Judgment of the Court of Justice, Foglia, Case 244/80 (16 December 1981)

Caption: In the Sacchi judgment, the Court of Justice defines the notions of services (the transmission of television signals) and of goods (the physical medium for the signals). According to the Court, Article 37 of the EC Treaty (now Article 31), in the Chapter on the elimination of quantitative restrictions on the free movement of goods, refers to commercial monopolies and not to service monopolies. Accordingly, Community law does not prevent the Italian monopoly on television advertising insofar as it can be justified by 'considerations of public interest of a non-economic nature'. However, this principle is tempered by the condition that exclusive rights of this nature must not have a discriminatory influence on trade between Member States, and by the application of the rules on competition, in particular Article 90 (now Article 86).

Source: Reports of Cases before the Court. 1981. [s.l.].

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Judgment of the Court of 16 December 1981 [1]

Pasquale Foglia v Mariella Novello

(reference for a preliminary ruling from the Pretura, Bra)

(Tax arrangements applying to liqueur wines)

Case 244/80

Summary

1. Preliminary questions — Jurisdiction of national court — Assessment of need to obtain an answer — Exclusive application of Community law
(EEC Treaty, Art. 177)

2. Preliminary questions — Jurisdiction of Court of Justice — Limits — Questions submitted within the framework of procedural devices arranged by the parties — Examination by the Court of Justice of its own jurisdiction
(EEC Treaty, Art. 177)

3. Member States — Application of Community law by a national court — Action relating to compatibility of Community law with the legislation of another Member State — Possibility of taking proceedings against the Member State concerned — Appraisal on basis of the laws of the State in which the court is situated and of international law

4. Preliminary questions — Jurisdiction of the Court of Justice — Question designed to allow the national court to determine whether legislative provisions of another Member State are in accordance with Community law — Parties to the national proceedings — Special care to be taken by the Court of Justice
(EEC Treaty, Art. 177)

5. Preliminary questions — Jurisdiction of the Court of Justice — Conditions for exercise — Nature and objective of proceedings before national courts — No effect
(EEC Treaty, Art. 177)

1. According to the intended role of Article 177 of the EEC Treaty it is for the national court — by reason of the fact that it is seized of the substance of the dispute and that it must bear the responsibility for the decision to be taken — to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment. In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it maintains within the framework of Article 177 with the Court of Justice are governed exclusively by the provisions of Community law.

2. The duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.

Furthermore, 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 in order to check, as all courts must, whether it has jurisdiction.

3. In the absence of provisions of Community law, the possibility of taking proceedings before a national court against a Member State other than that in which that court is situated, whose legislation is the subject of a disagreement as to whether it is compatible with Community law, depends on the procedural law of the State in which the court is situated and on the principles of international law.

4. In the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the State whose legislation is called in question is a party, but in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 of the EEC Treaty is not employed for purposes which were not intended by the Treaty.

5. The conditions in which the Court of Justice performs its duties under Article 177 of the EEC Treaty are independent of the nature and objective of proceedings brought before the national courts. Article 177 refers to the "judgment" to be given by the national court without laying down special rules as to whether or not such judgments are of a declaratory nature.

In Case 244/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura (District Court), Bra, for a preliminary ruling in the action pending before that court between

PASQUALE FOGLIA, Santa Vittoria d'Alba,

and

MARIELLA NOVELLO, Magliano Alfieri,

on the interpretation of Articles 177 and 95 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans and U. Everling, Judges,

Advocate-General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

By an order of 6 June 1979 the Pretura di Bra stayed the proceedings between Mr Foglia and Mrs Novello in which the French tax arrangements applying to liqueur wines were called in question and referred to the Court of Justice for a preliminary ruling questions on the interpretation of Articles 92 and 95 of the EEC Treaty.

In its judgment of 11 March 1980 (*Foglia*, Case 104/79, [1980] ECR 745) the Court of Justice replied to the Pretore di Bra that it had no jurisdiction to give a ruling on the questions submitted by the national court.

In its judgment the Court found that the parties to the main action were concerned "to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point", and concluded that:

"The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions

which are contrary to the Treaty."

Following that judgment the defendant in the main action contended before the national court that in that judgment the Court of Justice had considered that it was in a position to appraise the facts of the specific case submitted to the Pretore di Bra for the purpose of defining its own jurisdiction under Article 177 of the Treaty establishing the European Economic Community with a view to the subsequent exercise of its own powers of interpretation.

