OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 4 MAY 1966[1]

Mr President,
Members of the Court,

The request for an interpretation which the Finanzgericht des Saarlandes brings before you in connexion with the proceedings instituted in that court by an importer against the customs administration relates to one of the tax provisions of the Treaty of Rome, namely Article 95. It is not the first and will not be the last time that you are required to consider directly or indirectly the complex rules within this chapter of the Treaty and their relationship with the rules in the chapter on the Customs Union. You have already encountered them in Cases 2 and 3/62 (*EEC Commission v Grand Duchy of Luxembourg and the Kingdom of Belgium*, [1962] E.C.R. 425), 10/65 (*Waldemar Deutschmann v Federal Republic of Germany*, Rec. 1965, p. 602) and 45/64 (*EEC Commission v Republic of Italy*, Rec. 1965, p. 1058). The present case will allow you to clarify on certain points the meaning and scope of the first and third paragraphs of Article 95 of the Treaty which are designed to protect the imported products of Member States against excessive internal taxation; I should like to remind you of the text:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'

and

'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.'

The dispute arose in the following circumstances. When on 9 October 1963 the Lütticke undertaking imported into the Federal Republic of Germany 15 000 kg. of whole-milk powder from Luxembourg, payment was claimed from it, over and above the customs duty, of 1 323.80 DM as turnover equalization tax. It maintained in an administrative complaint, which was rejected, and thereafter before the Finanzgericht des Saarlandes, that the countervailing charge in dispute was unfounded in law. From 1 February 1956, paragraph 4, No 20 (f), of the Turnover Tax Law exempted domestic whole-milk powder from this tax. Since 30 June 1961, pursuant to paragraph 4, No 25, of the same Law supplies of the basic product, that is to say of milk, were also exempted, so that levying the countervailing charge on imported whole-milk powder was illegal under Article 95 of the Treaty. The undertaking furthermore has found in your judgment in Joined Cases 2 and 3/62 an argument for maintaing that, since the case concerned goods manufactured or produced in the Federal Republic of Germany, or imported from other Member States, the countervailing charge could not be levied unless a similar tax was also imposed on German goods. The turnover tax imposed on domestic goods was neither identical with the countervailing charge nor levied in the same way as the latter. No countervailing charge could therefore be levied after 1 January 1962, the date of the beginning of the second stage.

From the order of 25 November 1965 which referred the matter, it will be recalled that the Finanzgericht first considered the nature of the countervailing charge and thereafter the provisions applicable. In principle it is an internal tax coming under Article 95, but since wholesale supplies of whole-milk powder and milk are exempt from the turnover tax, the court considers that the disputed charge takes on the nature of a charge having an effect equivalent to that of customs duties in the sense of Article 12. It founds this latter assertion on the judgment in Joined Cases 2 and 3/62.

The problem is then raised as to whether individuals may directly plead in court a right to have these provisions observed or whether the latter only fall under Articles 169 et seq. of the Treaty. For reasons to which I shall return, the Finanzgericht

1 — Translated from the French.

doubts whether Article 95 can give rise to a direct right, either on the entry into force of the Treaty or even if the Member State has failed to rectify a situation contrary to the Treaty on the expiry of the period fixed in the third paragraph, that is to say, on 1 January 1962. This date appears to the court as simply marking the point after which Article 169 could be applied.

Finally the Finanzgericht, differing from certain commentators, does not think that in the event of the concurrent applicability of or a conflict between Articles 13 and 95 of the Treaty, it is the latter of these Articles which would prevail after 1 January 1962 with regard to taxation in existence before 1958, since it best corresponds to the purposes of the Community. It considers rather that the preservation of discriminatory interval taxation having an effect equivalent to customs duties cannot be contested by means of Article 12 in conjunction with Article 95, but only on the basis of Articles 95 and 169 of the Treaty.

Since all those problems concern the interpretation of provisions of the Treaty, the Finanzgericht requests you to give a preliminary ruling on the following three questions:

1. Does the first paragraph of Article 95 of the EEC Treaty have direct effect, creating individual rights of which the national courts must take account?

If the answer to that question is in the negative:

2. Does the third paragraph of Article 95 of the EEC Treaty in conjunction with the first paragraph of that Article have direct effect as from 1 January 1962 and create individual rights of which the national courts must take account?

If the answer to this second question is also in the negative:

3. Do the first and third paragraphs of Article 95 of the EEC Treaty in conjunction with Articles 12 and 13 thereof have direct effect creating individual rights of which the national courts must take account?

You have indisputable jurisdiction over the questions thus raised. They have given rise to observations by the Federal Republic of Germany and by the Belgian and Netherlands Governments; proof enough of the practical importance attributable to the answers. Even before we endeavour to reply to them, it is desirable to place the disputed provisions in the context of the Treaty, as did the Commission of the EEC.

