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"A View from the Tax Court – or A First-tier Tax Tribunal Judge's perspective on References to the ECJ"

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I have been a First-tier Tax Tribunal Judge since the Tribunals reorganisation in April of this year, and before that a Chairman of VAT and Duties Tribunals and Deputy Special Commissioner, dealing with direct tax appeals, since 2002. My appointments are all part-time, I carry on in parallel a tax practice at the English bar.

I have made the assumption that this audience would wish to hear from me on my practical experiences in a judicial capacity with the interaction with the Court of Justice which the preliminary reference system represents.

Our Tribunal, as its name implies, is the lowest rung in the appellate ladder for tax cases in the UK, and so my experience is of what happens at the stage where a Community law point is first identified in a taxpayer's appeal – where the individual citizen or corporate appellant first addresses Community law issues. Our Tribunal is, in the tax field, the "coal face" where Community law needs to be applied to real disputes with real litigants. Under our system, our Tribunal has the exclusive fact-finding jurisdiction and our findings of fact can generally only be interfered with on appeal if they are held effectively to have been perverse.

Drawing from my experience, I propose to divide this paper into two main headings: first, the practical issues that arise when the making of a reference to the Court of Justice is considered in our Tribunal, and secondly, the practical issues that have arisen when a reference has come back and the Judgment needs to be applied in our Tribunal.

Considering making a reference

Under this heading, I am going to talk about the situation where a recent decision of the Court of Justice apparently covers the exact issue arising in an appeal, but one party submits that nevertheless another reference should be made. This is not uncommon in practice, as the *Vodafone 2* case which I will mention illustrates, but I now wish to comment on the appeal of *Repertoire Culinaire v HMR*C[1].

Repertoire Culinaire was an appeal about whether or not cooking wine is to be classified as ethyl alcohol for the purposes of the charge to excise duty under the Excise Directive[2], and, if it is, whether it is nonetheless exempt from duty by application of article 27 of the Excise Directive. 'Cooking wine' is red or white wine with the addition of salt and pepper to make it undrinkable as a beverage.

'Ethyl alcohol' is defined for the purposes of the Excise Directive in article 20 thereof. The definition is complex technically and the details are irrelevant for present purposes.

Article 27 of the Excise Directive requires Member states to exempt products covered by the Directive specifically in paragraph 1(f) where they are used directly or as

[1] Tribunals Service (Tax) website reference TC00043, 24 April 2009
[2] EC Directive 92/83/EEC

constituent of semi-finished products for the production of foodstuffs, provided that the alcoholic content does not exceed 8,5 litres of pure alcohol per 100 kg of the product for chocolates, and 5 litres of pure alcohol per 100 kg of the product for other products.

The first issue, whether or not cooking wine is to be classified as ethyl alcohol for the purposes of the Excise Directive, had been considered and ruled upon by the Court of Justice in the case of *Skatteverket v Gourmet Classic Limited*[3], in a judgment dated 12 June 2008. The Court of Justice had ruled in that case that cooking wine, if it has an alcoholic strength exceeding 1.2% by volume, is to be classified as ethyl alcohol for the purposes of the Excise Directive[4].

However the *Gourmet Classic* case before the Court of Justice was unusual in several respects. Gourmet Classic, a British undertaking, proposed to market cooking wine on the Swedish market. Before doing so, Gourmet Classic asked the Swedish Revenue Law Commission (*Skatterättsnämnden*) for an opinion confirming that its cooking wine was not subject to excise duty because, in its view, cooking wine was covered by the exemption in article 27.1(f) of the Excise Directive.

The cooking wine in *Gourmet Classic* had a strength of 4.5 litres of pure alcohol per 100 kg of the cooking wine – on one reading of article 27.1(f) therefore within the limit allowed for exemption.

The Swedish Revenue Law Commission performs an essentially administrative function in giving a preliminary opinion on matters which concern, in particular, taxpayers in their relationships with the public authorities with respect to their tax liabilities. In the proceedings before the Swedish Revenue Law Commission, there was agreement between Gourmet Classic and the Swedish tax administration that the cooking wine came within the definition of ethyl alcohol and that it benefited from the exemption laid down in article 27.1(f) of the Excise Directive.

