OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 26 September 2000 [1]

I. Introduction

1. By the question referred by it for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), the Tribunale di Genova (Genoa District Court), Italy requests the Court of Justice for an interpretation of Articles 243 and 244 of Council Regulation No 2913/92 of 12 October 1992 establishing the Community Customs Code. [2]

II. Facts of the main action

2. The questions referred for a preliminary ruling have arisen in proceedings brought by Kofisa Italia Srl (hereinafter 'Kofisa') against the Ministero delle Finanze (Ministry of Finance) and the Servizio Riscossione Tributi, Concessione Provincia di Genova (Tax Collection Department, Genoa Provincial Office).

3. Without having made any prior administrative complaint, Kofisa challenged, before the Tribunale di Genova, the order made by the Genoa Customs Authority requiring it to pay ITL 782 393 152, together with interest, owning to irregularities in the application of the VAT ceiling on imports in respect of 1995.

4. While that case was pending, the Tax Collection Department issued a tax claim against Kofisa for payment of the abovementioned amount together with costs and interest accrued and accruing. Kofisa challenged the claim, seeking a declaration that it was unlawful, and suspension of implementation of the customs order and the tax claim and also of execution against the company pending a court ruling concerning the customs debt.

5. In connection with this second case, and more specifically with the application for suspension, the Tribunale di Genova stated that, under current national law and the case-law on the matter, it did not have jurisdiction, and pointed out that Article 244 of the aforementioned Code provides that customs authorities may, in

1 — Original language: Spanish.
2 — OJ 1992 L 302, p. 1.

certain circumstances, suspend implementation of a decision challenged before them.

6. After observing that the conditions imposed by Article 244 for suspending the implementation of contested decisions appeared to be met, the national court expressed doubts as to whether the provision was applicable, owing to the fact that Kofisa brought the proceedings without first lodging an appeal before the customs authority, in accordance with Article 243 of the Code, and that Article 244 confers the power to suspend implementation of the contested decision only on the customs authority and not on the courts.

7. It therefore decided to stay the proceedings and refer two questions to the Court of Justice for a preliminary ruling in order to resolve the doubts concerning the interpretation of Articles 243 and 244 of the Code.

III. The questions referred for a preliminary ruling

8. The Tribunale di Genova has forwarded the case-file to the Court of Justice so that it may give a preliminary ruling on the following questions of interpretation:

'(1) May the appeal referred to in Article 243(2) of Regulation (EEC) No 2913/92 be brought directly before the courts without the matter being first referred to the customs authority?

(2) Is the power to suspend the contested decision provided for in Article 244 of Regulation (EEC) No 2913/92 conferred exclusively on the customs authority or also on the court before which an appeal has been brought?'

IV. Community legislation

9. Article 243 of the Community Customs Code states as follows:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and

which concern him directly and individually.

Any person who has applied to the customs authorities for a decision relating to the application of customs legislation and has not obtained a ruling on that request within the period referred to in Article 6(2) shall also be entitled to exercise the right of appeal.

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

10. Article 244 provides:

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

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

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

11. Finally, Article 245 establishes:

'The provisions for the implementation of the appeals procedure shall be determined by the Member States.'

V. Proceedings before the Court of Justice

12. The applicant in the main proceedings, the Italian and United Kingdom Governments, and the Commission, submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice. At the hearing on 22 June 2000, Kofisa's representative and the agents of the Italian Republic and the Commission submitted their oral observations.

13. Kofisa maintains, first of all, that the Court of Justice has jurisdiction in this matter, as a corollary to the judgments in *Dzodzi* [3] and *Giloy*. [4] In view of the fact that the Italian customs authorities are responsible for collecting both the customs duties and the turnover tax on imports and that the procedures for the purpose are identical, it follows, in Kofisa's view, that the relevant provisions should be interpreted uniformly. Furthermore, Article 70 of the Italian VAT law [5] establishes that the provisions of the customs regulations relating to duties received at the border shall apply to disputes concerning VAT on imports.

With regard to the first question submitted, Kofisa states that it cannot be inferred from Article 243 that an appeal brought directly before the courts is inadmissible. In addition, since under Article 245 of the Community Customs Code the provisions for the implementation of the appeals procedure are to be determined by the Member States and under Italian customs legislation an appeal to the courts lies only against the tax order, Kofisa concludes that the taxpayer has no alternative but to adhere to those requirements, and cannot be said to have infringed Article 243.

In connection with the second question referred for a preliminary ruling, Kofisa states that the reply is to be found partly in the Court's judgment in the *Factortame* case, [6] since the primacy of Community law requires a national court to disapply a rule of national law which precludes the adoption of interim measures.

As to whether the court may order suspension of implementation, the applicant in the main proceedings considers that it would not be reasonable to allow the power of suspension only at the first stage of an appeal. Moreover, it believes it to be illogical for the courts to have the power to annul a decision made by the customs authority but not to suspend its implementation. In Kofisa's view, this argument is reinforced in cases such as that of the Italian legal order, under which an appeal

3 — Judgment of 18 October 1990 in Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.

