OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 21 February 2002 [1]

Introduction

1. By order of 9 March 2000, the Hovrätt för Västra Sverige (Court of Appeal for Western Sweden, hereinafter the 'Hovrätt') referred four questions to the Court of Justice for a preliminary ruling under Article 234 EC. The first two concern that provision, specifically the third paragraph thereof, and turn, respectively, on the concept of a national court or tribunal required to make a reference for a preliminary ruling and on the scope of that obligation. The other two questions, which are subordinate, relate rather to the interpretation of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (hereinafter 'Regulation No 918/83'). [2]

Legal framework

The preliminary ruling procedure

Community law

2. As regards Community law, I would merely point out that the third paragraph of Article 234 EC defines in the following terms the obligation to refer to the Court the questions mentioned in the first paragraph of that article:

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

Swedish law

3. The ordinary Swedish courts, with jurisdiction in civil and criminal matters, comprise Tingsrätter (District Courts), Hovrätter (Courts of Appeal, six in all for the whole country) and the Högsta Domstol (Supreme Court). As a rule, a declaration of admissibility (leave to appeal) is needed for a judgment or a final decision of a Court of Appeal, delivered on appeal against a judgment handed down by a Tingsrätt, to be reviewed by the Supreme Court except where the case is brought in the Supreme Court by the Public Prosecutor acting in the public interest.

1 — Original language: Italian.
2 — OJ 1983 L 105, p. 1.

4. For the purposes of Paragraph 10 of Chapter 54 of the Rättegångsbalk (Code of Procedure), the Supreme Court may grant leave to appeal only if:

'1. it is important for the uniform application of the law that the appeal be heard by the Supreme Court; or

2. there are particular reasons for hearing the appeal, such as the existence of grounds for review on a point of law, a formal defect, or if the decision by the Court of Appeal manifestly rests on a serious omission or error'.

5. Review of the case under Paragraphs 1 to 3 of Chapter 58 of the Rättegångsbalk is an extraordinary remedy whereby judicial decisions may be challenged. Paragraph 10(2) states that a review may be requested when new facts or new evidence are produced which would probably have led to a different outcome had they been known before the judgment was given.

6. Under Paragraph 11 of Chapter 54, leave to appeal may be limited to a specific aspect of the case where review of that aspect is of particular importance for the uniform application of the law. In determining whether to grant leave to appeal, the Supreme Court considers points of law and of evidence and is in no way bound by the lower court's assessment of the evidence.

7. According to the information supplied by the Swedish Government in its written observations, about 24 000 judgments are handed down by the Hovrätter each year. Leave to appeal to the Supreme Court is sought in about 5 000 of those cases and granted in some 150 to 200 (that is, in 3 to 4% of them).

The system of reliefs from customs duty

The Community regulations

8. As regards the substance of the main proceedings, the applicable section of Regulation No 918/83 is that determining the specific cases eligible for relief from Common Customs Tariff duties. In view of the fact that in certain well-defined circumstances, where by virtue of the special conditions under which goods are imported the usual need to protect the economy is

absent, such taxation is not justified (second recital in the preamble), the Council decided to set out 'those cases in which, owing to special circumstances, relief from import or export duties shall be granted respectively when goods are put into free circulation or are exported from the Community' (Article 1(1)).

9. To begin with, therefore, Article 1(2) of the Regulation gives a number of definitions; in particular, it provides that for the purposes of the Regulation:

'(a) "import duties" means customs duties and charges having equivalent effect and also agricultural levies and other import charges provided for under the common agricultural policy or under specific arrangements applicable to certain goods resulting from the processing of agricultural products;

(b) "export duties" means agricultural levies and other export charges provided for under the common agricultural policy or under specific arrangements applicable to certain goods resulting from the processing of agricultural products;

(c) "personal property" means any property intended for the personal use of the persons concerned or for meeting their household needs.

The following, in particular, shall constitute "personal property":

...

Household provisions appropriate to normal family requirements ... shall also constitute "personal property". Personal property must not be such as might indicate, by its nature or quantity, that it is being imported for commercial reasons;

(d) "household effects" means personal effects, household linen, furnishings and equipment intended for the personal use of the persons concerned or for meeting their household needs;

(e) "alcoholic products" means products (beer, wine, aperitifs with a wine or alcohol base, brandies, liqueurs or spirituous beverages, etc.) falling within heading Nos 22.03 to 22.09 of the Common Customs Tariff'.

10. Title XI of the Regulation sets out the reliefs from customs duty granted by the Member States for goods contained in the personal luggage of travellers coming from a third country. Under Article 45(1), and subject to Articles 46 to 49, such goods are to be admitted free of import duties, 'provided such imports are of a non-commercial nature'.

Article 45(2) states that for the purposes of paragraph 1:

'(a) "personal luggage" means the whole of the luggage which a traveller is in a position to submit to the customs authorities on his arrival in the Community, as well as any luggage submitted to this same authority at a later date, provided that evidence can be produced to prove that it was registered, at the time of the traveller's departure, as accompanied luggage with the company which transported it into the Community from the third country of departure.

...

(b) "imports of a non-commercial nature" means imports which:

— are of an occasional nature, and

— consist exclusively of goods for the personal use of the travellers or their families, or of goods intended as presents; the nature and quantity of such goods should not be such as might indicate that they are being imported for commercial reasons'.

11. Article 47 provides that the relief referred to in Article 45 is to be granted up to a total value of ECU 175 per traveller.[3] Member States may reduce the value and/or the quantities of goods allowed to enter duty-free if they are imported by certain categories of persons: persons residing in the frontier zone, frontier workers, or the crews of cross-border means of transport.

The Swedish regulations

12. The total value of ECU 175 mentioned in Article 47 of Regulation No 918/83 was calculated by the Generaltullstyrelse (the Swedish Board of Customs) and subsequently by the Tullverket to be equivalent to SEK 1 700.[4] A decision of the local customs authorities set the permitted duty-

3 — As amended by Article 1 of Council Regulation (EC) No 355/94 of 14 February 1994 amending Regulation (EEC) No 918/83 setting up a Community system of reliefs from customs duty (OJ 1994 L 46, p. 5).

4 — Tullverkets Författningssamling 1996:36, 1998:34 and 1999:47.

free quantity for private imports of rice at 20 kg per person.

13. Under Paragraph 1 of the Varusmugglingslag (Law on smuggling, 1960:418), anyone who, without notifying the proper authorities, imports into the Kingdom, or exports, goods for which customs duty, other taxes or charges are payable to the State or which it is prohibited by statutory or constitutional provisions to import or export is, if the act is intentional, to be sentenced to a fine or a maximum of two years' imprisonment for smuggling. Under Paragraph 8 of that Law, attempted smuggling falls under Chapter 23 of the Brottsbalk (Criminal Code), pursuant to which anyone who has commenced a certain crime without bringing it to completion is, in the cases expressly provided for, to be convicted of attempted crime, provided there is a risk that the act would lead to the completion of the crime or such risk was averted only as a result of fortuitous circumstances.

Facts, procedure and questions

14. On 7 April 1998, Kenny Lyckeskog (hereinafter 'Mr Lyckeskog' or 'the defendant'), on his way from Norway with 500 kg of rice, was stopped at the Swedish border as he came out of the green customs channel at Svinesund and summoned to appear before the Tingsrätt (District Court) in Strömstad on a charge of attempting to smuggle 460 kg of rice, worth SEK 3 564. The charge was based on Paragraphs 1 and 8 of the Law on smuggling and on Chapter 23, Paragraph 1, of the Criminal Code.

15. In the hearing before the Tingsrätt, the defendant admitted the facts but disputed liability for smuggling on the ground that the rice was intended for his own and his family's consumption. He explained, in particular, that he had had to go to Norway with his wife for other reasons and had found out before the journey that it was permissible to import goods into Sweden to a maximum value of SEK 1 700 per person. He had therefore taken the opportunity offered by the journey to purchase 25 bags of rice, of 20 kg each, for a total amount of NKR 3 400, paying about NKR 145 per bag compared with the SEK 240 that he would have paid in Sweden at the current market price in that State. Contesting the charge of smuggling, the defendant pointed out that his wife is of Asian origin, that they have three children living at home, that the family consumes at least 25 kg of rice per month and that they are often visited by a grown-up daughter and her family, who also eat a large amount of rice. He therefore estimates that the quantity of rice in question, which was marked for consumption by November 2000, would have been sufficient for approximately one and a half years.