Thus the first issue which Repertoire Culinaire raised in the appeal before us was one on which there had been common ground, in a sense adverse to the taxpayer, in the domestic proceedings in *Gourmet Classic*.

The Swedish Revenue Law Commission gave its opinion based on the recommendation of the Swedish tax administration, although the President of the Commission issued a dissenting opinion that cooking wine does not fall within the scope of the Swedish law on excise duty on alcohol.

A special feature of the Swedish appellate system is that the Swedish tax administration may bring an appeal before the Swedish court (*Regeringsrätten*) about an opinion adopted by the Swedish Revenue Law Commission, even if the appeal seeks confirmation of the opinion. In *Gourmet Classic* the Swedish tax administration brought an appeal before the Swedish court seeking to have the opinion of the Swedish Revenue Law Commission upheld. Gourmet Classic also contended that the Commission's opinion should be followed. So, again, there was no disputed issue before the Swedish court.

The Swedish court took the view that in order to give a ruling it was necessary to obtain the Court of Justice's answer to the question: "Is the alcohol contained in

[3] (Case C–459/06)
[4] See: Article 20, EC Directive 92/83/EEC

cooking wine to be classified as ethyl alcohol as referred to in article 20 of the Excise Directive?".

When the reference came before the Court of Justice, the opinion of the Advocate General (Bot), which was delivered on 3 April 2008, was entirely concerned with the question of whether the ECJ had jurisdiction to give a ruling on the question referred by the Swedish court. The Advocate General's opinion was that the ECJ lacked such jurisdiction, on the ground, essentially, that what the Swedish court sought was an advisory opinion, and not a preliminary ruling justified by the need to resolve a genuine controversy.

The Court of Justice (Fourth Chamber) dealt with the matter without an oral hearing, having heard the opinion of the Advocate General and having considered written observations submitted on behalf of the Commission and the Belgian and Portuguese Governments.

In its judgment, the Court disagreed with the Advocate General's opinion, which (as stated) was concerned with the jurisdiction issue, and held that it was not being asked to give an advisory opinion on a hypothetical question and accordingly had jurisdiction to reply to the question posed by the Swedish court. (Its ground for this decision was that the procedure before the Swedish court was not simply to obtain confirmation of the opinion of the Swedish Revenue Law Commission, but to provide in the exercise of the court's judicial function a definitive legal judgment which would bind the tax authorities.)

The Court therefore went on to consider and rule on the question referred, whether the alcohol contained in cooking wine is to be classified as ethyl alcohol as referred to in the first indent of article 20 of the Directive.

The Court's ruling was that the alcohol contained in cooking wine is, if it has an alcoholic strength exceeding 1.2% by volume, to be classified as ethyl alcohol as referred to in the first indent of article 20 of the Directive.

This ruling was, however, expressly given without prejudice to the exemption provided for by article 27.1(f) of the Directive[5].

Before us, in *Repertoire Culinaire*, the taxpayer took the point that cooking wine did not come within the definition of 'ethyl alcohol' in the Excise Directive. Counsel submitted that in *Gourmet Classic* the Court had not considered his detailed textual submissions on the definition of 'ethyl alcohol' in article 20 – which was true, it had not. He also commented that the Court's judgment had simply stated the conclusion that cooking wine contains ethyl alcohol without giving any reasons.

Counsel also noted that cooking wine was in free circulation in France, which indicated that the French authorities considered that it was not subject to excise duty. So there was in this case, as in others, the aspect of an apparent inconsistency in the application of Community law in different Member States.

Additionally, in *Gourmet Classic*, as noted above, the Court's judgment had not dealt with the issue arising in our case on the exemption in article 27.1(f) of the Directive. This was also basically a construction issue. Where article 27.1(f) speaks of alcohol used directly or as a constituent of semi-finished products, for the production of foodstuffs, and lays down a limit that for products which are not chocolates, the

[5] See: [39] of the judgment

alcoholic content must not be more than 5 litres of pure alcohol per 100 kg. of product, the *Repertoire Culinaire* appeal raised the question – "what are the products to which this alcohol-content limit must be applied?". The appellant contended that where the cooking wine was an ingredient of a dish such as *boeuf bourguignon*, then that dish was the finished product. The revenue said that the cooking wine itself was the finished product and the alcohol-content limit had to be applied to it.

