure by adopting a broad interpretation of the definition of the body entitled to implement it. However, what previously was clearly justified, now — when the Community is a reality accepted by the legal practitioners of the Member States — is disturbing and may seriously hinder the work of the Court of Justice.

64. Therefore, as Community law now stands, there is a need to tighten the definition of court or tribunal of a Member State, to bring together its various components in order to provide a precise frame of reference and so to prevent uncertainty from becoming a permanent feature of this sphere. The Court's initial approach of encouraging references for preliminary rulings, which has been properly described as a vocation to educate, must yield to a different dialectic, which no longer has the national court under supervision and allows it to take on the responsibility of an ordinary court of Community law.

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

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

66. The Treaty on European Union has extended the jurisdiction of the Court of Justice to the third pillar by three routes. One of them enables it to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions on police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them (Article 35(1) of the Treaty on European

Union). The Court's jurisdiction is at a preparatory stage, since it must be approved by the Member States in order to take effect.

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

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

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

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

70. The need to clarify the definition of court or tribunal becomes even more urgent following the results of the recent intergovernmental conference. Article 225(3) of the Treaty of Nice, signed on 26 February 2001, [91] establishes the bases on which the Court of First Instance may consider questions referred for preliminary rulings under Article 234 EC, in specific matters determined by the Statute. I think that the Court of Justice should make clear what it understands by national court or tribunal, as a relevant guideline for the Court of First Instance. If it does not do so, there is a risk that, when that possibility is acted upon and takes effect, the hesitancy of the first body will be matched by that of the second.

71. The possibility that the decisions of the Court of First Instance may be reviewed by

91 — OJ 2001 C 80, p. 1.

the Court of Justice, under the new third subparagraph of Article 225(3) EC, will not, in my view, provide an adequate means of avoiding the disruptive effect of a disagreement between the two Community courts, because the possibility of review is considered to be exceptional and seems to relate to substantive issues rather than the grounds for admissibility of the reference for a preliminary ruling, [92] amongst which is the status of the referring body as a court or tribunal. It would be more efficient to mark the route in advance than after the event by way of review.

72. However, the Nice Conference has not only allowed an increase in the number of Community courts called upon to establish the uniform interpretation of the law of the European Union, but also, by providing for the enlargement of the Union from fifteen to twenty-seven Member States, made it possible for the number of bodies making preliminary references to increase exponentially. The future of the European Union offers a panorama in which twelve new States, with very varied legal traditions and different organisational structures, will join a law-based Community which, if it is to operate effectively, requires, as the Court of Justice has so often pointed out, uniform interpretation and application of its legal order. It is essential to give a precise definition of the concept of court or tribunal for the purposes of Article 234 EC if the Court of Justice and, as the case may be, the Court of First Instance, are not to face an avalanche of requests for preliminary rulings from bodies that are difficult to categorise, which will have to be declared admissible, in spite of the fact that they are of barely any use, [93] because the concept is ill-defined in the case-law. Doubts will be sown and the inertia typical of all institutions will mean that references for preliminary rulings will be accepted from bodies which are merely administrative.

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

73. Thus, the Court of First Instance has also been called upon to cooperate in the task of giving preliminary rulings. However, in my view, in spite of its established reputation, it will not be operating under the most favourable conditions. It is not easy to reconcile jurisdiction to give preliminary rulings, which is repeatedly described as 'constitutional', with performance of duties under supervision, [94] nor is the Court of First Instance structurally designed to carry out a task which requires a great degree of operational independence, the wish to ensure uniformity, innovative ability and spirit of cooperation. 'It will not have enough freedom to fulfil a guiding role, directing everyone's efforts towards a

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

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

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

common understanding of the law of the European Union'. [95]

74. The uniform interpretation of Community law must, without exception, remain subject to the jurisdiction of the Court of Justice for preliminary rulings. It is an indivisible jurisdiction, [96] which suggests that the Court of First Instance should not be asked to share the task. The key to the success of the preliminary-ruling procedure has lain in the centralisation of the interpretative function, which promotes uniformity. If other bodies are invited to participate, there is a risk that the unity will be destroyed. The day that two different interpretations are given by the two Courts in respect of the same precept of Community law, the death knell will sound for the preliminary-ruling procedure. The risk of confusion is not avoided by the fact that Article 225 states that the Court of First Instance is to be given jurisdiction to give preliminary rulings in 'specific matters', since any jurist knows that 'different matters' share common categories, institutions and legal principles, so that the possibility of disagreements does not disappear. The preliminary-ruling procedure seeks to protect the law, in the manner of a court of cassation, and there must be only one court of cassation in each legal order.

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

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

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

75. There was a time when the acceptance by the Court of Justice of jurisdiction to reply to questions referred by bodies which were unquestionably not judicial in nature could be justified, as I have already pointed out, by the need to foster the implementation of a unitary legal system in the Community. However, now that the system has reached cruising speed and Community law is an accepted reality, it would be

unsettling if the preliminary-ruling procedure were to be made available to bodies which do not give judgments.

76. Article 234 EC introduces an instrument for judicial cooperation, a technical dialogue by courts and between courts. The Court of Justice has never wavered with regard to that description. The objective of the preliminary-ruling procedure is not, therefore, to assist an agency of the executive.

77. Furthermore, the members of administrative organisations which apply legal rules and take decisions in accordance with legal criteria, do not need to be lawyers. [97] This may mean that the question referred will not be worded in the most appropriate way or that it will lack accuracy or the necessary technical precision.

