restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question legal relationships arising and established prior thereto.

2. **A special system of national rules relating to the collection of Community charges and dues which restricts the powers given to the national authority to ensure the collection of those charges as compared with the powers granted to the same authority in respect of national charges or dues of the same kind is not in accordance with Community law.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 9 JANUARY 1980 [1]

Mr President,
Members of the Court,

The cases which form the basis of the present proceedings for a preliminary ruling are concerned with additional charges in respect of levies on imports to Italy of beef and veal. The following points are essential for an understanding of the case.

Under Italian law, namely under Article 6 (1) of the Introductory Provisions to the Customs Tariff (Decree No 723 of the President of the Republic of 26 June 1965), the rate of customs duty to be applied to imported goods is that in force on the date on which the import declaration is accepted by the customs authorities. Under Article 6 (2) in its original form, in the event of a change in duty after the date referred to in paragraph (1), the customs authorities could, at the request of the importer, apply the lowest rate of duty, provided that the goods had not been released to the

1 — Translated from the German.

importer. This rule was applied by the Italian authorities both as regards customs duties and as regards levies on agricultural products.

After the Court had laid down in its judgment of 15 June 1976 in Case 113/75 *(Giordano Frecassetti* v *Amministrazione delle Finanze dello Stato* [1976] ECR 983) that, in regard to the determination of the levy to be applied to cereals, the rate of levy to be charged had to be that which was in force at the date upon which the import declaration was accepted by the customs authorities, the Italian Government, by Decree No 695 of the President of the Republic of 22 September 1978, supplemented the above-mentioned Article 6 (2) of the Introductory Provisions to the Customs Tariff by a provision which made it clear that the possibility of applying the most favourable rate was not to be open in the case of agricultural levies or other charges laid down within the context of the common agricultural policy. Further, Article 3 of the said decree stated that the provision excluding levies from the option of applying the most favourable rate was to enter into force as from 11 September 1976, the date upon which the judgment in the *Frecassetti* case had been published in the Official Journal of the European Communities.

However, before the date of that judgment the Italian Finance Administration had already given notice to three undertakings, Salumi, Vasanelli and Ultrocchi, to pay additional levies for beef and veal imports because the more favourable rate, which came into force after the acceptance of the import declaration and before the release of the goods, had, in the absence of a written request, been mistakenly applied.

Thereafter the Tribunale, Genoa, to which the three undertakings had appealed, sustained their complaint and declared the assessments to levy to be unwarranted. The appeal thereupon lodged by the administration was dismissed by the Corte d'Appello [Court of Appeal] on the ground that the determination of the rate of levy for agricultural products was dependent on the provisions, not of national customs law, but of Community law, according to which the rate to be charged in every case was that applicable at the date of the importation, namely, that for the date on which the goods finally and irrevocably entered the customs territory and were cleared for free circulation.

Against this judgment the Italian Finance Administration appealed on a point of law to the Corte Suprema di Cassazione [Supreme Court of Cassation] where it argued *inter alia* that — as was demonstrated in particular by the judgment which had meantime been delivered in the *Frecassetti* case — under Community law, which the court below had held to be applicable, the decisive date for the determination of the rate to be charged was that on which the customs authorities accepted the import declaration. In excluding the application of the lower rate for agricultural levies from 11 September 1976 onwards and thereby simultaneously directing the application of the provisions of national law which until then had been in conflict with Community law, Article 3 of Decree No 695 of the President of the Republic of 22 September 1978 was not incompatible with Community law, which directly regulated agricultural levies. In enacting the said provision the national legislature had merely accepted a principle of Community law whereby, when the

construction of a provision of Community law was in doubt and when, as a consequence of a uniform but erroneous interpretation on the part of those concerned with it, payments which were not due had been in the meantime made or charges which were due had not been collected, the correct application of the rules of Community law was only to be insisted upon as from the date upon which the rules of Community law had been authoritatively interpreted. It was said that both the Court in its judgment of 8 April 1976 in Case 43/75 *(Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455) and the Commission in its Memorandum No 75425312 of 30 May 1975, which was issued as a result of the judgment of the Court of 12 November 1974 in Case 34/74 *Société Roquette Frères* v *French State,* [1974] ECR 1217, had been guided by that principle.