The rules of Chapter 2, 'Tax provisions', have as their purpose the prevention of the distortion of competition arising from differences amongst taxes in the Member States. From this point of view, they have the same purpose as the provisions relating to customs duties between Member States. The system applied is as follows: in trade between Member States, the imported product is exempted from taxes in the country of origin and on the other hand is liable to the taxes in force in the 'country of delivery', subject to the reservation that Article 95 prohibits the heavier taxation of that product than of similar domestic products.

This Article refers to 'any internal taxation of any kind'. There can be no doubt that this includes the turnover taxes which are expressly mentioned by several Articles in this chapter, and also, if appropriate, the countervailing charge when it is levied instead of the turnover tax, even though for reasons of tax policy the method of levying it is different. It is moreover known that, in the Federal Republic, both taxes are governed by the same law.

If Article 95 is applicable to the countervailing charge, is it the sole article so applicable? In other words, can this tax also be considered as a charge having an effect equivalent to a customs duty, consequently coming under Article 12 et seq. of the Treaty, either in all cases of when its rate exceeds the limits authorized by Article 95, or for the fraction above the permissible rate? On this point widely divergent views have been expounded in legal doctrine or before the national courts. Without wishing to dwell on the point, I may say that your case-law appears to exclude any argument in favour of the concurrent applicability of these articles. The judgment in Case 10/65 gives as the criterion for defining the respective fields of Articles 12 and 95 the charge imposed on similar domestic products. If tax is charged on the latter—as in the case of the countervailing charge—Article 95 and not Article 12 must be applied. Against this concept the terms of the judgment in Joined

Cases 2 and 3/62, apparently very strict, have sometimes been invoked but, in order to assess the scrope of this judgment, they must be set within the context of the dispute which was before you. You had to reply to the defendants' argument which claimed on the basis of Article 95 to justify a customs duty on gingerbread, maintaing that its purpose was to offset another charge of an economic, not a fiscal nature; the terms employed by you are to be understood against this background and I do not think there is a contradiction between this judgment and the judgment in Case 10/65.

In the course of the oral proceedings Counsel for the applicant endeavoured to justify the concurrent application to the same tax of two chapters of the Treaty, quoting the picturesque example of a case in which the same fact might simultaneously come under the various provisions of penal, civil or social security law. The example was picturesque rather than persuasive, as there was not one of the provisions cited the application of which was compatible with that of the others. On the other hand it is difficult to understand how in the present case there can operate at the same time two provisions one of which prescribes that a charge shall be abolished at the beginning of the second stage of the transitional period and the other that abolition must be achieved progressively throughout that same period. The judgment in Case 10/65 moreover expressly draws attention to this difference in phasing. With regard to the applicant's assertion, that of two provisions the one which must be selected is that prohibiting charges to a greater extent and from a nearer date, because it is more 'progressive' and more compatible with the Community: it is an attitude which seems to me political rather than legal, and hazardous to adopt as a general principle.

Finally, the Commission justly observes that a charge which normally comes under Article 95 does not become a charge having an effect equivalent to a customs duty to the extent that the rate exceeds the limit authorized by that Article. The prohibition against imposing internal taxation on imported products takes effect only to the extent that such taxation is in excess of that imposed directly or indirectly on similar domestic products. The question is debateable as to how far it is in accordance with Article 95 to consider as 'indirect' taxation charges levied on the domestic product at a stage prior to its manufacture, but, even if this constitutes an illegality, it does not alter the nature of the countervailing charge. The latter is legally indivisible, and cannot be partly a charge under Article 95 and partly under Article 12.

In the light of these observations I now progress to the first two questions which must be examined together. You are asked whether the first paragraph of Article 95 has direct effects and creates individual rights of which the national courts must take account, and moreover what is the effect of the third paragraph of Article 95 as from 1 January 1962, which marks the beginning of the second stage. To repeat a term frequently employed and which the applicant criticizes, are the provisions of these paragraphs 'self-executing'?

First let us consider what the scope of the disputed provision is.

The first paragraph of Article 95 postulates a general and permanent rule: internal taxation on imported products shall not be in excess of that imposed on similar domestic products. It is thus the system of 'traitement national' ('same treatment as own nationals') but the application of which is spread over a period of time in order to take account of the situation existing on the entry into force of the Treaty. Under the third paragraph the Member States had a period of 4 years, expiring on 1 January 1962, to adapt where necessary their legislation and rules thereunder to the principle set forth in the first paragraph. This system necessarily involves a certain flexibility; thus Article 97 provides that Member States which employ a cumulative multistage tax system—only France at the present moment does not do so—may, for internal taxation on imported products, establish average rates for products or groups of products, but subject to the following double reservation: they must conform to the principles set forth in Article 95, and, when the average rates established by them do not so conform, the Commission shall address appropriate directives or decisions to them.