4 — Judgment of 17 July 1997 in Case C-130/95 [1997] ECR I-4291.

5 — DPR 633/1972 of 26 October 1972 (*Gazzetta Ufficiale* of 11 November 1972, suppl. ord. No 1).

6 — Judgment of 19 June 1990 in Case C-213/89 [1990] ECR I-2433.

may not be brought before the customs authorities, which precludes any opportunity to suspend implementation of the contested act. It further considers that it was unnecessary to give formal recognition to this competence in the Code, since the power to order interim measures is one usually vested in the national courts.

As regards the second question, the Italian Government argues that the 'independent authority' is not vested, at first instance, with the power to suspend the decision taken by the customs authority. On the other hand, at second instance, it is indeed possible to appeal against the customs authority's decision not to order suspension and, in that event, the independent authority could take the appropriate measures, including suspension of the contested decision.

14. The Italian Government deals, first of all, with the question of the jurisdiction of the Court of Justice. Pointing out that the subject-matter of the dispute, VAT on imports, lies outside the scope of the Code, it submits that the reference in Article 70 of the Italian VAT law to the customs regulations with regard to disputes and penalties concerning VAT on imports is restricted to the national laws relating to border duties and dates from a 1972 provision, a time when there were no Community provisions in this sphere. In short, unlike the *Giloy* case, there is no provision in the Italian legal system which renders the Code, in particular Articles 243 and 244, applicable to disputes in respect of VAT on imports; it therefore deduces that the Court of Justice does not have jurisdiction in this case.

15. The United Kingdom Government points out, in its observations, that Article 243 of the Customs Code establishes an appeals procedure with a mandatory structure of two consecutive stages, which means that an appellant may not have recourse to a court without first referring the matter to the customs authority. This two-stage system benefits both the appellant, by allowing him to challenge the decisions of a customs authority using an informal and inexpensive procedure, and the customs authority, by giving it the opportunity to rectify promptly a manifestly erroneous decision.

In the alternative, the Italian Government expresses a view on the questions referred for a preliminary ruling. With regard to the first question, it emphasises that Article 243 of the Code does not make it possible 'to skip' the prior administrative stage and that, therefore, an appeal brought directly before the court must be declared inadmissible.

On an ancillary basis, the United Kingdom highlights the fact that the aforementioned article leaves the opportunity of establishing a procedure in two consecutive stages to the discretion of the Member States; therefore, if a Member State introduces such legislation, Article 243 may not be invoked in order to avoid the first stage.

The United Kingdom Government has not submitted observations in respect of the second question.

16. Finally, the Commission raises, as a preliminary matter, the admissibility of the questions referred for a preliminary ruling. Whereas in the *Giloy* case, which also concerned VAT on imports, the Court underlined the fact that there was no doubt that the main proceedings had to be resolved by the application of rules of Community law, in the present case, in the Commission's view, that matter is in doubt, because the customs regulations are based on the current system of direct and indirect taxes, such as VAT, not the other way round. In short, according to the Commission, not all the criteria for stating definitively that the Court has to give a ruling are met.

With regard to the first question referred for a preliminary ruling, the Commission maintains that Article 243 of the Code should be interpreted as meaning that it does not preclude the submission of a claim directly to a judicial body, without an appeal having first been made to the customs authorities. [7]

As far as the second question is concerned, the Commission believes that Article 244 confers the power to suspend implementation only on the customs authorities. However, it does not preclude the courts from ordering suspension under rules of procedure applicable in the national legal order. Furthermore, the Commission points out that, under the case-law of the Court of Justice, Community law affords individuals complete and effective judicial protection, which means, in particular, that interim protection may be secured if it is necessary in order to ensure full effectiveness of that final decision.

VI. Jurisdiction of the Court of Justice

17. I shall first consider whether the Court of Justice has jurisdiction to give a ruling on the questions referred for a preliminary ruling. In that regard, it must be stated that the subject-matter of the main proceedings lies outside the scope of the Community Customs Code. Under Article 4(10) of the Code, the concept of import duties is limited to customs duties and charges having an effect equivalent to customs duties, and to agricultural levies and other import charges introduced under the common agricultural policy or under other specific arrangements applicable in the agricultural sector. It does not include VAT on imports, which therefore lies outside the scope of the Code.

18. However, the national court does not appear to question the applicability of the

7 — The Commission's agent explained at the hearing that it was the Commission's view that, if a Member State requires an appeal to be brought before the customs authority as a prerequisite to referring the case to the judicial authority, an individual may not rely on Article 243 in order to apply directly to the court.

provisions of the Community Code or, consequently, the need to obtain an interpretation of its provisions from the Court of Justice. On this point, it relies on the judgment in *Giloy*,[8] whose subject-matter, turnover tax levied on imports, also lay outside the ambit of Community law; in it the Court declared that it had jurisdiction owing to the fact that the contested provisions of German law applied without distinction to situations governed by domestic law and to situations governed by Community law, so that the provisions had to be interpreted uniformly.