16. The Tingsrätt, having stated that there was no reason to call into question the defendant's statement that the rice was for his own and his family's consumption, found that the rice was contained in the defendant's personal luggage within the meaning of Article 45 of Regulation No 918/83 inasmuch as it had been carried in his private car. As regards the condition laid down in that article that 'the nature and quantity of such goods should not be such as might indicate that they are being imported for commercial reasons', the Tingsrätt took the view that it should be construed as meaning that the nature and quantity of the goods ought not, *objectively seen*, to be such as to raise doubts as to the nature of the import. That is precisely the approach which underlies the decision taken by the local customs authorities to set the standard duty-free quantity for private imports of rice at 20 kg per person. In view of the large scale of rice imports from Norway and the need to avoid uncertainty, the court found it essential and also advisable for the customs authorities to set a certain quantity, below the maximum quantity which would otherwise apply, as free of duty. The Tingsrätt therefore took the view that the fact that the rice was not intended to be resold — and was therefore intended for non-commercial use — was not sufficient to discharge the defendant from liability. It therefore sentenced him to a fine for attempted smuggling and ordered that the rice be confiscated.

17. The defendant appealed against that judgment and asked for the conviction to be quashed and the decision to confiscate the rice to be annulled. He claimed that the Tingsrätt had wrongly introduced an intermediate concept, namely non-commercial use, between personal use and commercial use; and had set a different duty-free limit accordingly. However, Regulation No 918/83 merely states a maximum amount — ECU 175 — and stipulates that the goods must be intended for the family's personal use. The Swedish authorities could not therefore set limits of their own lower than the limits laid down in the Regulation or introduce a concept of non-commercial use.

18. Faced with a case which involved the interpretation of provisions of Community law, the Hovrätt first raised the question, in the order for reference, whether it should be regarded as a court of last instance in the present case and whether, as such, it is required to refer a question to the Court of Justice for a preliminary ruling under the third paragraph of Article 234 EC. The Hovrätt itself considered that the answer should be in the affirmative inasmuch as under Swedish law leave to appeal to the Supreme Court is granted only on the conditions laid down in Paragraph 10 of Chapter 54 of the Rättegångsbalk and explained above (in point 3 et seq.), that is to say only where the point of law is so complex that there is an interest in establishing a precedent for the uniform interpretation of the law or where the Hovrätt makes an entirely erroneous determination on the point of law. According to the order for reference, a minor error in the interpretation or application of Community law does not in itself constitute grounds for leave to appeal.

19. Having thus determined that it should be described as a 'court of last instance' within the meaning of the third paragraph of Article 234 EC, the Swedish court then raised a further question, namely whether it was really necessary to refer to the Court of Justice the questions that had arisen in the case pending before it. It points out that the Court itself recognised, in its well-known judgment in *CILFIT*, that the obligation to refer a question of Community law does not apply where the national court or tribunal has established that 'the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'. [5] In the present case, however, the Hovrätt considers that the questions of Community law raised in the main proceedings are not of the kind mentioned in that judgment, although the answer to them appears to be equally clear. It is therefore unsure whether, in the event of confirmation that it has the character of a court or tribunal of last instance, it would also be under an obligation to request a preliminary ruling even though it considers itself able to give judgment in the case without the assistance of the Court.

20. In the light of those considerations, the Hovrätt therefore decided to refer the following questions to the Court for a preliminary ruling:

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

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

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

3. Under Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty, goods contained in the personal luggage of travellers coming from a third country are, subject to Articles 46 to 49 of the regulation, to be admitted free of import duties, provided that such

5 — Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415.

imports are of a non-commercial nature. Does this mean that the nature and quantity of the goods should, on an objective view, not be such as to raise doubts about the nature of the import? Or may regard be had to the individual's lifestyle and habits?

4. What is the legal significance of a national authority's provisions which indicate the duty-free quantity of a certain product — to which Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty is applicable — normally to be admitted?'

21. In the course of the procedure before the Court, the Danish, Finnish, Swedish and United Kingdom Governments and the Commission submitted observations. I shall give an account of their views as I examine the questions one by one in the order in which they are put in the order for reference.

22. First, however, I should add that in order to clarify the first question, the Court of Justice asked the referring court to explain whether the Rättegångsbalk or judicial practice precluded the Högsta Domstolen from raising a question for preliminary ruling in the course of a procedure for granting leave to appeal against a decision of the Hovrätt. The Hovrätt replied that that possibility was not precluded, although the question had not so far been considered in the case-law.

Legal analysis

The first question

23. By its first question the Hovrätt asks whether, in the situation described above, it can be regarded as a court of last instance and whether it is therefore required to refer a question to the Court of Justice for a preliminary ruling under the third paragraph of Article 234 EC.

1. Observations of the parties

24. All the parties which submitted observations expressed views on this question.

25. The Danish Government considered that it should be answered in the affirmative, since otherwise the aims pursued by the third paragraph of Article 234 EC might be jeopardised. In its view, national courts or tribunals whose decisions may be reviewed only after leave to appeal has been granted are to be regarded as courts of last instance within the meaning of that provision.

26. The Finnish and Swedish Governments take the opposite view, primarily on the basis of the formal reference to courts of last instance in the third paragraph of Article 234 EC. They consider that the mere fact that the decisions of Hovrätter are open to review is sufficient to exclude those courts from the scope of the provision in question, inasmuch as the fact that leave to appeal is required limits but does not preclude the possibility of review by the higher court. They also point out that if the purpose of Article 234 is to prevent the emergence of a body of national case-law that is not in accord with Community law, then, in the Swedish judicial system, the task of ensuring uniformity in the judgments handed down by the courts must be regarded as a matter for the Supreme Court, not for the courts of appeal. The two governments add that the answer they suggest presents no risk for the uniformity of Community law, first, because the courts of appeal may in any case refer a question to the Court of Justice for a preliminary ruling, and that alone reduces the risk of distortion, but above all because cases where a question of interpretation of Community law is raised and where there is no prior case-law of the Court of Justice may generally be regarded as cases where leave to appeal must be granted, so that in the subsequent proceedings the Supreme Court will itself, if necessary, have to make the reference for a preliminary ruling. The Finnish Government observes that this is precisely what happens in Finland and in fact, according to expert legal opinion, the Supreme Court could decide to make a reference for a preliminary ruling when the request for leave to appeal was first considered. The Finnish Government also argues that, if the Court of Appeal were to be regarded likewise as a court of last instance, there would be a risk that not one but two courts would be required to refer a question for a preliminary ruling in the same case.

27. The United Kingdom Government, too, points out that the mere fact that leave to appeal is required in order for a case to be reviewed by the Supreme Court is not sufficient to make the Court of Appeal a court of last resort within the meaning of the third paragraph of Article 234 EC. If the particular purpose of that provision is to prevent the emergence in a Member State of a body of national case-law that is not in accord with Community law, achievement of this objective will be fully ensured if the court or tribunal which has the final decision on leave to appeal bears the obligation to seek a preliminary ruling. Extending the scope of the analysis to other legal systems, including the English system, the United Kingdom maintains that that applies in circumstances where the court or

tribunal against the decision of which leave to appeal is sought has power to grant leave ('leave to appeal'), or where it is rather the supreme court ('permission to appeal'), or where it may be first the one and then the other. In all cases in which a decision on an issue of Community law is necessary, the court which has the final decision on whether leave to appeal should be granted should either grant permission or refer the question of Community law to the Court of Justice. According to the United Kingdom Government, therefore, the answer to the first question should be in the negative, provided that in the legal system in question the court of last instance is entitled to, and does, take into account when considering whether to grant permission the obligation referred to in the third paragraph of Article 234 EC.

28. The Commission's analysis is more detailed, in that it attempts to explore both possible answers to the question with a view to obtaining a better idea of their implications. Assuming, first, that the answer is in the affirmative, the Commission concedes that the need to seek leave to appeal means that there is nevertheless a possibility of reviewing the case. However, if in practice the proportion of cases in which leave is granted is too low because of the difficulty of obtaining a review and if leave is not granted as of right because it is subject to certain conditions, it must be concluded that there is in fact no effective right of appeal. If this conclusion is accepted, the Hovrätt, like all courts or tribunals whose decisions are open to review only after leave to appeal has been granted, would be under the obligation referred to in the third paragraph of Article 234 EC. However, the fact that a higher court, the Högsta Domstol, or its equivalent in other Member States, may grant leave or permission to appeal means that that court too may be under the same obligation. That should not, however, create particular problems because that possibility was taken into consideration by the Court in its judgment in *Parfums Christian Dior* where, as we shall see, it explained that even if one court is under the same obligation as another to comply with the third paragraph of Article 234 EC, that may not remove from the first court the obligation to submit a question to the Court in the same or similar terms. [6] The Commission observes that, if that solution were thus to be adopted, not only could the court and the parties be absolutely sure that at least one national court or tribunal was required to refer a question to the Court for a preliminary ruling but there would also be a considerable increase in the number of courts under that obligation.