On the basis of these submissions the Corte Suprema di Cassazione, to which appeal was made, came to the view that the said Article 3 of Decree No 695 of the President of the Republic might, in principle, be construed in two ways: either the mention of the date was of legislative significance only in the "positive" sense of meaning that the rules for the period antecedent thereto were not affected, or else the mention of the date had significance in law also in the "negative" sense of meaning that, despite the judgment in the *Frecassetti* case, the Italian administration was debarred from making additional charges, for the period up to 11 September 1976, in respect of the difference between the amount of levy applicable on the day of importation and the actual amount charged by applying the rule relating to the most favourable rate. Accordingly, by orders of 11 January 1979 that court stayed the proceedings and in pursuance of Article 177 of the EEC Treaty referred the following questions to the Court of Justice for a preliminary ruling:

"(a) For the purpose of Article 177 of the EEC Treaty where, in respect of imports and with regard to relationships as yet undefined according to their own national law, the national authorities of a State have charged amounts which they should not have charged or, on the other hand, not levied amounts which they should have levied pursuant to the Community provisions applicable in that sector according to the interpretation subsequently placed upon them by judgment of the Court of Justice, does that judgment also apply to such relationships within the domestic legal system of the Member State or not, or does it apply subject to specific limits and on specified conditions: if the latter is the case, what are those limits and conditions?

(b) Also for the purposes of Article 177 of the Treaty, is it prohibited or required by Community law or irrelevant in relation thereto that in respect of such relationships those concerned are empowered under national law to institute proceedings to claim or recover, on the basis of the interpretation provided by the judgment of the Court of Justice, amounts due but not collected or amounts paid in error?"

On these matters my opinion is as follows:

The first question is concerned with the temporal scope of a judgment in which the Court has interpreted a provision of Community law by way of a preliminary

ruling. The court making the reference wishes to have clarified the question whether a provision of Community law has to be applied, with the construction given to it by the Court, to a factual situation occurring before the date of the interpretative judgment given pursuant to Article 177 of the EEC Treaty and whether such an application is not excluded by other principles of Community law.

Under the second question the court making the reference seeks to know whether and to what extent national law must give to those concerned the power to enforce by way of legal proceedings rights arising out of that provision.

Since both questions are closely connected it is convenient to examine them together.

As I have already mentioned, in Case 113/75 *(Frecassetti)* the Court made clear that in applying both of the regulations relating to the market in cereals, (Regulation No 19 of the Council of 4 April 1962, Journal Officiel of 20 April 1962, p. 933, and Regulation No 120/67/EEC of the Council of 13 June 1967, Official Journal, English Special Edition 1967, p. 33) the amount of levy to be charged may not vary from the amount of levy applicable on the day of importation. It then decided that the "day of importation" in terms of the said regulations is to be defined as that on which the import declaration of the importer is accepted by the customs authority. This interpretation, which the Court derived principally from the meaning and purpose of agricultural levies as such, must also apply to all other regulations on agricultural markets which similarly provide that *the* levy which applies on the day of importation is to be charged. An express provision to that effect was only included in the regulation on the market in beef and veal relevant to the main actions (Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) by Regulation (EEC) No 2838/71 of the Council of 24 December 1971 (Official Journal, English Special Edition 1971 (III), p. 1040), and was also absent from Regulation No 14/64/EEC of the Council of 5 February 1964 on the progressive establishment of a common market in beef and veal (Journal Officiel No 34 of 27 February 1964, p. 562) which had applied previously.

