The recovery of those costs and the recoverability of those expenses are governed by the provisions of national law applicable to the main action.

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 1 March 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 FEBRUARY 1973 [1]

Mr President,
Members of the Court,

In Case 40/69 (the well-known Turkey Tails Case), involving proceedings before the Bundesfinanzhof in Munich, the Court of Justice gave a preliminary ruling on 18 February 1970 (Recueil 1970, p. 69). Its ruling on costs, following its constant line in earlier cases, was that 'the costs incurred by the Commission of the European Communities and the Government of the German Federal Republic, which submitted their observations to the Court, cannot be reimbursed. With regard to the parties in the case, the proceedings before this Court are in the nature of a step in the proceedings pending in the Bundesfinanzhof. It is for that court therefore to make its own order as to costs.'

After the preliminary ruling was given, the Hauptzollamt Hamburg-Oberelbe (one of the parties in the case), withdrew its application for revision. All the Bundesfinanzhof had to do therefore was to make an order in respect of the costs of the proceedings. This was done by a decision of 29 April 1970 whereby the Hauptzollamt must bear the costs of the revision proceedings. A further decision of 21 July 1970 specified furthermore that the Hauptzollamt must also bear the costs of the proceedings before the Court of Justice of the European Communities.

On the basis of these facts, the Bollmann firm, respondent in the revision proceedings before the Bundesfinanzhof, requested that expenses to be recovered by them be fixed in such a way that, in respect of the proceedings before the

1 — Translated from the German.

Court of Justice of the European Communities, an award be made in their favour to cover two legal fees within the meaning of Paragraph 31 of the Bundesrechtsanwaltsgebührenordnung, that is a trial fee (Prozeßgebühr) and a hearing fee (Verhandlungsgebühr). The Clerk of the Finanzgericht in Hamburg competent for fixing costs pursuant to Paragraph 149 of the Finanzgerichtsordnung did not follow that line of thinking and awarded only a hearing fee in respect of proceedings before the Court of Justice of the European Communities (second line of Para. 2 BRAGO). The Finanzgericht, by a decision of 30 October 1970, rejected an objection made in the matter, founding its decision on the fact that, in accordance with Paragraph 139 of the Finanzgerichtsordnung, legal fees and expenses of an agent are recoverable. Paragraph 114 of the Bundesrechtsanwaltsgebührenordnung, together with the third section of that law, and in particular paragraph 31 thereof, define what can be treated as legal fees and expenses, to the effect that only one trial fee is due for any one case. This must also apply where a case was submitted to the Court of Justice of the European Communities by way of reference. Proceedings of that kind were in the nature of incidental proceedings, that is they were to be treated, with regard to costs, as part of the main action and not as a separate matter within the meaning of paragraph 13, Section 6, of the Bundesrechtsanwaltsgebührenordnung.

The Bollmann firm was not prepared to accept this decision, and consequently lodged a complaint with the Bundesfinanzhof. It founded its action on the view that a reference to the Court of Justice of the European Communities should be treated as separate proceedings. Although the Court of Justice of the European Communities left the apportionment of costs to the national court, this did not mean that such court was also to determine the scope of the recoverable costs. The recoverability of expenses incurred by the parties should rather be determined in accordance with the Rules of Procedure of the European Court of Justice, and then only the amount of the costs determined in accordance with national law. This can clearly be deduced from Article 103 of the Rules of Procedure of the Court of Justice, which provides that Articles 44 *et seq* of the Rules of Procedure are applicable in a corresponding manner in respect of references for preliminary rulings, and hence also Article 73, in which the 'remuneration of lawyers' is clearly included among recoverable costs. The Finanzgericht was therefore wrong in failing to take into account Article 73 of the Rules of Procedure of the European Court of Justice.

Having regard to these arguments derived from Community law, the Bundesfinanzhof, which was hearing the complaint, again suspended the proceedings and, by an order of 8 August 1972, referred the following question for a preliminary ruling:

Where the Court of Justice has ruled that the decision as to costs in an application for a preliminary ruling is a matter for the national court, should

(a) the procedure for the recovery of costs

(b) the recoverability of expenses necessarily incurred by the parties for the purposes of the proceedings, in particular the remuneration of lawyers,

be determined by reference to Community law (Articles 73 and 74 of the Rules of Procedure of the Court of Justice) or by reference to the rules laid down by national law in the matter?

I shall now give my opinion on the problem thus set out.