It will be observed immediately that, unlike the provisions in respect of customs duties and charges having equivalent effect, the object sought is not the abolition of all internal taxation on imported products, but to ensure that these are treated in the same way as domestic products. The Member States, which in principle preserve their fiscal sovereignty to the extent to which it does not conflict with the Treaty, are thus much less restricted in this sphere than in customs matters. Any discrimination must be avoided, but, from that point of view of Community law, which alone concerns us, equality can in theory be re-established at the beginng of the second stage by increasing taxation on domestic products just as well as by lowering the tax on imported products. All that is required by the Treaty is that the latter are not more heavily taxed than the former. Likewise, the countervailing charge may consequently vary so as to correspond to alterations in the charges on domestic products.

The result is that the scope of the disputed provisions may be summarized as follows: The first paragraph of Article 95 prohibits from the entry into force of the Treaty the creation of any countervailing charge or any modification of existing countervailing charges having the effect of imposing on imported products a tax in excess of that on similar domestic products. On the other hand, in view of the third paragraph, countervailing charges in existence on 1 January 1958 may for four years thereafter derogate from the principle of equality of treatment established by the Treaty. In certain respects, the first paragraph of Article 95 thus appears to create a 'stand-still' obligation.

With regard to the third paragraph of the same Article, it amends and completes the first paragraph, imposing on Member States the *positive obligation* to amend not later than 1 January 1962 their tax legislation in the circumstances and for the purposes which I have indicated.

Are these provisions directly applicable and can individuals require their observance before a national court? The Commission, like the plaintiff in the main action, maintains that they can, whilst the three States who have submitted observations dispute this; both arguments find support in your case-law, more precisely in the judgments in Cases 26/62 and 4/64.

Some preliminary remarks may be made:

— Contrary to what has been maintained in certain quarters, the point does not appear to me to be settled in advance, even by implication, by the judgment in Joined Cases Nos 2 and 3/62 which, it was said, effectively placed Article 95 on the same level and accorded it the same importance as Article 12, the latter being directly applicable. Nor is it possible to draw any decisive conclusions with regard to this point from the judgment in Case 10/65.

— The case-law on the other hand leads one to dismiss the notion, entertained by the Finanzgericht, that Article 95 cannot produce direct effects because this provision is addressed directly to the Member States. Nor is there any reason to dwell on the thought that these states have not 'transferred to the Community the right to legislate with regard to internal taxation', as the Finanzgericht again says, since their fiscal sovereignty is only slightly although appreciably affected by the provisions of Article 95 et seq.

That being so, as your judgment in Case 26/62 says, it is possible to decide whether provisions are directly applicable by seeking guidance from their spirit and general scheme and from their wording as it appears in the Treaty. In general, this is so when the provision imposing an obligation on the Member State is clear and unconditional, and neither assumes for its implementation any legal measure by the Community institutions, nor leaves to the State responsible a real discretion with regard to its application. Once these conditions are complied with, there are no grounds, as it is noted in the judgment to which I have just referred, for restricting the supervision of the implementation of the Treaty to the procedures of Article 169 and 170 alone, or to deny individuals the right to plead before the courts of their country the obligations imposed on it.

1. Since we are concerned with the first paragraph of Article 95, to the extent that it forbids, from the entry into force of the Treaty, Member States from establishing new countervailing charges, imposing on

imported products internal taxation heavier than that imposed on domestic products, or from increasing existing countervailing charges, it basically resembles a stand-still measure and constitutes a negative obligation, and must be considered directly applicable according to the principles which I have just described.

The Commission, however, which supports this argument, itself draws attention to two objections which may be made to it. The first is that, in order to define the lawful imposition of tax upon an imported product, Article 95 refers to the charge imposed directly or *indirectly* on similar domestic products. However, the extent to which account may be taken of this tax is far from decided: it is sufficient to recall all the disputes which you have heard on the legality of taking account of or calculating the indirect tax imposed during earlier stages of manufacture. Although there may on this point be a margin for interpretation, it does not preclude the provision of Article 95 from being complete in itself. It is for the national court to settle the question, should the occasion arise, and indeed if necessary, after it has referred a matter to you under Article 177 for a preliminary ruling.