The defendant concluded that the Court of Justice had directly arrogated to itself the discretionary powers of the Italian court in relation to the appraisal of the actual substance of the action — powers which were conferred upon the latter by the rules of the judicial system in force. As a principal conclusion the defendant accordingly put forward as its main submission a formal objection that the Law of 14 October 1957 on the ratification and implementation of the Treaty establishing the European Economic Community and the Law of 13 March 1958 ratifying and implementing the Protocol on the Statute of the Court of Justice of the EEC were unconstitutional, arguing that on the above-mentioned interpretation and application by the Court of Justice of Article 177 of that Treaty those laws constitute infringements of the provisions of Articles 11, 24, 101 and 108 of the Italian Constitution.

By an order of 18 October which was registered at the Court on 5 November 1980 the Pretore di Bra stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. What interpretation must be placed upon Article 177 of the EEC Treaty with regard to the power of appraisal of the Court of Justice in relation to the wording of requests for interpretative rulings submitted to it and in particular in relation to their function in the context of the main action? More particularly, what are the respective powers of the Court of Justice and of the courts which refer questions for a preliminary ruling, having regard above all to the powers possessed by the latter under their various national legal systems, in relation to the evaluation of all the matters of fact and of law relevant to the disputes as to the substance and of the questions raised therein, above all when the claim in the main action is for a declaratory judgment?

2. If the Court of Justice in connection with a reference for a preliminary ruling declares for any reason whatever that it does not have jurisdiction to give a ruling on the questions submitted to it, may the court referring the questions, which is bound under its own national legal system to administer justice to the parties, also undertake the interpretation of Community law, and if so within what limits and according to what criteria, or must it instead give a ruling exclusively in terms of national law?

3. Within the framework of the criteria for interpretation of Article 177 of the EEC Treaty is there within the legal order of the Community a general principle which requires or permits the national courts before which proceedings are instituted wherein questions of interpretation of Community law arise also involving national provisions, which may pertain to legal systems other than that of the court in question, to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice?

4. At all events, wherever a question of interpretation is raised before or by the national courts in proceedings between private persons which directly concerns the individual rights of nationals or traders of one of the Member States, do such individual rights under substantive Community law obtain a degree of protection which is different from and at all events less than that which the same individual rights might obtain if the administrations of the Member States whose laws form the subject-matter of the requests for interpretation in relation to their compatibility with the EEC Treaty were represented and entered an appearance before either the national court or the Court of Justice?

5. Must Article 95 of the EEC Treaty be interpreted as meaning that the prohibition on the imposition of

internal taxation, differentiated according to the origin and provenance of a product, encompasses situations such as that of the French provisions on the taxation of liqueur wines which are described in detail in Case 104/79?".

In the statement of reasons on which the order making the reference is based the Pretore di Bra explains that, with regard to circumstances of fact in the case:

"It must be emphasized that this action comprises a procedure which furthermore is not uncommon in the Italian legal system, in which the defendant, in contesting the claim of a plaintiff for a ruling against him, proceeds not only to request the dismissal of the plaintiff's claim but also submits a claim, which is to a certain degree independent, for a declaratory ruling in relation to the particular legal situation in that case and in general.

It is superfluous to point out that in this case that course was adopted as early as the initial hearing on entry of appearance, with the evident purpose of emphasizing what was, or was intended to be, the procedure to be adopted by the defendant for the purposes, *inter alia*, of the decision of the court on costs. This is the legal point of view which must be adopted in this case in order properly to approach and resolve both the dispute and the points of fact and of law which arise in relation to that dispute, according to the claims or arguments of the parties. In other words, the very fact that the defendant counters the claim submitted by the plaintiff for judgment against her by a direct request for a declaratory ruling dictates the specific classification of the type of dispute or proceedings and the equally specific classification of the questions of law which arise independently on the occasion of the proceedings, as well as the specific determination of the type of ruling which must be given by the court seized of the main action.

Ultimately, the present case has been consigned to a specific category through the action of the defendant from the first stages of the procedure in which there emerged clearly the fundamental importance not so much of the proceedings or of the dispute as of the questions of fact and of law which, if the arguments of the defendant had been upheld, would have been resolved in particular in the declaratory ruling."

The Pretore di Bra then proceeds to consider the judgment of the Court of Justice of 11 March 1980 and finds that it contains three assertions:

— The implied assumption that Article 177 of the Treaty confers upon the Court of Justice jurisdiction to assess the substance of the case and supervisory powers over the actions of the national court.

— The statement that the case in which it was decided to make a reference is artificial.

— Finally a statement indicating an intention to ensure that in the course of proceedings for an interpretation under Article 177 questions of interpretation may not be submitted entailing a decision, positive or negative, on provisions, actions or practices of a Member State other than those of the court making the reference.

