National Competition Law and the Preliminary Ruling Procedure

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A. Introduction

Austria,[1] Belgium,[2] Denmark,[3] Finland,[4] France,[5] Germany,[6] Greece,[7] Ireland,[8] Italy,[9] Luxembourg,[10] the Netherlands,[11] Portugal,[12] Spain[13] Sweden[14] and the United Kingdom[15] have each introduced domestic competition rules modeled on Article 81 EC and Article 82 EC, or have at least amended their domestic competition rules to achieve greater alignment with Community law.

The Europeanization of domestic law adds a new dimension to the complex system of overlapping competition law enforcement within the Community. The Treaty's competition rules can be applied by the European Commission,[16] national

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1 *Kartellgesetz* BGBI 1993/693, 1993/532, 1993/693, 1995/520.

2 Law of 5 August 1991.

3 Law 384 of 10 June 1997.

4 Laws 711/88,480/92, 481/92, 485/92, 66/93.

5 Ordonance 86–1243 of 1 December 1986.

6 *Gesetz gegen Wettbewerbeschränkungen* (GWB), amended in 1965, 1973, 1976, 1980, 1990 and 1998.

7 Law 703/77, amended by Law 1934/91, Law 2000/91 and Law 2296/95.

8 Competition Act 1991, amended by the Competition (Amendment) Act 1996.

9 Law 287/90.

10 Law of 17 June 1970.

11 Law of 22 May 1997.

12 Law 422/83, amended by Law 371/93.

13 Law 16/1989, replacing Law 110/1963. See also Law 66/1997 and Decrees 157/92, 1080/92 and 295/1998.

14 Law 20/1993, as amended.

15 Competition Act 1998.

16 Relying on powers contained in implementing regulations, or on the residual powers contained in Art. 85 EC.

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courts,[17] and national competition authorities.[18] The reception of Community law principles into domestic competition law provides a fourth route by which those principles can be given effect in the territories of the Member States.

Significant regulatory costs are associated with the existence of a patchwork of national laws, and a convergence of competition law standards across Europe will streamline the system of overlapping jurisdiction. In addition, Europeanization may contribute to the goal of ensuring that regulation takes place at the most appropriate level. The European Commission has encouraged national courts and competition authorities to apply Community competition law.[19] However, not all national competition authorities have the power to apply Community law: even where they do, they may prefer to use the powers contained in their domestic regimes.[20] Applying national law that is based on Community law may achieve the same (or similar) results as would have been achieved by the application of Community law. Europeanized national law offers a viable alternative to the decentralized application of Community law.

However, there is a fundamental difference between the application of the Treaty's competition rules and the application of rules based on the Treaty. Europeanization has involved borrowing from Community law, without implementing it as such: the Treaty has acted as a point of reference, not a source of obligations.[21]

This might suggest that the preliminary ruling procedure, set down in Article 234 EC, is not capable of playing a role in the interpretation of national law. Where national law makes a *renvoi* to Community law, national courts and competition authorities may find themselves turning for interpretative help to the case-law of the

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[17] Art. 81(1) and Art. 82 are directly effective. A national court cannot give an Art. 81(3) exemption, although it is within its jurisdiction: (a) to decide that an agreement falls within the terms of a block exemption; (b) to decide that it is unlikely that an exemption is capable of being granted by the European Commission.

[18] Relying on powers conferred by Art. 84 EC. The powers of national competition authorities with regard to Article 81(3) are limited in the same way as those of national courts.

[19] See the European Commission's Notice on Co-operation with National Courts, OJ 1993 C 39/6, and its Notice on Co-operation with National Competition Authorities, OJ 1997 C 313/3.

[20] In particular, given their current inability to grant Art. 81(3) exemptions. The Commission's *White Paper on Modernization* contains proposals for allowing national courts and competition authorities to grant exemptions under Art. 81(3).

[21] Subject to the possibility that an Art. 81(3) EC exemption represents a form of field occupation, preventing stricter regulation of an exempted agreement at a national level (see note 63 *infra*). Therefore, if national law grants automatic exemption to any agreement that has been exempted under Art. 81(3) EC, this may be said to fulfil a Community obligation. Community law, and Art. 10 EC, is not generally understood as requiring Member States to adopt Community-based prohibitions for domestic use: note, however, the arguments of John Temple-Lang to the contrary: J. Temple-Lang, 'Community Constitutional Law: Article 5 EEC' in (1990) 27 *CML Rev*, at p. 645.

Court of Justice, and decisions and statements of the Commission. However, if a national court[22] had a specific question that it wished to put to the Court of Justice, it would face the difficulty that the aim of Article 234 is to ensure the uniform application of Community law, rather than the uniform application of Community concepts in situations that are internal to the Member States. The purpose of this article is to analyse ways of navigating around this difficulty.