We decided to make a reference to the Court of Justice raising both issues. The article 27.1(f) issue had not been the subject of an authoritative ruling, but the first issue on the definition of 'ethyl alcohol' had. The revenue (somewhat faintly) opposed the reference on the grounds that we should simply follow *Gourmet Classic*, and one would have expected them to make that submission.

We considered that the way the *Gourmet Classic* reference had proceeded in the Swedish appellate system and at the Court of Justice was in some respects extraordinary. The result was a decision which did not address what seemed to us to be highly respectable arguments advanced by the appellant in *Repertoire Culinaire* to the effect that cooking wine did not come within the definition of 'ethyl alcohol' in the Excise Directive. The procedure in the Court of Justice in *Gourmet Classic* seemed to have been primarily concerned with the special and unusual jurisdiction issue which arose in that case and was not of course relevant to *Repertoire Culinaire*.

We recognised that the Court of Justice's judgment in *Gourmet Classic* was both directly on point and very recent. This of course gave us significant pause for thought before deciding to make a reference. But we were satisfied that we were entitled to make a reference – in the sense that *Gourmet Classic* did not deprive us of the power to do so.

The judgment of the Court of Justice in *SpA International Chemical Corporation v Amministrazione delle Finanze dello Stato*[6] was referred to us as authority for the proposition that, as a matter of Community law, we were not (by reason of any prior judgment of the Court of Justice) deprived of our power to refer and that it was for us to decide whether there was a need to raise once again a question which has already been settled by the Court. That authority shows that there may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of an earlier judgment.

In our view, the points referred to about the *Gourmet Classic* judgment raised sufficient questions as to the grounds, scope and consequences of that judgment to justify, exceptionally, a second reference on the issues raised. We thought that the Court of Justice may wish to revisit the issues raised in the light of fuller submissions to be made in *Repertoire Culinaire.* Our reference was made in, I think, April, and I have no information on the reaction to it in Luxembourg.

Applying a decision of the Court of Justice

Two appeals on which I have sat illustrate the difficulties of a first-tier tribunal in this area. They are *HMRC v Paul West*[7] and *Vodafone 2 v HMRC*[8].

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[6] Case 66/80
[7] On appeal to the High Court (Sir Andrew Park) [2008] EWHC 2277 (Ch) 2 October 2008
[8] [2008] EWHC 1569 (Ch), 4 July 2008; [2009] EWCA Civ 446, 22 May 2009

The *West* case is easier to deal with as an illustration of the problems of applying a decision of the Court of Justice in practice, so I will take it first.

Mr. West, a motor car collector, had imported into the UK from New Zealand a 1955 Ford Zephyr Mark 1 Convertible. UK Customs classified the car as a "motor car" for customs duty purposes under the Combined Nomenclature, but Mr. West contended that it ought to be classified as a "collector's piece of historical interest". Motor cars attract a customs duty at 10% while collector's pieces may be imported free of customs duty.

This issue had been before the Court of Justice in the case of *Erika Daiber v Hauptzollamt Reutlingen*[9] and in that case the Court of Justice had laid down four conditions for an article – it was a motor car in that case – to qualify as a collector's piece. They were:

- That the article must be "relatively rare";
- That the article is "not traded on the ordinary market" and/or that it is "handled by a specialized trade";
- That the article "may fetch a high price";
- That the article is "not normally used for [its] original purpose, although it cannot be ruled out that [its functional capacity may remain intact".

In *West*, Customs accepted that Mr. West's 1955 Ford Zephyr Convertible satisfied 3 of these 4 conditions and that it was only the issue of whether it "may fetch a high price" that remained in dispute.

The facts found relevant to this issue were that Mr. West bought the car from an unconnected vendor in New Zealand for £9,000. It needed some restoration to bring it up to A1 condition and by the time of the tribunal hearing he had already spent 300 hours in restoring it. The model of car was rare, and one in mint condition might command a price of £15,000 to £20,000.

Customs' case was to interpret the Court of justice's requirement that a motor vehicle "may fetch a high price" as a requirement that its value on importation must be at least £20,000 – far more than the value of Mr. West's car on importation.

This figure was arrived at by an interpretation of a test attributed to the Advocate-General (Lenz) in *Daiber*, that a motor car which is a collector's piece is "bought at several times the price of a new car"[10].

