JUDGMENT OF THE COURT
1 MARCH 1973 [1]

Paul G. Bollmann
v Hauptzollamt Hamburg-Waltershof
(preliminary ruling requested by the Bundesfinanzhof)

Case 62/72

1. *Preliminary questions — Procedure — Nature — Parties — Concept — Laws*
   (EEC Treaty, Art. 177; Protocol on the Statute of the EEC Court, Art. 20)
2. *Preliminary questions — Costs — Recovery — Expenses necessarily incurred by the parties — Recoverability — National law — Application*
   (Rules of Procedure, Art. 103 (1))

1. Proceedings instituted under Article 177 are non-contentious and are in the nature of a step in the action pending before a national court, as the parties to the main action are merely invited to state their case within the legal limits laid down by the national court.

   By the expression 'parties', Article 20 of the Protocol on the Statute of the EEC Court refers to the parties to the action pending before the national court.

2. In view of the essential difference between contentious proceedings and proceedings under Article 177 of the Treaty, one cannot, without express provision, extend to the latter proceedings rules laid down solely for contentious proceedings. The recovery of costs and the recoverability of expenses necessarily incurred by the parties to the main action for the purposes of an application for a preliminary ruling under Article 177 of the EEC Treaty are not covered by Article 103 (1) of the Rules of Procedure of the Court. The recovery of those costs and the recoverability of those expenses are governed by the provisions of national law applicable to the main action.

In Case 62/72

Application to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

PAUL G. BOLLMANN, Hamburg,

and

HAUPTZOLLAMT HAMBURG-WALTERSHOF,

on the interpretation of the provisions of the Rules of Procedure of the Court relating to costs,

THE COURT

composed of: R. Lecourt, President, R. Monaco (Rapporteur) and P. Pescatore, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen and A. J. Mackenzie Stuart, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. In its judgment of 18 February 1970 in Case 40/69, given at the request of the Bundesfinanzhof (Federal Fiscal Court) which was acting in revision proceedings in the case of Bollmann v Hauptzollamt Hamburg-Oberelbe, the Court of Justice decided 'that as these proceedings are, insofar as the parties to the action are concerned, in the nature of a step in the action pending before the Bundesfinanzhof of the Federal Republic of Germany, the decision on costs is therefore a matter for that court'.

Pursuant to this decision, the Bundesfinanzhof made an order for the costs of the revision proceedings against the Hauptzollamt after its withdrawal from the case. When the opposing party asked for reimbursement of the expenses incurred in the application for a preliminary ruling before the Court of Justice, the competent national authority considered that that party had a right to recover a hearing fee of 13/10ths, together with postage and travel expenses, but that the sum claimed under the heading of lawyers' fees should be reduced, as the revision proceedings and those before the Court were, in its opinion, part of one and the same action.

The firm of *Paul G. Bollmann* appealed against this decision.

When the appeal was rejected, the matter was brought before the

Bundesfinanzhof which, by order dated 8 August 1972, filed at the Court on 11 September 1972, decided to suspend proceedings and, under Article 177 of the EEC Treaty, to refer the following question to the Court:

'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, and

(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?'

2. The order referring the matter was received at the Registry of the Court on 11 September 1972.

The firm of Paul G. Bollmann, represented by Gabriele Rauschning, the Government of the Federal Republic of Germany, represented by Erich Bülow, acting as agent, and the Commission of the European Communities, represented by its Legal Adviser Heinrich Matthies, acting as agent, submitted their written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiries.

The oral observations of the Bollmann firm, the Government of the Federal Republic of Germany and the Commission of the EC were made at the hearing on 23 January 1973.

On that occasion, the Bollmann firm submitted a statement of case prepared by Peter Wendt.

The Advocate-General presented his opinion at the hearing on 6 February 1973.

II — Observations presented under Article 20 of the Protocol on the Statute of the Court

The observations presented under Article 20 of the Protocol on the Statute of the Court may be summarized as follows:

A — Observations presented by the firm of Paul G. Bollmann

With regard to question (b), concerning the *substantive law* applicable in the matter of costs, *the Bollmann firm* expresses the opinion that the fact that a decision awarding costs is within the jurisdiction of a national court does not affect the remuneration to which the lawyer is entitled in respect of work undertaken in an application for a preliminary ruling before the Court, nor the recoverability of expenses incurred in that connection.

In fact, frequently in national law decisions awarding costs and determining the expenses recoverable are taken by two different courts. This is precisely the case in German law which, however, contains — at least to date — no express provision on the recoverability of expenses incurred by a party in an application for a preliminary ruling before the Court of Justice. There remains to be examined the possibility of relying, by way of analogy, on the principle of § 113 No 2 of the German Federal Tariff of Charges and Emoluments, taking into account in particular that that provision determines the right to reimbursement of the lawyer pleading in a preliminary case before the Constitutional Court, in accordance with Article 100 (2) of the Basic Law. However, this is not possible in the present state of German law.

Moreover, Community law does not expressly recognize a legal right to reimbursement of a lawyer or adviser for work undertaken in an application for a preliminary ruling. Article 73 of the Rules of Procedure of the Court only deals with the question of such right in the case of contentious proceedings.

