JUDGMENT OF THE COURT
3 FEBRUARY 1982 [1]

Kommanditgesellschaft in Firma Gebrüder Glunz v Hauptzollamt Hamburg-Waltershof (reference for a preliminary ruling from the Finanzgericht Hamburg)

(Common Customs Tariff — Specific duty)

Case 248/80

Common Customs Tariff — Customs duties — Specific duties expressed in units of account — Conversion into the currency of the importing Member State — Application of the rate of exchange corresponding to the parity notified to the International Monetary Fund — General Rule C.3 — Validity — Reduction of customs duties to the amount payable in the case of importation into the Member State having the weakest currency — Not permissible

(Regulation No 950/68 of the Council, as amended by Council Regulation No 2500/77, General Rule C.3)

Consideration of General Rule C.3 in Part I, Section I, of the Annex to Council Regulation No 2500/77 has disclosed no factor of such a kind as to affect its validity. The rule must be applied in such a way that in the case of an importation into a Member State having a strong currency customs duties expressed in units of account must be converted, in conformity with the rule, into the national currency of the Member State where the importation took place and must not be limited to the amount which would have been charged in the case of importation into the Member State having the weakest currency.

In Case 248/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg for a preliminary ruling in the case pending before that court between

KOMMANDITGESELLSCHAFT IN FIRMA GEBRÜDER GLUNZ [Glunz Brothers, limited partnership], Hamburg,

1 — Language of the Case: German.

and

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-WALTERSHOF

upon the validity of General Rule C.3 for the interpretation of the Common Customs Tariff as set out in Council Regulation No 2500/77 of 7 November 1977 amending Regulation No 950/68 on the Common Customs Tariff (Official Journal 1977, L 289, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

General Rule C.3, applicable both to nomenclature and to duties, in Part I, Section I of the Annex to Regulation No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (Official Journal, English Special Edition 1968 (I), p. 275) reads as follows:

"The unit of account (u.a.) by reference to which certain specific customs duties are expressed or the scope of certain headings or subheadings is defined has a value of 0.88867088 grams of fine gold.

The exchange rate to be used in converting the unit of account into Belgian francs, Dutch guilders, French francs, German marks, Italian lira or Luxembourg francs shall be that corresponding to the par value communicated to and recognized by the International Monetary Fund in respect of these currencies."

The only change in the text of Regulation No 2500/77 amending Regulation No 950/68 is that currencies of Member States which acceded to the Community on 1 January 1973 are added to those of the original Member States.

By Regulation No 2800/78 of 27 November 1978 (Official Journal L 335, p. 1) amending Regulation No 950/68, the Council replaced Rule C.3 by a rule which fixed the value of the European unit of account (EUA) in each national currency. The European unit of account had been made applicable to legal acts adopted in the customs sphere by Regulation No 2779/78 of 23 November 1978 (Official Journal L 333, p. 5).

In August 1978 Gebrüder Glunz of Hamburg imported ceramic statuettes originating from Taiwan. They were described as "ceramic angels" and were in the form of a clothed girl whose forearms and hands had the shape of a candlestick. Glunz declared the statuettes as porcelain Christmas angels with candles under tariff heading 97.05 of the Common Customs Tariff (Christmas tree decorations and similar articles for Christmas festivities; rate of customs duty 10%). The principal customs office of Hamburg-Waltershof cleared the goods for customs purposes on the basis of that declaration by notices of assessment which it described as provisional. A customs duty of 10% was therefore charged on the statuettes.

By an amended notice of assessment dated 26 September 1978 the defendant in the main action classified the statuettes under tariff subheading 69.13 B (statuettes ... of porcelain or china; rate of customs duty 11%, with a minimum of 70 units of account per 100 kg gross).

As the rate communicated to the IMF by the Federal Republic of Germany for the amount of fine gold referred to in General Rule C.3 was DM 3.66, 70 u. a. was equivalent to DM 256.20. On the basis of this exchange rate the result was a liability to customs duty of DM 72 045.59 on the gross weight of the imported goods, namely 28 128.20 kg. On the basis of an 11% rate, the amount of duty would have been only DM 18 386.19. Accordingly the rate of 70 u.a. per 100 kg was to be applied.

Glunz lodged an objection against the amended notice of assessment, which the defendant rejected as unfounded. On 10 October 1979 Glunz commenced legal proceedings before the Finanzgericht [Finance Court] Hamburg, submitting on the one hand that the classification of the goods in question under subheading 69.13 B was wrong, and on the other hand that it was not legitimate to charge a higher customs duty than that applicable in Member States with a weaker currency. The defendant in the main action submitted before the Finanzgericht that a reduction of customs duty to the amount applicable in the case of importation into the Member State with the weakest currency was out of the question.