29. If, on the other hand, it is assumed that the answer is in the negative, the Commission observes that there is a real, albeit conditional and uncertain, possibility of obtaining leave to appeal and it must therefore be concluded that there is provision for a remedy within the meaning of the third paragraph of Article 234 EC. The Commission recognises that on this assumption it remains uncertain which court is under an obligation to refer, but considers that the answer must be sought

6 — Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 30.

within the national legal systems themselves and specifically in relation to the discretion they accord, in the matter of fulfilling that obligation, to the court or tribunal which has the final decision on whether leave to appeal is to be granted. The Commission considers that it is for that court, having due regard to the principle of the primacy of Community law and the obligation to protect legal positions based on that law, to ensure that a question of interpretation of Community law has been, or is, dealt with properly. This means that, if it is considered that that is not so, the court which has jurisdiction to decide whether leave to appeal is to be granted must either refer the case back to the lower court, if that is possible in the legal system in question, or take a decision itself or take some other measure permitted within its own legal system. In that context, it may therefore decide directly to refer the matter to the Court of Justice, either when considering whether to grant leave to appeal or, if necessary, when examining the merits of the request. From the point of view of Community law, however, the Commission considers that it is important not so much to know which court is under an obligation to refer as to know that there is, as the Court of Justice wishes, a court or tribunal able in the course of the procedure to guarantee the uniform interpretation of Community law.

30. Lastly, while recognising that both the alternatives it has explored have advantages and disadvantages, the Commission considers that, in order to avoid an inordinate increase in the number of courts under the obligation referred to in the third paragraph of Article 234 EC, the second is preferable and that the answer should therefore be that it is for the court which decides whether leave to appeal is to be granted to ensure compliance with Community law, within the possibilities available under its own legal system, and that court must therefore be regarded as the court of last instance within the meaning of the third paragraph of Article 234 EC.

2. Community case-law to date

31. Before expressing a view on the issue and the answers proposed by the parties, it seems to me advisable to undertake a brief survey of the Court's case-law on the subject.

32. I must first point out in this connection that, as regards the aspects that are of interest for present purposes, the third paragraph of Article 234 EC was initially subject to two conflicting interpretations. One side, comprising the case-law of the Member States and expert legal opinion, held that the obligation to refer applied only to the courts at the apex of the judicial pyramid in the legal system concerned, that is to say the supreme courts, by reason of their specific role as guarantors of the uniform interpretation of the law and the unity of national law. The other side maintained, on the contrary, that the very *raison d'être* of the obligation in question lay in the need to prevent the emergence of a body of definitive decisions that would

entail differences in the application of Community law. According to that view, in order to guarantee the useful effect of the third paragraph of Article 234 EC, the obligation laid down in that provision must apply to any court handing down a final decision, irrespective of its position in the hierarchy of the national legal system.

33. The case-law of the Court of Justice quickly gravitated towards the second view. Already in the famous case of *Costa* v *ENEL*, a reference for a preliminary ruling from the Giudice Conciliatore di Milano, the court of first and sole instance by reason of the sum of money at issue, the Court stated *obiter dictum* that under Article 177 of the EEC Treaty (now Article 234 EC) 'national courts against whose decisions, as in the present case, there is no judicial remedy must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the "interpretation of the Treaty" whenever a question of interpretation is raised before them'. [7]

34. Even more significant, however, is the subsequent judgment in *Hoffmann-La Roche*, in which the Court was called upon to rule on a question of interpretation of the third paragraph of Article 177 of the EEC Treaty raised by a German court in interlocutory proceedings for an interim order (*einstweilige Verfügung*). The fact that in such proceedings no judicial remedy lies against the court's decision, although it is open to the parties to bring an ordinary action having the same subject-matter, prompted the German court to ask the Court whether it was under a duty to refer the question for a preliminary ruling. The Court stated that 'in the context of Article 177, whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State. The requirements arising from that purpose are observed as regards summary and urgent proceedings, such as the proceedings in the present case, relating to interim measures, where an ordinary main action, permitting the re-examination of any question of law provisionally decided in the summary proceedings, must be instituted, either in all circumstances or when the unsuccessful party so requires. In these circumstances the specific objective underlying the third paragraph of Article 177 is preserved by reason of the fact that the obligation to refer preliminary questions to the Court applies within the context of the main action'. [8]

35. The same line was followed in the judgment in *Morson and Jhanjan*, in which the Court reiterated, again in the context of interlocutory proceedings, that 'the specific objective underlying the third paragraph of Article 177 is preserved if the obligation to refer preliminary questions to the Court applies within the context of proceedings as to the substance even if that action is tried

7 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at 592.

8 — Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957, paragraph 5.

before the courts or tribunals belonging to a jurisdictional system different from that under which the interlocutory proceedings are conducted, provided that it is still possible to refer to the Court under Article 177 any questions of Community law that are raised'. [9]

36. It seems to be clear, therefore, that the Court's principal concern is to preserve the objective of the provision in question, characterised by the need to 'prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State', which might jeopardise the uniform interpretation and application of Community law. Precisely for that reason, however, the objective must be protected not in a formal and abstract manner but having regard to whether or not the decision at issue is final, because it is essential to prevent the national courts from ruling on questions of Community law without referring to the Court of Justice in cases where there is no other instance that can do so later. [10]

37. If that requirement is satisfied, the problem of determining in what national proceedings the question is to be referred, in cases where more than one court is in principle entitled to do so, becomes less urgent. In fact, as we know, that possibility was considered in *Parfums Christian Dior*, which I have already mentioned, where, albeit in another context and for reasons which I need not go into here, it was a matter of choosing between the national supreme court (the Hoge Raad) and the Benelux Court of Justice. In its judgment in that case, cited above, the Court held that both courts must be regarded as courts of last instance and are therefore under an obligation to refer to the Court of Justice for a preliminary ruling under the third paragraph of Article 177. However, should one of them have brought the matter before the Court already, it also explained that 'that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings' (paragraph 31). In his Opinion in that case, Advocate General Jacobs had pointed out for his part that the requirements of the third paragraph of Article 177 will be satisfied provided that the Court of Justice has given a ruling at some stage in the proceedings before the national court takes a final decision inasmuch as 'the rationale of the Treaty provisions is that a court of a Member State whose decisions are final should not decide a question of Community law in the absence of a ruling from this Court. From that perspective, it may make little difference in which proceedings the ruling is requested'. [11]

38. Finally, the Court has not had occasion to give any general guidance on determin-

9 — Judgment in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraph 9.

10 — As Advocate General Capotorti observed in his Opinion in Case 107/76 *Hoffmann-La Roche*, cited above, point 4, 'in order that the Court may fully and effectively discharge its task of protecting the rights which the Community legal system has created in favour of individuals, it is reasonable to regard the courts, at every level, as under a duty to seek a preliminary ruling in the course of any proceedings which must of necessity result in a final decision'.

11 — Opinion in Case C-337/95 *Parfums Christian Dior*, cited above, point 28.

ing whether a decision is final and what judicial remedies may prevent it from being so. However, I find Advocate General Capotorti's observations on the subject in his Opinion in *Hoffmann-La Roche*, cited above, highly significant. After pointing out that the concept of judicial remedy differs from one legal system to another, he concludes that appeals by persons other than the parties involved, for example third-party proceedings or an action by the public prosecutor in the interests of the law, and so-called exceptional remedies such as a re-opening of the case, are in principle to be regarded as falling outside that concept and that 'the decisions referred to in the third paragraph of Article 177 are all those which are final, in the sense that they do not give rise to any review of the case on the request of either of the parties either as regards the facts or even only as regards the law without any fresh facts or exceptional conditions being necessary'. [12]

3. Assessment

39. It seems to me that the ample details elicited so far provide all the information required for a reply to the question, a reply — I should add — that, again in my view, is applicable both to the specific Swedish system, in which only the Supreme Court may grant leave to appeal, and to the judicial systems I mentioned earlier in which the court that took the contested decision is (alone or with others) the court that may grant leave to appeal against it.