B. Methods of Europeanization

Borrowing from Community law does not necessarily involve imitating Community law faithfully. Domestic competition law draws on Community law in three ways. First, domestic law may transpose aspects of the Treaty and associated secondary legislation.[23] Secondly, domestic law may incorporate passages from Community case law.[24] Third, domestic law may give Community principles a general role in questions of interpretation. For example, Article 4(1) of the Italian Competition Act reads:

> The provisions of this Title [Title I containing the provisions modelled on Community law] shall be interpreted in accordance with the principles of European Community competition law.

Despite this clause, there is some doubt in Italy about the extent to which Community law should govern interpretation of Title I.[25] In some cases, Italian

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[22] Only courts and tribunals can use Art. 234.

[23] Although clearly a change of territorial scope is required. Some national drafters have experienced difficulty in bringing Community rules within national boundaries. Chapter I of the United Kingdom Competition Act, modeled on Art. 81(1), prohibits agreements that 'may affect trade within the United Kingdom' and 'have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom'. It is not clear what role (if any) this double territorial filter plays: it reflects the difficulty of following the structure of Art. 81(1), which refers to practices that 'may affect trade between Member States' and to restrictions on competition 'within the Common Market'. In other national systems, the structure of Art. 81(1) has been followed less rigidly, avoiding this problem: for example, Art. 6 of the Dutch Competition Act prohibits agreements 'which have as their object or effect the prevention restriction or distortion of competition within the Dutch market, or a part thereof . . .'.

[24] For example, Art. 1(i) of the Dutch Competition Act defines a dominant position in terms drawn from the judgment of the Court of Justice in Case 27/76, *United Brands v. Commission,* [1978] ECR 207. The technique of codifying case law in secondary legislation is used in the Community system also: see e.g. Art. 9(7) of Regulation 4064/89 which uses the market definition formula found in *United Brands.*

[25] See M Siragusa and Scassellati-Sforzolinia, 'Italian Competition Law: A New Relationship-Reciprocal Exclusivity and Common Principles' in (1992) *CML Rev*, at pp. 93–131.

Courts have followed Community case law closely.[26] At the same time, the Italian Competition Authority has indicated, that whilst it acknowledges the principle of fidelity in broad terms, it must always be taken into account that Community and national law have different aims: in particular, Community law has been influenced by a concern with market integration, with the result that Community principles should not be followed in all cases.[27]

However, if those aspects of Community law that have been influenced by the concern with market integration are to be ignored when interpreting national law, an obvious difficulty arises. In all competition law systems there is a tendency to roll together different policy goals. This can make it difficult to be precise about what explains a particular line of decision-making. For example, even though it is acknowledged that the concern with market integration has influenced Community law, it is not clear in exactly which ways Community policy would be different without this concern. It is not even clear why the pursuit of market integration requires a different form of policy from one aimed only at efficiency.[28]

If the interpretation of national law is not to be affected by the concern with market integration, national courts and competition authorities will be required to take on the near impossible task of unpicking the different policy strands of Community judgments. This task may be complicated by developments taking place within Community law itself. Legislative moves towards completion of the internal market may lead Community institutions to place less emphasis on market integration as a distinctive feature of Community competition policy. Economic and monetary union may have a similar effect.

This difficulty can be explored further by looking at the interpretation clause used in the United Kingdom. Section 60(1) of the United Kingdom Competition Act reads:

> The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part[29] in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

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[26] See, for example, the decision of the Cassazione Civile of 1 February 1999, applying the case law of the Court of Justice to interpretation of the notion of agreement in Art. 2 of the Italian Competition Act: n 827 *Guir Comm* 1999 II, 224.

[27] Autorita garante della concurrenza e del mercato *Relazione annuale sul-l'attiva svolta* 1998, 16.

[28] If the pursuit of market integration requires a distinctive form of decision making, implicitly this involves an acceptance that market integration (or, at least, the Community conception of it) is inefficient and is pursued in order to achieve other non-efficiency goals.

[29] Part I, containing the provisions modeled on Community law.

The effect of Section 60[30] is that national courts and competition authorities must aim for consistency with the principles laid down by the Treaty and the Court of Justice where they identify 'questions arising ... in relation to competition' for which there are 'corresponding questions arising in Community law in relation to competition'. Having identified such a corresponding question, they must then have regard 'to any relevant differences between the [legislative] provisions concerned'.

To apply the notion of 'corresponding questions' it will be necessary to look at the policy context surrounding a question. For example, it is clear that the Community case law on price discrimination has been influenced by a desire to prevent consumers *in different Member States* paying different amounts for the same goods.[31] Does this mean that the question of territorial price discrimination in the Community corresponds with that of price discrimination within a single Member State? Similar questions can be asked across different areas of the case law. For example, does the question of a cross-border refusal to supply that has the effect of sealing off a national market one corresponds with that of a refusal to supply in a single Member State?

