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The manifest inapplicability standard: the puzzling story of the *Dzodzi* jurisprudence

In applying Article 234 (ex Article 177) of the EC Treaty the European Court of Justice has been faced with a recurring problem: What to do with requests from national courts for a preliminary ruling on disputes that fall clearly outside the scope of Community law, but to which Community rules were made more or less applicable by national law. May the Court give a preliminary ruling in such cases under Article 234 EC or would that go beyond its jurisdiction? As first demonstrated in *Thomasdünger*, and then later, in a more reasoned judgment of *Dzodzi*, the Court assumed jurisdiction over preliminary references in such instances.[1] The Court has followed the central principle of these decisions in a long line of cases in the last twenty years (the so-called "*Dzodzi* line of cases", as the Court first called it in the *Leur-Bloem* and *Giloy* judgements)[2] in spite of the fact that the line of Advocates General who have, with considerable force, opposed this approach, has been also long, e.g. AG *Mancini* (in *Thomasdünger*) AG *Darmon* (in *Dzodzi* and *Gmurzynska-Bscher*), AG *Tesauro* (in *Kleinwort Benson*), AG *Jacobs* (in *Leur-Bloem, Giloy* and *BIAO*), or AG *Ruiz-Jarabo Colomer* (in *Kofisa*).[3]

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[1] Case 166/84 Thomasdünger GmbH v Oberfinanzdirektion Frankfurt am Main [1985] ECR 3001; Joined Cases C–297/88 and C–197/89 M. Dzodzi v Belgium [1990] ECR I–3763.

[2] Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 23.; Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 29.

[3] Case 166/84 Thomasdünger GmbH v Oberfinanzdirektion Frankfurt am Main [1985] ECR 3001, Opinion of AG Mancini delivered on 15 May 1985; Joined Cases C–297/88 and C–197/89 M. Dzodzi v Belgium [1990] ECR I–3763, per AG *Darmon*, paras. 8–16.; Case C–231/89 Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln [1990] ECR I–4003, per AG *Darmon*, paras. 5–14. ; Case C–346/93 Kleinwort Benson Ltd. v City of Glasgow District Council [1995] ECR I–0615, per AG *Tesauro* paras. 16–28.; Leur-Bloem and Giloy, *ibid.*, per AG *Jacobs* (joined opinion) paras. 24–82; Case C–306/99 Banque Internationale pour l'Afrique Occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg [2003] ECR I–0001, per AG Jacobs, paras. 40–71. See also LENAERTS, K.: *The Unity of European Law and the Overload of the ECJ -*

In this paper I do not purport to make general objections to, or provide support for, the *Dzodzi* jurisprudence. The opinions and arguments of the Advocates General in the above-mentioned cases are well-known,[4] and many commentators have taken sides on the issue.[5] Instead, I intend to provide some analysis on consistency of this case-law, taking the recent developments also into account.

1. The "necessity" criterion in Article 234 EC

In *Dzodzi* the Court's justification for finding that it has jurisdiction to interpret Community rules that are applicable by virtue of national law in disputes falling outside the ambit of EC law, is surprisingly thin. It observes that "...it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied."[6] As the wording of Article 234 EC does not prevent the Court from giving a preliminary ruling in such circumstances, and as it does provide for a judicial cooperation where the Court shall give support to national courts in interpreting Community provisions, the Court thus has jurisdiction to meet these goals.[7] This line of reasoning, by which the objections raised by various Advocates General have been repeatedly rejected, has been reaffirmed in many cases. As the central principle laid down by the Court in *Dzodzi* has firmly

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The System of Preliminary Rulings Revisited, in: PERNICE, I. – KOKOTT, J. – SAUNDERS, C. (eds.): *The Future of the European Judicial System in a Comparative Perspective.* Nomos, Baden-Baden, 2006. p. 225.

[4] See, *ibid. Oliver* provides a good summary on the arguments of the Advocates General, see OLIVER P.: *La recevabilité des questions préjudicielles: la jurisprudence des années 1990.* Cahiers de droit européen 2001/1–2., pp. 37–38. For such summary, see also ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* Sweet and Maxwell, London 2002, pp. 72–73.

[5] See e.g. KALEDA, S. L.: *Extension of the preliminary rulings procedure outside the scope of Community law: 'The Dzodzi line of cases'.* European Integration online Papers (EIoP) Vol. 4 (2000) N° 11., pp. 8–19., 26–31. <http://eiop.or.at/eiop/texte/2000-011a.htm> (visited on 23 September 2008); LEFÈVRE, S.: *The interpretation of Community law by the Court of Justice in areas of national competence.* (2004) 29 E.L.Rev., pp. 501–516., Oliver , *supra* note 4., p. 38., TRIDIMAS: *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure.* (2003) 40 CML Rev., pp. 34–37.; RASMUSSEN, H.: *Remedying the crumbling EC judicial system.* (2000) 37 CML Rev. p. 1083.; BISHOP, E. M.: *Kleinwort Benson: A good Example of Judicial Self-restraint?* (1995) 20 E. L. Rev., pp. 495–501.

[6] Joined Cases C–297/88 and C–197/89 M. Dzodzi v Belgium [1990] ECR I–3763, par. 37. *Lefèvre* regards this point as the principal justification for the whole *Dzodzi* jurisprudence, see Lefèvre, *supra* note 5., p. 508.

[7] *Dzodzi, ibid.*, paras. 32. and 36. For the summary of the resoning, see e.g. Oliver, *supra* note 4., p. 36.

prevailed for more than twenty years,[8] the main question nowadays is the fine-tuning of its application in various situations, by which its limits and characteristics are explored.

This fine-tuning has centered on a principal issue of jurisdiction. The Court has often reiterated that it is the referring national court that has to assess the need to obtain a preliminary ruling in light of the facts of the dispute at issue. It is the national court that is fully aware of the facts and legal background of the particular case, so it is in the best position to appraise the appropriateness of a question or questions being referred to the Court for a preliminary ruling. However, at the same time, Article 234 EC contains important conditions on the Court's jurisdiction to give a preliminary ruling, over which the Court should retain control.[9] After having given, in the 1960s, the greatest deference to the national courts' assessment of the appropriateness of their references in the decisions of *Albatros, Salgoil,* or *Portelange,*[10] the Court seemed to recover this control in the early 1980s in the famous *Foglia (II)* ruling.[11]

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[8] See, e.g. Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207.; Case C–267/99 Christiane Urbing-Adam v Administration de l'enregistrement et des domaines [2001] ECR I–7467.; Case C–222/01 British American Tobacco Manufacturing BV v Hauptzollamt Krefeld [2004] ECR I–4683; Case C–3/04 Poseidon Chartering BV v Marianne Zeeschip VOF, Albert Mooij, Sjoerdtje Sijswerda, Gerrit Schram [2006] ECR I–2505; Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893.