The Finanzgericht Hamburg did not accept Glunz's first argument relating to the exact tariff classification of the goods in question. It did not therefore submit that point to the Court of Justice. However, on the second submission it held that there was doubt as to the interpretation and validity of the Community provisions. Since its decision

depended on the interpretation of those provisions, the Finanzgericht decided by an order which reached the Court Registry on 6 November 1980 to stay proceedings and to submit the following question for a preliminary ruling:

"Is General Rule C.3 in Part I, Section I, of the Annex to Council Regulation (EEC) No 2500/77 of 7 November 1977 in its application to tariff heading 69.13 B of the Common Customs Tariff invalid in so far as, in the case of the importation of goods into a Member State with a strong currency, it would lead to a higher incidence of customs duty than in the case of importation into the Member State whose currency has most depreciated in relation to the parity notified to the International Monetary Fund, or is the said rule to be interpreted in such a way that customs duty is to be charged only at the level at which it would have been charged in the case of importation into the Member State with the weakest currency?"

The Finanzgericht points out that if the goods had been imported into Italy, Glunz would have paid a far lower rate of duty: in view of the parity of LIT 625 declared by Italy to the IMF, customs duty would have amounted to DM 29 342.30.

The Finanzgericht bases its legal assessment mainly on the following considerations:

"The differing incidence of customs duty in the various Member States is incompatible with the fundamental conception of customs union. The customs union is the foundation of the Communtiy; a crucial aspect of the customs union is the introduction of the Common Customs Tariff in relations with non-member countries (Article 9 (1) of the EEC Treaty). The Customs Tariff includes customs duties. Specific duties are fixed either in the form of a percentage of the value for customs purposes or in the form of a fixed sum expressed in money or in some other accounting unit in respect of weight, size or number. Consequently the customs union prohibits differing rates of customs duty expressed in the currencies of the Member States.

At the same time the varying incidence of customs duty amounts to discrimination in breach of the general principle of equality. To the extent to which Community law itself lays down rules and there are no national provisions in a field of law which has not been harmonized or national implementing provisions which permit rules in the Member States which diverge from one another within specific narrow limits, the principle of equality requires that the system of duties which are contributed to the Community budget must be so arranged as to constitute a uniform, that is an equal, burden on all persons who fall within the conditions specified in the Community provisions for the charging of such duties. The fact that importation takes place through Member State A instead of Member State B is not recognized by any provision of the Treaty as a decisive criterion for calculating the amount of customs duty. Similarly, the existence of a specific minimum rate of customs duty does not justify a varying incidence of duty. The purpose of specific minimum rates of duty is to prevent tariff protection from dropping below a minimum amount when world market prices are low or falling. But if that effect is in fact produced in a Member State with a weak currency the legislature is obliged, in conformity with the fundamental idea of the customs union together with the

principle of equality, to adopt 'measures having equivalent effect' for Member States with strong currencies. The difficulties described in the observations of the Council and the Commission in Case 135/79 caused by the transition from the unit of account to the system of the European unit of account (based on a basket of currencies) in force from 1 January 1979 do not provide any justification for the failure to adjust the arithmetical value used in Regulation (EEC) No 2500/77 to the altered exchange rates, as required by the basic idea of the customs union. In this context it should also be borne in mind that the Customs Tariff contains specific rates of duty only for relatively few goods so that the effects of an adjustment would only have been limited. Even if it is acknowledged that there were legislative or administrative difficulties in adjusting the exchange rates for the unit of account to the actual exchange rate relationships, it must be doubted whether a serious variation in the incidence of customs duty of more than 100% according to whether the goods in question are imported through Italy or Germany may be considered acceptable."

Glunz, represented by J. Gündisch of the Hamburg Bar, the Council of the European Communities, represented by its Legal Adviser, A. Sacchettini, acting as Agent, and the Commission of the European Communities, represented by its Legal Adviser, P. Gilsdorf, acting as Agent, assisted by M. Schäfers, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

II — Summary of the written observations submitted to the Court

Glunz considers that in submitting its question for a preliminary ruling the Finanzgericht is asking the Court to accept the consequences of the judgment given on 3 June 1980 in Case 135/79 *(Gedelfi Großeinkauf GmbH & Co KG* v *Hauptzollamt Hamburg-Jonas* [1980] ECR 1713) on slightly different facts. Admittedly, in that judgment the Court had accepted neither the point of view shared by Gedelfi and the Finanzgericht of Hamburg nor the opinion of the Advocate General who considered that General Rule C.3 of the Annex to Regulation No 2500/77 should be annulled in so far as it resulted in the charging of a levy on the importation of orange juice into the Federal Republic of Germany when the same orange juice was exempt from the levy when it was imported into another Member State. However, the Court arrived at the same result from an economic point of view. It ruled that Article 2 of Council Regulation No 516/77 in conjunction with Annex I to that regulation should be interpreted as meaning that a levy was not chargeable in respect of added sugar on the importation of orange juice into a Member State if it was established that the same orange juice was exempt from the levy in other Member States.