After examining the judgment of the Court of Justice of 11 March 1980 and the arguments advanced by the defendant in the main action in support of his objection of unconstitutionality, the Pretore di Bra concludes that:

"There are good grounds for considering, on the basis of the meaning and scope of the judgment of the Court of Justice, that the interpretation and application of Article 177 which was effected in this case entails the exercise of powers relating to the substance of the case by the court charged with interpretation and of an implied supervision of the exercise of the discretionary powers which the court making the reference enjoys independently under its own national legal system and which are conferred upon it under the Constitution."

and that:

"The judgment of the Court of Justice entails the creation, albeit indirectly, if not of a clear obstacle at any rate of serious difficulties in enforcing the defendant's procedural claim for a declaratory judgment; these difficulties, which limit the rights of the defence, also infringe rights guaranteed under the Constitution."

Nevertheless, before referring the matter to the Italian Constitutional Court, the Pretore di Bra considered that, in order to obtain "an accurate and clear assessment of the scope and meaning of the judgment of the Court of Justice of 11 March 1980", it was preferable to refer to the Court the questions set out above.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were lodged by Mr Foglia, represented by Emilio Cappelli and Paolo De Caterini, of the Rome Bar, by Mrs Novello, represented by Giovanni Motzo, of the Rome Bar, and by Maurilio Fratino, of the Turin Bar, by the Government of the French Republic, represented by Thierry Le Roy, acting as Agent, by the Danish Government, represented by Mr Lachmann, acting as Agent, and by the Commission of the European Communities represented by its Legal Adviser Antonio Abate, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. Observations of the Commission

According to the Commission this second order for reference by the Pretore di Bra sets in relief a series of matters of procedural law specific to the Italian legal system which, if they had been brought to the attention of the Court in the course of Case 104/79 would certainly have led to the delivery of a different judgment.

According to the Commission there now appears to be no doubt that in the course of the procedure before the national court it has emerged that there is a conflict of interest between the parties in the main action the scope of which is entirely new.

The Commission accordingly considers that the conditions which the Court assumed to exist in ruling that it had no jurisdiction in the first Foglia case were not fulfilled.

The Commission recalls in any case the risk, which according to it, would exist if national courts, which are bound to settle even questions of principle, were allowed themselves to interpret Community law. Such a situation would bring about an irremedial alteration in the unity of case-law and thus of Community law, the uniformity of its interpretation, its applicability and primacy and would furthermore weaken the individual rights of persons concerned.

In addition the Commission emphasizes that any ruling by the Court of Justice that it does not have jurisdiction would inevitably cast doubts on the judgments hitherto delivered in similar proceedings and would undermine the authority of that case-law.

With regard to the interpretation of Article 95 the Commission continues to hold the views which it put forward in Case 104/79 and in addition refers to the judgments of 27 February 1980 concerning the tax arrangements applying to spirits.

2. Observations of Mr Foglia, the plaintiff in the main action

The plaintiff in the main action begins by recalling the previous history of the case in order to show the existence of a genuine dispute between the parties to the main action. This dispute relates to the payment of a sum of LIT 148 300 which represents the sum paid to the French customs authorities by Mr Foglia's

carriers, payment of which he requested from Mrs Novello.

In the course of that action Foglia never contended before the Pretura di Bra that the French charge was unlawful. It was only in the proceedings for a preliminary ruling that Foglia maintained that the consequences of an interpretation of Article 95 which would mean that the French charge was unlawful were matters of relative indifference to him since even if he were unsuccessful in the main action he would obtain a refund from his carrier of what he had paid.

On the other hand it is incorrect to conclude, as did the Advocate General in Case 104/79, that this attitude in the course of the reference for a preliminary ruling corresponds to a “neutral” attitude in the procedure in the main action.

In law Mr Foglia’s attitude in the procedure for the preliminary ruling was furthermore based on the conviction that the procedure before the Court of Justice was one relating exclusively to questions of law, without parties, in the course of which observations are put forward which must be as far removed as possible from the specific facts.

With regard to the fact that the carrier was not called as a party, the plaintiff in the main action states that the decision of the Pretore to consider the question of interpretation as a preliminary to any possible application in the case was without a certain logic since, if the answer to the preliminary question of interpretation had been that the tax was lawful, such action would have proved pointless.

The plaintiff then considers the first question submitted by the Pretore di Bra concerning the powers of the Court of Justice to appraise questions which are submitted to it.

According to Foglia it is impossible to arrive at a firm decision purely on the basis of the wording of Article 177. Nevertheless there can be no doubt that the system is inspired by the principle that the two procedures are as far as possible independent of one another. It is for the Court of Justice to interpret Community law and for the national court to distinguish the specific individual issues to be resolved on the basis of that law and to assess in each case whether it is appropriate (or essential if it is sitting as a court of last instance) for it to obtain an interpretation by the Court of Justice.