78. The judicial body which reviews an administrative decision adopted on the basis of the reply given by the Court of Justice may consider that it was unnecessary to make the reference or that it should have been approached from another point of view. If it comes to the conclusion that neither the interpretation nor the application of rules of Community law is in issue in the dispute, the reference for a preliminary ruling and all the effort invested in settling the question will have been pointless, with the added disadvantage that the fact that its judgments are not taken into account because they are considered unnecessary undermines the legitimacy of the Court of Justice.

79. If the reviewing body considers that the question should have been formulated differently, it will be faced with the difficult situation: the reference for a preliminary ruling has been made and the reply received but, for reasons of procedural economy, it is not inclined to resort again to the preliminary-ruling procedure in order to straighten out the track which it considers became twisted because the reference was incorrectly made. It is a serious matter that the system of judicial cooperation under Article 234 EC should be disrupted because the direct connection between the Court of Justice and the national court is interrupted by an administrative body which, by acts which are well-intentioned but lacking in independence and the necessary specialised legal preparation, holds up the whole procedure. We have already seen how the way in which the question is formulated may determine the Court's reply, [98] so it is

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

98 — In my opinion in *Gottardo*, cited in footnote 36, I point out that, in the space of barely two years, the Court of Justice gave two completely different replies to the same question owing to the fact that, in the first, Case C-345/89 *Stoeckel* [1991] ECR I-4047, the referring court had made no mention of an ILO Convention, and in the second, Case C-158/91 *Levy* [1993] ECR I-4287, it had alluded to it.

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

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

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

A. The Community nature of the term

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

81. Uniformity in the application of Community law requires that the concept of national court or tribunal be defined within it. The task must be addressed within the European legal order and according to its own structural requirements. In other words, the concept cannot be described only in terms of the categories of national law,[99] but, essentially, must take account of the *raison d'être* of the preliminary ruling, which is to ensure that Community law is equally effective in every corner of the Community, even though common constitutional traditions must play a crucial role when it comes to interpreting such an important definition.

82. A court or tribunal is not only a body which is such under national law, but also a body which must be such in order to guarantee that no sector of Community law escapes the process of harmonisation. That is why the Court of Justice has attached great importance to whether the decision of the referring body is open to review within the national legal system. If it acts at last instance, the Court pays less

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

heed to its requirements for considering a body to be a court or tribunal and confers that status on administrative bodies. That, in my view, was the case in *Danfoss* [100] and *Broekmeulen.* [101] The criterion of effectiveness, to ensure that Community law should always be applied in accordance with the criteria of the Court of Justice, also determined the admissibility of the questions referred for a preliminary ruling in *Barr and Montrose Holdings* [102] and *Pereira Roque.* [103]

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

83. Throughout this Opinion, I have given details of the way in which the Court of Justice has described the elements which characterise the definition. The exercise of judicial power is attributed to bodies established by law, whose members are subject to the rule of law and act, when giving decisions in litigation before them, with complete independence and in accordance with the principle that proceedings should be *inter partes*. However, sufficient attention has not been paid to the principle of unity and exclusive jurisdiction.

84. According to the latter principle, the exercise of judicial power and the right to judge and to enforce judgments are entrusted exclusively to courts which are part of the legal system. It is a field from which all other public servants are excluded. Its basis is the same as that of competence to hold judicial office: independence and submission to the law. In principle, then, references for preliminary rulings must be made only by judicial bodies, those with the aforementioned exclusive jurisdiction to give judgment.

85. The study I have made of the case-law of the Court of Justice reveals that the bodies which form part of the national court systems are always courts or tribunals within the meaning of Article 234 EC [104]; however, that does not mean that every

100 — Cited in footnote 77.

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

102 — Judgment cited in footnote 83.

103 — Judgment cited in footnote 85.

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

question referred by a body of that kind must automatically be admitted and decided on the merits. The referring body must, in addition, act in the capacity of a court or tribunal and it must have a case pending before it, a dispute between litigants which it is called upon to settle by interpreting and applying legal rules. In short, it must be exercising its judicial powers. [105] In these circumstances, a body that is part of the court system of a Member State which acts independently to decide a case, in accordance with legal criteria, in adversarial proceedings, always constitutes a court or tribunal within the meaning of Article 234 EC, and the Court of Justice must acknowledge that fact because it cannot deny that status to a body which enjoys it under its national law.

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

86. To put it the other way round, a body which does not form part of the national court system and has not been granted the power to 'state the law' by interpreting and applying the law [106] in judicial proceedings must not be considered a court or tribunal. As I have already pointed out, the preliminary-ruling procedure is a dialogue by and between courts.

C. Exception: inclusion in the definition of those bodies which, although not forming part of the judicial structure, have the final word in the national legal order

87. Only as an exception should the Court of Justice accept questions referred for a preliminary ruling by a body which does not form part of the national court system, namely when the referring body, although outside the judicial framework, has the last word in the national legal order, because its decision may not be contested. In those circumstances, the purpose and *raison d'être* of the preliminary-ruling procedure

105 — It should be remembered that, in *Job Centre I*, cited in footnote 66, the Court rejected at the outset a question referred for a preliminary ruling by a court of justice in

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

make it essential for the Court of Justice to accept and reply to the questions put to it.[107] In spite of the current consolidation of the preliminary-ruling procedure, the Court of Justice still needs to ensure that situations governed by Community law do not remain outside its jurisdiction and, consequently, without a uniform interpretation of the rules which regulate them.