In addition, the requirement to have regard to relevant differences between the provisions concerned could bring in issues of policy. The fact that two provisions, although identically worded, have different purposes, could be seen as a relevant difference between them.[32]

The possibility of a different policy factor decoupling Community and national law is suggested by Danish law. Article 1, Part 1 of the Danish Competition Act, reads:

> The purpose of this Act is to promote efficient production and resource allocation by means of workable competition.[33]

It can be seen that Article 1 of the Danish Act refers only to the efficiency goals of competition law. In all systems, one of the key choices to be made is whether, in addition to pursuing *efficiency,* competition law should be sensitive to concerns about the *fairness* of market behaviour. Another way of explaining that choice is to distinguish between the aggregate and distributive effects of competition policy. A

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[30] For further discussion of s. 60, see Thomas Sharpe, 'Consistency and Diversity in the United Kingdom' in *Modernisation and Decentralisation: the New Relationship Between Community and National Competition Law* (Kluwer Law International (forthcoming)); Nicholas Green, 'Some Observations on the Civil Consequences of the Chapter I and Chapter II Prohibitions' in (Green and Robertson (eds.)) *The Europeanisation of UK Competition Law* (Hart, Oxford, 1998) pp. 25–33.

[31] See e.g. the judgment of the Court of Justice in *United Brands,* note 23 *supra.*

[32] Green, note *supra.* If policy differences are relevant both to the issue of whether two questions correspond and to whether two provisions display relevant differences, it is not clear how these two aspects of s. 60 relate to each other.

[33] I am grateful to Professor Richard Whish for drawing attention to this aspect of the Danish Competition Act.

policy motivate by efficiency is concerned only with aggregate welfare creation. In contrast, a policy motivated by fairness has a redistributive intention: such a policy may require the re-ordering of market relationships, reallocating risks and resources between contracting parties,[34] in ways that are deemed to reflect what would have happened if the parties had contracted in good faith, and any inequality of bargaining power between them had not been exploited.

Many aspects of Community competition law[35] reflect a concern with contracting in good faith. If Article 1, Part 1 of the Danish Act is read as suggesting that the Danish legislature wished to jettison non-efficiency goals from Danish competition law, an obvious difficulty arises. Just as with market integration, determining the precise extent to which the Community meaning of a term has been influenced by non-efficiency concerns is not easy.[36]

C. The Role of Preliminary Rulings in Anchoring Interpretation of the System

Can Article 234 be used in cases involving purely national law? In his opinion in *Kleinwort Benson v. City of Glasgow District Council*[37] Advocate-General Tesauro gave a speculative answer to this question. Having referred to the fact that Article 2 of the Italian Competition Act prohibits anti-competitive agreements in terms similar to those found in the Treaty, Advocate-General Tesauro argued that:

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[34] Or non-contracting parties in cases of refusal to supply.

[35] Whish, *Competition Law*, London, (1993). Merger control is probably the exception: the analysis of mergers is tied closely to economic standards.

[36] The Danish case illustrates another problem. The Danish Act transposes Community texts fairly directly. The concern with contractual fairness is found not just in Community case law, but also in Community texts themselves: as a result, the Danish Act incorporates elements that, on the face of the text, show a concern with distribution rather than just aggregate welfare creation. Therefore, this creates a possible tension between the wording of the Danish Act itself and the interpretative requirement suggested by Art. 1. For example, Art. 6(2), fourth indent and Art. 11(2), third indent of the Danish Act, in line with Arts 81 EC and 82 EC, refer to the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The concern with dissimilarity may be efficiency-based, but this is not always so. In addition, Art. 8(1), second indent of the Danish Act contains a distributional concern requiring that exempted agreements 'allow consumers a fair share of the resulting benefits', a provision carried over directly from Art. 81(3) EC. Therefore, if the Danish legislature sought to refocus the policy goals of the Community rules that were carried over into Danish national law, the text of these rules themselves may frustrate this to some extent.

[37] Case C–346/93, *Kleinwort Benson v. City of Glasgow District Council,* [1997] ECR I–630.

> I do not believe that an Italian court could ask the Community judicature for an interpretation of Article 85 of the Treaty in order to apply the corresponding national provision; and I am even more certain that in any event it would not receive a reply from the Court that it was seeking.[38]

Nevertheless, in *Oscar Bronner*,[39] the Court of Justice did give a preliminary ruling in order to aid interpretation of national competition law. The discussion that follows reviews the case law relevant to this issue.

I. The Dzodzi Line of Cases

The starting point for this review is the *Dzodzi* line of cases. *Dzodzi v. Belgium*[40] concerned a dispute about an application for a Belgian residence permit. Mrs Dzodzi, the applicant, was not a Community national and was not in a position to rely on any Community-based rights of residence. However, Belgian law[41] awarded non-Community nationals in Mrs Dzodzi's position the same entry and residence rights as those enjoyed by Community nationals. These rights were defined by reference to Community secondary legislation. A request for a preliminary ruling regarding the interpretation of the relevant Community legislation was made by the *Tribunal de première instance* in Brussels.

