amounts — in so far as to apply national law would alter the effect of the Community rules relating to the basis of assessment, the manner of imposition or the amount of the charge in question.

2. There is no legal basis under Community law for exemption from monetary compensatory amounts on grounds of natural justice.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 28 June 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 24 MAY 1977 [1]

Mr President,
Members of the Court,

On 6 November 1971 the plaintiff in the main action, who is already known to us from the reference for a preliminary ruling dealt with in Case 5/73 (judgment of 24 October 1973, *Balkan-Import-Export GmbH* v. *Hauptzollamt Berlin-Packhof* [1973] II ECR 1091), concluded with the Bulgarian national trade department 'Rodapaimpex' a contract of purchase expressed in German marks for the delivery of Bulgarian sheep's milk cheese. The goods were imported into West Berlin on 24 March 1972. In pursuance of the provisions of Regulation No 974/71 (OJ English Special Edition 1971 (I), p. 257), which was adopted as a result of the floating of the rates of exchange of the German mark and the Dutch guilder effected in May 1971, monetary compensatory amounts were levied on that importation. The rate applied was that which was in force on the day of importation and which had been fixed by the Commission in Regulation No 548/72 of 16 March 1972 (JO L 66, p. 1).

1 — Translated from the German.

As it considered the levy of this amount to be unlawful, the plaintiff brought an action before the Finanzgericht Berlin against the Hauptzollamt Berlin-Packhof, which had issued the notice of recovery. That action resulted in the reference for a preliminary ruling in the aforementioned Case 5/73, which concerned the validity of Regulations Nos 974/71 and 548/72 as well as the calculation of the monetary compensatory amount which had been applied at the time in question. In its judgment of 24 October 1973 the Court held that examination of the questions referred had not revealed 'any element capable of affecting the validity of Regulation No 974/71 of the Council nor of Regulations Nos 1013/71, 1014/71 and 548/72 of the Commission, fixing the compensatory amounts applicable during the period indicated [that is, on 24 March 1972] in the questions referred'. However, the judgment of the Finanzgericht which followed on 7 February 1975 did not altogether adhere to the terms of the preliminary ruling. It rather concentrated on the compensatory amount applicable when the contract was concluded and reduced the amount owed by the plaintiff by a corresponding sum. As the tax authorities considered that the preliminary ruling given by the Court of Justice had not been correctly acted upon an appeal was made to the Bundesfinanzhof on a point of law and that appeal is apparently still pending before that court.

Even before that appeal was lodged, that is, in February 1974, the plaintiff had made another attempt to obtain exemption from the amount due. It had applied to the Hauptzollamt Berlin-Packhof for exemption from and repayment of the monetary compensatory amounts on the basis of Article 131 of the Reichsabgabenordnung which at that time was worded as follows:

'Total or partial exemption from taxes and other pecuniary charges may be granted in individual cases where, in a given case, their recovery would be contrary to natural justice. On the same condition taxes and other pecuniary charges which have already been paid may be refunded or credited.

For certain categories of similar cases directives may be laid down for the application of paragraph (1) by analogy.

The powers available under paragraphs (1) and (2) shall be exercised by the highest financial authority of the public body responsible for administering the tax or by the departments designated by that body . . .'

In German law such a discretionary exemption from taxation imposed by the State may be granted on several grounds. First, it may be granted on grounds of natural justice of a subjective nature, such as, for example, personal living circumstances or financial difficulty. Secondly, it may be based on grounds of natural justice which are said to be objective in nature. Such grounds exist, first — I refer in this connexion to Section B II of the directive on natural justice drawn up by the Bundesfinanzministerium (Federal Ministry for Economic Affairs) in 1974 — where it may be concluded from the will of the legislature that if the question to be settled had been dealt with expressly, it would have been settled along the lines of the measure of natural justice envisaged. The aim is to arrive at a just solution in specific cases and unusual situations which were not foreseeable by the legislature. Secondly, so-called objective grounds of natural justice cover cases in which a failure to observe the proper procedure or the expiry of a time-limit for bringing an action give rise to the imposition of a sum owed by the way of tax which is materially unjustified.