Customs' thought process was that £7,000 is the price of a very modest new car; "several times" suggests a factor of at least 3; multiplying £7,000 by 3 gives £21,000, which they round down to £20,000. So, Customs contended that no motor car with a value on importation of less than £20,000 could qualify as a collector's piece within the relevant classification.

Daiber concerned the importation from the USA into Germany in 1980 of a second-hand Daimler-Benz 300 SL Coupé, manufactured in 1955 at a customs value which translated to something more than £50,000.

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[9] Case 200/84

[10] [1985] ECR at page 3371

The Court in *Daiber* did not repeat the Advocate General's reference to "several times the price of a new car", but confined itself to ruling that a collector's piece must be of high value.

The point had, surprisingly to me, already arisen, in the UK, in four relatively recent tribunal cases and Customs' point that a comparison with the price of a new car should be made, had been generally accepted by the tribunals concerned.

As a matter of application of the Court's judgment in *Daiber*, our Tribunal was faced with the question: how to interpret the requirement that a collector's piece must be of high value? In particular, what comparison was required – was it a comparison with the price of a new car, or a comparison with something else?

We concluded that there was nothing in the Court's reasoning which supported Custom's contention that a comparison with the price of a new car was called for. Indeed we described the policy as "unreasonable, arbitrary and not supported by *Daiber*".

We interpreted the Court's reasoning as inviting a comparison with the value of an article's constituent materials[11] and that the Advocate-General's reference to a car bought at several times the price of a new car was a direct comment on the facts of the case under consideration in *Daiber*, where an expensive, if elderly, Daimler-Benz was in issue.

We asked for evidence of the value of Mr. West's car's constituent materials and (at a later hearing) found that the approximate value of the car as scrap metal was £75, and the approximate value of the car as a source for spare parts was £2,500. We found that the car's value on importation was of high value, because it was out of all proportion to the value of its constituent materials, whether taken as scrap metal or as a source of spare parts. The case went on appeal to the High Court and was heard by Sir Andrew Park[12]. He generally supported our reasoning, and dismissed the appeal against our decision, but he did add an additional comparison which he thought was relevant and which we had not taken into account.

In determining whether Mr. West's car was of "high value" Sir Andrew considered that we should also have compared its value on importation with its "value as a usable or potentially usable functioning car, excluding from that value any element which represents its value to collectors"[13]. He described this as a car's "utility value". It was accepted by Customs before Sir Andrew that the utility value of Mr. West's car was well below its market value and so the appeal was dismissed.

The *West* case illustrates the point that sometimes a judgment of the Court of Justice is difficult to apply because it indicates that comparisons on the facts must be made by the national court, but is not as clear as it might be as to what those comparisons precisely are. I should add that in the *West* appeal neither side suggested that the Tribunal should make a reference to the Court of Justice and I had anyway concluded that one was not necessary. Sir Andrew Park obviously agreed on this point also.

Vodafone 2 was altogether a weightier matter.

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[11] See paragraph 19 of the Judgment in *Daiber*
[12] [2008] EWHC 2277 (Ch)
[13] *Ibid.* paragraph 25

It concerned the compatibility of the UK corporation tax anti-avoidance rules on controlled foreign (non- UK resident) companies ("CFCs") enacted in Chapter IV of Part XVII of the Income and Corporation Taxes Act 1988 ("ICTA") with articles 43, 49 and 56EC of the Treaty of Rome, effectively freedom of establishment. The CFC in issue in the case was Luxembourg-resident. So, although the CFC legislations applied to CFCs generally, Vodafone 2 was taking the incompatibility point in relation to the application of the legislation to a CFC resident in another Member State.

The CFC legislation has the effect in UK law of apportioning the profits of a CFC among the UK resident persons with an interest in the CFC and taxing those persons accordingly. There are, of course, the necessary detailed definitions and exemptions necessary to establish this scheme of taxation, and, in particular, a CFC is exempt from the regime if the "motive test" laid down in s.748(3) ICTA applies to it.

The motive test, in broad terms, provides that if the reduction in UK tax achieved by activities involving the CFC were minimal or "it was not the main purpose of one of the main purposes of" the transactions involved to achieve the reduction *and* "it was not the main reason or one of the main reasons for the CFC's existence ... to achieve a reduction in UK tax by a diversion of profits from the UK" then the CFC is exempt from the regime.