19. Thus, the question again arises whether, under Article 177 of the EC Treaty, the Court of Justice has jurisdiction to reply to questions raised by a national court regarding the interpretation of Community law, when those questions arise in proceedings in which Community law is not applicable as such, but has been transposed by national legislation to a non-Community context.

20. The Court of Justice has considered this question on several occasions. It gave its first ruling on the matter in 1985 in the *Thomasdünger* case.[9] Subsequent cases were *Dzodzi*,[10] *Gmurzynska-Bscher*,[11] *Tomatis and Fulchiron*,[12] *Kleinwort Benson*,[13] *Leur-Bloem*[14] and *Giloy*.[15] To these must be added the cases of *Federconsorzi*[16] and *Fournier*,[17] concerning references to Community law in contractual clauses.

21. According to this case-law, the Court of Justice has jurisdiction, under Article 177 of the EC Treaty, to interpret Community law in cases in which the national legislature has decided to rely on Community provisions in order to regulate matters which lie within the scope of domestic law.

22. Significantly, this case-law has always been opposed by the Advocates General in their Opinions. In the *Thomasdünger* case Advocate General Mancini concluded that the Court of Justice should not reply to the questions raised because, although appearing to interpret the provisions of the Common Customs Code, the Court would, in fact, be giving a ruling on the rules of domestic law into which those provisions had been incorporated, thereby losing their binding effect as Community provisions.[18]

8 — Judgment referred to in footnote 4 above.

9 — Case 166/84 *Thomasdünger* [1985] ECR 3001.

10 — Judgment referred to in footnote 3 above.

11 — Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003.

12 — Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127.

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

14 — Case C-28/95 *Leur-Bloem* [1997] ECR I-4161.

15 — Judgment referred to in footnote 4 above.

16 — Case C-88/91 *Fournier* [1992] ECR I-4035.

17 — Judgment of 12 November 1992 in Case C-73/89 [1992] ECR I-5621.

18 — Point 2 of the Opinion.

23. For his part, Advocate General Darmon stated, in his Opinions in the *Dzodzi* and *Gmurzynska-Bscher* cases, that the aim of the preliminary-ruling procedure, namely to ensure the uniform effect of Community law, applies only within the scope of Community law, as defined by Community law itself and by itself alone. According to Advocate General Darmon, a reference made by a national law cannot extend the scope of Community law or, with it, the jurisdiction of the Court of Justice, since, in the final analysis, 'there is no Community law outside its field of application'. [19]

24. Finally, in his Opinion in the cases of *Leur-Bloem* and *Giloy*, Advocate General Jacobs, after reviewing the case-law on the matter in great detail, reaches the conclusion that the Court of Justice should rule only in cases in which it is aware of the factual and legislative context of the dispute and in which that context is one contemplated by the Community rule. [20]

25. However, the Court of Justice never followed the proposals of its Advocates General and, as I have already said, has consistently held that it has jurisdiction under Article 177 of the EC Treaty, to interpret Community rules when they do not directly govern the situation in dispute but the national legislature has decided to rely on their content.

26. The Court of Justice founds its jurisdiction in cases of this kind on three fundamental points. It considers, first, that it is solely for the national courts before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of each case, both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions which they submit to the Court. [21]

Secondly, the Court relies on the absence of a rule to the contrary, since it does not appear, either from the wording of Article 177 or from the objective of the procedure introduced by that Article, that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific circumstances in which the national law of a Member State refers to the content of that provision in

19 — Points 5 and 6 of the Opinion in *Gmurzynska-Bscher*, and points 8 to 11 of the Opinion in *Dzodzi*.

20 — Point 75 of the Opinion. In order to reach this conclusion, Advocate General Jacobs relies, principally, on the following arguments: the importance of interpreting the Community provisions in their context, since there is no certainty that the Court's ruling in a dispute arising in a non-Community context will be relevant to that dispute; moreover, the national courts would be free to disregard the Court's rulings on the ground that the contexts to which the rule of Community law applies differ, which would undermine the binding effect of the Court's judgments, as stipulated in Article 177; the fact that national courts against whose decisions there is no judicial remedy have no obligation to refer the matter to the Court of Justice and, finally, the fact that if jurisdiction were accepted the number of cases in which the Court would be required to give a ruling might increase significantly.

21 — See the judgments, cited above, in *Dzodzi*, paragraphs 33 and 34, *Gmurzynska-Bscher*, paragraphs 18 and 19, *Leur-Bloem*, paragraph 24, and *Giloy*, paragraph 20.

order to establish the rules applicable to a situation which is purely internal to that State. [22]

Finally, the Court is of the opinion that it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. [23]

27. According to this case-law, a reference for a preliminary ruling by a national court can be declared inadmissible only if it is clear that the procedure laid down in Article 177 has been diverted from its purpose and is being used in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation is manifestly incapable of applying, either directly or indirectly, to the facts of the main proceedings. [24]

28. I am not persuaded by these arguments.

29. The first, which is based on the division of judicial functions between the Court of Justice and the national courts, sits uneasily, in my view, with the principles established by the case-law of the Court regarding the admissibility of questions referred for a preliminary ruling.

