OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 16 SEPTEMBER 1981

My Lords,

This case was referred to the Court by the Finanzgericht of Hamburg in the Federal Republic of Germany on 15 October 1980. It concerns a consignment of ceramic candlesticks, in the form of a clothed girl, which were imported from Taiwan in August 1978 by the plaintiff before the Finanzgericht, KG in Firma Gebrüder Glunz ("Glunz"), and described in the invoices as angels.

The goods were declared to the customs as porcelain Christmas angels with candles falling within subheading 97.05 of the Common Customs Tariff ("CCT") which covers, *inter alia*, "articles for Christmas festivities". They were provisionally classified under this heading by the Hauptzollamt Hamburg-Waltershof ("the Hauptzollamt") but, on 26 September 1978, the Hauptzollamt definitively classified the goods under subheading 69.13 B which covers, *inter alia*, porcelain or china statuettes and other ornaments.

Glunz objected to classification under that subheading and, after the Hauptzollamt had rejected its objection on the 3 September 1979, commenced proceedings challenging the Hauptzollamt's decision. Its primary submission was that the goods had been wrongly classified. The Finanzgericht came to the conclusion that the candlesticks lacked the essential features of an angel and so could not be regarded as being articles for Christmas festivities. No question as to that assessment arises in the present reference.

The second point made by Glunz in the proceedings before the Finanzgericht was that its liability to pay the duty could not be greater in Germany than in any other Member State and that, for this reason, it was to be gauged by reference to the Member State with the weakest currency. The explanation for this submission is to be found in the way in which the duty to be imposed on goods falling within subheading 69.13 B is expressed in the Regulation applicable at the time, Regulation No 2500/77 of 7 November 1977 (OJ L 289/1 of 14 November) namely: "11 % with a minimum of 70 units of account per 100 kilograms gross".

When calculated on the basis of 11 % of the value of the goods, the duty only came to DM 18 386.19. The minimum duty of 70 units of account per 100 kilograms gross was to be calculated in accordance with Rule C.3 in Section 1 of the Annex to Regulation No 2500/77 comprising the CCT. That Rule provides 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, Danish kroner, Dutch guilders, French francs, German

marks, Irish pounds, Italian lira, Luxembourg francs or pounds sterling shall be that corresponding to the par value communicated to and recognized by the International Monetary Fund in respect of these currencies."

According to the Finanzgericht, the par value recognized by the International Monetary Fund for that amount of fine gold was DM 3.66. Seventy units of account therefore represented DM 256.20 and, since the gross weight of the imported goods came to some 28 128.8 kilograms, the duty was assessed at DM 72 045.49. In accordance with the CCT, the duty demanded from Glunz was therefore based on this amount. Glunz's objection was founded on the fact that, if the goods had been imported into Italy, the duty would have been lower, indeed the equivalent, according to the Finanzgericht, of only DM 29 342.30.

The Finanzgericht took the view that such a difference in the duty to be imposed on the same goods was incompatible with the basic principle of the CCT and that it was also discriminatory. On the basis of the opinion of Mr Advocate General Warner in Case 135/79 *Gedelfi Großeinkauf GmbH & Co. KG* v *Hauptzollamt Hamburg-Jonas* [1980] ECR 1713, the Finanzgericht came to the tentative conclusion that the Hauptzollamt could not exact by way of duty an amount greater than that which would have been imposed had the goods been imported into a Member State with the greatest currency depreciation since the introduction of the unit of account into the CCT. In these circumstances, it decided to refer the following question to the Court: "Is General Rule C.3 in Part 1, Section 1 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 import into a Member State whose currency has most depreciated in relation to the parity notified to the International Monetary Fund, or are the said rules to be interpreted in such a way that customs duty is to be levied only at the level at which it would have been levied in the case of importation into a Member State with the weakest currency?"

Most of the customs duties levied on goods covered by the CCT are *ad valorem* and are in consequence expressed as a percentage of the value of the goods. It seems that, in Regulation No 2500/77, there were only some 115 subheadings of the CCT for which the duty was fixed by reference to a different characteristic of the goods, here weight, and expressed by reference to the unit of account. It does not seem to be disputed that the purpose of this was to ensure that the CCT afforded a uniform minimum level of protection to certain vulnerable industries in the Community. Rule C.3, which defines the method of converting the duties expressed in units of account into national currencies, first appeared in the original Regulation setting up the CCT, Council Regulation No 950/68 of 28 June 1968 (OJ L 172/1 of 22 July 1968) and, at the time, achieved this purpose. The system upon which it was based became obsolete when fixed parities were abandoned and exchange rates were allowed to float in the early 1970s. The inevitable result was

that it became impossible to maintain a uniform level of protection. It appears that from 1974 the application of Rule C.3 was causing significant problems but it was not until Council Regulation No 2779/78 of 23 November 1978 (OJ L 333/5 of 30 November 1978) that the unit of account as defined by it was replaced, with effect from 1 January 1979, by the European unit of account ("EUA") in so far as the CCT was concerned. Rule C.3 was amended to take account of Regulation No 2779/78 in the 1979 version of the CCT annexed to Council Regulation No 2800/78 of 27 November 1978 (OJ L 335/1 of 1 December 1978) which also came into force on 1 January 1979.