But independently of such an express provision the position could only have been the same previously. That follows from the meaning and purpose of levies, which, by levelling out fluctuations in the world market price, are intended in the main to support and stabilize the Community market. It readily follows therefrom that in regard to the rate of levy the focus must be on the point in time at which the goods exercise a decisive influence on the operation of the market in the Community, that is, on the time at which the goods enter the internal market of the Community. That point in time, as one knows since the judgment of the Court of 15 June 1976 in Case 113/75 *(Frecassetti),* is that at which the customs authority accepts the importer's declaration of intention to clear the goods for free circulation. Consequently, we have to consider whether the regulation on the market in beef and veal, interpreted in the manner above described, also applies to imports of beef and veal which took place before the said judgment.

The defendants in the main actions refer to the fact that, in the absence of any special provision of Community law, the criteria for assessing the temporal scope

of preliminary rulings are to be derived from the case-law of the Court. After an extensive analysis of that case-law, for the details of which I may refer to the written observations of the defendants, they come to the conclusion that it is impossible to come out in favour of a general *ex tunc* or *ex nunc* effect of interpretative judgments issued under Article 177 of the EEC Treaty. Rather, the solution to this question depends upon the special nature of the various individual cases as well as upon the various methods of interpretation and the consequences of the interpretation. If the interpretation is based upon the history of the origin of a provision or upon its wording the implication would be that the judgment in question has an *ex tunc* effect whereas, if the interpretation results from the taking into account of logical considerations and is based upon the evolution of the legislative or socio-economic background, that would point to an *ex nunc* effect. If the Court restricts itself to laying down the meaning of a provision, then it is to be assumed that the interpretation applies from the time of the provision's coming into force, whereas that may not always be assumed if a judgment aims at the further development and supplementation of Community law. In the former case, the defendants think, nothing is to be said against attributing retroactive effect to an interpretative judgment if it creates for the individual personal *rights* against the Member State which the courts of the State were bound to protect. If, on the other hand, the judgment imposes *duties* on private persons, it must be considered whether an *ex tunc* effect might not be in conflict with the basic requirements of legal certainty. It is true that, in principle, it may be inferred from the meaning of *ultra partes* judgments that they assume to that extent an *ex tunc* effect. On the other hand, the *erga omnes* effect, which, subject to certain limitations, is ascribed to interpretation by way of preliminary ruling, does not always admit of the conclusion that the judgment has retroactive effect. Thus the Court has preferred on occasions to answer the question of the date from which a particular provision produces direct effect with an ambiguous formula by laying down that the direct effect of the provision under construction came into being "at the latest" at a more precisely defined point in time. In its judgment of 8 April 1976 in Case 43/75 *(Defrenne)*, finally, the Court stated, following upon reference to certain exceptional circumstances in that case, that only a limited retroactive effect was to be given to its judgment.

In my opinion, however, for various reasons, these arguments cannot be upheld. As the Commission rightly stresses, Article 164 of the EEC Treaty assigns to the Court of Justice a purely judicial task, which excludes any legislative function. When the Court has before it a reference from a national court under Article 177 of the EEC Treaty for a preliminary ruling it may simply interpret Community law in a general and abstract fashion by declaring the meaning of the rule which falls to be interpreted. It must always be the aim of interpretation to put the purpose of the Treaty into effect in the best possible way. As I have already stated in my opinion in Case 61/79 *(Denkavit)* a judgment issued upon a reference for a preliminary ruling has always declaratory effect in so far as it lays down, with the assistance of customary methods of

interpretation, the meaning attaching to a provision from the beginning. The position is no different when the Court, with the assistance of comparative law, fills in lacunae in Community law. In doing so, it does not, as the defendants in the main actions contend, create judge-made law but simply elicits general legal principles which are common to the corpus of the laws of the Member States and which, as in particular the second paragraph of Article 215 of the EEC Treaty shows, are, as such, constituent parts of the Community legal order.