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

The right of access to the courts is protected by Article 6(1) of the European Convention on Human Rights. Although it is true that this provision expressly regulates only the safeguards that must be observed to ensure a fair hearing, it is none the less true that they would be ineffective if the prior existence of a right to judicial protection were not acknowledged. The primacy of law is inconceivable if there is no access to the courts. 'The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.'[108] Conversely, it is not possible to speak of true judicial protection if the proceedings are deprived of those safeguards. 'Access to the courts' and 'procedural safeguards' therefore constitute an indivisible whole, and we may therefore say that there is no effective judicial protection without those safeguards, amongst the most important of which is that relating to the independence of the body giving judgment and the adversarial nature of the proceedings.

Community case-law has also established the right to obtain a judicial determination,[109] which entitles individuals to seek before the competent court due observance of their rights and legitimate interests under the legal order of the European Union.

The judgments in *Johnston*[110] and *Heylens*[111] have defined the characteristics of that right, which, as has been said, requires that there must be a means of contesting, by legal process, any decision of a national authority preventing the exercise of a right conferred by the Community legal order. Thus, any citizen of a Member State is

107 — On several occasions in this Opinion, I have noted the Court's sensitivity to the need, on the one hand, to extend the use of the preliminary-ruling procedure and, on the other, to ensure that Community law is applied uniformly, by accepting references for preliminary rulings from bodies whose decisions were not open to further challenge by legal process.

108 — Eur. Court HR, Golder v the United Kingdom judgment of 21 February 1975 (Series A, no. 18), paragraph 35.

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

110 — Cited in the previous footnote.

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

entitled to ask the court to protect his rights under Community law. [112] Consequently, administrative decisions which are not subject to review by a court of law must be the exception rather than the rule in the legal systems of the Member States.

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

90. So far as concerns the last-mentioned requirement, the Court of Justice must forget the restrictions which may be observed in its own judgments. [113] Except in the most recent and inopportune pronouncements, the principle in question was relaxed in this way only where the absence of adversarial procedure was offset by the fact that the court was equally remote from both parties to the case.

91. It is all the more necessary to be rigorous in relation to the requirement of independence of the body which has to take the decision and decides to make a reference for a preliminary ruling. [114] The Court of Justice has sometimes gone a very long way in its interpretation of this essential element of the judicial function and has distorted it. [115]

92. Independence is not a fortuitous, but an inherent, element of the judicial function. It has two aspects, one personal and the other functional. The former relates directly to the person who has to give judgment and requires certain safeguards to ensure independence, such as his irremovability. The functional aspect involves the absence of hierarchical links, other than those of a purely procedural nature in appeals. Independence must be present not only externally, in respect of elements which are unconnected with the judicial power and the proceedings, but also internally, with regard to the opposing interests. Here, independence is called impartiality. In short, it is not possible to be both judge

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

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

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

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

and party at the same time, and not possible to speak of judicial function without an impartial and independent body.

93. To compare the independence of the person who gives judgment between the parties to third party status is to speak in simplistic terms. Such third-party status is, as I have already pointed out, [116] necessary but not sufficient. Independence is much more than that: it is equidistance from the parties to the case and from the subject-matter of the dispute; that is to say, a lack of any interest in the settlement of the dispute other than the strict application of the law, [117] hence the need to establish the grounds for the judge to withdraw or be recused. However, it is also freedom in relation to superiors within the hierarchy and government bodies, other national authorities and social pressures. Irremovability is the basis and the reflection of judicial independence and means that judges cannot be dismissed, suspended, moved or retired except on grounds, and subject to the safeguards, provided by law. [118] Finally, the obverse of independence is the judge's personal liability, which also counterbalances the court's submission to the only bond which the legal order allows and imposes on it: the law.

Impartiality and independence are fragile virtues which must be very rigorously protected. Bodies whose decisions may be subject, either partially or in theory, to supervision, review or reversal by a non-judicial authority are not wholly independent and, consequently, are unable to afford full judicial protection. [119]

94. Therefore, in order to ascertain whether the body from which it receives a reference for a preliminary ruling is of a judicial nature, the Court of Justice is required to check that it fulfils the safeguard of independence it all its forms and the requirement that it is subject only to the law, by reference to clear rules relating to appointment procedures, permanence of tenure, grounds for the withdrawal, recusation or dismissal of its members, which distance it from the interests at issue and make it immune from any kind of external suggestions, intimations or pressures, whether obvious or veiled.

95. In short, as a general rule, references for preliminary rulings may be made only by judicial bodies in proceedings in which they must settle a dispute by exercising their power of adjudication. By way of exception, references from other bodies are admissible only where no further legal

116 — See footnote 13.

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

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

119 — Eur. Court H.R., in Van de Hurk v. Netherlands judgment of 19 April 1994, Series A, no. 288, paragraph 45, and Findlay v United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, paragraph 77.

remedy can be pursued and provided that safeguards of independence and adversarial procedure are available.

D. The advantages of the proposal

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

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

I have already stated, in point 41 of the Opinion I delivered in the *Kofisa* case, [120] that a significant increase in the number of cases in which the Court has to give a ruling might, indirectly, adversely affect the uniform interpretation of Community law which the preliminary-ruling procedure purports to safeguard. The acceptance of questions referred by bodies which do not form part of the national judicial system is likely to increase the Court's workload and delay the giving of rulings. This protraction of the procedure as a result of unnecessary references for preliminary rulings [121] might dissuade courts in the Member States from submitting questions which are essential for the uniform application of Community law, and the judicial cooperation established by Article 234 EC would be undermined.