Accordingly, the Court considers that it is not for it to deliver advisory opinions on general or hypothetical questions [25] and rejects questions which plainly have no bearing on the real situation or on the subject-matter of the case in the main proceedings, [26] especially when the national court seeks the interpretation of Community rules which are not applicable to the case. [27] The Court has also held that questions referred for a preliminary ruling are inadmissible unless a reply is essential to a resolution of the dispute in the main proceedings. [28]

30. By accepting jurisdiction in cases in which a national court asks it to interpret a Community provision in a context which is outside the scope of that provision, under the principle that the national courts have exclusive jurisdiction to decide on the

22 — See the judgments, cited above, in *Dzodzi*, paragraph 36, *Gmurzynska-Bscher*, paragraph 25, *Leur-Bloem*, paragraph 25, and *Giloy*, paragraph 21.

23 — See the judgments, cited above, in *Dzodzi*, paragraph 37, *Leur-Bloem*, paragraph 32 and *Giloy*, paragraph 28.

24 — See the judgments, cited above, in *Dzodzi*, paragraph 40, *Gmurzynska-Bscher*, paragraph 23, *Leur-Bloem*, paragraph 26, and *Giloy*, paragraph 22.

25 — See, for example, the judgments of 16 July 1992 in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 17, and in Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25.

26 — See, for example, the judgment of 3 March 1994 in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17.

27 — Judgment of 13 December 1994 in Case C-297/93 *Grau-Hupka* [1994] ECR I-5535, paragraph 18.

28 — See, for example, the judgments of 16 December 1981 in Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17; of 12 June 1986 in Joined Cases 98/85, 162/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6, and of 17 May 1994 in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14.

relevance of the questions referred, the Court of Justice runs the risk of acting inconsistently. It would be taking a more stringent approach when assessing the admissibility of questions referred for a preliminary ruling in cases to be resolved under Community law in a Community context, than when assessing the admissibility of questions in which the subject-matter of the main proceedings lies outside the scope of Community law.

31. Nor must we forget how important it is for the Court of Justice to give an interpretation in the proper context. In this regard, since the judgment in *Telemarsicabruzzo and Others*, [29] the Court has been stricter in demanding that national courts clearly specify the factual and legal context in which a ruling is sought. That they do so is important not only to ensure that the Court provides a national court with a reply that is useful for the dispute before it but also because it is often difficult or even impossible to interpret a rule *in abstracto*.

32. However, the interpretation which the Court of Justice might give when the factual situation giving rise to the reference for a preliminary ruling is not contemplated by Community law might not be appropriate, since it would be made outside its proper context. It may therefore be submitted, as Advocate General Jacobs stated in his Opinion in the cases of *Giloy* and *Leur-Bloem*, that the Court should rule only in cases in which the factual and legislative context of the dispute is one contemplated by the Community rule. [30]

33. The second argument, that there is nothing, either in the wording of Article 177 or in the objective of the procedure laid down in that article, to suggest that the authors of the Treaty intended to exclude these references for a preliminary ruling from the jurisdiction of the Court, overlooks, in my view, one of the fundamental principles governing the distribution of competences within the Community, namely the principle that powers are specifically assigned.

34. Under Article 5 EC, the Community is to act within the limits of the powers conferred upon it and the objectives assigned to it by the Treaty. Article 7 EC provides that each institution is to act within the limits of the powers conferred by the Treaty.

Consequently, the powers devolved to the Community and, hence, to its institutions are powers by conferral, that is to say, they exist only if conferred by the constituent Treaties. National jurisdiction is, therefore, the norm, and Community jurisdiction the exception; or, to put it another way,

29 — Judgment of 26 January 1993 in Joined Cases C-320/90, C-321/90 and C-322/90 [1993] ECR I-393.

30 — Point 75 of the Opinion.

national jurisdiction is virtually unlimited, whereas Community jurisdiction is exhaustively specified. [31]

35. Now, in my view, the Treaties do not entrust to the Court of Justice the task of resolving cases which lie outside the scope of Community law, and that is why I am not wholly convinced by the Court's statement concerning the absence of a textual argument to the contrary. Therefore, the jurisdiction of the Court of Justice to give a ruling in this type of case may only be inferred from a supposed Community interest, which is the third argument put forward and which I believe is also unfounded.

36. Under the aforementioned case-law, that interest may be said to lie in the need to ensure a uniform interpretation of Community law. In order to defend that view, it would first be necessary to determine the specific risk to the uniform interpretation of Community law which leads the Court to accept jurisdiction. The Court has never given an explanation in its case-law.