When, therefore, the Court by way of interpretation laid down in Case 113/75 *Frecassetti* that it followed from the *ratio* of levies that the rate of levy to be charged could be only the rate of levy which applied on the date on which the import declaration was accepted by the customs authority that construction must also apply to all other regulations on agricultural markets which similarly provide for levies and to that extent adopt the same purpose.

In a legal context, a judgment delivered by the Court pursuant to Article 177 cannot be without significance for other cases of a similar kind pending before the courts of the individual States. The importance for those courts of an interpretation given by the Court of Justice results *inter alia* from the fact that, according to the judgment of the Court of 27 March 1963 in Cases 28 to 30/62 *(Da Costa & Schaake NV, Jacob Meijer NV and Hoechst-Holland NV* v *Nederlandse Belastingadministratie* [1963] ECR 31), the national courts of final instance which intend to adopt that interpretation are relieved of the obligation to call again upon the Court of Justice and the fact that the inferior courts of the individual States, unless they make a new reference, may not adopt any different interpretation without misapplying Community law. Accordingly, the interpretation given by the Court of Justice extends also to the beef and veal market regulations, which have to be applied in the main actions, with the consequence that, in every case in which a party to litigation relies upon them, each national court has to apply the provisions in question subject to that interpretation from the date of their entry into force within the national territory. If the interpretation given by the Court of Justice were not to be applied to factual situations occurring prior to the delivery of the judgment, then, as the Commission rightly reminds us, that would amount to depriving a provision of any effect, or of giving it another meaning, as regards the past and thus to the fragmentation of Community law in terms of time, and so to a failure to observe the precept of legal certainty.

When, in some of its judgments, the Court comes by way of interpretation to the conclusion that a rule produces direct effect "at the latest" from a more precisely defined point in time, it does not thereby intend to limit the temporal scope of its judgment, but simply to make a finding as regards the point in time from which the rule in question produces *direct effect.* In the case of regulations, however, such a determination is not necessary since, under the second paragraph of Article 189 of the EEC Treaty, these are directly applicable in all Member States from the moment of their coming into force. Direct applicability in this sense means, as the Court pointed out in its judgment in Case 106/77 *(Amministrazione delle Finanze dello Stato* v *Simmenthal S.p.A.,* judgment of 9 March 1978, [1978] ECR 629) "that rules of Community law must be fully

and *uniformly* applied in all the Member States from the date of their entry into force and *for so long as they continue* in force." As the Court has emphasized in a consistent series of decisions, directly applicable provisions are the source of rights and duties for all concerned by them, whether Member States or individual persons. It follows further from direct applicability, linked to the principle of the precedence of Community law, "that every national court must, in a case within its jurisdiction, apply Community law *in its entirety* and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule" (Case 106/77 *Simmenthal).* Accordingly, in principle, any provision of a national legal system or any legislative, administrative or judicial practice which might impair the effectiveness of Community law is incompatible with those requirements which are the essence of Community law.

The demands of a uniform application of Community law entail, in regard to the main actions in this case, the result that, in principle, a supplementary charge may be made as respects levies which were undercharged owing to an erroneous application of the agricultural market regulations, and the enforcement of such rights must, in principle, be protected by the national courts. As I have already demonstrated in my opinions in Cases 68/79 *(Hans Just I/S* v *Danish Ministry for Fiscal Affairs)* and 61/79 *(Denkavit)* with reference to the case-law there mentioned, the courts of the Member States may enforce these rights only in accordance with the provisions of their respective national legal systems for such time as Community law has no rules of its own. In applying their internal law, as I also pointed out in the opinions just mentioned, the courts of the Member States have to observe the restrictions mentioned in Case 33/76 (*Rewe Zentralfinanz EG and Rewe Zentral AG* v *Landwirtschaftskammer für das Saarland,* judgment of 16 December 1976 [1976] ECR 1989); that is, that the conditions for enforcing rights deriving from Community law must not be less favourable than those for the prosecution of similar claims arising out of national law and enforcement at law must not be made impossible in practice.