98. Finally, we should not ignore the impact on the diverse sources of law of the powers which the Court of Justice has conferred on the national courts and tribunals. The Court held in *Simmenthal* [122] that courts of the Member States with jurisdiction to apply provisions of Community law are under a duty to give full effect to those provisions, if necessary refusing to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for them to request or

120 — Case C-1/99 *Kofisa* [2001] ECR I-207.
121 — See point 78 of this Opinion.
122 — Case 106/77 *Simmenthal* [1978] ECR 629.

await the prior setting aside of such provision by legislative or other constitutional means.

99. In the *Factortame* case, [123] the Court added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given. In those circumstances, the court is empowered to set aside the national provision. [124]

100. But, in any event, the broad interpretation which the Court of Justice gives to the definition of court or tribunal under Article 234 EC presents serious problems when it ascribes the status of court to bodies to which it is not ascribed by the national legal system, since it distorts the identity there must be between the person who formulates the question and the person who receives the reply. Although it is conceivable that the Court of Justice may expand the definition, as it unfortunately has done, to include administrative bodies, it is harder to comprehend that, in its reply, it should grant them powers which they do not have under national law, with the consequence that the constitutional system of the Member State in question is undermined. If the Court of Justice grants the national court full jurisdiction as a Community court, [125] for which we need only recall the apodictic terms of the judgment in *Simmenthal*, which I have just cited, it is incomprehensible that that jurisdiction should be conferred on bodies which, under their own national law, do not form part of the judiciary and are considered to be merely administrative authorities. Even more difficult to accept is the fact that the Court of Justice, when replying to a body which it considers to be a court or tribunal, even though it has a different status in the State to which it belongs, is addressing only bodies which actually are part of the national judicial system. [126]

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

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

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

125 — Alonso García, R., *Derecho comunitario. Sistema constitucional y administrativo de la Comunidad Europea*, Ed. Centro de Estudios Ramón Areces, Madrid, 1994, pp. 332 and 333, highlights the confusion created by the Court's judgment in Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, when it categorically declared that not only judicial bodies but also administrative authorities were under an obligation to refrain from applying national law which was incompatible with Community law, committing the serious error of failing to explain that such incompatibility must be determined by the Court of Justice.

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

4. *The Collège Juridictionnel de la Région de Bruxelles-Capitale*

102. I admit that, as will become apparent, the Collège Juridictionnel de Bruxelles-Capitale is a borderline case, and it is very doubtful, in the light of the case-law of the Court of Justice, that it would be classified as a court or tribunal for the purposes of Article 234 EC. However, as will also be seen, the fact that it is a borderline case illustrates perfectly the need for a change in direction of the kind I suggest.

The question has been referred by a collegiate body which has all the extrinsic characteristics of a court of justice but is not a judicial body. To ascertain its true nature, we need to pause and examine the Belgian legislation governing appeals in respect of provincial and municipal taxes.

103. The Law of 23 December 1986 [127] granted the permanent deputations of the provincial councils, [128] exercising judicial functions, jurisdiction to settle complaints brought by taxpayers against tax assessments.

104. The permanent deputation is a collegiate body of seven members, six of whom are elected by the provincial council from amongst its own members; the seventh is the governor, who is chairman of the deputation. [129] The term of office is linked to that of the provincial council and, consequently, is currently six years. [130] Appointments may not be revoked nor may the members be subject to disciplinary proceedings. [131] Members of the judiciary, ministers of worship, and officials and agents of the provincial and municipal administrations are not eligible for membership of the deputation; nor are mayors or councillors. [132]

105. The permanent deputation is the executive body of the province and exercises administrative, legislative and judicial

127 — 'Law on collection and disputes concerning provincial and municipal taxes' (*Moniteur belge* of 12 February 1987).

128 — See Articles 5 and 9.

129 — Articles 96 and 104 of the Provincial Law of 30 April 1836 (text published in the *Moniteur belge* of 23 December 1891), as amended by the Law of 25 June 1997.

130 — Article 100 of the Provincial Law cited in the previous footnote, in the wording given in Article 10 of the Law of 15 May 1949. The term of six years was established by Article 224 of the Law of 16 July 1993.

131 — See point 1(3) of the paragraph entitled operation and jurisdiction of the reply given by the Belgian Government to the questions put to it by the Court of Justice.

132 — Ineligibility is governed by Article 27 of the Organic Law of 19 October 1921 concerning provincial elections. The list of those ineligible is completed by Article 71 of the new Communal Law of 24 June 1988, consolidated by Royal Decree of that date (*Moniteur belge* of 3 September 1988), which was ratified by the Law of 26 May 1989 (*Moniteur belge* of 30 May 1989).

functions.[133] When it acts in the last-mentioned capacity, the proceedings are adversarial.[134] If the amount involved in the dispute is BEF 10 000 or more, the decision may be contested before the Cour d'appel (Court of appeal). The decision of the Cour d'Appel or, if the decision is not open to appeal, of the permanent deputation, may be contested before the Cour de Cassation (Court of Cassation).[135]

106. Under Article 83*quinquies*(2)[136] of the Law of 12 January 1989 concerning the Brussels institutions,[137] the judicial function which in the provinces is exercised by the permanent deputation is exercised in Brussels-Capital by a board of nine members appointed, for an unlimited term, by the Council of the Brussels-Capital region on a proposal of its Government.[138] This is the Collège Juridictionnel.