40. I too, like almost all the other parties which submitted observations in the present proceedings, consider that, even though the requirement of leave to appeal limits the possibility of challenging the decisions of the Hovrätter, that possibility undoubtedly exists. I would add that this is particularly relevant for present purposes since, as the Swedish and Finnish Governments both point out, such a challenge is not an extraordinary or exceptional remedy but 'an appeal in the strict sense of the word', that is to say 'an ordinary action' in the context of the judicial remedies offered by the legal system; this is confirmed moreover, as the Finnish Government points out, by the fact that decisions of the Hovrätter are regarded as final only after the request for permission to appeal has been refused. Also, the Swedish Government itself notes that in some cases (notably criminal cases) even appeal against judgments given by the district courts (Tingsrätter) is subject to permission being granted by the courts of appeal and this clearly does not alter the ordinary nature of the remedy. There is consequently no reason why the uncertainty attending the decision on leave to appeal should be mentioned in a negative light, that is to say in order to obscure the objective fact that there is nevertheless a possibility of appeal, and why its positive implications should be

12 — See Opinion in Case 107/76 *Hoffmann-La Roche*, cited above (ECR 957, at 979).

overlooked, that is to say in order to cast doubt on, if not preclude outright, the qualification of Hovrätter as courts of last instance. It seems to me on the contrary that, given the possibility I have mentioned, the Hovrätter cannot be regarded, either technically or in the light of the principles implicit in the case-law of the Court which I have just mentioned, as courts of last instance.

41. However, as we saw earlier, the problem in the present case, as in the similar cases I have just mentioned, is not in fact to determine which of the courts concerned is to be formally described as a court of last instance within the meaning of the third paragraph of Article 234 EC, but rather to avoid the risk that deciding that the Supreme Court is to be the court of last instance might jeopardise the oft-quoted purpose of Article 234 EC to 'prevent the emergence of a body of national case-law not in accord with the rules of Community law', which might jeopardise the uniform interpretation and application of Community law. The real concern is how to achieve that objective in cases such as the present one, where the court entitled to grant permission may refuse it, thereby closing the entire case without giving the Court an opportunity to rule on any questions of Community law that might be raised in the course of the proceedings. Hence the reservations about solutions that carry that risk and the attempt to find remedies that may remove it in cases where is it impossible to avoid a solution of that kind. This was, moreover, clear from the observations of almost all those who submitted observations in the present case, although they agreed that the possibility of appeal to the Supreme Court precluded the Hovrätt from being regarded as a court of last instance. I should say, first, that even the Danish Government did not really dissent from this view, but sought to express concern about the risks it might entail for the uniform interpretation of Community law in the Member States.

42. It seems to me, however, that the proper response to that legitimate and reasonable concern is not to force decisions of the Hovrätter into the mould of decisions of last instance, nor is it to produce statistics showing how often leave to appeal is granted or quote arguments that have nothing to do with the matter in hand. On the contrary, the answer is to be found in Article 234 EC itself and in the nature of the cooperation it establishes between the Court and the national courts. In other words, it must be borne in mind that, although it is usually distilled into the relationship between the Court of Justice and the individual referring court, that cooperation in fact invests the whole of the national judicial system at every level. The whole of the judicial system in question, not just individual courts, must therefore be considered in the event of uncertainties or difficulties such as those in the present case, in order to determine whether that system provides instruments capable of fulfilling the aims of Article 234 EC. This was precisely the line the Court took in resolving the issues in *Parfums Christian*

Dior, for example, and it is the line I believe it should take in ruling on the present case. In short, I consider that it is important not to engage in the abstract exercise of defining the nature of the court at issue but rather to determine whether and how, in the light of a full review of the judicial system in question, that system will secure compliance with the aims of Article 234 EC.

43. Turning now to the concern I mentioned in the last paragraph, it seems to me that one thing must be made absolutely clear, namely that, in principle, courts such as the Swedish Supreme Court, when functioning as courts of last instance, are fully bound by the obligation enshrined in the third paragraph of Article 234 EC unless the legal system to which they belong allows them to avoid that obligation without infringing the provision in question. That would be the case, for example, if, when a question of Community law was raised, such courts were permitted not to seek a preliminary ruling directly but to refer the case back to the lower court for it to do so. In that case, clearly, no problems of compliance with Article 234 EC would arise because, I repeat, what is of interest to Community law is that the aim pursued by that provision be secured, not that it be secured by any particular court. But apart from such cases, the obligation to refer for a preliminary ruling is absolutely binding on those courts even if the legal system to which they belong does not allow them to do so in certain cases. In those cases, irrespective of the state of national law, the obligation to refer would be derived directly from Article 234 EC and from the primacy of Community law, since those courts, as the Court of Justice has repeatedly emphasised, are required to ensure that the obligation in question is fulfilled.

44. In the light of the foregoing considerations and the facts that have emerged during the case, it seems to me that it is now easier to reply to the specific question raised in the present case. I should point out, first, that under its own national law the Swedish Supreme Court must grant leave to appeal in cases where the uniform application of the law in that legal system is at issue. Clearly, a question of interpretation of Community law falls into that category, as the Swedish and Finnish Governments have both expressly confirmed; indeed the Finnish Government has even reported judicial practice and expert legal opinion to that effect.

45. I should add, next, that in its reply to a question on the subject put to it by the

Court of Justice, the referring court has explained that, while there are as yet no precedents for it, there is nothing in the Swedish legal system to prevent the Högsta Domstol from referring a question of Community law directly to the Court of Justice for a preliminary ruling if such a question should arise during its examination of a request for leave to appeal against a decision of the Hovrätt. However, it is not clear whether it may, in that context, refuse permission but at the same time refer the case back to the Hovrätt for it to make the reference. If that were the case, compliance with Article 234 EC would be ensured.

46. Save in that case, however, the Högsta Domstol cannot, as I have said, avoid the obligation to refer to the Court of Justice if a question of Community law is raised in proceedings before it, provided of course that the other conditions laid down in the third paragraph of Article 234 EC and in the case-law of the Court are met. It may clearly do so during its examination of the merits of the appeal in cases where it has granted leave to appeal. But it may also do so during its examination of the request for leave to appeal, particularly if it was minded to refuse it. In that case, if the answer given by the Court were to conflict with the decision of the Hovrätt and the case could not be referred back to that court, the Högsta Domstol would be positively required to grant leave to appeal in order to give effect to the Court's interpretation. It would be required to do so because of the obligations to that effect arising from Article 234 and because Swedish law itself requires the Supreme Court to grant leave to appeal if it is important for the uniform application of the law.

47. In both cases, therefore, compliance with Article 234 EC would be ensured and the solution I have just outlined would not entail any risk to the aims pursued by that provision, or at least no greater risk than might arise in similar and less difficult situations.

48. In the light of the foregoing considerations, I therefore propose that the reply to the first question should be that a national court or tribunal whose decisions may be challenged subject to examination of a request for leave to appeal is not in principle a court of last instance within the meaning of the third paragraph of Article 234 EC.

The second question

1. Introduction

49. By this question, on the assumption that in the present case it is bound by the obligation referred to in the third paragraph of Article 234 EC, the Hovrätt asks

whether it may nevertheless decline to seek a preliminary ruling where it considers, as it does in the present case, that the questions of Community law raised in the case pending before it are 'clear' — even if, the Hovrätt adds in an obvious allusion to the judgment in *CILFIT*, the conditions laid down in that judgment are not met, in particular if the questions are not covered by the doctrine of *acte clair* or *acte éclairé*.

2. Observations of the parties

50. Only the Danish Government and the Commission expressed views on this question and both took the opportunity presented by the general and summary nature of the question itself to suggest a more or less radical review of the judgment in *CILFIT*.

51. The Danish Government would like the Court to reconsider that judgment, both on principle and on practical grounds, especially as it is now almost 20 years since it was given. To that end, it concurs fully with the views expressed by Advocate General Jacobs in his Opinion in *Wiener*, [13] in which he observed that the expansion of Community legislation to new fields and the great increase in the volume of legislation has led inevitably also to an increase in references to the Court for a preliminary ruling. However, as the Advocate General observed, excessive resort to such references is likely to prejudice the quality, the coherence, and even the accessibility of Community case-law, and may therefore even be counter-productive to the aim, pursued by Article 234 EC, of ensuring the uniform application of Community law throughout the Union. By contrast, to limit the obligation to refer would not necessarily jeopardise the certainty of the law but might even promote it; it would also have the advantage of lightening the Court's case-load and reducing the length of proceedings. On those grounds and on the premiss that the Court's function under Article 234 EC is not so much to ensure that Community law is correctly applied whenever a question relating to that law is raised in a national court as to ensure that it is applied uniformly throughout the Community, Advocate General Jacobs proposed that references be limited to cases where 'there is a genuine need for uniform application of the law throughout the Community because the question is one of general interest' (paragraph 50). Since the national courts have become increasingly familiar with Community law and there is now a considerable body of case-law on the subject to which they can refer independently, it is possible, according to Advocate General Jacobs, to envisage self-restraint in the matter of references for a preliminary ruling, either on the part of those national courts, possibly on the basis of guidelines drawn up by the Court, or by the Court, which could 'exercise self-restraint and ... limit itself to more general issues of interpretation' (paragraph 45). Thus, without essentially calling into question the judgment in *CILFIT*, the Advocate General concluded that the conditions laid down in that case 'should apply only in cases where

13 — Paragraph 60 of the Opinion in Case C-338/95 *Wiener* v *Hauptzollamt Emmerich* [1997] I-6495.

a reference is truly appropriate to achieve the objectives of Article 177, namely when there is a general question and where there is a genuine need for uniform interpretation' (paragraph 64).

