JUDGMENT OF THE COURT
4 APRIL 1968[1]

# Firma August Stier
# v Hauptzollamt Hamburg-Ericus
# (Reference for a preliminary ruling by the Finanzgericht, Hamburg)

**Case 31/67**

## Summary

*1. Policy of the EEC — Common rules — Tax provisions — Taxation — Taxation forming part of a general tax applying without distinction to domestic and imported products — Nature of internal taxation*
*(EEC Treaty, Article 95)*

*2. Policy of the EEC — Common rules — Tax provisions — Internal taxation imposed by a Member State on products from Member States — Absence of similar domestic products or other products capable of being protected — Permissibility — Limits of right of Member State to impose taxation*
*(EEC Treaty, Article 95)*

1. Taxation levied within the framework of legislation relating to the turnover tax applying without distinction to all categories of products, whether domestic or imported, does not constitute a specific tax on imported products even if charged at the moment of importation.

   Cf. paragraph 4, summary, judgment in Case 25/67, [1968] E.C.R.

2. The provisions of Article 95 of the EEC Treaty do not prohibit Member States from imposing internal taxation on imported products from other Member States when there is no similar domestic product or other domestic product capable of being protected. Nevertheless it would not be permissible for Member States to impose on such products charges of such an amount that the free movement of goods within the Common Market would be impeded as far as those products were concerned. Such a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part.

   Cf. paragraph 1, summary, judgment in Case 27/67.

In Case 31/67

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court), Hamburg, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

FIRMA AUGUST STIER, Hamburg,

and

HAUPTZOLLAMT (Principal Customs Office) HAMBURG-ERICUS,

on the interpretation of the Treaty establishing the EEC, especially Article 95 thereof,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and W. Strauß (Rapporteur), Presidents of Chambers, A. Trabucchi, R. Monaco, J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Issues of fact and of law

### I — Facts

1. *Summary*

The facts may be summarized as follows:

Between 11 July and 1 August 1966, Firma Stier cleared through customs several consignments of fresh lemons originating in Italy. The relevant customs office charged on these imports a turnover equalization tax of 2.5 % in conformity with German law.
In its application to the Finanzgericht (Finance Court), Firma Stier points out in particular that the German tax law applied in this case is contrary to Article 95 of the EEC Treaty according to which an equalization tax may only be applied to imported products competing on the domestic market with comparable domestic products, whereas Germany produces neither lemons nor other fruits capable of replacing lemons for the consumer as they are either inexistent or too expensive for him.

2. *Contents of the order containing the reference; arguments of the Finanzgericht*

A — On 11 August 1967 the Finanzgericht, Hamburg, decided to ask the Court to give a preliminary ruling on the following questions:

'(a) Has a Member State the right to impose taxes on products originating in other Member States which compete neither with similar domestic products within the meaning of the first paragraph of Article 95 of the Treaty establishing the European Economic Community nor with domestic products which may be substituted for them within the meaning of the second paragraph of Article 95 of the Treaty, or is such a measure contrary to the rules of law contained in the Treaty?

(b) Does a legal rule elaborated on the basis of the law established by the Treaty within the meaning of question (a) and contrary to the national right to

impose taxation produce direct legal effects in favour of the individual?

(c) To the extent to which its right to impose taxation (Question (a)) is recognized in principle, is a Member State subject in this sphere, as far as the amount of internal taxation is concerned, to restrictions by virtue of the Treaty establishing the European Economic Community? If the answer is in the affirmative, to what restrictions?'

B — On this subject the Finanzgericht points out in particular that the wording of Article 95 of the Treaty is limited to prohibiting Member States from imposing on products imported from other Member States internal taxation in excess of that imposed directly or indirectly on similar domestic products or ones which may be substituted for them; on the other hand it does not contain any provision applicable to the lemons imported by Firma Stier in view of the fact that in the Federal Republic there exists no similar domestic product or one which may be substituted for it.

Accordingly the questions submitted to the Court do not concern the interpretation of the Treaty but are intended to fill a possible gap in the rules of law laid down by the Treaty; *a fortiori* the Court has jurisdiction in this sphere in conformity with Article 177.

The Finanzgericht sets out in detail the reasons for which it regards it as necessary to refer the matter to the Court of Justice and points out in particular that the reference to the Court 'is always justified to the extent to which a party concerned presents in support of the legal argument which is favourable to it valid arguments based upon the EEC Treaty'.