107. Although there is no specific legislation governing the Collège's constitution, disciplinary proceedings may not be brought against its members, nor may their appointments be revoked, and they are subject to the same ineligibilities as those which apply to the permanent deputations in the provinces.[139] The rules of procedure are identical to those of the deputations when they exercise judicial functions[140] and the circumstances in which appeals may be brought against its decisions are also identical.[141]

108. Article 9 of the Law of 24 December 1996[142] provided that the permanent deputations would hear complaints in their capacity as administrative authorities. On the other hand, under Article 9(2) the Collège Juridictionnel retained jurisdiction for the region of Brussels-Capital.

133 — See the first chaper of Title VII of the Provincial Law cited above. Also Uyttendaele, M., *Regards sur un système institutionnel paradoxal. Précis de droit public belge*, Ed. Bruylant, Brussels, 1997, pp. 1034 and 1035.

134 — See Article 104a of the 1836 Provincial Law, incorporated in the Law of 6 July 1987 (*Moniteur belge* of 18 August 1987), and Royal Decree of 17 September 1987 (*Moniteur belge* of 29 September 1987).

135 — See Article 7 of the Law of 23 December 1986, cited above.

136 — Incorporated in the Special Law of 16 July 1993.

137 — *Moniteur belge* of 14 January 1989.

138 — At least three members belong to the minority language group.

139 — See Article 83*quinquies*(2) of the Law of 12 January 1989. Also points 1 and 2 of the paragraph entitled 'operation and jurisdiction' of the reply given by the Belgian Government, referred to above.

140 — See Article 83*quinquies*(2)(3) of the 1989 Law.

141 — See the article referred to in the previous footnote, in conjunction with Article 7 of the Law of 23 December 1986. The reference made by Article 83*quinquies* of the 1989 Law to the procedural rules governing the judicial function of the permanent deputations also applies to appeals. See, to that effect, the last two paragraphs of the Belgian Government's reply, in which it states that an appeal lies against a decision of the Collège before the Cour d'Appel if the amount at issue is BEF 10 000 or more. It adds, immediately afterwards, that an appeal may be brought before the Cour de Cassation against the decision of the 'permanent deputations' (*sic*) or against the decision given on appeal. This is the consequence of the view that the reference made in the aforementioned Article 83*quinquies* also applies to the rules governing appeals, that is to say, to Article 7 of the 1986 Law. Thus, if an appeal lies against the Collège's decision, before the Cour d'appel or, as the case may be, the Cour de Cassation, the reference to 'permanent deputation' in the Belgian Government's reply must be taken to refer, owing to what is said and the context in which it appears, to the Collège Juridictionnel.

142 — *Moniteur belge* of 31 December 1996.

109. This change prompted an action before the Cour d'arbitrage [143] against the provision on the ground that it was contrary to Articles 10 and 11 of the Belgian Constitution. It was stated in the judgment that Article 9 of the Law of 24 December 1996 was, indeed, contrary to the principle of equality because it unjustifiably treated the inhabitants of Brussels differently from those of the rest of the State. The former benefited from a judicial procedure, whereas the latter had to make do with an administrative procedure. The Court accordingly annulled the provision and reinstated the system which had been in place before it came into force. [144]

110. Finally, a new law on disputes relating to tax matters of 15 March 1999, [145] has withdrawn the jurisdiction in question from the permanent deputations and conferred it on the provincial governor or a board composed of municipal representatives, depending on whether the matter relates to provincial or municipal taxes; they act as administrative bodies and appeals may be brought against their decisions before the court of first instance with jurisdiction in the region. [146]

111. Since the 1999 amendments, doubts have been raised as to whether the Collège juridictionnel still has jurisdiction to hear claims against tax assessments in the region of Brussels-Capital. Article 9 of the 1996 Law provided that, in the provinces, the taxpayer could submit a complaint to the permanent deputation, whereas in the aforementioned region, the competent body was the Collège juridictionnel. The provision was annulled in its entirety, and without any qualification, by the Cour d'arbitrage. The Law of 15 March 1999 restores the provision but its wording makes no mention of the Collège. However, it is not stated that Article 83*quinquies* of the 1989 Law, which governs the Brussels-Capital institutions, has been repealed and, therefore, it seems at first sight that tax appeals in the region should be addressed to that body.

However, upon looking more closely, I find that Article 83*quinquies* allocated to the Collège the judicial function which in the provinces was exercised by the permanent deputation. Since the latter no longer has any involvement in municipal taxes, nor does the Collège juridictionnel. However, there is a more cogent reason for making this deduction: it lies in the *ratio decidendi* of judgment No 30/98 in which the Cour d'arbitrage declared that Article 9, in the 1996 wording, was void because it established a judicial procedure in Brussels-Capital and an administrative procedure in the provinces. That being so, to retain the Collège's jurisdiction after the 1999

143 — This is the court responsible for interpreting and upholding the Belgian Constitution.

144 — Judgment No 30/98 of 18 March.

145 — *Moniteur belge* of 27 March 1999.

146 — See Articles 9 and 10 of the Law of 24 December 1996, as amended by Articles 91 and 92 respectively of the Law of 15 March 1999.

Law would be to repeat the unequal treatment condemned in the 1998 judgment. [147]

112. Belgian academic lawyers have unreservedly described the permanent deputations as political bodies. [148] In my view, it is impossible to describe the Collège juridictionnel in the same way. It is true that they both exercise the same functions and follow the same procedure, but the latter is of a special nature owing to the origin of its members and the exclusivity of its function.