In making its application the plaintiff relied solely on objective grounds of

natural justice. It referred to the spirit and the aim of the Community rules on monetary compensation and maintained that, in its case, the imposition of the charge led to a result which was not desired by Community law. That application was, however, rejected by the Hauptzollamt on the grond the the effects of the levying of the amount in the plaintiff's case were consciously accepted by the Community legislature. The plaintiff protested against that decision to the Oberfinanzdirektion Berlin. As that protest was also rejected the plaintiff finally brought an action before the Finanzgericht Berlin for the repayment of the monetary compensatory amounts.

In the opinion of the Finanzgericht the grant of an exemption on grounds of natural justice cannot be ruled out *a priori* since, as a system of taxation, monetary compensation is clearly flat-rate in nature. However, it feels that the existing case-law on the subject and the opinion expressed in academic legal writing raise certain questions. For that reason it suspended the proceedings by an order of 23 November 1976 and requested the Court under Article 177 to give a preliminary ruling on the following questions:

1. Is a national customs authority entitled and, if necessary, obliged on grounds of natural justice, to deal with applications for exemption from charges due to the Community (in this instance, monetary compensatory amounts) on the basis of national law (in this instance, on the basis of Article 131 of the Reichsabgabenordnung)?
2. If the answer to the first question is in the negative, is there any legal basis (possibly under Community law) for exemption from payment of a monetary compensatory amount on grounds of natural justice?
3. What in relation to the question to be decided here, is the legal principle resulting from such a legal basis if any?
4. Which authority, if any, is empowered to take a decision on a question concerning an exemption on grounds of natural justice?

My view of these questions is as follows:

1. In relation to the first question I must first clarify two points.

It is clear from the context that the phrase 'charges due to the Community' is not to be understood literally as relating to charges actually payable to the Community. That was not the case at that time as regards monetary compensatory amounts. It can therefore only refer to charges imposed under Community law.

Furthermore, it is clear from the facts that the question may be confined to the problem of the grant of exemption on objective grounds of natural justice, in particular, in cases where the imposition of the charge is alleged to conflict with the aim of the law and is contrary to the intention of the legislature. In the present case, therefore, it is unnecessary to discuss the question whether an exemption may be granted on grounds of a subjective nature or by reason of the effects of provisions of a formal and procedural nature.

The plaintiff in the main action suggests that a positive answer be given to the question when understood in that way. It regards it as important that the Community regulation only contains an authority to levy monetary compensation. If follows, therefore, that the duties imposed in pursuance of the German regulation of 14 May 1971 on the imposition of a compensatory amount to protect German agriculture were charges governed by national law. It further follows that the grant of an exemption from such charges on grounds of natural justice is governed by German procedural law. As regards the procedural law it is established (Case 33/76, *Rewe-Zentralfinanz AG and Rewe-Zentral*

AG v *Landwirtschaftskammer für das Saarland,* judgment of 16 December 1976), that the Member States may develop their own procedural law so long as no Community rules have been adopted. Reference must also be made to the case-law concerning binding customs tariff notices which may be issued under German law. Such notices have been declared to be lawful even though they may in certain circumstances result in divergencies from the tariffs required under the Common Customs Tariff. An exemption on grounds of natural justice from charges provided for by Community law is a similar type of measure adopted in implementation of the law.

A contrary view is held by the Commission and by the Government of the Federal Republic of Germany. They — and in particular the Commission — maintain that the Member States have no power to adopt regulations governing exemption on objective grounds of natural justice since the Community has made use of the powers attributed to it by the Treaty and has fixed all the conditions necessary for the imposition of charges. In those circumstances it cannot be accepted that the Member States may, by the adoption of national measures, affect the scope of the Comunity rules. That principle has already been stressed on many occasions in comparable cases.