[9] For comments on the Court's growing control over admissibility conditions, see e.g. Tridimas, *supra* note 5., pp. 21–36., Anderson – Demetriou, *supra* note 4., pp. 104–124.; CRAIG, P.O – DE BÚRCA, G.: *EU Law. Text, Cases and Materials.* Oxford University Press, Oxford 2008, pp. 484–493., ARNULL, A.: *The European Union and its Court of Justice.* Oxford University Press, Oxford 2006, pp. 114–119.

[10] Case 13/68 SpA Salgoil v Italian Ministry of Foreign Trade [1968] ECR 0661, point I.; Case 10/69 S.A. Portelange v S.A. Smith Corona Marchant International and others [1969] ECR 0309, par. 5.; Case 20/64 SARL Albatros v Société des pétroles et des combustibles liquides [1965] ECR 0041.

[11] In *Foglia (II),* balancing among various considerations, the Court put stress on the proper exercise of its jurisdiction under Article 234 EC and asserted: "Furthermore, it should be pointed out that, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in a position to make any assessment inherent in the performance of its own duties in particular order to check, as all courts must, whether it has jurisdiction. Thus the Court, taking into account the repercussions of its decisions in this matter, must have regard, in exercising the jurisdiction conferred upon it by Article [234], not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States. Accordingly it cannot, without disregarding the duties assigned to it, remain indifferent to the assessments made by the courts of the Member States in the exceptional cases in which such assessments may affect the proper working of the procedure laid down by Article [234]." Case 244/80 Pasquale Foglia v. Mariella Novello (II). [1981] ECR 3045, par. 19. See also Craig, *supra* note 9., pp. 484–488., CHALMERS, D. – TOMKINS, A.: *European Union Public Law. Text and Materials.* Cambridge University Press, Cambridge 2007. pp. 287–291., and 297.

In this regard, the central concept of Article 234 EC is the "necessity", that is when it is necessary for the Court to reply to questions referred to it for a preliminary ruling so that the national court can make a decision (give a judgment) in a particular case. The Court's jurisprudence relating to admissibility questions under the provision is in significant part the chain of attempts at determining the degree of the Court's control over the necessity criterion in light of the factual backgrounds of various cases.

Thus, in situations which the Court has confronted in the *Dzodzi* line of cases, the principal admissibility issue is how much deference the Court should accord to the national courts' decisions regarding the necessity of their requests for a preliminary ruling. What are the applicable standards by which the necessity factor can be controlled by the Court in particular cases? However, it is unnecessary to pursue here in general the point regarding this criterion, because only specific aspects of necessity appear in situations like that of the *Dzodzi* case.[12] Thus, the focus has to be placed in this respect upon the *Dzodzi* jurisprudence, though, it is far from being consistent.

2. The ramifications of the necessity criterion in the Dzodzi line of cases

According to the *Dzodzi* holding, the Court may decline jurisdiction over a preliminary reference "only if it were apparent either that the procedure provided for in Article [234] had been diverted from its true purpose and sought in fact to lead the Court to give a ruling by means of a contrived dispute, or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying."[13] In this two-pronged test[14] the Court followed *Foglia (I)* and *Foglia (II)*, asserting that only in the context of genuine disputes may it exercise jurisdiction to give a preliminary ruling[15] – however,

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[12] For the general examination of the necessity criterion, see Anderson-Demetriou, *supra* note 4., pp. 91–95.

[13] Joined Cases C–297/88 and C–197/89 M. Dzodzi v Belgium [1990] ECR I–3763, par. 40. *O'Keeffe* also emphasizes these two limits appearing in *Dzodzi* of the Court's jurisdiction under Article 234 EC, see O'KEEFFE, D.: *Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility.* (1998) 23 E.L.Rev., p. 518.

[14] For further application of the test by the Court, see, e.g. Case C–118/94 Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l' Ambiente – Comitato Regionale, Lega Anti Vivisezione – Delegazione Regionale, Lega per l' Abolizione della Caccia, Federnatura Veneto and Italia Nostra – Sezione di Venezia v Regione Veneto [1996] ECR I–1223, par. 15.; Case C–85/95 John Reisdorf v Finanzamt Köln–West [1996] ECR I–6257, par. 16.

[15] Case 104/79 Pasquale Foglia v Mariella Novello (I) [1980] ECR 0745, par. 11.; Case 244/80 Pasquale Foglia v Mariella Novello (II) [1981] ECR 3045, par. 18.

this rule has no significance within our subject.[16] On the other hand, the manifest inapplicability standard[17] which appeared in its early form in the *Thomasdünger* ruling (without the genuine dispute requirement) illustrates the turn which the Court took in the two *Foglia* holdings: it, *in principle*, does not examine the circumstances or conditions of the case which trigger the national court's reference[18] – but, the demand that Community rules apply to the case seems to be one of the most important constraints on this deference.[19]

The necessity criterion has other faces, of which the "obvious irrelevancy" standard which the Court seems to have set up first in its *Salonia* decision, is of special importance.[20] Under this standard the Court may reject a request for a preliminary ruling if it is quite obvious that the interpretation (or the examination of the validity) of a Community rule bears no relation to the actual nature or the subject matter of the case.[21] (Obviousness has been given up as a

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[16] The Court did not explain how the genuine dispute requirement comes into the reasoning. The facts of the case did not raise any suspicion that *Dzodzi* would have been a contrived dispute. In *Thomasdünger*, the most important precedent to *Dzodzi*, the Court did not even mention this requirement.

[17] Appearing as "obvious" inapplicability in Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 26.; Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 23.; Case C–231/89 Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln [1990] ECR I–4003, par. 23.

[18] Leur-Bloem, *ibid.*, par. 25., Giloy, *ibid.*, par. 22., Gmurzinska-Bscher, *ibid.* par. 22., Case C–118/94 Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l' Ambiente – Comitato Regionale, Lega Anti Vivisezione – Delegazione Regionale, Lega per l' Abolizione della Caccia, Federnatura Veneto and Italia Nostra – Sezione di Venezia v Regione Veneto [1996] ECR I–1223, par. 14.; Case C–85/95 John Reisdorf v Finanzamt Köln–West [1996] ECR I–6257, par. 15.

[19] The Court has in fact developed a complex set of various factors, standards or principles on which it may reject jurisdiction to give a preliminary ruling; however those grounds of refusal are "diverse, overlapping and, in some cases, still uncertain in their application." Anderson-Demetriou, *supra* note 4., p. 104. The manifest inapplicability standard is a good example for this assertion.