When considering this case, it must first be borne in mind that Community law contains few provisions concerning proceedings for preliminary rulings and that, in particular, special provisions concerning costs do not exist. The only relevant provision in the Rules of

Procedure of the Court of Justice is that of Article 103, which only states that Articles 44 *et seq* of the Rules of Procedure shall apply in a corresponding manner.

If one asks oneself what this reference to Articles 44 *et seq* means, it becomes clear that this is meant to apply in the first place to the continuation of the proceedings after the written part is completed, and thus to the drawing up of a preliminary report as to whether a preparatory inquiry is necessary and to the oral procedure which follows, with statements by the parties and the opinion of the Advocate-General. There can at any rate be no doubt that not all the provisions which follow Article 44 in the Rules of Procedure can properly be applied in a corresponding manner in the case of a reference for a preliminary ruling. One need only think of Article 55 (2) (deferment of a case on a joint application by the parties), a provision which is clearly designed for proceedings where the parties have a certain measure of control. Mention can be made also of Article 67, relating to the supplementing of a judgment, which is equally not appropriate since, in reference proceedings, there is no submission by the parties, but only the possibility of making observations on certain points. Or there is Article 77 of the Rules of Procedure (parties reaching a settlement of the dispute before the Court), a rule which requires no further explanation to show that it can clearly have no place in reference proceedings. Last but not least, reference can be made in this connection to several previous cases of a similar nature. It was, for example, already held in case 6/64 (Recueil 1964, p. 1141) that there can be no intervention in reference proceedings, so that, there too, application in a corresponding manner of Article 93 of the Rules of Procedure is not possible. Furthermore, it has already been pointed out in previous cases that, in cases of reference for a preliminary ruling, there can be no interpretation of a judgment upon application by the parties, and there is thus no question of applying in a corresponding manner Article 102 of the Rules of Procedure (Case 13/67 (Recueil 1968, p. 275).

The Court of Justice has consistently held the view in previous cases that, in respect of reference proceedings, no decision as to costs pursuant to Article 69 of the Rules of Procedure was to be given by the Court of Justice. This is not based on the fact that the proceedings are not formally closed (in actual fact the reference proceedings as such are concluded by the preliminary ruling of the Court of Justice); what is important is that we do not have to deal with parties and that frequently there is no question of a successful and an unsuccessful party. Only the court referring the case can decide as to the successful party in the concrete dispute, and therefore the decision as to costs, to be meaningful, should also be left to that court, at least as regards the costs of the parties in the main action who took part in the reference proceedings. This practice of the Court of Justice coincides with that of the Italian Supreme Constitutional Court — a fact which some may find comforting. That Court clearly does not rule as to costs when a matter is referred, but leaves this to the judge who hears the case (Cf. Article 19 of 'Norme integrative per i giudizi davanti alla Corte Costituzionale' of 16. 3. 1956). This is in essence not disputed by the parties in the present case.

From this undisputed and — it should also be said — indisputable starting-point, it must then be quite obvious that, similarly, Article 73 of the Rules of Procedure, which lays down what can be regarded as recoverable costs, with particular regard to its second subparagraph on 'expenses incurred by the parties', must likewise be treated as not applicable in reference proceedings. That Article also is clearly intended to apply to disputes in which there are 'parties', and seen in that light is obviously closely related to the decision as to costs under Article 69 of the Rules of Procedure. It would seem, at the very least, artificial to deal with

the question in two separate ways, that is to leave the decision as to the apportionment of costs to the competent national court, and to leave the matter of recoverability, that is the scope of the liability to costs, to be decided under Community law with the Court of Justice being brought in. To justify this it is at any rate not possible to point to a situation arising in very different circumstances under national law, where, likewise, one court rules on the apportionment of costs and another (subordinate) court fixes the costs in respect of the particular case, both of course under the *same* law, which is what the complainant has done. As has been thought right by both the Federal Government and the Commission, where there is no special Community rule it must be regarded as correct for the decision as to costs in cases of reference for a preliminary ruling to be made entirely in accordance with national law, including therefore the question of recoverability of lawyers' fees.

If this applies to the question of substantive law, it must consequently be accepted in respect of the application of the related Article 74 of the Rules of Procedure, i.e. the provision whereby, if there is a dispute concerning the costs to be recovered, the Chamber to which the case has been assigned shall, on application by the party concerned and after hearing the opposite party and the Advocate-General, make an order, from which no appeal shall lie. In fact, what is involved here is likewise a provision the application of which is closely linked with the decision as to costs under Article 69 of the Rules of Procedure, and, in particular, one cannot escape the conclusion that we are dealing here in the main with a *procedural* measure clearly intended to make possible the implementation of the principles set out in Article 73.