In its opinion that is so in this case. In fact the opinion of the Stier undertaking that the importation of products which are not in competition with any similar product or one which may be substituted for it cannot give rise to the imposition of internal taxation may be defended. However, the undertaking can hardly base its opinion on reasoning *a contrario* based on Article 95, as it attempts to do. In view of the fact that this article restrains a State's right to impose taxation by means of certain prohibitions, such reasoning would rather give rise to the consequent deductions that the Treaty does not otherwise restrict such a right. Nor can the opinion of the Stier undertaking be founded either on Article 12 of the Treaty, for the Court stated in the judgment delivered in Case 57/65 (Rec. 1966, p. 295 et seq.) and the Finanzgericht agrees with this view, that, having regard to its purpose, the turnover equalization tax is internal taxation, it matters little whether it actually has an equalizing effect or not. However, it seems 'at least interesting' to deduce by analogy 'from the objectives of the Treaty, from the tasks assigned to the Community and in particular from the rules of the Treaty guaranteeing free movement of goods within the European Economic Community and prohibiting all restrictions on trade between Member States (in particular Articles 9, 12 et seq., 30 et seq., 36 et seq. and 95 et seq.)' the rule of law which the Stier undertaking wishes to have accepted.

## II — Procedure

The order containing the reference was lodged at the Court Registry on 18 August 1967.

The Government of the Federal Republic of Germany, the Commission of the European Communities and the Stier undertaking submitted their written observations in conformity with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC and presented oral argument at the hearings on 5, 6 and 7 December 1967.

The Advocate-General delivered his reasoned, oral opinion at the hearing on 25 January 1968.

The Stier undertaking was represented by Messrs Wendt and Dräger, advocates of the Hamburg Bar, the Government of the Federal Republic of Germany by Messrs Everling, Ministerialrat, Hahnfeld, Ministerialrat, and Bühlow, Oberlandesgerichtsrat and the Commission of the European Communities by its Legal Adviser, Mr Wägenbaur.

## III — Summary of the observations submitted by the parties concerned

Question (a)

The observations of the *Stier undertaking*

may be summarized in particular as follows:
(a) It is true that the first paragraph of Article 95 deals first of all with the case —the normal one—in which the imported product is in competition with similar domestic products. But when that Article prescribes that the former may not be subjected to taxation in excess of that imposed on the latter, it is formulating not only a prohibition but also an authorization. However, the latter is clearly limited to the case in question so that, in the contrary case, the prohibition on imposing a fiscal charge flows directly from Article 95.
The same conclusion may be drawn from a comparison between the first paragraph of Article 95 and the corresponding provisions of GATT and the Havana Charter. It follows in fact from these provisions that internal taxation must be considered as a customs duty when the imported products subjected to a tax are not in competition with domestic products.
But the objectives of the EEC Treaty go even further than those of the agreements mentioned above since, at the present time, it is a question not only of facilitating trade in general, but also of ensuring the '*freedom* of movement of goods'.
A negative answer to Question (a) would permit the national legislature to charge equalization taxes and to fix their level just as it wished.
A '*turnover equalization* tax' imposed on products which are not manufactured in the importing State is absurd since logically there is nothing to 'equalize'.
This opinion is even more clearly confirmed by the prohibition on the imposition of taxes 'of such a nature as to afford indirect protection to other products', set out in the *second paragraph* of Article 95. The Stier undertaking refers to the judgment in Case 34/62 (Rec. 1963, at pp. 296, 298 et seq.), according to which there exists also competition by way of substitution between, for example, oranges on the one hand and apples etc. on the other hand.
In addition it is appropriate to accept the argument of the Finanzgericht, according to which Article 95 represents a gap which must be filled by means of analogy.
(b) In the event of the Court's rejecting the argument set out at (a) above, inquiry must be made as to whether the turnover equalization tax is not a customs duty or at least a charge having an effect equivalent to a customs duty.
The Stier undertaking explains in a more detailed manner that the first of these two arguments appears justified by the judgment delivered in Joined Cases 90 and 91/63 ([1964] E.C.R. 625). In cases such as the present one the turnover equalization tax in fact fulfils the criteria for a customs duty of a fiscal nature as its sole object is to provide finance for the State.
One may also agree that the turnover equalization tax is a charge having an effect equivalent to a customs duty which is by way of exception lawful to the extent to which it fulfils the conditions of Article 95. In the course of its consistent case-law the Court has concentrated upon the effect inherent in the charges which it has had to examine.
The judgment of the Court in Case 57/65 (Rec. 1966, p. 293) does not invalidate this opinion; it simply states that a charge under Article 95 must be evaluated according to this rule. However, as regards charges not coming under Article 95 it must be concluded that they are subject to the general rules contained in Article 9 et seq.
The observations of the *Federal Government* may be summarized as follows:
Like the Finanzgericht it takes the view that Article 95 does not apply to the case referred to in the question put but it rejects the suggestion of a 'gap'. In its opinion the Treaty does not form a system which is perfect in itself put provides for limitations on the powers of national legislatures only in the cases expressly mentioned therein. These limitations are not capable of being extended by way of analogy.
The judgment of the Court in Case 8/55 (Rec. 1955–1956, p. 305) is not opposed to this interpretation, for Article 95 is not deprived of its meaning by reason of the fact that it is not completed by a prohibition on imposing charges, as in the present case. Moreover the Court has applied the principle enunciated in that judgment only with great caution (Rec. 1960, p. 690).
The view of the Stier undertaking, that Article 95 authorizes the charging of internal taxation, is incorrect. Member States