37. I believe, on the contrary, that there is no such Community interest which in such cases allegedly requires every Community provision to be given a uniform interpretation. As Advocate General Jacobs points out in his Opinion in *Giloy* and *Leur-Bloem*, the perceived threat to the correct application of Community law in the State concerned would, at most, be only indirect and transient. It would be clear that any interpretation given to a Community rule by a national court in such circumstances would not be based on a ruling from the Court of Justice and that, as soon as that interpretation was applied in a Community context, it would be open to challenge. [32]

38. Moreover, to assume jurisdiction does not appear to be an appropriate way of achieving the objective pursued, since it undermines one of the fundamental characteristics of the judgments of the Court of Justice: their binding effect. As they lie outside the scope of Community law, the national courts would not be compelled to follow the interpretation given by the Court.

31 — However, the Court of Justice has qualified the scope of the principle of specific conferment of powers. Taking into consideration the conclusive and dynamic dimension which forms part of the constitutional bases of the Community legal order, the Court has acknowledged that, although the Community only has powers which are conferred, these may arise from express provisions of the constituent Treaties and also flow implicitly from the organisation and scheme of the Treaties.
In short, the inflexibility of the principle of conferred powers is thus moderated by the effect of the amending clauses, such as Article 308 EC, and by the technique of implied powers. The recognition of those implied powers means that the institutions have the powers necessary to carry out the tasks entrusted to them by the Treaties. The theory of implied powers has been applied in the field of external relations, when it was necessary for the institutions to intervene in relations with third countries in order to implement the internal powers vested in the Community (judgments of 31 March 1971 in Case 22/70 *Commission* v *Council* ('*AETR*') [1971] ECR 263, and of 14 July 1976 in Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, and the Opinion of 26 April 1977 in Case 1/76 [1977] ECR 741).

32 — Point 49 of the Opinion.

First, that circumstance appears to me to be in open contradiction with the case-law of the Court, when it states[33] that it is unacceptable that the answers given to the courts of the Member States are to be purely advisory and without binding effect, since that would be to alter the function of the Court of Justice, as conceived by the Treaty, namely that of a court whose judgments are binding.

Secondly, the Court's argument concerning the interest in ensuring that every Community provision is interpreted uniformly is thereby invalidated because it is inapposite. Since the national courts would not be bound by the Court's interpretation, how may the assumption of jurisdiction by the Court ensure that provisions and concepts taken from Community law are interpreted uniformly?

39. Furthermore, with its case-law on this point the Court is making the scope of Community law and, therefore, its own jurisdiction, dependent upon decisions by Member State authorities. Thus, on the pretext of ensuring uniformity of interpretation, the Court is, paradoxically, undermining another fundamental principle of the Community legal order, its autonomy in regard to the laws of the Member States. Making the Court's jurisdiction dependent on the legislation of each Member State also means that it may vary widely between the different Member States. It is difficult to accept that the scope of a fundamental rule of Community law, such as Article 177 of the EC Treaty, should be determined in part by the various national legal systems.

40. Other difficulties entailed by the extension of the Court's jurisdiction should not be overlooked, such as the fact that courts against whose decisions no appeal lies are not required to refer the matter to the Court of Justice. Nor should one disregard the problems which may arise from the referral for a preliminary ruling of a question concerning the validity of a Community act in a case of this nature.

41. The extension of competence could also cause a significant increase in the number of cases in which the Court would have to give a ruling. That could, in a less obvious way, adversely affect the uniform interpretation of Community law which the assumption of jurisdiction purports to safeguard: since the extension of jurisdiction to this kind of case is likely to increase the Court's workload and, at the same time, to delay resolution of the dispute, protracted duration of proceedings could dissuade courts in the Member States from submitting questions to the Court of Justice for a preliminary ruling.

42. For those reasons, I share the view of the Advocates General who have preceded

33 — See, for example, in relation to the present case, the judgment in *Kleinwort Benson*, referred to in footnote 13 above, paragraph 24.

me in their consideration of this matter, that the Court of Justice does not have jurisdiction to reply to questions raised by a national court on the interpretation of Community law, when those questions arise in proceedings to which Community law does not apply in a context within its field of application, but has been transposed by national rules to a non-Community context.

43. Focusing on the Court's recent rulings on the matter, I observe that, in its judgment in *Kleinwort Benson*, [34] in which the interpretation of specific provisions of the Brussels Convention was sought, [35] the Court took a somewhat narrower view of the limits of its jurisdiction. Although it did not take up Advocate General Tesauro's invitation to reconsider previous decisions, the Court held that it did not have jurisdiction to give a preliminary ruling on the questions submitted by the national court.