52. Agreeing with that view, the Danish Government also points out that a similar conclusion was reached by the group of experts set up by the Commission in the autumn of 1999 to reflect on the future of the judicial system of the European Communities. In its closing report, [14] the group likewise recommended, on the one hand, that national courts should be encouraged to apply Community law more frequently themselves and, on the other, that the obligation imposed on courts of last instance should be limited to cases where 'the question is of sufficient importance to Community law' and where, after examination by the lower courts, there is still a 'reasonable doubt' as to the solution. In the Danish Government's opinion, the Court should adopt those criteria in preference to the excessively restrictive criteria adopted in *CILFIT*, both in general and in relation to the definitions of those criteria developed in its judgment in that case. That applies in particular to the statement that the national court may refrain from referring the question to the Court of Justice if it is convinced that the correct interpretation of Community law is obvious and that 'the matter is equally obvious to the courts of the other Member States and to the Court of Justice' (judgment in *CILFIT*, paragraph 16). That criterion, according to the Danish Government, implies the absence not of any 'reasonable doubt' but of any doubt at all. Lastly, citing once again Advocate General Jacobs' Opinion in *Wiener* (paragraph 65), the Danish Government suggests that the Court should also abandon the other criterion laid down in the judgment in *CILFIT*, according to which the national court or tribunal must be convinced that the answer to the question of interpretation is obvious, in view of the difficulty of comparing the various language versions of a Community provision.

53. The Commission, for its part, does not consider that there is any need to call into question the conditions laid down by the Court in *CILFIT*, except for the requirement that the interpretation of Community law must be 'so obvious' as to leave no scope for any reasonable doubt on the subject. It points out in that connection that, under Article 104(3) of the Rules of Procedure of the Court as recently amended, [15] the Court may give its decision on a reference for a preliminary ruling by reasoned order not merely, as originally provided, where 'a question referred to the Court for a preliminary ruling is (manifestly) identical to a question on which the Court has already ruled' but also 'where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt'. The fact that the last

14 — Report of the reflection group on the future of the judicial system of the European Communities, January 2000.

15 — Amendments to the Rules of Procedure of the Court of Justice of 16 May 2000 (OJ 2000 L 122, p. 43).

condition laid down by Article 104(3) is not accompanied by a statement, as in the judgment in *CILFIT*, to the effect that the absence of any reasonable doubt must be 'obvious' could, in its view, be taken as an indication that that condition is no longer necessary and that it is therefore permissible to refer only to the absence of any 'reasonable doubt'. The Commission argues that this is particularly true in that experience shows that the national courts hesitate to recognise that a situation is 'obvious' and it appears impossible to comply with the requirement that the absence of any reasonable doubt must be obvious.

54. As regards the present case, having emphasised that derogations from the principles established by the Treaty must be interpreted strictly, the Commission observes that the referring court has not explained how and in what sense the question of interpretation of Community law 'obviously' arises in the case at issue. In any event, that court must abide by the principle that the answer must leave no scope for any reasonable doubt, having regard to the different language versions, terminology and legal concepts, and to the objectives of Community law and its state of evolution. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court and take upon itself the responsibility for resolving it, according to the judgment in *CILFIT*; however, the fulfilment of those conditions must be assessed in a manner which permits of objective verification, in order to ensure that the purpose of Article 234 is not circumvented. The Commission therefore proposes that the second question should be answered in the negative, that is to say, to the effect that a court of last instance may not avoid the obligation to refer if there is a reasonable doubt as to the answer to a question of application of Community law, having regard to the fact that the different language versions are all equally authentic, to terminology, and to the objectives of Community law and its state of evolution.

3. The judgment in *CILFIT*

55. Before assessing the various views on the subject, it seems to me advisable to recall briefly but in greater detail the relevant terms of the judgment in *CILFIT* and the context in which that judgment was given.

56. As you know, that judgment was the outcome of pressure from conflicting demands between which it sought to achieve a reasonable balance, although, as the present case confirms, it did not ultimately succeed in reconciling the opposing views. On the one hand, in the light of the practical considerations mentioned earlier, there was a need to avoid a plethora of references for a preliminary ruling possibly arising from the fact that the use of the term 'question' in Article 234 EC implies the existence of an interpretative doubt, or reliance on the well-known principle *in claris non fit interpretatio* or the doctrine of

acte clair or *acte éclairé* familiar from French case-law. On the other, the fundamental function of Article 234, to ensure the uniform interpretation of Community law, was stressed, with reference to the risk that any loopholes in the preliminary ruling mechanism, resulting from their inevitable tendency to proliferate and from the risk of their being differently applied in practice, might lead to a gradual erosion of the entire system.

57. That divergence, which had been very evident during the first few years when the EC Treaty was applied, lessened with the passage of time and did not surface again in practice until the *CILFIT* case. That does not mean that all had been well in the interim; on the contrary, national judicial practice was far from consistent and in some instances openly flouted the obligation imposed under the third paragraph of Article 234 EC. The Court for its part appeared gradually to temper the rigid attitude it had initially adopted, for a variety of reasons there is no need to go into here, except to observe that one, though not the only one, was the steady and rapid increase in the number and complexity of references for a preliminary ruling. Also, the idea that Article 234 EC entailed not subordination but cooperation between the Court and the national courts — an idea that was somewhat vague at first but was gradually developed in the Community case-law as a genuinely bilateral arrangement applicable throughout the system — in its turn encouraged a less mechanical and automatic interpretation of the obligation to refer and inevitably led to the national courts, even courts of last instance, becoming more actively involved.

58. Such was the background to the judgment in *CILFIT*. First of all, therefore, it sought to address the need to avoid superfluous references that would have placed an undue burden on the Court's activities and jeopardised the efficient performance of the task entrusted to it under Article 234 EC. To that end, it was considered advisable, despite the strict wording of the third paragraph of that provision, to leave the national courts of last instance a measure of discretion in determining whether the reference is really necessary. Consequently, as I have already noted, the Court admitted that the obligation to submit a question of Community law for a preliminary ruling might be limited in cases where the court or tribunal has established that 'the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court [16] or that the

16 — The Court had already ruled, in this connection, that 'although the last paragraph of Article 177 unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive that obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case' (judgment in Joined Cases 28/62 to 30/62 *Da Costa* [1963] ECR 31). See also the judgment in *Parfums Christian Dior*, cited above, paragraph 29.

correct application of Community law is so obvious as to leave no scope for any reasonable doubt'. [17]

59. However, precisely with reference to that last condition the Court introduced a number of precautions designed to limit the discretion exercised by the national courts and thus, despite the loopholes that the judgment in *CILFIT* opens up, to secure the fundamental objective of Article 234 EC of ensuring that Community law is interpreted and applied in a uniform manner in all the Member States and in particular, as regards the third paragraph of that provision, to 'prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law'. [18] While recognising that 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved', it therefore warns that 'before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice' (paragraph 16). Not just that, but 'the existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community' (paragraph 21). In particular, 'it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic: the interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied' (paragraphs 18 to 20).

4. Assessment

60. Turning now to the present case, I must first repeat that the order for reference is so brief on the subject that it is not easy to understand the Hovrätt's question. It is nevertheless more or less clear from the context that it was contemplating the third of the three conditions laid down in *CILFIT*. The interpretation of Article 45(1) of Regulation No 918/83 is undoubtedly relevant to the outcome of the case pending before the Swedish court and

17 — *CILFIT*, paragraph 21.
18 — *CILFIT*, paragraph 7.

the Court has, moreover, produced no case-law on the provision in question. [19]

61. However, this does not amount to anything because the Hovrätt is in fact asking whether there is an obligation to refer to the Court under the third paragraph of Article 234 EC on a question of Community law that is 'clear', being at pains however to explain that that would not be so in cases — such as those covered by the doctrine of *acte clair* for example — where, according to the case-law of the Court, a court of last instance may refrain from requesting a preliminary ruling. Thus there is clearly a reference to *CILFIT* but the case considered by the Hovrätt, as it itself says, differs from the case mentioned in *CILFIT*, where the answer is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'. In that case, quite simply, the answer to the question is 'clear'.