The Commission itself had stated during the proceedings in Case 135/79 that different conversion rates could have an effect both when the scope of a tariff subheading depended on the value of the goods and when customs duty did not depend on this value (specific customs duties). That statement on its own was

sufficient to show clearly that it followed from the judgment in the *Gedelfi* case that the applicable provisions should be interpreted in the present case also as meaning that the duty charged to the importer in one Member State may not be higher than that which is charged in another Member State.

The Advocate General for his part had stated in his opinion that the solution depended above all upon the purpose of the customs union and had referred in this context to the judgment given on 13 December 1973 in Joined Cases 37 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *Indiamex* [1973] ECR 1609, according to which "the Common Tariff is intended to achieve an equalization of customs charges levied at the frontiers of the Community on products imported from third countries, in order to avoid any deflection of trade in relations with those countries and any distortion of free internal circulation or of competitive conditions."

Glunz considers that the differences between the facts of the two cases should not lead to a different result. Indeed, different external duties would also have the result of altering the pattern of trade in a way likely to bring about distortions of competition and consequently hinder the development of the Community. This is particularly apparent in the present case where the customs duties in the Federal Republic of Germany are more than twice as high as those in Italy.

Glunz invokes the Court's judgment against the arguments to the contrary which the Commission and the Council had set out during the proceedings in Case 135/79 and which the Court had examined and held to be unfounded. The firm adds that the principal defect in those arguments was that they dealt mainly with the prohibition against discrimination and only dealt inadequately with the spirit and the aims of the customs union, which was intended to establish equal conditions of competition in all Member States and would be infringed by a scheme which imposed grossly unequal customs duties according to whether the importation was carried out in one or other of the Member States. It was for this reason that the Advocate General expressed his opinion in the *Gedelfi* case that the Council did "not enjoy a discretion to ignore the fundamental principles laid down in the Treaty, such as those of the customs union".

The problem raised in the present case affects 37 tariff subheadings, of which 15 relate to agricultural products. All in all that constitutes a substantial proportion of the goods covered by the Common Customs Tariff. Moreover, the goods in question are subject to real competition, since Glunz, which imports from the Far East, is in competition with similar firms in all the other countries of the Community. The difference in customs duty means, for example, that Italian importers could import the consignment of statuettes in question for a price about DM 43 000 lower than that paid by Glunz. If such differences in customs duty persist, they would certainly result in a deflection of imports away from the Federal Republic of Germany towards Member States with a weaker currency.

The *Council* submits that when it was adopted General Rule C.3 had the effect of ensuring that the rates of cusloms duty applied in Member States under the Commom Customs Tariff were equal. More and pronounced disturbances in the international monetary system have subsequently distorted the

normal functioning of all the Community mechanisms based on the device of the unit of account, including General Rule C.3. The Community was however unable to exert any control on those disruptions, which arose from events beyond its jurisdiction. Those disruptions were subsequent to the introduction of Rule C.3 which remained unchanged in all the regulations amending the basic Regulation No 950/68 which brought in the rule. The Council therefore considers that it cannot be criticized for having used its powers in such a way as to produce "different customs duties in the various Member States incompatible with the fundamental idea of the customs union". Consequently, nor could the Council be accused of discrimination infringing the general principle of equality.

In fact, the Community had been trying for a long time to reach a more appropriate definition of the unit of account. To that end the Commission had laid a proposal before the Council on 6 October 1976 seeking to introduce the use of the European unit of account in all legal acts of the Community, including the Common Customs Tariff. The Commission's proposal, which was based mainly on Articles 209 and 235 of the Treaty, was passed on for the consultations provided for in those articles, namely with the Assembly and with the Court of Auditors. The latter did not communicate its opinion to the Council until 22 June 1978. Furthermore, the discontinuance of the parities declared to the IMF following the coming into force of amendments to its statutes on 1 April 1978, had brought about an acceleration in the work of the Council with the object of avoiding the disadvantages of the absence of a criterion (reference to gold) for the determination of the value of the currency of Member States as provided for in Rule C.3. Those were the circumstances which preceded the adoption of Regulation No 2779/78, which had declared the European unit of account applicable to acts adopted in the customs sphere. The fact that that regulation came into effect on 1 January 1979 instead of 1 January 1978, the date proposed by the Commission, was also due to the desire to adhere to the guidelines laid down in the Council resolution of 27 June 1974 for the adoption of tariff measures.