In his opinion in *Dzodzi*, Advocate-General Darmon took the view that it was outside the jurisdiction of the Court of Justice to give a preliminary ruling. He argued that:

> A reference made to Community law by a national law cannot extend the scope *ratione materiae* or *ratione personae* of Community law. Such a reference is unilateral and independent and, in referring to a given substantive provision of Community origin, has no effect on the field of application of Community law as such. It is Community law and Community law alone that defines the necessary connecting factor for the provisions governing the free movement of persons. Where there is a reference of the sort made by Belgian law in this instance, the persons concerned are covered by national law alone. In such a case the court's ruling on interpretation would not be to ensure that Community law has uniform effects, that is to say, uniform content in its field of application. It would be a *sui generis* operation designed to assist the national court in giving effect to national law alone and outside the field of application of Community law.[42]

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[38] Ibid. at p. 631.
[39] Judgment of 26 November 1998, Case C-7/97, *Oscar Bronner v Mediaprint*, [1998] ECR.
[40] Cases C–297/88 and 197/89, *Dzodzi v. Belgium*, [1990] ECR I–3763.
[41] Law of 15 December 1980 on admission to the territory of the state for aliens and the residence, establishment and expulsion of aliens.
[42] At p. 3780.

However, the Court of Justice did not follow the Advocate-General's opinion, giving two different justifications for not doing so. The first justification concerned the relationship between national courts and the Court of Justice:

> ... according to the division of judicial tasks between national courts and the Court of Justice pursuant to Article 177, the Court gives its preliminary ruling without, in principle, having to look into the circumstances in which the national courts were prompted to submit the questions and envisage applying the provision of Community law which they have asked the Court to interpret.

This concept of a division of judicial tasks between national courts and the Court of Justice is a familiar one from the case law on the preliminary ruling procedure. It had been used previously by the Court of Justice in a context similar to *Dzodzi*: in *Thomasdunger*[43] the Court gave a preliminary ruling for the purposes of applying purely national law, relying on the idea that the Court had a duty to respond to a request for a preliminary ruling if a national court perceived the need for one.

However, in *Dzodzi* the Court relied on an additional justification, involving the intention of the framers of the Treaty and the interests of the Community legal order:

> It does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that Article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine the rules applicable to a situation which is purely internal to that state. On the contrary, 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 uniform interpretation irrespective of the circumstances in which it is applied.[44]

The two lines of reasoning used in *Dzodzi* have been used to justify giving preliminary rulings in subsequent cases involving the use of Community concepts within the confines of national law[45] including most recently in *Leur-Bloem*[46] and *Giloy*.[47]

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[43] Case 166/84, *Thomasdünger GmbH v. Oberfinanzdirektion Frankfurt am Main,* [1985] ECR 3001.

[44] At p. 3793.

[45] Case C–231/89, *Gmurzynska-Bscher,* [1990] ECR I–4003; Case C–384/89, *Tomatis and Fulchiron,* [1991] ECR I–127; Case C–88/91, *Federconsorzi,* [1992] ECR I–4035. In the last two of these cases a provision of Community law had been used in a contract rather than in national legislation: in each case, a preliminary ruling enabled construction of the contract.

[46] Case C–28/95, *Leur-Bloem*, [1997] ECR I–4161.

[47] Case C–130/95, *Giloy*, [1997] ECR I–4291.

II. Kleinwort Benson

The *Dzodzi* line of cases can be contrasted with *Kleinwort Benson v. City of Glasgow District Council.*[48] *Kleinwort Benson* concerned a void swap agreement between Kleinwort Benson, a bank, and Glasgow District Council, a local authority. Kleinwort Benson brought proceedings in the English High Court for restitution of sums paid under the agreement. Glasgow District Council sought a declaration that the Scottish Courts, and not the English Courts, had jurisdiction over the claim. Due to the limitation periods applicable in the Scottish system, if Scottish jurisdiction were to be established, part of the Kleinwort Benson's claim would be time-barred.

The Civil Jurisdiction and Judgments Act 1982 ('the 1982 Act') gives effect to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention') within the United Kingdom. In addition to giving effect to the Brussels Convention, the 1982 Act contains a number of special provisions dealing with the allocation of jurisdiction within the United Kingdom. These provisions are based on the Brussels Convention, but adapt it, and do not transpose all of its terms directly. Interpretation of the special provisions is not governed by the case law of the Court of Justice, although Section 16(3) of the 1982 Act requires regard to be had to that case law when interpreting the provisions. In addition, Section 47(3) of the 1982 Act allows for modifications to be made to the special jurisdictional provisions, including modifications designed to produce further divergence between them and the case law of the Court of Justice.

In *Kleinwort Benson* resolution of the jurisdictional question depended on whether the restitutionary claim came within either of two of the special jurisdictional provisions in the 1982 Act, Article 5(1) and Article 5(3) of Schedule 4. Article 5(1) deals with 'matters relating to a contract', and Article 5(3) deals with 'matters relating to tort, delict and quasi-delict'. The terms 'matters relating to a contract' and 'matters relating to tort, delict and quasi-delict' as they appear in Articles 5(1) and 5(3) of Schedule 4 are drawn directly from Articles 5(1) and Articles 5(3) of the Brussels Convention.[49]

The categories of obligation found in Article 5(1) and 5(3) of the Brussels Convention gain their meaning chiefly by reference to the system and objectives of the Convention:[50] this meaning is independent of national law. The English Court of Appeal sought a preliminary ruling under the 1971 Protocol on the Interpretation of the Brussels Convention[51] asking for an interpretation of Articles 5(1) and 5(3) of the

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[48] See note 37 *supra*.