62. I propose to leave aside for the moment the perfectly correct point made by the Commission that the question is extremely general and is not reasoned, and also the fact that, as we shall see later, the questions of substance raised in the order for reference do not in fact appear to be as 'clear' as the order makes out. The point I am concerned to emphasise is that the Hovrätt seems to be proposing as it were an extra limb or qualification of the third condition laid down in *CILFIT*, suggesting a version that is more limited and I would say more 'subjective', in that it is based simply on the national court's conviction that it is in a position to resolve a question independently in so far as it presents no problems of interpretation and the answer is therefore 'clear'.

63. These observations alone justify the strong doubts that would be raised, were the question to be answered in the affirmative. These doubts arise, generally, from the fact that such an answer would appreciably extend the measure of discretion accorded to the national courts and consequently reduce the scope of the obligation to refer imposed on courts of last instance under the third paragraph of Article 234 EC. But they also arise, more specifically, from the fact that it would be tantamount to introducing, in a completely arbitrary way, a strong element of uncertainty and subjectivity, and consequently confusion, into the application of that provision.

64. To justify and strengthen those doubts, I think it is advisable to point out that the principle of the obligation on courts of last instance to refer questions for a preliminary ruling is not the outcome of an extempore decision by the Court but is set out directly in precise and formal terms in the Treaty and is thus, by its aims and implications,

19 — The Court has so far ruled on the interpretation of Regulation No 918/83 in Case C-247/97 *Schoonbroodt* [1998] ECR I-8095, with reference to the definition of 'standard tanks' in Article 112(2)(c), and in Case C-394/97 *Heinonen* [1999] ECR I-3599, with reference to restrictions on imports of alcoholic drinks, on the basis of the duration of the journey.

one of the fundamental and essential principles, I would say almost a structural principle, of the Community legal system. Needless to say, therefore, any derogation from that principle must be interpreted strictly. Precisely on that assumption, moreover, it has recently been authoritatively stated that, since the judgment in *CILFIT*, it would be difficult for the Court to apply the principle less strictly and still remain true to the letter and spirit of the Treaty. [20]

65. However, I must say that, apart from the fact that the nature and scope of the proposed derogation from the principle is not clear in the present case, such a derogation appears to be neither useful nor necessary in any way. Not only that: all the risks attending it are patently obvious. The judgment in *CILFIT* sought to provide a coherent and responsible set of indications that would give reasonably balanced guidance to the national courts. However, I do not believe the Court was under the illusion that it had thereby identified secure and definitive, not to say infallible, criteria for the purpose of defining the obligation referred to in the third paragraph of Article 234 EC. Notwithstanding that judgment, the very nature of the problem precludes any such solution because in practice the application of the provision objectively encourages — nor could it be otherwise — a measure of 'flexibility' and may consequently leave an even larger loophole than the courts intended for possible avoidance of the obligation to refer. The fact that that does not always happen or does not always lead to any significant developments does not mean that all is well in practice but rather that the avoidance often remains undetected or is considered to be relatively unimportant. Above all, it means that there is no effective machinery for monitoring and responding to it, or better that the existing machinery, as in the present case, is purely theoretical. It is known that the Commission (and it is not alone) rightly considers that it is not really feasible, and even less advisable, in such cases to bring an action for failure to fulfil an obligation under Article 226 EC. Nevertheless, I repeat, the problem exists and resurfaces from time to time in quite a conspicuous way. [21] However, the objective difficulties associated with the application of the judgment in *CILFIT* should in themselves militate against introducing any further element of uncertainty and ambiguity on the subject and, above all, abandoning a line of interpretation based on assessment criteria that are as objective as possible for a line that leaves room for subjective, not to say arbitrary, assessments by the national courts. I do not think it is any exaggeration to say that any other course would lead to a gradual erosion of the unity and uniformity of Community law and ultimately undermine its primacy.

20 — See, to that effect, D. Edward, 'Reform of Article 234 procedure: the limits of the possible', in D. O'Keeffe (ed.), *Judicial Review in European Union Law, Liber Amicorum Slynn*, The Hague, 2000, pp. 119 to 142, especially p. 123.

21 — See, for example, the recent order, 1 BvR 1036/99 of 9 January 2001, in which the Bundesverfassungsgericht, while interpreting the obligation referred to in the third paragraph of Article 234 EC with some latitude, nevertheless quashed a judgment of the Bundesverwaltungsgericht on the ground that, although it was a court of last instance, that court had failed to refer to the Court of Justice for a preliminary ruling on a question of Community law (see *Juristenzeitung* 2001, pp. 923 to 924).

66. That being said, I might consider my analysis to be complete except that a few more words remain to be said about the arguments advanced by Denmark, and to some extent also by the Commission, on the need to review the judgment in *CILFIT*. As I have already noted at some length, the Danish Government, recalling the concerns expressed by Advocate General Jacobs and repeated in the report of the reflection group on the future of the judicial system of the European Communities, cited above, openly asks in its written observations for a relaxation of the *CILFIT* criteria, which it considers to be too strict and therefore unlikely to avoid the risk of a plethora of references for a preliminary ruling. In particular, it revives the idea of limiting the obligation imposed on courts of last instance under Article 234 EC to cases where 'the question is of sufficient importance to Community law and where there is still a reasonable doubt as to the solution'.

67. I do not in principle dispute the validity of the concerns underlying the proposals in question or the value of some of them, particularly on the subject of courts that do not decide at last instance (I am thinking, for example, of the need to encourage self-restraint on the part of those courts in referring questions for a preliminary ruling). However, I should like to point out, first, that the substantial amendments to the Rules of Procedure of the Court which I mentioned earlier (point 53) were introduced after the proposals in question and go some way towards meeting the concerns expressed in that, as practice is already tending to show, they enable a number of the less 'difficult' questions to be resolved by means of simpler and shorter procedures.

68. On the other hand, I also believe that those concerns ought not to be exaggerated, especially when we consider the general context and the problems almost all courts now have to face. The sum total of references for a preliminary ruling is still relatively modest compared with the large and growing number of cases where a question of Community law is raised in the national courts and even more so if we consider the large number of courts with authority to refer and of cases brought before those courts. However, those concerns seem to me to be quite off the mark when they relate, as in the present case, to courts of last instance, because the number of references for a preliminary ruling made by those courts has always been and still is very small, both in absolute terms and in proportion to the total number of such references. [22]

69. It seems to me, therefore, that no action can usefully be taken in that area to address the concerns I have mentioned: even if it were feasible or desirable, any advantages

22 — I merely point out that between 1960 and 2000 references for a preliminary ruling from courts of last instance accounted for just over a quarter of the total number of references (1 173 out of 4 381).

it might bring would be really too small to justify the negative implications and the risks involved in those proposals. One has only to think of the danger of making it even more difficult for those concerned to obtain an order for reference from courts which, as experience shows, are not noted for their willingness to support such requests and already have (or assume) a sufficient measure of independence. Not only might it limit the protection afforded to individuals by the courts, it would inevitably affect the uniform interpretation and application of Community law. The Court itself has frequently noted that the preliminary ruling procedure is the real keystone securing the Community character of the law established by the Treaties because it preserves its unity and enables it to produce the same effects throughout the Union while at the same time ensuring that individuals are effectively protected by the courts. [23] Thus the Court may well encounter problems, now or in the future, as a result of the influx of references for a preliminary ruling but I am nevertheless firmly convinced that practical and contingent requirements, however legitimate and understandable they may be, cannot be satisfied to the detriment of the principles and coherence of the system, still less by inducing the Court to abdicate the responsibilities conferred on it by the Treaty.

70. The general doubts that have been raised so far increase when we come to consider the proposals on their merits. The criterion that the question of Community law referred for a preliminary ruling must be 'sufficiently important' seems to me, as even its supporters recognise at least to some extent, so vague and uncertain that it is all too easy to imagine how it may offer an opening to those fond of litigation and above all leave too great a measure of discretion to the national courts (and remember that we are speaking here of courts of last instance). I should add that I also find it hard to understand what is, in my view, the most serious motive underlying the proposal, namely the idea that it is not the duty of the Court to ensure that Community law is applied correctly in particular cases but merely to see that it is applied uniformly. I wonder whether it is possible to separate correct application from uniform interpretation, that is to say whether it is possible to imagine correct application of Community law in a specific case without uniform interpretation of that law being given, or required, beforehand.

