JUDGMENT OF THE COURT
16 JANUARY 1974 [1]

Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (preliminary ruling requested by the Bundesfinanzhof)

'Consequences of judgments of appeal courts'

Case 166/73

Summary

Preliminary ruling — Reference to the Court — Jurisdiction of national courts — Extent
(EEC Treaty, Article 177)

Power of the national judge to refer to the Court of Justice, either of his own motion or at the request of the parties, questions relating to the interpretation or the validity of provisions of Community law in a pending action is very wide. It cannot be taken away by a rule of national law whereby a judge is bound on points of law by the rulings of superior courts. It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

In Case 166/73

Reference 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

RHEINMÜHLEN-DÜSSELDORF, Düsseldorf-Holthausen,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-on-Main,

1 — Language of the Case: German

on the interpretation of the second paragraph of Article 177 of the EEC Treaty,

THE COURT

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

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

The facts of the case, the subject matter of the request and the views of the parties may be summarized as follows:

I — Facts and procedure

During the period from 30 December 1964 to 16 December 1965, the plaintiff in the main action exported pearl barley from the Federal Republic of Germany. As a result of the particulars given by the plaintiff to the effect that the goods were being delivered to third countries, the defendant in the main action granted it the refunds for exports for third countries. Subsequently the defendant withdrew these refunds on the grounds that the deliveries had not been made to third countries but to other Member States. After an unsuccessful administrative appeal the plaintiff brought the matter before the Hessisches Finanzgericht. This action was dismissed and the plaintiff appealed on a point of law to the Bundesfinanzhof, which, by judgment dated 8 November 1972 — VII R 98/68, annulled the judgment of the Finanzgericht and sent the case back to it for reconsideration. The Bundesfinanzhof considered that the decision to make a refund could only be rekoved to the extent that the refund for 'third countries' exceeded the refund for 'Member States'. According to Paragraph 126 (5) of the Finanzgerichtsordnung (Rules of Procedure for the Finanzgerichte) of 6 October 1965 (BGBl. I — 1477) the court to which the case is sent back is bound by the judgment of the court which has sent the case back. However, the Hessisches Finanzgericht considered that the view of the Bundesfinanzhof was not consistent with the system of refunds provided for by Regulation No 19/62 and by order dated 7 May 1973 referred the matter to the Court for a preliminary ruling.

The plaintiff then appealed to the

Bundesfinanzhof against the order for a preliminary ruling issued by the Finanzgericht. By order dated 14 August 1973 the Bundesfinanzhof stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does the second paragraph of the above-named Treaty give to a court or tribunal against whose decisions there is a judicial remedy under national law a completely unfettered right to refer questions to the Court of Justice, or does it leave unaffected rules of domestic law to the contrary whereby a court is bound on points of law by the judgments of the court superior to it?'

The order for a preliminary ruling was filed at the Court Registry on 4 September 1973.

The plaintiff, represented by Mr Rauschning and Mr Modest, of the Hamburg Bar, and the Commission of the European Communities, represented by its legal advisers Mr Gilsdorf and Mr Zur Hausen, submitted their written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur, and the opinion of the Advocate-General, the Court decided to proceed without a preparatory inquiry.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. The *Commission* observes that the question basically relates to the problem of conflicting provisions, which in the case in question happen to be the second paragraph of Article 177 of the EEC Treaty and paragraph 126 (5) Finanzgerichtsordnung according to which inferior courts are bound by the judgment of the superior court which sends a case back for reconsideration.

Paragraph 126 (5) of the Finanzgerichtsordnung does not stand in the way of a reference for a preliminary ruling. Even if another meaning had to be given to the contents of this provision, the reasoning of the Bundesfinanzhof in its order for a preliminary ruling could not be adopted, according to which it is necessary to distinguish between the theoretical possibility of putting a case to the Court and the power of making use of this possibility in a concrete case. If this argument were accepted, the national legislature could to a large extent render inoperative the provision of the second paragraph of Article 177 by enacting provisions which would limit its effect. Such a limitation on the useful effect of Article 177 by the national legislature would infringe the EEC Treaty and would lead to the initiation of procedure under Articles 169 et seq. of the EEC Treaty.

In the same way it is impossible to limit the power of referring a case for a preliminary ruling by invoking the binding nature of judgments of superior courts, which in practice would exclude the power to submit cases to the Court.

What holds good for the national legislature holds equally well for the national courts, since the latter are bound, in the same way as the legislature, to conform to Community law.

The Commission further states that it is necessary to distinguish between the binding effect referred to in Paragraph 126 (5) of the Finanzgerichtsordnung and the binding effect of *res judicata*. The first concept was introduced into the German law of procedure to speed the final decision which has to be given in the case, whereas the object of the binding force of *res judicata* is to put a definite end to the proceedings and binds both the court and the parties.

Consequently it is not possible to regard Paragraph 126 (5) and the principal of *res judicata* as being on the same level.

If the effect of Paragraph 126 (5) is regarded as limited as compared with the power of *res judicata,* the question of priority could be solved simply and correctly in favour of Community law: so long as the proceedings are still pending before the national court, the possibility of referring a case for a preliminary ruling as provided for by the second paragraph of Article 177 must be kept open.

This legal construction would prevent, as far as possible, judgments of national courts from infringing Community law.

In the Commission's view the question referred for a preliminary ruling could be replied to in the following manner:

'The second paragraph of Article 177 of the EEC Treaty gives to the courts or tribunals of Member States, against whose decisions there is a judicial remedy under national law, a completely unfettered right. The provisions or principles of national law cannot preclude a national court or tribunal from referring a case to the Court of Justice for a preliminary ruling and complying therewith.