44. In that case, the United Kingdom provisions did not make a direct and unconditional reference to Community law. Moreover, the United Kingdom courts were not required to decide the disputes before them by applying, absolutely and unconditionally, the interpretation of the Convention provided to them by the Court. Accordingly, the Court held that its interpretation would not be binding on the national court and, referring to Opinion 1/91, [36] declared that it could not be accepted that the rules given by the Court of Justice to the courts of the Member States were to be purely advisory and without binding effect, since that would be to alter the function of the Court, as envisaged in the Protocol of 3 June 1971, [37] namely that of a court whose judgments are binding. [38]

45. In short, *Kleinwort Benson* may be seen as a departure from previous cases decided by the Court of Justice. In that judgment, the Court requires that the reference by national law to Community law should be direct and unconditional and should render Community law applicable as such. The previous case-law, on the other hand, did not impose conditions in respect of the nature of the reference and considered that the national court had sole competence to assess its relevance and effects. Secondly, the Court of Justice ruled that its interpretation had to be binding on the court making the reference, a requirement not found in its previous case-law.

46. However, in the *Leur-Bloem* and *Giloy* cases, the Court of Justice does not apply the criteria of the *Kleinwort Benson* judgment and again considers whether it has

34 — Judgment referred to in footnote 13 above.

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

36 — Opinion of 14 December 1991 [1991] ECR I-6079, point 61.

37 — Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

38 — See paragraphs 23 and 24 of the judgment.

jurisdiction under the previous case-law. The Court does not establish whether the reference by national law is direct and unconditional or whether the court referring the question is bound by the Court's interpretation. Jurisdiction proves to be the rule and the presumption, whereas lack of jurisdiction constitutes an exception limited only to cases of contrived disputes or when it is clear that the Community provision is not applicable in the main proceedings.

Specifically, in *Kleinwort Benson* (paragraph 16) it may be observed that the Court requires a direct and unconditional reference to Community law. In *Giloy*, on the contrary, the presumption is that the Court has jurisdiction, as is borne out by paragraph 26 of the judgment, which states that there is nothing in the file to suggest that the main proceedings will not be settled by application of rules of Community law. The Court appears to attach much importance to recognition of the autonomy of the national courts and, consequently, does not criticise their decisions except in the case of an obvious anomaly.

47. In the observations which it has submitted to the Court in this case, the Italian Government maintains that the national legal system does not contain any provision rendering the Community Customs Code applicable. For its part, the Commission considers that, unlike the *Giloy* case, there is no certainty that the main proceedings will be settled by application of rules of Community law.

48. In the end, since the Court of Justice does not have jurisdiction to interpret national law, the position is that it is not possible to ensure that the interpretation of the Community provisions which the Court has been asked to give is necessary to the resolution of the main proceedings.

49. In this connection, I think it is appropriate to recall the criteria laid down by the Court for declaring the admissibility of a question referred for a preliminary ruling. As I have already pointed out, the Court has been stricter in demanding that national courts clearly specify the factual and legal context in which the questions referred arise. Furthermore, in spite of the basic rule that the national court has exclusive jurisdiction to determine the relevance of the questions referred under Article 177 of the EC Treaty, case-law has established the principle that questions are inadmissible if they have no connection with the main proceedings and if a reply is not essential to a resolution of the main proceedings

50. In my view, the decision in *Kleinwort Benson* is much more in keeping with these criteria for admissibility of a question referred for a preliminary ruling than the subsequent judgments in *Giloy* and *Leur-Bloem*. The condition laid down in *Kleinwort Benson* that there should be a direct and unconditional reference to Community law reflects the Court's concern that the

interpretation to be given should be objectively necessary to the resolution of the dispute in the main proceedings. On the other hand, under the formula in *Leur-Bloem* and *Giloy* there is no requirement that the Court's decision should be necessary to determine the main proceedings or, therefore, that the national courts are bound to apply it.

51. Consequently, in order to avoid the risk of the Court giving a ruling on a Community provision which has no bearing on the subject-matter of the main proceedings, and respecting the presumption of relevance of the questions referred for a preliminary ruling by the national courts, at the same time as taking into account the case-law on the admissibility of such questions, I propose that the Court of Justice should restore the criterion applied in *Kleinwort Benson* and declare that it lacks jurisdiction to reply to any question referred for a preliminary ruling concerning the interpretation of a Community rule which does not satisfy the condition of being applicable in the national legal system by reason of a direct and unconditional reference to Community law.

52. In the present case, it is apparent from the order for reference from the Tribunale di Genova that not all the requirements enabling the Court to affirm with certainty that it must reply to the questions referred to it for a preliminary ruling are met, since the facts in the main proceedings lie outside the scope of Community law and it has not been demonstrated in what manner the Community provisions whose interpretation is sought have been declared applicable by a reference by national law.

53. For all the above reasons, I suggest that the Court should declare that it has no jurisdiction to reply to the questions submitted by the Tribunale di Genova.

54. In the alternative, should the Court not follow this suggestion, I shall consider the questions referred for a preliminary ruling by the national court.