[49] Although certain aspects of Art. 5(3) of Schedule 4 diverge from Art. 5(3) of the Brussels Convention.

[50] Case 34/82, *Martin Peters,* [1983] ECR 987.

[51] OJ 1975 L 204/28; OJ 1983 C 97/24; OJ 1990 C 189/25. Subject to certain differences (eg limitations on the courts allowed to make a reference) the Protocol plays the same role in relation to interpretation of the Brussels Convention as Art. 234 does in relation to the interpretation of Community law.

Convention. The Court of Justice, following the opinion of Advocate-General Tesauro, declined jurisdiction. In explaining its refusal to give a preliminary ruling, the Court drew attention to divergences between the 1982 Act and the Convention:

> Far from containing a direct and unconditional *renvoi* to provisions of Community law so as to incorporate them into the domestic legal order, the 1982 Act takes the Convention as a model only, and does not wholly reproduce the terms thereof. Though certain provisions of the 1982 Act are taken almost word for word from the convention, others depart from the wording of the corresponding Convention provision. That is true in particular of Article 5(3). Moreover, express provision is made in the 1982 Act for the authorities of the contracting state in question to adopt modifications 'designed to produce divergence' between any provision of Schedule 4 and a corresponding provision of the Convention, as interpreted by the court. Accordingly, the provisions which the court is being asked to interpret cannot be regarded as having been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the contracting state concerned ... The 1982 Act does not require the courts of the contracting state to decide disputes before them by applying absolutely and unconditionally the interpretation of the Convention provided to them by the Court.[52]

The Court added that if it were to have given a preliminary ruling in this case, the ruling would not have bound the outcome of national proceedings:

> It cannot be accepted that the replies given by the Court to the courts of the contracting states are to be purely advisory and without binding effect. That would be to alter the function of the Court ... namely that of a court whose judgments are binding (see Opinion 1/91 [1991] ECR I–6097, paragraph 61).[53]

III. Controlling Access to the Preliminary Ruling Procedure

The reasoning used in *Kleinwort Benson* is based on reasoning used elsewhere in the case law on admissibility. The Court has emphasized that it is not its function to give non-binding advisory opinions: before replying to a reference it must be satisfied that its ruling will be followed by the referring court.[54] Of course, whenever the court gives a preliminary ruling in a case that lies outside the field application of Community law, there is no basis *in Community law* for the court to insist that its ruling is followed by the national court: in this sense, any preliminary ruling given in these circumstances must be non-binding. In *Kleinwort Benson*, the Court was concerned to ensure that *as a matter of national law*, the preliminary ruling would

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[52] Paragraphs 16–19.
[53] Paragraph 24.
[54] See e.g. *Opinion 1/91* [1991] ECR I-6097, at paragraph 61, cited in the Court's judgment in *Kleinwort Benson* at paragraph 24.

bind interpretation of the relevant domestic provisions. Its conclusion was that such a binding effect would be felt only when national law contained a direct and unconditional *renvoi* to Community law. In *Kleinwort Benson*, the Court did not refer to the reasoning used in the *Dzodzi* line of cases, to the effect that there is a Community interest in avoiding divergent interpretations of the same provision: presumably, however, where national law does not contain a direct and unconditional *renvoi* to Community law, the Community interest in ensuring consistent interpretation does not arise.

It is helpful to put *Kleinwort Benson* in context. In recent years, the Court of Justice has developed a variety of techniques for controlling access to the preliminary ruling procedure.[55] It is clear that the picture suggested in the *Dzodzi* line of case, of the Court unconcerned about the context or likely use of its rulings, needs qualification. The development of these techniques has been motivated, in part, by the recognition that tighter docket-control is necessary if the Court is to deal with its increasing workload.[56]

IV. Applying Kleinwort Benson to National Competition Law

The next task is to examine what the direct and unconditional *renvoi* test means: in what way does it require national law to be anchored to Community law? One analytical framework that can be imposed on *Kleinwort Benson* is to treat the 'direct and unconditional *renvoi*' test as two-limbed test in which the requirement for directness concerns *textual* fidelity, and the requirement for unconditionality concerns *interpretative* fidelity. Viewed in this way, the directness requirement would be satisfied where a Community term or text has been transposed without amendment into national law; the unconditionality requirement would be satisfied where a term that has been directly transposed is required to be interpreted in strict conformity with the Community text to which it corresponds. Cumulative application of the two requirements will identify both textual mismatches and interpretative provisions, that result in national law becoming decoupled from Community law.

1. A Need to Transpose a Text 'in its Entirety'?

The Europeanization of domestic competition law has involved a process of selective dislocation: particular terms, phrases or concepts have been taken from Community

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[55] For a general review of these techniques see C. Barnard and E. Sharpston 'The Changing Face of Article 177 References' (1997) *CMLRev* at 1113–71.