In the present matter the court submitting the case is bound by the interpretation of the Court, even if this interpretation conflicts with the superior court's view of the law and even if the court making the submission is bound under national law to accept the superior court's view of the law.'

2. The *plaintiff* in the main action points out that individuals do not have a direct or indirect right to require national courts to refer cases to the Court of Justice for a preliminary ruling on the interpretation or validity of provisions of Community Law. According to the second paragraph of Article 177 of the Treaty courts or tribunals against whose decisions there is a judicial remedy under national law have a discretionary power in the matter.

If a final court neglected to refer a case to the Court for a preliminary ruling, there would be no legal remedy available to attack this decision. In these circumstances, it is unjustified to say that Article 177 gives rights to individuals.

The plaintiff denies that the organs of the EEC can initiate proceedings against a Member State, where a final court has omitted to refer a case to the court for a preliminary ruling. Member States cannot be held responsible for the omissions of independent courts.

Paragraph 126 (5) of the Finanzgerichtsordnung gives to the decisions of final courts a binding effect similar to the force of *res judicata.* The court to which the matter is sent back for reconsideration is bound, just as are the parties, by the decisions on appeal of the Bundesfinanzhof.

Consequently it is not open to the Finanzgericht to refer a case to the Court of Justice when it is required to give a judgment based on a judgment of the Bundesfinanzhof.

The Court of Justice itself should inquire whether national courts are entitled to refer cases for preliminary rulings. In order to avoid useless conflicting judgments the Court ought to declare as unacceptable requests for a preliminary ruling emanating from national courts which are already bound by a national decision of a supreme court.

If the Court considers that it does not have to examine admissibility on the footing that the judge who has been directed to reconsider a matter is bound by the judgment of the superior national court, it ought to allow the national court not to take account of preliminary rulings which have been given conflicting with a decision emanating from the superior national court.

The plaintiff proposes that the following reply should be given to the question submitted by the Bundesfinanzhof for a preliminary ruling:

1. The second paragraph of Article 177 of the EEC Treaty does not give to a

national court or tribunal, against whose decision there is a judicial remedy under national law, a completely unfettered right to refer questions to the Court of Justice. On the contrary, Article 177 of the EEC Treaty cannot avoid the provisions of national law under which courts are bound by the ruling of a superior national court.

2. *Alternatively*

The question whether, in the event of a ruling conflicting with that of the Court, the national decision of the supreme court retains its binding effect — as provided for by Paragraph 126 (5) of the Finanzgerichtsordnung — is in essence a question of national law. The superior court sitting on appeal on a point of law is entitled to enquire whether the conditions laid down in the second paragraph of Article 177 are complied with by the inferior court bound under Paragraph 126 (5) of the Finanzgerichtsordnung by the ruling of the superior court. Where it considers that the conditions have not been complied with, the preliminary ruling of the Court has not binding effect.

The oral hearing took place on 4 December 1973.

The Advocate-General delivered his opinion at the hearing on 12 December 1973.

Grounds of judgment

1 By order dated 14 August 1973, filed at the Registry on 4 September 1973, the Bundesfinanzhof referred to the Court under Article 177 of the EEC Treaty the question whether the second paragraph of Article 177 gives 'to a court or tribunal against whose decisions there is a judicial remedy under national law a completely unfettered right to refer questions to the Court of Justice' or 'does it leave unaffected rules of domestic law to the contrary whereby a court is bound on points of law by the judgments of the courts superior to it'?

It appears from the order that the question is put in the context of proceedings directed against the decision of the Hessisches Finanzgericht requesting from the Court an interpretation of the provisions of Regulation No 19/62 of the Council (OJ 1962, p. 933) in order to be able to judge a case which had been sent back to it by the appellate court, the Bundesfinanzhof, which had reserved an earlier judgment of the Finanzgericht.

Since the interpretation requested by the Finanzgericht concerns the conformity with Community law of the grounds which had led the Bundesfinanzhof to reverse the earlier judgment of the Finanzgericht, the question arises whether Paragraph 126 (5) of the Finanzgerichtsordnung whereby the inferior judge is bound by the *ratio decidendi* of the superior court, does not preclude

the lower court from referring a case to the Court of Justice for a preliminary ruling.

2 Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.

Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.

Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law.

The provisions of Article 177, which enable every national court or tribunal without distinction to refer a case to the Court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light.

3 The provisions of Article 177 are absolutely binding on the national judge and, in so far as the second paragraph is concerned, enable him to refer a case to the Court of Justice for a preliminary ruling on interpretation or validity.

This Article given national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on a point referred to in the first paragraph of Article 177.

4 It follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part.

It follows from these factors that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the

inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.

It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.

If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.

5 The reply must therefore be that the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power provided for by Article 177 of referring cases to the Court.

Costs

6 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

Since the proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before a 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 Commission of the European Communities and the plaintiff in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;

Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Bundesfinanzhof by order of that court dated 14 August 1973, hereby rules:

The existence of a rule of domestic law whereby a court is bound on points of law by the rulings of a court superior to it cannot of itself take away the power provided for by Article 177 of referring cases to the Court of Justice of the European Communities.

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

Delivered in open court in Luxembourg on 16 January 1974.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 12 DECEMBER 1973

My Lords,

These two references (Cases 146 and 166/73) to the Court for preliminary rulings raise a most important question of interpretation of Article 177 of the EEC Treaty.

The references themselves are incidents in a long legal battle between the plaintiff, a German exporter of cereal products, and the defendant, the German intervention agency for cereals and feedingstuffs. That battle was originally about claims by the plaintiff for refunds on certain exportations of wheat meal and of pearl barley which the plaintiff effected between December 1964 and December 1965. The claims relating to