In order to assess that difference of opinion I consider it necessary to begin with the findings made in the judgment in the abovementioned Case 5/73. In that judgment it was emphasized that the Community rules on monetary compensatory amounts, which are to be found in Regulation No 974/71, were adopted on the basis of Article 103 of the EEC Treaty, that it had been necessary to avoid the adoption of unilateral measures and that the measures adopted pursuant to Article 103 were essential to protect the aims and machinery of the common agricultural policy. Since the validity of the Community rules, and in particular the implementing provisions adopted by the Commission under Regulation No 974/71, has not been called in question it is clear that the Community institutions made a proper use of the powers conferred on them by the Treaty.

It must also be remembered that although Regulation No 974/71 only provided the Member States with an authorization, Article 7 expressly stipulated that partial or temporary use might not be made of the authoritzation provided for in the regulation; it was therefore impossible for exemptions to be granted by means of national measures.

Finally, it must not be forgotten that in its judgment in Case 5/73, in which it considered the validity of Regulation No 974/71 and the Commission regulation which fixed compensatory amounts for the various products, the Court expressly held that no objection could be made to the fact that a single overall criterion had been selected for fixing the compensatory amounts. It was expressly stated that the fact that the compensatory amounts do not always correspond to the effects in the monetary field of the revaltuation of the German mark does not constitute a violation of the principle of proportionality.

As against that the plaintiff in the main action is now applying for an exemption on grounds of natural justice from the compensatory amounts fixed in accordance with Community law. In support of the application of national rules of natural justice it refers to the general purpose of the Community legislation and, in that respect — as the Commission has rightly pointed out — its arguments are to a large extent the same as those put forward in Case 5/73, *inter alia,* that the revaluation of the German mark had no influence on the transaction concluded by the plaintiff since that contract had been concluded on the basis of the mark.

Thus, what is at issue is nothing less than the modification of a Community rule which forms the subject of a directly applicable regulation which — as is stated in the judgment in Case 43/72 (judgment of 24 October 1973, *Merkur-Außenhandels-GmbH* v *Commission of the EEC* [1973] II ECR 1055) — is of global application. This would amount to interfering in the area of application of that regulation and to challenging to a certain extent the application of Community law.

In my opinion it is not at all clear how the foregoing can be reconciled with the rules governing the distribution of powers between the Community and the Member States, as well as with the precedence of Community law and the principle that it shall be given uniform application.

In this connexion the plaintiff's reference to the judgment in Case 33/76, in which it was held that in the absence of any Community rules it is for the domestic legal system of each Member State to determine questions concerning procedural law, is clearly inappropriate. The present case does not concern the acceptance of consequences with regard to substantive law as a result of a failure to comply with national provisions of a formal and procedural nature: it concerns an exemption on grounds of natural justice solely on the basis of considerations of substantive law, that is to say, with reference to the general purpose of the law in question.

The plaintiff's reference to the case-law on the admissibility of binding customs tariff notices issued by the national customs authorities (Case 30/71, *Kurt Siemers & Co.* v *Hauptzollamt Bad Reichenhall,* judgment of 24 November 1971, [1971] II ECR 919) is no more convincing. Such notices merely constitute an anticipatory application of Community law, in the process of which errors may naturally occur, while an exemption granted on grounds of natural justice from charges fixed in accordance with Community law would constitute a derogation from that law and would result in modifying it.