[56] The Court has produced a note: 'Note for Guidance on References by National Courts for Preliminary Rulings' in (1997) *CMLR* 1319–22. See also the Court's discussion paper, *The Future of the Judicial System of the European Union*, referring to 'a dangerous trend towards a structural imbalance between the volume of incoming cases and the capacity of the institutions to dispose of them' (p. 3).

law, but then mixed with provisions that are not textually faithful to Community law.

This makes it necessary to examine one aspect of the judgment in *Kleinwort Benson*. In *Kleinwort Benson* the Court of Justice referred to the fact that the special jurisdictional provisions of the 1982 Act did not 'wholly reproduce' the Brussels Convention. This was despite the fact that the parts of the 1982 Act that were at issue had been taken directly and without amendment from the Convention. In drawing attention to the fact that parts of the Convention *that were not even the subject of the reference* had not been transposed into national law, was the Court suggesting that the 'direct and unconditonal *renvoi*' test would be satisfied only where a Community text has been transposed into national law in its entirety?

There are reasons for thinking that this is not the right reading of the Court's judgment.

First, it is not clear what principle would justify the imposition of an 'in its entirety' requirement. Of course, taking a term or phrase out of context, by detaching it from a larger text of which it forms a part, *may* alter its meaning: however, this result cannot be assumed. If a term, phrase or provision has been transposed directly, and is then to be interpreted in a way that is dependent unconditionally on its Community meaning, it is not clear what would be achieved by a requirement that the term must be accompanied by the rest of the Community text from which it was drawn.

Secondly, as the *Dzodzi* line of cases shows, the Court has been prepared to give a ruling when the relevant national law borrows fairly eclectically from Community law. This can be seen clearly, for example, in *Leur-Bloem*. In effect, the Court of Justice has been prepared to take provisions in isolation.

Finally, if the Court of Justice intended to impose an 'in its entirety' requirement, it is not clear that it could be given a clear operational meaning. To give the requirement a meaning, it would be necessary to determine the boundary of a given Community text. Take a national law that transposes Article 81(1) directly, but omits to transpose Article 81(2) and transposes Article 81(3) subject to modification. Does national law transpose a Community text in its entirety? Does Article 81 form a single seamless text, or is it three texts? One could use paragraph numbering as a way of identifying the boundaries of a text, but would be a device of convenience rather than one driven by any clear principle.[57]

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[57] If *Kleinwort Benson* is not to be read as imposing an 'in its entirety' requirement, then it is necessary to explain why the Court drew attention to the fact that the Brussels Convention had been transposed selectively. Arguably, it did so because selective transposition, along with other factors, suggested that the United Kingdom legislature did not intend the Convention to bind interpretation of *any* part of the special jurisdictional provisions of the 1982 Act, including those that had been transposed directly. This conclusion was reinforced by the fact that modifications, leading to further divergence from the Convention, were envisaged in the Act. Selective transposition, on its own, did not dictate inadmissibility. It is interesting that, in *Kleinwort Benson*, the referring court did go on to apply the 1982 Act in conformity with Community case law: [1997] 3 WLR 923.

2. The Unconditionality Requirement

The unconditionality test creates a particular challenge for references in cases involving national competition law. The point was made above that, when applying Community terms in domestic situations, it is not always appropriate to give them their Community meaning.

Where it is appropriate to interpret a particular term in conformity with Community law in one context, but not appropriate to do so in another, would the Court of Justice be willing to assist a national court in interpreting the term? The Court of Justice may balk at the prospect of distinguishing between policy contexts in this way. It might hold the unconditionality requirement to be satisfied only when interpretation of a particular term or phrase is *always* dependent on Community law.

However, a different approach could be taken. In line with general Community principles of interpretation, the unconditionality requirement could be read purposively. The aim of the requirement for unconditionality is to ensure that the Court of Justice gives rulings only when they will bind the outcome of the relevant national proceedings. If:

(a) a term is being applied in a context that makes it possible to carry over its Community meaning to national law; and
(b) national law requires conformity with Community law in these circumstances;

then it could be argued that the national law does contain an unconditional *renvoi* to Community law.

If a national court wished to make a reference in such circumstances, it would be helpful for the reference to contain a clear certificate to the effect that any ruling would bind the application of national law. However, if the Court wished to emphasis the restrictive aspects of *Kleinwort Benson*, the possibility of rejection of a reference cannot be ruled out.

V. Oscar Bronner

Having discussed the difficulties raised by *Kleinwort Benson*, it is necessary to turn to *Oscar Bronner*. *Oscar Bronner* is the only case so far in which the Court of Justice has been asked for a preliminary ruling to help with the application of national competition law. The approach taken in *Oscar Bronner* is striking. If *Oscar Bronner* is interpreted in a particular way, it opens up a new route to admissibility that allows the court to side-step the difficulties associated with the direct and unconditional *renvoi* test.