113. The members of the permanent deputations, in spite of the ineligibility rules, are on the corresponding provincial council, which is formed by electoral process [149] and its term of office, as we have seen, is linked to that of that political body. The chairman of the deputation is the governor, who is the Government's representative in the province [150] and has full voting rights, together with a casting vote in the event of a tie. [151] Furthermore, the deputation has responsibility for political, administrative and judicial functions, and the combination of these does not seem to be the most appropriate formula for ensuring the independence of its members. [152]

114. The Collège juridictionnel, on the other hand, is made up of persons who, although subject to the same ineligibilities as the members of the permanent deputations, do not come from government institutions, although they are appointed by the government of the region of Brussels-Capital, and, more significantly, their term of office is unconnected to that of the authority which appoints them. Furthermore, they exercise only judicial functions. This parti-

147 — Afschrift, T. and Igalson, M., 'La procédure fiscale après les lois des 15 et 23 mars 1999', in *Journal des tribunaux*, No 593, 26 June 1999, pp. 48 et seq., paragraph 132, seem to be of the same opinion. They say that, after the judgment of the Cour d'arbitrage, it would have been preferable to establish in the Flemish and Walloon regions institutions identical to the Collège juridictionnel. In 1999 the legislature chose the opposite course: purely administrative claims with the possibility of judicial review.

148 — Leroy, M., *Contentieux administratif*, Ed. Bruylant, Brussels, 1996, pp. 96 to 98, has said that the permanent deputations are, first and foremost, political institutions and that although, in practice, their decisions are rarely criticised for being biased, as a matter of principle there is no justification for for setting politicians up as judges. Uyttendaele, M., *Regards sur un système institutionnel paradoxal. Précis de droit public belge*, p. 1035, referring to these boards, says that it is striking to see a political body exercising judicial functions.

149 — See Article 2 of the Provincial Law of 30 April 1836, as amended by the Law of 11 April 1936.

150 — See Article 4 of the Provincial Law of 30 April 1836, as amended by the Law of 25 June 1997.

151 — See the first and third indents of Article 104 of the Provincial Law of 1836, cited above.

152 — The persons who have to adjudicate upon the legality of a tax assessment belong to a body which, in the exercise of legislative powers, has approved the tax regulation and, in its capacity as an administrative authority, has issued the tax assessment. Afschrift, T. and Igalson, M., 'La procédure fiscale après les lois des 15 et 23 mars 1999', cited above, paragraph 132, criticise the lack of independence of the board of municipal representatives established by the 1999 amendment and say that its members will not be overly inclined to annul assessments prepared in application of provisions approved by the council to which they belong and drawn up by officials working directly under their authority. However, in Case 109/90 *Giant* [1991] ECR 1385, the Court replied to a question referred for a preliminary ruling by the permament deputation of Brabant provincial council. The Court gave a ruling on the substance of the case without examining the referring body's status as a court or tribunal. Advocate General Jacobs, who did address the matter, inclined to the view that the question was admissible, pointing out that the deputation held public hearings, followed an adversarial procedure and had to give reasons for its decisions.

cular feature has led a number of academic writers to state that it is wholly independent of the municipal authority. [153]

115. However, the fact that the Collège juridictionnel is not a political body and the fact that it exercises its powers independently of the authority which appoints its members are elements which, although significant, do not automatically convert it into a court or tribunal for the purposes of Article 234 EC.

116. The Collège is an institution which exercises its function independently but is still part of the administrative organisation of Brussels-Capital and has jurisdiction to settle complaints relating to the taxes imposed in the region. [154] In actual fact, it is a filter between the administrative authorities which manage and assess the taxes and the courts of justice. [155] Of course, it does not form part of the judiciary and it necessarily follows that its members cannot be judges. If it is not a court of justice, it should not be accorded the status of court or tribunal for the purposes of Article 234 EC.

117. It is true that Belgian academic writers do not dispute the description of the Collège as a body which exercises judicial functions. [156] It is also true that, in judgment No 30/98, the Cour d'arbitrage stated that 'judicial proceedings' are held before the Collège. But this last statement does not contradict the thesis that it is not a judicial body. The Cour d'arbitrage's ruling was given in proceedings to review whether the 1986 Law was constitutional from the point of view of the principle of equality and it sought to emphasise differences by reference to the contrasting term, represented by the permanent deputations. The decision rested on the difference in description between the two institutions, which I have set out in the above points.

In any event, 'exercise of judicial functions' and 'judicial body' are not synonymous terms. The case-law of the Court of Justice provides, as we have seen, a good example of this and it is the specific aim of this Opinion to resolve this terminological confusion. Nobody has said, or could say, that the Collège juridictionnel forms part of the judicial system, even though it holds

153 — Afschrift, T. and Igalson, M., 'La procédure fiscale après les lois des 15 et 23 mars 1999', cited above, paragraph 132.

154 — Under Article 83*quinquies* of the Law of 12 January 1989, the jurisdiction exercised in the provinces by the permanent deputations is divided, in the region of Brussels-Capital, between the Government and the Collège juridictionnel: the former exercises administrative powers and the latter judicial powers. Legislative powers are exercised by the Council and, if appropriate, by the Government (see Articles 6, 38 and related articles of the Law).

155 — This is the view of T. Afschrift and M. Igalson, *op. cit.* paragraph 132.