In my view, and contrary to the submission of the defendants in the main actions, no ground at all exists for deriving from Community law further restrictions for the resolution of the present case, even if levies, which, on a proper construction of the beef and veal regulations, ought to have been applied previously, have to be collected retroactively. The basic rule that regulations are directly applicable — an elementary principle of Community law — may not be called in question by the protection of legitimate expectation when, as will later be demonstrated, the interests of the Community citizen may be safeguarded by other means. The following considerations lead me to this conclusion:

In applying the principle, recognized by Community law, of the protection of legitimate expectation, the decisive question is whether, through some measure or other adopted by the Community institutions, *unforeseeable* changes in or

encroachments on the affairs of citizens have been brought about and whether their anticipation represents a *legitimate* expectation and is therefore worthy of protection. As we have seen, the law was simply declared, but not created, by the Court's judgment in the *Frecassetti* case. It is true that, in contrast to its judgment in the *Frecassetti* case, in its decision in the *Defrenne* case the Court expressly limited the temporal effect of its judgment because, "as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past". But the different premises apart, it is impossible to infer from that judgment, as the defendants in the main actions and the Italian Government have sought to do, a *general principle* that the temporal effect of an interpretative judgment is restricted on grounds of legal certainty or of the protection of legitimate expectation even when that is not expressly so stated in the judgment.

Moreover in the *Frecassetti* case the Court only gave to the regulations on agricultural markets the content which might have been expected as a matter of general experience. In this case, however, it was to be expected that, as the Court had already made clear in Case 35/71 (*Schleswig-Holsteinische landwirtschaftliche Hauptgenossenschaft* v *Hauptzollamt Itzehoe,* judgment of 15 December 1971 [1971] ECR 1083) the relevant point in time for the application of the levy scheme must be the same in all the Member States, in order to exclude the danger that different rates of levy would be applied to goods which were in the same situation economically at the same date and the introduction of which into the territory of the Member States would have comparable effects on the market in agricultural products.

This interpretation means however that the Italian law, in so far as it was incompatible, could not be applied and accordingly that the charge which was made in accordance with it was itself unlawful. Consequently, if the supplementary charge for the difference is now claimed before the national courts, those courts too will have to consider whether the levy made by the appropriate authority was incorrect and whether that error might not have been detected by the party liable to pay the levy, in other words, whether the subsequent charge in the individual case, may not be barred by the principle of the protection of legitimate expectation, which is known to the legal systems of all the Member States.

In my opinion, it is appropriate to leave that consideration to be made by the national courts in accordance with their own rules of law for this reason also, that, as I have already stated in my opinions in Case 68/79 *(Just)* and 61/79 *(Denkavit),* because of the incomplete state of Community law, the other formal and substantive conditions for the claim have to be determined by national law. If therefore the additional charge is already barred by other conditions for or time-limits on the making of the claim which are also to be determined under the national law there is no need for recourse to the principle of the protection of legitimate expectation. If that is not the case, the national courts must be

able to resort to the principle of the protection of legitimate expectation if the charge to the lower duty was based, for example, on information issued by the appropriate authority, on general provisions the inapplicability of which was *later* established, or on error on the part of the appropriate authority which would not be apparent to an individual acting in good faith.

For these reasons I suggest that the questions referred to the Court for a preliminary ruling should be answered as follows:

1. In principle, Community regulations have to be applied by the national courts from the time of their coming into force with the interpretation given to them by the Court of Justice in a later judgment unless the Court, in formulating that judgment, has expressly restricted its temporal effect or the matter is referred afresh to the Court for interpretation.

2. National law must empower the parties concerned to enforce by way of legal proceedings rights arising from a regulation. The right to bring proceedings may, however, be restricted by, in particular, the national law on the protection of the legitimate expectation of the citizen.