The *Commission* believes that the Finanzgericht Hamburg construes General Rule C.3 as meaning that, whenever monetary fluctuations could entail differences in customs duty in Member States, the rule must be adapted at the administrative level in accordance with the following criteria:

(i) Consideration of all the discrepancies between customs duties, including relatively small discrepancies, which arise through monetary fluctuations (absolute obligation to make adjustments);

(ii) Reference to the weakest currency at that time as the basis of calculation for the correction of discrepancies in duty (lowest basis of calculation);

(iii) Application of these criteria of adaptation by national customs authorities contrary to the wording of the general rule and without prior amending legislation (administrative adaptation).

On the first point the Commission observes that, whilst the principle of uniformity is a useful test for determining the objective of all legal acts

adopted in the customs sphere, it could result in excessive requirements having regard to the purpose of the customs union. Discrepancies in customs duties at the different external frontiers of the Community due to monetary fluctuations may be regarded as compatible with the fundamental principle of the customs union so long as there is no reason to fear, on realistic criteria, that such discrepancies may cause deflections of trade or displacements of centres of activity or distortions of competition. Such discrepancies would invite criticism if they offered a real incentive for the importer to import goods at some point of the external frontier of the Community other than the external frontier of his State of residence in the hope of benefiting from lower customs duties.

The interpretation envisaged by the Finanzgericht would have unacceptable consequences in the new system of the EUA. To a certain extent the EUA represents the average value of national currencies and is linked to the actual economic situation and subject to much smaller fluctuations than the individual currencies. However, disparities may still occur in the equivalent amounts in national currency as a result of two factors: first, the setting of a new monetary parity in relation to the EUA (autonomous decisions to revalue or to devalue) and, secondly, the margins for fluctuation within the framework of the European Monetary System (EMS). Nevertheless, whilst in theory the maximum margin of fluctuation between two currencies is 4.5%, in practice the bilateral margins of fluctuation are lower than that percentage when the two currencies concerned have remained in the "snake" during the whole year in question. It is true that the best regulatory mechanism for effectively limiting discrepancies between the daily exchange rate and the official rates of the EUA would be to adjust the rates more frequently, since perfect congruence of the fixed parity with the real parity could be obtained by resetting the parities of national currencies with regard to the EUA each day. This latter solution is impossible since nowadays an essential feature of the import trade is that importers make their arrangements a long time in advance and daily adjustment would place customs authorities in extraordinary administrative difficulties. Although it would prefer a system of half-yearly fixing the Commission considers that a system of yearly fixing is legally defensible in principle. Any discrepancies between customs duties which may result from fluctuations of currencies in the snake may be explained by the force of circumstances and, in the final analysis, are due to the Community legislature's lack of jurisdiction in the monetary field. The Council had expressly contemplated a special adjustment independent of the annual cycle in a declaration included in the minutes when the regulation on the introduction of the EUA into the customs sphere was adopted. However, the Court would be forestalling that legislative amendment if it followed the point of view of the Finanzgericht and raised the consideration of all the discrepancies between customs duties arising out of monetary fluctuations to the rank of a higher principle which was intrinsic to the connection between the currency and the unit of account. Even if, in such an event, the Court confined its decision strictly to the former system of the unit of account, considerable legal uncertainty would follow over the question whether and, if so, above what level of discrepancy in customs duty, provision for adjustments should also be made in the new EUA system and whether such

adjustments should also be made simply by means of administrative measures on the part of the customs authorities.

As far as the former system of the unit of account is concerned, in the *Gedelfi* case, which dealt with the validity of General Rule C.3 in so far as it referred to the unit of account for the definition of the scope of the tariff classification of goods covered by an agricultural market organization (orange juice), the Court founded its judgment exclusively on the basis of the objectives of the market organization and based its interpretation essentially on the requirements of the Community's common trading system. On the other hand, the Court did not consider the wider question of what legal influence monetary fluctuations and the resulting discrepancies between customs duties charged at the Community's external frontiers have in general on the validity of General Rule C.3 and more particularly on its application for the purpose of defining the scope of tariff headings. The submissions made in that case in support of the validity of Rule C.3 appear to be perfectly valid in the present case also. The fact that in this case, unlike the *Gedelfi* case, the unit of account is not considered as a factor governing the definition of the scope of a tariff heading but as a direct factor in calculating the customs duty does not appear to constitute a crucial difference in this respect. In the present case the unit of account as a direct factor of calculation would result, depending on the influence exerted by national monetary fluctuations, in a gradual scale of discrepancies in customs duty and its general effect would therefore probably be to keep individual discrepancies within narrower limits than when the unit of account is applied as a factor governing the definition of the scope of tariff headings, which has the effect of classifying goods either under a taxable heading or under a non-taxable heading without any intermediate position. From this point of view it could even be said that in a case such as the present one the legal validity of the provision should be judged according to less strict criteria than those used in *Gedelfi* and similar cases.