[20] Only the necessity criterion has roots in the wording of Article 234, so it is puzzling which of the other grounds for declining jurisdiction can be derived directly from the textual appearance of this criterion, and which of them can be traced back to other parts or the general purposes of Article 234 EC, or to other provisions of Community law. The Court rulings are very succinct on the relationship between the necessity requirement and the other grounds of refusal.

[21] Case 126/80 Salonia v Poidomani and Giglio [1981] ECR 1563, par. 6., followed by the Court in e.g. Case C–368/89 Antonio Crispoltoni v Fattoria autonoma tabacchi di Cittu di Castello [1991] ECR I–3695, par. 11., Case C–186/90 Giacomo Durighello v Istituto Nazionale Della Previdenza Sociale [1991] ECR I–5773, par. 9., Case C–343/90 Manuel José Lourenço Dias v Director da Alfândega do Porto. [1992] ECR I–4673, par. 18., Case C–49/89 Corsica Ferries France v Direction générale des douanes françaises [1989] ECR 4453, par. 27., Case C–230/96 Cabour SA and Nord Distribution Automobile SA v Arnor "SOCO" SARL [1998] ECR I–2055, par. 21., Case C–129/94 Ruiz Bernaldez [1996] ECR I–1829, par. 7., Case C–125/96 Hartmut Simon v Hauptzollamt Frankfurt am Main [1998] ECR I–0145, par. 15. The standard has no strict framing in the jurisprudence, e.g. in the *Manfredi* ruling it appears as the interpretation of a Community rule which „bears no relation to the facts of the main action or its purpose", Joined

criterion for irrelevancy, e.g. in the case of *Reti Televisive Italiane*, for unspecified reasons.)[22]

The relationship between the two standards is not clear. If a question referred to the Court within a preliminary ruling procedure relates to a Community rule which is inapplicable to the case, the interpretation of this rule will also be irrelevant in the matter. The obvious irrelevancy standard is thus apt to absorb or to embrace the inapplicability factor – the inapplicability is assuredly a specific form of irrelevancy. Moreover, according to the obvious irrelevancy standard, the Court may reject the request of the referring national court *only if* the questions of interpretation or validity referred to the Court are obviously irrelevant. However, this "only if" restriction also appears in the context of the manifest inapplicability standard in *Dzodzi* (tied disjunctively to the genuine dispute condition), as well as in the cases to follow that contained these requirements. There appears to be one line of cases starting with *Salonia* where the Court declines jurisdiction over a preliminary reference *only if* the request is obviously irrelevant, and another one starting with *Dzodzi* (and with *Thomasdünger*, albeit using different wording) where this happens *only if* the Community rule to be interpreted by the Court is manifestly inapplicable (or the dispute is not genuine). It is obvious that in both lines of cases the same "only if" term cannot simultaneously be maintained. This throws light upon the fact that the substantive relationship of the various admissibility conditions is far from being clear in the Court's jurisprudence.

In any case, it seems to me that it is only the manifest inapplicability standard of the necessity criterion which principally and relevantly applies in the *Dzodzi* jurisprudence (though its application is not limited to this; see, e.g. *WWF Italia* ruling).[23] However, in factual situations like those emerging, e.g. in *Dzodzi, Leur-Bloem, Giloy*, the use of the other, obvious irrelevancy standard is, in theory, not ruled out either: the interpretation of an otherwise inapplicable Community rule "bears no relation" (on account of its inapplicability) at least to the actual nature or possibly to the subject matter of a referred case – thus, the two standards could be convertible in this context.

Cases C–295–298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA, and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA [2006] ECR I–6619, par. 27., or recently, „...bears no relation to the facts of the main action or to its subject-matter", Case C–11/07 Hans Eckelkamp and others v Belgium, judgment of 11 September 2008; (not yet reported) par. 28.

[22] Pl. Joined Cases C–320/94, C–328/94, C–329/94, C–337/94, C–338/94 and C–339/94 Reti Televisive Italiane SpA , Radio Torre, Rete A Srl , Vallau Italiana Promomarket Srl, Radio Italia Solo Musica Srl és társai és GETE Srl v Ministero delle Poste e Telecomunicazioni [1996] ECR I–6471, par. 23.

[23] Case C–60/05 WWF Italia and others v Regione Lombardia, [2006] ECR I–5083, especially par. 19.

3. If we took Dzodzi seriously ... in reading Benson

In *Dzodzi* the Court made it plain that it assumes jurisdiction over a preliminary reference if, and only if, the dispute is not fictitious or the Community rule to be interpreted is not manifestly inapplicable. Here, the Belgian law extended the reach of the Community law to purely internal situations by providing that residence in Belgium of the foreign spouse of a Belgian national (a situation not governed by Community rules) was to be treated like that of a national of a Member State other than Belgium (a matter governed by Community law). It was in this legal context, where Ms. Dzodzi had been the spouse of a Belgian national, and the dispute therefore entailed a wholly internal situation, that the Court replied to questions asked by the referring Belgian court. By exercising its jurisdiction under Article 234 EC, the Court implied, and in fact set up, the principle that a Community rule which is applicable to an internal situation only by force of domestic law is not manifestly inapplicable in a case involving such an internal situation for the purposes of Article 234 EC.

In this sense, the applicability of a Community rule means not only applicability by force of the Community law, but applicability on the basis of national legislation, as well. That explains why the "manifest" (or sometimes the "obvious") adjective in the wording of the standard is necessary for the Court. The word refers to only a very low-level, *prima facie* scrutiny of applicability. If a Community rule is applicable by virtue of national law, a significant uncertainty comes in from the Court's point of view: the extent and conditions of the applicability of Community rules are determined by national legislation, and the Court has no jurisdiction under Article 234 EC to interpret national legal rules, not even those giving extra effects to Community law. That is why the Court has to accord great deference in these situations to the national court's assessment of applicability (or would have had simply to disclaim jurisdiction to give interpretation over all such references).

In order to save something of the *Foglia* approach in *Dzodzi*-like circumstances, the Court seems to have claimed some control over the applicability issue by resorting to the "manifest" qualifying adjective, which represents the limits (very weak limits, at first sight) of the national courts' assessments. If the Court sees a Community rule as manifestly (or obviously) inapplicable to the case even under national law and the national court has taken a contrary position in its reference without avail, the request for a preliminary ruling will not be admissible. But when can the inapplicability be seen as manifest? What attribute does "manifest" ascribe to inapplicability? Given, that the Court may not interpret national legal rules within a preliminary ruling procedure, the manifest nature of inapplicability has to be conceptually based upon the absence of the need for interpretation. So, in this context, the standard of inapplicability "being manifest" can only be construed such that the inapplicability of a Community rule is reasonably clear and it can be established

– without any interpretative efforts – from the mere wording of the national law that aims to give extra effects to this rule.