VII. The questions referred for a preliminary ruling

A. *The first question*

55. By its first question the Tribunale di Genova seeks to ascertain whether, under Article 243 of the Community Customs Code, an appeal against a decision in that field may be brought directly before the courts without the matter first being referred to the customs authority.

56. Article 243 establishes that the right of appeal may be exercised, initially, before the customs authorities and, subsequently, before an independent body. This wording appears to suggest that the legislature

wished to introduce a sequence in the appeal procedures.

57. However, as the Commission points out in its observations, unlike most of the rules of the Code, which formulate a specific scheme and refer, failing that, to the enabling provisions adopted by the Community legislature, the rules in Title VIII concerning appeals merely set out certain essential features of the protection of traders, without regulating the matter exhaustively and, in particular, without laying down in mandatory terms the conditions and procedures governing access to appeal bodies.

58. As the Economic and Social Committee stated in its Opinion on the Proposal for a Council Regulation (EEC) establishing the Code, '... What makes harmonisation of rights of appeal special, however, is not only the differences between national procedures, which are in some cases considerable, but also the fact that they often apply uniformly to the whole field of national administrative and tax law so that the harmonisation of rights of appeal for the purposes of customs law only will fragment hitherto uniform national appeals procedures....' [39] Hence the Community legislature has merely regulated certain general aspects.

59. If the original Proposal presented by the Commission [40] is compared with the Code which was finally adopted, it becomes clear that this was the intention of the legislature.

60. In the Commission's Proposal, the Title relating to appeals contained detailed provisions arranged in four chapters. The first of these ('Right of appeal') included an Article 241 which broadly corresponds to Article 243 of the Code.

The following two chapters ('Initial stage of the exercise of the right to appeal' and 'Second stage of the exercise of the right to appeal' respectively) laid down the rules applicable to proceedings before the customs authorities and independent authorities.

Finally, Chapter Four ('Other provisions relating to the right of appeal') included an Article 250 which expressly recognised a person's right to appeal directly to the independent authority, in which case he would be deemed to have waived his right of appeal before the customs authorities, and which also allowed for the application of provisions in force in the Member States laying down that, in specific cases, appeals

39 — OJ 1991 C 60, p. 5, point 2.50.

40 — OJ 1990 C 128, p. 1.

were to be made directly to the independent authority.

61. The majority of those exhaustive provisions concerning appeals in customs matters disappeared in the final version adopted by the Council. Instead, apart from the aforementioned Article 243 and Article 244 relating to the interim suspension of the contested decision (to which I shall refer when I consider the second question), it included only Article 245 which states laconically that the provisions for the implementation of the appeals procedure are to be determined by the Member States.

62. In short, the sparse nature of these rules shows that the Community legislature has created an appeals system which seeks only to establish certain fundamental matters in order to ensure that the rights of traders are protected, but has left it to the Member States, in compliance with the Community provisions, to introduce detailed rules on the matter.

63. On the other hand, the fact that the legislature has opted, in Article 243, for the wording 'the right of appeal may be exercised' and not an alternative form such as 'the right of appeal shall be exercised' indicates that it did not seek to make provision for a two-stage procedure.

64. According to the Commission, there is an additional factor which supports this interpretation of Article 243 of the Code: it may be observed that the subject-matter of the appeal, before both the customs authorities and the judicial authorities, is the decision of the customs authorities relating to the application of customs regulations. If the aim had been to establish an appeals system in two consecutive stages, it would have been necessary to stipulate that the subject-matter of the second appeal, the one brought before the judicial authorities, was not the original decision of the customs authorities but the decision on the first appeal.

65. Therefore, Article 243 should not be interpreted as meaning that it imposes, at Community level, an appeals procedure in two consecutive stages. That article grants the Member States a discretionary power to introduce detailed rules and, with it, the opportunity to implement a two-stage procedure. Thus, one Member State may require proceedings to be brought initially before the customs authorities and subsequently before the judicial authorities, whereas another may dispense with the first proceedings.

66. However, in order for the reply to be given to the national court to be a useful one, it is necessary to establish whether, if a Member State has decided to introduce a two-stage system in which the admissibility of the appeal before the independent authority is conditional on an appeal first being brought before the customs authorities, a person may rely on Article 243 of

the Code in order to avoid the first stage and apply directly to the independent authority.

67. For the reasons already stated, the reply must be in the negative. Given that, as I have said, the Code grants the Member States the power to organise the appeals procedure, taking into account the differences between their various legal systems, it must also be held that, if a Member State has introduced a procedure comprising two successive stages, individuals must follow that procedure and appeal to the customs authority before applying to the independent authority.

68. In light of all these considerations, I suggest that the Court of Justice reply to the national court that Article 243 of the Code should be interpreted as meaning that it allows the Member States to regulate the procedure for appealing against decisions in customs matters, either in two consecutive stages — the first before a customs authority and the second before an independent authority —, or in a single procedure before the independent authority. If a Member State opts for a two-stage procedure, it is for the national law to determine whether, and under what conditions, individuals may bring their appeal directly before the independent authority.