1. The Background to the Reference

Oscar Bronner, the publisher of an Austrian daily newspaper, alleged that Mediaprint, the publisher of a rival Austrian newspaper, had breached Article 35

of the Austrian *Kartellgesetz,* a provision based on Article 86 EC (now Article 82 EC) . The *Oberlandesgericht Wien* made a reference to the Court of Justice, asking whether the conduct complained of by Oscar Bronner constituted an abuse of a dominant position contrary to Article 86. The *Oberlandesgericht Wien* took the view that the conduct complained of affected inter-state trade appreciably. However, it did not regard itself as competent to apply Article 86, and sought a ruling in order to help apply the *Kartellgesetz*. The *Oberlandesgericht Wien* added that it was necessary to have an authoritative interpretation of Article 86, because the principle of the supremacy of Community law required that conduct forbidden under Community law could not be tolerated under national law.

2. The Advocate-General's Opinion

In his opinion in *Oscar Bronner*, Advocate-General Jacobs drew attention to a number of differences between the *Kartellgesestz* and Article 86. Given these differences, the Advocate-General felt that it was doubtful whether *Oscar Bronner* fell in the *Dzodzi* category: there was no direct link, such as transposition of terms, between the *Kartellgesetz* and Community law.

However, the Advocate-General argued that the reference should be treated as admissible on other grounds. As the reference had been made on the basis that the alleged abuse had an effect on inter-state trade, the judicial nature of the *Oberlandesgericht* meant that it was competent to apply the Treaty's competition rules, even if it did not realize this. In these circumstances, even though the main proceedings did not involve the application of Article 86, the referring court might apply Article 86 later. According to the Advocate-General, this justified admissibility.[58]

3. The Court of Justice

The Court of Justice held the reference to be admissible. Citing *Dzodzi* and *Gmurzynska-Bscher* the Court referred to the 'clear separation of functions' between it and national courts, under which national courts bear the responsibility for determining whether a reference is necessary. The Court accepted that it could still refuse to give a ruling where it was obvious that the question posed by a national court was irrelevant 'to the to the facts of a case or to the subject matter of the main action'.[59] However, in this case, the Court was satisfied that the question did not fall into this category, as the *Oberlandesgericht Wien* had requested a ruling in order to avoid any conflict between Community and national law.[60]

Acknowledging that a question about conformity with Community law would arise only if there were an appreciable effect on inter-state trade, the Court dealt with

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[58] Paragraphs 26–38.
[59] Paragraph 17.
[60] Paragraph 18–20.

submissions from Mediaprint and the Commission that no such effect was felt. The Court took the view that this question formed part of the factual subject matter of the main proceedings and fell, therefore, to be assessed by the national court.[61]

Holding a reference admissible on the grounds that the referring court is faced with a genuine question of Community law does not represent a novelty: clearly, the purpose of the preliminary ruling procedure is to answer questions of this sort. However, the Court's approach in *Oscar Bronner* does raise a problem, as it hard to see what question of Community law arose. From the fact that there is an effect on inter-state trade, it does not follow automatically that there is a substantive dispute involving a question of Community law. National law cannot authorize something prohibited in Community law.[62] It is also possible that when a practice is authorized by Community law, it cannot be regulated more strictly at a national level.[63] Therefore, in a case in which a national court was called upon only to apply a national rule, a genuine question of Community law could arise if this involved regulating a practice that had already benefitted from a Community exemption.

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[61] Paragraph 21.

[62] Case 14/68, *Wilhelm v Bundeskartellamt,* [1969] ECR 1.

[63] In *Wilhelm* the Court of Justice referred to the right of Community authorities to take 'postitive though indirect action to promote harmonious development of economic life within the Community'. Developing this aspect of *Wilhelm* in Case 253/78, *Guerlain*, [1980] ECR 2327 at 2369–70, the Commission argued that: 'Where, on the one hand, the national court is led to conclude that the agreement is conclusively valid from a Community point of view either because it already enjoys an exemption under Art. 85(3) or because in the light of Community practice and case law there is no reasonable doubt that it is capable of benefiting from such an exemption, the national court must be prevented from applying its national law in so far as it is more rigorous. The Commission accordingly considers that the application of national law, which may be more rigorous, may not result in calling in question the substance of the exemption granted'. The Commission expressed similar views in the *Fourth Report on Competition Policy*, at p. 45 and the *Eighteenth Report on Competition Policy*, at p. 15. In practice, it is not clear at what point the Commission would regard the substance of an Art. 81(3) exemption as having been called into question. In 1989 the United Kingdom Secretary of State for Trade and Industry issued two orders (the 'beer orders': SI 1989/2390 and SI 1989/2258), imposing conditions on United Kingdom brewers which went beyond those contained in a Community block exemption. The effect of the beer orders, therefore, was to make illegal in national competition law practices authorized in Community competition law. In March 1992, in answer to a Parliamentary question tabled by Anne McIntosh MEP ((1993) 4 *CMLR* 7) the Commission explained that: 'As regards the relationship between the UK Supply of Beer Order and the provisions of block exemption Regulation 1984/83, the following observation should be made. According to the provisions of the EEC Treaty, EC law takes precedence over national law, but in certain respects, it could be said that the UK Order imposes stricter conditions on breweries than block exemption Regulation 1984/83. In general the Commission has always considered that national regulations which are more stringent than block-exemption regulations drawn up by the Commission are compatible with them, provided that they do not affect the essential conditions of such exemptions'. The Court of Justice has not ruled definitively on this question: see Case C-270/93 *BMW v ALD* [1995] ECR I-3439 and Case C-266/93 [1995] ECR I-3477.