From this, three points should be clear about the domestic CFC legislation. First, it is intended as an anti-avoidance measure to prevent siphoning off profits which would otherwise be taxable in the UK to subsidiaries in low-tax jurisdictions. Secondly, there is intended to be an exception for what I may loosely describe as *bona fide commercial CFCs*, which is the motive test. Thirdly, the motive test is, as I have indicated, drafted in *subjective* terms, that is, that it applies if the establishment of the CFC in the first place and the transactions giving rise to the diversion of profits to it in the second place are not motivated by the purpose of obtaining a reduction in UK tax.

The *Vodafone 2* litigation was procedurally complex, and may still be ongoing. However I can talk about it, since everything I will say is reflected in published decisions.

There was no CFC assessment. The revenue had opened an enquiry which could have led to a CFC assessment. Vodafone 2 took the point that the CFC legislation contravened articles 43, 49 and 56EC and that therefore there could be no valid requirement to produce documents or provide information in relation to an enquiry relating to compliance of the Luxembourg-resident CFC with the CFC legislation. Procedurally, Vodafone 2 therefore asked the Special Commissioners to direct the revenue to close their enquiry.

There were two hearings before the Special Commissioners, and our decisions as a result of each of them were both appealed to the Court of Appeal.

In the first hearing we had to decide whether to make a reference to the Court of Justice on the compatibility of the CFC legislation with articles 43, 49 and/or 56EC. Vodafone 2 urged us to do so, the revenue argued that the application for a direction to the revenue to issue a closure notice did not raise an issue of Community law capable of being referred.

In the background was the fact that there had already been a reference to the Court of Justice on the compatibility of the CFC legislation with the Treaty freedoms in the

appeal of *Cadbury Schweppes*[14]. The questions raised in that reference were not as far-reaching as those Vodafone 2 sought to raise in the reference we would make and Vodafone 2 hoped that our reference would "catch up" with the *Cadbury Schweppes* reference in the Court of Justice.

It seemed to us obvious that the *Vodafone 2* application raised points of Community law capable of being referred to the Court of Justice, and we had some difficulty understanding the revenue's argument that it didn't. In this we were not alone, because our decision to make a reference was appealed and both the High Court[15] and the Court of Appeal[16] dismissed appeals against our decision.

The revenue's argument was that it was no part of our function in considering an application for a direction to serve a closure notice to determine disputed issues of law, rather than simply to determine whether the revenue have reasonable grounds for not giving a closure notice – such reasonable grounds to include reasonably holding the view that the CFC legislation was indeed compatible with the Treaty freedoms.
We, and the High Court and the Court of Appeal all decided that where an application for a closure notice raises a point of Community law, it is for us to decide it (with the assistance of a reference if necessary), rather than simply to proceed on a finding that the view of the revenue on the point was reasonable.

The reference went off to Luxembourg, and did not "catch up" with *Cadbury Schweppes*. The Court gave its judgment in *Cadbury Schweppes* and the Registrar wrote to the Special Commissioners asking us whether we wished, in the light of the *Cadbury Schweppes* judgment, to maintain our reference.

We listed the matter for further argument so that the parties could assist us in how to respond to the Registrar. At the further hearing Vodafone 2 submitted that the judgment in *Cadbury Schweppes* gave clear guidance that the CFC legislation was *not* compatible with articles 43 and 48EC and that therefore we should dispose of the application without more ado by directing the revenue to issue a closure notice. In these circumstances we should also withdraw our reference.

Alternatively, Vodafone 2 submitted that if we were not satisfied that the judgment in *Cadbury Schweppes* gave guidance that the CFC was incompatible with the Treaty freedoms, then we should maintain the reference, unless we were prepared to find as a fact that the arrangements involving the Luxembourg company were not 'wholly artificial arrangements' as the Court of Justice had used that term in the *Cadbury Schweppes* judgment. If we were prepared to make that finding on the material that was already before us, then, we should withdraw the reference.

We indicated at the hearing that we were not prepared to make any findings of fact at this stage and so that submission effectively was that unless we were with Vodafone 2 on the point that *Cadbury Schweppes* showed that the CFC legislation was incompatible with the Treaty freedoms, then we should maintain the reference.