In support of the discretion of the national court in appraising the relevance of any preliminary questions Foglia also relies upon the practice of the national courts, in particular in France and Italy, the unanimity of academic writers and of the previous decisions of the Court of Justice, the latest being its judgment of 14 February 1980 (Case 53/79 *ONPTS* [1980] ECR 273).

According to the plaintiff in the main action the interpretation hitherto placed upon Article 177 by the Court of Justice has made it possible:

1. To make the national courts the principal agents of the application of Community law;

2. To involve private individuals, who have been enabled by Article 177 to assert their own interests directly at Community level.

Against these advantages the plaintiff in the main action sets out the risks entailed by the new course taken by the Court namely:

1. The risk of compromising the atmosphere of mutual confidence and cooperation which has been established between the Court of Justice and the national courts.

2. The fact that the course adopted by the Court will lead it, under pressure from the intervening Member States, to reconsider in increasingly greater detail the appraisals by the national courts of the relevance of the question, that is, to appraise the genuineness of the original dispute. According to the plaintiff in the main action, in addition to the objective difficulties and risks of unfortunate misunderstandings which such a

course would entail, it would be contrary to the principle of the specialization of courts and fail to take account of the inconvenience and technical difficulties which any such appraisals by the Court of Justice would cause for the court making the reference and which will be difficult to integrate with the actual national procedure. According to the plaintiff to the main action reconsideration of the relevance of the question at Community level merely allows the file to be returned to the national court so that it may bring out such relevance more clearly. Owing to the general principle of the definitive nature of nullity in procedural law it is in fact impossible simply to base the invalidity of the preliminary question on its irrelevance.

3. The fact that it requires the Court of Justice to distinguish between fictitious and genuine actions, a problem of Byzantine complexity, the occasion of futile theoretical speculation and a source of legal uncertainty, all the more so as most of the cases which have hitherto been submitted to the Court have been not so much fictitious disputes as test cases.

The plaintiff in the main action also rejects the arguments advanced by the Advocate General in support of that new course.

On the one hand the Advocate General, in declaring that the parties to the action before the national court are not at odds as to the interpretation of the provision in question and deducing therefrom that there is no question for interpretation, has not only confused the position of the parties in the main proceedings with their position in the context of the procedure for a preliminary ruling but also loses sight of the fact that the essential matter in the procedure for a preliminary ruling under Article 177 is not the position or the conduct of the parties but the view taken by the national court.

On the other hand with regard to the risk which the Advocate General perceives of jeopardizing the procedural guarantees which must be enjoyed by the Member States whose legislation is called in question, the plaintiff in the main action considers that it is primarily private persons who have legally protected interests against the national authorities and not the reverse. Furthermore he does not find that there was this same concern to conserve procedural guarantees in a case which is identical to the present proceedings and in which the Court of Justice delivered a ruling on a preliminary question submitted by an Italian court concerning French legislation (judgment of 4 February 1965, Case 20/64 *Albatros* [1975] ECR 29).

Finally the case-law of the Court cited by the Advocate General in his opinion in Case 104/79 is inapposite as it concerns the applicability of Article 177 within the framework of a special procedure for an injunction which is peculiar to Italian law and in which the fact that there were no adversary proceedings has given rise to the arguments concerning the admissibility of a reference for a preliminary ruling in such circumstances.

The plaintiff in the main action then examines the second question and considers that, since the national court must at all events settle the case, it must itself interpret and apply Community law if the Court of Justice declares that it has no jurisdiction. The argument in favour of such a conclusion is further strengthened by the fact that the Pretore is not sitting as a court of last instance.

With regard to calling as a party the State whose legislation is at issue, this is rendered difficult by the obstacles which arise in general in calling foreign States as parties and probably runs contrary to the principle of the sovereignty of States.

Finally, having replied to the fourth question of the Pretore di Bra to the effect that individuals' personal rights deserve the same degree of protection whether or not the authorities who are responsible for the provisions at issue are parties to the proceedings, the plaintiff in the main action refers with regard to the interpretation of Article 95 of the EEC Treaty to his observations in Case 104/79.

3. Observations of Mrs Novello, the defendant in the main action

According to Mrs Novello the refusal of the Court of Justice to give a ruling on the question of interpretation

which was referred to it by the Pretore di Bra has prevented the exercise of its jurisdiction by the Italian court and has at the same time prevented an individual's personal rights under Community law receiving in future definitive protection by activating the judicial procedures of Italian law. It has also affected relationships which came into being within the framework of national law for which it was envisaged that the Court of Justice might be made responsible in part for their protection.