The first, serious test for this construction was the widely-known *Kleinwort Benson* case.[24] Here, the national legislation of the United Kingdom had not incorporated the Community rules at issue by explicit reference, as is seen in *Dzodzi*, but the domestic legal rules applicable to internal situations had been modelled upon the Community rules for which the referring UK court then sought interpretation in Luxembourg.[25]

Rejecting jurisdiction to reply to the referred questions, the Court principally based its reasoning upon the factors that national legal rules (i) did not make a direct and unconditional reference to Community law to allow departure therefrom and (ii) provided that UK courts are not bound by the ECJ's decisions in applying to internal situations the rules transposed from the Brussels Convention.[26]

The second of these reasons for refusal constitutes a potentially strong argument against jurisdiction, and, in my view, the only successful argument against jurisdiction in this case. The Court may not give purely advisory opinions that lack binding effect, because that would be incompatible with its judicial function. And therefore, if the application of its ruling is not required by national law in the context of a case, the reference cannot be admissible. However, it is interesting to note that this element of the national legislation has not been assessed under and tied to the manifest inapplicability standard (see paragraphs 20–24 of the judgment), although a Community rule can be seen as unconditionally applicable only if the Court's decisions that give it meaning are binding upon the Member State, including its courts.[27] The Court seemed to share the concerns of those opponents of *Dzodzi* who had placed the focus upon the risk that the Court would in such cases become a purely advisory body. But the position the Court took in *Kleinwort Benson* was significantly weakened by its previous *Fournier* ruling, where it had explicitly acknowledged the possibly non-binding nature of the interpretation given in the case. The Court there reasoned that the decision in the main dispute was within the jurisdiction of the national court, which might give such meaning to the terms of the agreement in

[24] Case C–346/93 Kleinwort Benson Ltd. v City of Glasgow District Council [1995] ECR I–0615. For a short survey on the case, see e.g. BETLEM, G. Case note on Case C–28/95 Leur-Bloem and Case C–130/95 Giloy. (1999) 36 CMLR, pp. 165–178., Bishop, *supra* note 5., pp. 495–501.

[25] The reference was made for the interpretation of two phrases in Article 5 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and the preliminary ruling procedure began under Protocol of 1971 to the Brussels Convention, and not under Article 234 of the EC Treaty.

[26] Lenaerts, *supra* note 3., p. 226.; Arnull, *supra* note 9., pp. 108–109. *Collins* discusses the case in the context of UK domestic law, COLLINS, L.: *The Brussels Convention within the United Kingdom.* (1995) 111 The Law Quarterly Review, pp. 543–544.

[27] *Lefèvre* is also inclined to establish link between the two factors, Lefèvre, *supra* note 5., p. 504.

issue that it saw appropriate (!), "without being bound in that regard by the meaning" attributed by the Court's decision to the corresponding (and the same) expression used in the Directive in issue.[28] In spite of the explicit variance, the Court has not even made an attempt to distinguish *Kleinwort Benson* from *Fournier* in this respect.

Turning to the first principal reason for refusal of jurisdiction in *Kleinwort Benson* we can see that the Court explicitly referred to the manifest inapplicability standard in paragraph 19 of the judgment, which had not been met in the case. According to the Court, the provisions of the Convention "cannot be regarded as having been rendered applicable as such, in cases outwith the scope of the Convention". This contention – concerning the absence of applicability – is rooted in the following two factors: (1) the national law did not wholly reproduce the terms of the Convention and certain provisions of the national law departed from the wording of the corresponding Convention provision; (2) an explicit provision in the implementing Act allowed authorities to make changes "designed to produce divergence" between any provision of the Act and a corresponding provision of the Convention.

In my view, *Dzodzi* would not have allowed this conclusion in *Kleinwort Benson* for at least three reasons. First, the Court clearly transgressed the limits of its jurisdiction. To reach the conclusion in the case, it had to interpret the Act of the United Kingdom, which was expressly acknowledged by the Court itself in paragraph 18 of the ruling. This clearly demonstrated a departure from *Dzodzi* where the Court had strictly kept away from assessing or interpreting national legal rules and given much greater deference to the national court's decision to refer.

Second, the fact that the authorities had been empowered by the Act to make changes is irrelevant if they had not in fact taken steps extending to the facts of the case tied to the rules which had been transposed from the Convention provisions that were referred to the Court for interpretation.[29] However, in general, if a Community rule applies to various situations only by virtue of national law, such legislation may be subject to change at any time by unilateral act of the Member State. Still, the Court must have reckoned on such a possibility when engaging in this new jurisprudence starting from *Thomasdünger*.

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[28] Case C–73/89 A. Fournier and others v V. van Werven, Bureau central français and others [1992] ECR I–5621, par. 23., see also Case C–346/93 Kleinwort Benson Ltd. v City of Glasgow District Council [1995] ECR I–0615, per AG *Tesauro*, par. 24.

[29] In other, but similar contexts, the importance of specific approach has been emphasized by AG *Jacobs*, Joined Cases C–321/94, C–322/94, C–323/94 and C–324/94 Jacques Pistre and others [1997] ECR I–2343, per AG Jacobs, par. 38. and AG *Cosmas* in Case C–63/94 Groupement national des negociants en pommes de terre de Belgique (Belgapom) v ITM Belgium SA and Vocarex SA [1995] ECR I–2467, per AG Cosmas, par. 14., cited by AG Jacobs, *ibid.*, and RITTER, C.: Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234. (2006) 31 E.L.Rev. October, p. 700.

Third, the Court was asked to interpret only two phrases of the Convention: "matters relating to a contract" within the meaning of Article 5(1) of the Convention, and "matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3). In *Dzodzi* in setting up the manifest applicability standard the Court focused upon the *provision of Community law referred to the Court* for interpretation. It seems also irrelevant that all of the provisions of the Convention had not been transposed verbatim by the Member State into its national legislation. What counts is whether or not the transposed national rules departed from corresponding Articles 5(1) and 5(3) of the Convention; if so, to what extent they did, and whether the variance would have made the Court's interpretation of the corresponding Convention rules meaningless in the context of the case. In this respect, however, no reasoning has been offered by the *Kleinwort Benson* decision.