This being the case, in order to reply to the question posed, it is a matter of deciding which of those two provisions (Article 73 of the said Rules of § 113 No 2 of the German Tariff), arising under Community law and national law respectively, should be applied, by way of analogy, in calculating the remuneration due to the lawyer.

Several reasons militate in favour of the application of the rules of Community law, in particular:

(i) the nature and extent of the work undertaken by the lawyer in the application for a preliminary ruling before the Court,

(ii) the fact that those proceedings are subject solely to Community law and lie within the jurisdiction of the Court alone,

(iii) the fact that the substantive work of the lawyer in those proceedings concerns Community law alone,

(iv) the fact also that the parties must be represented by a lawyer for the purposes of an application for a preliminary ruling, which has the twofold consequence that in such proceedings the lawyer is entrusted with a duty by Community law itself, and that the amounts due to the lawyer by way of remuneration are 'expenses necessarily incurred'.

The application of the rules of Community law in this case is more especially called for as the necessity to avoid any discrimination requires that the fees due to lawyers should be determined on the basis of uniform criteria. This requirement is effectively ignored if the remuneration of the lawyer for work undertaken in an application for a preliminary ruling before the Court must be determined by each Member State in accordance with national law, as national laws are not uniform in this field and do not all guarantee the right of the lawyer to such remuneration.

In the view of the Bollmann firm, the reply to the question posed should be that the recoverability of expenses necessarily incurred by the parties in an application for a preliminary ruling — particularly under the heading of remuneration of lawyers — must be determined by reference to Community law.

In the event that the Court gives a negative reply, it should, in its judgment, enjoin the Member States to enact basic national rules providing for appropriate remuneration of lawyers charged with pleading before the Court in an application for a preliminary ruling, and guaranteeing them the possibility of recovering the amounts of such remuneration. It should not be less than that laid down in Germany for the services of a laywer in preliminary proceedings before the Federal Constitutional Court.

With regard to question (a), concerning the *procedure for the recovery* of costs, the answer to this question is directly connected to the first.

Since the substantive law applicable to the legal right to reimbursement of a lawyer is governed by Community law, the procedure relating to the enforcement of that right must also be governed by Community law.

The provisions of the Rules of Procedure (Articles 73 to 75) relating to an order for the recovery of costs, which are enforceable, may be extended to the recovery of costs incurred in an application for a preliminary ruling.

B — Observations presented by the Government of the Federal Republic of Germany

The *German Government* states first that in reality the question posed turns

on the interpretation of Articles 103 (1), first paragraph, and 73 et seq. of the Rules of Procedure of the Court. This question is therefore admissible under Article 177, first paragraph, (b) of the EEC Treaty insofar as it refers to 'an act of an institution of the Community', in this case the Rules of Procedure of the Court, but it should be worded as follows:

'When, within the framework of proceedings under Article 177 of the EEC Treaty, the Court of Justice leaves the decision as to costs to the court requesting the preliminary ruling, must Article 103 (1), first paragraph, of the Rules of Procedure, together with Articles 73 and 74 of those Rules, be interpreted as meaning that the procedure for the recovery of costs and the determination of the recoverability of such costs are governed by those provisions?'

The German Government goes on to observe that the reference in Article 103 (1), first paragraph, of the Rules of Procedure to Articles 44 et seq. of those Rules does not apply to Articles 69 et seq., which relate to costs. In fact it is provided, in Article 69 (1), that the Court shall give a decision as to costs *in its final judgment or in the order which closes the proceedings,* whereas, in the case of an application for a preliminary ruling, the decision which closes the proceedings is in fact delivered by the national court and not by the Court of Justice. As, because of this, the scope of Article 69 (1) is restricted to contentious proceedings, any application of that provision to applications for preliminary rulings, even by way of analogy, is impossible.

The same consideration obtains in respect of Article 74 of the Rules of Procedure, as that provision only applies in proceedings in which the Court is competent to rule on the merits as well as on costs.

In the view of the German Government, a negative reply should be given to the court requesting a preliminary ruling in respect of the procedure for the recovery of costs.

A negative reply should equally be given to the question whether the possibility of recovering expenses incurred in an application for a preliminary ruling must be considered by reference to Article 103 (1), first paragraph, of the Rules of Procedure, together with Article 73 of those Rules. As Article 103 (1), first paragraph, aforesaid applies only to contentious proceedings before the Court of Justice, the German courts do not have to apply this provision of Community law when they make a decision as to costs. For the same reasons, they do not have to apply Article 73 of the said Rules either.

The German Government concludes by proposing a reply to the question posed as follows:

'When, within the framework of the procedure referred to in Article 177 of the EEC Treaty, the Court of Justice leaves the decision as to costs to the court requesting the preliminary ruling, Article 103 (1), first paragraph, of the Rules of Procedure, together with Articles 73 and 74 of those Rules, must not be interpreted as meaning that the procedure for the recovery of costs and the determination of the recoverability of those costs are governed by those provisions.'