According to Mrs Novello the reasons advanced by the Advocate General and the Court of Justice in Case 104/79, maintaining that the dispute is of an artificial nature, conceal the wish of the Court, whenever proceedings are instituted by the Commission under Article 169 against Member States for failure to fulfil their obligations and whenever preliminary questions raised by the courts of other Member States are also involved, to preclude an interpretation having a negative effect for the Member State arraigned.

In order to arrive at that conclusion, the Court of Justice based its statement that it lacked jurisdiction on the claim to appraise the substance of the action pending before the national court and on the claim to assess the real interests of the parties to the action before that court. It has thus trespassed upon the discretionary power of the Italian court (based on the Italian Constitution) to appraise the relevance to its decision in a case before it of any questions of interpretation addressed to the Court of Justice and has asserted the right of the Court of Justice, a right of which no trace exists in the Treaties, to subject the point of relevance to an additional and subsequent review.

In the context of that review the Court of Justice saw fit to decide that a case pending before the national court must be considered artificial whenever the parties choose to propose to the latter court (rather than to the Court of Justice) a similar or even identical solution for the interpretation of the provisions of the Treaty. Mrs Novello considers that, even if the Court of Justice were acknowledged to possess power to review the relevance of the question of interpretation, the judicial concept of the questions of interpretation is in no way based on concurrence, rather on the divergence, of opinion of the parties and further, and much more important, the judicial concept of dispute is quite different from that of the question of interpretation.

According to the defendant in the main action the attitude of the Court of Justice leads European consumers to wonder whether, in exercising their own freedom to contract, they may rely on the protection which is guaranteed them by the rules of the Treaty and in any case by the legislative provisions of the Community institutions which are "directly applicable" within the legal systems of the Member States and so whether they may continue to feel that the rights of individuals under substantive Community law which they enforce before the courts, thus requiring cooperation between the Court of Justice and the national courts, can be given *real protection* on the basis of the interpretative rulings of the Court of Justice.

The defendant in the main action hopes that the judgment of the Court of Justice will establish that such protection does not vary in degree and intensity depending on whether, in proceedings before the national courts and in proceedings before the Court of Justice, the authorities of the Member States the provisions of whose law forms the subject-matter of requests for an interpretation as to its compatibility with the EEC Treaty are present and have entered appearance from the outset.

Finally, with regard to Article 95, the defendant in the main action also refers to what she stated in Case 104/79.

4. Observations of the French Government

The French Government considers that the problem of the jurisdiction of the Court under Article 177 has already been considered very clearly and completely by the Court in its judgment of 11 March 1980. The relative force of *res judicata* precludes the Court from reconsidering the question where no new matter is available justifying such re-examination and *a fortiori* from settling the questions of substance which it refused to settle by reason of its lack of jurisdiction. The judgment of the Court of Justice furthermore does not constitute a new departure in case-law. The national court remains the only one competent to appraise the choice of its questions and their relevance but there are exceptions to that principle. Thus it is that, as the

system set up by Article 177 of the Treaty is meaningful only where there is a dispute, it is for the Court of Justice to declare that it has no jurisdiction if there is obviously no such dispute. Because there is obviously no dispute such a step does not imply any real examination of the facts and accordingly it does not in any way trespass upon the jurisdiction of the national court.

With regard to the possibility of summoning a foreign State before a national court the French Government emphasizes first of all that proceedings such as those where two private individuals call in question a French law before an Italian court and request the latter on that ground to refer the action to the Court of Justice is, according to it, liable to infringe the rights of defence of the French State. That is on the one hand because the parties have not employed the procedures available under French law and on the other because the French Government has not been represented before the Italian court and has been unable to present argument as an actual party in the proceedings before the Court of Justice.

However, the French Government cannot admit that it is possible to summon a foreign State before a national court. In this connection it relies upon the principle of public international law that States enjoy immunity from legal proceedings and accordingly may not be compelled to appear before a foreign court. The question submitted by the court making the reference is moreover a question of interpretation of that rule of international law and not of a rule of a Community law. The Court accordingly has no jurisdiction to reply to it.

5. Observations of the Danish Government

The Danish Government, which restricts its observations to the first question submitted by the court, considers that, whilst on the one hand it is for the national courts alone to appraise in complete independence the need to resort to the procedure under Article 177 of the EEC Treaty, the Court of Justice has on the other hand exclusive jurisdiction in defining the questions to which it is empowered to reply.