As follows from the foregoing, in *Kleinwort Benson* a different standard of manifest inapplicability was in fact applied by the Court than was applied in *Dzodzi*.[30] Though AG *Jacobs* calls it "an uneasy compromise" between the two cases,[31] I have to regard *Kleinwort Benson* as a clear exception to *Dzodzi* or *Gmurzynska-Bscher* – and not just for its outcome.[32] The inheritance of *Dzodzi* regards the national courts' enhanced power to assess the circumstances and legal context of the case referred to the Court and the necessity of reference. This power, which is more extensive than in other preliminary ruling cases, is necessary in view of the fact that in these cases the application of Community law is conditional upon national legal rules, and the Court, in theory, completely lacks jurisdiction to interpret those rules. A concomitant of the Court's upholding the *Dzodzi* ruling will be the wide-reaching power of national courts.

4. The short life of "direct and unconditional renvoi" test

Kleinwort Benson reveals one of the principal problems of the manifest inapplicability standard. Is there a case where Community rules does not apply to the facts in an internal situation, but the inapplicability is not manifest, so the Court does not lack jurisdiction to give substantive answers? What does "manifest" mean in relation to inapplicability? Does this adjective designate a subjective requirement (if the Court takes notice of and determine the inapplicability it will be manifest), or an objective one (the certainty or degree of inapplicability)? The decision left open this question. The Court purported to

[30] *Collins'* claim that the Court followed previous cases in *Kleinwort Benson* seems to me unsupported and unpersuasive; Collins, *supra* note 26., p. 544.

[31] Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/ Ondernemingen Amsterdam 2. [1997] ECR I–4161, and Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main–Ost [1997] ECR I–4291, per AG *Jacobs* (joined opinion), par. 68.

[32] The exceptional nature of the case is emphasized by O'Keeffe, *supra* note 13., p. 519.

derive from its previous cases a new test, "direct and unconditional *renvoi*", by which manifest inapplicability could in some way be measured in particular instances. However, this new demand introduced by *Kleinwort Benson* tested inapplicability and did not test the manifest nature thereof, and thus the "direct and unconditional *renvoi*" test apparently did not provide solution to the problem.

The appraisal of the manner by which the national law incorporates Community rules implies the examination of the factual and legal context of the case. The application (and the manner of application) of Community rules in non-Community situations does not depend only on the pure texts of national legal rules, but on the case-law of national courts or administrative practices of the Member States' authorities that constitute parts of the body of national legal systems. Applying the test consistently might easily involve the extension of the Court's jurisdiction in these cases.

The "direct and unconditional *renvoi*" test to weigh manifest inapplicability has clearly been given up by the Court in the *Leur-Bloem* case, which came to Luxembourg from the Netherlands, where the Court was asked to interpret the phrase "exchange of shares" for income tax purposes within the meaning of Article 2(d) of Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. The reference was made by the national court to determine whether the merger of share companies in the main proceedings could be qualified as a "merger by exchange of shares" under the Netherlands income tax law, and whether the respondent was entitled to receive a tax exemption on the gains which she had made by transferring her shares. Although the merger operation in question only embraced companies in the Netherlands, and so did not fall within the scope of the Directive, the Dutch law contained *mutatis mutandis* the same provision concerning the mergers of companies established in the Netherlands and those of companies established two or more Member States.

In distinction to *Dzodzi*, the national law applicable in the case made no explicit reference to Community rules, and contained only two, in substance, identical clauses, one for internal merger transactions, and another for mergers in the Community context. In view of this legal background it would be hard to talk about "direct and unconditional *renvoi*" in this case. However, the Court – without applying the direct and unconditional *renvoi* test – assumed jurisdiction and gave answers to the Amsterdam court's questions. It did so in a case where the Community rule at issue might contribute to the interpretation of a national legal rule which was not applicable in the main proceedings, but which was, in substance, identical with another national legal provision covering the wholly internal factual situation of the dispute.

In reaching this decision it might have been important that the referring court took the view that under national law, the same treatment should be accorded to

domestic mergers and intra-Community mergers for income tax law purposes – and that in the earlier case of *Kleinwort Benson* there existed possibility of divergence in legal treatment between the internal and intra-Community situations. But apart from these considerations, putting aside conclusive previous holdings, the *Leur-Bloem* decision has clearly departed from *Dzodzi* in that it did not maintain the requirement of explicit reference to the Community rules,[33] and from *Kleinwort Benson* in so far as it has thrown out the "direct and unconditional *renvoi*" test in the assessment of manifest inapplicability. In this decision the Court went further to extend its jurisdiction under Article 234 EC than it had done in *Dzodzi* or any other previous cases belonging to this line.

Leur-Bloem's twin-case, *Giloy* which was decided on the same day covered similar factual situation and was concerned with the following question: to what extent had German tax law made the Community Customs Code applicable to the procedure relating to the levying of value-added taxes on imports (purely internal situation), and whether the Court had jurisdiction to interpret the Code for the purposes of clarifying some legal concepts and conditions in such an internal tax procedure. The outcome of the case was the same as that of *Leur-Bloem*: the Court gave substantive ruling in the case.

5. Lack of manifest inapplicability: "same solution" approach and the Leur-Bloem test

What has remained after *Leur-Bloem* and *Giloy*? What are the limits to the extent of the reach of Article 234 EC? Having renounced the demand for explicit reference to Community law the Court introduced the wider "same solution" approach. This conceptual turn was quickly reaffirmed in the subsequent cases of *Kofisa* and *Adam*. In *Leur-Bloem* the Court held that "where in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply..."[34] Although, in drawing this

[33] I find it extremely difficult to agree with *Kaleda's* opinion that in *Leur-Bloem* the Court reaffirmed the reasoning of *Dzodzi*, see Kaleda, *supra*, p. 4.

[34] Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 28.; Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 32., Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207, par. 32., Case C–267/99 Christiane Urbing-Adam v Administration de l'enregistrement et des domaines [2001] ECR I–7467, par. 27.

conclusion, the Court referred to *Dzodzi*, (and only to *Dzodzi*), just the second half of the contention related strictly to paragraph 37 of that decision. Of course, the "same solution" approach can be traced back *mutatis mutandis* to *Dzodzi*, although *Dzodzi* can only be read in such a way as to set up the requirement that the national law should refer to Community law, and so, providing for the *same solution by reference*. However, *Leur-Bloem* and *Giloy* made use of the "same solution" concept without qualification, i.e. the *same solution in any way*, implying no need for explicit reference to Community rules.[35] In AG *Kokott's* view, under *Leur-Bloem* and *Giloy*, it has become irrelevant whether national law refers to Community law; what is decisive is only orientation in substance to Community law.[36] This "same solution" approach has prevailed in recent rulings, and been made part of a new test by which lack of manifest inapplicability could be ascertained.[37]

In the cases subsequent to *Leur-Bloem*, the following three-pronged test, substituting for the abandoned "direct and unconditional *renvoi*" test, has been applied (*Leur-Bloem* test).[38] As a principle, the lack of manifest inapplicability can be ascertained if, conjunctively, (1) the national legislation, in regulating internal situation at issue, provides the same solution as that adopted in Community law;[39] and (2) the national legislation does not merely take the Community rules as a model and does not expressly provide that the national authorities may adopt amendments designed to give rise to divergence between

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[35] Betlem, *supra* note 24., p. 172.; In *Lefèvre's* view the *Leur-Bloem* judgment maintained the condition of direct and unconditional reference, which point does not seem to find support in the text of the ruling; Lefèvre, *supra* note 5., p. 505.