The currency fluctuations in the intervening years do not seem to have produced serious problems for traders largely because, no doubt, they simply passed on the burden of the import duties to the consumer when fixing their prices. In the present case, the difficulty seems to arise because Glunz fixed the price of the goods on the assumption that the duty payable would be that set for articles for Christmas festivities falling with heading 97.05 (10 %). The classification made by the German customs authorities and confirmed by the Finanzgericht has, on the other hand, resulted in the imposition of a duty which is the equivalent of just under 42 % of the value of the goods; had they been imported through Italy, the duty payable under subheading 69.13 B would have dropped to just over 17 % due to the depreciation of the lira.

This discrepancy in what was intended to be a uniform level of duty clearly illustrates the difficulties resulting from the continued application of Rule C.3 in its unamended form. Another example is to be found in the *Gedelfi* case where the lack of uniformity would have led to the levying of an import duty on the same goods in some Member States but not in others. The natural result of this state of affairs is to provoke distortions in trade and competition because traders are encouraged to import goods through Member States whose currency is exchanged at what is for them the most favourable rate. This situation is evidently contrary to the basic principles upon which the CCT is founded but it should be noted that even the amended version of Rule C.3 now in force does not eliminate entirely the unequal treatment which results from the movements in exchange rates.

Counsel for Glunz based his submissions in favour of the invalidity of Rule C.3, as it appears in Regulations No 2500/77, on Mr Advocate General Warner's Opinion in the *Gedelfi* case which, he said, was accepted in substance by the Court. Although the result on the facts of the case was the same as that which followed from the Advocate General's reasoning, it does not seem to me that the Court did adopt that reasoning but achieved the result by a different route. Mr Advocate General Warner's Opinion that the Rule was invalid was based, first, it seems, on the view that the regulation was not a consolidating measure but a re-enactment of the CCT with various amendments. On the basis that the validity of the Rule had to be considered in the context of the economic situation at that time, the Council in his opinion acted contrary to the Treaty when it adopted a provision

which, by applying obsolete fixed exchange rates, resulted in the same goods being subject to an import duty in one Member State and not in others. His conclusion may be taken to apply, *mutatis mutandis,* to the situation in the present case, which concerns differing levels in duties charged in importation, rather than, as in the *Gedelfi* case, the classification, of the goods. He rejected the arguments put forward on behalf of the Council and the Commission that Rule C.3 could not have been amended before 1 January 1979.

His opinion that rule C.3 was contrary to the Treaty was based on Cases 37 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *Indiamex* [1973] ECR 1609, where it was held that the customs union is intended to achieve an equalization of customs charges levied at the frontiers of the Community. The provision adopted in 1977 plainly did not and could not achieve that intention. Although to achieve this intention is not the only purpose of the CCT (since such purposes must also include a protective function inherent in any tariff system) it is certainly one of its purposes, and it is accepted that due to fluctuating exchange rates, the results produced by the Rule violated this purpose. They were accordingly incompatible with the Treaty.

At the hearing, counsel for the Commission questioned whether Mr Advocate General Warner had been right to regard Regulation No 2500/77 as something other than a mere consolidating measure. It was contended that, like all the other regulations re-enacting the CCT, this was an automatic adoption of existing provisions. I do not accept that contention. All the regulations re-enacting the CCT are described as "amending" Regulation No 950/68. It is true that most of the amendments relate to changes in customs duties or tariff headings, but there are passages which regularly occur in the preambles of each regulation which indicate that the yearly re-enactment of the CCT is intended to include amendments ensuring its uniform application and to bring the whole of it up to date. In the light of this, it is in my opinion wrong to regard them simply as codifications of pre-existing provisions with some amendments of minor importance. I agree with Mr Advocate General Warner that the validity of Rule C.3, as it appears in Regulation No 2500/77, must be considered at the time of its enactment in 1977 rather than in 1968.

On behalf of the Council it was contended that, since the true cause of this was beyond the control of the Community, the fault could not be said to lie in the Rule itself.

Where prevailing economic circumstances are such that they threaten the attainment of the objectives of the Treaty, it seems to me that it is the duty of the Community institutions to take the steps necessary to redress the situation (see, for example, the analogous situation in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135 at p. 1161). On the other hand they can only do what is possible, and it may be sufficient if a legislative provision is adopted which is the most reasonably practicable in the circumstances even if it

does not entirely solve the problem. Yet, if the Council has refrained from adopting the most reasonably practicable solution open to it, it cannot be said to have acted "to ensure that the objectives set out in (the) Treaty are attained", as Article 145 requires.