According to the Danish Government, since the guarantees of legal certainty which Community law offers in relation to the legislation of the Member States are considerably diminished where the proceedings in question relate to preliminary questions on the legislation of a Member State other than that in which the court making the reference is situated, such situations must be avoided except where, for example, under rules of private international law a court is led to apply the law of another Member State and it is necessary in that connection to obtain an interpretation of provisions of Community law. It thus appears entirely appropriate that the Court of Justice should refrain from replying, without thereby coming to a decision on the facts of the case, where, as in this case, the file shows that the case could or should be brought before the courts of the State whose legislation is at issue.

III — Oral procedure

At the sitting on 2 June 1981 oral argument was presented by the following: E. Cappelli and P. De Caterini, of the Rome Bar, for Mr Foglia; G. Motzo, of the Rome Bar, for Mrs Novello, the defendant in the main action; A. Abate, Legal Adviser to the Commission, acting as Agent, for the Commission of the European Communities and N. Museux and A. Carnelutti, acting as Agents, for the French Government.

The Advocate General delivered his opinion at the sitting on 9 July 1981.

Decision

1 By an order of 18 October 1980 which was received at the Court on 5 November 1980 the Pretore (District Magistrate), Bra, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions as to the interpretation of Articles 177 and 95 of the Treaty.

2 That order was made within the framework of a case pending before the Pretore which has already given rise to a first series of preliminary questions as to the interpretation of Articles 92 and 95 of the Treaty and

which formed the subject-matter of a judgment of the Court dated 11 March 1980 (Case 104/79 *Foglia* v *Novello* (1980) ECR 745).

3 It should be recalled that the main action concerns the costs incurred by the plaintiff, Mr Foglia, a wine dealer having his place of business at Santa Vittoria d'Alba, in the Province of Cuneo, Piedmont, Italy, in the dispatch, on the instructions of the defendant, Mrs Novello, to a consignee in Menton, France, of some cases of Italian liqueur wine bought by the defendant.

4 The file on the case shows that the contract of sale between Foglia and Novello stipulated that Novello should not be liable for any duties which were claimed by the Italian or French authorities contrary to the provisions on the free movement of goods between the two countries or which were at least not due. Foglia adopted a similar clause in his contract with the Danzas undertaking to which he entrusted the transport of the cases of liqueur wine to Menton; that clause provided that Foglia should not be liable for such unlawful charges or charges which were not due.

5 The first order making the reference which led to the above-mentioned judgment of 11 March 1980, found that the subject-matter of the dispute was restricted exclusively to the sum paid as a consumption tax when the liqueur wines were imported into French territory. The file established that that tax was paid by Danzas to the French authorities, without protest or complaint; that the bill for transport which Danzas submitted to Foglia included the amount of that tax and was paid in full by the latter although contrary to the clause expressly stipulated with regard to "unlawful charges or charges which were not due" and that Mrs Novello refused to reimburse the latter amount to Foglia in reliance on the identical stipulation in her contract.

6 The Pretore took the view that the defences advanced by Novello entailed calling in question the validity of French legislation concerning the consumption tax on liqueur wines in relation to the EEC Treaty, and submitted to the Court a series of questions on the interpretation of Article 95 and, in the alternative, of Article 92.

7 In its above-mentioned judgment of 11 March 1980 the Court ruled that it had no jurisdiction to give a ruling on the questions submitted by the national court. In its judgment it stated that:

"The duty of the Court of Justice under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the Court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty."

8 The order making the reference shows that the judgment of the Court of Justice was challenged by the defendant in the main action who considered that in making such an appraisal the Court had intervened in the discretion reserved to the Italian court. She considered that such an application of Article 177 by the Court gave rise at national level to a question of a constitutional nature. In the alternative she submitted a question concerning the interpretation of Article 177 of the EEC Treaty and further requested that the French Republic should be joined in the proceedings.

9 When these claims were submitted to him the Pretore considered that it was necessary to refer the matter again to the Court of Justice and to submit to it certain questions on the interpretation of Article 177 of the Treaty in order to obtain a clearer and more precise appraisal of the scope and meaning of the judgment of 11 March 1980.

10 Since the Pretore considered that a misunderstanding might have arisen from the wording of his first order he laid particular emphasis on a factor which, according to him, was not made clear in the order. The defendant, from the first hearing at which she appeared, in fact refused to restrict her case to the mere rejection of the plaintiff's application. Through a procedure which is by no means uncommon in the Italian legal system she submitted "a claim, which is to a certain degree independent, for a declaratory judgment in

relation to the particular legal situation in that case and in general".

11 For these reasons the Pretore, Bra, decided to refer the matter again to the Court and submitted the following questions:

"1. What interpretation must be placed upon Article 177 of the EEC Treaty with regard to the power of appraisal of the Court of Justice in relation to the wording of requests for interpretative rulings submitted to it and in particular in relation to their function in the context of the main action? More particularly, what are the respective powers of the Court of Justice and of the courts which refer questions for a preliminary ruling, having regard above all to the powers possessed by the latter under their various national legal systems, in relation to the evaluation of all the matters of fact and of law relevant to the disputes as to the substance and of the questions raised therein, above all when the claim in the main action is for a declaratory judgment?