It would only be possible to support an allegation of discrimination if the Community legislature had been under a legal obligation between 1972 and 1978 to adopt rules precluding differences in liability to customs duty according to the currency by reference to which the duty was calculated. The Commission recalls that it was only as from 1974 that monetary developments in Member States had brought about appreciable and easily detected inequalities in Member States in the application of the customs regulations. The Community legislature had from that moment prepared the way for the progressive introduction of a new unit of account, the "basket" unit. The fact that this new basket unit was not used immediately in other areas of Community law and in particular in the customs area may be explained largely by the fact that in view of the monetary disturbances which were continuing on the international scene it was still impossible to see whether the results of the new unit of reference would be satisfactory in the long term. It was no coincidence that the Commission had only submitted a proposal for a regulation on the EUA in October 1976, after the Interim Committee of the IMF had paved the way for the reform of the international monetary system following the Kingston Conference in January 1976. The amendments to the IMF statutes had come into force on 1 April

1978. Eight months after that, on 1 January 1979, the EUA was made applicable in the customs sphere.

The legal proposition that the legislature should be allowed sufficient time to eliminate any inequalities found to exist, particularly in the complex area of the law relating to customs duties, should not be regarded as a feature peculiar to Community law. Similar rules were applied under the legal systems of the various Member States of the Community. For example, according to the Bundesverfassungsgericht [German constitutional court], when factual circumstances have changed over a long period of evolution discrepancies cannot be eliminated by a simple, swiftly effected adjustment.

On the second point (the lowest basis of calculation) the Commission considers that in a period where there is a general inflationary trend the effectiveness of the protective function of customs duties is limited by the fact that those duties are normally calculated on the basis of the value of the goods originating in a non-member country and that where the currency of the non-member country depreciates, the customs duty is calculated on a base value reduced in proportion. This impairment of the function of protection against the exterior ascribed to *ad valorem* customs duties requires to be offset by means of permanent adjustments. The problem is in principle avoided in the case of specific customs duties tied to neutral values, that is to say values which are independent of fluctuations in the currency of the non-member country concerned, such as weight or quantity. However, the attachment of specific duties to certain intra-Community reference values, whether they be units of account or EUAs, again limits their neutrality within the Community because of the fluctuations to which equivalents in national currency are liable in relation to the unit of account. However, a reduction in the protective function of specific duties at certain points of the external frontier of the Community due to the depreciation of certain currencies is always compensated by equivalent increases due to a tendency to re-evaluation at other points of the external frontier. This corrective function of the unit of account would be put in jeopardy if, where discrepancies arose in customs duty owing to monetary shifts within the Community, the weakest currency of Member States had to be taken on each occasion as the decisive factor of calculation. That would lead to the same result as if the Community legislature, instead of choosing the unit of account, had linked the rates of specific duties to a national currency known to be weak or to the currency whose quotation was the lowest at the time of importation. The result would be seriously to undermine the effectiveness of the external protection afforded by specific customs duties.

On the third point, the Commission submits that an administrative adjustment involving calculation of the units of account by reference to the exchange rate, fluctuating daily, of the weakest currency of the other Member States, in this case the Italian lira, would be the complete opposite of the method of calculation provided for by the general rule and could not be reconciled either with the wording of that provision or with the working requirements of the

unit of account. Moreover, such a method would obliterate in an unacceptable way the division between legislative and executive powers. Apart from that, the practical problems which the customs authorities of Member States would face would be considerable.

If the Court should come to the conclusion that the customs duty levied on Glunz is incompatible with Community law, the Commission would wish to submit the following comments.

If the rule in question is interpreted as containing such a provision for adjusting customs duties, that would constitute a precedent which would be extended to the EUA system in force today. Not only would that substantially impair the protective function of specific customs duties, but in addition it would lead to a practically insoluble procedural problem: in what manner and from what level of discrepancy between the nine customs duties to be compared are the national customs authorities to apply such a correction?

If the Court should decide that the general rule is invalid without any restriction, the question would arise whether and to what extent this finding should have an effect on the specific case involved in the main action and on comparable cases in the past in which the unit of account has been used. Based on the principle of application by analogy of the second paragraph of Article 174 of the Treaty, the Court could hold that the invalidity of General Rule C.3 in its application to tariff subheading 69.13 B of the Common Customs Tariff did not invalidate a customs duty determined on that basis in so far as the assessment and the payment of the customs duty took place in the period prior to the date of the judgment in this case.