The revenue's submissions were that we should withdraw the reference on the grounds that the judgment in *Cadbury Schweppes* gave clear guidance that the CFC legislation *was* compatible with the Treaty freedoms, if and to the extent that (in relation to a CFC established in another Member State) the CFC legislation relates

[14] Case C–196/04
[15] [2006] STC 483
[16] [2006] STC 1530

only to wholly artificial arrangements intended to escape UK tax normally payable. To support this submission, the revenue contended that we could and should interpret the CFC legislation, as a matter of conforming interpretation, so that it could not be applied in circumstances where to do so would infringe Community law as declared by the Court in *Cadbury Schweppes*, but that it (the CFC legislation) otherwise stands and is generally applicable according to its terms.

Faced with these submissions, we reached conclusions on two issues: whether or not the CFC legislation could and should be interpreted as the revenue contended (whether the *Cadbury Schweppes* judgment could be "read down" into the CFC legislation) and whether or not to withdraw the reference.

The "reading down" issue is of course a matter of construction of domestic legislation in the light of the judgment of the Court of Justice and section 2(4) of the European Communities Act 1972.

I heard this appeal with my colleague, Theodore Wallace, an experienced full-time Special Commissioner. By some accident of fortune, I was in the chair. We disagreed on the "reading down" issue. I thought *Cadbury Schweppes* could be read down into the CFC legislation: he thought it could not, and so the CFC legislation could not be applied in relation to Vodafone 2. As I had the casting vote, our decision was that the CFC legislation was not disapplied. We went on to consider whether on this basis the reference ought to be maintained. Again, we disagreed. I thought that it should not be; Mr. Wallace thought that it should be on the basis that we were disagreed on the application of paragraph 72 of the judgment in *Cadbury Schweppes* in which the Court of Justice stated that it was for the national court to determine whether or not the motive test lent itself to an interpretation which was compatible with the freedome of establishment as that had been defined by the Court. Again, my view prevailed, but we stayed revocation of the reference pending any appeal against our decision. In the event the reference has been withdrawn.

Our decision was appealed on the conforming interpretation point. In the High Court, Evans-Lombe J agreed with Mr. Wallace. His decision has been reversed by the Court of Appeal[17], which held that the class of case which the Court of Justice in *Cadbury Schweppes* held was justified as a restriction on the freedom of establishment on the ground of prevention of abusive practices was within a permissible conforming interpretation of the CFC legislation.

That class of case was wholly artificial arrangements which do not reflect economic reality, created with a view to tax avoidance and in relation to which objective circumstances show that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment has not been achieved.

Presumably the appeal will eventually return to the Tribunal for the necessary fact-finding exercise to establish whether, in the case of Vodafone's Luxembourg-resident subsidiary, the arrangements were wholly artificial or not.

Standing back from the detail of the case, I would in conclusion make the observation that difficulty would have been avoided in the national courts if the Court of Justice had not phrased itself as it did in paragraph 72 of its judgment in *Cadbury Schweppes*.

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[17] [2009] EWCA Civ 446; Judgments of Sir Andrew Morritt, Chancellor of the High Court, Longmore and Goldring LJJ.

In that paragraph the Court stated that "it is for the national court to determine whether ... the motive test, as defined by the legislation on CFCs lends itself to an interpretation which enables the taxation provided for by that legislation to be restricted to wholly artificial arrangements" or not.

The Court there obviously correctly recognised that the interpretation of domestic law is a matter for the national court. However the Court of Appeal importantly held that it was not just the motive test which was the proper subject for the conforming interpretation exercise. The Chancellor made the point that "the jurisdiction of the ECJ to give preliminary rulings relates to the interpretation of the EC Treaty and the other matters referred to in article 234EC. They do not include the interpretation of the legislation of a Member State"[18], and he cited *Pfeiffer v Deutsches Rotes Kreuz*[19] and *Criminal Proceedings against Pulpino*[20].

In the light of our experience, so far, in the *Vodafone 2* application, I would therefore respectfully urge the Court of Justice to do its utmost to avoid expressing itself in ways that could give rise to difficulties of this sort, which go beyond the necessary difficulties already in the way of the national courts in their work of applying the interpretations of Community law given by the Court in response to references under article 234EC.

[18] *Ibid.* [34]
[19] [2004] ECR I-8835, para 115
[20] [2005] ECR I-5285, para 47