charged the turnover equalization tax long before the EEC Treaty was concluded.
All the Member States tax imported products according to the principle of the country for which they are intended. It matters little whether the imported product may happen to be in competition with any similar domestic product or one which may be substituted for it. It is difficult to understand why the fiscal sovereignty of Member States should be reduced precisely in such cases.
Article 17(3) of the Treaty confirms this line of argument. Customs duties of a fiscal nature are applied as a general rule to products which are not manufactured within a state. By authorizing the conversion of these customs duties into internal taxation, this article accepts that the charges in question do not have an effect equivalent to a customs duty. Moreover it must be concluded that Article 95 is not opposed to the charging of import taxes on products which do not meet with competition on the internal market for if this were not the case this article would be in practice without purpose. In fact it is the very absence of such competition which is typical of products on which customs duties of a fiscal nature are charged.
The *Commission* points out that Member States have in principle the right to impose taxes in cases like the present one subject to the reservation which will be further discussed under point (c) below.
Article 95 limits this right only with a view to ensuring equality of competition. This provision is applicable only when there exist similar products or ones which may be substituted for them. But apart from such eventualities these limitations cannot be invoked against Member States.
Nor can the converse conclusion be justified by way of legal analogy. The Treaty impinges only to a limited extent upon the sovereignty of Member States in financial and fiscal matters, although the position is different with regard to customs sovereignty. In the fiscal sphere the objective with regard to the total realization of conditions analogous to those of an internal market cannot be attained by the help of the few provisions contained in Article 95 et seq. The considerable labours of the Council and the Commission in the direction of the harmonization of national fiscal duties, in particular by the introduction of a uniform system of value added taxes, contribute much more to the attainment of that object. If products which are not manufactured within the countries concerned were exempt from indirect taxation the principle of equality of treatment in fiscal matters would be infringed.
This interpretation is confirmed by Article 17(3) of the EEC Treaty. In practice customs duties of a fiscal nature are imposed in particular on products which are not manufactured within the country concerned and which, frequently also, are not in competition with any domestic product. For this reason the argument of the Stier undertaking would to a great extent deprive this provision of its purpose.

Question (b)

*Firma Stier* takes the view that an affirmative reply to this question is justified by the judgment of the Court of Justice in Case 57/65.
In the event of the charges in question being considered as charges having an effect equivalent to a customs duty, Article 13(2) of the EEC Treaty would have to be taken into consideration. In fact this Article has no direct effect to the extent to which it obliges the Commission to determine by means of directives the timetable for the abolition of the charges and confers upon it thus a discretionary power. It is nevertheless 'self-executing' to the extent to which the Commission does not satisfy this obligation.
The *Federal Government* and the *Commission* take the view that this question has no purpose since Question (a) must be answered in the sense of the first alternative (see above).

Question (c)

*Firma Stier* takes the view that this question has no purpose in view of the answer which it is appropriate to give to Question (a).
The *Federal Government* explains that the reply follows from the arguments put forward on the subject of Question (a). At

the most it would be possible to inquire whether the imposition of prohibitive charges, that is to say, of charges completely paralysing the movement of goods, is not prohibited. However, this question only has a theoretical importance because such a case has never arisen and will never arise having regard to the economic interpenetration in Member States. Meanwhile, this question may be left aside for it is clearly not a case of this kind which is at the basis of the decision to make the reference.