Should the Court consider that it would be excessive to exclude any retroactive effect of the nullity with regard to the situation of the plaintiff in the main action or of importers who are in a comparable situation, for example because this method would not really allow the legitimate interests of those concerned to be taken into account, the Court could hold that the retroactive effect should be limited to Glunz and to comparable cases. This would mean that a correction should be made not simply for this case, but also in analogous cases which were pending in Member States before the judgment of the Court was given and which have not yet been finally disposed of.

It would then be for the Commission to effect this correction according to the criteria which the Court would define on the basis of an assessment of all the factual and legal considerations in this case and which would serve as binding guidelines for individual decisions by the Commission. The Commission considers that it would be reasonable in that case not to link the required corrections to the greatest depreciation of a currency in relation to the parity declared to the IMF but to an average value which would take account in a balanced way of trends to appreciate or depreciate of all the currencies of Member States.

III — Oral procedure

At the sitting on 16 June 1981 oral argument was presented by the following: J. Gündisch, Rechtsanwalt, Hamburg, on behalf of Gebrüder Glunz; P. Gilsdorf, Legal Adviser, acting as Agent, on behalf of the Commission of the European Communities; A. Sacchettini, Legal Adviser, acting as Agent, on behalf of the Council of the European Communities.

The Advocate General delivered his opinion at the sitting on 16 September 1981.

Decision

1 By an order dated 15 October 1980, which was received at the Court on 6 November 1980, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation, the validity and, if valid, the scope of General Rule C.3 in Part I, Section I, of Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (Official Journal, English Special Edition 1968 (I), p. 275), as amended by Council Regulation (EEC) No 2500/77 of 7 November 1977 (Official Journal 1977 L 289, p. 1).

2 That question arose in the course of proceedings between Gebrüder Glunz, the plaintiff in the main proceedings, and the German customs authority concerning the customs classification and the amount of customs duty to be charged on the importation in August 1978 of a consignment of small ceramic figures the forearms of which had the shape of a candlestick. The plaintiff in the main proceedings declared those figures as coming under tariff heading 97.05 of the Common Customs Tariff which includes "Christmas tree decorations and similar articles for Christmas festivities" and attracts an *ad valorem* duty of 10%.

3 Although the competent authorities accepted that classification initially, they later reviewed the position and decided that the goods came under tariff subheading 69.13 B comprising "porcelain statuettes". Goods falling within that subheading attract an *ad valorem* duty of 11% but a specific minimum duty applies, equivalent at the time to 70 units of account per 100 kg gross. The customs authority applied that specific duty and calculated the amount in German marks in accordance with the aforesaid General Rule C.3, which increased the customs duty to DM 72 045.49.

4 That provision, in its 1968 version, provides:

"The unit of account (u.a.) by reference to which certain specific customs duties are expressed or the scope of certain headings or subheadings is defined has a value of 0.88867088 grams of fine gold. The exchange rate to be used in converting the unit of account into Belgian francs, Dutch guilders, French francs, German marks, Italian lire or Luxembourg francs shall be that

corresponding to the par value communicated to and recognized by the International Monetary Fund in respect of these currencies."

5 The plaintiff in the main proceedings disputed that charge and brought proceedings before the Finanzgericht Hamburg. In its main head of claim it contested the customs classification which had been decided upon. In the alternative, it claimed that, if it was correct to apply to it the specific duty prescribed in subheading 69.13 B, the sum expressed in units of account could not be converted pursuant to General Rule C.3 set out above but that the duty ought to be calculated in such a way that, regard being had to the par values of the currencies of the various Member States, the amount payable by it in Germany would not exceed the amount which it would have had to pay if it had landed the goods and entered them for customs clearance in a port of a Member State having a weak currency. It takes the view that General Rule C.3 should be interpreted in that way because otherwise its application would entail differing rates of duty depending upon the country of importation and the rule would therefore be discriminatory and incompatible with the principle of equality. The method of calculation advocated by the plaintiff in the main proceedings would reduce the amount payable from DM 72 045.49 to DM 29 432.30.

6 In the order making the reference the national court stated that it had come to the conclusion that the relevant tariff heading was indeed 69.13 B (porcelain statuettes) and that the specific duty was applicable.