B. *The second question*

69. By its second question the Tribunale di Genova seeks to ascertain whether Article 244 of the Code confers the power to adopt the interim measure of suspending implementation of the contested decision exclusively on the customs authority or also on the judicial authority before which the appeal has been brought.

70. Article 244 merely provides, so far as relevant in this connection, that the customs authorities are to order the total or partial suspension of implementation of the contested decision where they have good reason to believe that the decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

71. The very wording of the Article supports the interpretation that the power to order suspension of implementation is conferred only on the customs authorities. Whereas Article 243 provides expressly for appeals to be brought before both the customs authorities and an independent authority (a judicial authority or equivalent specialised body), Article 244 only contemplates the possibility of the customs authorities' ordering suspension of implementation of the contested decision.

72. On the other hand, it should be noted, as the Commission points out in its observations, that the provision in question constitutes an exception to the general rule

(Article 7 of the Code) which lays down that, save in the circumstances specified in Article 244(2), the decisions adopted by the customs authorities are to have immediate effect.

In light of the fact that derogations from Community law are to be interpreted restrictively, the power to suspend implementation of decisions, provided for in Article 244, should be conferred only on the authorities expressly mentioned in the provision which, therefore, cannot be interpreted widely so as to extend the aforementioned power, by analogy, to the judicial authorities.

73. The conditions laid down by Article 244 of the Code for suspension by the customs authority confirm this interpretation. The rule allows suspension of implementation only in cases in which the customs authorities have good reason to believe that the contested decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned. As the Court of Justice pointed out in *Giloy*,[41] the customs authorities are to suspend implementation of a disputed customs decision where only one of the two conditions mentioned is fulfilled. Therefore, the administrative authority may order suspension merely where irreparable damage is to be feared for the person concerned.

41 — Judgment cited in footnote 4 above.

On the other hand, under the Court's case-law on the possibility of courts suspending a national administrative act adopted pursuant to a Community rule[42] the judicial authorities may order suspension only if, amongst other conditions, they entertain serious doubts as to the validity of the Community act and, at the same time, there is urgency, owing to the risk that the applicant may suffer serious and irreparable damage.

74. However, this interpretation of Article 244 does not preclude the judicial authorities seised of the case, pursuant to Article 243 of the Code, from ordering suspension of implementation of the contested decision in accordance with the rules of procedure applicable in the national legal order.

75. At the same time, the case-law of the Court of Justice[43] also lays down that Community law grants individuals full and effective legal protection, which means, in particular, that it recognises their right to interim relief in order to secure the full effectiveness of the judgment to be given on

42 — See the Court's judgments of 21 February 1991 in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415; of 9 November 1995 in Case C-465/93 *Atlanta and Others (1)* [1995] ECR I-3761 and of 17 July 1997 in Case C-334/95 *Krüger* [1997] ECR I-4517.

43 — See, in particular, the judgments of 19 June 1990 in Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 21, and of 21 February 1991 in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, cited in footnote 42 above, paragraphs 16 to 18, and the orders of 3 May 1996 in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46, and 29 January 1997 in Case 393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36.

the existence of the rights claimed under Community law.

76. In short, Article 244 of the Code does not prevent the judicial authorities before which an appeal is brought under Article 243 from ordering suspension of implementation of the contested decision, either pursuant to rules of procedure applicable in the national legal order or in accordance with the full and effective legal protection afforded to individuals under Community law.

77. For the reasons stated, I propose that the Court of Justice should state, in reply to the second question, that Article 244 of the Code should be interpreted as meaning that the power to order suspension of implementation of the contested decision is conferred only on the customs authorities. However, that provision does not prevent the judicial authorities seised of a case on appeal under Article 243 of the Code from ordering suspension, either pursuant to rules of procedure applicable in the national legal order or in accordance with the full and effective legal protection afforded to individuals under Community law.

VIII. Conclusion

78. In light of the foregoing considerations, I suggest that the Court of Justice declare that it has no jurisdiction to reply to the questions referred for a preliminary ruling by the Tribunale di Genova.

79. In the alternative, I propose that the Court of Justice give the following reply to the aforementioned questions:

(1) Article 243 of the Community Customs Code should be interpreted as meaning that it allows the Member States to regulate the procedure for

appealing against decisions in customs matters, either in two consecutive stages — the first before a customs authority and the second before an independent authority —, or in a single procedure before the independent authority. If a Member State decides on a two-stage procedure, it is for the national law to determine whether, and under what conditions, individuals may bring their appeal directly before the independent authority.

(2) Article 244 of the Community Customs Code should be interpreted as meaning that the power to order suspension of implementation of the contested decision is conferred only on the customs authorities. However, that provision does not prevent the judicial authorities seised of a case on appeal under Article 243 of the Code from ordering suspension, either pursuant to rules of procedure applicable in the national legal order or in accordance with the full and effective legal protection afforded to individuals under Community law.