[36] Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, per AG Kokott, par. 39.

[37] In view of these considerations the conclusion that in *Leur-Bloem* and *Giloy* the Court reverted to *Dzodzi* case-law after the exceptional case of *Kleinwort Benson* is unconvincing, O'Keeffe, *supra* note 13., p. 519.; Arnull, *supra* note 9., p. 109., Tridimas, *supra* note 5., p. 34., Anderson – Demetriou, *supra* note 4., p. 72.

[38] In the *Andersen og Jensen* case the *Leur-Bloem* test is used in other sense, see Case C–43/00 Andersen og Jensen ApS v Skatteministeriet [2002] ECR I–0379, par. 14.

[39] Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 32., Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 28., Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207, par. 32., Case C–300/01 Doris Salzmann [2003] ECR I–4899, par. 34., Case C–267/99 Christiane Urbing-Adam v Administration de l'enregistrement et des domaines [2001] ECR I–7467, par. 27., Case C–43/00 Andersen og Jensen ApS v Skatteministeriet [2002] ECR I–0379, par. 18., Case C–222/01 British American Tobacco Manufacturing BV v Hauptzollamt Krefeld [2004] ECR I–4683, paras. 40–41., Case C–3/04 Poseidon Chartering BV v Marianne Zeeschip VOF, Albert Mooij, Sjoerdtje Sijswerda, Gerrit Schram [2006] ECR I–2505, par. 16., Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, paras. 21., 23., Case C–217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA [2006] ECR I–11987, par. 20.

the national provisions and the corresponding Community provisions; [40] and (3) the national court is not empowered by national law to depart in the case from the Court's interpretation of the Community law.[41]

This test does not demand any explicit reference to Community law by the national legislation that regulates internal situations, and that is the most important consequence of the decisions made in the *Leur-Bloem* and *Giloy* cases. The second and third prongs of the test can be traced back to the *Kleinwort Benson* case on the problems of which I have provided a short survey.[42] But, as part of the *Leur-Bloem* test, the requirement that the national court be bound by the interpretation the Court gives in a case raises further problems.

In *Kleinwort Benson* the Court saw problem in the fact that, as it construed, under the national law the referring court was not bound by the Court's decisions in cases where the Community rules (i.e. the 1968 Brussels Convention) applied to internal situations on the basis of national legal rules. The relevant part of the 1982 Act run as follows: "In determining any question as to the meaning or effect of any provision contained in Schedule 4: (a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that Court as to the meaning or effect of any provision of that Title..."[43] The Court disapproved of the phrase "regard shall be had to" which in its view did not imply the "absolute and unconditional" application of the interpretation of the Convention provided by the Court. That being the case, the phrase "regard shall be had to" indicated for the Court that the national court was free to decide

[40] Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 29., Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 25., Case C–217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA [2006] ECR I–11987, par. 21., Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207, par. 30., Case C–306/99 Banque Internationale pour l'Afrique Occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg [2003] ECR I–0001, par. 93.

[41] See, e.g. Case C–28/95 A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2. [1997] ECR I–4161, par. 29., Case C–130/95 Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I–4291, par. 25., Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207, par. 31., Case C–3/04 Poseidon Chartering BV v Marianne Zeeschip VOF, Albert Mooij, Sjoerdtje Sijswerda, Gerrit Schram [2006] ECR I–2505, par. 18., Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, par. 28. In AG *Ruiz-Jarabo Colomer's* interpretation this requirement does not form part of the *Leur-Bloem* and *Giloy* decisions, *Kofisa, supra,* per AG *Ruiz-Jarabo Colomer,* par. 50. – I would not share this view.

[42] As to the relation between *Kleinwort Benson* and *Leur-Bloem* (or *Giloy*), or to the turn made by the Court in the latter two cases, see further AG *Ruiz-Jarabo Colomer's* opinion delivered in the case of *Kofisa, ibid.*, per AG Ruiz-Jarabo Colomer, paras. 45–50.

[43] The text of the Act is cited by AG *Tesauro*'s opinion delivered in the case, see par. 4.

whether or not the Court's interpretation of the Convention was applicable, or not, in resolving cases entailing purely internal situations.[44]

How can the Court determine that a national court is not bound to follow its preliminary rulings *under national legislation*? How does the Court know it does not follow from the phrase "regard shall be had to" that the domestic court shall, in fact, follow preliminary decisions? The basic problem is that in many cases all this implies interpretation by the Court of the national rules in question – over which it clearly lacks jurisdiction under Article 234 EC. In *Kleinwort Benson* the Court did in fact give an interpretation to this phrase denying deference in this respect to the national court's view of the necessity of reference.

In the subsequent cases of *Kofisa* and *Poseidon Chartering*, the Court gave a somewhat constricted and altered reading of this part of *Kleinwort Benson*, asserting that the national court *should not be empowered to depart from* the Court's interpretation given in the preliminary ruling and thereby suggesting that in these two cases the lack of explicit legal authorization for the courts to depart from Luxembourg case-law was an important factor. However, in *Kleinwort Benson* the national legislation did not explicitly empower national courts to depart from preliminary rulings either; it bound them to take the Court's jurisprudence into account. The possibility of departure was not established under an explicit authorization provision, but by way of the Court's interpretation leading to an outcome based on a negative inference or *argumentum a contrario*. To say that a national rule explicitly does not rule out the possibility of departing from the preliminary ruling is quite different from saying that a national rule empowers courts to depart from a preliminary ruling. This raises the problem of the degree of review which the Court may exercise over the national courts' competences to apply Community law under national law in cases embracing purely internal situations. In *Kofisa* a significant turn came about.

Contrary to the *Kleinwort Benson* approach, where the Court set up a substantive requirement of "absolute and unconditional" application of a preliminary ruling it gave in the matter, in *Kofisa* the Court took a more lenient route in saying that "there is nothing in the file to indicate that the national court is empowered to depart from the Court's interpretation of the provisions".[45] The demand for an "absolute and unconditional" application has disappeared, and

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[44] Case C–346/93 Kleinwort Benson Ltd. v City of Glasgow District Council [1995] ECR I–0615, paras. 20–22. In contrast, the Court construed the 1982 Act as providing that the national courts were bound to follow the Court's interpretation of the 1968 Convention in disputes to which the Convention was by its own force to be applied.