7 The national court considered, however, that the issue relating to the calculation of the amount of duty by conversion of the units of account into national currency raised a problem relating to the interpretation and validity of the contested provision and therefore requested the Court to give a preliminary ruling on a question worded as follows:

"Is General Rule C.3 in Part I, Section I, of the Annex to Council Regulation (EEC) No 2500/77 of 7 November 1977 in its application to tariff heading 69.13 B of the Common Customs Tariff invalid in so far as, in the case of the inportation of goods into a Member State with a strong currency, it would lead to a higher incidence of customs duty than in the case of importation into the Member State whose currency has most depreciated in relation to the parity notified to the International Monetary Fund, or is the

said rule to be interpreted in such a way that customs duty is to be charged only on the level at which it would have been charged in the case of importation into the Member State with the weakest currency?"

8 In the grounds upon which the order was based the Finanzgericht stated that the application of General Rule C.3 to the imported goods in question resulted in the Federal Republic of Germany in a charge to customs duty of DM 72 045.49, whilst if the same goods were imported into Italy the incidence of customs duty would be the equivalent in lire to DM 29 432.30. It considered that such a difference in the incidence of customs duty according to the Member State in which the importation took place was incompatible with the fundamental conception of the customs union. The differing incidence of customs duty constitutes discrimination in breach of the general principle of equality. The principle of equality requires that the system of duties which are contributed to the Community budget must be so arranged as to constitute a uniform, that is to say an equal, burden on all persons who fall within the conditions specified in the Community provisions for the charging of such duties. The Finanzgericht raised the question whether the difficulties encountered in implementing a new Community system for converting specific duties into national currencies, which was not carried out until November 1978, could provide any justification for the failure in the meantime to make the necessary adjustments to the exchange rates, in particular as regards specific duties.

9 In order to reply to the question raised it is first necessary to recall that the Common Customs Tariff was initially adopted by Regulation No 950/68 of the Council of 28 June 1968. The preamble to that regulation stated that, pursuant to the Council Decision of 26 July 1966 (Journal Officiel 1966, 165, p. 2971), the Member States were to apply the Common Customs Tariff from 1 July 1968 to imports from non-member countries of goods other than those specified in Annex II to the Treaty.

10 The Common Customs Tariff includes *ad valorem* duties and specific or minimum customs duties chargeable under certain headings or subheading. As regards *ad valorem* customs duties, Regulation (EEC) No 803/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 170) established rules for the valuation of goods for customs purposes in

order to ensure that the value for customs purposes is determined in a uniform manner in Member States so that the level of protection given by the Common Customs Tariff is the same throughout the Community and any deflection of trade and activities and any distortion of competition which might arise from differences between national provisions is thereby prevented, and that equal treatment of importers as regards the collection of Common Customs Tariff duties is ensured. Specific duties are expressed in units of account. General Rule C.3 states that the exchange rates to be used in converting the unit of account into national currencies shall be those corresponding to the par value communicated to the International Monetary Fund in respect of these currencies. Regulation No 950/68 was adopted in the context of the system of fixed parities in force at that time, so that General Rule C.3 was intended to ensure the uniform application of specific customs duties in all member States and for several years it did indeed have such an effect. Over the years that regulation has had to be supplemented and adapted by a series of subsequent regulations but General Rule C.3 has not been altered.

11 However, from 1971 the system of fixed parities based on reference to gold ceased to be wholly workable. Subsequent monetary developments led to appreciable alterations in the actual exchange rates compared to the official parities in relations between the Member States. As a result, the unit of account used in the Common Customs Tariff began to relate less and less to economic reality. It was, however, not until 1974 that monetary developments produced appreciable and clearly discernible inequalities in the application of customs regulations.

12 In December 1971 central rates together with new points of reference were fixed in Washington by the Smithsonian Agreement. But as a result of the rise in oil prices in 1973 the system collapsed. Under the aegis of the International Monetary Fund efforts to reform the monetary system were very soon undertaken. However, it was not until 1 April 1978 that they were completed. It was only at that time that the amendment to the articles of the International Monetary Fund entered into force and it was only in that way that the international monetary system found a new point of reference, namely the new special drawing rights.

13 From 1975 the Commission and the Council prepared the way for the progressive introduction of a new unit of account based on a "basket" of currencies. In October 1976 the Commission submitted to the Council a proposal for a regulation on the European unit of account (EUA). That proposal, which was based mainly on Articles 209 and 235 of the Treaty, was sent to the Parliament and the Court of Auditors for consultation. It was not until November 1978 that the Council adopted Regulation (EEC) No 2800/78 (Official Journal 1978 L 335, p. 1) which introduced a new system of conversion for calculating specific customs duties.

14 Between 1968 and 1978 the Council annually adopted a Common Customs Tariff with certain amendments, of which the only one affecting General Rule C.3 concerned the addition at the end of 1972 of a reference to the national currencies of the new Member States at the time of the accession of Denmark, Ireland and the United Kingdom as from 1 January 1973.