C — *Observations presented by the Commission of the European Communities*

After raising the question whether Community rules exist relating to costs in an application for a preliminary ruling, the *Commission* observes that such proceedings have special features: they arise from a main action pending before a national court and are only brought to a close by the judgment of that court. For this reason, in an application for a preliminary ruling before the Court, there are no 'parties'

but merely persons concerned, 'entitled' to present observations, as the term 'party' contained in Article 20 of the Protocol on the Statute of the Court and in Article 103 (1) of the Rules of Procedure of the Court refers only to the parties to the main action.

It follows from this that there are no Communtiy rules relating to costs in an application for a preliminary ruling before the Court: the basic reason for remuneration of the lawyer or adviser arises in the main action and the Court of Justice leaves the decision as to the costs of that action to the jurisdiction of the national court.

It is true that Community law contains the principle that the remuneration of a lawyer or adviser forms part of the expenses recoverable, insofar as they are expenses necessarily incurred (Article 73 of the Rules of Procedure of the Court). But this same law does not lay down provisions making it possible to decide what are the expenses recoverable under the heading of such remuneration. This implies in the case in question that, even supposing that Articles 73 and 74 of the Rules of Procedure are applicable by way of analogy, it must first be decided what the remuneration is to which the lawyer or adviser is entitled. In any event, one cannot, for the reasons previously stated, rely, in respect of an application for a preliminary ruling, on Articles 73 and 74 of the Rules of Procedure, as those Articles deal only with contentious proceedings.

Therefore, in the absence of any provision of Community law, one must look to the provisions of national law governing the main action and to the jurisdiction of the national authorities for the answer to the question relating to the recoverability of such expenses. Further, in the event of the Court contributing for its part, within the framework of an application for a preliminary ruling, to the decision of the national court as to costs, it would be obliged to rely on the applicable rules of national law and would thus be encroaching on the jurisdiction of the national courts.

The Commission suggests therefore that the reply to the question posed should be that the procedure for the recovery of costs incurred in an application for a preliminary ruling and the determination of the recoverability of expenses necessarily incurred, particularly remuneration of lawyers, are governed by national law and fall within the jurisdiction of the national authorities, within the framework of the main action.

Grounds of judgment

1 By order dated 8 August 1972, filed at the Court on 11 September 1972, the Bundesfinanzhof has submitted to the Court a question on whether the procedure for recovery of costs and the recoverability of expenses, in particular lawyers' fees, necessarily incurred in an application for a preliminary ruling under Article 177 of the EEC Treaty, are matters of Community law or domestic law.

2 The question posed concerns the interpretation of Article 103 (1) of the Rules of Procedure of the Court, which constitutes one of the acts referred to in Article 177 (b) of the Treaty.

3 Under the terms of Article 103 (1), the provisions of Articles 44 et seq. of the said Rules 'shall apply', after the written statements of case or written observations provided for in Article 20 of the EEC Statute have been lodged, to proceedings brought under Article 177.

In order to be able to reply to the question posed therefore, it is appropriate to examine whether, by this reference, the provisions of the Rules of Procedure which deal with costs, particularly those of Articles 73 and 74 concerning expenses regarded as recoverable, and their recovery, are by Article 103 (1) rendered applicable to such proceedings.

4 Proceedings instituted under Article 177 are non-contentious and are in the nature of a step in the action pending before a national court, as the parties to the main action are merely invited to state their case within the legal limits laid down by the national court.

By the expression 'parties', Article 20 of the Protocol on the Statute of the EEC Court refers to the parties to the action pending before the national court.

5 On the other hand, Articles 69 to 75 of the Rules of Procedure refer to costs in contentious proceedings.

The proceedings referred to by those provisions are distinguished by the presence of parties, and are closed by a judgment or order of the Court which decides definitively the dispute which gave rise to the proceedings.

Article 73 of the Rules of Procedure also refers to expenses incurred in such proceedings when defining the recoverability of 'expenses necessarily incurred by the parties'.

Article 74 is restricted to settling the procedure for the recovery of those expenses.

In view of the essential difference between contentious proceedings and proceedings under Article 177 of the Treaty, one cannot, without express provision, extend to the latter proceedings the rules laid down solely for contentious proceedings.

6 In the present state of Community law, therefore, it must be concluded that the recovery of costs and the recoverability of expenses necessarily incurred by the parties to the main action for the purposes of an application for a preliminary ruling under Article 177 of the EEC Treaty are governed by the provisions of national law applicable to the said proceedings.

In these circumstances, it devolves on the competent national courts to consider, in the context of their national law, the extent to which matters incidental to an application for a preliminary ruling should be taken into account.

Costs

7 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the firm of Paul G. Bollmann, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 177 and 188;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69, 73, 74 and 103;

THE COURT,

in answer to the question referred to it by the Bundesfinanzhof of the Federal Republic of Germany by a decision of that court dated 8 August 1972, hereby rules:

The recovery of costs and the recoverability of expenses necessarily incurred by the parties to the main action for the purposes of an application for a preliminary ruling under Article 177 of the EEC Treaty are not covered by Article 103 (1) of the Rules of Procedure of the Court.

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.