2. If the Court of Justice in connection with a reference for a preliminary ruling declares for any reason whatever that it does not have jurisdiction to give a ruling on the questions submitted to it, may the court referring the questions, which is bound under its own national legal system to administer justice to the parties, also undertake the interpretation of Community law, and if so within what limits and according to what criteria, or must it instead give a ruling exclusively in terms of national law?

3. Within the framework of the criteria for interpretation of Article 177 of the EEC Treaty is there within the legal order of the Community a general principle which requires or permits the national courts before which proceedings are instituted wherein questions of interpretation of Community law arise also involving national provisions, which may pertain to legal systems other than that of the court in question, to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice?

4. At all events, wherever a question of interpretation is raised before or by the national courts in proceedings between private persons which directly concerns the individual rights of nationals or traders of one of the Member States, do such individual rights under substantive Community law obtain a degree of protection which is different from and at all events less than that which the same individual rights might obtain if the administrations of the Member States whose laws form the subject-matter of the requests for interpretation in relation to their compatibility which the EEC Treaty were represented and entered an appearance before either the national court or the Court of Justice?

5. Must Article 95 of the EEC Treaty be interpreted as meaning that the prohibition of the imposition of internal taxation, differentiated according to the origin and provenance of a product, encompasses situations such as that of the French provisions on the taxation of liqueur wines which are described in detail in Case 104/79?"

The first, third and fourth questions

12 In his first question the Pretore requested clarification of the limits of the power of appraisal reserved by the Treaty to the national court on the one hand and the Court of Justice on the other with regard to the wording of references for a preliminary ruling and of the appraisal of the circumstances of fact and of law in the main action, in particular where the national court is requested to give a declaratory judgment.

13 The third and fourth questions concern more particularly the case in which questions of interpretation are submitted in order to permit the court to resolve disputes concerning the compatibility with Community law of national legislation enacted either by the State in which the court is situated or, as in this case, by another Member State. In that connection the question is raised

— Whether, where the legislation of one Member State is called in question before the courts of another Member State, there is within the Community legal order a general principle which requires or permits the court before which such a dispute is brought to order the joinder in the proceedings of the authorities of the Member State concerned before submitting a reference for a preliminary ruling to the Court of Justice;

— Whether the degree of protection for individuals in proceedings under Article 177 differs depending on whether that issue is raised within the framework of proceedings between private persons or in proceedings to which the administration of the State whose legislation is called in question is a party.

14 With regard to the first question it should be recalled, as the Court has had occasion to emphasize in very varied contexts, that Article 177 is based on cooperation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States.

15 With this in view it is for the national court — by reason of the fact that it is seized of the substance of the dispute and that it must bear the responsibility for the decision to be taken — to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment.

16 In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it maintains within the framework of Article 177 with the Court of Justice are governed exclusively by the provisions of Community law.

17 In order that the Court of Justice may perform its task in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment.

18 It must in fact be emphasized that the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that is has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.

19 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 in 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 177, 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 177.

20 Whilst the spirit of cooperation which must govern the performance of the duties assigned by Article 177 to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court’s proper responsibilities, it implies at the same time that the national court, in the use which it makes of the facilities provided by Article 177, should have regard to the proper function of the Court of Justice in this field.

21 The reply to the first question must accordingly be that whilst, according to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, is a matter for the national court it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where

necessary, the conditions in which the case has been referred to it by the national court.

22 As the Pretore has properly indicated in his third and fourth questions, special problems may arise concerning the application of Article 177 when questions of interpretation are submitted by the national court in order to enable it to establish whether the legislative provisions of a Member State are in accordance with Community law. In this connection the Pretore has indicated two distinct categories of problems.

23 The third question concerns circumstances in which, in proceedings between individuals before a court of a Member State, a dispute arises as to the compatibility with Community law of the legislation of a Member State other than that of the State in which that court is situated. The Pretore has submitted in this connection the question whether in such a case the Member State whose legislation is at issue may be joined in the proceedings instituted before the court in question.

24 The reply on this point must be that in the absence of provisions of Community law in the matter, the possibility of taking proceedings before a national court against a Member State other than that in which that court is situated depends both on the laws of the latter and on the principles of international law.

25 In the fourth question the Pretore has asked whether the protection provided for individuals by the procedure under Article 177 is different, or indeed diminished, when such a question is raised in proceedings between individuals as opposed to proceedings between an individual and the administration.