There is a second objection, namely, that in the majority of cases, Article 95 is applied in conjunction with Article 97; the latter authorizes Member States which, like the Federal Republic, employ a cumulative multi-stage tax system to establish, subject to well-known conditions, the average rates for products or groups of products since it is impossible to ascertain the actual burden placed on products by way of turnover tax. But these average rates must conform to the principles set forth in Article 95, failing which the Commission must address appropriate directives or decisions to the Member State concerned. The provision modifies in this instance the procedure whereby the Commission must ensure compliance with the Treaty and does not allow it to have recourse to Article 169 before it has issued a directive or a decision (it does not appear, however, that the Commission has always complied with this prerequisite), but it does not substantially affect Article 95 itself.

2. The Finanzgericht also asks you whether the third paragraph of Article 95, in conjunction with the first paragraph of the same Article has, as from 1 January 1962, direct effects creating individual rights. It is clear that this paragraph can only be interpreted in conjunction with the first paragraph which it amends and supplements: in fact it entails an obligation on the Member States, not later than at the beginning of the second stage, to amend their tax legislation to conform with the provisions of the first paragraph of Article 95. It was only as from this date that it became necessary to abolish the distortions which could arise from countervailing charges in existence when the Treaty entered into force.

Thus, unlike what we have seen above, this paragraph does not entail for the Member States a negative obligation but a positive one. And, contrary to what I said somewhat precipitately in Case 10/65, I consider that it is insufficient to exclude *ipso facto* the possibility of direct application. No doubt you have previously considered as directly applicable only those Articles containing a negative obligation but the Federal Republic is wrong in deducing from this the existence of a general and exclusive principle. The truth is simply that, by its nature and content, it is very much rarer and very much more difficult for a positive obligation to fulfil the conditions necessary for it to be considered as directly applicable.

To begin with, a provision the implementation of which is dependent upon an act by a Community Authority, the Council or the Commission cannot be regarded as directly applicable. The situation is the same when a Member State has a certain discretionary power to fix the extent and the content of a provision contained in the Treaty. As an example of this there is cited Article 68 (1) which stipulates that Member States shall 'be as liberal as possible' in granting such exchange authorizations as are still necessary after the entry into force of the Treaty. The third paragraph of Article 95 in conjunction with the first paragraph displays very different characteristics, since it imposes on the Member States a quite clearly defined obligation: on a given date, they must have amended their national laws to the extent to which they were not in conformity with this Article. The extent of their

obligation is thus fixed and remains so even in cases covered by Article 97, since that circumstance does not waive compliance with the principles provided for in Article 95. It must however be noted that the States are not entirely deprived of all discretion with regard to the method to be selected at the beginning of the second stage to establish fiscal equality between imported and domestic products: the former may be exempted or the latter taxed; but the obligation is always the same, to ensure equality of treatment which is all that is provided for by Article 95.

I am thus led to take the view that the third paragraph of this Article, in conjunction with the first paragraph, is directly applicable, in other words, it gives full effect after 1 January 1962 to the provisions of the first paragraph to the extent to which they concern internal taxation already in existence when the Treaty entered into force.

I should however like to say a few words with regard to the view adopted by the Federal Republic, according to which the provision must be so clear and so unequivocal that it may be directly applied without difficulty. In the case of the cumulative multi-stage tax system, it is alleged that the implementation of Article 95 would be so difficult as to be impossible for the national courts. In the course of the written procedure and at the oral proceedings there have been discussed at length calculations which did not directly concern the questions put to you, but rather the court trying the main action, and I am by no means unaware of the difficulty of that court's task, which consists not in fixing the rates but in supervising the legality of the rates established by the State. Lastly, it has been added that the difficulties encountered by the importers are temporary and that they will cease with the termination of the cumulative multi-stage tax.

This argument does not appear to me fully convincing. To refuse a plaintiff access to a court on the ground of the difficulties of the task which he imposes on that court, appears to me an argument all the less relevant in that judges in every country are accustomed to have raised before them the most difficult questions and to solve them, if need be with the assistance of experts. Moreover, no one will be bold enough to predict when the cumulative multi-stage tax will be abolished and there is the risk of its lasting even longer if it is outside the supervision of the courts.

There remains finally the third question in which you are asked whether Article 95, not treated in isolation, but in conjunction with Article 12 or with Article 13 of the Treaty, has direct effects. This is evidently an alternative to the preceding questions and there is much less reason to reply to it if you agree with me that it is necessary to draw an absolute distinction between the scope of Article 9 to 12 on the one hand and Article 95 on the other.

In the end, I am of the opinion that the questions put should be answered thus: the first paragraph of Article 95 of the Treaty of Rome is directly applicable as from 1 January 1958 with regard to new internal taxation, and, as for the third paragraph, it is directly applicable from 1 January 1962 with regard to internal taxation existing when the Treaty came into force.

I am of the opinion that a ruling should be given by the Finanzgericht on the costs incurred before this Court.