Against this, it is true, a number of points can be put forward which are certainly not insignificant.

As is well known, the Court of Justice also determines recoverability of costs in proceedings for preliminary rulings, in so far as it declares costs incurred by the Member States and institutions of the Community involved to be irrecoverable. This is based on the general provisions of Article 35 of the Statute and the view that it is fully justifiable, having regard to the basic significance of case law in proceedings for preliminary rulings, that part of the resulting costs be paid from public funds. It is moreover conceivable that, on some future occasion, after a measure of inquiry is carried out in the course of proceedings for a preliminary ruling, which could arise in particular in respect of proceedings on the validity of Community instruments, mention could be made of the recoverability of that kind of costs. The question of recoverable costs, in other words, is in this connection within the competence of the Court of Justice.

Furthermore, the following two considerations arise.

One can certainly be inclined to say that it would be desirable for the principle to be recognized that the persons concerned in a reference should, under certain conditions, be able to recover the costs arising from the reference proceedings. The persons concerned (that is the parties in the case) have indeed an important role to play in the process leading to a ruling in cases where a matter is thus referred. The readiness to fulfil that role could however be impaired, and thereby the development of European law prejudiced, if in fact no provision were made for expenses incurred to be recoverable where appropriate (as is apparently the case in accordance with German law on legal fees).

One would also be inclined to say that it is desirable that in this connection a *single Community rule* should apply so that the persons concerned in reference proceedings incur the same obligations and obtain the same advantages irrespective of the place of origin of the

main action. This would however only be so where Community law provides a yardstick for the determination of recoverable costs.

However, one cannot avoid reaching the following conclusions.

In respect of the first two points put forward, it must be realized that in this matter two absolutely unavoidable cases of decisions as to costs are involved, which do not necessarily require to be extended generally.

In respect of the last two considerations put forward, it must be conceded that these are considerations of *legal policy,* which could usefully serve as a basis for legislation, but that no compelling principles of law are discernible which would enable concrete inferences to be made in respect of the laws in force. In saying this, I think of the fact that, as regards the law relating to legal fees, there is similarly no uniformity within the Community. I just refer to the fact that not all Member States have legal rules governing recoverability of legal fees, and I refer too by way of example to Article 71 of the Rules of Procedure, which states that costs incurred by a party in enforcing a judgment or order of the Court are to be refunded on the scale in force in the State where the enforcement takes place. In the present state of integration, divergences of that kind must obviously be accepted, since they are not accompanied by heavily prejudicial effects for the life of the Community. On the other hand, it should also be noted that, when making a comparison with corresponding national procedures, the conclusion of principle can definitely not be drawn that expenses must necessarily be recovered by the parties in cases of reference. In the Federal Republic of Germany, in proceedings for testing the constitutionality of laws before the Federal Constitutional Court, i.e. proceedings originating before other Courts, the rule is that the Federal Constitutional Court makes at its discretion an order on whether costs are recoverable (paragraph 34 of the Bundesverfassungsgerichtsgesetz). In connection with matters referred to the full court in the supreme courts of justice of the Federal Republic, it is even expressly laid down that extra-judicial costs incurred by the parties to the main action, involved in proceedings before the full court, are not recoverable (paragraph 17 of the Law to ensure uniformity in the rulings of the higher courts of justice of the Federal Republic — Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes — of 19 June 1968). Whilst, however, there is no basic principle whereby costs in cases of that kind are always recoverable, the conclusion must be reached also in respect of Article 73 of our Rules of Procedure — to come back to it — that the Article has a general significance, to which attention must be paid equally in reference proceedings.

Since furthermore, the impression may prevail — although this is of course not a decisive factor — that an interpretation of the Bundesrechtsanwaltsgebührenordnung enabling persons concerned in reference proceedings to expect a satisfactory settlement of the question of recoverability of their expenses cannot be rejected out of hand; since, moreover, attempts are being made to amend the Bundesrechtsanwaltsgebührenordnung in such a way that proceedings before the Court of Justice of the European Communities would be subject to a special treatment, it is possible, in my opinion, to keep to the view that there is no compelling reason for adopting the argument put forward by the complainant for application of Articles 73 and 74 of the Rules of Procedure in a corresponding manner.

In agreement with the views put forward by both the Federal Government and the Commission, the question referred by the Bundesfinanzhof can

therefore be answered to the effect that, following a preliminary ruling of the Court of Justice of the European Communities, the national courts must not only rule on the apportionment of costs as between the parties in the main action, but that they are also competent to determine costs and rule as to recoverability of expenses.