However, *Oscar Bronner* did not involve this type of conflict. The *Kartellgesetz* appeared to think that it was under a constitutional duty to apply domestic law in a way that was no less strict than Community law. The Court of Justice exercised a fairly low level of supervision over the claim that a genuine question of Community law arose.

It is to be regretted that the Court, although following the Advocate-General, in the sense that it held the reference admissible, did not examine the reasoning that drove the Advocate-General to this conclusion. Advocate-General Jacobs supported admissibility simply on the grounds that the *Oberlandesgericht Wien* had jurisdiction to apply Community law. This approach is a novelty. In effect, this approach amounts to saying that where a national court has jurisdiction to apply a Community rule, a preliminary ruling can be given on interpretation of that rule, even if the national court does not intend to apply the rule. This could involve the Court of Justice giving a ruling on a hypothetical question, an outcome that the Court has always said that it would resist. In addition, there are significant uncertainties surrounding the notion of an effect on inter-state trade, and in *Oscar Bronner* the Court was unwilling to exercise supervision over the national court's finding that such an effect was felt.[64]

D. Conclusion

So far, one possible reading of *Oscar Bronner* has been ignored. It may be that the Court felt that there was a Community interest in assisting the Europeanization of national competition law. In effect, the Court may have been adapting the preliminary ruling procedure to make it reform-friendly, recognising that it has a key role to play in bringing stability to the experiment in Europeanization.

This approach would be entirely consistent with the principle of subsidiarity. In some circumstances, achievement of Community objectives can be secured adequately by action at a national level, and the principle of subsidiarity creates a rebuttable presumption in favour of action at this level.[65] Despite this, the preliminary ruling procedure gives no formal recognition to action that, in constitutional terms, is internal to the Member States, but that is, nevertheless, capable of securing Community objectives. Put another way, the Treaty envisages this form of action, but does not provide an institutional framework for supporting it.

It appears that the drafters of the Treaty did not envisage there being any Community interest in supporting action lying outside the scope of Community law. Nevertheless, as the introduction to this article explained, the Europeanization of

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[64] See note 61 *supra* and the accompanying text.
[65] Art. 5 EC.

domestic competition law can be seen as contributing to Community objectives. As such, a pattern of judicial co-operation capable of crossing the border between Community and national law may seem appropriate.

However, although aspects of the Advocate-General's Opinion suggest some sympathy for an extension of the preliminary ruling procedure,[66] in *Oscar Bronner* the Court did not give formal recognition to the idea that the new relationship between Community and national law required a new form of judicial co-operation.

In summary, in cases involving national competition law, preliminary rulings can be given in the following circumstances:

(1) Where national law makes a direct and unconditional *renvoi* to Community law: (the *Dzodzi* line of cases, read in the light of *Kleinwort Benson*).
(2) Where a genuine question of conflict with Community law arises.
(3) Where a national court applies a Community rule in tandem with applying a national rule. Here, a ruling can be sought on the meaning of the Community rule: the national court can then have regard to that ruling when interpreting national law if it wishes.
(4) Where a national court is competent to apply a Community rule, but does not intend to apply that rule. However, the exact basis of this approach is unclear: it may be confined to cases in which the national court claims that there is a genuine conflict with Community law (2 above), or it may be broader: (*Oscar Bronner*).

The Court of Justice now faces unenviable choices. It could continue to rely on the reasoning articulated in the cases discussed above, although this would leave a number of uncertainties. A different option would be for the Court to move towards a new form of judicial co-operation, that sought to assist the Europeanisation project, without making admissibility strictly dependent on the formal criteria so far articulated. The problem here would be to develop criteria that are stable, and sufficiently generous to make judicial co-operation effective, whilst placing principled and policy-based limits on the willingness of the Court to act as an open advice shop. Another possible outcome is judicial pragmatism. The Court could continue to stretch Article 234, but in an erratic way. Where it wished to deal with a question, it could exercise light supervision over the question of admissibility: conversely, where it did not wish to deal with a question, it could emphasise those parts of its case-law that denied it jurisdiction. Given the history of the case-law on admissibility,[67] this outcome is the most likely.

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[66] '... it is understandable that a national court, even if it were competent solely to apply national law, should wish, especially where there is an effect on trade between Member States, to obtain guidance on the position under Community law ...': paragraph 24. In reaching this view, Advocate-General Jacobs took into account the uncertainty surrounding the relationship between Community and national law.

[67] See Barnard and Sharpston, note 55 supra.