156 — Dambermont, B., *Textes communales (Loi du 24 décembre 1996, analyse par article, textes légaux)*, Ed. La Charte, Bruges, 1999.

inter partes proceedings to settle tax complaints by interpreting and applying legal rules.

118. The Collège is not, then, a judicial body. Its decisions are always subject to appeal [157] before judicial authorities, either a court of appeal, if the amount involved is BEF 10 000 or more or, otherwise, a court of cassation. [158] These real judicial bodies would be able to request an interpretation by making a reference for a preliminary ruling in the appropriate terms, having a more comprehensive view of the national legal order and being vested with the independence and responsibility needed for the exercise of judicial power. I have already suggested that the Collège juridictionnel is a borderline case because it comes very close to being regarded as a court or tribunal; however, it is precisely in such cases that it is necessary to take extra precautions and indicate clearly the position of the dividing line, however fine it may be. I therefore suggest that the Court of Justice declare that it has no jurisdiction to reply to the question referred to it for a preliminary ruling by the Collège juridictionnel de la Région de Bruxelles-Capitale.

119. However, in case that proposal is not accepted, I shall now analyse the substance of the question.

157 — See point 107 above and footnote 141.

158 — To ascertain whether a body's decision is the final one in the national legal system, consideration must be given to whether an appeal in cassation lies. Certainly, cassation is not a further instance but, since its aim is to determine the interpretation of the legal order and since the purpose of the preliminary-reference procedure is to establish the interpretation of the Community legal order, a body whose decision is subject to appeal before a court of cassation cannot be regarded as the court of last instance for the purposes of Article 234 EC.

V — Analysis of the question referred to the Court for a preliminary ruling

120. The Collège juridictionnel de la Région de Bruxelles-Capitale seeks to ascertain whether the articles of the Treaty which establish the freedom to provide services within the Community preclude the introduction of an annual tax on satellite dishes.

121. I shall begin this analysis by recalling that although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with the law of the European Union. [159]

122. Article 49 EC prohibits restrictions on freedom to provide services within the Community. According to the case-law of the Court of Justice, this principle requires not only the elimination of all discrimination against a person providing services on

159 — See, for example, Case 279/93 *Schumacker* [1995] ECR I-225, paragraph 21.

the ground of his nationality but also the abolition of any restriction, even if it applies irrespective of nationality, which is liable to prohibit, impede or discourage the activities of a provider of services established in another Member State. [160]

123. 'Services' are defined in Article 50 EC as services normally provided for remuneration, in so far as they are not governed by the provisions relating to the free movement of goods, capital and persons. Freedom to provide services is guaranteed within the Community and must be cross-border in character. The Treaty only mentions providers of services as being entitled to exercise that freedom, but the Court of Justice has also applied its provisions to the recipients, [161] who may, therefore, rely on the individual rights conferred on them by Community law.

124. Furthermore, the Court of Justice has held that the transmission of television signals comes within the rules relating to the provision of services [162] and that, to be lawful, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. [163]

125. Consequently, even if the tax restriction at issue were not discriminatory, it would have to be justified by an imperative requirement in the general interest and, in any event, observe the principle of proportionality.

1. *The discriminatory nature of the tax regulation*

126. The principle of equal treatment, as specifically expressed in Article 49 EC, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [164] That provision likewise precludes the application

160 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 16.

161 — Joined cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955; and Case C-294/97 *Eurowings and Luftverkehrs* [1999] ECR I-7447, paragraph 34.

162 — Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; Case 52/79 *Debauve* [1980] ECR 833, paragraph 8; and Case C-23/93 *TV10* [1994] ECR I-4795, paragraphs 13 to 16.

163 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

164 — Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8, and Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

of any national legislation which has the effect of making the provision of services between Member States more difficult. [165]

127. As the Commission states in its observations, the tax on satellite dishes is of a substantially discriminatory nature, in two respects.

128. First, so far as concerns the recipients of services, the annual tax, although applied without distinction to every user irrespective of nationality or residence, has more of an effect on the non-Belgian Community citizens settled in Watermael-Boitsfort. Those users, unlike Belgian citizens resident in their country, do not always have an opportunity to receive cable broadcasts from their State of origin and are therefore more interested in receiving television programmes by satellite.

129. As regards the providers of services, the tax on ownership of satellite dishes restricts freedom to receive television programmes by satellite. Since, unlike Belgian broadcasting companies, those established in other Member States only broadcast by satellite, they are more affected by the tax in question. The tax therefore has a discriminatory effect.

130. However, it is the established view of the Court of Justice that national rules which are applied to the provision of services according to their origin and are, therefore, discriminatory may be compatible with Community law, if authorised by an express provision contained in the Treaty. [166] Article 55 EC renders applicable to the freedom to provide services Articles 45 EC to 48 EC, which are contained in the chapter devoted to the right of establishment. Article 46 EC includes, as exceptions to both freedoms, measures contained in national provisions which establish special rules for foreigners and which may be justified on grounds of public policy, public security or public health.

131. In my view, the discriminatory regulation does not fall within that exception and thereby become compatible with Community law. In a democratic society, founded on freedom of speech and communication, a tax on the ownership of satellite dishes has nothing to do with public policy and public safety.

165 — Case 381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17, and Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23.

166 — Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 32, and Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 24.

2. The regulation as a restriction on freedom to provide services

A. Its effect on freedom to provide services

132. In case the Court of Justice does not consider the Belgian tax regulation at issue to be discriminatory, I also need to analyse whether it constitutes a restriction on freedom to provide services within the Community and, if so, whether it may be justified by imperative requirements connected with the general interest.