[45] Case C–1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi – Concessione Provincia di Genova – San Paolo Riscossioni Genova SpA [2001] ECR I–0207, par. 31., see also Case C–3/04 Poseidon Chartering BV v Marianne Zeeschip VOF, Albert Mooij, Sjoerdtje Sijswerda, Gerrit Schram [2006] ECR I–2505, par. 18.

what has remained is the requirement that nothing in the file should indicate an explicit authorization for the referring court to depart from the Court's preliminary decision in handling the purely internal situation of the case.[46] In my opinion *Kleinwort Benson* would have easily met such condition.

Thus, the condition articulated in *Kleinwort Benson* has been converted, and in my view has necessarily been converted, on account of the jurisdictional limits of Article 234 EC, into a pure procedural question depending on the manner in which the questions were asked in the referral and on the material submitted to the Court.[47] If the referring court makes a clear statement relating to the necessity of reference in its referral and there is nothing in the file to the contrary, the Court will give a ruling.

The low level of degree of review has been recently demonstrated in the *ETI* case where the Commission tried to keep the condition of "absolute and unconditional application" alive eight years after *Kofisa*. The Commission's argument was simply brushed aside by the Court satisfied that the Italian authorities had based their decisions in the dispute on Community rules and case-law, and that the *Consiglio di Stato*, as the referring court, had made its reference on the ground that it had considered the reference necessary for the purposes of giving a judgment according to the principles of Community competition law.[48] So, the Court concluded to the existence of the national courts' obligation to apply (absolutely and unconditionally?) Community law and Luxembourg case-law from the fact that they had *de facto* applied them in the case. That is what I would regard as a quite low level of degree of review amounting to explicit overruling of *Kleinwort Benson* in this respect.

6. Bottom of the slope: the useful answer doctrine

The first prong of the *Leur-Bloem* test – the "same solution" approach – is not easy to apply in some circumstances. It requires that the Community law should be equally applied to internal situations as well as to those that fall directly within the scope thereof. If the reference by the national law to the Community law is too general and indirect, the Court will not be able to make sure of the applicability of Community law or the existence of the same solution possibly ensured by the national law and therefore will be forced to rely on the national court assessment. Here, the Court gives up the *Leur-Bloem* criteria in testing manifest inapplicability and puts stress on its function to support the national

[46] See e.g. Tridimas, *supra* note 5., p. 36.

[47] On account of this low-level of the degree of review, *Kofisa* and *BIAO* is regarded by Lefèvre as a separate phase of *Dzodzi* case-law, Lefèvre, *supra* note 5., p. 506.

[48] Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, par. 28.

court's decision by providing useful answers to the questions asked in the referral, abandoning any definite control over the substance of the reference.

This trend has become apparent in the so-called reverse discrimination cases, which constitute a specific form of disputes when Community rules shall be applied to purely internal situations on the basis of national legislation.[49] Reverse discrimination arises when a Member State's nationals or domestic products are disadvantaged in internal situations under the applicable domestic law in comparison to those of the Member State or other Member States involved in intra-Community legal situations or at least having some tie with EC law, and therefore treated on more favorable terms within the scope of the Community law.[50] In national legislations there may exist such rules which purport to eliminate reverse discrimination. That is why the Belgian legislature inserted a specific rule into the immigration law in the *Dzodzi* case in order to ensure that even internal situations be treated in the same manner as Community law treats intra-Community relations.

However, the national legislation does not always entail a specific rule that can easily be identified by the Court in a preliminary ruling procedure as could be seen for example in *Dzodzi*. If the elimination of reverse discrimination is intended by general antidiscrimination clauses or principles of the domestic law, or even without such rules, simply by the case-law of national courts, the applicability of Community law will depend on how these general rules or the national courts' holdings that form part of the case-law can be construed. In these instances the Court will not be in a position to assess the applicability of Community rules that depend on the application of domestic principles or rules that have uncertain or even vague content. As a deeper consequence of the position taken by the Court from *Thomasdünger* onwards – that is the Court has jurisdiction to interpret Community rules that apply only by virtue of national law in an internal case –, the Court loses control over the substantive issues of relevancy in cases where the only possible basis of the applicability of Community law lies in general or vague internal rules.

This most permissive approach on the part of the Court first became apparent in the decision of *Guimont* [51](a reverse discrimination case) where, after having found that the particular case embraces wholly internal situation, it went further and held:

> 22 However, that finding does not mean that there is no need to reply to the question referred to the Court for a preliminary ruling in this case. In principle, it is for the national courts alone to determine, having

[49] Reverse discrimination cases are also regarded as a form of *Dzodzi*-like situations by e.g. Kaleda, pp. 3–4. or Ritter, *supra* note 29., pp. 690–710.

[50] Ritter, *ibid.*, p. 691., see also Craig, *supra* note 9., p. 762–763.

[51] Case C–448/98 Ministère Public v Jean-Pierre Guimont [2000] ECR I–10663, paras. 22–23.

> regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court. A reference for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action [...].
>
> 23 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the national court. Such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.

This part of the decision illustrates the uncertainty as to what the national law says in the case. The Court, framing the second sentence of paragraph 23 in the conditional, clearly reckoned on the possibility that the Community rules it was interpreting would not be applied in the main proceedings. This may be the fearful situation the Court has always tried to avoid by refusing jurisdiction on the grounds that giving preliminary rulings of an advisory nature would alter the Court's function as envisaged by the EC Treaty.

In *Guimont*, the Court, though referring to the general necessity criterion of Article 234 EC, appeared to renounce the *Leur-Bloem* test all together – the test which had constituted the remnants of substantive content of manifest inapplicability standard. Furthermore, it did not mention the manifest inapplicability standard itself, and simplified its final reasoning by pointing to the useful answer doctrine.[52] As this doctrine, mainly in its subjective form, provides little guidance, provides no substantive control and gives way to a piecemeal, case-by-case jurisprudence, the Court seems to have given up the chance of a more controlling, principled approach to the jurisdictional issues of such cases.[53]

In subsequent cases the approach taken in *Guimont* that combines the useful answer doctrine with a reference to the necessity criterion or to the obvious irrelevancy standard seems to have settled into a consistent case-law in reverse discrimination cases.[54] Although it is uncertain whether the Community rules

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[52] *A fortiori*, I am unable to discover such "essential similarity" between the Court's *Dzodzi* and *Guimont* holdings that *Ritter* discovered, see Ritter, *supra* note 29., p. 698.