Furthermore, if the result adopted does produce unequal results in different Member States, or violates the principle of proportionality referred to by Mr Advocate General Capotorti in Case 114/76 *Bela-Mühle* v *Grows Farm* [1977] ECR 1211 at p. 1232, it is also in violation of the principles of law upon which the Treaty is based.

In this case it seems to be agreed that the EUA was a more reasonably practicable solution than the unamended Rule C.3. Both the Council and the Commission appear to accept that the essential question is whether its re-enactment betrays an unjustified failure to remedy the situation caused by the fluctuating exchange rates.

The history of the EUA seems to be as follows. It was first introduced in 1975 for the purpose of expressing the amounts of aid mentioned in Article 42 of the Lomé Convention, for the accounts of the European Investment Bank and for the ECSC. It was also adopted for use in the Community Budget in December 1977 (see OJ L 356/1 of 31 December 1977). On 6 October 1976 the Commission submitted to the Council a proposal that the EUA be adopted for all acts of the Community institutions, including the CCT, as from 1 January 1978 (see OJ C 271/5 of 17 November 1976). This initiative was made in the light of the agreement reached at Kingston earlier in the year legalizing floating exchange rates and amending the articles of the International Monetary Fund. According to the Commission, it had not been made beforehand because, until then, the international monetary situation precluded the adoption of a long-term solution which would provide a stable and usable reference value for the currencies of the Member States.

In his opinion Mr Advocate General Warner said that this proposal was not proceeded with. It seems that this proposal for a comprehensive reform of the EUA was first referred by the Council to the Economic and Social Committee on 15 October 1976, the latter's opinion being dated 15 December (see OJ C 56/70 of 7 March 1977). Since it was based on Articles 209 and 235 of the Treaty, the Parliament and the Court of Auditors also had to be consulted. The Parliament delivered its opinion on 10 March 1977, suggesting various amendments (see OJ C 83/33 of 4 April 1977), and an amended version of the proposal was submitted to the Council on 16 May. No doubt, had the proposal been accepted in its original form, it could have been enacted in order to come into effect on 1 January 1978 as the Commission had intended. Instead there appears to be an eight months gap until 23 January 1978 when the Council submitted the original proposal, together with the amended draft, to the Court of Auditors. The latter gave its opinion on 15 June 1978 (see OJ C 139/23 of 5 June 1979). Nothing further seems to have been

done with this proposal. Instead on 6 November 1978 the Commission submitted a new proposal that the EUA be applied in all legal acts concerning customs matters (see OJ C 279/4 of 23 November 1978). That proposal, which is now Regulation No 2779/78, was adopted by the Council on 23 November.

No explanation has been given to show why matters took this course. It is difficult to understand why the Commission proposed the separate introduction of the EUA into customs law only in 1978 when, in 1976, it had proposed the wholesale replacement of the unit of account by the EUA. At all events, it is plain that there was no obstacle in the way of the amendment of Rule C.3 in 1977 since the introduction of the EUA into customs law did not have to await the wider reform envisaged by the Commission. It was in fact introduced into customs law as a separate matter. Moreover, as a customs matter, the Court of Auditors did not have to be consulted. In these circumstances, it is my opinion that the re-enactment of Rule C.3 in Regulation No 2500/77 constituted an unjustified failure on the part of the Community institutions to adopt the most reasonably practicable solution open to them to attain the objectives of the Treaty and, in particular, the CCT. The Rule should, therefore, in my view, be declared to be invalid.

The Finanzgericht has asked whether if Rule C.3 is not wholly invalid it is to be interpreted in such a way that the duty is to be charged only at the level at which it would have been charged had the goods been imported into the Member State with the weakest currency. Given its wording, it is in my view impossible to interpret the Rule in this way. Such a method of calculation would be diametrically opposed to that envisaged by the Rule and the concept of the unit of account.

On behalf of the Commission it has been submitted that, should the Court hold the Rule to be invalid, it should limit its decision in some way, e.g. by declaring that the invalidity has effect only from the date of its judgment or that the effect is restricted to Glunz itself or any other importer who might already have started an action still pending when the Court gives judgment. The reason for this is said to be that the number of potential claims for the reimbursement of duties wrongly exacted is incalculable and that the sums which may be due are difficult to assess in view of fluctuations of national currencies, variations in national law concerning such claims and the need to ensure that the excess duties paid were not passed on to the consumer. In Cases 4/79 *Providence Agricole de la Champagne* v *ONIC*, 109/79 *Maïseries de Beauce* v *ONIC* and 145/79 *Roquette* v *France*, [1980] ECR 2823 the Court held that the invalidity of the provisions in question did not affect payments made prior to the date of judgment.

The situation in those cases was somewhat different but it seems to me that the same principles apply to the present case.

For these reasons, it is my opinion that Rule C.3 in Regulation No 2500/77 should be declared invalid but that this declaration should not affect payments made before the date of the Court's judgment in the present case.