71. Nor am I convinced by the other proposal that is made on the subject, namely that the obligation to refer should be waived only in cases where the answer to the question of Community law leaves no scope for any 'reasonable doubt', without the further requirement, implicit in the judgment in *CILFIT*, that it must be 'obvious' that there is no scope for such doubts. I should like, first, to make it clear in this connection that the requirement that this be obvious is not a further condition, a

23 — See, for example, the *Report of the Court of Justice on some aspects of the application of the Treaty on European Union*, Luxembourg, May 1995, p. 6.

sort of additional requirement imposed by the Court to relieve the court of the obligation to refer. On the contrary, it is a qualification of 'reasonable doubt', intended to emphasise that the doubt must really exist and must not be merely subjective. It is thus a requirement which, like the comparison of the different language versions of the provisions at issue, which I shall come to shortly, seeks to draw attention to the fact that the national court must exercise particular caution before deciding that there is no reasonable doubt. To delete the phrase 'be so obvious as to' from the judgment would not, therefore, make the doubt more 'reasonable' but would merely expose it to a higher degree of subjectivity and discretion. [24] That seems to me in the last analysis to be the result — going even beyond its supporters' intentions — of this proposal; otherwise I do not think there would be any reason to engage in a battle of words in a situation where the judgment in *CILFIT* has in any case already given courts of last instance a substantial measure of discretion.

72. I have already said more than once that in my view that measure of discretion is sufficient and it would be dangerous to extend it further. What I want to emphasise here is that the very body that commissioned the report of the reflection group mentioned earlier, that is to say the European Commission, reached the same conclusion despite the more open position it has taken in the present case. The Commission observed that the advantages of the proposals as far as the Court's workload was concerned were very slight, whereas there were real dangers for the uniform application of Community law, especially with enlargement on the horizon, and it therefore concluded with a request that the current wording of the third paragraph of Article 234 EC be retained, which is, as we know, exactly what happened in the Treaty signed at Nice on 26 February last year. [25]

73. In the present case, as I said, the Commission took the opposite view, namely that it was advisable to relax the strict criterion set in *CILFIT* that it must be obvious that there is a reasonable doubt, a view based *inter alia* on the recent amendments to Article 104(3) of the Rules of Procedure of the Court, which covers cases where the Court may give its decision on a

24 — I note that Advocate General Capotorti already issued the following warning in his Opinion in Case 283/81 *CILFIT*, cited above, point 7: 'Clearly, acceptance of the idea that the obligation to refer a matter to the Court exists only where a reasonable interpretative doubt has arisen would lead to the introduction of a subjective and uncertain factor and might prevent the procedure in Article 177 from attaining its objective'.

25 — In the 'Additional Commission contribution to the Intergovernmental Conference on institutional reform, Reform of the Community courts', of 1 March 2000 (COM/2000/109 final) we read on p. 5: 'The Commission does not feel it would be right to give flexibility to the obligation on courts of final instance to refer preliminary questions, currently laid down in the third paragraph of Article 234, requiring them to consult the Court of Justice only if the question were sufficiently important for Community law and if, after examination by the lower courts, there were still reasonable doubts as to the reply. The Commission considers that the advantages of such flexibility as far as the Court's workload is concerned are very slight and that there are real dangers for the uniform application of Community law, especially with enlargement on the horizon. It therefore thinks it is essential to stick with the current wording of the third paragraph of Article 234. Naturally, the flexibility introduced by case-law would continue to apply'.

reference for a preliminary ruling by reasoned order (see point 53 above). In particular, the Commission points out that the Court may also avail itself of that option in cases where 'the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt'. The fact that that passage does not adopt the whole of the *CILFIT* formula, notably the statement that the correct application of Community law must be 'so obvious' as to leave no scope for any reasonable doubt, could support the proposal that the national courts should be accorded a greater measure of discretion.

74. I must say, however, that even without a literal analysis of the said amendments I cannot see the connection between the proposal and the new wording of Article 104(3) of the Rules of Procedure. In the first case, the issue, so to speak, is the existence and degree of the doubts that *the national court* must have on a question of Community law in order to decide whether or not to refer it to the Court of Justice; in the second case, on the contrary, we are concerned with the doubts that the answer to the question may raise *for the Court* for the purpose of determining the procedure to be followed in replying to it.[26] It is therefore obvious that the prerequisites and purposes of the third paragraph of Article 234 EC and Article 104(3) of the Rules of Procedure are, and must be, completely different, so that one cannot be cited for the purposes of the other and vice versa.

75. Lastly, I believe we must also reject the Danish Government's other objection to the judgment in *CILFIT* and particularly to the requirement that the national court must be convinced that a particular interpretation is obvious, bearing in mind the difficulty of comparing the various language versions of a Community provision. As I have just observed, in my view it is not a matter here of the Court imposing a further condition but of emphasising that the national court must exercise particular caution before deciding that there is no reasonable doubt. In my view, the Court is insisting not that the national court should always compare the various language versions of a provision but that it should bear in mind that the provision in question produces the same legal effects in all those versions so that, before assuming that an interpretation is correct, it must be sure

26 — Moreover, the view that the provision in question is addressed to the Court and is concerned solely with its specific requirements is confirmed, if confirmation were needed, by the fact that, unlike the judgment in *CILFIT*, it contains no reference to the requirement that the question referred for a preliminary ruling must be relevant to the subject-matter of the case and that it is in principle for the national court to determine whether that requirement is satisfied (see judgments in *CILFIT*, cited above, paragraph 10, and Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 47).

that it is not doing so merely for reasons associated with the wording of the provision. This seems to me to be what Advocate General Jacobs means, although the Danish Government cites his Opinion in support of its own position, when he says that the reference to many languages in the *CILFIT* judgment 'would be better regarded ... as an *essential caution* against taking too literal an approach to the interpretation of Community provisions and as reinforcing the point that they must be interpreted in the light of their context and of their purposes as stated in the preamble rather than on the basis of the text alone'.[27] For my part, I would add that comparison of the various language versions should be regarded as a perfectly normal method of interpretation in the case of any legislation drafted in several languages, be it national (in multilingual States), Community or international legislation.

76. I therefore propose that the answer to the second question should be that the third paragraph of Article 234 EC must be interpreted as meaning that, even where it considers that a question of Community law is clear, a national court or tribunal against whose decisions there is no judicial remedy under national law is required to bring the matter before the Court of Justice by way of a reference for a preliminary ruling unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergence in judicial decisions within the Community.

27 — Opinion in Case C-338/95, cited above, paragraph 65. My emphasis.

The third question

77. By its third question the Hovrätt asks the Court of Justice what factors are to be taken into account in determining when imports of goods contained in the personal luggage of travellers coming from a third country may be deemed to be of a non-commercial nature within the meaning of Article 45(1) of Regulation No 918/83. In particular, it asks whether that provision means that the nature and quantity of the goods should, on an objective view, not be such as to raise doubts about the nature or the import, or whether regard may be had to the individual's lifestyle and habits.

78. The Finnish Government points out that the relief referred to in Article 45 of Regulation No 918/83 is limited in respect of value for goods other than those listed in Article 46 of the Regulation. Within that limit (ECU 175 per traveller), laid down in Article 47 of the Regulation, it is therefore possible to import a considerable quantity

of low-priced goods as personal luggage. However, in order to determine whether the system of reliefs applies in such cases it is necessary to establish whether the goods are being imported for commercial purposes or are intended for the personal use of the travellers or their families. To that end, it is necessary to consider in each case not just the nature and quantity of the goods that are being imported but also the lifestyle and habits of the traveller because that is what determines whether or not the import is deemed to be of a commercial nature.

79. The Swedish Government for its part considers that in order to determine whether the import is of a non-commercial nature within the meaning of Article 45(2)(b) of Regulation No 918/83, all the facts of the case must be taken into account, including the nature and quantity of the goods that are being imported and the economic and personal circumstances of the traveller. The import must also be of an occasional nature.

80. Lastly, the Commission too considers that there is nothing in Article 45 of Regulation No 918/83 to suggest that the quantity and nature of the goods are decisive for the purpose of determining whether or not the import is of a commercial nature. It therefore considers that it is contrary to Community law to lay down a specific quantity for a particular kind of goods, beyond which reliefs will not be granted. On the contrary, the national authorities must determine case by case whether the conditions for granting relief under the Regulation are met.

81. As we have already seen, Article 45(1) of Regulation No 918/83 allows goods contained in the personal luggage of travellers coming from a third country to be admitted free of import duties, subject to Articles 46 to 49, provided such imports are of a non-commercial nature. Thus, the relief is subject to two conditions, which are cumulative: the goods must be contained in the traveller's personal luggage and the import must be of a non-commercial nature. The limits on duty-free imports are laid down in Articles 46 and 47. In respect of certain categories of goods — tobacco products, alcoholic beverages, perfumes and toilet waters — Article 46 limits the relief to certain quantities per traveller, while in respect of other goods Article 47 limits it to a total value, set at ECU 175 per traveller. It follows that, within those limits, provided that the two conditions laid down in Article 45(1) are met, there is in principle nothing to prevent the import of a considerable quantity of low-priced goods.