[53] *Bishop* suggested in 1995, that the Court should leave the national court to decide whether a preliminary ruling necessary and apply the useful answer doctrine even in *Dzodzi*-like cases, Bishop, *supra* note 5., p. 501. In *Guimont* the Court has come dangerously close to this pre-*Foglia* situation.

[54] See e.g. Joined Cases C–515/99, C–519/99 to C–524/99 and C–526/99 to C–540/99 Hans Reisch and others v Bürgermeister der Landeshauptstadt Salzburg, Grundverkehrsbeauftragter des

interpreted by the Court will be applied by the referring court to the case at issue, the Court nevertheless gives a preliminary ruling, if it is not manifest that the interpretation of Community law sought bears no relation to the facts or the purpose of the action before the national court (obvious irrelevancy standard),[55] or more generally, if it is not obvious that the interpretation of Community law requested is not necessary for the national court (necessity criterion).[56]

By the elimination of the *Leur-Bloem* test, and mainly the same solution approach, forming part of the content of the manifest inapplicability standard, no obstacle seems to exist to the Court's extending the *Guimont* rule in the future to other types of *Dzodzi*-like cases if the reference by the domestic law to Community rules is vague or uncertain.[57] The formal requirement which has remained is – as seen in the decision of *Centro Europa 7* – that the referring court *"give indication"* as to why it thinks that the preliminary ruling to be given by the Court is relevant to the main proceedings.[58]

Landes Salzburg; Anton Lassacher and others v Grundverkehrsbeauftragter des Landes Salzburg, Grundverkehrslandeskommission des Landes Salzburg [2002] ECR I–2157, par. 26.; Case C–300/01 Doris Salzmann [2003] ECR I–4899, par. 33.; Case C–6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and others and Estado português [2003] ECR I–8621, par. 41.; Case C–451/03 Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori [2006] ECR I–2941, par. 29.; Joined Cases C–94/04 and C–202/04 Federico Cipolla v Rosaria Fazari, née Portolese, Stefano Macrino; Claudia Capodarte v Roberto Meloni [2006] ECR I–11421, par. 30.; Case C–380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni, [2008] ECR I–0349, par. 53.

[55] See e.g. Joined Cases C–94/04 and C–202/04 Federico Cipolla v Rosaria Fazari, née Portolese, Stefano Macrino; Claudia Capodarte v Roberto Meloni [2006] ECR I–11421, par. 28.; Case C–300/01 Doris Salzmann [2003] ECR I–4899, par. 35.

[56] See e.g. Case C–448/98 Ministère Public v Jean-Pierre Guimont [2000] ECR I–10663, par. 23., Joined Cases C–515/99, C–519/99 to C–524/99 and C–526/99 to C–540/99 Hans Reisch and others v Bürgermeister der Landeshauptstadt Salzburg, Grundverkehrsbeauftragter des Landes Salzburg; Anton Lassacher and others v Grundverkehrsbeauftragter des Landes Salzburg, Grundverkehrslandeskommission des Landes Salzburg [2002] ECR I–2157, par. 26.; Case C–6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and others and Estado português [2003] ECR I–8621, par. 41.

[57] See e.g. AG *Kokott's* view who says in *ETI* that the decisive factor in these cases is whether or not the reply to the questions referred can be useful to the national court, Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, per AG Kokott, par. 47.

[58] Case C–380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni; judgment of 31 January 2008, (not yet reported), par. 55.

7. Conclusions

In *BIAO*, referring to the *Dzodzi* line of cases, *AG Jacobs* pointed out that he did not consider "that it is correct to read total consistency in the Court's case-law."[59] Neither do I.

I have discussed the limited approach of *Dzodzi* plainly requiring reference to Community law to prove that Community law is not manifestly inapplicable to a case. I have also covered the more principled approach of *Kleinwort Benson*. This ruling, although contrary to *Dzodzi* and *Gmurzynska-Bscher* in requiring direct and unconditional reference to Community law, still constituted a suitable basis for deciding future cases that involved wholly internal situations that were governed by Community law by force of national rules. However, the "direct and unconditional renvoi" test proved to be a transient solution tailored only to the facts of *Kleinwort Benson*.

A sharp turn can be perceived in *Leur-Bloem* and *Giloy*, where a new three-pronged test was introduced to substitute for the direct and unconditional *renvoi* that demands only a "same solution" indication instead of reference to Community law. Though, in the case of *BIAO* the full Court had an opportunity to reconsider the whole *Dzodzi* jurisprudence,[60] not surprisingly, that proved impossible – the slope built upon such cases as *Leur-Bloem, Giloy, Kofisa* or *Guimont* was too slippery and steep to stop. Moreover, within the *Dzodzi* line of cases, from *Guimont* onwards, a group of "reverse discrimination" cases has been separating. In these cases, the Court has left the *Leur-Bloem* test and the manifest inapplicability standard far behind, and given even a wider margin of appreciation to the national courts in controlling the necessary criterion of Article 234 EC.

Though often referred to, *Dzodzi* – apart from its central rule, which *de facto* already appeared in *Thomasdünger* – and, in part, the *Kleinwort Benson* holdings seem to be dead. Advocates General no longer challenge the Court's more lenient position first illustrated in *Leur-Bloem* and *Giloy*, and, for example, AGs *Kokott* and *Sharpston* have submitted strongly pro-*Leur-Bloem* opinions in the recent cases of *ETI, CEPSA* and *SPF Finances*.[61] Recent rulings suggest that the Court firmly follows the line of *Leur-Bloem* – and applies the

[59] Case C–306/99 Banque Internationale pour l'Afrique Occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg [2003] ECR I–0001, per AG Jacobs, par. 49.

[60] *Ibid.*, see also Lenaerts, *supra* note 3., p. 228., Arnull, *supra* note 9., 110–111.

[61] Case C–280/06 Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and others [2007] ECR I–10893, per AG Kokott, paras. 19–64.; Case C–217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA [2006] ECR I–11987, per AG Kokott, paras. 16–37.; Case C–48/07 État belge – SPF Finances v Les Vergers du Vieux Tauves SA; AG Sharpston's opinion delivered on 3 July 2008, paras. 20–38. (not yet reported).

even more permissive *Guimont* principle, in some cases running distinctly parallel with the *Leur-Bloem* jurisprudence.

BLUTMAN LÁSZLÓ

A NYILVÁNVALÓ ALKALMAZHATATLANSÁG KÖVETELMÉNYE: A *DZODZI* ESETJOG ELGONDOLKODTATÓ TÖRTÉNETE

(Összefoglalás)

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