Against that it is useful to bear in mind other judgments given in relation to comparable circumstances which have ruled out the application of national laws on natural justice or of other national rules which depart from Community law. This was true of Case 31/70 *(Deutsche Getreide- und Futtermittel-Handelsgesellschaft mbH* v *Hauptzollamt Hamburg-Altona,* judgment of 15 December 1970, [1970] II ECR 1055) which concerned the problem of the imposition of levies on maize which had lost value as a result of water damage. In that case the reference by the Netherlands Government to the possibility under Netherlands law of reducing the rate of charge on grounds of natural justice was impliedly but none the less clearly stated to be irrelevant. Reference must also be made to the judgment in Case 18/72 *(NV Granaria Graaninkopmaatschappij* v *Produktschap* v *Produktschap voor Veevoeder,* judgment of 30 November 1972, [1972] II ECR 1163). In that judgment it was stated quite clearly that the national authorities could not apply national law in order to grant exemption from levies on grounds of natural justice. The judgment states unequivocally that it is incompatible with the distribution of powers between the Member States and the Community for a Member State of affect the application of Community law by means of national measures. Finally, let me refer to the judgment in Case 50/76 *(Amsterdam Bulb BV* v *Produktschap voor Siergewassen,* judgment of 2 February 1977) in which — admittedly in a case of a rather different nature — the Court ruled that national authorities could not authorize any derogation from the minimum prices fixed under Community law.

As a result of all the foregoing I consider that a negative answer must be given to

the first question and that it must be held that, as regards monetary compensatory amounts, which are entirely governed by Community rules, a Member State has no power to adopt rules providing for exemption on grounds of natural justice and that it is irrelevant in that connexion whether the charges are payable to the Community or to the Member States.

2. The second question asks whether there is any legal basis under Community law for the exemption on grounds of natural justice applied for by the plaintiff. As the Commission has rightly observed, a distinction must be drawn here between the written law and the unwritten principles of law which may emerge from a concordance between the national laws of the Member States in this matter.

(a) First, as regards written Community law, the Commission has shown that it does not contain any general provision concerning natural justice comparable to Article 131 of the Reichsabgabenordnung. Reference is made to principles of natural justice only in certain individual cases and in specific provisions, in particular as regards matters which relate to events on the currency markets.

In that connexion the Commission refers to Regulation No 1608/74 (OJ L 170, 1974, p. 38). Under the terms of that regulation the Member States are empowered to waive monetary compensatory amounts introduced or increased as a result of the adoption of unforeseeable monetary measures. However, it is important to note that that regulation only applies to imports and exports effected since 4 June 1973 pursuant to contracts concluded before the monetary measures were adopted — which is not the case in the main action. The position is the same as regards the system established by Regulation No 2966/74 (OJ L 316, 1974, p. 5) which, in selation to temporary measures following suspension of the application of Article 4 (a) (2) of Regulation No 974/71, only provides for an authorization in relation to binding contracts, and as regards Regulation No 2042/73 (OJ, L 207, 1973, p. 34), which applies to unforeseeable situations which result from a variation in the system.

Furthermore, as regards the law relating to documentation, reference must also be made to certain rules which exclude the forfeiture of the security in cases of *force majeure,* or to other texts such as, for example, Regulations No 1134/68 (OJ English Special Edition 1968 (II), p. 396) and 556/76 (OJ L 65, 1976, p. 12) which provide for the cancellation of documents or the adoption of appropriate alternative measures in the case of alteration of amounts fixed in advance. Similar provisions, which provide for the adjustment of refunds after the *de facto* devaluation of the dollar, are also contained in Regulation No 842/73 (OJ L 82, 1973, p. 23). It is clear, however, that no principle having any significance for the main action can be deduced from those provisions.

It may therefore be stated with justification that no provision can be found in written Community law along the lines of Article 131 of the Reichsabgabenordnung which, be it only by analogy, might justify the grant of an exemption from monetary compensatory amounts on grounds of natural justice.