The *Commission* is of the opinion that the prohibition on imposing charges having an effect equivalent to a customs duty takes effect when, in the cases mentioned in the order making the reference, a Member State imposes a charge on an imported product 'in an exorbitant manner', that is to say, beyond the general level of indirect taxation, for such a charge has the same effect as a customs duty added to a normal indirect charge.

However, this question does not arise in the present action because the turnover equalization tax charged in Germany on lemons remains within the limits of the usual rates of taxation under the turnover tax on ordinary and tropical fruits.

## Grounds of judgment

By order of 11 August 1967, which reached the Court on 18 August 1967, the Finanzgericht, Hamburg, by virtue of Article 177 of the Treaty establishing the EEC, asked several questions relating to the interpretation of the said Treaty and in particular Article 95 thereof.

(1) Question (a) inquires substantially whether the Treaty must be interpreted as prohibiting a Member State from imposing internal taxation on imported products originating in another Member State 'which compete neither with similar domestic products within the meaning of the first paragraph of Article 95 of the Treaty establishing the EEC nor with domestic products which may be substituted for them within the meaning of the second paragraph of Article 95 of the Treaty'.

In Question (b) the court making the reference inquiries whether, in the event of the Treaty's prohibiting the imposition of charges on the products referred to in Question (a), such a rule has direct legal effect in favour of individuals.

The questions put, having regard to the fact that the court making the reference mentions the provisions of Article 95, refer to the internal taxation dealt with in that Article.

Taxation such as that which is the subject of the main action, levied within the framework of legislation relating to the turnover tax, does not constitute a specific tax on imported products, but a general tax applying without distinction to all categories of products, whether domestic or imported, even if charged at the moment of importation.

In principle such taxes come within the concept of internal taxation referred to in Article 95, which is moreover confirmed as far as the turnover tax is concerned by several articles in the same chapter relating to fiscal provisions.

Article 95 is intended to ensure that the application of internal taxation in one

Member State does not have the effect of imposing on products originating in other Member States taxation in excess of that imposed on similar domestic products or taxation of such a nature as to protect other domestic products referred to in the second paragraph of the same Article.

Although in essence Article 95, both by the precision of the first paragraph and by the general nature of the terms of the second paragraph, contributes to the creation of a Common Market ensuring the free movement of goods, nevertheless its ambit would be extended beyond its proper objective if one were to deduce from it a prohibition on the imposition of internal taxation on imported goods which do not compete with a domestic product.

Internal taxation and especially the turnover tax have an essentially fiscal objective.

Hence there are no reasons why certain imported products should benefit from a privileged system by reason of the fact that there are no national products capable of being protected.

In fact such a tax, when charged on importation, even on products not competing with domestic products, is intended to place in a comparable fiscal situation all categories of products, whatever their origin.

Accordingly it is appropriate to reply to the first question by a finding that Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic product capable of being protected.

Consequently, Question (b) has no purpose.

(2) Question (c) inquires whether, in the cases referred to in Question (a), the Treaty fixes limits with regard to the amount of internal taxation affecting the imported product, and, if so, requests the Court to rule what those limits are.

Although Article 95, as has just been stated, does not prohibit Member States from imposing taxation on imported products, nevertheless it would not be permissible for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, charges of such an amount that the free movement of goods within the Common Market would be impeded as far as those products were concerned.

Such a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part.

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable, and as these proceedings are, in so far

as the parties to the main action are concerned, a step in the action pending before the Finanzgericht, Hamburg, 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 Government of the Federal Republic of Germany, the Commission of the European Communities and the applicant in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 95 and 177;
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,

THE COURT

in answer to the questions referred to it by the Finanzgericht, Hamburg, by order of that court dated 11 August 1967, hereby rules:

1. **The provisions of Article 95 of the Treaty establishing the European Economic Community do not prohibit Member States from imposing internal taxation on imported products originating in other Member States when there is no similar domestic product or other domestic products capable of being protected;**

2. **In the cases referred to in paragraph 1 above, the Treaty does not have the effect of restricting the freedom of Member States to fix rates of taxation which remain within the general framework of the national system of internal taxation of which the tax in question forms part;**

and declares:

**It is for the court making the reference to decide as to the costs in this action.**

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 4 April 1968.

A. Van Houtte — Registrar

R. Lecourt — President