133. The periodic tax on satellite dishes is likely to have a significant effect on the exercise of freedom to provide audiovisual services, from the point of view of both the recipients and the providers.

134. As regards the former, an annual tax on satellite dishes may discourage viewers or make the conditions for receiving television programmes by satellite more onerous. With respect to the providers of services, the tax, by making the receiving of television programmes by satellite less appealing, reduces the opportunities for cross-border broadcasting by operators established in other Member States.

135. In short, the introduction, by means of a municipal law, of an annual tax on satellite dishes represents a restriction on the use of that receiving device and, therefore, on the freedom to provide audiovisial services by satellite. [167]

B. The lack of justification

136. According to the case-law of the Court of Justice, the freedom to provide services, as a fundamental principle of the Treaty, may be restricted only by rules:

(1) which are justified for compelling reasons in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community

167 — It should not be forgotten, in this regard, that the annual amount of the tax (five thousand Belgian francs) is a significant sum in relation to the cost of acquiring a satellite dish. In any event, there is no doubt, as the Commission points out, that the aim of the tax is to discourage the use of this means of receiving sound and visual broadcasts. This is stated in the text of the regulation itself as an argument to justify the measure: 'in view of the increasing number of satellite dishes...'.

national is subject in the Member State where he is established;

(2) which are necessary to ensure that the desired result is achieved, and

(3) which go no further than necessary to achieve that result. [168]

137. It happens that, in this case, the Belgian Government has not submitted observations and it is therefore only possible to speculate as to any possible justification for this restriction on the freedom to provide services.

138. The Commission observes, on the basis of the circular sent by the Ministry for the Region of Brussels-Capital to the councils on 31 August 1999, that the tax on satellite dishes is linked to the urban environment, since its aim is to preserve the aesthetic appearance of the buildings. The Municipal Council of Watermael-Boitsfort acknowledged this in a letter dated 27 April 1999 submitted to the Collège juridictionnel, when it stated that 'the tax on satellite dishes was introduced in an attempt to prevent their uncontrolled proliferation in the municipality and thereby preserve the quality of our environment'.

139. However, this explanation is not acceptable. I find no justification for the restrictive measure. It is not stated that the alleged concern for aesthetics was supported by any study on the impact of satellite dishes on the urban environment. And, even if, for obvious reasons, there may be justification in respect of protected and listed buildings, no explanation at all is given with regard to the others.

140. Even if protection of the urban environment were considered to justify the restriction, the principle of proportionality ought to be observed. There is nothing which inclines me to think that the tax on satellite dishes is appropriate to achieving the aim of protecting the urban environment. The income obtained from the tax does not seem to be allocated to initiatives or compensatory devices to protect the environment and the regulation applies irrespective of the place and time of installation of the dish and also of its dimensions.

141. In short, it cannot be held that the tax is appropriate for ensuring preservation of the environment.

168 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; and Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 29 to 31.

142. The Commission maintains that the declared aim of the tax regulation could be achieved effectively by imposing less onerous measures on the owners of satellite dishes, such as the obligation to use a specific colour or size, to install dishes behind buildings or in places which are not very visible. Measures of precisely that kind have been incorporated in the local planning rules relating to outdoor aerials, [169] which provide, for example, that an aerial must not be fitted on a listed building, must be in keeping with the building's architectural features and must not exceed 1.20 metres in diameter.

143. However, the general application of the tax to every satellite dish, regardless of the circumstances of its installation, infringes the principle of proportionality.

144. In view of all the foregoing, the tax regulation of the Municipal Council of Watermael-Boitsfort constitutes a restriction contrary to Article 49 EC, which cannot be justified for imperative reasons in the general interest.

145. Finally, the Commission believes it would be expedient to examine the tax legislation in question in the light of Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which upholds freedom of information.

146. In point 9 of the Opinion I delivered in *Connolly* v *Commission*, [170] I stated that freedom of expression is one of the fundamental pillars of any democracy. As stated in one of the finest passages found in the Strasbourg case-law: 'Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'. [171]

147. However, given that the principle of freedom to provide services in the Community clearly precludes the Belgian tax regulation, and that it is even stated in the eighth recital of the Directive that that right, when applied to the broadcasting and

169 — See footnote 2.

170 — Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611.

171 — Eur. Court H.R., Handyside v. United Kingdom judgment of 17 December 1976 (Series A, no 24), paragraph 49.

distribution of television services, is a specific manifestation in Community law of freedom of expression, as enshrined in the Treaty of Rome, I do not consider it is necessary to undertake the examination suggested by the Commission.

148. I therefore suggest that the Court of Justice declare that, by virtue of Article 49 EC, the municipal regulation on satellite dishes approved by the Municipal Council of Watermael-Boitsfort is unlawful.

VI — Conclusion

149. In the light of the foregoing considerations, I suggest that the Court of Justice should:

(1) refer this case to the full court so that it may clarify the meaning of court or tribunal for the purposes of Article 234 EC;

(2) declare that it does not have jurisdiction to reply to the question referred to it for a preliminary ruling by the Collège juridictionnel de la Région de Bruxelles-Capitale, because that body is not a court or tribunal within the meaning of Article 234 EC;

(3) in the alternative, if it decides to accept the question, declare that, under Article 49 EC, a rule, such as that contained in the tax regulation adopted by the Municipal Council of Watermael-Boitsfort sitting on 24 June 1997 introducing a tax on satellite dishes used to receive audiovisual broadcasts by satellite is unlawful.