15 The question raised divides into two parts: the first part relates to the validity of General Rule C.3, the other to its interpretation. It is necessary to deal with the second part first since the validity of the provision is only challenged if the interpretation advocated is rejected.

The interpretation of General Rule C.3

16 The Court is asked whether the provision in question may be interpreted, in the light of the circumstances set forth above, in such a way that, in order to determine the level of the specific duties throughout the Community, account should be taken only of the relationship which General Rule C.3 has maintained as regards the weakest currency, at the time the Italian lira, whilst in the other Member States specific duties should be calculated by converting at the real exchange rate the amount thus determined from Italian lire into the relevant national currency.

17 Whilst it is of fundamental importance for the free movement of goods and the establishment of the customs union that a Common Customs Tariff be adopted laying down uniform rates of duty on the entry of goods into the Community irrespective of the geographical location of their point of entry, the interpretation advocated cannot be accepted.

18 It is apparent from the very wording of General Rule C.3, which contains express references to six (later nine) specific currencies, that the rule cannot be interpreted in such a way that all those currencies may none the less be discarded with the exception of that currency which at any given moment results in the smallest amount of duty.

19 Moreover, such an interpretation does still less justice to the fiscal and economic objectives of the Common Customs Tariff than the interpretation resulting from a literal reading of General Rule C.3. The interpretation which is advocated, fixing the duties at the lowest level, risks having entirely negative effects on a certain number of economic sectors in the Community, the level of duties having been calculated with particular regard to those economic necessities. The interpretation advocated would have the effect of reducing, to an extent not justified on economic grounds, specific duties fixed originally at a level giving competing Community products a particular degree of protection, and thus would reduce the desired level of protection.

20 The interpretation advocated cannot therefore be accepted.

The validity of General Rule C.3

21 According to the applicant, the provision is not automatically invalidated by the existence of divergences which have gradually widened between the exchange rates laid down in General Rule C.3 and the real exchange rates. It is argued that, by not promptly correcting the divergences found to have arisen, as soon as they reached certain proportions, the Council failed to observe the principles which are at the heart of the customs union and the general principle of equality of treatment.

22 At the present stage of integration, where Member States essentially retain their powers in monetary matters, recourse to the mechanism of specific duties in the Common Customs Tariff will inevitably lead to certain differences in the incidence of the duties charged.

23 It is conceivable that if the Council deliberately maintained monetary situations incompatible with the customs union and the principle of equality of treatment, it would be in breach of the principles invoked by the applicant if it were established that the means of finding a balanced solution were within its power.

24 It is not clear from the evidence before the Court that such a proposition can be established in respect of the period from 1974 to 1978, a period characterized by uncertainties as to subsequent monetary developments. In those circumstances, the reluctance of the Council to adapt Community provisions to the new situation may be explained by the difficulty in laying down, not only in the sphere of customs but also in other spheres, criteria enabling stable rates of exchange to be fixed.

25 It should be rememberd that nearly seven years were required before it was possible to reform the Bretton Woods monetary system on 1 April 1978, and that in view of the GATT rules any unilateral change by the Community of the monetary parities to be used in converting specific customs duties risked creating difficulties with the Community's trading partners, in the absence of new parities established within the International Monetary Fund.

26 In those circumstances, it does not appear that, by awaiting the conclusion of the negotiations within the International Monetary Fund in 1978 before amending General Rule C.3, the Council was in breach of the Treaty. It follows that the first part of the question must also be answered in the negative.

27 Therefore the answer to the question raised by the Finanzgericht Hamburg must be that consideration of General Rule C.3 in Part I, Section I, of the Annex to Council Regulation No 2500/77 of 7 November 1977 has disclosed no factor of such a kind as to affect its validity, and the rule must be applied in such a way that in the case of an importation into a Member State having a strong currency, customs duties expressed in units of account must be converted, in conformity with the rule, into the national currency of the Member State where the importation took place and must not be limited to the amount which would have been charged in the case of importation into the Member State having the weakest currency.

Costs

28 The costs incurred by the Council of the European Communities and the Commission of the European Communities, which have submitted written observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Finanzgericht Hamburg by order of 15 October 1980, hereby rules:

Consideration of General Rule C.3 in Part I, Section I, of the Annex to Council Regulation (EEC) No 2500/77 of 7 November 1977 (Official Journal 1977, L 289, p. 1) has disclosed no factor of such a kind as to affect its validity, and the rule must be applied in such a way that in the case of an importation into a Member State having a strong currency customs duties expressed in units of account must be converted, in conformity with the rule, into the national currency of the Member State where the importation took place and must not be limited to the amount which would have been charged in the case of importation into the Member State having the weakest currency.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 3 February 1982.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President