82. In the present case, the referring court asks specifically how far, in the context of

the aforesaid relief, the nature and quantity of the goods are relevant for the purpose of determining the nature of the import. To that end, I think the proper starting-point is the definition provided in Article 45(2)(b), under which 'imports of a non-commercial nature' means imports which are of an occasional nature and consist exclusively of goods for the personal use of the travellers or their families, or of goods intended as presents, and their nature and quantity should not be such as might indicate that they are being imported for commercial reasons. The provision thus refers to a mixture of objective and subjective factors. The occasional nature of the import and the nature and quantity of the goods fall into the first category, while the requirements that the goods must be for the personal use of the travellers or their families and must not be imported for commercial reasons fall into the second.

83. That being established, it seems to me that there is nothing in Article 45 of Regulation No 918/83 to suggest that the nature or quantity of the goods are in themselves decisive factors for the purpose of determining whether or not an import is of a commercial nature. Had that been the case, the Community legislature would have set a quantitative limit on imports of goods as well as a limit as to value. It cannot of course be precluded that in certain cases the nature and quantity of the goods may arouse the suspicion that they are being imported for commercial reasons but that alone cannot form the basis for an absolute presumption that the import is of a commercial nature, especially as the nature and quantity of the goods are mentioned in Article 45(2)(b) only in so far as they might indicate that the goods are being imported for commercial reasons.

84. I agree with almost all the parties who have expressed a view on the subject that, on the contrary, all the criteria mentioned in the provision in question must be taken into account, including the subjective criteria, namely that the goods must be for the personal use of the travellers or their families and must not be imported for commercial reasons. In other words, I consider that the actual circumstances must be examined in each case and, in particular, regard must be had to the traveller's lifestyle and habits in determining whether the goods are for the personal use of the traveller or his family.

85. I therefore propose that the answer to the referring court should be that Article 45(1) of Regulation No 918/83 must be interpreted as meaning that, where the nature and quantity of the goods raise doubts about the purpose of the import, the question whether it is of a non-commercial nature must be determined case by case in the light of a full examination of the circumstances in the individual case, bearing in mind that the import must be of an occasional nature, that the goods must be for the personal use of the traveller or his family having regard to his living habits, and that they must not be imported for commercial reasons.

The fourth question

86. By its fourth question, the Swedish court seeks to ascertain the legal significance of national administrative rules determining the quantity of a certain product, to which Regulation No 918/83 is applicable, normally to be admitted duty-free.

87. In that connection, the Finnish Government has observed that Regulation No 918/83 seeks to establish a single comprehensive Community system of reliefs from customs duties. It does not give Member States the right to impose quantitative restrictions or to establish absolute and irrebuttable presumptions with respect to certain products. National provisions of this kind are in breach of Community law, whereas non-binding acts containing instructions for the customs authorities, giving indicative quantities above which imports would be presumed to be of a non-commercial nature, are not.

88. The Swedish Government for its part argues that the customs authorities' provisions setting at 20 kg per person the quantity of rice that may be admitted free of duty are not binding but are merely recommendations designed solely to save customs officers from having to determine case by case whether the conditions for granting relief are satisfied. As evidence that its view is correct, the Swedish Government cites case-law in which the Court held, likewise with regard to questions of customs duties and exemption, that 'in the area in question Member States are left with only the restricted power given to them' by the provisions of the Community act in question (in that case Directive 69/169 [28] which — like Regulation No 918/83 which is the subject of interpretation in the present case — does not provide for the possibility of laying down quantitative limits for goods which are not expressly listed in the act itself). On that premiss, the Court held that a national provision laying down a quantitative limit for certain goods to be admitted free of duty in terms such as to raise an absolute presumption that the importation has a commercial character was unlawful. [29] The Swedish Government infers from that case-law, *a contrario*, that Member States may adopt non-binding provisions laying down quantities of goods that may be admitted free of duty, on the understanding that the traveller has a chance to prove that an import of goods exceeding that limit is not of a commercial nature and that the value of the import is within the limit of ECU 175 laid down in Article 47 of the Regulation.

28 — Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (II), p. 232), as amended by Council Directive 87/198/EEC of 16 March 1987 (OJ 1987 L 78, p. 53). Article 3 of the Directive employs the same definition with respect to 'importations having no commercial character' as that given in Article 45 of Regulation No 918/83.

29 — See judgment in Case C-208/88 *Commission* v *Denmark* [1990] ECR I-4445.

89. The Commission expressed the same view, while also pointing out that it was not clear in the present case whether or not the Swedish provisions were binding. However it observed that that was a matter for the national court to determine, bearing in mind that the provisions in question were lawful only if they were not binding.

90. As we have just seen, all the parties who expressed a view on the subject agreed that Member States cannot adopt binding provisions laying down quantitative limits on duty-free imports or even an absolute presumption that an import is of a commercial nature because of the quantity of goods imported. At most, the customs authorities may issue administrative instructions indicating the quantity of certain goods that may be admitted free of duty, on the understanding that the traveller may prove that a larger quantity is not being imported for commercial reasons.

91. In my view, that is the right answer and I have no difficulty in supporting it. I consider however that its scope can usefully be refined by the addition of one or two further considerations. It must be remembered that Regulation No 918/83 is expressly based on recognition that common rules are required in this area under the international conventions to which the Member States are parties. This presupposes the introduction of 'Community rules on reliefs from customs duties designed, in accordance with the requirements of the Customs Union, to eliminate differences in the aim, scope and conditions for the application of the reliefs contained in these conventions, and to enable all those concerned to enjoy the same advantages throughout the Community' (fourth recital in the preamble). Consequently, while it is legitimate to allow any Member State to issue 'instructions' or 'recommendations' to customs officers, laying down quantitative limits not provided for in the Regulation, even if such instructions or recommendations are not binding, that must not jeopardise in practice the uniform application of the Community system of reliefs from customs duty.

92. To that end, it seems to me, first, that any quantitative limit on imports indicated in a national administrative measure must be reasonable and appropriate. By this I mean that, expressed in monetary terms, that quantitative limit must not be very different from the maximum total value of ECU 175 laid down in Article 47 of Regulation No 918/83. In that respect it seems to me that, in the present case, the duty-free allowance of 20 kg of rice per person, costing SEK 240, is a very long way

from the limit of ECU 175 laid down in Article 47 of the Regulation, a limit considered by the Swedish authorities to be equivalent to SEK 1 700.

93. By the same token, I also consider that the traveller should be able to protect his own interests without too much difficulty, as regards both knowledge of the precise content of his own right to relief from customs duty as defined in Regulation No 918/83 and the evidence he is required to provide, which should not be too rigorous or such as to make it effectively impossible to prove that the import is of a non-commercial nature.

94. In the light of the foregoing considerations, I therefore take the view that Article 45 of Regulation No 918/83 precludes national administrative measures or practices resulting in the imposition of binding quantitative limits on reliefs from customs duty or raising an absolute presumption that imports are of a commercial nature by reason of the quantity of goods imported.

Conclusion

95. In conclusion, I propose that the Court give the following answers to the questions referred by the Hovrätt för Västra Sverige:

(1) The third paragraph of Article 234 EC must be interpreted as meaning that a national court or tribunal whose decisions may be challenged subject to

examination of a request for leave to appeal is not in principle a court of last instance within the meaning of the third paragraph of Article 234 EC.

(2) The third paragraph of Article 234 EC must be interpreted as meaning that, even where it considers that a question of Community law is clear, a national court or tribunal against whose decisions there is no judicial remedy under national law is required to bring the matter before the Court of Justice by way of a reference for a preliminary ruling, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt, bearing in mind that the existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergence in judicial decisions within the Community.

(3) Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty must be interpreted as meaning that, where the nature and quantity of the goods raise doubts about the purpose of the import, the question whether it is of a non-commercial nature must be determined case by case in the light of a full examination of the circumstances in the individual case, bearing in mind that the import must be of an occasional nature, that the goods must be for the personal use of the traveller or his family having regard to his living habits, and that they must not be imported for commercial reasons.

(4) Article 45 of Regulation No 918/83 precludes national administrative measures or practices resulting in the imposition of binding quantitative limits on reliefs from customs duty or raising an absolute presumption that imports are of a commercial nature by reason of the quantity of goods imported.