(b) As regards unwritten Community law, it is natural to refer first to the Commission's proposal for a regulation on the repayment or remission of import duties or export duties. Although it is not yet law its content may be of interest, from the point of view of those of its rules which, since they concern matters on which the legal position is the same in all the Member States, may now, in the opinion of the Commission, be regarded as customary Community law. That view appears to be correct as regards exemptions granted in the case of

charges which have been wrongly fixed as the result of an error of calculation or transcription or of other types of error, as regards exemptions granted in the case of goods which are defective or do not meet the terms of the contract, as well as exemptions granted in a number of special situations which are listed in Section E of the proposal for a regulation. However, that finding is of little interest here, since clearly the case which forms the subject of the main action does not belong to one of the categories just described.

In addition, the Commission has shown by means of a thorough study of comparative law that it is impossible to deduce from the legal orders of the Member States any general principle of law which would enable a provision such as Article 131 of the Reichsabgabenordnung to be regarded at this time as an integral part of Community law.

In fact, with the exception of Luxembourg law, a similar principle is only to be found in the Netherlands. Netherlands law not only provides for specific circumstances in which exemption form or repayment of duties may be ordered but also contains a general provision according to which the approprivate Minister may take such a discretionary decision on grounds of natural justice.

In Great Britain, on the other hand, it is impossible for an exemption to be granted on grounds of natural justice. The relevant provisions merely list a series of circumstances in which no sum is owed by way of charge and in certain cases an exemption is possible only if certain specific legal conditions are satisfied. Similarly, Italian law makes no provision for any discretionary power to grant an exemption on grounds of natural justice or for any exception on similar grounds to an obligation to make payment. The relevant provisions merely list specific circumstances in which an exemption is granted, but they are not based on grounds of natural justice in favour of the person liable to pay the charge. French law goes so far as to prohibit the granting of any exemption from charges. An exception in the form of a discretionary exemption or a reduction exists only in relation to direct taxes, that is, it does not apply to customs duties and similar charges, and it is at all events not made on objective grounds of natural justice. Finally, to the extent to which an exemption may be granted under Belgian, Danish or Irish law, the possibility exists only in clearly defined circumstances which, in addition, clearly fall rather within the framework of procedural law. For further details on these points I would refer to the statements contained in the observations of the Commission and to the table annexed thereto.

In fact, the only conclusion which may be drawn is that Community law contains no general legal principle corresponding to Article 131 of the Reichsabgabenordnung. In so far as the proposal for a regulation in question goes further and envisages rules which, to say the least, resemble very closely those contained in Article 131 of the Reichsabgabenordnung, it is clearly creating new Community law. For that reason it is also impossible to speak of a temporary lacuna which would enable the principles contained in that German provision to be taken into account immediately.

The result of the foregoing is that the second question must also be answered in the negative. At the same time it is clear that questions 3 and 4 need not be considered.

Thus, for the court making the reference the conclusion is that the refusal of the exemption applied for by the plaintiff on grounds of natural justice cannot be criticized from the point of view of Community law. Furthermore, having

regard to the relevant case-law of the Bundesfinanzhof, according to which an exemption on grounds of natural justice may not have the effect of mitigating consequences which have been *accepted* by the legislature (see the judgment of 2 September 1964), it might even be added that in the present case the conditions required under German law for such an exemption to be granted were not in fact fulfilled. It is clear from the case-law referred to earlier (the judgment in Case 5/73) that the Community rules on monetary compensatory amounts made allowance for the legal consequences contested by the plaintiff since, in the interests of introducing a speedy and effective measure, it consciously accepted the fact that compensatory amounts were to be levied in cases in which the effects of the monetary measures could not be discerned. It is therefore impossible in the case of the plaintiff to speak of unforeseeable hardship.

3. In conclusion, I propose that the following answer be given to the request for a preliminary ruling from the Finanzgericht Berlin:

(a) National authorities are not entitled to deal with applications for exemption from monetary compensatory amounts, imposed in pursuance of Community legislation, on the basis of national rules of natural justice, where such applications invoke objective grounds of natural justice which involve an element of discretion.

(b) At present there is no general basis in Community law for the grant of an exemption on objective grounds of natural justice from charges fixed in accordance with Community law.