26 In answer to the question thus raised it must be emphasized that all individuals whose rights are infringed by measures adopted by a Member State which are contrary to Community law must have the opportunity to seek the protection of a court possessed of jurisdiction and that such a court, for its part, must be free to obtain information as to the scope of the relevant provisions of Community law by means of a procedure under Article 177. In principle the degree of protection afforded by the courts therefore must not differ according to whether such a question is raised in proceedings between individuals or in an action to which the State whose legislation is challenged is a party in one form or another.

27 Nevertheless, as the Court has stated in its reply set out above to the first question it is for the Court of Justice to appraise the conditions in which a case is referred to it by a national court in order to confirm that it has jurisdiction. In that connection the question whether the proceedings are between individuals or are directed against the State whose legislation is called in question is not in all circumstances irrelevant.

28 On the one hand it must be pointed out that the court before which, in the course of proceedings between individuals, an issue concerning the compatibility with Community law of legislation of another Member State is brought is not necessarily in a position to provide for such individuals effective protection in relation to such legislation.

29 On the other hand, regard being had to the independence generally ensured for the parties by the legal systems of the Member States in the field of contract, the possibility arises that the conduct of the parties may be such as to make it impossible for the State concerned to arrange for an appropriate defence of its interests by causing the question of the invalidity of its legislation to be decided by a court of another Member State. Accordingly, in such procedural situations it is impossible to exclude the risk that the procedure under Article 177 may be diverted by the parties from the purposes for which it was laid down by the Treaty.

30 The foregoing considerations as a whole show that the Court of Justice for its part must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law.

31 The reply to the fourth question must accordingly be that in the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law the degree of legal protection may not differ according to

whether such questions are raised in proceedings between individuals or in an action to which the State whose legislation is called in question is a party, but that in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 is not employed for purposes which were not intended by the Treaty.

The fifth question

32 In the fifth question the Pretore, Bra, repeats in abbreviated form the first question submitted in his first order concerning the interpretation of Article 95 of the Treaty. In its above-mentioned judgment of 11 March 1980 the Court of Justice found that the parties took the same view as to the lawfulness of the French legislation at issue and in reality sought to obtain by the device of a special clause inserted in their contract a ruling by an Italian court that the French legislation was unlawful although French law provided appropriate remedies. The Court of Justice concluded that to reply to the questions submitted in such circumstances would be to exceed the duty entrusted to it by Article 177 of the Treaty, which is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. It accordingly declared that it had no jurisdiction to give a ruling on the questions raised.

33 In his second order making a reference to the Court the Pretore has specially emphasized that the defendant had requested him to deliver a declaratory judgment. In this connection is must be pointed out that the conditions in which the Court of Justice performs its duties in this field are independent of the nature and objective of proceedings brought before the national courts. Article 177 refers to the “judgment” to be given by the national court without laying down special rules in terms of the nature of such judgments.

34 The circumstance referred to by the national court in its second order for reference does not appear to constitute a new fact which would justify the Court of Justice in making a fresh appraisal of its jurisdiction. It is therefore for the Pretore, within the framework of the collaboration between a national court and the Court of Justice to ascertain in the light of the foregoing considerations whether there is any need to obtain an answer from the Court of Justice to the fifth question and, if so, to indicate to the Court any new factor which might justify it in taking a different view of its jurisdiction.

The second question

35 Having regard to the foregoing it is unnecessary to reply to the second question.

Costs

36 The costs incurred by the French Government, the Danish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Pretore, Bra, by order of 18 October 1980, hereby rules:

1. According to the intended role of Article 177, an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, is a matter for the national court; it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court.

2. In the absence of provisions of Community law, the possibility of taking proceedings before a national court against a Member State other than that in which that court is situated depends both on the procedural law of the latter and on the principles of international law.

3. In the case of questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the State whose legislation is called in question is a party, but in the first case the Court of Justice must take special care to ensure that the procedure under Article 177 is not employed for purposes which were not intended by the Treaty.

4. The circumstance referred to by the Pretore, Bra, in his second order for reference does not appear to constitute a new fact which would justify the Court of Justice in making a fresh appraisal of its jurisdiction and it is therefore for the Pretore, within the framework of the collaboration between a national court and the Court of Justice, to ascertain in the light of the foregoing considerations whether there is any need to obtain an answer from the Court of Justice to the fifth question and, if so, to indicate to the Court any new factor which might justify it in taking a different view of its jurisdiction.

Mertens de Wilmars
Bosco
Touffait
Due
Pescatore
Mackenzie Stuart
O'Keeffe
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Everling

Delivered in open court in Luxembourg on 16 December 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

1 — Language of the Case: Italian